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**IN THE HIGH COURT OF SOUTH AFRICA  
NORTHERN CAPE DIVISION, KIMBERLEY**

Case No: **678/2023**

Reportable: YES / NO

Circulate to Judges: YES / NO

Circulate to Magistrates: YES / NO

Circulate to Regional Magistrates: YES / NO

In the matter between:

**NORLAND INVESTMENTS LIMITED**

Applicant

and

**DORIA SAUL**

First Respondent

**OTHER OCCUPANTS OF ERF 1[...], KIMBERLEY**

Second Respondent

**SOL PLAATJE LOCAL MUNICIPALITY**

Third Respondent

**Heard:** 18/10/2024

**Delivered:** 29/11/2024

**Summary:** Eviction unlawful occupiers. Sec 4 Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998 (PIE). Authority to bring proceedings challenged. Compliance with Uniform Rule 63 authentication of documents executed outside the Republic. Whether Solicitor had powers conferred upon a Commissioner of Oaths contemplated by the Justices of the Peace and Commissioner of Oaths Act 16 of 1963. Whether it is just and equitable to evict the respondents. Just and equitable date to vacate.

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## **ORDER**

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In the result, the following order is made:

- (1) Condonation is granted to both the applicant and the first respondent for the late filing of their answering and replying affidavits.
- (2) Leave is granted to the applicant to file a further affidavit in terms of Rule 6(5)(i) of the Uniform Rules of Court.
- (3) The first and second respondent, and any person occupying the property through them, are hereby ordered to vacate the property situated at 2[...] A[...] Street, Beaconsfield, Kimberley ("the property").
- (4) The first and second respondents, and any person occupying the property through them, shall vacate the property on or before 28 February 2025.
- (5) In the event that the respondents and any person occupying the property through them, refuse or fail to vacate the property by 28 February 2025, the sheriff of the court is authorised and directed to remove them together with any movable property belonging to them from the property.

- (6) The first respondent is liable to pay the costs of this application including the application for a further affidavit on the scale as between party and party.

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## JUDGMENT

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### **Mamosebo ADJP**

- [1] The applicant, Norland Investments Limited, is a juristic person and registered owner of the property situated at 2[...] A[...] Road, Beaconsfield, Kimberley. Its main application is for the eviction of the first respondent and persons occupying its property through her cited as the second respondent. The third respondent, Sol Plaatje Municipality, is only joined to these proceedings as an interested party in whose jurisdiction the property is situated. The Municipality neither opposed nor participated in the proceedings.
- [2] At commencement of the hearing, Mr Kgotlagomang, of the firm Towell and Groenewaldt Attorneys, withdrew as attorney of record for the second respondent for the lack of proper instruction. He now seeks an indulgence from the court to withdraw. He has already explained his predicament to both Mr Rust, for the applicant and Mr Juries, for the first respondent, who both confirmed the discussion. Mr Kgotlagomang was excused.
- [3] There were several preliminary issues raised which were of a technical or a procedural nature which I deal with first.
- [4] Absence of report by the Municipality

Mr Juries argued that because the applicant has failed to file the report by the Municipality, the matter is not ripe for hearing and must be postponed. Mr Rust countered, contending that the Municipality was served with the

papers and has elected not to participate. I made a ruling that the absence of a report cannot prevent the matter from continuing and directed that it should proceed.

[5]     Condonation applications

The first respondent filed her answering affidavit late and sought condonation therefor. The applicant did not oppose the relief sought. In turn, the applicant sought condonation for the late filing of its replying affidavit, to which there was no opposition. It is trite that condonation is not to be had for the mere asking. In the absence of opposition and prejudice from either side, it would be in the interests of justice that condonation be granted. Condonation is therefore granted to both parties.

[6]     Applicant's affidavit not complying with Rule 63 of the Uniform Rules of Court and no resolution for the applicant's locus standi

Mr Juries argued that the applicant's affidavit failed to comply with Rule 63 of the Uniform Rules of Court in that the founding affidavit, deposed to by Mr Michael Bullock, the Company Secretary of the applicant, before Mr Benjamin Thomas Pumphrey, who signed the document in his capacity as a solicitor commissioned in the United Kingdom, is not recognised as a commissioner of oaths.

[7]     Rule 63(4) stipulates:

'Notwithstanding anything in this rule contained, any court of law or public office may accept as sufficiently authenticated any document which is shown to the satisfaction of such court or the officer in charge of such public office, to have been actually signed by the person purporting to have signed such document.'

[8]     Rule 63 addresses authentication of documents executed outside the Republic for use within the Republic in this manner:

- (1) 'document' means any deed, contract, power of attorney, affidavit or other writing, but does not include an affidavit or solemn or attested declaration purporting to have been made before an officer prescribed by section eight of the Justices of the Peace and Commissioners of Oaths Act, 1963 (Act No 16 of 1963);
- (2) 'Authentication' means, when applied to a document, the verification of any signature thereon.

The first respondent's challenge is that the solicitor is not recognised by the South African Justices of the Peace and Commissioners of Oaths Act, 1963.

[9] At para 4.2 of the replying affidavit, Mr Bullock said the following:

- '4.2 Rule 63.4 affords the right to any Court of law to accept as sufficiently authenticated any document which is shown to the satisfaction of such Court to have been actually signed by the person purporting to have signed such document. Regulation 1872 (published in Government Gazette 7215 of 12 September 1980) further states that "...any person who exercises in a state to which independence has been granted by law a legal profession equivalent to that of an attorney, notary or conveyancer in the Republic" shall have the powers conferred upon a Commissioner of Oaths in terms of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963.
- 4.5 Mr Pumphrey is indeed a registered solicitor (with solicitor number 419265). As far as it might be relevant, I also attach printouts of the register of Solicitor's Regulation Authority and of the English Law Society, as on 14 August 2023, which confirms that Mr Pumphrey was admitted as a solicitor on 16 January 2014 and that he is practicing as such (marked 'MBR1' and 'MBR2').

It is accepted that practicing attorneys in England are known as solicitors. I am satisfied that Mr Pumphrey is a solicitor with powers conferred upon a commissioner of oaths in South Africa in terms of the Justices of the Peace and Commissioners of Oaths Act, 1963. Notably, s 1 of England's Commissioner for Oaths Act, 1889, determines that the Lord Chancellor may appoint commissioners for oaths which includes solicitors. I am further satisfied that the documents presented regarding the solicitor are properly authenticated. It follows that the contention by the first respondent has no merit and stands to fail.

- [10] The first respondent also challenged the locus standi of the applicant maintaining that the resolution attached to the founding affidavit was not signed and the resolution attached to the supplementary affidavit is not dated. Mr Bullock, the deponent to the founding affidavit wrote:

'I depose to this affidavit in my capacity as Company Secretary of the applicant, duly authorised thereto in terms of the resolution dated 1 June 2022, a copy of which is attached hereto and marked as "MB1". I further attach a certificate issued by the Companies and Intellectual Properties Commission confirming directors and officers of the applicant hereto and mark same as "MB2".

- [11] In substantiation to the unsigned first resolution, Mr Bullock explained in his supplementary affidavit that, due to a change in directors and attorneys since the filing of the impugned special resolution, the deponent has produced the signed special resolution passed at a meeting held on 28 February 2023 attached to the supplementary affidavit authorising him to launch the proceedings on its behalf. The supplementary affidavit was commissioned in Fish Hoek, South Africa, on 1 March 2023.

- [12] This is what Bullock deposed to at para 5.3 of his replying affidavit pertaining to the locus standi issue:

‘I am advised by my attorney, which advice I accept as correct, that the need for a resolution in litigation is not to afford a litigant a technical issue to escape liability but that it is rather inspired by the risk that a party may deny that it was party to litigation carried on in its name. In view of the resolution that was passed by the applicant’s board of directors, irrespective of the date that appears on said resolution, there can be no doubt that the pending litigation is with the knowledge and in accordance with the instructions and wishes of the applicant.’

- [13] Brand JA made these informative remarks in *Unlawful Occupiers, School Site v City of Johannesburg*<sup>1</sup>

‘The issue raised had been decided conclusively in the judgment of Flemming DJP in *Eskom v Soweto City Council* 1992 (2) SA 703 (W), which was referred to with approval by this Court in *Ganes and Another v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA) at 624I - 625A. The import of the judgment in *Eskom* is that the remedy of a respondent who wishes to challenge the authority of a person allegedly acting on behalf of the purported applicant is provided for in Rule 7(1) of the Uniform Rules of Court.’

It follows that the first respondent is clutching at straws in her contention, expecting this court to put form over substance in its adjudication of the matter. I am persuaded that the deponent had the requisite authority to bring this application, and the challenge thereto stands to suffer the same fate.

- [14] The applicant had also attacked the affidavit of the first respondent in its heads of argument relying on Regulation 3(1) of the Regulations Governing the Administering of an Oath or Affirmation as promulgated in terms of the Justices of the Peace and Commissioners of Oaths Act, 1963, on the frivolous ground that on face value it does not seem like it was signed in the

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<sup>1</sup> *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA) para 14

presence of a commissioner because the attestation refers to the person as a male gender whereas the first respondent is a female. Really?

- [15] The applicant further applied in terms of Rule 6(5)(i) for the court to accept a further affidavit to place the order of Olivier J granted on 10 March 2017 before court. The first respondent has not opposed this application. It is necessary to receive the court order not only because the first respondent has in her answering affidavit placed in dispute the applicant's rights to the property but also to show that the property was registered in the name of the applicant after the court so ordered. The applicant only gained possession of the court order on 29 August 2023 having filed the replying affidavit on 23 August 2023. In the absence of any prejudice and in the interests of justice the further affidavit is allowed.

#### The factual background

- [16] In 2004 the applicant authorised its employees, Mr Edward George Warley and Ms Hilda Dawn Patricia Warley, to purchase the property on its behalf from Mr Kevin Richard Harris. Their work entailed being general handymen and housekeepers on the applicant's properties in Kimberley. Their mandate regarding this property was to buy and renovate with the view to either let or sell the property. The applicant had appointed Mr Edward Datnow to oversee the project and made funds available for that project. Mr Datnow transferred two amounts, R20 000.00 and R24 177.56, to the conveyancing attorneys, Engelsman Magabane Inc. on 13 and 14 May 2004, respectively. Unbeknown to the applicant, the Warleys were deflecting the funds and were allegedly assisted by one Eugene Anthony to sign a sale agreement with Harris to have the property registered in their name.
- [17] The Warleys thus fraudulently bought the property, registered it in their name and renovated it at the applicant's expense. Upon becoming aware of the Warleys' action, an agreement was reached between the applicant and the Warleys that the applicant will not press any criminal charges against them provided they transfer the property in its name. Several years passed and Mr



Warley was incarcerated on an unrelated matter and later decamped to India. The applicant had to trace Ms Warley. Later, Ms Warley passed on and the particulars of her death are unspecified. Mr Warley returned to South Africa after some time. An executor was appointed for the estate of his late wife.

[18] The applicant became aware in 2018 that the arrears in rates and taxes at the Municipality were to the tune of R90 000.00. It instructed an estate agent, Ms Hubré Datnow, to inspect the property to determine whether it would be commercially viable, considering the debt, to transfer it in its name. The applicant eventually settled the outstanding arrears which had escalated to R128 558.04.

[19] The applicant, the Warleys and Eugene Anthony had entered into a settlement agreement on 10 March 2017 which Olivier J, before whom Adv Sieberhagen appeared for the applicant and Mr Fletcher for the Warleys and Eugene Anthony, made the following order:

'It is directed that the written settlement agreement, entered into between the parties, dated 8 September 2010, annexed hereto and marked "X", is made an Order of Court.'

On 27 October 2020 and in compliance with the aforementioned order the Registrar of Deeds issued a Deed of Transfer under section 33 of the Deeds Registries Act, 47 of 1947, registering the deed in the applicant's name.

[20] The first respondent has refused to vacate the property necessitating the application for an eviction order. She is a female educator residing at 2[...] A[...] Street, Beaconsfield, Kimberley, with her two children and four grandchildren. Before his passing on 11 March 2008, her late brother, Godfrey Saal, introduced her and her son to the Warley couple to confirm an agreement to settle on Erf 1[...]. They resided in a 'dilapidated structure' with his late brother. She approached the Municipality enquiring about the property and she was informed that it belonged to the Municipality. She was

advised by a municipal officer to pay a certain fee for sewer and electrical connections. She paid an architect for the house plans which were approved by the Municipality on 01 April 2011. At p72 of the papers there appears a plan with an approval stamp and written in a koki pen across that approval stamp the word “cancelled”.

[21] The first respondent contends that since occupation she has been paying rates and taxes and attached proof thereof as annexure ‘DS4’. Payments of R3 128.65 and R1 300.00 were made on 21 October 2008 and another two payments of R300.00 and R822.00 were made on 22 October 2008 as reflected in DS4. Even if one were to accept that the payments were meant to address rates and taxes, which is unclear, the amounts are insignificant when considered against the backdrop of the settlement arrears of R128 554.04 paid by the applicant. The first respondent is asking this court to dismiss the application with costs.

[22] Section 26(1) and (3) of the Constitution, on the issue of housing, enjoins that:

- ‘(1) Everyone has the right to have access to adequate housing.
- (2) ...
- (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.’

[23] Section 1 of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act, 19 of 1998 (PIE), defines an unlawful occupier as a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land. The first respondent and the municipality were served with written and effective notices of these proceedings as contemplated in s 4(2) of PIE. Following this service, the first respondent was legally represented throughout the proceedings.

[24] Despite the first respondent having occupied the property way beyond six months at the time the proceedings were initiated, her contention that the Municipality ought to have filed a report before this matter was heard is misconceived. Section 4(7) of PIE, stipulates:

‘(7) If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, *except where the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier*, and including the rights and needs of the elderly, children, disabled persons and households headed by women.’

[25] The first respondent is silent in her answering affidavit on whether the eviction will render her homeless. Despite the applicant alleging it in its founding papers that she is an educator and can afford alternative accommodation, she elected not to deal with that averment. The Municipality is indeed responsible to provide temporary emergency accommodation but can only do so when requested by persons facing homelessness.

[26] Upon scrutiny, the version of the first respondent does not hold water for the reasons dealt with hereinafter.

[27] The property could not have been vacant land when they took occupation of it because on her own version, at para 11 she states ‘...there was no building on the erf as per the records of the third respondent [municipality] as it was just registered as a piece of land.’ At para 12 she says ‘...I will start to occupy the structure on the piece of land..’ At para 13 she further states ‘...I could start to renovate the dilapidated structure...the property belonged to

the third respondent as it was still registered on their system as an open piece of land.'

- [28] The first respondent's allegation that her late brother concluded an agreement with the Warleys in 2005 and introduced her to them is tenuous. First, the alleged agreement does not form part of the papers; secondly, the Warleys themselves had no right of ownership to the property and could therefore not have transferred the property to the first respondent's late brother; more importantly, the requirement in s 2(1) of the Alienation of Land Act, 68 of 1981 provides that:

'(1) No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority.'

- [29] The Deeds Office records show that the property was fraudulently registered in the names of GE Warley and HDP Warley before it was transferred to the applicant. The contention by the first respondent that the property was vacant land owned by the Municipality cannot be correct. I am persuaded that there was a house on the property on 17 June 2010 which was valued at R380 000.00. The conduct of the Warleys was unlawful. No further right can flow from an illegal transaction.

- [30] The Warleys signed a settlement agreement to register the fraudulently obtained property into the name of the applicant as quid pro quo for not being criminally prosecuted. Olivier J made the agreement an order of Court.

- [31] When the applicant settled the arrears rates and taxes for the property on 30 June 2020 in an amount of R128 558.04, the clearance information on "MB5" shows the purported owner as Warley GE and not the first respondent's late brother, Godfrey Saal.

[32] I am satisfied that the property known as Erf 1 [...], also known as 2 [...] A [...] Street, Beaconsfield is the rightful property of Norland Investments Limited.

[33] I am further satisfied that all the requirements of this Act have been met and the first respondent has not raised a valid defence. It would therefore be just and equitable to grant the order sought. The pending eviction application has been well known to the first respondent and those occupying through her at least since 26 April 2023. The following factors are taken into account for purposes of considering a just and equitable date for the first respondent and those occupying through or under her to vacate, set out by Brand JA in *Unlawful Occupiers, School Site v City of Johannesburg*<sup>2</sup>:

‘[23] The purpose of s 4(2) is to afford the respondents in an application under PIE an additional opportunity, apart from the opportunity they have already had under the Rules of Court, to put all the circumstances they allege to be relevant before the court (see Cape Killarney Property Investments at 1229 E – F).’

[34] The first respondent is employed as an educator. She has been in occupation of the property since 2005, a period of about nineteen (19) years. She lives with her two daughters, their ages unspecified, and four grandchildren. The first respondent has elected not to disclose any other relevant factors which are known to her, for example, whether her daughters are employed or not, the ages of her grandchildren and any other relevant information she wished to be taken into consideration.

[35] Ms Hubré Datnow has filed a confirmatory affidavit confirming what has been deposed to by Mr Bullock in his founding affidavit which I consider relevant. When she visited the property for an inspection in 2018 having obtained the order from court for the property to be transferred into the applicant’s name, the first respondent told her that she had purchased the property from the

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<sup>2</sup> *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA) para 23

son of George Warley and was not willing to vacate the property. The first respondent further said she had paid the purchase price in full and her daughter, an attorney, was in the process of effecting transfer of the property in her name. These averments were uncontroverted. I can infer from the submission that the first respondent and at least her one daughter have the means and can afford alternative accommodation.

[36] I am satisfied that the applicant is entitled to the relief claimed. In as far as costs are concerned, there is no reason why costs should not follow the result.

[37] In the result, the following order is made:

- (1) Condonation is granted to both the applicant and the first respondent for the late filing of their answering and replying affidavits.
- (2) Leave is granted to the applicant to file a further affidavit in terms of Rule 6(5)(i) of the Uniform Rules of Court.
- (3) The first and second respondent, and any person occupying the property through them, are hereby ordered to vacate the property situated at 2[...] A[...] Street, Beaconsfield, Kimberley (“the property”).
- (4) The first and second respondents, and any person occupying the property through them, shall vacate the property on or before 28 February 2025.
- (5) In the event that the respondents and any person occupying the property through them, refuse or fail to vacate the property by 28 February 2025, the sheriff of the court is authorised and directed to remove them together with any movable property belonging to them from the property.

- (6) The first respondent is liable to pay the costs of this application including the application for a further affidavit on the scale as between party and party.

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**MC MAMOSEBO**  
**ACTING DEPUTY JUDGE-PRESIDENT OF THE HIGH COURT**  
**NORTHERN CAPE DIVISION**

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|-------------------------------------|-----------------------------|
| For the applicant:                  | Adv. JM Rust                |
| Instructed by:                      | Venters Rust Incorporated   |
| For 1 <sup>st</sup> respondent:     | Mr KL Juries                |
| Instructed by:                      | Kenneth Juries & Associates |
| For the 2 <sup>nd</sup> respondent: | No appearance               |