IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case no. A603/2010

In the matter between:

EMELDA PAULINE SALIGEE-QUICKFALL	Appellant
v	
ESTER DANIELS	First Respondent
RUDOLF DANIELS	Second Respondent

JUDGMENT HANDED DOWN ON FRIDAY, 29 APRIL 2011

CLEAVER J

[1] The appellant appeals against a judgment of the magistrate, Atlantis, handed down on 10 December 2009 in which an order was granted for her eviction and all those persons occupying Erf 9028 Wesfleur situate at 39 Beaverhead Lane, Sherwood Park, Atlantis ("the property").

[2] The order for the appellant's ejectment was granted pursuant to the provisions of section 4 of the Prevention of Illegal from and Unlawful Occupation of Land Act, No 19 of 1998 ("PIE") and it is common cause that the formalities of that section had been complied with. PIE, and in particular section 4 thereof, provides for the eviction of an unlawful occupier of land.

[3] An unlawful occupier is defined, for the purposes of this application, as *'a person who occupies land without the express or tacit consent of the owner or person in charge, or without any right in law to occupy such land...'*.[1] Section 4(8) of PIE reads as follows:

'If the court is satisfied that all the requirements of this section have been complied with and that no valid defence has been raised by the unlawful occupier, it must grant an order for the eviction of the unlawful occupier, ...'

[1] Section 1 of PIE.

[4] It is common cause that the property is registered in the name of the respondents and it appears that this fact, together with the fact that the respondents are liable to repay the loan secured by a mortgage bond over the property, weighed heavily with the magistrate who concluded that since he could not determine whether the appellant's version was to be accepted or not, he was obliged to find for the respondents. Before an order can be granted in terms of s 4, a court must be satisfied, on a balance of probabilities, that no valid defence has been raised by the respondent and when a defence has been put up, due and proper regard must be had to the onus which an applicant must discharge.

[5] The appellant's case was that on 5 March 2004 she had concluded a written agreement with the then owner of the property, Mr T J Keyster ("Keyster") who incidentally is the father of the second respondent who in turn is married in community of property to the first respondent. This agreement, which was put before the court, was for a period of five years commencing on 15 March 2004 and terminating on 15 February 2009 and provided for a deposit of R10 000 to be paid to Keyster and also that the property would become the sole property of the appellant if the full amount of R50 000 had been paid to the Blaauwberg Municipality within the five years lease period. It would seem that at the time the agreement was entered into, the property was owned by the Blaauwberg Municipality and that Keyster had tenancy rights to it. The agreement provided that the basic rental was to be that which was payable by the tenant to the Blaauwberg Municipality and provided further that in the event of Keyster becoming incapacitated within the lease period, his daughter Rachel Benjamin would become the legal landlord and would have the right to sign the transfer of the property over to the appellant on behalf of Keyster. The appellant produced documentation recording that she had paid the full amount of R50 000 and all other amounts payable by her, but says that when Keyster was asked to sign a deed of sale for the purposes of effecting transfer, he declined to do so. At that stage the appellant's

attorneys were informed that the property was to be registered in the name of the first respondent. The property was thereafter registered in the name of the first respondent on 21 May 2009, this being effected pursuant to a deed of donation entered into between Keyster and the first respondent in January 2008.

[6] The respondents contend that the appellant committed a breach of the contract which she had with Keyster and which in turn they allege gave Keyster the right to cancel the contract which they say he duly did. The appellant denies that Keyster had the right to cancel the lease and avers that she is entitled to have the property registered in her name. The magistrate found that the respondents had terminated the appellant's tenancy, but no evidence of any nature was put forward to justify such a finding. The averment that Keyster had cancelled the lease is unsubstantiated, for it is the mere say so of the respondents to this effect and is not confirmed on oath to this effect by Keyster.

[7] On the appellant's version, once she had made payment of the agreed amount of R50 000 and other amounts, she had a right in law as referred to in the definition of '*unlawful occupier*' in PIE to occupy the property.

[8] As pointed out by counsel for the appellant, the respondents clearly, and on their own version, had knowledge of the appellant's agreement of lease with Keyster which included the appellant's contractual right to become owner of the property upon compliance with the agreement. Having made payment of the agreed amount of R50 000 and all other amounts, the appellant had also obtained a personal right in respect of the property which, having regard to the knowledge which the respondents had may well prevail against the real right which the

respondents have to the property by virtue of the registration thereof in the name of the first respondent.

[9] The application before the magistrate was to be decided on motion and it is trite that accordingly, a final order could only have been granted if the facts stated by the respondent in the application before him, together with facts alleged by the applicant and admitted by the respondent justified the granting of the order.[2] The respondents failed to cross this hurdle and the magistrate was therefore not correct in finding that the appellant had not put up a valid defence. The fact that the respondents, having taken transfer of the property and having committed themselves to repayment of a loan secured by the property without being able to occupy the property was not a factor which should have been taken into account in deciding whether the applicants a quo had discharged the onus on them.

[10] In the circumstances the following order will issue:

1. The appeal succeeds with costs.
2. The order granted by the magistrate is set aside and replaced with the following order:

   "The application is dismissed with costs."

R B CLEAVER

WEINKOVE AJ

I agree.

L WEINKOVE

[2] *Plascon-Evans Limited v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634.