IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 2020/12597

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED: NO
27 SEPTEMBER 2021

In the matter between:

FELLINGER, ERIC	Applicant
and	
COX, ENOCH	First Respondent
COX, DOREEN	Second Respondent
ALL OCCUPIERS OF ERF [....] YEOVILLE TOWNSHIP	Third Respondent
THE CITY OF JOHANNESBURG	Fourth Respondent

JUDGMENT

This judgment is handed down electronically by circulation to the parties or their legal representatives via email and by uploading same onto CaseLines. The handing down of this judgment is deemed to be 27 September 2021.

MOOKI AJ:

[1] The applicant seeks an order evicting the respondents from premises at Erf [....] Yeoville Township, Johannesburg ("the premises"). The applicant contends that the respondents are unlawful occupiers. The applicant seeks eviction in terms of the Prevention of Illegal Evictions from Occupation of Land Act, 19 of 1998 ("PIE").

[2] I refer to the second respondent as ("the respondent"). The City of Johannesburg Municipality did not participate in the proceedings.

[3] The respondent seeks a counterclaim in relation to the premises. The counterclaim is essentially to oblige the applicant and his former wife ("Doreen"), to effect transfer of the premises into the name of one Gertrude Angela Williams ("Williams"). The counterclaim also seeks to have Williams joined as a respondent. The applicant opposes the counterclaim.

[4] The applicant and Doreen were married in community of property. The property that forms the subject of this application is, by deed [....]/1992, registered jointly in their respective names. They divorced on 10 October 2003. The settlement agreement in the divorce does not address how the immovable property was to be treated after the divorce.

[5] Doreen has subsequently went missing. The applicant filed a missing person's report with the South African Police Service on 22 November 2019. Doreen's whereabouts remained unknown when this application was launched.

[6] The respondent contends that the application is premature. That is because only registered owners of the property could bring eviction proceedings. She contends that an executor had to have been appointed for Doreen, pursuant to sections 12 and 13 of the Administration of Estates Act, 66 of 1965 and that the applicant had no standing to bring the application.

[7] The contention that the application is premature is premised on Doreen having gone missing. The contention is unsound. The respondent has not shown that the estate of Doreen must be dealt with as detailed in the two sections. The sections do not apply to the estate of a missing person.

[8] The applicant and Doreen vacated the premises as a family home in 2008. That is when the first and second respondents took occupation. The first respondent has since died. The respondent remains in occupation. She stays with her three adult children and four grandchildren.

[9] The applicant contends that the respondents occupied the premises pursuant to an agreement of lease between the applicant, Doreen and the respondents; that the respondents failed to comply with their obligations under that agreement, leading to termination of the lease.

[10] The respondent contends that her occupation has nothing to do with the applicant or Doreen; she never had dealings with the applicant, and never concluded any agreement with the applicant or Doreen. She maintained that she occupies the premises pursuant to an arrangement between her and Williams, her sister.

[11] The case for the respondent is that Williams purchased the property from Doreen in terms of a “deed of sale” dated 31 October 2008. The first and second respondents are indicated as witnesses to this document.

[12] Williams, according to the respondent, purchased the property on behalf of the first and second respondents because they had no money at the time. Doreen sold the property to Williams for R250,000.00. Williams paid Doreen a deposit in the amount of R30,000.00. The arrangement between the first and second respondents and Williams was that the respondent would pay Doreen R3000,00 per month until the purchase price was paid up. The property would, thereafter, be transferred into the names of the first and second respondents.

[13] The applicant denies that Doreen sold the property. The respondent, in turn, referred to a document styled “Deed of Sale”, bearing the date 31 October 2008 and to a letter by Doreen dated 23 August 2011. Doreen addressed the letter to the Observatory Girls School. She copied Williams. The letter reads as follows:

> Dear Sir/Madam
>
> Please be advised that Mrs Williams has purchased the (sic) on deed of sale. Her sister Doreen lives on the property a (sic) monthly rent of R3000. (sic) into my FNB bank account. Account number: [account number specified].
>
> For further information please feel free to email me.
>
> Yours faithfully
> (signed)
> D.F. Fellinger

[14] The applicant contends that reference to “rent of R3000” in the letter confirms his view that the first and second respondents are in occupation pursuant to a lease agreement, which has since been cancelled. The respondent, on the other hand, maintained that the first line of the letter confirms that Doreen sold the property to Williams.

[15] Williams deposed to a confirmatory affidavit. She agreed with the respondent regarding the purchase of the property. She also supports the counterclaim. Williams says in her affidavit that it was agreed that Williams would, in due course, either take transfer and allow her sister and or her family to live in the premises or that the respondent would take transfer of the property after the respondent had paid Williams the monies loaned to the respondent; that she agreed with the respondent immediately before purchasing the property that the respondent and her family could reside in the property; that the respondent would be responsible for municipal utility charges and was to pay the monthly amount of R3000 in respect of the purchase price. Williams further maintained that the full purchase price had been made and that she was entitled to acquire transfer of the property, which transfer had been refused despite her demand.

[16] The applicant maintains that the deed of sale does not bind him; that the deed of sale is invalid because he did not, as a registered co-owner of the property, sign the agreement. The respondent in turn contends that the agreement is valid because the divorce settlement agreement entitled Doreen to treat the property as her own.

[17] The applicant denies that the settlement agreement entitled Doreen to deal with the property however she wished. He never renounced his half share entitlement to the property. He further pointed out that the stated deed of sale was never registered against the title deed, and, for that reason, Williams had no right against him in relation to the property.

[18] It was submitted on behalf of the respondent that the “deed of sale” was valid because Doreen was the beneficial owner of the property and, for that reason, could sign the deed of sale on her own. The respondent referred to clause 2.3 of the divorce settlement agreement in support of her contention. The clause states that:

The parties have agreed, with regard to their respective proprietary claims to retain those assets presently in their respective possession and/or under their respective control in settlement of their respective claims in the joint estate.

[19] It was submitted for the respondent that the applicant was hardly involved in dealings concerning the property; that he became involved after Doreen disappeared. That fact, according to the respondent, confirmed Doreen's representation that she owned the property.

[20] The respondent put up an annexure which, according to her, showed that the property had been paid up.

[21] The applicant denied that an executor had to be appointed for Doreen. He maintained that he did not renounce his right to a half-share of the property; that the "deed of sale" was not binding on him. He also denied that the settlement agreement entitled Doreen to do with the property as she wished. The applicant also pointed out that the "proof of payment" by the respondent showed that the stated purchase price had not, in any event, been paid in full.

[22] The parties ultimately agreed that there is no lease agreement between them. The dispute then turned on whether the "deed of sale" entitled the first and second respondents to occupation.

[23] I agree that the "deed of sale" does not bind the applicant. It did not divest him of his half-share to the property. Whatever the status of the "deed of sale" document, the applicant remained entitled to a half-share of the property on 31 October 2008. That half share remained extant regardless of the status of the "deed of sale" document. Neither the respondent nor Williams have rights to the property that trump the first applicant's half share as shown in the title deed to the property.

[24] It was submitted on behalf of the respondent that Doreen represented to the respondent that Doreen owned the property. Such a representation did not divest the applicant of his co-ownership of the property. Ownership of immovable property is evidenced by entries in a title deed.

[25] The applicant contended that the “deed of sale” did not, in any event, comply with the requirements in section 2(1) of the Alienation of Land Act, 68 of 1981. In this regard, and as an illustration, the document does not mention the extent of the land that is the subject of the contract.

[26] Ownership of the property remained indivisible as between the applicant and his former wife on 31 October 2008. The respondent did not refer the court to any authority to support her contention that Doreen was the “beneficial owner” of the property and, for that reason, could conclude a binding deed of sale pertaining to the property without involving the first applicant, notwithstanding that the applicant is a registered co-owner of the property. The respondent sought to square the circle by submitting that a beneficial owner can sign a deed of sale but that the applicant and Doreen would both have had to sign to effect transfer of the property. There was, equally, no judicial support for this submission.

[27] The applicant has established that he is a co-owner of the property, as recorded in the title deed. A Title Deed is the best evidence of ownership of immovable property.

[28] To the extent that the respondent and her sister contend for an entitlement to the property, that is not so. The respondent’s sister is not a litigant in this application. There is no *lis* between her and the applicant. The respondent in turn has no right to the property as between herself and the applicant. The respondent should look to Doreen for any recourse that the respondent may have in connection with the property.

[29] The respondent has not shown a lawful entitlement to residing on the property. She is in unlawful occupation.

[30] There is no challenge to the procedural requirements for the grant of relief under PIE.

[31] The court is then to consider whether it is just and equitable that the respondent be evicted from the property. There is no closed list of considerations whether it is just and equitable to order an eviction. A court must consider the circumstances peculiar to the matter before court.

[32] The respondent avers that she has been staying in the property since 2008. She stays with her adult children and grandchildren; she says that she is sickly, that both she and two of her adult children are unemployed, and that she receives a monthly stipend of $500 United Dollars from her sister in the United States of America. She further contends that she will have no place to stay should the court order her eviction.

[33] The respondent did not provide support for her contention that she is sickly. She also did not provide any detail about the minor children, such as whether they are school-going and the like. She says that two of her adult children are unemployed. She does not say, however, whether those children are actively seeking employment. She does not say, in addition, that her adult children receive social grants, such as for a disability and the like.

[34] The first and second respondent have been aware that the applicant and Doreen have, since 2014, essentially contended that the first and second respondents had no lawful basis to occupation. The first and second respondents threatened to institute court proceedings in 2015 for the property to be recorded in their name. Nothing was done.

[35] The respondent did not proactively seek to find a solution or alternative accommodation. She has not sought the assistance of the fourth respondent. In any event, it appears that the respondent would not qualify for low-cost housing because the $500 monthly stipend from her sister equates to more than the minimum amount required to be considered for low-cost housing.

[36] The applicant is an 80-year-old pensioner. He receives a pension of some R1800 per month. He contends that the property is his only real asset and that he has spent more than five years trying to secure this asset. He was unable, in the past, to initiate eviction proceedings for lack of means. He further pointed out that the respondent had tenants in the property from whom she collects rent. The respondent denies keeping tenants. The applicant's daughter and her boyfriend deposed to affidavits confirming that the respondent has tenants on the premises.

[37] I conclude, having regard to what is stated above, that it is just and equitable that the respondent and those in occupation of the premises be evicted. In addition, and with reference to the respondent's stated precarious financial position; it bears mentioning that the respondent receives an amount of money from her sister that is almost 5 times what the applicant receives as a pension.

[38] The respondent has been aware since 2014 that her claim to the property was precarious. It would be expected of her to have taken steps to secure what she considered her interests. The applicant explained why he launched the eviction proceedings when he did. It remains a regret that the ability of the public to use the machinery of the courts remains largely a function of whether a member of the public have means to prosecute their interests in the courts.

[39] The applicant and his former wife acquired the property when the applicant was 52 years old. He is now an 80-year-old pensioner. The property is his only real asset. Permitting the respondent and those in occupation to remain in occupation would amount to indirect expropriation. The law does not permit expropriation other than as contemplated in the Constitution. The applicant, as a registered co-owner of the property, will effectively be permanently divested of his interest in the property should the court not order eviction. That would not be just and equitable as between the respondent and the applicant.

[40] The counterclaim is dismissed. The respondent did not make a case for the relief sought. For example (and assuming the validity of the deed of sale), the applicant and his former wife cannot be obliged to sign documents to effect transfer of the property to Williams when the document that the respondent relies upon as proof of payment of the purchase price does not, on the face of the document, reflect payment of the purchase price; even where one added R30,000 to the amount shown on the document.

[41] The applicant sought condonation for the late filing of his replying affidavit. Condonation is granted.

[42] The court will grant relief to the applicant. The respondents should be given the opportunity to get their affairs in order in relation to where they will keep accommodation. A period of three months out to be sufficient.

[43] I make the following order:

1. The second respondent and all persons (collectively "respondents") occupying with and through the second respondent are hereby evicted from the immovable property situated at Erf [....] Yeoville Township, Johannesburg, also known as [….] Harley Street, Yeoville, Johannesburg, referred to as "the property".

2. The respondents are ordered to vacate the property within 90 calendar days of service of this order on each of the second and third respondents.

3. It is further ordered that if the respondents do not vacate the property as stated in paragraph 2 above, then it that event the Sheriff; alternatively, the Sheriff's duly appointed deputy, together with such assistance as is deemed appropriate, is authorised and directed to evict the respondents from the property.

4. The second respondent is ordered to pay the costs of this application and the costs of the s 4(2) application of the PIE Act.

O. MOOKI
Acting Judge of the High Court
Gauteng Local Division, Johannesburg

Heard:	19 July 2021
Judgment:	27 September 2021
Applicant's Counsel:	B van Tonder
Instructed by:	Thomson Wilks Inc.
Second and Third Respondent's Counsel:	B Friedland
Instructed by:	Beder Friedland Inc.