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

Case Number: A93/2013

In the matter between:

ASTRID STEYN **APPELLANT**

and

FRIEDRICH HELMUT HASSE **FIRST RESPONDENT**

THE SHERIFF FOR THE MAGISTRATE'S COURT FOR THE DISTRICT OF SOMERSET WEST **SECOND RESPONDENT**

JUDGMENT DELIVERED ON 15 AUGUST 2014

GOLIATH, J.:

[1] The parties in this matter were involved in a brief cohabitation relationship which ended, and resulted in first respondent obtaining an eviction order against the appellant. The appellant now seeks to have the eviction order granted by the Magistrate's Court on 12 December 2012 set aside.

[2] The appellant filed a notice of appeal on 15 January 2013 in which appellant's grounds of appeal are that the learned magistrate erred in finding:

2.1. it is just and equitable to evict the appellant from the property given her personal circumstances and more particularly the fact that the applicant is an elderly disabled, unemployed woman in a woman headed household, diagnosed with motor neuron disease.

2.2. That the appellant's eviction will not lead to her homelessness.

2.3. That it is not necessary for the relevant municipality to compile a report regarding alternative accommodation and that it would serve no purpose to refer the matter to mediation in terms of Section 17 of Act 19 of 1998.

2.4. That no dispute of fact existed on the affidavits and by consequently not referring the matter to oral evidence in respect of the following disputed issues:

(i) Whether there existed an agreement between the parties that the appellant would have the right to occupy the property for a minimum period of 10 years; and

(ii) Whether a cohabitation agreement existed between the parties and what the material terms of such agreement were.

[3] In the alternative the appellant contends that if it is found to be just and equitable to evict the appellant that the eviction date should be extended to a date in the discretion of the Court.

Factual Background

[4] The first respondent is a married German businessman, primarily residing in Germany, and is the registered owner of the property at 10 Vredelust Street Somerset West. In his founding papers the first respondent contended that the parties had entered into an oral agreement of lease for residential purposes on 20 February 2007, and consequently the appellant took occupation of the property on this date. According to first respondent the express terms of the agreement were that the appellant would look after the house and maintain the swimming pool and garden and furthermore, that appellant would ensure that all costs related to the property would be paid out of appellant's designated bank account from cash provided by the first respondent. According to the first respondent the appellant breached the agreement by failing, refusing or neglecting to account to first respondent.

[5] The first respondent subsequently informed the appellant that he wished to rent, alternatively sell the property, and requested her to vacate the property by 30 January 2011. He alleged that at some stage he felt sorry for her and agreed that she could extend her stay. However, subsequently further correspondences were exchanged, notices to vacate were served on appellant, but she failed to vacate. The first respondent stated that the

appellant made no financial contribution towards the property and lives rent free. He is suffering financially and could no longer afford to allow the appellant to continue living rent free at his property.

[6] The appellant opposed the eviction application and denied that the parties ever concluded a written or oral agreement of lease as contended by the first respondent. She stated that the parties were involved in a romantic relationship, and that she took up occupancy of the premises with the first respondent at his invitation on 1 April 2007. The first respondent resided at the property for approximately four months per year with her, and the remainder of the year he lived in Germany with his wife.

[7] The first respondent furnished her with a general power of attorney and provided her with a bank card to withdraw necessary funds to perform the services as required by the first respondent, including paying the domestic worker. She also received funds for her maintenance. She stated that the first respondent maintained her for a period of approximately five years. The first respondent gave her an expensive ring and a 2007 Ford Fiesta vehicle as gifts. She stated that first respondent referred to her as his wife and introduced her to people as his wife.

[8] Following his invitation to move in with him, the first respondent assured her that he would provide her with a secure home for at least ten years, which period will lapse in April 2017. First respondent also assured her that should their relationship not work out, he would buy her a place to the

value of the townhouse she previously occupied. She admits that on 18 April 2012 she received an eviction notice from the first respondent's attorney. However, she is not financially and physically in a position to adhere to the request to vacate the premises.

[9] According to the appellant, the first respondent omitted to deposit the necessary funds for the upkeeping of the premises since December 2011, and she had to contribute R73 080.00 towards the expenses. However, she also alluded to an amount of R100 000.00 which was paid into her bank account on 16 July 2012 and disputes his averment that he was going through difficult economic times.

[10] She alleges that the contents of the house belong to her. She denies that she is an unlawful occupant, or that she entered into any lease agreement with the first respondent, but contends that she occupied the premises with him on his invitation as his partner, and her occupancy was with the express consent of first respondent. She stated that in 2006 she was diagnosed with motor neuron disease, is physically unable to find alternative accommodation on her own, and is unable to provide for herself financially without first respondent's assistance.

[11] The first respondent admitted to being in a romantic relationship with appellant, but averred that it has ended. According to first respondent the general power of attorney referred to by the appellant was revoked on

5 November 2007. He contends that the appellant had to take care of the property and manage it in his absence, but failed to do so adequately.

[12] The first respondent denied that he ever promised or offered to provide appellant with a secure home for at least ten years, or assured her that he would buy her a place should the relationship end. First respondent contends that he has no obligation to maintain the appellant. Furthermore, the appellant has two children and is in a position to find alternative accommodation. He initially consented to her living rent free at the premises, but has subsequently cancelled or withdrawn his consent. According to first respondent the relationship ended in 2010 and the current state of affairs where appellant continues to occupy his property rent free is untenable. First respondent submits that a proper case for the eviction of the first respondent had been made out.

The finding of the Court a quo

[13] The court a quo found that there were no reciprocal rights and duties of support between the appellant and first respondent. The court concluded that the appellant's occupancy was motivated by the love relationship, based on the consent of the first respondent. The first respondent had subsequently withdrawn his consent and furnished the appellant with a written termination notice. The court accepted that there was no lease agreement between the parties. The court considered all the circumstances of the case and concluded

that the appellant's occupation was unlawful as the first respondent withdrew the consent previously given.

[14] The court then considered whether it would be just and equitable to evict the appellant. The court took into account that previous attempts to settle the matter had failed, that the relationship had ended, and found mediation would serve no purpose. The court also considered the fact that the appellant previously had a town house and on her own version made a financial contribution in the sum of R73 080.00 since occupying the property, despite her contention that she is unemployed. The court therefore found no need to obtain a report from the Municipality and concluded that an eviction order will not lead to homelessness. The court a quo was satisfied that all the material issues could be ascertained from the pleadings and found it unnecessary to refer the matter for oral evidence. Consequently the court found that it is just and equitable that the appellant be ordered to vacate the relevant property.

Did a reciprocal duty of support exist between the parties?

[15] The relationship between the parties commenced in 2005 and in early 2007 the appellant moved into the premises at the first respondent's invitation. It is common cause that the first respondent resided at the property approximately four months per year. The property was therefore mainly occupied by the appellant and the first respondent was responsible for the costs of maintaining the property. In a letter from appellant's attorneys to first respondent's attorneys dated 26 April 2012 (annexure "AS4"), appellant's

attorneys demanded continued financial support from first respondent, and alluded to the existence of a universal partnership between the parties.

[16] It is common cause that the parties cohabited outside a formal marriage. Cohabitation generally refers to people who, regardless of their gender, live together without being validly married to each other. In South Africa cohabitation is a common phenomenon and widely accepted. However, cohabitants generally do not have the same rights as partners in a marriage or civil union, since our Courts have emphasized the importance of marriage as a social institution and the important legal obligations such as the reciprocal duty of support flowing therefrom (See: **Volks NO v Robinson and Others** 2005 (5) BCLR 446 (CC) para 20; **Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others** 2000 (3) SA 936 (CC) at para 30). Our law recognizes various forms of family relationships which create a duty of support **(Satchwell v President of the Republic of South Africa and Another** 2002 (6) SA 1 (CC) at para 23, 25; **Du Toit v Minister of Welfare and Population Development and Others** 2003 (2) SA 198 (CC) para 19; **Du Plessis v Road Accident Fund** 2004 (1) SA 359 (SCA) at para 13).

[17] Although no reciprocal duty of support arises by operation of law in the case of unmarried cohabitants, it does not preclude such duty from being regulated by agreement. However, our Courts provide some measure of recognition to cohabitation and have on many occasions found that an

express or implied universal partnership existed between cohabitants. (**Butters v Mncora** 2012 (4) SA 1 (SCA)). A universal partnership exists when parties act like partners in all material respects without explicitly entering into a partnership agreement. The three essential elements are firstly, that each contributes something into the partnership or bind themselves to contribute something into it, secondly, the partnership should be carried on for the joint benefit of both parties and, thirdly, the object should be to make profit. (**Muhlmann v Muhlmann** 1981 (4) SA 632 at 634 C-E; **Kritzinger v Kritzinger** 1989 (1) SA 67 (A); **Pezzutto v Dreyer & Others** 1992 (3) SA 379 (A) at 390 A-C; **Ponelat v Schrepfer** 2012 (1) SA 206 (SCA) at 212 para 19).

[18] The issue regarding the existence of a universal partnership was never explicitly raised by appellant in the pleadings. Appellant therefore does not allege that there was an express or implied universal partnership as a result of their cohabitation. It is therefore not in dispute that the relationship does not comply with the essential requirements of a universal partnership.

[19] The appellant contends that the first respondent maintained her for a period of five years, but failed to do so since December 2011. However, she contradicts herself in her pleadings by stating that he deposited the sum of R100 000.00 into the bank account in January 2012. Furthermore, in the letter addressed to first respondent's attorneys ("AS4") she clearly stated that she was maintained by first respondent until October 2010.

[20] The initial general power of attorney given to the appellant, which was subsequently revoked, clearly states that the first respondent is married, and lives in Germany. The first respondent was generous towards the appellant, maintained the premises she resided in rent free, and bought her gifts. The appellant provided assistance with the managing and maintenance of the property. It appears that the parties have not established or maintained a joint household and appellant never contributed towards first respondent's expenses.

[21] The first respondent stayed intermittently with the appellant when he came to South Africa. On the pleadings it is evident that this occurred from early 2007 until 2010 when the relationship was terminated. The first respondent commenced legal intervention at a meeting on 19 April 2010 requesting the appellant to vacate the premises. An extension was given to the appellant and on 11 April 2012 a formal letter was delivered to her demanding that the premises be vacated by 30 June 2012.

[22] The general power of attorney given to the appellant was revoked as early as 5 November 2007. The relationship was terminated in 2010 and appellant was requested on 19 April 2010 to vacate the premises. The power of attorney giving her access to the bank account was cancelled on 28 April 2010. The revocation of the general power of attorney, the subsequent request to vacate the property, followed by the cancellation of access to the bank account, are all indicative of signs of a relationship having irrevocably broken down.

[22] The magistrate was cautious not to label the nature of the relationship of the parties, but concluded that it resembled no more than that between a man and mistress or even concubinage between a married man and his mistress. Considering the overall nature of the relationship, as well as the fact that the appellant had no intimate knowledge of first respondent's personal affairs, it is evident that there was clearly no express or tacit universal partnership. I am therefore in agreement with the magistrate's conclusion that there is no legal basis to find that there existed reciprocal rights and duties of support between the appellant and the first respondent.

Is the occupation of appellant unlawful?

[23] Section 1 of the Prevention of Illegal Eviction from and Unlawful occupation of Land Act 19 of 1998 ("the PIE Act") defines an unlawful occupier as:

> *"unlawful occupier means 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, excluding a person who is an occupier in terms of the Extension of Security of Tenure Act, 1997, and excluding a person whose informal right to land, but for the provisions of this Act, would be protected by the provisions of the Interim Protection of Informal Land Rights Act, 1996 (Act No. 31 of 1996)".*

[24] The appellant stated the following in her answering affidavit:

> *"I deny that I am an unlawful occupier of the premises situated at 10 Vredelust Street, Helderview Somerset West ... I base this submission on the fact that I at no stage entered into any sort of lease agreement*

with the applicant, but occupied the premises with him on his invitation as his partner, and was my occupancy of the premises accordingly with the express consent of Applicant".

[25] The appellant further alleges that the first respondent promised to provide her with a secure home for ten years, and assured her that he would buy her a place to the value of her townhouse should the relationship not work out. It is trite that no reciprocal duty of support exists between cohabitants. Any obligation which may arise during the subsistence of their relationship arises by agreement and only to the extent of such agreement. (**Volks N.O. v Robinson** (supra) at para 58; **McDonald v Young** 2012 (3) SA 1 (SCA)). The question which then arises is whether an agreement as alleged by appellant did exist between the parties. It is well established under the Plascon Evans Rule that where in motion proceedings disputes of fact arise in the affidavits, a final order can be granted only if the facts averred in the applicant's affidavit which have been admitted by respondent, together with the facts alleged by the respondent justify such order. (**Plascon Evans Paints Ltd v Van Riebeek Paints (Pty) Ltd** 1984 (2) All SA 366 (A)). Cameron, JA stated the position as follows in **Fakie NO v CCII Systems (Pty) Ltd** 2006 (4) SA 326 (SCA) at para 55 and 56.

"[55] That conflicting affidavits are not a suitable means for determining disputes of fact has been doctrine in this court for more than 80 years. Yet motion proceedings are quicker and cheaper than trial proceedings and, in the interests of justice, courts have been at pains not to permit unvirtuous respondents to shelter behind patently implausible affidavit versions or bald denials. More than 60 years ago,

this Court determined that a Judge should not allow a respondent to raise 'fictitious' disputes of fact to delay the hearing of the matter or to deny the applicant its order. There had to be a 'bona fide' dispute of fact on a material matter. This means that an uncreditworthy denial, or a palpably implausible version, can be rejected out of hand, without recourse to oral evidence. In ***Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd,*** *this Court extended the ambit of uncreditworthy denials. They now encompassed not merely those that fail to raise a real, genuine or bona fide dispute of fact but also allegations or denials that are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers.*

[56] Practice in this regard has become considerably more robust, and rightly so. If it were otherwise, most of the busy motion courts in the country might cease functioning. But the limits remain, and however robust a court may be inclined to be, a respondent's version can be rejected in motion proceedings only if it is 'fictitious' or so far-fetched and clearly untenable that it can confidently be said, on the papers alone, that it is demonstrably and clearly unworthy of credence".

[26] In **National Director of Public Prosecutions v Zuma** 2009 (2) SA 277 (SCA) at para 26 Harmse, JA stated that if a *"version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable the court is justified in rejecting them merely on the papers".* In **Buffalo Freight systems (Pty) Ltd v**

Crestleigh Trading (Pty) Ltd and Another 2011 (1) SA 8 (SCA) at 14, 15 para 21)**,** Shongwe, JA said this could be done where *"the version propounded by the respondents was fanciful and wholly untenable".* In **Wightman t/a JW Construction v Headfour (PTY) Ltd and Another** 2008 (3) SA 371 (SCA) at para 13 the court noted that:

> *"A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed".*

[27] From the above decisions it is clear that the Court is permitted to scrutinize the detailed versions presented on affidavit in order to establish if indeed there is a real and genuine dispute of fact and whether the version offered by the respondent is wholly fanciful and untenable. Our case law recognises that where a respondent's version is so far-fetched or untenable, it can, on that ground alone be rejected.

[28] The facts of this case present no difficulties in resolving the disputes of fact on the papers. (**Soffiantini v Mould** 1956 (4) SA 150 (E) at 154 G). All the issues in this matter are ascertainable from the pleadings and there was clearly no need to refer the matter for oral evidence. It would serve no purpose for the court to refer the matter to oral evidence when it is apparent that *viva voce* evidence is unlikely to disturb what appeared from the papers. It would only result in unnecessary costs and unnecessary delays. (**Wallach v Lew Geffen Estates CC** 1993 (3) SA 258 AD at 263 G-I). I am satisfied that

the facts and circumstances of this matter called for the adoption of a common sense and robust approach. (**Buffalo Freight Systems (Pty) Ltd v Crestleigh Trading (Pty) Ltd and Another** (supra) at 14 A-D).

[29] The first respondent is a married German national. He spent four months per year in South Africa during the duration of the relationship. Appellant's occupation of the property and the financial benefits she received were solely based on the romantic relationship. Appellant states the following in her answering affidavit:

> *"The very nature of the relationship between the Applicant and me did not lend itself towards any discussions surrounding the intended duration of the cohabitation or the payment of rent".*

[30] On appellant's own version there appear to have been no meaningful discussions surrounding their cohabitation. If there were no discussions surrounding the intended duration of the cohabitation, on what basis would the issue of long term or alternative accommodation have been raised and agreed to by the parties? The appellant's reliance on an alleged verbal undertaking or agreement is inconsistent with her own version.

[31] It is not seriously disputed that a meeting was held at the offices of first respondent's attorneys on the 19th April 2010 requesting her to vacate the premises. If appellant moved into the premises on 1 April 2007 as alleged, and she was requested to vacate on 19 April 2010, it is evident that the period of cohabitation was only three years. The first respondent cancelled the general power of attorney in the same year the appellant had moved in on 5

November 2007. This conduct clearly indicates that the relationship envisaged by the first respondent was not one in which the appellant actively played a role in his personal affairs.

[32] The appellant acknowledged receipt of a letter on 18 April 2012 giving her notice to vacate the premises. Significantly the appellant's attorneys responded to the notice in a letter dated 26 April 2012 and at no stage referred to the existence of any such agreement but instead referred to appellant as first respondent's universal partner.

[33] Having regard to the circumstances of this case, and the nature of the relationship, it is highly improbable that first respondent who had no duty to support the appellant, would have given an undertaking of a secure home for ten years, or offer to purchase appellant a property at termination of the relationship. These averments by the appellant are palpably implausible, so far-fetched, and clearly untenable and stand to be rejected.

[34] The first respondent cannot be prohibited from terminating his relationship with appellant. Nor can the first respondent be placed in a situation where he may not withdraw his consent for appellant to reside with him. The appellant was no longer his partner and the first respondent had duly withdrawn his consent. The first respondent is the owner of the premises and is entitled to retain possession of the premises, having properly withdrawn the consent previously given. In my view the court correctly found that proper notice of termination of occupation was given. The magistrate therefore correctly concluded that the appellant is unlawfully occupying the property.

Is it just and equitable to evict?

[35] In terms of section 4(7) of PIE an eviction order may only be granted if it is just and equitable to do so. If no valid defence is advanced the court is obliged in terms of section 4(8) to grant an eviction order (**City of Johannesburg v Changing Tides 74 (Pty) Ltd** 2012 (6) SA 294 (SCA) at paras 11, 12). The Constitution and PIE require that the court must have regard to the interests and circumstances of the appellant and have due regard to broader considerations of fairness and other constitutional values, so as to produce a just and equitable result **(Port Elizabeth Municipality v Various Occupiers** 2005 (1) SA 217 (CC)). Once the conclusion has been reached that eviction would be just and equitable the court enters the second enquiry, namely as to what would be a just and equitable date upon which the eviction order should take effect (**City of Johannesburg v Changing Tides 74 (Pty) Ltd** (supra) at para 12).

[36] The first respondent is the legal owner of the property. He invited the appellant to move into the property. On her own version the appellant had supported herself unaided and had the means to rent a townhouse before she moved into the immovable property. She has two children who have a duty to support her should she become indigent. She supported herself at least since December 2011 and was in a position to make financial contributions during her occupation of the property in the sum of R73 080.00 after the first respondent withdrew financial support. This is clearly a case where the

availability of alternative accommodation is not relevant. The magistrate correctly concluded that an eviction order will not lead to homelessness which will require the Municipality to provide alternative accommodation.

[37] Mediation was suggested in a letter 26 April 2012 as well as round table meetings. It is evident that no progress had been made in this regard. The Magistrate therefore correctly found that this is clearly not the type of eviction matter that can benefit from mediation in the interests of justice.

[38] The appellant claims that she has been suffering from motor neuron disease since 2006. First respondent, with whom she was engaged in a romantic relationship at the time she was allegedly diagnosed with this condition, was never told about it. The serious nature and effects of the disease is highlighted in an article annexed to the papers. However, there is no medical evidence to substantiate her claim that she suffers from this debilitating disease. There is no suggestion that she is frail or requires assistance in her daily life. It is evident that appellant has suffered no diminishment of her capabilities from this progressively debilitating disease and her averments in this regard can therefore not be accepted in the absence of medical confirmation of her condition.

[39] The romantic relationship between the parties was terminated in 2010. First respondent has no duty to support appellant, and no obligation to provide accommodation until 2017 or purchase a home for appellant. I am satisfied that the magistrate duly considered all the circumstances of this case, and correctly found that it would be just and equitable to grant an eviction order.

[40] The parties have been involved in protracted litigation and appellant ought by now to have made contingency plans should she not be successful. She was aware of the real prospect of eviction since legal proceedings commenced. I therefore find that a reasonable period for the appellant to vacate the premises would be a period of three (3) months upon the granting of this order.

[41] With regard to costs, the general rule is that costs are to follow the event. It therefore follows that the first respondent, as the successful party, would ordinarily be entitled to a costs order in his favour. This general rule should only be departed from in exceptional circumstances.

[42] The parties were involved in a relationship and an unfortunate sequence of events led to litigation between the parties. Appellant is unemployed, in her senior years and not in good health. Given the regrettable tension that already exists between the parties, I deem it undesirable to make matters worse by granting a costs order against the appellant. Considering the history of this matter, I am satisfied that justice and fairness would be best served in this case if no costs order is made.

[43] In the result the following order is made:

(a) The appellant's application for condonation is granted, the appellant to bear any costs associated therewith.

(b) The appeal is dismissed.

(c) The appellant and all persons holding through her are hereby ordered to vacate the premises at 10 Vredelust Street Helderview Somerset West, also known as erf 8354 Somerset West, by no later than 21 November 2014.

(d) In the event of appellant or any persons holding through appellant failing to comply with paragraph (c) of this order, the Sheriff is authorized to evict them from the said property together with their belongings and to hand over vacant possession to the first respondent on 24 November 2014.

(e) No order is made as to costs.

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GOLIATH, J
Judge of the High Court

I agree.

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SCHIPPERS, J
Judge of the High Court