

SOUTH AFRICA / JUDGMENT

Boikanyo NO and Others v Qambi and Another (34999/2014) [2017] ZAGPPHC 950 (8 December 2017) [2017] ZAGPPHC 950

COURT

North Gauteng High Court, Pretoria

BEFORE

Petersen

CASE / FILE NUMBER

34999/2014

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: 34999/2014

Not

Reportable

Not

of interest to other judges

8/12/2017

In

the matter between:

STANLEY
ISAKA SOLOMON BOIKANYO
N.O.
FIRST APPLICANT
MATOME
STANLEY MPHAAHLELE N.O.
SECOND APPLICANT
and
ZAMABUNTU
LENNOX QAMBI
FIRST RESPONDENT
ID.
NO. [...]
MRS
QAMBI SECOND RESPONDENT
CITY
OF JOHANNESBURG METROPOLITAN
THIRD RESPONDENT
MUNICIPALITY

JUDGMENT

PETERSEN AJ

[1] This is an application for eviction of the first and second respondents (together with all other persons occupying the property

through or under them) from the property known as Erf [...] Cosmo City Extension 3, Registration Division I.Q., Province of

Gauteng, measuring 911 square metres and held by Deed Of Transfer No T149116/2005.

[2] The application was enrolled on the opposed motion court roll of the week of the 30 October 2017 to 03 November 2017. The application was set down for hearing on 30 October 2017. The applicant sought a postponement of the application to seek legal representation from Legal Aid South Africa through the Justice Centre Pretoria.

[3] The application was initiated on 29 October 2014. On 05 November 2014, the applicants were granted leave to serve the prescribed

notice in terms of section 4(2) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("the PIE Act) on the respondents. The eviction application date was set for 12 January 2015. The said notice was served on Miss Ayanda Teyana, a co-occupier at eviction address occupied by the first and second respondents on 11 December 2014 and on the third respondent at its registered address on 11 December 2014. On 31 December 2014, the First Respondent delivered a notice of intention to oppose the relief sought by the applicants purporting to have been done through attorneys Smit, Jones and Pratt.

- [4] The eviction application was removed from the roll on 12 January 2015, with an order that costs shall be costs in the cause. The application was re-enrolled on 27 February 2015. The notice of setdown was served through the Sheriff of the Court on 12 February

2015, once again on Miss Ayanda Tetyana. On 12 February 2015, Mr Pierre Jacques De Vaal Smit, a duly admitted attorney of the High

Court of South Africa and partner in the law firm Smit, Jones and Pratt, deposed to an affidavit, stating that the said partnership was not the attorneys of record of the First Respondent.

According to Mr Smit none of the partners or anyone employed at the firm had ever met the First Respondent and one Barry Werner a professional assistant in the partnership had resigned from the partnership and left their employ on 31 October 2014. Whilst the signature on the notice of intention to defend is that of Barry Werner the reference number refers to a different case.

- [5] On 27 February 2015, the application was postponed to 10 April 2015 and marked final. The first respondent was further ordered to file his opposing affidavit within 15 (fifteen) days of date of the order if he so elected. Costs occasioned by the postponement were reserved. The application was enrolled for hearing on 10 April 2015. On 09 April 2015, the first and second respondents gave notice of the appointment of attorneys Du Toit's Attorneys as their attorneys of record. On 10 April 2015 the application was postponed sine die with the respondent ordered to file his opposing affidavit before 07 May 2015. The respondent was ordered on this occasion to pay the wasted costs. The first respondent filed his opposing affidavit on 08 May 2015. The first respondent's attorneys of record withdrew as attorneys of record on 04 June 2015. The applicants replying affidavit was filed on 22 June 2015.

- [6] The application was enrolled for 03 November 2015, on which date the application was postponed sine die with an order that the first respondent seek pro bono legal representation, if he qualified for same; and that the parties may approach the Deputy Judge President for allocation of the matter on a preferential date, if pro bono legal representation was appointed. As a result of inaction on the part of the first respondent pursuant to the order of 03 November 2015, the applicant's attorneys instructed a candidate attorney, Sifiso Christian Dukashe, to establish whether or not the first respondent had been appointed an attorney of record on a pro bono basis by the Law Society of the Northern Provinces. On 03 February 2016, he was unable to find any record of an application by the first respondent at the pro bono walk in office at the Pretoria High Court. He was referred by the Registrar of the High Court to make further enquiries at the Law

Society of the Northern Provinces. The Law Society of the Northern Provinces conducted a search on their system but could find no record of any application by the first respondent for pro bono legal representation.

[7] At the hearing of the application on 30 October 2017, the first respondent presented a facsimile from Miss Sophie Kolobe from Legal Aid South Africa Johannesburg Justice Centre dated 27 October 2017 accompanied by a letter of the same date. The content of the letter reads as follows:

"1. We refer to the above matter as well as to the recent consultation and more particularly the telephone discussion between writer and yourself of even date.

2. We advise that during the aforesaid communication with you it has come to light that you in fact do not qualify for Legal Aid

assistance in that you do not pass the Means Test (the process used in determining an individual's eligibility for Legal Aid assistance.

3. In the circumstances, we advise that we are no longer in a position to assist you further in this matter and as such we will not be attending at Court on Monday the 30th October 2017 ..."

[8] The first respondent sought a postponement to approach Legal Aid South Africa in Pretoria for legal aid assistance. The application

was opposed by the applicants. The application for postponement was refused as the first respondent clearly had no prospects of securing legal aid assistance when regard is had to Ms Kolobe's correspondence. The first respondent had further been granted numerous indulgences in the application over a period close on 3 years. The prejudice to the plaintiff which would have been occasioned by a further postponement could not be overlooked. The first respondent was, however, granted an indulgence of a stand down of the application to 01 November 2017, to allow him to acquaint himself fully with the papers in preparation for his opposition to

the relief sought. The first respondent attempted to circumvent the indulgence by seeking a postponement to a date outside of the week that the application was enrolled. This application was likewise refused.

[9] I turn to the application. The applicants' are the duly appointed joint trustees' of the insolvent estates of Monty Petrus Mavundla and Onica Mshikwane Nthabiseng Mavundla by appointment of the Master of the High Court on 07 May 2012 with Trust Number T3458/10. The insolvent estate is the registered owner of the property situated at Erf [...] Cosmo City Extension 3, Registration Division I.Q., Province of Gauteng, measuring 911 square metres and held by Deed of Transfer No T149116/2005("the property").

[10] The applicants' as trustees' of the insolvent estate took a decision to sell the property. Bantori College, a private company duly registered, on 28 August 2006 with registration number 2006/026711/08, which at 11 April 2012, had two active directors, the first respondent and Mr Ivor Alec Blumenthal put in an offer to purchase the property. The offer to purchase was signed on 14 July 2011 by the first respondent as representative of Bantori College. The seller represented by Riaan van Rooyen signed the offer to purchase some eight and half months

later on 29 March 2012. The first respondent secured the purchase price by means of a bank approved loan and paid a deposit of R48 000-00. The first and second respondents subsequently took occupation of the property. They remain in occupation of the property. The applicants requested the first respondent in writing to pay the balance of the purchase price but he failed to do so. The applicants accordingly cancelled the agreement of sale on 18 May 2012. Notwithstanding numerous requests to the first respondent to vacate the property he refuses to do so.

[11] The procedure for eviction of illegal occupiers of property is set out in section 4 of the PIE Act with the relevant provisions

providing as follows:

"4(1) Notwithstanding anything to the contrary contained in any law or the common law; the provisions of this section apply to proceedings by an owner or person in charge of land for the eviction of an unlawful occupier.

(2) At least 14 days before the hearing of the proceedings contemplated in subsection (1), the court must serve written and effective notice of the proceedings on the unlawful occupier and the municipality having jurisdiction.

...

(8) 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, and determine-

(a) a just and equitable date on which the unlawful occupier must vacate the land under the circumstances; and

(b) the date on which an eviction order may be carried out if the unlawful occupier has not vacated the land on the date contemplated

in paragraph (a)."

[12] It is trite that the PIE Act has its origins in the Bill of Rights in the Constitution of the Republic of South Africa. Section 26(3) of the Constitution provides that "no one may be evicted from their home without an order of court after consideration of all the relevant circumstances."

[13] It is common cause that the first respondent and others occupying the property through him are in occupation of the property. The applicants have complied with the provisions of section 4(2) of the PIE Act having obtained an order for service of the said notice on 05 November 2014, which was served on all three respondents on 11 December 2014. The procedural requirements of section 4(2) of the PIE Act have accordingly been met.

[14] The answering affidavit was filed on 08 May 2015, one day after the date ordered by court on 10 April 2015. No condonation was sought for the late filing of the answering affidavit. The applicants' have not taken issue with the late filing of the answering affidavit, but premise their application solely on the merits. I propose in the circumstances, to deal with the merits of the application. The court is constrained to consider the application on the papers and importantly to consider, amongst others, the defences (if any) raised by the first respondent in his answering affidavit.

[15] The first respondent opposes the application on the following basis:

1. By relying on clause 1 of the agreement of sale which he contends made the sale of the property subject to confirmation or refusal by the seller within twenty one (21) days from date of sale. That the applicants only provided confirmation of sale nine (9) months after the date of sale at which stage the first respondent applied for a bond;
2. Latent defects were detected in the property upon taking occupation which are not identified in his answering affidavit;
3. A request to rectify the latent defects was made to the applicants who failed to attend to same;
4. A referral of the matter to the Banking Ombudsman upon failure to rectify the latent defects.

[16] The first respondent states he is prepared to accede to cancellation of the sale subject to repayment of the deposit paid at auction.

[17] The terms and conditions of the offer to purchase relevant to the first respondents' opposition to the relief sought are as follows:

"1. PROCEDURE

The property will be sold, subject to confirmation by the Seller, which confirmation or refusal will be given without furnishing any reasons, within (21) days from the date of sale. During the confirmation period the offer made by the Purchaser shall be irrevocable".

2. ACCEPTANCE

This offer becomes a final and binding purchase on acceptance by the Seller. Should the offer to purchase not be confirmed by the

Seller..., then the offer will be deemed as cancelled and the full deposit will be repaid to the Purchaser. The Property shall be provisionally sold to the bidder of the highest accepted bid subject to confirmation of the sale by the Seller within twenty-one(21) business days (or such longer period as may be agreed in writing) and the highest bidder shall be bound by his bid for twenty

(21) days from date of signature of these conditions by the Purchaser."

- [18] On 29 March 2012 the sale of the property was concluded when a representative of the applicants', Riaan Van Rooyen, accepted the offer to purchase, albeit nine (9) months after signature by the first respondent of the offer to purchase. The first respondent took occupation of the property shortly thereafter. Nothing turns on the 21 day confirmation period. The first respondent upon acceptance of the offer to purchase on 29 March 2012 took occupation shortly thereafter.
- [19] It was a condition of the offer to purchase that the property was sold "'voetstoots" as it is and to the extent as it lies at the date of acceptance hereof without any warrant or guarantee whatsoever. The seller shall not be responsible for any latent of(sic or) patent defect...". The first respondent signed the offer to purchase fully mindful of the voetstoots clause. In terms of the common law principle caveat subscriptor, any agreement reduced to writing and signed by the parties binds them to the terms of the agreement as signature thereof demonstrates assent thereto. The first respondent's opposition to the relief sought on the basis of alleged latent defects cannot be sustained.
- [20] None of the purported grounds raised by the first respondent constitutes a valid defence. On the contrary no defence at all has been raised by the first respondent in his papers.
- [21] The first respondent having no valid defence this court must grant an order for the eviction of the first respondent, the second respondent and all unlawful occupiers occupying the property through them and determine a just and equitable date on which the unlawful occupiers must vacate the property.
- [22] The first respondent has placed no evidence before the court in his answering affidavit on steps he has taken to secure alternative accommodation in the event of the Court ordering the eviction of the first and second respondents and all unlawful occupiers of the property. The first respondent has further adduced no evidence that the eviction order will impact adversely on any of the unlawful occupiers of the property or that he is not able to secure alternative accommodation.
- [23] The Court must consider the rights of the property owner against the basic human rights of the unlawful occupier in determining a just and equitable date on which the property must be vacated. The peculiar facts of this matter demonstrate that the property owner has been severely prejudiced by the unlawful occupation of its property. The respondents' and all those occupying the property through them have been in occupation of the property since at least March 2012 , a period of at least five (5) years and eight
- (8) months, have not paid or guaranteed the full purchase price and have paid no occupational interest since. A case has been made for an order for the immediate vacation of the property. However, in the spirit of fairness, the court is of the view that the respondents' be given at least 30 days' notice to vacate the property.
- [24] In the result the following order is made:

1. An order for the eviction of the First and Second Respondents (together with all other persons occupying the property through or under them) from the property known as Erf [...] Cosmo City Extension 3, Registration Division I.Q., Province of Gauteng, measuring 911 square metres and held by Deed of Transfer No T149116/2005 (hereinafter referred to as the property);
2. The First and Second Respondents and all persons occupying the property through them are ordered to vacate the property within thirty
(30) days from date of this order. A copy of this order shall be served by the Sheriff on the Second Respondent at her residential address being Erf [...] Cosmo City Extension 3, Registration Division I.Q., Province of Gauteng.
3. If the First and Second Respondents and all those occupying the property through them do not vacate the property within 30 (thirty) days from date of this order, then the Sheriff and/or the Sheriff/s Deputy is authorised and ordered to carry out the eviction order within seven
(7) days after the thirty (30) day period in order 2 above has expired , by removing the First and Second Respondents and all those occupying the property through them from the property.
4. The First and Second Respondents are ordered to pay the costs of the application.

AH PETERSEN

ACTING JUDGE OF THE HIGH COURT

OF SOUTH AFRICA

APPEARANCES

For the Applicant: Advocate Markram

Instructed by: Delport Van Den Berg Inc.

For the First Respondent: In Person

For the Second Respondent: No Appearance

Dates Heard: 30 October 2017 and 01 November 2017

Date of Judgment: 08 December 20 17

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