

SOUTH AFRICA / JUDGMENT

Booyesen and Another v City of Cape Town and Others (17673/2022)

[2024] ZAWCHC 134 (20 May 2024)

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COURT

Western Cape High Court, Cape Town

BEFORE

J Cloete

CASE / FILE NUMBER

17673/2022

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IN

THE HIGH COURT OF SOUTH AFRICA
(WESTERN
CAPE DIVISION, CAPE TOWN)
Case No: 17673/2022

In the matter between:

ANNA
BOOYSEN
First Applicant
VERONICA
BOOYSEN
Second
Applicant
and
CITY
OF CAPE TOWN
First
Respondent
THE
OFFICE OF THE DEEDS REGISTRAR, CAPE TOWN
Second Respondent

ANTHONY
BOOYSEN
Third
Respondent
CHARMAINE
LINDA BOOYSEN
Fourth Respondent
Coram: Justice J Cloete
Heard: 17 May 2024
Delivered electronically: 20
May 2024

JUDGMENT

CLOETE J:

[1] The first and second applicants are sisters. The third respondent is their nephew and the fourth respondent is his wife. On 21 October 2022 the applicants launched this application, describing its purpose as follows: (a) a review ‘to correct the wrongs that had been done by the respective respondents regarding the property’; and (b) to ‘correct the legal wrongs whose ripple effects are being felt by all of us through eviction proceedings pending in the Magistrate’s Court’. They made clear in the founding affidavit that the application is brought in terms of s 6 of PAJA[1] read with s 33 of the Constitution (pursuant to which PAJA was enacted).

[2] The dispute pertains to an immovable property, being erf [...] Manenberg, Cape Town (the property). At the time the application was launched the first applicant and third and fourth respondents were all residing at the property. Although not apparent from the papers it was confirmed during argument that the first applicant has since

vacated the property, as a consequence of which the aforementioned eviction application brought by the third respondent has been

withdrawn. One of the points raised in limine by the City and third and fourth respondents is that the second applicant lacks locus standi. I will however assume in her favour, without deciding, that she has an interest in the outcome of this matter.

[3] Although in their notice of motion the applicants sought an order setting aside the ‘sale, purchase and transfer’ of the property by the first respondent (the City) to the third and fourth respondents, the evidence of these respondents is that no sale has been concluded, and the report of the second respondent (Registrar of Deeds) confirms that the property remains registered in the name of the City. It is accordingly not necessary to deal with this part of the relief.

- [4] Apart from this the applicants seek orders: (a) setting aside a lease concluded between the City and the third and fourth respondents in respect of the property; (b) compelling the Registrar of

Deeds to transfer the property from the City to the first applicant 'in her capacity as beneficiary' of the property; and compelling the City to provide information relating to 'the policies and regulations' utilised by it 'in terms of acquisition, development, sale and transfer' of the property. The lease in question has an effective commencement date of 8 April 2019, and its addendum records that for purposes thereof the date of occupation by the third and fourth respondents was 6 April 2017.

- [5] Given that the applicants seek relief under PAJA they were required in terms of s 7(1) thereof to launch this application without unreasonable delay and not later than 180 days after the date –

'(a) subject to subsection (2)(c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2)(a) have been concluded; or

- (b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons...'

(Section 7(2)(c) is not relevant since the obligation to exhaust internal remedies has not been raised by any of the respondents).

- [6] In their founding affidavit the applicants allege that after the death of their sister on 4 April 2017 (she was the registered tenant of the property) they attended at the Manenberg office of the Department of Human Settlements and met with a Mr Omar Paulse to arrange a meeting for purposes of transferring the 'rates lease' from the name of their late sister to someone else in the family. Mr Paulse promised to advise them of a suitable date when this discussion could take place. They further allege that:

'16. We were still awaiting the call from Mr Paulse when we heard through the neighbours that our nephew, who is the Third Respondent was told by Mr Paulse he can purchase the house from him, and in the interim have the lease in his name so they can facilitate this sale transaction for him. We immediately after hearing that information rushed to the rand (sic) office and enquired why there was a deviation from the normal process of being a rates lease holder and why they were busy transferring the house into the Third Respondent's name.

17. It is also at this time we were told by a Mr Mayekiso that this house does not belong to us, instead belongs to the City of Cape Town and they can do whatever they want to do with their property. We were shocked and we informed him we knew the property belonged to us as beneficiaries of it since we were the children of our mother who had passed away.

18. We further informed him the previous government never said the house belonged to the City of Cape Town Municipality, but rather their words were “(t)his is your new home now”. We requested to have a meeting with the City of Cape Town, however that request fell on deaf ears.
19. On the 24th October 2018 we decided to write a letter to the Manenberg Human Settlement expressing our concerns and requesting our home rental lease to be transferred to myself as the First Applicant...
24. Our attorney also tried to mediate with the City of Cape Town by [writing] them two letters, on the 20th January 2022 and 21st February 2022, requesting for reasons and attempting to mediate the unfavourable situation we currently find ourselves in...
27. The property was leased and will now be sold by the First Respondent on or about 06.04.2017 (sic) to the Third and Fourth Respondents. I am however not certain when the transfer of the property will take effect...’
- [7] In the letter to the Manenberg Human Settlements Contact Centre of 24 October 2018 (annexed to the founding affidavit) the applicants stated that Mr Paulse ‘is currently busy transferring our home to our nephew whom is a backyarder’. It is thus clear that by that date the applicants were aware of what they regard as the impugned decision. The letters of the applicants’

attorney dated 20 January and 21 February 2022 take the issue of delay in launching these proceedings no further since

although ‘adequate’ reasons were indeed requested in the letter of 20 January 2022, no formal steps were taken thereafter to procure them prior to this application being instituted 9 months later; and in any event the 90 day period for requesting reasons after the applicants became aware of the administrative action complained of had long since passed by 20 January 2022.

- [8] Accordingly, on the applicants’ own version, they were aware of the impugned decision at the latest on 24 October 2018, and the failure to provide adequate reasons by 21 February 2022, but only launched this application on 21 October 2022. Moreover, although the applicants had a further opportunity to deal with the delay in a replying affidavit (since it was pertinently raised in limine by both the City and the third and fourth respondents) they elected not to depose to any replying affidavit. They have also had legal representation since at least January 2022.

- [9] I am of course bound by the Supreme Court of Appeal decision in *OUTA v South African National Roads Agency Ltd*[2] where it was held that:

[26] At common law application of the undue delay rule required a two stage enquiry. First, whether there was an unreasonable delay and, second, if so, whether the delay should in all the circumstances be condoned (see eg *Associated Institutions Pension Fund and others v Van Zyl and others* 2005 (2) SA 302 (SCA) para 47). Up to a point, I think, s 7(1) of PAJA requires the same

two stage approach. The difference lies, as I see it, in the legislature's determination of a delay exceeding 180 days as per se unreasonable. Before the effluxion of 180 days, the first enquiry in applying s 7(1) is still whether the delay (if any) was unreasonable. But after the 180 day period the issue of unreasonableness is pre-determined by the legislature; it is unreasonable per se. It follows that the court is only empowered to entertain the review application if the interest of justice dictates an extension in terms of s 9. Absent such extension the court has no authority to entertain the review application at all. Whether or not the decision was unlawful no longer matters. The decision has been "validated" by the delay (see eg Associated Institutions Pension Fund para 46). That of course does not mean that, after the 180 day period, an enquiry into the reasonableness of the applicant's conduct becomes entirely irrelevant. Whether or not the delay was unreasonable and, if so, the extent of that unreasonableness is still a factor to be taken into account in determining whether an extension should be granted or not (see eg Camps Bay Ratepayers' and Residents' Association v Harrison [2010] 2 All SA 519 (SCA) para 54).

[10] The applicants have not sought condonation in respect of the delay nor an extension in terms of s 9 of PAJA, and the City, third and fourth respondents have not agreed to any such extension. More fundamentally the applicants also do not explain the reason for the delay which impacts directly on the interests of justice requirement in s 9 of PAJA as was explained by the Supreme Court of Appeal in Camps Bay Ratepayers' and Residents' Association v Harrison:[3]

'[54] ...And the question whether the interests of justice require the grant of such extension depends on the facts and circumstances of each case: the party seeking it must furnish a full and reasonable explanation for the delay which covers the entire duration thereof and relevant factors include the nature of the relief sought, the extent and cause of the delay, its effect on the administration of justice and other litigants, the importance of the issue to be raised in the intended proceedings and the prospects of success.'

[11] I accept that in heads of argument filed on their behalf the applicants' counsel attempted to make out a case for condonation but it was incumbent on the applicants themselves to have done so in their papers. Put simply there is nothing before me to enable me to exercise a discretion to come to the assistance of the applicants in respect of the delay which is very lengthy. That is the end of the matter and the application falls to be dismissed on this ground alone.

[12] However given that it is desirable, where possible, for a lower court to decide all issues raised in a matter before it,[4] I also deal with the review relief itself. The Constitutional Court in Bato Star[5] stated as follows:

'[27] The Minister and the Chief Director argue that the applicant did not disclose its causes of action sufficiently clearly or precisely for the respondents to be able to respond to them. Where a litigant relies upon a statutory provision, it is not necessary to specify it, but it must be clear from the facts alleged by the litigant that the section is relevant and operative. I am prepared to assume, in favour of the applicant, for the purposes of this case, that its failure to identify with

any precision the provisions of PAJA upon which it relied is not fatal to its cause of action. However, it must be emphasised that it is desirable for litigants who seek to review administrative action to identify clearly both the facts upon which they base their cause of action, and the legal basis of their cause of action...'

[13] A similar situation arises in the present matter and I will adopt the same approach as in *Bato Star*. It is clear from the notice of motion that the actual impugned decision is the conclusion of the lease between the City and the third and fourth respondents. The only "procedural irregularities" relied upon by the applicants are set out in the founding affidavit as follows:

'28. We are advised that in terms of law as earlier highlighted we are entitled to procedural protection in that, with everything that affects us we ought to be consulted and allowed to participate in whatever process that may unfold against and affecting our lives. We categorically state we were never approached by anyone prior to our property being leased and being in the process of being sold and we equally know not of the reason for the said lease and sale...

30. The processes followed in this transaction requires a judicial microscope to ensure that we are not being robbed from what we believe is rightfully ours...

32. When we get the record of the processes followed especially from the offices of First Respondent we are certain more will be revealed...

33. We equally pray for supplementing these papers at a later stage once we receive more information as requested...'

[14] The applicants' papers were never supplemented and there is no rule 53 record before the court. The complaint that the applicants were required to be consulted by the City is not identified with reference to any mandatory and/or material procedure or condition prescribed by an empowering provision for purposes of s 6(2)(b) of PAJA. The deponent to the City's answering affidavit was Ms Grace Blouw, the Manager at Tenancy Management, Public Housing. She pointed out that the applicants do not seek to set aside the City's decision to normalise the third respondent's tenancy but only the resulting lease agreement. Accordingly even if the lease is set aside on review the City's decision to normalise that tenancy remains intact.[6]

[15] The first applicant alleges that she, together with her siblings, her mother who passed away in 2000, and the third respondent, first took occupation of the property in around 1984 after being forcibly relocated from Table View under the apartheid government. The applicants' late sister who passed away on 4 April 2017 was, in the City's records, the 'previous existing tenant'. On 4 October 2018 the Directorate: Human Settlements and the Department: Home Ownership Transfers & Tenancy Management conducted a house visit at the property. Its subsequent report dated 11 February 2019 indicated inter alia the following. The third respondent had filed a housing application on 9 December 2005 at a time when the first applicant was absent from the property (this was during the period 2000 until 2007). According to the City's records the date of original tenancy of the registered tenant (the

applicants' late sister) was 2 June 2000.

[16] The report indicated further that the third respondent was not part of the original family housed in 2000 but part of a previous tenancy dated 1984. He moved out in 1999 but moved back during 2001 and occupied a structure in the yard with his family. He was employed. The fourth respondent moved in with the third respondent during 2001. She was also employed. Their two daughters, both of whom were majors, were unemployed. Importantly, the first applicant was not part of the original family housed per the City's records in 2000 for the reason already given. After she returned in 2007 she occupied the main house with her two sons, one of whom was an unemployed

adult.

[17] The City, applying its policy referred to below, determined that the third respondent qualified as an 'unlawful occupant' since the tenant had passed away and he was not a member of the 'original household' when the applicants' late sister was registered as the tenant in 2000. (The fourth respondent was in a similar position). It was then recommended that the third respondent's tenancy be regularised in terms of clause 1.3 of the City's Unlawful

Occupation Policy[7] which provides that unlawful occupants who moved onto a property prior to 1 March 2006 will be considered for 'normalisation' subject to their meeting the eligibility criteria, which the City was satisfied the third respondent had met.

[18] At a meeting of the City's Cases Committee (which Ms Blouw chaired) on 21 February 2019 it was resolved that the third respondent's tenancy be normalised on this basis, subject to there being evidence on file confirming that he was still in occupation (which was subsequently provided), and that he be given the opportunity to purchase the property once the normalisation process was complete. It was further resolved that the third respondent be entitled to move into the main dwelling on his own volition. Accordingly, on the City's version: (a) neither applicant had filed a housing application in respect of the property when the third respondent's application was approved; and

(b) sadly in the circumstances, the applicants have no entitlement to the property as "beneficiaries" of their late mother who passed away in 2000.

[19] The Unlawful Occupation Policy was annexed to the City's answering affidavit. Ms Blouw explained that in cases such as the present, where an original tenant of a property belonging to the City passes away and there are persons left in the property, the position is regulated by the City's Housing Policy which must be read together with the Unlawful Occupation Policy. The latter Policy refers to an unlawful occupant as one who has been left behind by a tenant who has died. Whereas clause 1.3 provides that unlawful occupants who moved in prior to 1 March 2006 will be considered for normalisation subject to their meeting the eligibility criteria, clause 1.4 provides that unlawful occupants who moved in after 1 March 2006 must vacate, failing which legal action will be taken for their eviction unless they are

the next qualifying applicants for assistance on the waiting list or qualify in terms of clause 1.2 which pertains to children of ‘former tenants’ which is not the case in the present matter. The City also confirmed that while the first applicant is recorded as only having moved back into the property in 2007, the second applicant is not recorded as having lived in the property at all. Indeed in her confirmatory affidavit the second applicant confirmed that she resides at a different address. Save for one or two minor discrepancies in dates the third and fourth respondents confirm the City’s version in all material respects.

[20] While the court has great sympathy, in particular for the first applicant, there is simply no evidence to refute the City’s version in relation to the absence of any right on the part of the applicants to either lease or own the property, or to support the applicants’ claim that the procedure adopted (and explained) by the City was in any way procedurally unfair. It is also well-established that a court hearing a review is not at liberty to substitute a decision of an administrative functionary simply because it does not like it. In the circumstances the application must in any event fail.

[21] Although the City asks for costs in a limited respect, in the exercise of my discretion I decline to make any such order in the particular circumstances of this case. Counsel for the applicant appears pro bono; the City can hardly be hugely out of pocket as a result of this application; and the third and fourth respondents are represented by the Law Clinic of the University of Cape Town.

[22] The following order is made:

1. The application is dismissed; and
2. Each party shall pay their own costs.

J I CLOETE

For applicants: Adv S Sibanda

Instructed by: Mbebe and Associates (Mr U Mbebe)

For first respondent: Adv P Gabriel

Instructed by: ZS Incorporated (Mr W Saban)

For third and fourth respondents: Adv T Mayosi

Instructed by: UCT Law Clinic (Mr Y Moodley)

[1] Promotion of Administrative Justice Act 3 of 2000.

[2]

[2013] 4 All SA 639 (SCA).

[3]

[2010] 2 All SA 519 (SCA) at para [54] referred to in OUTA above.

[4] Theron N.O. v Loubser N.O.: In Re Theron N.O v Loubser 2014 (3) SA 323 (SCA) at paras [21], [24] and [26]; Spilhaus Property Holdings (Pty) Ltd and Others v MTN and Another 2019 (4) SA 406 (CC) at para [44].

[5] Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others 2004 (4) SA 490 (CC).

[6] In terms of the well-established Oudekraal principle, Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2010 (1) SA 333 (SCA).

[7] Policy on the Unlawful Occupation of Council Rental Stock, approved on 27 March 2008, C90/03/08.

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