

SOUTH AFRICA / JUDGMENT

Drews and Another v Engelbrecht and Others (67012 / 2016) [2017] ZAGPPHC 1281 (7 December 2017) [2017] ZAGPPHC 1281

COURT

North Gauteng High Court, Pretoria

BEFORE

Holland-Muter

CASE / FILE NUMBER

67012 / 2016

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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA DIVISION,)

- (1) NOT REPORTABLE
- (2) NOT OF INTEREST TO OTHER JUDGES
- (3) REVISED.

Case No: 67012 / 2016

7/12/2017

In the matter between:

WALDEMAR WITOLD DREWS

1st Applicant

MALGORZATA DREWS

2nd Applicant

and

JOHANNES CORNELIUS ENGELBRECHT

1st Respondent

JOHANNA MARIA ENGELBRECHT

2nd Respondent

JOHANNES CORNELIUS ENGELBRECHT NO

3rd Respondent

JOHANNA MARIA ENGELBRECHT NO

4th Respondent

CITY OF TSHWANE METROPOLITAN

MUNICIPALITY

5th Respondent

REASONS

FOR JUDGMENT

Before: HOLLAND-MUTER A/J:

- [1] This matter served before myself on 24 October 2017 as an opposed application for eviction of the respondents under the provisions of the Prevention of Unlawful Evictions and Illegal Occupation of Land Act, Act 19 of 1998 (hereafter referred to as PIE,) . After arguments were heard, I granted an eviction order with the relief as recorded in the draft

order handed up and made an order by myself. See the draft order marked XYZ annexed hereto.

COMMON

FACTS:

- [2] The first end second applicants are the registered owners of the immovable property known as [...] and the first and second

respondents occupied the property since March 2015 in terms of a written lease agreement between the parties.

- [3] The lease agreement was entered into on 4 February 2015 for a lease period from 1 March 2015 until 28 February 2016. See the copy of the lease agreement on p 30 to 36. The agreement is clear that the lease will expire on 28 February 2016.

- [4] The lease agreement contained an option to purchase the property by the lessees at a fixed price.

- [5] The lessees are obliged to make certain payments in terms of clause 7 of the agreement in respect of pre-paid electricity, water, sanitation waste removal and the garden and pool maintenance.

[6] A deposit was payable and the lessor had the right to set off the deposit at the termination of the lease against outstanding amounts

payable by the lessee.

[7] The first applicant signed the lease agreement as lessor and the first respondent as the lessee.

[8] The applicants and the first respondent, duly authorized by the Trustees of the Marnazel Trust, entered into a written offer to purchase the property 29 February 2016. The first and second respondents are the trustees of the Marnazel Trust. See p 37 to 41.

[9] The offer to purchase contained a suspensive condition that the purchaser was to obtain financing from a bank or other financial institution of choice within 45 days from signing the offer to purchase. See clause 10 on p 40. The suspensive condition was never fulfilled and the offer to purchase never materialized in an agreement of sale.

[10] The offer to purchase also made provision that the occupiers of the property, whilst awaiting the approval of the necessary financing above, will pay the agreed occupational rent until registration of the property in the name of the purchasers. See clause 3 on p 38.

[11] It is trite that the respondents could not obtain the required financing but also failed to make any further rental payments after the signing of the offer to purchase. See annexure „JCE-3" on p 115 to 116.

DISPUTES:

[12] The respondents raised the following points in limine:

- (i) no cause of action;
- (ii) premature eviction application; and
- (iii) material dispute of fact.

[13] The respondents raised a substantive defence to the application with reference to the Consumer Protection Act, Act 68 of 2008 (hereafter referred to as. CPA) , the purchase of the property and alterations and improvements to the property and the enrichment lien. See the heads of arguments on behalf of the respondents.

APPLICATION FOR SERVICE OF THE NOTICE IN TERMS OF SECTION 4 (2) OF PIE:

[14] The applicants approached this court on 25 November 2016 for the necessary directive of service of the required notice and such order was granted. See p 481 to 482 Volume 7 for the court order.

[15] The matter was eventually postponed to the opposed roll on 15 May 2017, the matter argued before myself. I am satisfied that the correct procedure was followed to have the matter enrolled for adjudication.

ADDITIONAL AFFIDAVIT AND AMENDED NOTICE OF MOTION:

[16] The applicants filed an amended notice of motion in the main application 24 July 2017 as per INDEX: ADDITIONAL INDEX. The purpose of this additional affidavit and amended notice of motion is set up security in the amount of R 245 000,00 in the applicants attorneys of records trust account for any possible enrichment claim by the respondents. No objection was raised against this amended notice prior to the hearing nor at the beginning of the hearing. The amended notice was allowed.

THE AGREEMENTS:

[17] The first question to answer is whether the respondents occupied the property in terms of the initial lease agreement or in terms of the offer to purchase when the dispute arose. To put it different, was the lease agreement terminated when the first respondent entered into the offer to purchase on the same day that the lease agreement expired on 28 February 2016? Clearly there could not be two different agreements in place at the same time between the parties over the same occupation of premises. The respondents occupation of the property was either in terms of the lease agreement or in terms of the offer to purchase.

[18] The lease agreement clearly provides for a fixed term of lease from the 1st of March 2015 up and until the 28th of February 2016. Although the agreement had a renewal clause, there is no indication that it was renewed at all. The opposite is clear in that on the date of expiring, the first applicant and the first respondent now wearing a new cap as trustee, entered into an offer to purchase, with a term specifically dealing with the interim occupation of the property by the first and second respondents pending the finalization of the purchase of the property by the trust.

[19] In my view this is a clear indication that the parties intended to be bound to the new offer to purchase agreement and the only reasonable inference is that the existing lease agreement no longer existed. The respondents conceded that no occupational rent was paid in terms of the offer to purchase. The respondents paid no rent after 29 February 2016.

[20] The reasonable inference is that the lease agreement came to an end and was succeeded by the offer to purchase. The terms of the offer to purchase was now applicable on the parties.

POINTS IN LIMINE:

[21] NO CAUSE OF ACTION:

21.1 It is clear from the founding affidavit and not denied by the respondents that the lease agreement had specific terms and was for a fixed period. The offer to purchase is admitted.

21.2 The respondents admitted not honoring the offer to purchase with regard to obtaining financing or paying the occupational rent.

21.3 The respondents never denied receipt of the letters dated 15 April 2016 (annexure WWD-5) , 4 May 2016 (annexure WWD-6) and 2 June 2016 (annexure WWD-7) .

21.4 These letters clearly in my view were intended by the applicants to place the respondents in mora. The contents is clear in this regard. The contents of WWD-6 is a clear cancellation of the offer to purchase due to the respondents non-compliance with the offer to purchase.

21.5 This argument cannot succeed.

[22] PREMATURE EVICTION APPLICATION:

The offer to purchase agreement was clearly terminated as set out above. The occupation can therefore in my view not be lawful after the notification on 4 May 2016. This argument is also without substance.

[23] MATERIAL DISPUTE OF FACTS:

The existence of a possible counterclaim does not give rise to a dispute of facts as set out in Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty Ltd 1984 (3) SA 623 A. The counterclaim can be instituted irrespective whether the respondents occupy the property or not. The dispute between the parties is not whether the respondents have a counterclaim but whether their occupation is unlawful or not. See below whether a

salvage lien can be raised as a defence on eviction.

SUBSTANTIVE DEFENCE:

[24] THE CONSUMER PROTECTION ACT, ACT 68 OF 2008:

24.1 Section 5 of the Consumer Protection Act (hereafter referred to as CPA) , applies inter alia to rental agreements, subject to the further provisions of the CPA. Section 48 refers to unfair, unreasonable or unjust contract terms. The respondents in my view did not indicate any specific term that could be found to be unfair, unjust or unreasonable, justifying a finding in favor of the respondents. See par 13 of the answering affidavit.

24.2 The bald statement in par 13 As it happens the lease agreement contains provisions that are unenforceable by the First Applicant. That the lease agreement has

been automatically continued on a month-to-month basis::, does not refer to any alleged unfair provisions in the lease agreement and is without any substance.

24.3 The later remarks as to the alleged handling of the deposit by the first applicant do not make the provisions unfair nor unjust or un- reasonable.

24.4 The respondents heads of argument and the subsequent oral arguments during the hearing did not take this aspect any further. See par 20 and 21 of the heads of argument. In my view this argument cannot succeed.

[25] THE PURCHASE OF THE PROPERTY: OFFER TO PURCHASE:

25.1 The offer to purchase was signed on the 29th of February 2016.

25.2 This agreement, although subject to a suspensive condition, or condition precedent, had certain other provisions with binding effect on the parties thereto. Clause 3 thereof specifically deals with the occupation of the property until transfer of the property takes place.

25.3 The respondents occupation of the property after signing the offer to purchase was now regulated by the terms of the offer to purchase and no longer in terms of the previous lease agreement. The offer to purchase was not void after signing but inchoate pending the fulfilment of the condition precedent. See Christie Law of Contract in South Africa 3rd Ed p 156.

25.4 A suspensive condition is one which suspends the operation or effect of one, or some, or all, of the obligations under the contract until the condition is fulfilled. See Kerr, Law of Contract 5th Ed on p 415. Tebutt Jin ABSA BANK Ltd v Sweet and Another 1993 (1) SA 318 C at 322 C-F held that: „ ... There is, however, a binding agreement between the parties... Van den Heever J (as he then was) in Odendaalsrust Municipality v New Nigel Estate Gold Mining Co Ltd 1948 (2) SA 6560 at 666-667 held that: „The Contract ... is binding immediately upon its conclusion, .∴ ∴

25.5 As held above, the terms of the offer to purchase agreement, and in particular clause 3 thereof (the occupation of the property) , was immediately binding on the parties. The only suspended term was the obtaining of the financing for the purchase by the respondents.

25.6 The offer to sale only became void after the non-compliance to the suspensive condition by the respondents. The occupation of the property by the defendants as from 1 March 2016 was therefor in terms of the offer to purchase and no longer the previous lease agreement.

25.7 The condition was not fulfilled and the applicants requested the respondents in writing, as required by clause 7 of the offer to purchase, to comply with the conditions within 14 days (as stipulated in clause 7) to avoid cancellation of the offer to purchase. See annexure WWD-5 dd 15 April 2016 and WWD-6 dd 4 May

2016. These letters can only be construed to place the respondents in mora.

25.8 The offer to purchase was therefore cancelled and the subsequent occupation of the property by the respondents was unlawful. There was compliance with section 4 (2) of PIE by the applicants and the argument of premature application for eviction must fail.

[26] ALTERATIONS AND IMPROVEMENTS:

26.1 The respondents aver that the applicants should reimburse them for improvements and alterations made by them to the property. They rely on inter alia clauses 8.1, 8.2, 12, 13.6, 14 and 15 of the lease agreement. They also annexed certain documentary proof of incurred expenses to the answering affidavit. This also forms the basis of the alleged counterclaim against the applicants.

26.2 It became clear during the arguments that certain items listed could never be part of improvements. The reimbursement for improvements is a claim for damages.

26.3 A lien is a dilatory defence entitling a possessor to retain possession until compensated for by the owner. See Amlers Precedent of Pleadings 6th Ed p 226. The possessor may retain it until compensated for the improvements. There is however a dispute as to the improvements, the quantum and necessity thereof.

26.4 The applicants have set security in the amount of R 245 000,00 in the event if the respondents proving that they are entitled to be compensated for the alleged improvements. The court has a discretion to order the release of the item held under a salvage lien against the provision of security for the defendants claim. See Hochmetals Africa (Pty) Ltd v Otavi Mining Co (Pty) Ltd 1968 (1) SA 571 A.

26.5 The respondents. occupation of the property is however unlawful and can therefore not rely on the alleged lien. Lawful possession is a requirement for a lien. This defence can therefore not succeed.

26.6 The defendants. continued occupation of the property, if lawful, can be distinguished from the position in Rekduum (Pty) Ltd v Weider Gym Athlone (Pty) Ltd 1997 (1) SA 646 C. In Rekduum the property was a commercial property and the court held that the property held in lien could not be used for operating a business for the benefit of the defendant. This is not the situation here.

CONCLUSION:

[27] I am of the view that the respondents occupied the property in terms of the offer to purchase and that the initial lease agreement expired when the offer to purchase was signed.

[28] There was proper notice given by the applicants to the respondents to comply with the suspensive condition, and failing to do so, the agreement was terminated. The continued occupation of the property was therefore unlawful.

[29] The applicants gave notice to the respondents in terms of the offer to purchase and the cancellation of the offer to purchase was done. The necessary consent to serve the section 4 (2) PIE notice was obtained and the eviction application is not premature.

[30] The applicants also set security for any possible counterclaim the respondents may institute and prove with regard to any expenses

incurred for improvements.

ORDER:

[31] Under the circumstances the application is granted and the draft order marked XYZ on 24 October 2017 as annexed hereto, is confirmed as the order of court for the reasons as set out above.

J HOLLAND-MUTTER (A/J)

PRETORIA

GAUTENG DIVISION, PRETORIA

CASE NO: 67012/16

On the 24th day of October 2017 before the Honourable Holland-Muter AJ

In the matter between:

WALDEMAR WITOLD DREWS

First Applicant

MALGORZATA DREWS

Second Applicant

JOHANNES CORNELIUS ENGELBRECHT

First Respondent

JOHANNA MARIA ENGELBRECHT

Second Respondent

JOHANNES CORNELIUS ENGELBRECHT N.O.

Third Respondent

JOHANNA MARIA ENGELBRECHT N.O.

Fourth Respondent

CITY OF TSHWANE METROPOLITAN MUNICIPALITY

Fifth Respondent

DRAFT COURT ORDER

After hearing Counsel and perusal of the papers the following is made an order of court:

1. That the First, Second, Third and Fourth Respondents are evicted from the immovable property known as [...], Gauteng Province with street address of the said property being [...], together with all their belongings' from the immovable property on or before 30 November 2017;
2. That the Sheriff is mandated and ordered to evict the First, Second, Third and Fourth Respondents , together with all their belongings, from the immovable property mentioned in the event that they fail to vacate said property on or before 30 November 2017;

3. That the amount of R245 000.00 (TWO HUNDRED AND FORTY FIVE THOUSAND RAND) paid in by the First and Second Applicants , into the trust account of the First and Second Applicants attorneys of record should be retained on trust, pending the institution of legal proceedings by the First and Second Respondents , for the alleged enrichment lien, which legal proceedings are to be instituted within 30 calendar days from date of this order;
4. Should the First and Second Respondents institute the legal proceedings as envisaged in paragraph 3 above, within 30 days, the amount retained on trust by the First and Second Applicants' attorneys of record should remain on trust pending the finalisation of such legal proceedings;
5. Should the First and Second Respondents fail to institute legal proceedings, as envisaged in paragraph 3 above, within 30 days, the amount retained on trust by the attorney of record of the First and Second Applicants may be paid out to the First and Second Applicants;
6. That the First, Second, Third and Fourth Respondents are ordered to pay the costs of the application, jointly and severally, the one paying the other to be absolved.

BY ORDER

REGISTRAR

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Prepared on 9 October 2026 · Esheria