

SOUTH AFRICA / JUDGMENT

Earle v Lam and Another (A01/2021)

[2021] ZAMPMBHC 65 (13 August 2021)

[2021] ZAMPMBHC 65

COURT

Mbombela High Court, Mpumalanga

BEFORE

Greyling-Coetzer, Mashile

CASE / FILE NUMBER

A01/2021

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IN THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION, MBOMBELA (MAIN SEAT)

CASE NUMBER A01/2021

- (1) REPORTABLE: YES/NO
- (2) OF INTREST TO OTHER JUDGES: YES/NO
- (3) REVISED

STEPHEN PHILLIP EARLE

APPELLANT

and

ROGERIO PAULO CABACHINA LAM

FIRST RESPONDENT

MBOMBELA LOCAL MUNICIPALITY

SECOND RESPONDENT

JUDGMENT

GREYLING-COETZER AJ

- [1] This is an appeal against an eviction order granted by the Magistrate's Court for the district of Mbombela, held at Mbombela on 10 September 2020. In terms of the eviction order the appellant, a practising attorney was evicted from a residential property he occupies.

- [2] It bears mention that the hearing of this appeal was preceded by an urgent application for postponement. The urgent application was struck off the roll for non-compliance with the practice directive and lack of urgency, with costs on an attorney-and-client scale.
- [3] Although the appellant was duly represented by counsel during the urgent application, counsel held no instruction in respect of the appeal and sought to be excused. Consequentially, the appeal was heard without an appearance by the appellant. Notwithstanding the appellant's failure to appear and his failure to file heads of argument as required, the appellant was granted a further opportunity to file a written document containing his oral submissions before court in terms of Covid-19 practice directive No 5. The appellant filed his oral argument document 31 May 2021.

THE

FACTS

- [4] The appellant occupies the property pursuant to a written lease agreement. The lease agreement was for the period 1 February 2018 until 1 February 2019, where after it would automatically continue on a 2 (two) month basis. The rental payable for occupation was R16 000.00 per month. The lease agreement further made provision therefore that should the appellant fail to pay any amount due in terms of the lease agreement the agreement may be cancelled should the appellant fail to remedy the breach within 3 days from notice of breach.
- [5] The appellant took occupation of the property on 1 February 2018. The property was purchased by the first respondent during 2017 and registered in his name during May 2018. After expiry of the initial lease period, the appellants occupation continuing as provided for in the agreement. The appellant concedes that as from August 2019, he failed to make payment of the rental amount due. The appellant was placed on terms, but notwithstanding failed to remedy the payment breach, and the lease agreement was cancelled during November 2019.
- [6] As a result of the appellant's failure to vacate the property, the first respondent launched the eviction application in the Mbombela Magistrate's Court in terms of Section 4(6) of the Prevention of Illegal Eviction and Unlawful Occupation of Land Act, 1998 ("PIE Act"). The appellant opposed the eviction application and raised various interlocutory aspects. The eviction hearing was similarly preceded by an urgent application.

GROUND OF APPEAL

- [7] From the 29 grounds of appeal set out in the notice of appeal, it can be distilled that this appeal mainly concerns the following issues:-
- (a) Written lease agreement;
 - (b) Section 4(2) ex parte application and Rule 60A;

- (c) The Consumer Protection Act 68 of 2008;
 - (d) Non-joinder;
 - (e) Set-off / proof of the appellant's unliquidated claim;
 - (f) Findings of fact;
 - (g) Report from the municipality (second respondent herein);
 - (h) Payment of costs;
 - (i) Enrolment of application in the magistrate's court;
 - (j) Failure of the court a quo to engage in active judicial management.
- [8] Before dealing with each of the above its apposite to briefly restate the relevant legal principles in respect of PIE evictions.

LEGAL PRINCIPLES – PIE EVICTIONS

- [9] A court has a discretion in ordering an eviction. In the exercise of this discretion various prescribed factors must be considered.[1]
- [10] In order to be successful, the applicant in an eviction application in terms of the PIE act, must show that:-
- (a) the applicant is the owner of the property or the person in charge of the property;
 - (b) the respondent is an unlawful occupier; and
 - (c) it would be just and equitable for the order of eviction.

[11] The PIE Act defines :

an “owner” to mean “the registered owner of land, including an organ of state”;

a “person in charge” to mean “a person who has or at the relevant time had legal authority to give permission to a person to enter or reside upon the land in question” and

an “unlawful occupier” to mean “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”.

WRITTEN LEASE AGREEMENT

[12] The appellant contends that the court a quo erred in finding that the written lease agreement marked “LAM2”[2] was in fact legitimate. Its submitted that should “LAM2” be held to be a forgery/fraudulent/void, the locus standi of the first respondent would be undone, there would be no effective cancellation of the lease agreement, no proof of such agreement

exists, and that the basis for the cost order founded on “LAM2” will fall away.

[13] The appellant argued that the court a quo misdirected itself in respect of its finding that, absent any allegations and proof that “LAM2” was fraudulent or a forgery, “LAM2” was exactly that which it purports to be, being a lease agreement. It was argued that the papers before the court a quo contradict the finding by the court a quo. The appellant submitted that it was explained to the court a quo that he signed a blank lease agreement under the impression that it was with the Lategans (the former owners of the property).

[14] It was contended on behalf of the appellant that in terms of the Plascon-Evans rule the court a quo should have accepted the appellant’s version that he did not enter into the lease agreement marked as “LAM2” with the first respondent. The appellant maintains that the lease agreement with the Lategans remains intact, which renders the appellant a lawful occupant. The appellant submitted that as the first respondent became the owner of the property on 21 May 2018, and was thus not the owner at the time of the conclusion of the lease agreement, which is dated January 2018.

[15] The court a quo found that the information contained in “LAM1” (a deed search conducted in respect of the property in question which

indicates the property was purchased during 2017 but registered during May 2018) is supplemented by the information contained in

“LAM2”. Consequently, the court a quo did not deem it necessary to rule in respect of the sufficiency of “LAM1” to prove the first respondent’s ownership of the property. “LAM2” makes it clear that the first respondent is the landlord and therefore is a “person in charge”, who has the legal authority to give consent to a person to reside on the property.

[16] It is trite that a party wishing to rely on fraud must not only plead fraud but also prove it clearly and distinctly.[3] So too is it trite that fraud is not easily inferred.[4] For a party to successfully rely on a defence of fraud, the following essential allegations have to be made:-

- (a) a representation by the representor to the representee;[5]
- (b) fraud (i.e. that the representor knew that the representation to be false).[6] It is not sufficient to allege that the representation was false, as the word “false” merely implies ‘not true’,

as the mental element needs to be alleged. The representor must intend that the representee will act on the representation;

- (c) causation (i.e. the representation must have induced the representee to act in response to it[7]);
 - (d) if damages are claimed it must alleged that the representee suffered damages because of the fraud; and
 - (e) if reliance is place on fraudulent non-disclosure, facts giving rise to the duty to disclose must be set out.
- [17] Forgery is a specie of Fraud and can be defined as to be “committed by unlawfully creating a false document with intent to defraud to the actual or potential prejudice of another”. [8]
- [18] The opposing papers, falls drastically short of that required and set out above. The appellant failed to prove that “LAM2” was fraudulent and/or a forgery. Even if the appellant did adequately allege and prove that “LAM2” is indeed a forgery or fraudulent, it does not have the result contended for by the appellant. Absent “LAM2” the lease agreement with the Lategans would not remain intact, nor would the appellant in such circumstances be a lawful occupant.
- [19] The Lategans are no longer the owners nor could they be persons in charge as defined in the PIE Act. They cannot give the consent envisaged in terms of the PIE Act. Nor can the Lategans be regarded as the landlords[9] as defined in the Rental Housing Act, Act 50 of 1999.
- [20] Catering for change of ownership during a lease period, the principle of “Huur gaat voor koop” entails that the first respondent became automatically bound by the lease when the property was registered in his name. The protection of which the appellant enjoyed for as long as he made payment of the rental.

SECTION 4(2) ORDER

- [21] The appellant argued that the Section 4(2) order is appealable in terms of Section 83 of the Magistrate’s Court Act 32 of 1944, despite being of an interlocutory nature. This, the appellant argued is so as the Section 4(2) order was obtained whilst the filing of the replying affidavit was disputed in terms of a “Rule 60A notice of the Magistrate’s Court Act” (sic).
- [22] It was contended on behalf of the first respondent that the court a quo’s finding in respect of the urgent application, setting aside the Section 4(2) order and Rule 60A application as the aforesaid were simple interlocutory applications, therefore not making them susceptible to appeal, was correct.
- [23] I agree with the first respondent in that the rulings in this respect are not appealable. Even should they have been there appears to be no irregularity in the manner in which the Section 4(2) application was brought, more so, it is in line with the PIE Act that a Section 4(2) application ought to be brought on an ex parte basis. It is common cause that said order was served on 4 August 2020 wherein the opposed hearing date was specifically indicated. As such the order was fulfilled. The Section 4(2) the order is not a final judgment on the main

lis between the parties.

[24] The same principle applies in respect of the ruling by the court a quo with regard to the Rule 60(A) application. The court a quo judicially exercised its discretion to allow the replying affidavit in the present circumstances dictated by the COVID-19 pandemic. The commissioning of the affidavit was done remotely, but was done in accordance with the procedure utilised and described in the

substantive law.[10]

[25] Furthermore, the remedy set out in Rule 60A is not a competent remedy in respect of unsworn affidavits being objected to, as an irregularity contemplated by this rule must be a step which at one stage or another affects the development of the suit as a whole.[11]

CONSUMER PROTECTION ACT 68 OF 2008

[26] The appellant contends that the lease agreement was not properly cancelled in terms of Section 14(2)(b)(ii) of the Consumer Protection Act 68 of 2008, and that the court a quo erred by holding that this issue was not sufficiently canvassed in the affidavit nor argued in court, as well as that the appellant, who does not meet his obligations, cannot insist on protection from legislation just because the protection might be available.

[27] Upon a consideration of the facts, the appellant seemingly elects to 'sit on two chairs', arguing that no lease agreement exists on the one hand, and on the other that the terms of the lease agreement have not been complied with through the lens of the Consumer Protection Act 68 of 2008. Never the less, the appellant's argument stands to fail on a consideration of the content of Section 14 of the Consumer Protection Act 68 of 2008. These regulatory provisions only find application during the initial lease period. Upon expiry of such fixed term period, such lease agreement will automatically continue, but although previously governed by Section 14, after expiry Section 14 does not apply.

[28] In the present instance a notice of breach and cancellation followed during a period exceeding the original fixed term period.

NON-JOINDER

[29] In the court a quo the appellant raised the non-joinder of Me. SM Houghton as a point in limine. In this respect the appellant argued that Me SM Houghton is his mother and an elderly resident of the property in question, and therefore has a direct and substantial interest in the subject matter of the litigation and ought to have been joined.

- [30] The court a quo concluded that Me SM Houghton is not a party to the lease agreement, but in occupation of the property through the appellant occupation. The notice of motion made provision for an application against the appellant and all persons occupying the property through him. As such, provision for Me Houghton has already been made. From that placed before court, there is no basis on which to conclude that the court a quo erred in this respect.
- [31] The appellant further raised the issue of non-joinder of SP and TP Lategan. In this respect the appellant in the court a quo argued that they are the true lessors in respect of the lease agreement, and thereby have a substantial interest in the matter, and the first respondent's failure to join them amounts to a non-joinder.
- [32] In this respect the court a quo held that the involvement of SP and TP Lategan does not appear from any of the documentation before it. There is nothing that indicates that there was any error or misunderstanding or ignorance of any law or fact which led the court a quo to the conclusion reached.

SET-OFF / PROOF OF THE APPELLANT'S UNLIQUIDATED CLAIM

- [33] The appellant in the court a quo argued that he enjoys the defence of set-off in respect of a counterclaim that he intends to institute against Pam Golding Properties (Nelspruit). It was alleged by the appellant that Pam Golding Properties (Nelspruit) caused, and is causing, damage to the appellant's reputation and has breached their statutory provision and infringed on his right to privacy and dignity. This claim for damages, it was argued, is capable of set-off against any claim the lessor of the property may have against the appellant.
- [34] The court a quo in this respect held, correctly in my view, that the appellant lost sight of at least three issues. The first being that Pam Golding Properties (Nelspruit) is not a party to the eviction proceedings. Secondly, set-off can only be applied once the claim for damages has been quantified and liquidated. Thirdly, set-off can only be raised against a claim sounding in money between the same parties, as set-off is a method by which contractual and other debts may be extinguished. It comes into effect when two parties are reciprocally indebted to each other.
- [35] Differently put, set-off takes place when two parties are mutually indebted to each other, and both debts are liquidated and fully due. This would thus entail that if a creditor claims payment, the debtor must plead and prove set-off, and once set-off is established, the claim is deemed to have been extinguished (fully or in part) retrospectively from the moment mutually of the debts arose.[12]
- [36] There is thus no basis to hold that the court a quo erred in this respect.

FINDINGS OF FACT

- [37] In order to be successful, the first respondent had to establish that the appellant is residing within the property without the consent of the owner or person in charge, or in terms of another legal basis, and is therefore an unlawful occupier. Further, that it is just and equitable for the appellant to be evicted. In this context, there is no basis to find that the court a quo erred.
- [38] It was established by the first respondent that he is the owner in terms of “LAM1” considered with “LAM2” alternatively a person in charge in terms of “LAM2”. The appellant did not enjoy his consent to occupy the property post the appellants admitted failure to make payment of the rental.
- [39] The versions put up by the appellant that no lease agreement was concluded between the appellant and the first respondent, and that the lease agreement was still intact as between the first respondent and the former owners (the Lategans) are untenable for the reasons already set out herein above. Therefore absent a lease agreement between the first respondent and the appellant, no legal basis for continued occupation has been established. In the circumstances of the matter it was just and equitable to evict the appellant on the terms set by the court a quo.
- [40] Therefore there is no basis on which to contend that the court a quo, based on the evidence and argument made, misdirected itself or erred in any respect.

REPORT FROM THE MUNICIPALITY

- [41] The appellant sets out as a ground of appeal that the court a quo erred in failing to find that the report from the second respondent was required in order to assess whether or not to grant the eviction order. No basis has been set out in the papers filed on record in this regard. Similarly no finding was made by the court a quo in this regard.
- [42] The application was brought in terms of Section 4(6) of the PIE Act, as such, on the basis that the appellant had unlawfully occupied the property for a period of less than 6 (six) months at the time when the proceedings were initiated.[13] The effect is that the requirement whether land has been made available or can reasonably be made available by a municipality or an organ of State or other landowners for the relocation of the unlawful occupier, is not relevant.
- [43] As such the absence of a report by the second respondent is not a bar to the eviction order nor an essential consideration by the court a quo.

PAYMENT OF COSTS

- [44] It was contended in the notice of appeal that the court a quo erred in finding that the appellant should pay the respondents' costs on an attorney-and-client scale, including the cost of counsel.

[45] It is trite that an award of cost is discretionary in nature, and unless the court a quo, in exercising its discretion, failed to bring an unbiased judgment to be on the issue, did not act for substantial reasons, exercised its discretion capriciously or exercised its discretion upon a wrong principle, the court of appeal is not entitled to interfere with such discretion.[14]

[46] In the present matter none of aforementioned was present. As such there is no basis on which the appeal court will interfere with the court a quo's finding in respect of cost.

ENROLMENT OF APPLICATION IN THE MAGISTRATE'S COURT

[47] The appellant, as ground of appeal, bemoans the fact that the court a quo held that Form 1A of the Magistrates Court Rules does not provide for a date of enrolment on the opposed roll to appear in the notice of motion. This was raised as a point in limine in the court a quo.

[48] There is simply no merit in this ground of appeal. The prescribed Form 1A does not provide for a date of the enrolment of the matter in the event that it is opposed. The reason for this is that the parties to the proceedings first need to finalise the exchange of documents before a hearing date can be determined. A party will then be informed through a notice of set down, or in the present matter through a notice of set down and a Section 4(2) notice, authorised by the court on which the opposed matter would proceed. In the matter at hand same was duly done.

THE COURT'S FAILURE TO ENGAGE IN ACTIVE JUDICIAL MANAGEMENT

[49] The appellant bemoans that the court a quo erred and misdirected itself "In failing to go beyond its formal functions and to engage in active judicial management ..."

[50] From the record it appears that the matter was initially set down for hearing on 20 August 2020 and was allocated to the court a quo. It was thereafter postponed to 27 August 2020 for argument. On said date argument proceeded. The issue of case management never arose, its thus unclear what the appellant contends for in this respect.

CONCLUSION

[51] It light of the findings above it follows that the order of the court a quo was correctly made. The appeal must therefore fail.

[52] I, therefore propose the following order:-

1. The appeal is dismissed.
2. The appellant is ordered to pay the cost of the appeal.

D GREYLING-COETZER AJ

I agree

BA MASHILE J

DATE OF HEARING: 14 May 2021

DATE OF ORAL ARGUMENT DOCUMENT BY APPELLANT: 31 May 2021

DATE OF JUDGMENT: 13 August 2021 (handed down electronically)

FOR THE APPELLANT : No appearance

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FOR THE

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SECOND RESPONDENT : No appearance

[1] Section 4(6) to (8) of the PIE Act; Pitje v Shibambo and Others 2016 (4) BCLR 460 (CC)

[2] written lease agreement

[3] Courtney-Clarke v Bassingthwaite 1991 (1) SA 684 (NM) at 689

[4] Gilbey Distillers and Vintners (Pty) Ltd and Others v Morris N.O. and Another 1990 (2) SA 217 (SE)

[5] Feinstein v Niggli and Another 1981 (2) SA 684 (A)

[6] Ruto Flour Mills (Pty) Ltd v Moriates and Another 1957 (3) SA 113 (T)

[7] Seven Eleven Corporation of SA (Pty) Ltd v Cancun Trading No 150 CC 2005 (5) SA 186 (SCA)

[8] Joubert The Law of South Africa 2nd Ed Vol 6 at par 317

[9] 'landlord' means the owner of a dwelling which is leased and includes his or her duly authorised agent or a person who is in lawful possession of a dwelling and has the right to lease or sub-lease it

[10] Elchin Mammadov & Vugar Dadashov v Jan Stefanus Stander and Three Others GP (unreported case under case no: 100608/15)

[11] Cyril Smiedt (Pty) Ltd v Lourens 1966 (1) SA 150 (O)

[12] Mahomed v Nagdee 1952 (1) SA 410 (A)

[13] Ndlovu v Ngcobo; Bekker and Bosch v Jika 2003(1) SA 113 (SCA) at 123F-124A

[14] Giddey N.O. v JC Barnard and Partners

[2006] ZACC 13; 2007 (5) SA 525 (CC)

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