

SOUTH AFRICA / JUDGMENT

Ed-u College (Port Elizabth) NPC v Transnet Limited and Another (135/13,212/13) [2014] ZAECPEHC 96 (22 December 2014)

[2014] ZAECPEHC 96**COURT**

Eastern Cape High Court, Port Elizabeth

BEFORE

Revelas

CASE / FILE NUMBER

135/13,212/13

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Source record**Not****Reportable****IN THE HIGH COURT****OF SOUTH AFRICA****EASTERN CAPE****LOCAL DIVISION – PORT ELIZABETH****Case****No: 135/13****212//13****In****the matter between:**ED-U
COLLEGE (PORT ELIZABETH) NPC
(Registration**No:**

1995/011813/08).....

Applicant

and

TRANSNET

LIMITED

(Registration

No:

1990/0090/06).....First

Respondent

SHERRIF

OF THE HIGH COURT

PORT

ELIZABETH.....Second

Respondent

JUDGMENT

REVELAS J

- [1] The applicant is an educational institution (a school), and a company registered not for gain. The applicant operates five schools. Its 2000 pupils, their various classrooms and the applicant's offices are currently accommodated in two buildings owned by the first respondent. These two buildings are the Paynes Building, which the applicant has occupied since February 1996, and the Harbour Building which the applicant has occupied since 2008.
- [2] On 22 August 2014, the applicant and the first respondent reached their fifth settlement agreement in an ongoing saga which commenced in 2010, concerning the applicant's non-payment of rentals and the respondent's eviction applications. The aforesaid agreement which was made an order of court by Msizi AJ, provided that:
- (a) two intervening parties (a learner at the applicant's school and his father) withdraw their application to be joined in the eviction proceedings.
 - (b) the applicant was to be evicted from the premises.
 - (c) the eviction of the applicant was to be held over until 15 December 2015.
 - (d) the applicant was to pay the costs of the application.
- [3] In urgent proceedings filed on 15 December 2014, the applicant applied for a rule nisi, returnable on 29 January 2015, in terms whereof the writs of execution issued by the registrar in favour of the first respondent
- be set aside, or alternatively that the execution of the warrants be postponed to 15 May 2015 or to an alternative date. This application is in essence an application to stay the eviction. The second respondent is the Sheriff, who abides by this order. I shall refer to the first respondent just as "the respondent" hereinafter.
- [4] This relief is sought on the basis that the applicant has not been able to secure alternative premises to accommodate the schools before 31 December 2014, despite its best attempts to do so. The applicant alleges that it has however accepted a lease proposal for alternative premises, but that the premises to be leased are not ready for occupation yet. This new lease with a third party allegedly commences on 1 January 2015, and although the applicant's counsel is hoped that the refurbishment would be completed by the end of April 2015, she could not say for certain that it would be completed by then. No copy of any lease agreement was furnished by the applicant.

- [5] The applicant blamed the respondent for the inconvenience brought about by the urgency to argue this matter in the recess when it was set down to be argued with four other opposed urgent applications. The applicant contends that it had no choice but to bring this application on an urgent basis because, prior settlements entered into between the parties were unrealistic in relation to the time periods imposed. The applicant also accused the respondent of being unreasonable in its refusal to negotiate any further settlements.
- [6] The respondent opposes the application and requested a special costs order if the application was to be dismissed.
- [7] The applicant based its entitlement to further occupation of the premises on the following grounds:
- (a) The eviction of the applicant will cause irreparable harm to the learners as their schooling will be interrupted as a result of their not being premises to conduct schools from, until 1 May 2015.
 - (b) As an organ of State, the first respondent had a constitutional obligation to the applicant's learners, not to infringe their right to education.
 - (c) The respondent had greatly benefitted from the rentals received from the applicant who had expended its own money on the maintenance of the buildings in question, over the years. (This aspect was not properly before me).
 - (d) The respondent will suffer no prejudice from the applicants' continued occupation as it would receive rental income until May 2014.
- [8] The respondents' opposition to the application is premised on the events preceding the present application. The order of Msizi AJ was preceded by, as the applicant put it, "a slew of litigation" between the applicant and the respondent concerning unpaid rentals and subsequent eviction applications. In addition, the respondent contends that the urgency of the matter is self-created and an abuse of the Court's process.

Background

- [9] To place this application in a perspective, it is necessary to refer to preceding events.
- [10] In 2010, the respondent obtained summary judgment against the applicant for arrear rentals. The parties settled the matter on the basis that the applicant would vacate the building by 31 December 2011 (the date upon which one of the leases came to an end) and the applicant admitted its indebtedness to the respondent in the amount of R44 217.83. According to the respondent, a comprehensive audit revealed that the amount was much more (over a R1 million).
- [11] The two leases pertaining to the premises were renewed from time to time, but after 31 December 2011 and 30 April 2013, the lease agreements were renewed from month to month.

- [12] The respondent once again issued summons against the applicant on 14 June 2012, for payment of arrear rental and service charges. The action was initially defended but a settlement agreement was reached in terms whereof the applicant would pay off its arrears of R1 181 383.00 in instalments of R36 326.00, commencing on 1 September 2012. The agreement was made an order of court on 7 February 2012 by Pickering J.
- [13] The respondent subsequently gave the applicant two opportunities to remedy the breaches of the aforesaid agreement which occurred after the order was not complied with by the applicant.
- [14] In January 2012, the respondent, for the first time applied for the eviction of the applicant as well as confirmation that the lease of the premises had been terminated on 11 December 2011 and had been cancelled. The application for eviction was settled and the settlement agreement was made an order of Court. The respondent contends that to date the applicant has failed to comply with the terms of the second settlement agreement which provided, that in the event of the applicant defaulting in terms of the settlement, the respondent would be entitled to evict the applicant with immediate effect.
- [15] According to the respondent, because repeated demands, for payment of arrear rentals were ignored and it was tired of the applicant's continued failure to comply with the agreements reached, the respondent decided to issue a warrant of execution for payment of the outstanding sum. R181 383.00 had been paid by the applicant in terms of the first writ contained a typing error to the effect that R181 383.00 was owing, instead of R1 181 383.00. A second writ was then issued for R1 million. The warrant of execution was met with a nulla bona return and an admission by the applicant's director, that the applicant was unable to pay the R1 million still owing. The respondent subsequently brought an application for the liquidation of the applicant and an order for the applicant's eviction from the premises.
- [16] Both these matters were settled and the settlement agreement was made an order of Court on 28 March 2013 by Dukada J. In terms of the agreement, the applicant undertook to vacate the respondent's premises by no later than 31 July 2013. The applicant did not honour the agreement, nor did it make any payments in respect of its indebtedness.
- [17] Because of the applicants' failure to vacate the premises by 31 July 2013, the respondent had another writ issued. As in the present matter, the applicant brought an application to have that writ set aside, or stay the eviction until the end of year exams. The application was also brought on an urgent basis, and as in the present application, it was brought after the actual date on which the applicant was ordered to vacate the premises. The application was brought on essentially the same grounds as in this application. That application was also settled, and the settlement agreement was made an order of court on 29 August 2013, by Schoeman J.
- [18] Under another threat of eviction the applicant launched a second application to stay eviction. At this point the respondent

refused to negotiate any further with the applicant and the matter was then argued before Msizi AJ, on 27 March 2014. Before

judgment was delivered by Msizi AJ, a parent whose son was a learner at the applicant, brought an urgent application to intervene, in order to join in the application on the basis that an eviction would violate his constitutional right to be educated.

[19] The matter again came before Msizi AJ on 22 August 2014, and again the parties settled the matter on the terms set out earlier herein. The settlement agreement was made an order of court as stated, and the applicant's non-compliance with that order forms the subject matter of the present application.

Discussion

[20] The respondent contends that it reached settlement agreements with the applicant, not because it had a case to answer, but because it felt a moral obligation towards the learners. The respondent emphasized the fact that the evictions were always delayed until the end of the year and mid-year at the specific behest of the applicant, to accommodate their exams. The respondent did not prescribe the dates upon which the evictions would become operative.

[21] Sections 28(2) and 29(1)(a) of the Constitution of South Africa, entrench the rights of children to be educated. These

constitutional rights must be weighed up against the respondent's constitutional right not to be deprived of its property, in terms of section 25(1) of the Constitution. The right to education will most certainly always trump property rights in matters of this nature. However, in this particular case, the applicant's reliance on the Constitution to ensure its continued occupation of the respondent's property, is misconceived. The history of the dispute between the parties demonstrates that the respondent, in so far as it may have had a constitutional obligation not to impair the right of the learners concerned, to be educated[1], to complied with that obligation on numerous occasions.

[22] The applicant's contract with learners is to provide schooling and a certain standard of education. In that capacity the applicant also has an obligation, not only a negative constitutional one, but a contractual one, to ensure that there are school premises for that purpose. The prompt and continued payment of rental would be one way of achieving that. The applicant's

reliance on indulgences from the respondent and the courts to secure premises for its school, has rendered the learners' rights precarious.

- [23] Since December 2011, the applicant knew it had no secure right to occupy the respondent's property and it was aware that the respondent was no longer interested in having the applicant as a tenant. The applicant has throughout approached the matter as if a lease existed between it and the respondent for an indefinite period, and as long as it paid rental, (which was not always paid) it was entitled to remain in occupation, as of right.
- [24] The applicant raised a further complaint, namely that the respondent has not provided any good reason why the applicant must vacate its premises. This complaint is unfounded. There is no valid lease between the parties and since the lease agreements were commercial in nature, the provisions of the Prevention of Illegal Eviction From And Unlawful Occupation of Land Act, No 19 of 1998 are not applicable to this matter. The applicant has approached this matter as if it were such a matter. It must also be borne in mind that the applicant signed several settlement agreements, binding itself to vacate by certain dates, chosen by the applicant itself. The finding of alternative premises was never made a condition of any of the agreements reached in order to stop eviction.
- [25] The respondent disputes that the applicant contracted a lease with the entity to which the applicant referred to as Growthpoint Properties. The respondent pointed out that there is no proof of such an agreement, which is true, and there is also no guarantee that there will be such a lease in the future, which is also true. The respondent submits that the applicant follows a stratagem whereby it relies on an agreement allegedly concluded and which will be implemented shortly, only for the respondent to find that it is never implemented. The respondent alleged that this stratagem was followed before.
- [26] The applicant, in its replying affidavit, listed entities which it unsuccessfully approached for securing new premises. Whether there was a stratagem or not, is not possible to determine with certainty. What is however not certain, is whether the applicant will find suitable accommodation by May 2015. The effect of granting the application would be to ignore the existing court order, to write a new contract for the parties and simply to grant another indulgence.
- [27] There is no lease agreement in place to ensure the applicant's continued occupation of the property, which occupation presently is unlawful in terms of a court order. The applicant has not made proper use of all the indulgences given to it. The reliance on a constitutional imperative to remain in occupation is unfounded. The application must accordingly fail. The learners in question need not be deprived of continued education as a result of this order, which will no doubt impact on their continued education. They could enrol in different schools, or the applicant could approach the Department of Education to assist with its self-created problem. If it indeed has entered into a lease agreement for new premises, as of 1 January 2015, as it alleges, it could possibly make interim arrangements to use those premises.

Costs

[28] The continued occupation of the respondent's premises occurred in terms of various settlement agreements to which the respondent was willing party. Although there are strong indications of a stratagem followed by the applicant, I am unable to find conclusively that there was such a stratagem. Accordingly, a punitive costs order is not appropriate.

Order

[29] In the circumstances, and for the aforesaid reasons, the application is dismissed with costs.

E REVELAS

Judge of the High Court

Counsel for the applicant, Adv Veldsman, instructed by Liston, Brewis & Company.

Counsel for the respondent, Adv Rorke and Adv Mullins, instructed by Burmeister de Lange Soni Inc.

Date Heard: 18 December 2014

Date Delivered: 22 December 2014

[1] Khumalo and Others v Holomisa

[2002] ZACC 12; 2002 (8) BCLR 771 (CC); Governing Body of the Juma Musjiid Primary School v Essay NO 2011

(8) BCLR 761 (CC).

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