

SOUTH AFRICA / JUDGMENT

Engelbrecht N.O and Others v Maluleke and Others (11334/2022) [2024] ZALMPPHC 137 (16 August 2024) [2024] ZALMPPHC 137

COURT

Limpopo High Court, Polokwane

BEFORE

T.C. Tshidada

CASE / FILE NUMBER

11334/2022

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REPUBLIC

OF SOUTH

AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

LIMPOPO

DIVISION, POLOKWANE

CASE

NO: 11334/2022

(1)

REPORTABLE: YES

(2)

OF INTEREST TO THE JUDGES: YES

(3)

REVISED.

DATE: 16/8/2024

SIGNATURE:

IN

THE MATTER BETWEEN: KARIN
ENGELBRECHT N.O.
1st
Applicant
STEPHANUS
PAULUS ENGELBRECHT N.O.
2nd
Applicant
THE
OFFICE OF STELLENBOSCH (PTY) LTD
(REPRESENTED
BY ILZEMARIE KNOETZE N.O.)
in
their capacities as trustees of the SP & K Trust
with
Master's reference: IT 1459/2005
3rd
Applicant
SP
& K PROPERTIES 1(PTY) LTD
4th
Applicant
and
TSUNDZUKA
KEVIN MALULEKE
1st
Respondent
THE
UNKNOWN OCCUPIERS OF UNIT NO. [...],
J[...],
B[...] STREET, N[...] ESTATE, BENDOR,
POLOKWANE,
LIMPOPO PROVINCE
2nd
Respondent
THE
POLOKWANE LOCAL MUNICIPALITY
3rd
Respondent

JUDGEMENT

TSHIDADA J.

[1] Having read and considered the documents filed on record and having heard counsel, the following order was granted by this court on 21 May 2024, thus;

1.1 The cancellation of the lease agreement is confirmed.

1.2 The 1st and 2nd Respondents are in unlawful occupation of the property known as Unit No. [...], J[...] B[...] Street, N[...] Estate, Bendor, Polokwane, Limpopo Province (hereinafter referred to as "the property") and that it is just and equitable that the 1st and 2nd Respondents, as well as all persons occupying the said property, should be evicted from the property in terms of Section 4(1) read with Section 6(1) of Act 19 of 1998, upon the grounds set out in the application whereby proceedings were instituted.

1.3 The court deems it just and equitable the 1st and 2nd Respondents shall vacate the property by no later than 30 June 2024.

1.4 The 1st and 2nd Respondents and all those occupying the property through them are ordered to remove all their personal belongings from the property by the date set in order 1.3 hereof.

1.5 The 1st Respondent is ordered to deliver to the Applicant's attorneys all keys and/or remotes and/or access cards giving access to the property by the date set in order 1.3 hereof.

1.6 Should the 1st and 2nd Respondents not vacate the property by the date set in order 1.3 hereof, the court orders that the eviction order as set out above may be carried out by the Sheriff of the above Honourable Court on 1 July 2024 or any day thereafter as the Sheriff of the above Court is able to do so.

1.7 Directing and authorizing the Sheriff of the above Honourable court to evict/eject and to remove all the 1st and 2nd Respondent's personal belongings from the property as from the date set out in order 1.6 hereof.

1.8 The South African Police Services is ordered to assist the Sheriff in the execution of his duties in accordance with order 1.6, if so, requested by the Sheriff.

1.9 The 1st and 2nd Respondents are ordered to pay the costs of the application on attorney and own client scale.

[2] Herein follows a full judgment and reasons for the order granted afore, as requested by the 1st Respondent's legal representative.

[3] Applicants issued the current eviction application from this court, and on the same day caused same to be personally served on the 1st Respondent at his chosen domicile. 1st Respondent in turn served and filed a notice of intention to oppose the application dated 25 October 2022.

[4] 1st Applicant averred in their founding papers that on or about the 1st August 2016, SP and K Trust duly represented by its authorized agent, namely Majacon 1129 (Pty) Ltd and the 1st Respondent in his personal capacity entered into a written Lease Agreement (hereinafter referred to as "the Lease Agreement"), for the 1st Respondent to rent, occupy and use the property as residence with his immediate family, as per the agreed terms. A property listed and known as Unit No. [...], J[...], B[...] Street, N[...] Estate, Bender, Polokwane, Limpopo Province situated on Erf 4[...], Bendor Ext 92, Polokwane.

- [5] To be noted is that the Trust later sold the property to the 4th Respondent on 16 September 2016. The 4th respondent as a result was therefore substituted ex lege for the original lessor. Notwithstanding, the 4th Respondent retained the Trust and Majacom 1129 (Pty) Ltd as its agent, for them to continue managing and interacting with its tenants.
- [6] The lease of the property was to commence from 1 August 2016 to continue for an indefinite period subject to such further conditions provided for on the lease agreement.
- [7] Amongst others, the monthly rental due and payable would be an amount of R7 400.00 (Seven Thousand Four Hundred Rand). The amount of rent was to increase in accordance with further terms stipulated on Clause 1.7 of the lease agreement[1].
- [8] Clause 18.1 provided that, should the 1st Respondent, as a tenant, fail to pay the rental or any portion thereof by the due date thereof or breach any provision of the agreement and or fail to comply with such provision, the Trust shall be entitled subject to the stipulations of the Consumer Protection Act 68 of 2008, to cancel the agreement and to evict him or any person or persons occupying the property, without prejudice to the Trust's right to claim any due rentals with interest on any arrears, alternatively, the Trust may demand specific compliance of the terms and conditions of the agreement, in either event, without prejudice to any right to damages.
- [9] In the event of breach of any term or clause of the lease agreement, first part of Clause 3.2, entitled either party to terminate the lease by giving not less than two (2) calendar month's written notice of termination of the lease to the other party, provided that such notice shall not be given before the expiration of a period of twelve (12) months from the commencement of the lease.
- [10] The 1st Respondent chose and selected the address of the leased property as his domicilium citandi et executandi henceforth and up until the date of granting of the afore-stated order by this court.
- [11] Applicants alluded that during the course and existence of the lease agreement, unfortunately the 1st Respondent defaulted and failed to timeously pay his rentals when it was due and payable. Despite various verbal demands, he is reported to have failed and/or refused to pay his accrued arrears and current rentals.
- [12] Complaints regarding 1st Respondent's failure to honor his obligation was allegedly lodged and referred to the Rental Housing Tribunal for possible resolution.

Subsequently, parties were able to reach an agreement in terms of a written Settlement Agreement concluded on 14 March 2022, not necessary to discern in this judgment.

- [13] Regardless of the parties' agreement that, amongst others, the 1st Respondent shall remain liable to pay the monthly rent of the property in terms of the existing lease agreement, and further endeavor to bring the arrear rentals up to date, sadly, the Applicants indicated that the 1st Respondent was furthermore unable to pay his monthly rentals and/or update his arrears thereof, save for one and only payment of R7 000.00 (Seven Thousand rand), made on 3 March 2022.
- [14] In light of the above, Applicant reinstated its complaint with the Rental Housing Tribunal during April 2022. After the Mediator appointed by the Tribunal referred the complaint for hearing, it is stated that the 1st Respondent ostensibly as a knowledgeable practicing advocate of the High Court of South Africa, took the Mediator's decision on review since 8 June 2022. For a period over two years the said review remains unprosecuted for reasons better known by the 1st Respondent himself.
- [15] Applicants have highlighted on a tenant's monthly rental statement annexed to the founding papers that the 1st Respondent was in arrears with his monthly property rentals and ancillary charges to the tune of R110 300.02, as at 1 October 2022, excluding rentals and related charges that accrued since October 2022 to date of final order.
- [16] Due to the 1st Respondent's failure to comply with his obligations in terms of the parties lease agreement, the Applicants resolved to invoke Clause 18.1 of the agreement, thereby notifying the 1st Respondent in writing on 24 August 2022 through the services of a Sheriff of this court, of his breach and Applicant's subsequent
- decision to cancel the agreement and demand that the 1st Respondent forthwith vacate the leased property by no later than 30 September 2022, failing which eviction proceedings shall be instituted against him.
- [17] On 29 September 2022, 1st Respondent's legal representative wrote to the Applicant's legal representatives threatening that should the Applicant attempt to institute eviction proceedings against their client, same shall prompt the 1st Respondent to approach the High Court on urgent basis for unspecified relief. No such application was ever launched by the 1st Respondent till the day of hearing of this application by this court.
- [18] Of note is that, in spite Applicant's letter of demand for 1st Respondent to vacate the property, he remained in occupation for the entire period until the hearing of this application. An occupation

which the Applicants contends has always been unlawful until the granting of a final eviction order of the 1st Respondent by this

court for his failure and/or refusal to pay the owing rentals and to vacate the property.

LEGAL FRAMEWORK

- [19] Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (herein referred to as "PIE Act") is intended to provide for the prohibition of unlawful eviction and also to provide for procedures for the eviction of unlawful occupiers.
- [20] Section 4(2) of the PIE Act requires unlawful occupier facing eviction to be given at least two weeks "written and effective notice" of the date on which proceedings for their eviction will be heard. The Applicant has to approach court ordinarily through an ex parte application that precedes the main application, seeking the court to grant an order to authorize service of such notice combined with the main application, where necessary.
- [21] An unlawful occupier is entitled to a 4(2)[2] notice separately apart from the ordinary main application papers that institute the eviction process. The form and manner of service of the notice comprised of the main application papers must be approved by the court. See paragraphs 13 and 14 of *Cape Killarney Property Investment v Mahamba*[3].
- [22] It is trite law that procedure contemplated on PIE Act is applicable to eviction of unlawful occupiers from property used for residential purposes.
- [23] Section 4(2) notice is peremptory to the extent that its purpose is obligatory for the property owner to seek authorization from court to serve a notice advising the occupiers of the date on which the eviction per the main application documents will be heard. The Act requires that a Section 4(2) notice be served on occupiers and the municipality having jurisdiction at least 14 days prior the hearing of the eviction proceedings.
- [24] The court may after hearing an eviction application and in appropriate circumstances grant an eviction order if it is "just and equitable" to do so.
- [25] In compliance with the prescribed notice requirement, the court granted Applicants authorization on 2 February 2023, to serve the notice on the Respondents advising them that the eviction application against the 1st Respondent shall be heard on 16 May 2003 at 10h00 on the grounds set out on the affidavit attached to the main application so served on the 1st Respondent.
- [26] With no answering or opposing papers forthcoming from any of the Respondents since February 2023, and when the dies to file same having lapsed, the Applicants then enrolled the application to be heard on the unopposed roll of the 16 May 2023, in terms of Rule 6(5)(c) of the Uniform Rules of the High Court and as per Directive 13.3.6[4] of the Practice Directives of this Honourable Court.
- [27] However, the application could not proceed on the day as scheduled and was ultimately removed from the roll with no costs order due to the Applicant's omission to file all original documents in the court file. Respondents were further ordered to file their answering affidavit within ten (10) days from granting of the order. Any reply to be filed ten (10) days after receipt of answering affidavits.

- [28] Surprisingly, the Applicants indicated that to its dismay, on 19 May 2023, 1st Respondent filed "leave to appeal a removal order" of an application which he did not oppose, and astonishing, was that the purported "leave to appeal" sought to contest an order which, in any case, and by right was indirectly in his favour, in that the unopposed eviction application against him did not proceed on the day. The intention and purpose of the leave to appeal an order granted somewhat in ones favour, in my view becomes questionable.
- [29] In order to fulfill the purpose of Section 4(2), the Applicants enrolled a fresh ex parte Section 4(2) application seeking an order authorizing service of a notice on the Respondents to inform them of 21 May 2024 to be the allocated date for hearing of the main eviction application. The court granted the order which was equally served by Sheriff on Respondents chosen domicilium.
- [30] Section 18(2) of the Superior Courts Act[5], provides thus;
- "subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the final effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal."
- [31] Essentially, interim orders which are not determinative of the issues are not appealable, unless the court under "exceptional circumstances"

orders

otherwise. For instance, it is startling to fathom the cause and bona tide intention, if any, to appeal an ex parte order granted to authorize service of the 4(2) notice in terms of PIE Act of which its primary purpose is merely to inform the other party alleged to being an unlawful occupier of a date for hearing of the main eviction application. If anything, such an order best serves any of the Respondent to enable him/her to prepare opposition of the main application timeously, if any.

- [32] All the attempts by 1st Respondent to appeal the interlocutory orders which are not final in nature nor decisive of the main application seemingly to circumvent

the hearing of the main application, were, in my view, spurious, unsustainable in law, at best ill conceived, unfounded and frivolous. This court finds the attempts to have been of no intent other than a delaying tactic to halt the hearing and finalization of the main dispute between the parties. Much so because the 1st Respondent would always find time to file any other document to impede the hearing of the main application, yet neglecting to file answering papers to oppose the impending application on the merits.

- [33] If indeed the real intention was to contest the main application, I fail to understand, neither did I find anything that could have prevented the 1st Respondent, particularly, to file his opposing papers even after he was invited to do so by the court on 16 May 2023.

- [34] It is further unimaginable why a Respondent would seek to appeal an order for the removal of the matter from the roll without any costs order granted against him/her, not unless the approach is intended for ulterior motive like what appears to be the case in this matter.
- [35] In my view, both the applications seeking to appeal the referred interlocutory orders deserves for what it is worth to be declared pro non scripto.
- [36] The main application then served before this court again on unopposed basis for the sole reason that it remained without any opposing papers filed since its inception back in the year 2022 to date.
- [37] Albeit, on the day of hearing, counsel noted appearance on behalf of 1st Respondent. I found him to have been there clearly to interrupt the hearing because he could barely proffer a reasonable explanation and basis for his opposition, absent any opposing or answering papers filed on record or in his possession, notwithstanding the court reminding him of the basic rules regulating motion proceedings, mainly that parties' cases are pleaded on paper/affidavits. Further that, an opposed application is comprised of three sets of affidavits, they being, the founding affidavit, answering affidavit and replying affidavit, if any,
- [38] As a result of court's enlightenment to him, counsel rightly conceded that his opposition from the bar was misplaced and inappropriate to cause the court to hear the application as an opposed matter, but for the matter to proceed on unopposed basis, since it was so enrolled with 1st Respondent full knowledge.
- [39] Counsel could neither explain why the 1st Respondent has failed and/or neglected to file his answering affidavit since the year 2022 when he first became aware of the application, and why he could not do so subsequent thereto when the matter came before court and even after he was invited to do so at the instance of both the Applicants and the court when the matter was previously removed from the roll.
- [40] Absent any plausible explanation, counsel was excused from participating in the proceedings simply because the 1st Respondent that he sought to represent had failed to oppose the application on numerous occasions save for only filing a notice of intention to oppose.
- [41] The dire consequence of the respondents' failure to file answering affidavit enabling them to put their versions before court and to oppose/challenge the Applicant's averments from the founding papers is considered fatal, in that the Applicant's case remains and is bound to proceed uncontested, likewise in this case.

- [42] Having perused the documents and considered the submissions made by counsel for the Applicants, this court was persuaded and satisfied that a case has been made out to prove that the 1st Respondent breached the terms of the parties' lease agreement, and that the agreement was lawfully cancelled rendering the First and/or Second Respondents unlawful occupiers of the property.
- [43] This court remains satisfied that there has been full and proper compliance with the procedure and the law, as envisaged in the PIE Act.
- [44] In the result, this court was justified when granting an order in terms of the relief sought in the notice of motion, succinctly set out from sub- paragraphs 1.1 to 1.9 of this judgment.
- [45] I accordingly confirm the court order granted by this court on 21 May 2024 and that same is to be incorporated and read into this judgment.
- [46] The scale of costs granted emanates and was provided for on Clause 5.8 of the Lease Agreement, thus the legal costs arising from any legal proceedings between the parties shall be on an attorney and own client basis.

T.C. TSHIDADA

JUDGE OF THE HIGH COURT

Appearances:

For the Appellant:

Adv HF Marx

Instructed by:

De Bruin Oberholzer Attorneys

Polokwane

For the 1st & 2nd Respondents: Counsel excused (application unopposed)

For the 3rd Respondent:

No appearance

Date of hearing:

21 May 2024

Judgement

delivered on:

16 August 2024

Judgment

electronically

transmitted to the parties on:

16 August 2024

- [1] "The Landlord has the right to increase the rent after giving two calendar months' notice of the intention to increase the rent. The rental will not increase before the expire of the 12 month period as stipulated in paragraph 3.2 ".
- [2] In terms of PIE Act
- [3] [2001) 4 ALL SA 479 SCA
- [4] Where the Respondent has failed to deliver an answering affidavit and has not given notice of an intention to raise a question of law in terms of Rule 6(5)(c) or a point in limine, the application must NOT be enrolled for hearing on the opposed roll. Such application MUST be enrolled on the unopposed roll".
- [5] Act 10 of 2013

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