
SOUTH AFRICA / JUDGMENT

Ferreira and Others v Leonard and Others (1714/14) [2014] ZAECPEHC 79 (18 November 2014) [2014] ZAECPEHC 79

COURT

Eastern Cape High Court, Port Elizabeth

BEFORE

E Revelas

CASE / FILE NUMBER

1714/14

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE LOCAL DIVISION – PORT

ELIZABETH

Case

No: 1714/14

In

the matter between:

CEDRIC
CHARLES
FERREIRA
First Applicant
SHEONA
LYNNE
FERREIRA
Second Applicant
SHAUN
PIERRE
STEINMANN
Third Applicant
and
BRIGITTE
ERIKA
LEONARD
First Respondent
MALCOLM
LEONARD
Second Respondent
BRIGITTE
ERIKA LEONARD
N.O.
Third Respondent
MALCOLM
LEONARD
N.O.
Fourth Respondent
THE
NELSON MANDELA BAY METROPOLITAN
MUNICIPALITY
Fifth Respondent

JUDGMENT

REVELAS J

- [1] This is an application for the eviction of the first and second respondents from a property owned jointly by the three applicants.

The property is a house situated at [.....], Redhouse, Port Elizabeth.

- [2] The property in question was leased to the respondents in terms of a lease agreement concluded on 29 May 2012 between the Leonard Family Trust, (“the trust”) represented by the first and second respondents and the applicants, represented by the third applicant.

- [3] In terms of the lease agreement, rental was payable in the amount of R4000.00 per month and the trust was also liable for utility charges levied by the local municipality. In the event of non-payment of the monthly rental the agreement entitled the applicants cancel the agreement with immediate effect and take possession of the property.
- [4] It is not in dispute that the trust did not pay rental for the months of March, April, May 2014 and thereafter. Utility charges in the amount of R21 409.42 was also not paid by the trust, according to the respondent's the trust only owes a portion. On 26 May 2014, the lease was cancelled by the applicants and in the letter of cancellation, the trust was advised of the applicant's intention to bring an application for the eviction of the first and second respondents from the property, if they do not vacate the property.
- [5] The first and second respondents continued to live on the property without paying any occupational rental or their rental arrears.

The applicants subsequently obtained summary judgment against the respondents in the Magistrates' Court on 30 September 2014, in the sum of R33 009.42 for arrear rentals and utilities. In that application, the basis of the respondents' opposition was an improvement lien for which no consent was sought from the applicants to make the improvements. The trust maintains that it effected improvements to the property which amounted to R32 833.00.

- [6] The magistrate found on 30 September 2014:

"It is not clear what the bona fide defence is and furthermore [the fourth respondent] admitted that he did not pay rental since June 2014, July 2014 and August 2014 on ill-advice received from his legal advisor."

The magistrate concluded by saying that:

"Since I am not persuaded that there was a reasonable possibility that the respondents had a bona fide defence and that this defence might succeed at trial summary judgment should be granted."

- [7] The present application for the eviction of the respondents was then brought. The respondents once again opposes the application for their eviction on the basis that they are entitled to remain in occupation of the house in order to protect an improvement lien for the necessary improvements they effected on the property which could be set-off against the amount of arrear rentals (which they do not dispute is owing to the applicant).
- [8] In the present application the fourth respondent set out his claim for improvements as follows:

Repairs of dangerous holes in garden

regarded as risk

June 2012 R2400.00

Retiling and repair of rotten toilet floor July 2012

R2685.00

Outside toilet drain repairs

August 2012 R 638.00

Outside toilet & shower repairs August 2012 R3600.00

Inside toilet drain repair

September 2012 R2640.00

Repair to leaking roof, waterproofing Feb/March 2013 R7980.00

Repairs to structural damage inside property

(collapsing walls, cracks, moisture) February 2013 R8990.00

Repairs to leaking taps & plumbing June 2013 R3900.00

- [9] The fourth respondent stated that he and the second respondent bound themselves as co-principal debtors, in their personal capacities, for the improvements to the property which amounted in total to R32 833.00.
- [10] As far as “improvements to the drains/sewerage are concerned”, the fourth respondent submitted that none of these were necessitated by any negligent act or omission on the part of any of the respondents or their invitees.
- [11] According to the fourth respondent, a final counterclaim came about in March 2014 when he repaired a trailer for the third applicant in the amount of R2 890.00. In terms of agreement between third applicant, acting on behalf of all applicants, and himself the respondents could deduct this amount from any amounts due to the applicants. The total amount due to the respondents by the applicants is thus R33 723.00, according to the fourth respondent who stated that the respondents intend counterclaiming for this amount.
- [12] The above lists shows that most of the items are not improvements. They in fact relate to structural repairs and maintenance of sanitary plumbing, the roof and walls for which the lessees (the respondents) are liable in terms of the lease agreement. Any improvements to be effected or fittings to be installed required the lessor’s permission to be obtained first, in terms of the lease. This permission was not obtained in nor unreasonably withheld by the applicants.
- [13] The respondents do not have a builder’s right of retention over the property. The lease agreement also does not provide for a builder’s lien and on the facts of this case, the existence of such a lien was not established. Accordingly, there is no contract which could entitle the first and second respondent to remain in occupation of the property in the exercise of such a lien. In the result, the respondent’s occupation of the property against the applicants’ will is unlawful (see: *Ballinger & Another v Norvic Diverse Systems CC t/a Johns Builders & Another* [2005] JOL 13876 (SE) at page 3, and *Brooklyn House Furnishers (Pty) Ltd*

v Knoetze and Sons 1970 (3) SA 264 (A) at 270).

- [14] The lease agreement was cancelled in May 2014. The respondents have not been paying rent in terms of the lease since March 2014 and no occupational rental since June 2014. Whatever they believe the applicant's owe them can be pursued through ordinary legal remedies. Their continued occupation of the property is unlawful and not in terms of any builder's right of retention. The respondents must vacate the property in the circumstances.

The postponement

- [15] The fourth respondent applied for a postponement of the matter in order to obtain legal advice. After hearing argument, which contained submissions on the merits and the need for postponement, the application for postponement was dismissed. The reasons given in my judgment dismissing the application can be summed up as follows:
- [16] Given the facts of the matter, it did not appear to me that a legal representation could add anything of value. The respondents had been in unlawful occupation since the contract was cancelled. They had no entitlement to occupy the property. The applicants have been prejudiced by the situation created by the respondents' unlawful occupation of the property to an extent that cannot be addressed by a costs order. The respondents, as I understand, have also not complied with the magistrate's order for payment of arrear rentals.
- [17] In addition, the fourth respondents' affidavit and the issues raised therein, suggest that he is not as naïve about legal matters as he professed. The fourth respondent also said he had been assisted, albeit informally, by someone who had legal expertise.

Costs

- [18] In my view, this is not the kind of matter which warrants a punitive costs order since the fourth respondent appeared in person and acted on poor legal advice. The magistrate also held that view.
- [19] The following order is made:
1. The first and second respondents, and all persons occupying thorough them, are hereby evicted from [.....], Redhouse, Port Elizabeth and must vacate the property within 30 days of the granting of this order, failing which the sheriff of a court is hereby authorised to evict the first and second respondents and all persons occupying through them by virtue of their occupancy, from the aforesaid property.
 2. The sheriff is authorised to request any person, including the members of the South African Police Service, to assist him in the eviction and/or removal of the first and second respondent and all those occupying the property through them, together with their possessions (if any) from the property, provided that the sheriff must at all times be present during such eviction and/or removal.

3. The first, second third and fourth respondents be ordered to pay the costs occasioned by this application.

E REVELAS

Judge of the High Court

Counsel for the applicant's, Adv KB Pask, instructed by Pagdens Attorneys.

For the respondent's, Mr Leonard in person.

Date Heard: 13 November 2014

Date Delivered: 18 November 2014

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Prepared on 11 October 2026 · Esheria