
SOUTH AFRICA / JUDGMENT

Fisher N.O and Another v Mwaba and Another (2020/ 25663) [2021] ZAGPJHC 546 (11 October 2021) [2021] ZAGPJHC 546

COURT

South Gauteng High Court, Johannesburg

BEFORE

Molahlehi

CASE / FILE NUMBER

2020/ 25663

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

Case number: 2020/ 25663

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED

11/10/2021

In the matter between:

JAQUES ANDRE FISHER NO

FIRST APPLICANT

MARYKE LANDMAN NO

SECOND APPLICANT

AND

EMMAMUEL CHOLA MWABA

FIRST RESPONDENT

CITY OF JOHANNESBURG

SECOND RESPONDENT

Delivery: This judgment is handed down electronically by circulation to the parties' legal representatives through email and released to the court's library. The date for hand-down is deemed to be 11 October 2021.

Summary: Eviction application. Section 4 (7) and

- (8) of PIE. The respondent relying on a lease agreement disputed by the applicant. The respondent repudiating the lease agreement by not paying rental. The respondent unlawfully occupying the property. The principles of equity applicable in eviction matters restated and applied.

JUDGEMENT

Molahlehi J

Introduction

- [1] This is an opposed application to evict the first respondent and those occupying the property described as a portion of ERF 1 Hyde Park extension 12 Township, Johannesburg (the property).

Background

facts

- [2] The applicants are joint liquidators of African Management Communications (Pty) Ltd (AMC), a company registered in terms of the company laws of the Republic of South Africa. The first respondent is Mr Mwaba, the erstwhile director and shareholder of AMC.
- [3] AMC was placed under final winding-up on 11 May 2021 by the Master of the High Court. The first and second applicants being liquidators of the estate of AMC were appointed as final liquidators on 12 February
2020. The property that AMC owns had multiple mortgage bonds registered under the property in the combined sum of R6.4 million. Currently, The Standard Bank of South Africa is owed in the aggregate R7.7 million regarding the loans advanced to AMC.
- [4] The liquidators are in terms of the Companies Act,[1] and the Insolvency Act,[2] entitled to receive rental from any person occupying the property in terms of such a lease agreement.
- [5] It is not in dispute that, on 21 November 2017, the first respondent and the erstwhile sole shareholder of AMC took a resolution placing capital AMC under the supervision and commencing rescue proceedings.

- [6] The business rescue practitioner, Mr Naude, resigned his position soon after his appointment because of the disagreement with the first respondent about the prospect of rescuing the company. He left before the publication of the business rescue plan was developed.
- [7] After the resignation of Mr. Naude, the Standard Bank applied for the order under case number 16100/15, placing AMC under final winding up. The two liquidators were appointed on 7 June 2018. The application to appeal this order went up to the Constitutional Court but was unsuccessful. After failing to oppose the liquidation order, the respondent offered to purchase the property, but that was also unsuccessful.
- [8] After all the above failures to rescue the estate of the property from winding-up, the first respondent furnished the liquidators with a copy of the written lease agreement purportedly concluded with AMC. In terms of the lease agreement, the monthly rental was R500. 00 per month with an escalation rate of 6% per annum for a period of nine years.
- [9] In November 2019, the liquidators' attorneys addressed a letter to the respondent demanding that he vacates the property before 29 November 2019. In response to the above letter, the first respondent indicated that he was unwilling to leave the property.
- [10] Based on the above, the liquidators contend that the first respondent is in unlawful occupation of the property. It has also questioned the validity of the lease agreement produced by the first respondent. They contend in this respect that the lease agreement is nothing but a simulation.
- [11] The applicant contends that the property was liable for the monthly instalment of R63,000 to the Standard Bank at the time of the liquidation.
- [12] About the contention that the agreement is simulated and thus cannot be regarded as valid, the applicants based this on the following:
- (a) The monthly rental of R500.00 is not sufficient to defray the cost of the payment of the rates and taxes and levies raised by the body corporate.
 - (b) The respondent did not produce evidence of witnesses to confirming the signature of Mr Harrybarram when he signed the lease agreement.
- [13] There is no proof that the R40,000, alleged to have been paid on 30 December 2011, was made to AMC and why the respondent elected to pay rental for eight months in advance.
- [14] The applicant further contends that the alleged payment of R5 000 between 11 December 2018 and 13 March 2020 is a further indication that the agreement was contrived because there is no indication why such payment was made when on the respondent's version. He had already paid R40,000 in advance on 30 December 2016.

The respondent's case

[15] The respondent opposed the eviction application mainly on the ground that he had entered into a lease agreement with AMC, which is to endure for a period of nine years on a monthly rental mentioned earlier.

[16] In concluding the lease agreement, AMC was represented by its erstwhile corporate manager. In support of the proposition that the lease agreement between him and AMC was valid, the first respondent attaches to his answering affidavit annexures ECM3, ECM for, and ECM6. He contends that he has made the following payments since December 2016:

"12.1. On 30 December 2016, I paid a . . . lump sum amount of R40 000 to cover at least 80 months of the 9 year lease period.

12.2. On 11 December 2018, I paid a lump sum amount of R5000.00.

12.3. On 15 March 2019, I paid a lump sum amount of R5000.00.

12.4. On 15 April 2019, I paid a lump sum amount of R5000.00.

12.5. On 10 March 2020, I paid a lump sum amount of R5000.00.

12.6. On 13 March 2020, I paid a lump sum amount of R5000.00."

[17] Based on the above, the respondent contended that it could not be said that he was in unlawful occupation of the property. He further argued that the applicants are not entitled to the relief sought on the papers because there exists a dispute of facts. The dispute of fact concerns the disputes about the validity of the lease agreement. According to him, the court is thus not able to resolve the dispute on the papers as they stand before it.

[18] Even if the version of the respondent that there is a valid lease agreement between him and the applicant, that does not sustain his legal status of occupying the property. He remains in unlawful occupation of the property in that he repudiated the very lease agreement that he placed reliance on for his occupation. In this respect, the deponent to the founding affidavit avers that:

"39.2. the Liquidators submitted that the aforesaid lease agreement is a simulated agreement contrived by the first respondent in order to prolong his long-term and unlawful occupation of the property; and

39.3. the Liquidators accepted the first respondent's repudiation of the purported lease agreement, which was evidenced by his failure to pay a single months rental thereunder from inception thereof to date, and to the extent that it may be found to be valid, which is, in any event, denied."

[19] In support of the above the applicant attached to the founding affidavit annexure "FA11," correspondence from their attorneys addressed to the respondent on 10 February 2020, which reads as follows:

"4. Our instructions are as follows:

4.1. We submit that the Purported Lease is nothing more than a simulated or bogus agreement contrived by you in an attempt to secure your long-term unlawful occupation of the property;

4.2. In any event, you have failed to make payment of the rental in terms of the Purported Lease; and

4.3. To the extent that it may be found that the terms of the Purported Lease are of any force or effect (which is denied), your failure to make payment of rental in terms thereof constitutes a repudiation of the Purported Lease. The liquidators, on behalf of Africa Management, hereby accept your repudiation."

[20] In response to the above, the respondent, in his answering affidavit in paragraph 31, simply makes a bare denial and insist that he has been paying rental since the inception of the lease agreement.

[21] In light of the above, the respondent is unlawfully occupying the property, and he has not proffered any sustainable defence. It

follows, therefore, that the applicant is entitled to the relief sought subject to the determination as to whether it would be just and equitable to evict him in terms of sections 4 (7) and (8) of Prevention of Eviction from the Unlawful Occupation of Land Act (PIE).[3]

[22] In interpreting the provisions of section 4 of PIE the Constitutional Court in *Occupiers, Berea v De Wet NO and Another*,[4] set out the enquiry to be conducted in determining whether an eviction order in term of section 4 of PIE should be granted in the following terms:

"First, it must decide whether it is just and equitable to grant an eviction order having regard to all relevant factors. Under section 4(7), those factors include the availability of alternative land or accommodation. The weight to be attached to that factor must be assessed in the light of the property owner's protected rights under section 25 of the Constitution and on the footing that a limitation of those rights in favour of the occupiers will ordinarily be limited in duration. Once the court decides that there is no defence to the claim for eviction and that it would be just and equitable to grant an eviction order, it is obliged to grant that order."

[45] The second enquiry, which the court must undertake before granting an eviction order, is to consider—

"what justice and equity demand in relation to the date of implementation of that order and it must consider what conditions must be attached to that order. In that second enquiry it must consider the impact of an eviction order on the occupiers and whether they may be rendered homeless thereby or need emergency assistance to relocate elsewhere. The order that it grants as a result of these two discrete enquiries is a single order. Accordingly, it cannot be granted until both enquiries have been undertaken and the conclusion reached that the grant of an eviction order, effective from a specified date, is just and equitable. Nor can the enquiry be concluded until the court is satisfied that it is in possession of all the information necessary to make both

findings based on justice and equity."

[23] In applying the above principles to the present matter, it is to be noted that I have already found that even if the lease agreement relied on by the respondent is accepted, he remains an illegal occupier. He repudiated the same lease agreement, which repudiation was accepted by the applicant. Accordingly, the respondent has no lawful right or entitlement to occupy the property.

[24] In my view, the facts and circumstances of this case support the proposition that it is just and equitable that the respondent should be evicted from the property. In this respect, the applicants raised this issue in paragraph 52 of the founding affidavit wherein the deponent to the founding affidavit avers as follows:

"52. To the best of my knowledge, the property is not a household headed by a woman, and there are no elderly women or disabled persons occupying the property. The Liquidators are not aware of the personal circumstances of the first respondent."

[25] In his answering affidavit, the applicant provides no evidence or information as to whether he is staying on the property with other

vulnerable people who may be negatively affected by the decision to evict him. He also provides no evidence or information about his circumstances and in particular, whether he will be rendered homeless by an eviction.

[26] For the above reasons, I find that it is just and equitable to order the eviction of the respondent, and it be done within thirty days from the date of the order. As concerning the costs I find it to have been unnecessary for the respondent to have opposed this application. I do not, however, agree with the applicant that the appropriate order should be punitive.

Order

[27] In the premises, the following order is made:

1. The first respondent, and all those who occupy the property described as Portion 4 of Erf 301 Hyde Park, Extension 12 Township, situate at 33 Ruth Road, Unit 4 Sherwood Estate, Hyde Park, Johannesburg (Property) through or under the first respondent, are to vacate the Property within 30 (thirty) days from the date of the granting of the order.
2. In the event of the first respondent and/or any person in occupation of the property, through or under the first respondent, failing to vacate the property in accordance with prayer 1 above, then and in that event, the Sheriff of the above Honourable Court be and is hereby authorised and directed, to evict the first respondent forthwith and/or any person in occupation of the property, through or under the first respondent, from the property.
3. The first respondent be ordered to pay the costs of this application on the party and party scale.

E MOLAHLEHI J

Judge of the High Court of South

Africa, Johannesburg

Representations:

For the applicant: Adv. M De Oliveria

Instructed by: Jason Michael smith Incorporated Attorneys

For the respondent: Adv. L Siyo

Instructed by: Petker and Associates Incorporated Attorneys

Hearing date: 27 July 2021

Delivered: 11 October 2021

[1] Act number 71 of 2008.

[2] Act number 71 of 2008.

[3] Act number 19 of 1998.

[4] 2017

(5) SA 346 (CC).

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