

SOUTH AFRICA / JUDGMENT

Hardisty and Another v Noor and Others (6885/16) [2016] ZAWCHC 168 (24 October 2016)

[2016] ZAWCHC 168

COURT

Western Cape High Court, Cape Town

BEFORE

Magona, AJ

CASE / FILE NUMBER

6885/16

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IN

THE HIGH COURT OF SOUTH AFRICA
(WESTERN
CAPE DIVISION, CAPE TOWN)

CASE

NO: 6885/16

In

the matter between:

GARY
NIGEL HARDISTY
First Applicant
JENNIFER
JANINE DOROTHY
HARDISTY
Second Applicant
and
AQEELAH
NOOR
First Respondent
THE
CITY OF CAPE TOWN
MUNICIPALITY
Second Defendant
MARWANN
NOOR
Third Respondent
Judgment
:

Magona, AJ
Coram
:
Magona, AJ
For
the Applicant
Attorney
Mr Eddie Roux
For
the Respondent
Attorney
Mr Gavin Langenhoven
Heard
on
06 September 2016
Judgment
delivered on 24
October 2016
GARY
NIGEL HARDISTY
First Applicant
THE
CITY OF CAPE TOWN
MUNICIPALITY
Second Defendant
MARWANN
NOOR
Third Respondent
Heard: 06
September 2016

Delivered: 24 October 2016

JUDGMENT

MAGONA, AJ:

INTRODUCTION

[1] This is an application for Summary Judgment against the First and Third Respondents (the Respondents). The Summary judgment

effectively seeks an order of ejectment, evicting the Respondent and every other person occupying the property situated at 46 Woodley

Road, Plumstead, Cape Town. (the Property) in terms of section 4 (1) of the Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998 (the PIE Act) .

- [2] This summary judgment application arises out of an action to which a claim for both damages and ejectment was sought. Before me however is only the Applicants merely seeking the ejectment order described above.

The appearances were as follows: Mr Roux appeared for the Applicants, and Mr Langenhoven for the Respondents.

FACTUAL

BACKGROUND

- [3] On 26 April 2016 the Applicant issued summons for the payment of damages and an ejectment order. The summons were served on the Third Respondent personally who received them on behalf of the First Respondent.
- [4] On 13 May 2016, the First Respondent filed a notice of intention to defend. On 25 May 2016, the Applicant filed a notice for a Summary Judgment Application set to be heard on 24 June 2016.
- [5] On 01 June 2016, under the same case number the Applicant filed An ex parte application seeking an order in terms of Section 4 (2) of the PIE Act (the S4(2) order) with a date of hearing set for 3 June 2016. The S4(2) order was granted on 3 June 2016.
- [6] On 07 June 2016, the S4 (2) order together with the ex parte notice in terms of Section 4 (2) was served on the First Respondent personally notifying her of the date of hearing as 24 June 2016. Part of the terms of the Section 4(2) order where clause 4 and 5 provides as follows:
- “4. That the Defendants be informed that an action procedure has been brought in terms of Section 4(1) of Act 19 of 1998, to evict the 1st Defendant, and /or any other person occupying The property, from the same; (sic)*
5. That the Defendants be informed that the date in which said proceeding will be heard will be on the 24th day of June 2016, or as soon thereafter as council may be heard, at the High Court of South Africa, Western Cape Division, Cape Town-Court No.16 High Court Building , 35 Keerom Street, Cape Town;” (sic)
- [7] It was brought to my attention by the parties that the Third Respondent was later on added to the proceedings by agreement between

them.

- [8] I turn to look at the various averments made for and against the application before me.

The Applicants' Contentions are:

[9] As stated before the Applicants seek an ejectment order based on their acquired ownership right to the property.

[10] Mr Roux, argued that they are the lawful owners of the property having purchased it at a sale in execution in November 2015. The Respondents and any other occupiers as stated above are illegal occupiers of the property; that they occupy the property without any form of consent from the Applicants.

That there is no bona fide defence to the relief sought.

[11] Further that the Applicants have complied with the provisions of the PIE Act and that the Respondents have no valid defence to the summary judgment sought.

The Respondents' Contentions are

[12] The Respondent raised points in limine that these should be looked at first before the actual defence raised against the summary

judgment

application can be considered for the dismissal of the application:

12.1 Mr Langenhoven argued that, firstly, the Applicants cannot seek an eviction order by way of action proceedings, they therefore approached this court improperly;

12.2 That, secondly, for Summary Judgment applications an applicant is not allowed to adduce further evidence in support of the application, that the Applicants have done exactly that;

[13] As to the summary Judgment sought, he argued that Rule 32 prerequisites were not strictly followed by the Applicants, but if

the court finds against these,

13.1 that the Respondent have a valid defence against the Applicants application which renders for leave to be granted or the application be dismissed. This defence I can succinctly put entails the Applicant bringing a rescission application against the default judgment that led to an execution order or also be granted where the house was eventually sold in execution and bought by the Respondents. Further

that they would attack the sale in execution which was not properly conducted. The details of these I will deal with where necessary

further in this judgment.

[14] Mr Langenhoven further argued that the Applicant failed to comply with the provisions of Section 4(1) and 4(2) of the PIE Act, prior to the action proceedings; That the S4(2) order obtained was never served on the First Respondent therefore including him in the proceedings as a party. That therefore the application was premature in that there was non-compliance with section 4(1) of the PIE Act.

THE

ISSUES

[15] Whether the Applicants are entitled to the Order sought?

[16] Whether can eviction proceedings be instituted by way of action procedure?

LEGAL PRINCIPLES

Action or motion proceedings

[17] In *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1555 (T) at 1161, gives a general position as to when a party can use motion proceedings as opposed to action proceedings.

“Two types of proceedings may be mentioned, as falling outside the scope of this enquiry. (1) There are certain types of proceedings (e.g. in connection with insolvency) in which my statute motion proceedings are especially authorized or directed: in these the matter must be decided upon affidavit and Rule 9 may permit viva voce evidence to be led in order to counteract any balance of probability appearing from affidavits.

(2) There are on the other hand certain classes of case (the instances given by Dowling, J are matrimonial causes and illiquid claims for damages) in which motion proceedings are not permissible at all. But between these two extremes there is an area in which (as I see the position) according to recognized practice a choice between motion proceedings and trial action is given according to whether there is or is not an absence of a real dispute between the parties on any material question of fact.”

Summary Judgment applications

[18] Rule 32(1) of the Uniform Rules of the High Court of South Africa provides as follows:

“(1) Where the defendant has delivered notice of intention to defend, the plaintiff may apply to court for summary judgment on each of such claims in the summons as is only-

- (a) on a liquid document;
- (b) for a liquidated amount in money;
- (c) for delivery of specified movable property; or
- (d) for ejectment;

together with any claim for interest and costs.”

[19] Rule 32 (4) provides as follows:

“(4) No evidence may be adduced by the Plaintiff otherwise than by the affidavit referred to in subrule (2), nor may either party cross-examine any person who gives evidence viva voce or on affidavit: Provided that the court may put to any person who gives oral evidence such questions as it considers may elucidate the matter.”

[20] Section 26(3) of the Constitution[1] provides as follows:

“No one may be evicted from their home or have their home demolished , without an order of court made after considering all the relevant circumstances...”

The Prevention of Illegal Eviction and Unlawful Occupation Act (PIE Act) provides as follows:

[21] Section 1 of the PIE Act defines the word “owner” to mean a “registered owner of land, including an organ of state;”

[22] The words “unlawful occupier” are defined 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”....

Section

S.4 (1)

Notwithstanding anything to the contrary contained in any law or the common law, the provisions of this section apply to proceedings by an owner or person in charge of land for the eviction of an unlawful occupier.

S.4 (2)

At least 14 days before the hearing of the proceedings contemplated in subsection (1), the court must serve written and effective notice of the proceedings on the unlawful occupier and the municipality having jurisdiction.

S.4 (5)

- (5) The notice of proceedings contemplated in subsection (2) must—
- (a) state that proceedings are being instituted in terms of subsection (1) for an order for the eviction of the unlawful occupier;
 - (b) indicate on what date and at what time the court will hear the proceedings;
 - (c) set out the grounds for the proposed eviction; and
 - (d) state that the unlawful occupier is entitled to appear before the court and defend the case and, where necessary, has the right to apply for legal aid.

S.4 (7)

If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women.

S.4 (8)

If the court is satisfied that all the requirements of this section have been complied with and that no valid defence has been raised by the unlawful occupier, it must grant an order for the eviction of the unlawful occupier, and determine—

- (a) a just and equitable date on which the unlawful occupier must vacate the land under the circumstances; and
- (b) the date on which an eviction order may be carried out if the unlawful occupier has not vacated the land on the date contemplated in paragraph (a)."

ANALYSIS

[23] Points in Limine

[24] Mr Langenhoven raised issues in limine which I will deal with before tackling the main issues if I find it necessary to do. The first of these points is:

Non- compliance with Rule 32

[25] That the filing of the eviction application papers amounted to "inclusion of any other facts" which are not contained in the summons which logically constitutes adducing further evidence a conduct prohibited by Rule 32(4).

[26] That the eviction applicaton ought not have been brought by way of action proceedings that therefore the application is improper before me; I will first deal with these issues in turn.

Rule 32 and adducing of further evidence

[27] The summons were served on 26 April 2016 to the Respondents for a claim sounding in money at first and an ejectment order, subsequent to the filing by the Respondents of their notice of intention to defend on 13 May 2016, the Applicant filed the notice of the Application for summary judgment together with the necessary affidavit verifying the cause of action and the claim and stating

that in his opinion there is no bona fide defence defence to the action and the notice to defend has been delivered solely for the purpose of delay.

In my view up to this point Appicant had complied with Rule 32(1) and 32(2).

[28] As stated before, Rule 32 (4) provides as follows:

“(4) No evidence may be adduced by the Plaintiff otherwise than by the affidavit referred to in subrule (2), nor may either party cross-examine any person who gives evidence viva voce or on affidavit: Provided that the court may put to any person who gives oral evidence such questions as it considers may elucidate the matter.” (my emphasis)

[29] It has been held that with summary Judgment applications it is an absolute prohibition to adduce further evidence in support of the application; a plaintiff must stand or fall by his/her verifying affidavit.[2]

[30] In casu, the Applicants moved for a Section 4(2) eviction application under the same case number as that of the action to which this summary judgment application is based.

[31] The papers of the section 4(2) notice and subsequent order granted on 03 June 2016 have been filed and form part of the summary

judgment

application. In my view this was “further evidence in support of the application” which is specifically prohibited by Rule 32(4).

[32] Mr Langenhoven’s argument that this shows that it was an improper use of the summary judgment procedure to obtain an eviction order. I agree.

[33] The rule was clearly designed to prevent a plaintiff’s claim, based upon certain causes of action, from being delayed by what amounts to an abuse of the process of the court.

I would also think that the converse should be acceptable to state that Subrule (4) is a safety measure however placed to prevent certain causes of action to be diverted improperly to Rule 32 applications, to what amounts to be an abuse of the process of the court.

[34] I further add that the ejectment sought in this matter before me is not one by way of common law where the test is less stringent. It is by way of the PIE Act which came about when the Constitution and land reform legislation placed severe restrictions on the common Law right to evict occupiers.

Proof of compliance with the requirements or the restrictions set by the legislature means an applicant must show or adduce evidence to a court to prove such compliance. Summary Judgment applications therefore would not be proper, as no other affidavit can be filed in support of summary judgment application as prohibited by Rule 32(4) described above.

[35] Further, in my view since the eviction herein relates to an immovable property used for dwelling purposes. It would not be proper for these kind of private or residential evictions to be moved by way of Summary Judgment application as they are not mere commercial property[3].

[36] In closing on this point, even if I were to ignore the Section 4(2) papers in toto, which I cannot, this would leave me with an application brought before me for the ejectment of individuals out of a residential property without compliance with the PIE Act as the common law does not apply in such instances. The application would still be improper.

There is a greater need to make sure that where the PIE Act applies summary judgment application is not the proper process to evict individuals out of a residential property.

[37] In all, it is my view that this Summary Judgment application is invalid as the procedure does not pass the requirements of Rule 32 for the order sought. The application therefore stands to be dismissed.

[38] I now tend to deal with the second point in limine.

Whether Action or Application Proceedings?

[39] As a starting point even though the case I am to look at below deals with the Magistrates' court jurisdiction and proceedings on PIE Act related matters that were brought by way of an application procedure: It bears to be mentioned that the Magistrates' Court

is a creature of statute and it already has the jurisdiction to make ejectment orders by way of action proceedings[4]. (my emphasis)

[40] Mr Langenhoven argued that Mr Roux had misconstrued the Nduna[5] judgment, that in that case Hlophe JP does not expressly accept that the Magistrates' court has the jurisdiction to hear eviction applications by way of summons, instead he pronounces that residential evictions are more appropriately brought by way of application. I do not agree, in my understanding of the judgment Hlophe JP dealt with the issue of jurisdiction in the following manner :

On the issue brought before him that the Magistrate had no authority to order an eviction order brought by way of motion as it is usually brought by way of action/summons only.[6]

Following the principle applied in *Pedro and others v Greater George Transitional Council* 2001 (2) SA 131 (C) where the full bench dealt with Section 4 eviction appeal proceedings initiated by way of motion as opposed to action procedure, that court assumed that the Magistrate did have the necessary jurisdiction to entertain eviction proceedings initiated on motion[7].

My emphasis

Hlophe JP also assumed that both action and application proceedings can be utilized in ejectment applications brought under PIE Act. At the bottom of paragraph [8] he pronounces :

Hlophe JP:

"...I am more than convinced that this Court was correct in assuming in the Pedro case that the magistrate's court has jurisdiction to entertain applications for ejectment brought under the PIE Act on motion

proceedings.”

[41] In my view therefore there was no need for Hlope JP to pronounce that the Magistrates’ Court had the power to hear ejectment or eviction matters by way of a summons procedure, as is a power granted to that Court by statute already.

[42] The judgment itself is authority to the fact that ejectment orders can also be moved for by way of application procedure. I would add that if it is a residential property one must make sure they apply with the provisions[8] of the PIE Act .

The Nduna judgment also assisted in the interpretation of the word “proceedings” which I need not repeat here[9] , that it should not be given a narrow meaning limiting it to only applications , but a wide one to include actions or vice versa.

[43] Mr Roux had also argued this point, that the word “proceedings” in terms of Section 4(1) of the Act should be given a wide meaning to include that eviction proceedings can be brought by way of action proceedings. I agree.

[44] To clarify however when it comes to the application like the one before me , I do not agree with Mr Roux’s approach of instituting the PIE Act eviction proceedings by way of summons and then divert them to a summary judgment application. I had already given my reasons above as to why I disagree.

[45] Returning to the Nduna principle, in my view Mr Langenhoven’s interpretation of Hlope JP’s finding is misconstrued. As I understand it the proper approach is this, that one can obtain an ejectment or eviction order in terms of PIE Act by way of either action or application proceedings, provided the requirements of the Act are met.

[46] Having made the above findings I am of the view that it would serve no purpose to deal with the further issues raised relating to the rest of the application as the summary judgment application which is the main application is found to be invalid.

[47] In closing, I will not make any comments on whether the eviction proceedings would have been successful or not if proper

procedure was followed that will perhaps be an issue to be decided by another court.

[48] I now turn to look at the issue of costs.

Costs

[49] In matters of this nature the Rule is clear that the court may make an order as to costs as to it may seem just[10], this is a wide discretion[11].

[50] The Applicants brought these proceedings improperly and the Respondents incurred costs in the circumstances. In the application of my discretion it would be fair that an order as to costs be borne by the Applicants.

[51] In the circumstances I make the following Order:

The Application for Summary Judgment is dismissed with costs.

MAGONA, AJ

- [1] The Republic of South Africa Constitution, Act 108 of 1996
- [2] *Rossouw v First Rand Bank Ltd* 2010 (6) SA 439 (SCA) at 451 A-B
- [3] *Ndlovu v Ngcobo; Bekker and Bosch v Jika* 2003(1) SA 113 (SCA)
- [4] Section 29(1)(b) of the Magistrates' Court Act 32 of 1944, with PIE Act conferring that court jurisdiction when it relates to PIE Act eviction proceedings
- [5] *Nduna v Absa Bank Ltd & Others*[2004] JOL 12733 (C); dealing with the jurisdiction of the Magistrates' Court in eviction

applications.

- [6] Paragraph 6 of that judgment
- [7] paragraph 7 of that judgment
- [8] The PIE Act Preamble, SS 9,4(1), and 5
- [9] Paragraph 10 of that judgment
- [10] Rule 32(9)
- [11] *Tredoux v Kellerman* 2010 (1) SA 160 AT 165 E

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