

SOUTH AFRICA / JUDGMENT

Islam v Kabir (CA : 280/2010)

[2011] ZAECHGC 9 (11 April 2011)

[2011] ZAECHGC 9

COURT

Eastern Cape High Court, Grahamstown

BEFORE

J.E Smith, A.E.B Dhlodhlo

CASE / FILE NUMBER

CA : 280/2010

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOWN

CA : 280/2010

Date Heard:25/03/2011

Date Delivered:11/04/11

In

the matter between:

MOKTAR

KARIM ISLAM

.....APPELLANT

Versus

HUMAYUN

KABIR

.....RESPONDENT

JUDGMENT

SMITH J:

- [1] This is an appeal against a judgment of the Grahamstown magistrate in terms of which she ordered the eviction of the appellant from a property described as House no: 7341, Extension 2, Phumlani Location Grahamstown (hereinafter “the premises”).

- [2] It is common cause that the premises comprised of two rooms, one of which was being utilized as a "spaza" shop and the other for residential purposes by the appellant. The appellant (who was the respondent in the court a quo) had taken the point that the application was fatally defective for want of compliance with the provisions of the Prevention of Illegal Eviction from unlawful occupation of Land, Act no 19 of 1998 (hereinafter "PIE").
- [3] It appears that the magistrate had correctly found on the basis of the judgment in the matters of *Ndlovu v Ngcobo*, *Bekker and Another v Jika* 2003 (1) SA 113 (SCA), that the provisions of PIE were not applicable to that portion of the premises which was being used for commercial purposes, namely for a 'spaza' shop.
- [4] Although her reasons for judgment seem ambivalent in this regard, it does appear from the court order that she had intended to order the appellant's eviction only from that portion of the premises which was being used for commercial purposes. The relevant portion of the order reads as follows:

"The Respondent, Moktar Karim Islam, be evicted from the section of the property used for the purposes of conducting the business of a spaza shop ..."

Paragraph 2 of the order also refers to 'the described section' of the property.

- [5] The appellant's notice of motion was initially based on the assumption that the magistrate had ordered his eviction from the entire premises. This was clearly not the case and unsurprisingly at the hearing of the appeal the appellant applied for an amendment to reflect the correct position. Mr Voultsos, who appeared for the appellant, however nevertheless persisted with his argument that the magistrate was wrong in holding that PIE was not of application. In my view there is no merit in this argument. As I have

stated earlier, it is common cause that the magistrate had in effect refused the order for eviction from that portion of the property

which was being used for residential purposes. This was obviously based on the finding that PIE was of application to that portion of the premises. She then subsequently, in my view, correctly found that PIE was not of application to that part of the premises which was being used for the commercial purposes.

- [6] The respondent sought the relief in the court a quo on the basis of the following allegations:

[6.1] The respondent had entered into a written lease agreement in respect of the premises with the owner, one Mr Elvis Madondile Mpepo. The lease commenced on 1 April 2008 and would terminate on 31 March 2012.

[6.2] He commenced to operate a "spaza" shop from the premises with effect from 12 April 2008.

[6.3] During June 2009 he appointed the appellant to manage the business. During September 2009 he noticed that the business was suffering substantial financial losses and he confronted the appellant who assured him that it was just because “business was bad”.

[6.4] Things however did not improve and he had to approach the appellant on various occasions thereafter. It appears however that the relationship thereafter soured considerably to the extent that the respondent instructed his attorney to address a letter to the appellant confirming that he had been dismissed and demanding that he vacated the premises by 14 January 2010. The appellant never responded to this letter and also did not vacate the premises.

- [7] The appellant’s answering papers introduced massive disputes of fact. His version was that the premises comprise of two separate buildings, one of which was being used by the owner for residential purposes and the other a two-roomed structure, is where he conducts the "spaza" shop from and also lives in. He uses one room for the "spaza" shop and lives in the other. It was for this reason that the appellant averred that the provisions of PIE were of application.
- [8] The appellant furthermore denied that he had been employed by the respondent and stated that they were business partners and that it was always understood that the lease would be for their mutual benefit even though the respondent was the designated lessee.
- [9] During 2009 the respondent opened another shop in Extension 6, Grahamstown. They then agreed that the partnership would be terminated and that they would each go their own separate ways. He had paid to the respondent R45 000.00 and R18 400.00 respectively, as quid pro quo for his share in the business. He has effectively been conducting the business from the premises for his own account since 1 September 2009.
- [10] He subsequently informed Mr Mpepo about the dissolution of the partnership and that he would henceforth be conducting the business for his own account. Mr Mpepo agreed to enter into a lease agreement with him. The agreement was initially oral and was subsequently reduced to writing with effect from 11 January 2010.
- [11] The appellant also filed a confirmatory affidavit by Mr Mpepo wherein he confirmed that he had cancelled the lease agreement with the respondent on the ground of numerous breaches by the respondent with effect from 25 January 2010. He also stated that he had entered into a binding written lease with the appellant in respect of the premises. A copy of that lease agreement was duly annexed to the papers.
- [12] It appears from the magistrate’s reasons for judgment that after she had found for the respondent on the point in limine, instead of proceeding to consider the merits of the application, she simply granted judgment in favour of the respondent. In my view this was a serious misdirection on her part.
- [13] The appellant had taken the point in limine that the application was fatally defective because of the respondent’s failure to comply with the procedures prescribed by PIE. If the appellant’s arguments were upheld then it would have been *cadit quaestio* and the

application should have been dismissed. If however, as was the case here, the point in limine was dismissed, it did not automatically follow that the application should succeed. It was still incumbent on the magistrate to decide, on the basis of the evidence before her, whether or not the respondent had in fact made out a case for the relief which he sought.

- [14] As must have been apparent from my summary of the facts, there were indeed real and substantial disputes of fact in this matter. The respondent did not apply for any of these issues to be referred for oral evidence and the magistrate was therefore constrained to decide the matter on the basis of the papers before her.
- [15] Now it is trite law that where in application proceedings there are disputes of fact which cannot be decided without the hearing of oral evidence the court has a discretion to either: (i) dismiss the application with costs; (ii) order that oral evidence be heard in terms of the rules or; (iii) order the parties to go for trial. Rule 55(2) of the Magistrates Court Rules provides that a court may receive either viva voce evidence or by way of affidavit and try the issues in dispute in a summary manner or order that the issues be tried by way of action. Where the disputed issues have not been referred for oral evidence, the court may grant relief only if those facts averred in the applicant's affidavits, which have been admitted by the respondent, together with the facts alleged by the respondent justify such an order. See *Plascon Evans Paints v Van Riebeck Paints (Pty) LTD* [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634A-I. Also *Stellenbosch Farmers' Winery LTD v Stellenvale Winery (Pty) LTD* 1957 (4) SA 234 (C).
- [16] Ms Watt, who appeared on behalf of the Respondent, submitted that the dispute regarding the existence of a partnership should be resolved in favour of the Respondent for the following reasons:

[16.1] The appellant has averred that the parties had jointly purchased the business from one Abdul in terms of a written agreement, yet failed to annex a copy of the agreement;

[16.2] The appellant was not a party to the lease agreement. The lease was with effect from 1 April 2008, which is the date from which the appellant alleged the partnership existed.

She submitted that these facts, which are common cause, render the appellant's version improbable.

- [17] I do not agree. Where in application proceedings there is a dispute of fact which has to be resolved on the papers and on the basis of the principle enunciated in the *Plascon Evans Paints* matter (*supra*), the court can only reject the version of the respondent if the absence of bona fides is abundantly clear and manifest and substantially beyond question. See: *Reynolds v Mecklenberg* 1996 (1) SA 75 (W). The court must therefore be convinced that the allegations of the respondent are so far-fetched or clearly untenable that it is justified in rejecting them merely on the papers. See in this regard *Plascon-Evans Paints* (*supra*).

[18] I am not convinced that the facts in this matter justify such a drastic finding. I am in the event of the view that the respondent's actions were not suggestive of someone who was dealing with his employee, but rather of a relationship based on equality. On his own version he had already noticed that there were stock losses of about R61 000-00. He confronted the appellant but despite not getting a satisfactory explanation decided to give him another chance. When at the end of September and October 2009 there had not been any improvement he again confronted the appellant. On this occasion the appellant became angry and told him to leave the shop – hardly the actions of someone who regarded himself as an employee. The respondent's actions were even more incongruous. Despite having been chased out of his own shop by his employee, he does nothing about the matter until 10 January 2010 when he again confronts the appellant. He was again chased out of the shop. In my view the actions of both parties were more indicative of disgruntled business partners than those of employer and employee. I also do not agree with Ms Watt's submission that Mpepo's averments in this regard should be ignored. Mpepo stated that he was initially approached by the appellant on the basis that he and the respondent were business partners and were in the process of purchasing the business. His evidence in this regard is clearly

relevant and further supports the appellant's assertion that he and the respondent were business partners.

[19] Ms Watt also argued that Mpepo's allegations regarding the cancellation of the lease should be disregarded because there has not been any compliance with the contractual terms and conditions relating to notices in the event of a breach. She submitted therefore that both the purported cancellation of his lease and the subsequent conclusion of a lease with the appellant are therefore invalid. On Ms Watt's argument the letter purporting to terminate the lease and the subsequent conclusion of a lease with the appellant in respect of the same premises would have amounted to an unequivocal repudiation of the contract by Mpepo, entitling the respondent to the usual contractual remedies. Whether or not the respondent has effectively accepted this repudiation is however an issue between him and Mr Mpepo and we would only be required to rule on that issue if it is strictly speaking necessary in order to decide this matter. In my view, in the light of my finding that the parties were business partners and that the appellant had paid the respondent for his share in the business, the appellant would in the event be entitled to occupy the premises even if the original lease was still in existence. For this reason I am of the view that it is not necessary for us to decide this issue.

[20] If the facts in this matter are approached on the basis of the aforementioned legal principles then the following become abundantly clear:

[20.1] The parties were business partners and appellant had purchased the respondent's share of the business. The appellant has been operating the business from the premises for his own account with effect from 1 September 2009.

[20.3] The appellant has therefore established that he had a legal right to remain in occupation of the premises.

[21] I am therefore of the view that the facts put up by the appellant in his answering affidavit effectively trumped the respondent's version in all material respects and that there would in the event not have been any legal basis for the magistrate to refer the matter for oral evidence or to call for further affidavits, either mero motu or on application by the respondent. When approached on the basis of the Plascon – Evans Paints principle the probabilities are overwhelmingly in favour of the appellant.

[22] For these reasons I am of the view that the magistrate should have dismissed the application with costs.

[23] In the result I am of the view that the appeal should succeed.

[24] The magistrate's order is therefore set aside and there is substituted in its place the following order:

(a) The application is dismissed with costs.

J.E SMITH

JUDGE OF THE HIGH COURT

I agree it is so ordered.

DHLODHLO ADJP

A.E.B DHLODHLO

ACTING DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

Appearances

Counsel for the Appellant : Advocate L Voultsos

Attorneys for the Appellant : Mssrs Borman & Botha

22 Hill Street

Grahamstown

6140

Ref: Mr. Powers/Ms Mahlati

Counsel for the Respondent : Advocate K. Watt

Attorneys for the Respondent : Wheeldon Rushmere & Cole

119 High Street

Date Heard : 25 March 2011

Date Delivered : 14 April 2011

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAECGHC/2011/9.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/islam-v-kabir-unknown-topic-aecghc-2011--6a3ea51d3b1caa9129813b07>

Prepared on 12 October 2026 · Esheria