

SOUTH AFRICA / JUDGMENT

Ives v Rajah (A205/2011) [2011] ZAWCHC 390; 2012 (2) SA 167 (WCC) (23 September 2011) [2011] ZAWCHC 390

COURT

Western Cape High Court, Cape Town

BEFORE

Zondi, Rogers

CASE / FILE NUMBER

A205/2011

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No. A205/2011

In the matter between:

DEBORAH IVESAppellant

and

NAWAAL RAJAHFirst Respondent

Coram: ZONDI J et ROGERS A J

Judgment:

ROGERS AJ

Heard: 16 September 2011

Delivered: 23 September 2011

For the Appellant: AdvL Wilken

As instructed by: Van Niekerk Groenewoud & Van Zyl

(Ref: SWPienaar)

For the Respondent: Adv RB Engela

As Instructed by: Heyns & Partners Inc (Ref: Mr AJ Van Greunen)

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Appeal Case No: A205/2011

In the matter between

DEBORA IVESAppellant

NAWAAL RAJAHRespondent

JUDGMENT: 23 SEPTEMBER 2011

ROGERS AJ

1. The appellant ("Ives") appeals against an eviction order granted against her by the Bellville Magistrate's Court at the instance of the respondent in the appeal ("Rajah"). The grounds of appeal in summary are [a] that the magistrate erred in finding that it would be just and equitable to evict Ives, having regard to her personal circumstances and [b] that the magistrate erred by finalising the matter in the absence of sufficient information, particularly having regard to the alleged inadequacy of the report filed by the local authority, the City of Cape Town ("the City").
2. The property from which Rajah applied to evict Ives is a residential dwelling at 43 Van Eyssen Street, Glen Lily, Parow ("the property"). This property, which for many years belonged to Ives' parents, was the home where she grew up. She inherited it from her mother in 1995. In 2003 she sold the property to a Mr Johan Kotze ("Kotze"), a family friend, for R175 000. She continued to live in the house, according to her on the basis of a promise by Kotze that she could occupy the property for life. No interest of this kind was registered against the title deed.
3. Kotze bonded the property to Standard Bank. He must have defaulted on his obligations, because on 18 September 2009 the bank caused the property to be sold in execution. Rajah bought it at the execution sale for R276 000. She was unaware of the history of the property and of Ives' transaction with Kotze. In terms of the conditions of sale signed by Rajah, the sheriff sold the property to her free of any leases and on the basis that she was at her own expense to evict (if necessary) any occupants of the property.
4. At the time of the execution sale Ives and her brother George were in occupation of the property. A few days after the sale Rajah's husband visited the property to ascertain when Ives and her brother would be vacating. They said they were seeking alternative accommodation and requested an indulgence. Rajah agreed to allow them to remain in occupation until the end of October 2009 against payment of one month's rent of R1 000.
5. Ives and her brother failed to pay the rent and failed to vacate by 31 October

2009. Subsequent requests that they should leave were not heeded. A formal letter of demand dated 19 January 2010 was followed in May 2010 by the initiation of proceedings for eviction in terms of s4 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("PIE").
6. In an answering affidavit Ives referred to her long occupation of the property and the transaction with Kotze. She alleged that Kotze had "tricked" her by paying her much less than the property was worth. As to her personal circumstances, she said she suffered from acute arthritis, having been involved in a motor accident, and was confined to a wheelchair. She was a single woman whose sole income was a disability grant of R1 010 per month. As a result of the distress caused by her physical disability and financial position she was on antidepressants and under the care of the Parow Clinic. She had no alternative accommodation. She had made enquiries from various homes for the aged but they were either full or not able to accept people with disabilities.
 7. Ives also said that the court should be loathe to grant an eviction order without a report from the City. Rajah then took the initiative of applying to the court a quo for a direction that the City file such a report. An order to this effect was made on 23 June 2010 and the report was issued on 20 September 2010. The City's report was annexed to Rajah's replying affidavit. The report stated that Ives was not on the City's waiting list for housing and that the City was unable to accommodate her under any of its temporary and emergency housing programs.
 8. By the time the matter was argued in the court a quo on 11 October 2010 Ives' brother had vacated the property. At the hearing Ives was represented by an attorney, Ms Allen, pro bono at the request of the Cape Law Society. In her submissions Ms Allen mentioned certain further personal circumstances which had not been stated in Ives' affidavit, namely that she was 51 years old and had no dependants. Ms Allen also mentioned that although Ives had an older sister, the latter's home was not large enough to allow Ives to move in there.
 9. After hearing argument the magistrate granted an eviction order. In accordance with s4(8) of PIE he determined the dates of 15 January 2011 and 29 January 2011 as the dates respectively on which Ives should vacate and on which the eviction order could be executed if Ives failed to vacate.

The appeal hearing

10. Mr Wilkin, who appeared for Ives at the appeal, conceded that Rajah was entitled to an eviction order. His argument was that in the absence of further information from the City the magistrate had not been in a position to determine a just and equitable date by which Ives should be required to vacate as contemplated in s4(8) of PIE. He criticised the City's report as a standard report which failed to address Ives' particular circumstances. He also submitted (while conceding that this was not covered by the notice of appeal) that there had been no engagement between the City and Ives.

11. In advance of the appeal hearing this court requested the parties to communicate to the City a request that the City be represented at the hearing of the appeal (whether by a legal representative or municipal official) so that the court could be placed in possession of any additional information thought necessary for the just disposition of the appeal. Ms J Kotze, the City's Director: Strategy, Support & Coordination, who was also the author of the report filed by the City in the court a quo, attended the hearing. We asked her to explain and amplify certain aspects of the City's report. The court wishes to express its thanks to Ms Kotze for responding to the court's request at such short notice.
12. For present purposes the important aspects of the City's report as amplified by Ms Kotze at the appeal hearing are the following:

[a] The City provides what can be described as ordinary housing by way of rental stock. There is a distressingly long waiting list for this accommodation going back to the mid-1980s (about 310 000 households). All of these households currently have inadequate housing, mainly in informal settlements. Ives has at no time placed her name on the waiting list.

[b] When new subsidised housing projects are ready for occupation, the City allocates them to those on the waiting list. In each new project 5% of the accommodation is earmarked for people on the waiting list with disabilities. The corresponding units are adapted to the needs of disabled people (ramps, wider passages and so forth). The waiting list of persons in the disabled category is also distressingly long. In Ms Kotze's view, Ives' physical disability does not put her in any special category in this regard.

[c] The City also has emergency accommodation programs for people displaced by fire, floods or evicted from unsafe or hazardous areas. Emergency accommodation is, as with the formal housing, over-subscribed. The result is that emergency occupation also has to be provided in temporary housing actually established to accommodate people while the areas in which they are to be permanently housed are prepared (so called TRAs). The TRAs are also over-subscribed.

[d] The City has fully allocated all funding available to it in respect of housing.

[e] Despite the further information concerning Ives' personal circumstances which were made known to her in advance of the appeal hearing, Ms Kotze was quite adamant that the conclusions in the City's report as filed in the court a quo remained the same, namely the City simply could not provide Ives with accommodation.

13. Mr Wilkin found it difficult to resist the conclusion that the City was not able to assist Ives and that further consideration of her circumstances would not lead to a different conclusion. He also said that temporary and emergency accommodation would not be suitable for Ives, given her disability. He nevertheless argued that the matter should be remitted to the magistrate to obtain a fuller report from the City, since it was important for the court should send out a message that it is not sufficient for local authorities to furnish generalised and standard reports; they must address the occupier's particular circumstances and be proactive in engaging with the occupier.

Analysis

14. Section 4(7) of PIE reads as follows (my underlining):

"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^

15. In paragraph 10 of the majority judgment in *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA) there is an obiter assumption that the effect of s4(7) is that where land has been sold in execution pursuant to a mortgage both the question of alternative land and the rights of the elderly and so forth are rendered irrelevant. It was observed that this appeared, when read in the light of s4(6), to give rise to an inexplicable anomaly, because it put persons who have been in unlawful occupation for longer than six months in a worse position than persons who have been in unlawful occupation for less than six months.

16. In my respectful view, the said assumption in *Ndlovu* is unsound. The repetition of the word "including" and the placing of a comma before each of them leads to the conclusion that on the natural and grammatical meaning of s4(7) the "except" clause applies only to the first "including" phrase. In other words, where there is the sale of mortgaged property in execution the question of alternative land is excluded as a relevant consideration but the rights of the elderly and so forth must still be taken into account. This removes the anomaly that was thought to exist between s4(6) and 4(7).

17. In the present case, Rajah bought the property at a sale in execution pursuant to a mortgage. Mr Wilkin argued that the "except" phrase applied only where the unlawful occupier was the person who had mortgaged the property and thus placed his asset at risk. I reject that interpretation. I find nothing in s4(7) to justify such an interpretation. It would require one to read into s4(7) a qualification which simply is not there. There are many instances where people occupy property without being the mortgagors: for example, a lessee, or a member of a family where the property is owned by a family trust or by a family company. If the lawmaker had intended these cases to fall outside the "except" clause much clearer language would have been used.

18. There is the further consideration that in s6(1) there is also an "except" phrase but it is differently formulated. It reads "except where the unlawful occupier is a mortgagor and the land in question is sold in execution pursuant to a mortgage". The words I have underlined do not appear in the "except" clause in s4(7). The purpose of the "except" clause in s6(1) is obscure (see *Ndlovu* paragraph 8) but one cannot ignore the fact that the very words which Mr Wilkin's argument would require one to read into s4(7) are the words which the lawmaker chose to insert in s6(1) but not in s4(7).

19. The last two sentences in paragraph 9 of the majority judgment in Ndlovu are, I think, at odds with Mr Wilkin's submission. Harms JA said that the "except" clause meant that if land was sold in execution the court was to exclude the specified circumstances: "It has nothing to do with the question of holding over by a mortgagor" (ie the "except" clause is not dealing specifically with an unlawful occupier who is the mortgagor). The point with which Harms JA was dealing (and which he rejected) was the argument (by the ultimately successful party in the appeal) that the "except" clause in s4(7) was a textual indicium that the lawmaker must have intended PIE to apply to a person who mortgaged his property as owner (and thus been in lawful occupation) and whose occupation thereafter became unlawful because of a sale in execution. If the "except"

clause on a proper interpretation was concerned with (and concerned only with, as Mr Wilkin argues) the unlawful occupier who had previously mortgaged his property, the clause would indeed have been a powerful, even decisive, textual indicium in favour of the applicability of PIE to cases of unlawful holding-over (as the full bench in the Bekker case had indeed held - see 2002 (4) SA 508 (E) at 521B per Somyalo JP and at 523I-524D per Jennett J). Yet this was the very interpretation of the clause which Harms JA rejected (even though for other reasons he nevertheless concluded that PIE applied to cases of unlawful holding-over). In this respect, the majority and minority were in agreement, except that in view of his overall conclusion Olivier JA (with whom Nienaber JA concurred) held that s4(7) referred only to the non-mortgagor occupier, PIE on his view being inapplicable to holding-over altogether (paragraphs 94-96).

20. The legislative purpose behind the "except" clause in s4(7) is, I believe, to ensure that the provision of finance for the acquisition of property by way of mortgage loans is not put in jeopardy or made more expensive by the risk that purchasers who buy distressed mortgaged properties at sales in execution will struggle to obtain vacant occupation. If that risk were not removed, potential buyers would be discouraged from bidding or would offer lower prices. This in turn would increase the lending risk for the banks. If the policy behind the "except" clause is as I have described, there would be no justification for interpreting it in the restrictive manner suggested by Mr Wilkin.
21. The first "including" phrase, with its requirement to consider whether the local authority or others can make alternative land available, is thus not applicable in the present matter.
22. However, the second "including" phrase remains applicable to Ives' case. I would not regard her as an "elderly" person nor, although she is a woman, does she head a household (she lives on her own). She is, however, "disabled", though she provided relatively little information to the court as to the extent of this disability. One would not expect a person with acute arthritis to be completely immobilised. It appears

that she has been living in Rajah's property for some time without any nursing or other assistance.

23. Where the occupier is, as here, disabled, the question arises as to how her rights are required by s4(7) to be considered by the evicting court, having regard to the simultaneous exclusion from consideration of the question whether alternative land is available for the occupier. It seems to me that where the eviction of a disabled person is under consideration, a relevant factor must inevitably be whether the person will on eviction have somewhere else suitable to go. In that way, the question of alternative accommodation enters the picture, through the backdoor as it were.
24. Nevertheless, the evicting court must respect the policy of the lawmaker that execution sales of mortgaged property are intended to result in the buyer obtaining vacant occupation. The question of alternative accommodation should thus not necessarily receive the same weight in such a case as it might if the disabled person were in occupation of property which had not been sold in execution. Furthermore, the question of alternative accommodation would, in the case of the disabled person, not have to be dealt with in the context of a statutory provision which expressly requires the court to consider whether the local authority could provide accommodation.
25. I thus do not think that the developing jurisprudence of our courts in relation to the investigation of alternative accommodation and the reporting by and engagement with local authorities can without more be transposed to cases such as the present where the question arises not in relation to the first "including" phrase but only as an aspect of the consideration of the rights of disabled persons. It is thus unnecessary to consider whether and to what extent this court should endorse the approach set out in the recent decision of the Land Claims Court in *Diedericks v Univeg Operation South Africa (Pty) Ltd t/a Heldervue Estates* [2011] ZALCC 11, to which Mr Wilkin referred us.
26. The position in the present case is that Ives has been in unlawful occupation since the end of October 2009, a period of nearly two years. If she considered that the City or some other public agency had a duty and the potential capacity to take care of her, she could long since have taken the initiative to engage with the relevant agencies (cf *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg & Others* [2008] ZACC 1; 2008 (3) SA 208 (CC) paragraph 20). Instead, she appears to have sat back and criticised Rajah and the court a quo for having failed to elicit further information. The duration of her unlawful occupation, the fact that she is unable to pay rent to compensate Rajah, and her failure in these circumstances to be proactive in finding a solution are matters which can properly be taken into account in assessing what is just and equitable.
27. A further relevant consideration, which calls into question Ives' main ground of appeal, is that in the report filed in the court a quo the City offered to provide further information if requested. Ives and her attorney did not ask the City to provide further information.

During argument before the magistrate this aspect was discussed. There was a recognition by the magistrate and Ms Allen that the

City's report was a standard report in the sense that it was very similar to others filed in similar cases. (To my mind, this is not necessarily a fault.) The magistrate asked Ms Allen whether she wanted him to ask the City to come to court to elaborate, though he expressed doubt whether it would help. Ms Allen's reply was that she did not think it would change the submissions in the report.

28. Despite this attitude adopted by Ives' attorney and the court a quo, this court took the step that Ives declined in the court below, and requested the City to be represented at the hearing. From what we were told it seems clear enough that further information from and engagement with the City would not have yielded, as an outcome, the provision of any, let alone suitable, accommodation for Ives.
29. This is not a case such as *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd & Another* [2011] ZASCA 47 where the eviction proceedings assumed the character of a review to impeach the municipality's housing policy on grounds of irrationality

and discrimination. Ives has not alleged that the City's policies and programs in the present case are impeachable. The complaint is that Ives' personal circumstances were not sufficiently considered. However, if it was not clear before, it was clear by the end of the appeal hearing that knowledge of those circumstances and further engagement with Ives would not have led to a different

conclusion.

30. I think one needs to guard against placing unrealistic burdens on local authorities in eviction matters, particularly since the wording of the statute does not compel one to do so. A large municipality's housing policies and programs must inevitably deal with classes of people and classes of problems. These must be rationally defined in a manner that accords with the Constitution. Provided the policies and programs pass constitutional muster, the municipality should generally be entitled to act in accordance therewith. Special problems may arise, particularly where communities of displaced people are concerned, but I venture to suggest that generally speaking casuistic decision-making, based on each individual case, is the very antithesis of rational government. It is haphazard and calculated in the long run to cause unfairness and discontent. I agree with the observation by Binns-Ward J in *Omar NO v Omar & Others* [2010] ZAWCHC 91 that the provisions of PIE do not place a responsibility on municipalities to involve themselves in the detail of the possible consequences of every eviction case (paragraph 19). The learned judge later indicated that the nature of the input required from a local authority will generally be more extensive when the municipality itself seeks the eviction or where the eviction of communities of landless persons are concerned (paragraphs 22-24).

31. The present matter is a case in point. It might ease the consciences of those involved with this particular case to solve Ives' unfortunate predicament by putting pressure on the City to find something for her. But although Ives has her own particular set of problems, the same is true for tens of thousands of others on the City's waiting list. We know from what Ms Kotze told us that there is a lengthy waiting list which includes disabled persons, many of whose circumstances I have no doubt are as bad or worse than Ives'. To force the City to come up with a solution for Ives and for the relatively small number of other evictees who press their cases as hard as she has done is calculated to cause injustice to all those who are waiting their turn. I cannot see that it is reasonable towards the City, or fair to the 315 000 households awaiting adequate housing, that the City should have to trawl through its waiting list of 315 000 households every time an individual is faced with eviction in order to determine whether the potential evictee's circumstances are more dire than those of anyone else on the list and whether for this reason an exception should be made for the evictee. Those responsible for the housing function within the City might, in that event, be left with little time to do anything else. I doubt in any event whether such a process of rational comparison would be possible. Many people have been on the waiting list for more than 20 years. It is unrealistic to suppose that the City will have sufficiently precise information about the personal circumstances of all the persons making up the 315 000 households to enable meaningful comparisons to be made between their circumstances and those of any individual evictee.
32. I must emphasise that these remarks relate to the duties of local authorities when notified of a pending application for eviction, particularly the eviction of individuals rather than communities. The fact that it may not be reasonable to expect the local authority exhaustively to assess each individual occupier's circumstances does not relieve the court of the duty to have regard to the specific circumstances of the case in determining what would be just and equitable in a particular case (cf *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7; 2005
- (1) SA 217 (CC) paragraphs 33-34).
33. When all is said and done, Mr Wilkin accepted that Ives' eviction as such cannot be disturbed. He acknowledged that Rajah cannot be forced to accommodate Ives (for no rent, I would add) until something else can be found (which may be never). Ives has had nearly two years of unlawful occupation at Rajah's expense. Mr Engela, who appeared for Rajah at the appeal, said that his client was willing to afford Ives a final period of grace of three months. In the circumstances, I regard this as a generous and commendable gesture by his client. Even if there appeared to be a prospect that further engagement with the City might yield fruit, I do not consider that the magistrate erred in granting the eviction order on the terms he did. However, it is by now clear that there is in fact no such prospect.
34. The present case is thus, in the event, one of no doubt many where, despite the efforts of the various spheres of government to progressively realise the right to housing guaranteed by s26 of the Constitution, the State cannot provide Ives with accommodation. Section 26 of the

Constitution does not afford a right to unlawful occupiers to resist eviction, even though this may result in homelessness (see Omar supra paragraph 64). The court cannot indefinitely defer Rajah's right to vacant occupation. Ives' interests have already been taken into account in the period of grace she was initially afforded by Rajah, by the further period it took for eviction proceedings to be

brought and finalised in the court a quo, by the further period which the court a quo granted, and finally by the further period of grace tendered by Rajah at the appeal. As with many other evictees in similar circumstances, Ives is going to have to depend on family and friends to assist her (cf Transnet (Pty) Ltd v Zaaïman & Others [2008]ZAECHC 17 paragraphs 45-47).

35. Ives filed her notice of appeal more than two months late and on the very day before the date which the magistrate had authorised for the execution of the eviction. An application for condonation was delivered on 1 September

2011. Since Mr Engela for Rajah did not oppose the request for condonation I think the application should be granted but the appeal itself should be dismissed.

36. I concur. The order of this court is as follows:

The appellant's application for condonation is granted, the appellant to bear any costs associated therewith.

The appeal is dismissed with costs, save that the dates specified by the court a quo in terms of s4(8) are modified as set out in (c) ad (d) below.

The appellant is to vacate the property by not later than Friday 30 December 2011.

[d] If the appellant has not vacated the property by the said date, the eviction may be carried out on Friday 6 January 2012.

ZONDI J

23 September 2011

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