

SOUTH AFRICA / JUDGMENT

Jordan v Lowery (2249/2010)

[2011] ZAECPEHC 17 (12 May 2011)

[2011] ZAECPEHC 17**COURT**

Eastern Cape High Court, Port Elizabeth

BEFORE

N G Beshe

CASE / FILE NUMBER

2249/2010

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****(EASTERN****CAPE – PORT ELIZABETH)****CASE****NO.: 2249/2010**

In the matter between:

JANET VERA JORDAN

.....Applicant

And

EMILY DAISY LOWERY

.....Respondent

JUDGMENT**BESHE J:**

- [1] The applicant in this matter issued a notice of motion claiming the eviction of the respondent from a property situated at 23 Thembani Road, Greenbushes, Port Elizabeth (the property).
- [2] Applicant contends that she is entitled to the order for the eviction of the respondent on the basis that:
- (a) Respondent does not have her consent to occupy the property.
 - (b) Does not have a right to the land.

- (c) The lease agreement in terms of which she occupied the property has been cancelled.
 - (d) She has failed or refused to vacate the property when requested to do so by the applicant.
 - (e) Her actions in occupying the property make it impossible for the applicant to sell the property.
 - (f) Her actions in occupying the property are making it impossible for the applicant to enjoy the use of her property.
 - (g) It is in the public interest that she vacates or be evicted from the property.
- [3] The application is opposed by the respondent on the basis that her rights in and to the property derive from habitatio and not from her being a tenant.
- [4] The background to this matter is that applicant bought the property in question from one Audra Du Toit on the 5th of June 2006. Clause 10 of the agreement entered into between the applicant and Audra Du Toit, (Deed of Sale) contains special terms and conditions that are applicable to the agreement. Clause 10.1 stipulates that the purchaser hereby acknowledges that the seller's aunt, Mrs Emily Daisy Lowery (the respondent in this matter) is living in the property and will remain so living in the property until her death or until such time as she vacates the premises and confirms that she takes over all liabilities that the seller may have towards the said Mrs Emily Daisy Lowery.
- [5] It is common cause that on the 14th of June 2006 the parties added an addendum to the Deed of Sale whereby they recalled that no right of habitatio will be registered against the property, and that the respondent will be regarded as a non-paying tenant with all rights and obligations normally associated with a non-paying tenant. The terms and conditions of the addendum were accepted by the respondent. The Deed of Sale was signed by the seller, purchaser (applicant) and the respondent.
- [6] It is further common cause that applicant and respondent concluded a further oral agreement at the time of the sale of the property in terms of which it was agreed that respondent will pay half of the monthly electricity consumption charges. That it was part of the agreement that the respondent would in all respects as a tenant conduct herself in a manner required of her by law as such. That it was agreed between the parties that should the respondent breach any term of the agreement, applicant would be entitled to cancel the agreement and claim eviction.
- [7] It is also common cause that respondent continued living in the property together with the applicant after the latter had purchased the property.
- [8] It would appear that from as far back as 2007 the relations between the applicant and the respondent became acrimonious.

- [9] In her founding affidavit, applicant avers that the respondent has breached their agreement in that she failed to pay half of the electricity consumption; and that to this end she obtained a judgment against her in 2008. She is still paying erratically. That she has generally conducted herself in a manner which is inconsistent with that required of a tenant, which has made the continued occupation of the property by the applicant intolerable, by inter alia, abusing her on a regular basis, assaulting her, repeatedly brought broiler chickens onto the property against applicant's instructions or wishes, burning refuse in the property and cutting down trees.
- [10] In her answering affidavit respondent denies that she had defaulted in payments for electricity after she was ordered by court to do so. She alleges that applicant has been a cause of the disputes between them. She admits having called the applicant a slob. Admits cutting branches off trees for security reasons. Admits bringing chickens into the property "because it is her home too".
- [11] In my view, however, apart from the disputes relating to who did what to whom, the most important question to be answered is whether respondent's right to the property derives from habitatio or from being a non-paying tenant.
- [12] There clearly is a dispute of fact between the parties in this regard as indicated above, applicant contends that the relationship between her and the respondent is that of lessee and lessor. And that the lease agreement has since been cancelled by her. Respondent on the other hand contends that her rights over the property derive from habitatio.
- [13] 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:
1. Dismiss the application.
 2. Order that oral evidence be heard.
 3. Order that the matter goes to trial.
- [14] However the parties in this matter, in particular the applicant has allowed the matter to proceed by way off motion proceedings without availing herself of the remedies applicable in the case of genuine dispute occurring. This being the case the court is enjoined to apply the well established rule of practice that was enunciated in *Plascon – Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A) where at 634 H-I the following was said by Corbett JA:

"... ... where in proceedings on notice of motion disputes of fact have arisen on affidavits, a final order, whether it be an interdict of some other form of relief, may be granted 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."

- [15] As indicated in paragraph 4 supra, it is common cause that in clause 10.1 of the Deed of Sale entered into between the seller (respondent's aunt) and the applicant it was agreed that the respondent will remain living in the property until her death or until such time as she vacates the premises. It is also common cause that the parties added an addendum to the Deed of Sale whereby they confirmed that no right of habitatio will be registered against the property; and that the respondent will be regarded as a non-paying tenant with all rights and obligations normally associated with a non-paying tenant.
- [16] As indicated in paragraph 5 supra the terms and conditions of the addendum were accepted by the respondent.
- [17] Mr Naidu who appeared on behalf of the respondent submitted that the rights of respondent that are embodied in clause 10.1 of the Deed of Sale are clearly that she would reside in the property permanently until she died and or vacated the property.
- [18] It will be noted that in clause 10.1 there is no mention of "habitation", which to my understanding denotes the right to free residence in a house or property of another.
- [19] Mr Naidu further submitted that it was the intention of the parties to the Deed of Sale that respondent would reside on the property permanently until she died and or vacate the property voluntarily. To this end he referred the court to letters that the applicant wrote to the seller and the respondent respectively. In the letter to the respondent she states that the arrangement is that respondent will continue to stay where she is and nothing will change in that respect. She also confirms that this is permanent not temporary arrangement.
- [20] Mr Naidu argues that this is in contradistinction with what is envisaged in the addendum to the Deed of Sale which reads:
- "The parties specifically recall that no right of habitatio shall be registered in the name of the purchaser and that the said Emily Daisy Lowery will be regarded as a non-paying tenant with all rights and obligations normally associated with a non-paying tenant." (my underlining)*
- [21] He argued that the respondent and the seller were misled into believing that the addendum will not alter the position or arrangement that the respondent will be entitled to remain in the property until she died or vacated the property voluntarily.
- [22] On behalf of the applicant Mr Spruyt submitted that the addendum is clearly worded that even when read with clause 10.1 of the Deed of Sale it does not result in an ambiguity. He submitted that there was no right of habitatio or usufruct in terms of clause 10.1 and that the addendum did not change anything. He submitted further that the addendum sought to amplify what is contained in clause 10.1.

- [23] I agree with applicant's counsel in this regard. The wording of the addendum is clear and unambiguous. I do not see how the respondent and the seller may have been misled by the attorney who was attending to the transfer of the property if they advised respondent that she would still be able to live on the property in terms of the agreement as set out in the Deed of Sale. Because that was indeed what the parties intended, that respondent would continue living in the property.
- [24] I am convinced that the allegations of the respondent in this regard can be rejected as being untenable. In my view the facts that are common cause render the respondent's version improbable.
- [25] In light of the above, the question whether the rights of the respondent derive from habitatio or from her being a non-paying tenant is simply that, they derive from her being a non-paying tenant.
- [26] It was an express term of the agreement that the respondent would be regarded as a non-paying tenant with all rights and obligations normally associated with a non-paying tenant.
- [27] By her own admission, respondent inter alia called the applicant a "slob" was convicted of assaulting applicant, judgment was obtained against her for payment of half of the electricity consumption, admits bringing broiler chickens to the property (although she disputes the number thereof) cutting off trees. As a result of the above, applicant addressed a letter to the respondent cancelling the agreement between herself and the respondent. She was entitled to cancel the agreement.
- [28] I have considered the question of an award for costs in this matter. The general rule is of course that the successful party is entitled to costs. Unfortunately the question of costs was not fully ventilated during the hearing of this matter. It is however a feature of this matter that the respondent is represented by Legal Aid South Africa, an indication that she is not possessed of means to engage a representative of her choice. By the same token however, in her founding affidavit, applicant alludes to not being able to engage the services of an attorney to proceed with an application for respondent's eviction which she wanted to institute during 2007 and 2008, because of financial constraints. Is the fact that respondent is not possessed of sufficient means to engage the services of a representative of her choice a good ground that justifies the departure by this court from the general rule that the successful party is entitled to his costs? Usually the successful party would be deprived of his costs where there has been a misconduct on his part, or where there are other exceptional circumstances.
- [29] I am not aware of any misconduct on the part of applicant in the conduct of these proceedings, nor do I find any exceptional circumstances that justify the deprivation of the applicant of her costs.
- [30] In the result:

- (a) The respondent is ordered to vacate the premises at 23 Thembani Road, Greenbushes, Port Elizabeth within 30 days from the date of this order.
- (b) Respondent is ordered to pay the costs of this application.
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N G BESHE

JUDGE OF THE HIGH COURT

APPEARANCES

For Applicant ADV: M P Q Spruyt

Instructed by FRIEDMAN SCHECKTER ATTORNEYS

For Respondent ADV: V Naidu

Instructed by PORT ELIZABETH JUSTICE CENTRE

Date Heard 02 December 2010

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