

SOUTH AFRICA / JUDGMENT

Knoop NO and Another v Pillay and Others (8635/2022) [2023] ZAGPJHC 497; 2024 (3) SA 116 (GJ) (17 May 2023)

[2023] ZAGPJHC 497

COURT

South Gauteng High Court, Johannesburg

BEFORE

N Manoim

CASE / FILE NUMBER

8635/2022

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Policy

REPUBLIC

OF SOUTH AFRICA

IN THE HIGH COURT OF

SOUTH AFRICA

GAUTENG LOCAL

DIVISION, JOHANNESBURG

CASE NO:

8635/2022

NOT REPORTABLE

NOT OF INTEREST TO

OTHER JUDGES

NOT REVISED

In

the matter between:

KURT ROBERT KNOOP

N.O.

(In

his capacity as the Business Rescue Practitioner of Confident

Concept (Pty) Ltd)

First

Applicant

CONFIDENT

CONCEPT (PTY) LTD (In Business

Rescue)

(Registration no.[...])

Second

Applicant

And

SIVALINGAM PILLAY

(Identity number[...])

First

Respondent

THE UNKNOWN

UNLAWFUL OCCUPIERS OF THE REMAINING EXTENT OF ERF 295

SAXONWOLD,

JOHANNESBURG

Second

Respondent

THE UNKNOWN

UNLAWFUL OCCUPIERS OF THE REMAINING EXTENT OF ERF 296

SAXONWOLD,

JOHANNESBURG

Third

Respondent

THE UNKNOWN

UNLAWFUL OCCUPIERS OF THE REMAINING EXTENT OF ERF 297

SAXONWOLD,

JOHANNESBURG

Fourth

Respondent

THE

CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY

Fifth

Respondent

Neutral

Citation: Kurt Robert Knoop N.O. and Another v Sivalingam

Pillay and Others (2022/8635) [2023] ZAGPHJHC

497 (17 May 2023)

JUDGMENT

MANOIM J:

- [1] This case concerns an application for eviction brought by the first applicant, a business rescue practitioner (“BRP”). The BRP seeks to evict the first to fourth respondents from three properties owned by the second applicant which is the company in business rescue that the BRP acts for.
- [2] The company, known as Confident Concept (Pty) Ltd owns various properties in its portfolio, amongst them the three adjacent properties in Saxonwold Johannesburg, that are the subject of this case. It is relevant to the facts of this case to know that the company is owned by four members of the Gupta family whose legal affairs, it is public knowledge, are shrouded in controversy.
- [3] The reason the BRP seeks to evict the respondents is that he wishes to market and sell the properties as part of the business rescue. He considers that this object will be frustrated if the respondents remain in occupation. The question the case raises is whether the BRP can rely on the provisions of section 136(2)(b) of the Companies Act (the Act) to do so.
- [4] Although all four respondents are represented by the same legal team only the first respondent, Sivalingam Pillay, has identified himself and filed an answering affidavit.[1] He seeks to rely on a lease he entered into with a director of the company prior to it being placed into business rescue. Pillay does not contest the BRP’s power to sell the properties. His case is that there is no need to cancel the lease in order for the BRP’s objective – the sale of properties – to go ahead.
- [5] On 16 February 2018 Ashu Chawlu, then the sole director of the company put Confident Concept into business rescue. The first applicant, Kurt Knoop, was appointed the BRP on 18th February 2018. He proceeded to prepare a business rescue plan which, after amendment, was adopted. Included in the plan was a general mandate given to the BRP to market and sell properties.
- [6] On 22 October 2021 the BRP’s attorneys served a notice to vacate on Pillay. A few days, later Pillay’s erstwhile attorneys, wrote back to state that Pillay was occupying the properties in terms of a valid lease and hence the notice to vacate was “defective”. The attorney did not explain what the defect was but indicated that he would “[...] address your offices with greater clarity upon receipt of the written lease.” Pillay’s attorney referred to the client as “she”. It is now common cause that Pillay is a male which suggests that the attorney may not have met with him at the time or received an instruction from someone else.
- [7] Later Pillay’s attorney sent the lease to the BRP’s attorney. Up until this time the BRP had not been aware of the lease between the company and Pillay. Correspondence then flowed between the attorneys. In one letter the BRP’s attorney demanded payment of arrear rental of R 679 535.[2] This I understand from what was said during the hearing was based on the

rental reflected in the lease. But in a later letter the BRP's attorney said he had considered the lease and after examining certain of its terms concluded that it was a simulated transaction in order to justify Pillay's continued occupation. In the same letter he requested that Pillay give details of the other occupants on the properties and required him to vacate the properties within one month. Pillay's attorney did not reply to either of these requests and Pillay has remained on the properties since then.

- [8] In a later letter, the BRPs' attorney requested that a valuer be given access to the properties so the first steps could be taken to start marketing them for sale. Pillay's attorney agreed on a date of December 23rd for this to take place. When the valuer arrived on the 23rd he was denied access by security staff belonging to a private security company who told him Pillay was not there. No further attempt to gain access was made.
- [9] In February 2022, the BRP instituted the present proceedings. The BRP has relied on his powers in terms of section 136(2)(b) of the Act to do so. Pillay has opposed the relief.

The defences raised by Pillay

- [10] Most of the facts in this matter are common cause. There is no challenge to the BRP's locus standi, nor his compliance with the procedural provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("PIE"). An initial challenge was that the BRP had delayed in seeking this relief. Recall he was appointed in February 2018. However, in the replying affidavit the BRP explains that any delay was occasioned by the fact that those representing the Gupta interests were challenging his title to act in relation to several of their entities and it took some time for the matter to reach the doors of the Constitutional Court for these challenges to be dismissed. This finality only came about when the order of dismissal of the Constitutional Court was granted on 4 August 2021. The BRP states that he served the notices to vacate two months after receipt of the Constitutional Court's order. Based on this timeline I accept that whilst business rescue is meant to be an expeditious process the delay was not occasioned by any fault on behalf of the BRP.
- [11] What is in issue is whether the BRP can rely on section 136(2)(b) of the Act to seek eviction. The second issue is whether one of the three properties is covered by the terms of the business plan that was accepted by the creditors. I consider this latter issue first.
- [12] There is no dispute that a BRP has the powers in terms of the Act to oversee a company's business rescue and that included in the definition of business rescue in terms of section 128(1)(b) is the power both to manage its property (128(1)(b)(i)) and to rescue it through restructuring in a manner that would result in a better return to creditors or shareholders than would result from the immediate liquidation of the company (128(1)(b)(ii)).
- [13] Thus, it is fair reading of these provisions that this includes the power to evict persons from the property with a view to marketing and selling the property if this would result in a better return to creditors or shareholders. It is also clear that in terms of the amended business plan which was approved by the majority of the creditors of Confident Concept that the BRP

was given a mandate to market and dispose of properties. The reason Pillay has taken this point is that in the list of assets of the company contained in the business plan, only Erfs 295 and 297 are mentioned but not Erf

296. While the BRP gives no explanation for why this Erf was omitted from the statement of assets, I can only assume this was done in error. The question then is whether the omission of the mention of Erf 296 in the list of assets means the BRP has no mandate to sell that property.
- [14] The BRP states that Erf 296 is still reflected as an asset in the valuation of the company which is incorporated and forms part of the business. Moreover, the terms of the mandate to sell properties given to the BRP is open ended – it does not restrict the BRP to selling only certain properties. There is no dispute that the company owns Erf 296.
- [15] Although the three properties were bought separately and at different times, they are adjacent to one another and are treated as a single entity. This much is clear from the contested lease agreement. Here Confident Concept has leased all three to Pillay. Moreover, the rental payable is expressed as a globular amount; it is not separated into amounts for each Erf. Despite Pillay making something of this point he does not explain how the division between the three could be effected. This is all the more notable given that as the occupant he would have the best access to the facts. Photographs from press clippings the BRP attached to the founding affidavit reflect a single property not three divided ones. The press clippings describe the properties collectively as the Gupta's compound. I consider that the BRP's mandate by implication extended to Erf 296 as well and the omission

was clearly an error.

- [16] Pillay second defence is that he is not in breach of the lease agreement. Whilst he concedes that he has not paid rent since the commencement of the lease, he maintains that he was entitled to do so as he was setting off the cost of securing the premises against the rent. He claims he spent more than R2 million on security costs. Since this amount exceeds the outstanding rental, he is not in breach of his lease obligations. What he relies on is one among several unusual features of this lease. There is a provision which states that if the lessor is unable to provide security, then the lessee is entitled to do so and set this off against the monthly rental. The lease does not stipulate what level of security is to be provided; thus, on the face of it Pillay could select any level of security he wanted and set this off against the rent.
- [17] The BRP asked for documentary proof that these expenses had been incurred, and in that amount, and that Pillay had paid for them. But despite him serving a rule 35(12) notice on Pillay none of these details were provided. I do not have to decide this discovery request as it was not persisted with but Pillay's refusal to supply any supporting documentation which after all is relevant to his set off defence lends further credence to the BRP's claim that the lease is a simulated transaction.

- [18] But this is not the only unusual feature of the lease which led to the BRP's accusation that it is a simulated transaction. The first curiosity is about its timing. It was entered into on 2nd February 2018 just two weeks prior to the decision by Chawla to place Confident Concept into business rescue. Thus, the timing is strongly suggestive that the lease was entered into when Chawla had full knowledge of the pending application for business rescue and sought to place the properties in convenient hands. But this is not all. The terms of the lease are strongly suggestive that the intention was to protect Pillay from later eviction.
- [19] First, the lease is for a period of seven years commencing February 2018. It will thus, if not terminated, run to February
2025. Then the lease contains what it describes as a lock in clause protecting the lessee from eviction during the duration of the lease by providing for a convoluted process of arbitration to take place. If the lessor wants to sell the property during the duration of the lease, the lessee's consent has to be obtained. The rental of R 15000 is only to become payable after three months and not to increase for the first two years of the lease, thereafter, escalating by 7%. For properties whose purchase price exceeded R 20 million this is a substantial bargain on the rent.[3] As I mentioned earlier the obligation to provide security only falls on the lessee if the lessor does not provide this. This cost can be set off against the rental owing but there is no stipulation as to the level of security that needs to be provided – thus it could be single guard or a massive security operation.
- [20] Pillay concedes that the terms of the lease greatly favour him. However, he does not concede that this is evidence of a simulated transaction. Rather he argues it came about because of the strength of his bargaining position. As he put it, given the controversy around the properties and their previous owners Confident Concept would have struggled to market the properties. This problem was further exacerbated he says by the security risks associated with a property of that size.
- [21] These facts then take us to Pillay's second defence where he does not challenge the BRP's right to market the property with a view to selling it, but whether the BRP can evict him and the other respondents. He argues that since the BRP is not relying on the terms of the lease to evict him he can only rely on the terms of section 136(2)(b). This means that the test for the power to evict is whether such an action meets the just and reasonable circumstances test laid down in the section. The BRP he argues has not made out this case.
- [22] Section 136(2) states as follows:
- "136(2) Subject to subsection (2A), and despite any provision of an agreement to the contrary, during business rescue proceedings, the practitioner may-*
- (a) entirely, partially or conditionally suspend, for the duration of the business rescue proceedings, any obligation of the company that-

- (i) arises under an agreement to which the company was a party at the commencement of the business rescue proceedings; and
- (ii) would otherwise become due during those proceedings; or
- (b) apply urgently to a court to cancel entirely, partially or conditionally, on any terms that are just and reasonable in the circumstances, any obligation of the company contemplated in paragraph (a).

[23] Both counsel agreed that there is no authority on this point in relation to cancellation of a lease where the company in business rescue is the lessor. This is because in most business rescue cases the BRP is attempting to extricate the company from a lease in which it is a tenant, not, as in this case, where it is the landlord. Counsel for Pillay however placed reliance on the case of *Du Toit and Others v Azari Wind (Pty) Ltd and Others*[4] where Francis J considered an application to cancel a construction contract at the behest of the BRP. In considering the matter Francis J remarked that the cancellation of a contract is a drastic remedy which considerably waters down the principle of the sanctity of contracts. For this reason, he held: “It is thus incumbent on an applicant to identify precisely which obligations ought to be cancelled and provide a proper explanation

for why such a drastic measure is necessary.” [5]

- [24] Whilst I would agree with the learned judge that the effect of cancellation on the sanctity of contract is a consideration to keep in mind in interpreting the courts’ discretion in terms of the section it is not the only one. The purpose of business rescue and its impact on the various stakeholders is also a consideration and so in a sense the proposition advanced in this case takes too narrow a view of the phrase just and reasonable. Nevertheless, I find that in any event in this case the BRP has provided a proper explanation for why the respondents should be evicted.
- [25] The obligation being considered in the present matter is the company’s obligation to provide the leased premises to Pillay. It seeks to cancel this obligation “entirely”.
- [26] The reason the BRP wants to evict Pillay is to be able to sell the property and thus realise the most optimal price. This objective is more likely to be achieved in the absence of a tenant who enjoys the benefit of lease that makes no commercial sense for any owner of the properties to have entered into. Whilst Pillay does not concede this, he cannot escape this conclusion on his own version. In defending himself against the allegation that the lease is a simulated transaction he alleged that the company had little bargaining position at the time and hence he could extract the favourable terms that he did. But if that is so why should the BRP be obliged to be held to the bad bargain. That would be the antithesis of the purpose of business rescue. Thus, any buyer of the properties would discount from the purchase price the obligation to continue leasing the property to a tenant who alleges he does not have pay rent because he can set off the costs of security and who it is on a fair reading of the lease impossible to evict as a practical matter until the lease terminates in 2025. The BRP’s action

to evict is just and reasonable in the circumstances.

[27] I now turn to the issue of the PIE act. There is no dispute that the BRP has followed the procedural requirements of the PIE Act. The section 4(2) notice was approved by the court on 7 February 2023 and has been served on the respondents. But Pillay alleges that it would not be just and equitable to evict him and the other respondents who are aged and in poor health. However apart from making this statement and furnishing the names of two other persons who are allegedly occupying the property, no further facts are advanced.[6] It is not clear who the aged and ailing occupants are – him or the other two named individuals. The only fact we know from the papers is that Pillay is presently 64 years old. This does not ipso facto render him an aged person. He has thus failed in this respect to put up any basis for me to conclude that it is not just and equitable to evict him and the other respondents.

[28] I am thus satisfied that a case has been made out to grant the relief sought. In accordance with the general practice in this division the respondents will be given 30 days from the date of service of this order to vacate the properties. As far costs are concerned costs must follow cause.

ORDER:-

[29] In the result the following order is made:

1. The written agreement of lease entered into and concluded between the second applicant (duly represented by Ashu Chawla) and the first respondent on 2 February 2018 is hereby cancelled in terms of section 136(2)(b) of the Companies Act no. 71 of 2008;
2. The first respondent (and all persons claiming occupation through and/or under him), the second respondent, the third respondent and the fourth respondent, are ejected and evicted, from the immovable properties, described as:
 - 2.1. Remaining Extent of Erf 295 Saxonwold, Johannesburg (and situated at 3 Saxonwold Drive, Saxonwold, Sandton, Johannesburg);
 - 2.2. Remaining Extent of Erf 296 Saxonwold, Johannesburg (and situated at 5 Saxonwold Drive, Saxonwold, Sandton, Johannesburg);
 - 2.3. Remaining Extent of Erf 297 Saxonwold, Johannesburg (and situated at 7 Saxonwold Drive, Saxonwold, Sandton, Johannesburg); (“the immovable properties”);
 - 2.4. And are to vacate the immovable properties within 30 (thirty) days of date of service of this order.
3. In the event of any non-compliance with paragraph 2.4 above, the relevant Sheriff of the High Court (or his/her Deputy) is hereby authorised and directed to eject and evict the first respondent (and all persons claiming occupation through and/or under him), the second respondent, the third respondent and the fourth respondent from the immovable properties;

4. The applicants alternatively the relevant Sheriff of the High Court (or his/her Deputy) is hereby authorised to exercise any force necessary to execute and carry out the order granted in terms of prayers 1, 2 and 3, for which purpose the applicants alternatively the relevant Sheriff (or his/her Deputy) may enlist the services of the South African Police Service to effect the above, should it be necessary; and
5. The first respondent is to pay the costs of this application, including the costs of the ex parte application (under the above case number) dated 18 November 2022.

N. MANOIM

JUDGE OF THE HIGH COURT

GAUTENG DIVISION

JOHNANNESBURG

Date of hearing: 08 May 2023

Date of judgment: 17 May 2023

Appearances:

For the Applicants: L.V.R. Van Tonder Instructed by: Smit Sewgoolam Incorporated For the Respondents: L. Van Gass (Heads of argument prepared by N. Winfred) Instructed by: Louis Weinstein and associates

- [1] The other three respondents are described as the unknown unlawful occupiers of the respective three properties.
- [2] At the time the replying affidavit was filed the BRP states that the arrears had increased to R805 560.22.
- [3] This is based on the Windeed documents attached to the founding affidavit which show that Erf 295 was purchased for R5,5 million, Erf 296 for R 14million and Erf 297 for R 2,75 million.
- [4] 2022(2) 510 WCC
- [5] Ibid, page 517 paragraph 27.
- [6] They are named as Mkhathswa Maphungela and William Mashatola. No further information was furnished about these persons.

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