
SOUTH AFRICA / JUDGMENT

Kuhne v Central Bridge Trading 333 CC and Others (64416/2016) [2017] ZAGPPHC 1146 (18 August 2017) [2017] ZAGPPHC 1146

COURT

North Gauteng High Court, Pretoria

BEFORE

J.J.C. Swanepoel

CASE / FILE NUMBER

64416/2016

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO.: 64416/2016

18/8/2017

Heard

on 16 August 2017

(1)

NOT REPORTABLE

(2)

NOT OF INTEREST TO OTHER JUDGES

(3)

REVISED

In

the matter between:

ANNA
ELIZABETH
KUHNE
Applicant
and
CENTRAL
BRIDGE TRADING 333
CC
1st
Respondent
JUAN
ALBERT
MEYER
2nd
Respondent
OTHER
OCCUPIERS OF PORTION 155
OF
THE FARM ELANDSKRAAL 469 JQ
MOOINOOI
DISTRICT
BRITS
3rd
Respondent

JUDGMENT

SWANEPOEL AJ:

1. Applicant, an 86 year old lady (Kuhne), applies for the eviction of Respondents from the Portion 155 of the Farm Elandskraal 469 Registration Division JQ, situated at Mooinooi, District Brits (the property).
2. 1st Respondent (Central) is a producer of chrome concentrate, which it does by way of a processing plant that is situated on the property.

2nd Respondent (Meyer) is a member of 1st Respondent, and mainly represented 1st Respondent, in the events leading to this application.

3. 3rd Respondent is comprised of 12 employees of 1st Respondent, and they are housed in accommodation on the property. It is common cause that the provisions of The Prevention of Illegal

Evictions from and Unlawful Occupation of Land Act, 1998 (the PIE Act) is applicable to the 3rd Respondents.

COMPLIANCE WITH THE PIE ACT

4. On 31 May 2017 an order was granted in this Court authorizing the service of a notice in terms of section 4 (2) of the PIE Act on 3rd Respondents.
5. I have no evidence before me that the notice was in fact served, and I am consequently not satisfied that the requirements of the PIE Act in respect of notice have been met. 3rd Respondents were not represented at the hearing of this matter. I cannot make any order against 3rd Respondents.

DISPUTE OF FACT

6. It is common cause that Kuhne is the owner of the property. Central (and Meyer) are in occupation thereof. In the answering affidavit Meyer alleges that the occupation of the property is lawful, by virtue of an oral lease agreement entered into between Kuhne and Meyer, the latter acting on behalf of Central. Kuhne consistently denied the existence of an agreement.
7. It is within this context that counsel for Central and Meyer submitted that a dispute of fact exists, and that the matter should be referred to oral evidence.
8. I am mindful of the rule laid down in the matter of Plascon-Evans[1], that in applications where there are disputes of fact, the matter should be decided on the admitted averments of the applicant,

together with the averments made by respondent. However, there are exceptions to the rule, and where allegations or denials of the respondent are far fetched, or clearly untenable, a Court may be justified in rejecting them on the papers alone.[2]

9. It has been stated on numerous occasions that an application cannot be decided on the probabilities alone.[3] An objective analysis of the disputes is required, but where a version is fanciful or untenable, the Court may approach the matter

in a robust fashion, and may reject such version.[4] In short, the evidence of the respondent, where it contradicts the applicant's evidence, must be accepted unless it is palpably

implausible, far-fetched or clearly untenable.[5] It is with the above principles in mind that I consider the papers.

THE LEASE AGREEMENT

10. The background to Central's occupation of the property is fully set out in the answering affidavit. Meyer alleges that during December 2015 Central acquired the production plant from Allied Commodity Ventures CC (ACV), whereafter it took occupation of the property.[6] Meyer alleges that after the takeover, in other words, in December 2015, he went to Kuhne to introduce himself. During that meeting

Meyer advised Kuhne that Central had taken over ACV's business and that he was busy negotiating an agreement to purchase the processing

plant. I digress to state that it is common cause that Kuhne was not prepared to consider a lease agreement for the property until she had been satisfied that Central had purchased the plant.[7] In the answering affidavit, there is no mention of an agreement being reached at that meeting. Kuhne referred Meyer to Adv. Dirk Robertson, who represented Kuhne. Meyer states that he met Robertson for the first time during December 2015, at Kuhne's home.

11. It does not seem to be in dispute that the lease agreement between Kuhne and ACV was cancelled on 7 January 2016. According to Meyer, his co-member, Michael Schweizer emailed the agreements for the purchase of the plant and equipment to Kuhne during January 2016, in order to put her mind at ease regarding the ownership of the plant.[8]
12. Schweizer played a further role when, on 15 January 2016 he sent an email to Robertson[9]. In the email Schweizer confirmed that Central had purchased the plant, and that it was in control of the operation thereof. He then says the following:

"Central Bridge wishes to conclude a rental agreement with Mrs. Kuhne to replace the agreement which was in place between Mrs. Kuhne and ACV, which agreement, you advise, has been cancelled due to non-payment. We would also like to include a clause which covers the payment for accommodation for certain staff employed at Elandskraal, which we understand is being provided by Mrs. Kuhne and again was no (sic) paid by ACV."

13. Schweizer made proposals in regard to the terms of the proposed lease. Schweizer also requested a copy of the ACV lease, which Robertson duly sent to him on 15 January 2016.
14. On 13 February 2016 one Eben Meyer was appointed to represent Kuhne in the negotiations pertaining to the lease of the property.
15. On 17 February 2016 Robertson sent Schweizer a proposed lease agreement. It is common cause that the terms thereof differed substantially from the ACV lease, more especially in that the monthly rent was much higher, and it also provided for additional payments per ton of ore extracted.
16. Meyer took great exception to the proposed lease, and on 18 February 2016 he sent an email to Robertson, relaying his concerns. Most importantly, this email is the first time that it is alleged that an oral agreement had been entered into. It reads in part[10]:

"During December 2015, January 2016 and February 2016 3 separate meetings were held between Me Kuhne, her husband Piet Stroebel, Mike Schweizer and myself At all three of these meetings certain discussions took place re the proposed new lease agreement and at the last 2 meetings held in 2016, Me Kuhne and her husband accepted the verbal offers we made re a new proposed lease agreement and undertook to instruct you to draw up a new agreement in accordance with our offer to her which she accepted verbally."

17. Not only was this the first mention of an oral agreement having been concluded, it specifically placed the time frame for entering into the alleged oral agreement as being during January and February 2016. Meyer also stated that there were ongoing negotiations between Central and Kuhne during the period December 2015 to 3 March 2016. These negotiations were allegedly largely based upon the cancelled ACV agreement.
18. Meyer alleged that a further meeting was held on 25 February 2016 at which Kuhne dismissed both Robertson and Barnard. There is no factual basis for why this would have happened, and Kuhne denies that this was the case. Meyer's version was in any event contradicted by the emails that Barnard sent to Meyer on 2 March 2016.[11] Meyer was dismissive of Barnard's role in the negotiations, and stated that it was clear that they would not reach consensus with

Barnard.[12] Meyer did not explain why it would have been necessary to reach consensus with Barnard, if consensus had already been reached with Kuhne.

19. Nevertheless, a final meeting was held with Kuhne on 3 March 2016. Meyer and Central's attorney (Grove) were present. Meyer stated that the terms of the oral agreement were confirmed at that meeting, and that it was also agreed that the oral agreement would be reduced to writing. Pursuant thereto, Grove prepared a written agreement which was presented to Kuhne. She refused to sign the agreement until she had discussed it with her children. She undertook to sign it later, and to then hand it to Meyer.
20. On the original papers, there were already a number of questions that arose regarding Meyer's version. If an oral agreement had been reached during the January and February meetings, as alluded to in the Meyer email of 18 February 2016, then why would Robertson draft an agreement that was substantially at odds with the agreed oral terms, and why were further negotiations necessary thereafter if the main terms had already been agreed? Why would Kuhne, who was always insistent that the agreement should be reduced to writing (as was Meyer,) agree certain terms orally?
21. During June 2017 Central applied for leave to file a supplementary affidavit. The application was supported by Meyer's affidavit in which he stated that he had suffered under the misapprehension that the answering affidavit set out Central's defence "correctly and sufficiently". Meyer stated that during a consultation on 15 June 2017 he realized that Central's version had not been correctly set out in the answering affidavit.
22. Meyer says[13]:

"When I consulted with my attorney during the course of Thursday the 15th of June 2017, it became clear to me that the Pretoria advocate in fact did not set out the first respondent's version and did not put forward material facts I had given him during our consultations on which the first respondent relies and being that of a valid oral agreement of lease of the property in question. I persist that an oral agreement of lease had been concluded with the first respondent, there and then represented by myself and the applicant during November 2015 (my emphasis) in respect of

the property situate at Portion 155 of the farm Elandskraal 469 J.Q. Mooinooi, district Brits on which the first respondent conducts a chrome beneficiation plant at a rental of R 35 000.00 per month."

23. Meyer then listed a long list of complaints about his erstwhile legal representatives. Counsel for Kuhne had no objection to the

supplementary affidavit being admitted into evidence. Meyer's supplementary affidavit is dated 18 June 2017. In this affidavit he stated[14]:

"I say that during November 2015 I already had sight of the lease between ACV and the applicant and I informed Mrs. Kuhne that the first respondent sought a lease on the same terms and conditions as the ACV lease specifically with regard to rental of R 35 000.00 per month but that the first respondent did not wish to enter into a long lease of nine year and on this basis the applicant accepted my offer. A copy of the ACV lease is attached hereto as "SA 1.2.

The applicant accepted my offer during or about the last week of November 2015 and I submit that a lawful oral lease was concluded between the applicant and the first respondent. I am advised by my legal representatives, which advice I accept, that a lease is formed and becomes legally binding on the parties as soon as they have definitely agreed on the two following points:

5.5.1 the property to be Jet; and

5.5.2 the amount of the rent."

24. This statement is directly contradicted by the email of Schweizer of 15 January 2016. That email was very clearly intended to introduce Central to Kuhne, and it proposed that the parties should enter into a lease agreement. It is astounding that if oral agreement had already been reached more than a month before that email was sent, that Schweizer would not simply say so. Schweizer was after all Meyer's business partner. Meyer also could not have had sight of the

ACV agreement in November 2015 as Schweizer only received it during January 2016. In my view the email is inconsistent with Meyer's new version.

25. Meyer tried to explain Schweizer's email by calling it clumsy, and by submitting that it should be read in the context that there was an existing valid lease already in place. It is not possible to reconcile the email with Meyer's new version.
26. Meyer's new version is also inconsistent with the fact that Kuhne would only enter into an agreement once she was satisfied that Central was owner of the plant. If Kuhne was only handed the agreements relating to the plant in January 2016, why would she enter into an agreement in November 2015?
27. Most damning, Meyer's version in the supplementary affidavit contradicts his answering affidavit, and his email of 18 February 2016.

28. In the answering affidavit Meyer is adamant that the negotiations lasted from December 2015 to March 2016. On that version he did not even know Kuhne in November 2015 as he only went to introduce himself in

December 2015, after having taken over the plant.

29. In his email of 18 February 2016 Meyer alleged that there were three meetings with Kuhne, and at the last two, in January and February 2016, consensus was reached, and an oral agreement was entered into.
30. Meyer's new version is therefore not only contradicted by objective evidence, such as the Schweizer email, he also contradicts himself in material respects.
31. I am mindful also of the dictum in *Buffalo Freight Systems (Pty) Ltd v Crestleigh Trading (Pty) Ltd*[15]:

"A court must be cautious about deciding probabilities in the face of fact in affidavits. Affidavits are settled by legal advisers with varying degrees of experience, skill and diligence and a litigant should not pay the price for an adviser's shortcomings. Judgment on the credibility of the deponent, absent direct and obvious contradictions should be left open. Nevertheless, the courts have recognized reasons to take a stronger line to avoid injustice."

32. Meyer's problem lies in the fact that this is not so much a matter of a representative drafting an affidavit in an incompetent fashion, but rather that Meyer has put up two different versions of fact. He is a businessman who involves himself in large business deals. He has never denied reading the answering affidavit, and he declared to the commissioner of oaths that he was aware of the contents thereof. The inescapable conclusion is that he aligned himself with the version put up in the answering affidavit.
33. I am of the view that the two versions put up by Meyer are contradictory and clearly untenable. Central has the onus to prove the existence of the lease agreement. In my view it has not met this onus, and I find that Central's occupation of the property is unlawful.

DISMANTLING OF THE PROCESSING PLANT

34. The supplementary affidavit contains a technical report, which suggests that it would take 336 days to decommission and remove the plant. Of this, some 180 days would be taken up with removing chrome feed

material. It would take approximately 155 working days to remove the actual plant. The cost of removal is enormous, in excess of R 8.7 million. I take note of Central's dilemma in this regard.

35. However, I also point out that Central has not paid one cent in rent since it took occupation of the property, some twenty months ago. Meyer took the view that until a written agreement was signed, Central would not pay rent. During that time Central has used the property to generate large profits for itself. This situation cannot be allowed to continue, and if it were, it would result Central unlawfully occupying the property without paying rent for the most part of

another year. It is an injustice that cannot be allowed to continue for so long.

36. The Court is obviously not expert in the engineering field, but it is probable that the dismantling and removal of the plant can be expedited. Some of the work can surely be done simultaneously with other work.

37. Having calculated the actual number of days allowed for the dismantling and removal of the plant (155 days), I am of the view that 5 months would be sufficient time to remove the plant from the property. I take note

of the fact that one month would in all likelihood be lost as a result of the Christmas holidays.

38. It would be iniquitous to allow Central to continue with business as usual. Counsel for Kuhne urged me to make an order that Central should cease its business activities immediately. I am of the view that such an order would be proper.

39. In the result I make the following order:

39.1 1st and 2nd Respondents shall vacate the part of Portion 155 of the Farm Elandskraal 469 Registration Division J.Q., situate in District Brits, that it currently occupies (the property), by no later than 28 February 2018 ;

39.2 In the event that 1st and 2nd Respondents fail to vacate the property in accordance with paragraph 1, the Sheriff of Court for the District of Brits is authorized and ordered to evict Respondents and to take whatever steps may be required to remove the processing plant and other equipment of Respondent from the property;

39.3 Should the Sheriff be required to evict the Respondents in accordance with paragraph 2 above, 1st Respondent shall bear the cost of such eviction;

39.4 1st and 2nd Respondents are interdicted from conducting any business activities on the property, save in pursuance of the removal of the processing plant and Respondents' equipment;

39.5 While 1st and 2nd Respondents still occupy the property, they shall ensure that all service accounts in respect of water and electricity used by 1st Respondent are paid in full as they fall due;

39.6 1st and 2nd Respondents shall pay the costs of the application jointly and severally, the one paying the other to be absolved;

39.7 The relief sought against 3rd Respondents is postponed sine die.

J.J.C. SWANEPOEL

Acting Judge of the High Court

- [1] Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634 I
- [2] Plascon-Evans supra at 635 (c)
- [3] Buffalo Freight Systems (Pty) Ltd v Crestleigh Trading (Pty) Ltd & another 2011(1) SA 8 (SCA) at 14 D
- [4] Truth Verification Centre CC v PSE Truth Detection CC and Others 1998 (2) SA 689 (w) at 698H-J
- [5] Media 24 Book (Pty) Ltd v Oxford University Press Southern Africa (Pty) Ltd 2017(2) SA 1 (SCA) at 18 A-8
- [6] Para s 2-6
- [7] Paragraph 9.2
- [8] Paragraph 9.2
- [9] Annexure AK4 to the founding affidavit
- [10] Annexure AK8
- [11] Annexure AK12
- [12] Paragraph 13.8
- [13] Paragraph 9 of the founding affidavit of the application for leave to appeal
- [14] At paragraphs 5.4 and 5.5
- [15] 2011 (1) SA 8 (SCA) at 14 D-E

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Prepared on 24 October 2026 · Esheria