

SOUTH AFRICA / JUDGMENT

Mokwana and Others v Fakude (17861/2013) [2015] ZAGPPHC 503 (5 June 2015) [2015] ZAGPPHC 503

COURT

North Gauteng High Court, Pretoria

BEFORE

C J Collis

CASE / FILE NUMBER

17861/2013

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 17861/2013

In the matter between:

AMOS STEFAANS MOKWANA N.O FIRST

APPLICANT

MOJASAGAGE SOPHIE MOKWANA N.O SECOND

APPLICANT

MPHO STEPHEN MOKWANA I.O THIRD

APPLICANT

and

REBECCA FAKUDE

RESPONDENT

J U D G M E N T

COLLIS AJ:

INTRODUCTION

- [1] In the present application applicants seeks an order for the eviction of the respondent and all persons living through or under her from the premises situated and described as Portion 98 of Erf 772, also known as [.....], Groblersdal Extension 9.
- [2] Section 4 of the Preventior, of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (the Act) prescribes the procedure to be followed by an applicant in proceedings for the eviction of unlawful occupiers. The Act, inter alia has its roots in section 26(3) of the Bill of Rights, which provides that 'no one may be evicted ·from their home without an order of court after consideration of all the

relevant circumstances.' [1] It vests in the courts the right and duty to make the order,

which in the circumstances of the case, would be just and equitable and it prescribes certain circumstances that have to be taken into account in determining the terms of eviction.

- [3] At the hearing of the application, the respondent applied for a postponement to secure the services of an attorney to assist her to defend the application. It should be noted that Lingerfelder & Baloyi, her erstwhile attorneys had assisted her in filing her answering affidavit as early as October 2014. When the matter was first enrolled on the opposed roll for 16 March 2015, her previous attorneys had withdrawn on 1 March 2015. On this day, this court afforded her an indulgence and postponed the matter, on her request, to secure the services of another attorney.
- [4] Before me the respondent once again applied for a postponement to secure the services of an attorney. This application was opposed. The request was not premised on good and strong enough reasons and the prejudice to the applicants out-weighed the prejudice to the respondent. Her request for a postponement was not acceded to.

BACKGROUND

- [5] As per the founding affidavit[2] the First to Third applicants set out that they are the trustees of the Mokwana Family Trust with registration number IT 110/09. The Mokwana Family Trust is the registered owner of the following property described as:

PORTION 98 OF ERF 772 GROBLERSDAL [.....] REGISTRATION DIVISION J.S PROVINCE OF LIMPOPO MEASURING 1100 (ONE THOUSAND ONE HUNDRED SQUARE METRES FIRST TRANSFERED BY DEED OF TRANSFER T117212/1997 WITH DIAGRAM LG NUMBER A1644/1987 RELATING THERETO AND HELD BY DEED OF TRANSFER T117213/1997.

- [6] On 18 July 2012 the applicants became the registered owners of the property described above and despite numerous requests for the respondent to vacate the premises, she refuses to vacate the premises.

[7] The Act prescribes that before an unlawful occupier can be evicted; the applicant needs to comply with the provisions of section 4(2). The section reads as follows:

S 4(1) Notwithstanding anything to the contrary contained in any law or the common law, the provisions of this section apply to proceedings by an owner or person in charge of land for the eviction of an unlawful occupier.

(2) At least 14 days before the hearing of the proceedings contemplated in subsection (1), the court must serve written and effective notice of the proceedings on the unlawful occupier and the municipality having jurisdiction.

(3)

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(4)

..

(5)

. (6).....

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(7)

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(8) If the court is satisfied that all the requirements of this section have been complied with and that no valid defence has been raised by the unlawful occupier, it must grant an order for the eviction of the unlawful occupier, and determine-

(a) a just and equitable date on which the unlawful occupier must

vacate the land under the circumstances; and

(b) the date on which an eviction order may be carried out if the unlawful occupier has not vacated the land on the date contemplated in paragraph (a).

[8] In compliance with the provisions of Section 4(2), the applicants on 15 May 2013 obtained an order for service of the Section 4(2) notice, which notice was subsequently served on the respondent and the Groblersdal Municipality.

[9] Having regard to the returns[3] of service filed of record, I am satisfied that the procedural requirements as envisaged by section 4(2) have been met.

DEFENCES

[10] The Respondent in her answering affidavit had raised a number of defences. These defences can be listed as follows:

- (i) Lis Alibi Pendens.
- (ii) Challenging the transfer of the property under case number 68968/12.
- (iii) Commissioning of the Founding Affidavit.
- (iv) Lien over the property for improvements made by her.

Lis Alibi Pendens

[11] In her answering affidavit the respondent alleges that the applicants in a prior application brought against her, seeking her eviction in the Magistrate's Court in the District of Groblersdal under case number 779/2012,[4] launched the present application, seeking the same relief, whilst the previous application remained

pending.

[12] In reply hereto, the applicants contend that the proceedings instituted in the Groblersdal Magistrates Court, was withdrawn as early as 25 May 2013 and as such no other application was pending seeking the same relief.[5]

[13] When the respondent deposed to her answering affidavit, during October 2013, the application in the Groblersdal Magistrates Court had been withdrawn. Therefore it is simply factually incorrect for the respondent to contend that a similar application was pending against her at the time.

[14] A party wishing to raise a /is pendens bears the onus of alleging and proving the following:

- (i) there must be litigation pending;[6]
- (ii) the other proceedings must be pending as against the same parties or their privies;[7]
- (iii) the pending proceedings must be based on the same cause of action;[8]
- (iv) the pending proceedings must be in respect of the same subject-matter. [9]

[15] Having regard to the previous matter having been withdrawn, no /is remained between the parties and as such all the requirements to successfully rely on this defence have not been met.

Challenging the transfer of the immovable property.

[16] In paragraphs 7 to 9 of the answering affidavit the respondent alleges that she launched motion proceedings in this court under case number 68968/2012, seeking to set aside the sale agreement and the transfer of the immovable property into the names of the applicants. Further, in paragraph 9, she alleges that the application is still pending before this Court, but fails to indicate what progress she has made in finalising the said application.

- [17] In rebuttal, the applicants in paragraph 9 to their replying affidavit allege that their instructing attorney had made attempts to peruse the court file in question and found it to be empty. This was confirmed by their instructing attorney in a subsequent confirmatory affidavit deposed to.[10]
- [18] In the absence of the respondent stating objective facts indicative thereof that she is desirous of prosecuting her proceedings initiated under case number 6896812012 this Court cannot discount the possibility that she initiated these proceedings as a mere pretext and as such this defence cannot be sustained.

Commissioning of the Founding Affidavit

- [19] In relation to the commissioning of the founding affidavit, more specifically paragraphs 14 to 16 thereof, the respondent took the point that the founding affidavit was commissioned by a Commissioner of Oaths, who at the time of the commissioning was in the employ of the applicants attorney of record. As such the respondent regarded the commissioning of the founding affidavit as irregular.
- [20] In response hereto, the applicants conceded the point and had taken steps to have the founding affidavit re-commissioned. As a consequence I am satisfied that the commissioning of the founding affidavit complied with the requirements as stipulated in the relevant regulations governing the administering of an oath.

Lien over the property for improvements made by her.

- [21] The last defence raised by the respondent relates to the purported lien she alleges she holds over the immovable property in question. In paragraph 18 of her answering affidavit, she alleges that she had over the years effected substantial improvements to the immovable property which gave her a right of retention over the immovable property.

[22] A lien (right of retention) is the right to retain physical control of another's property, whether movable or immovable, as a means of securing payment of a claim relating to expenditure of money or something of monetary value by the possessor on that property, until the claim has been satisfied. 11[11]

- [23] One of the requirements to be satisfied in order to successfully raise the defence of a lien, is the lawful possession of the object. In the present proceedings this defence could never be sustained as against the applicants before this court, because the respondent is in unlawful possession of the immovable property.
- [24] As mentioned in paragraph 7 supra, if the court is satisfied, that no valid defence has been raised by the unlawful occupier, the court hearing the application, must grant an order for the eviction of the unlawful occupier.

- [25] A court having ordered the eviction of the unlawful occupier, must then determine a just and equitable date on which the unlawful occupier must vacate the land under the circumstances and in the event of the unlawful occupier failing to vacate the land on such determined date, determine a date on which the eviction order may be carried out.
- [26] In this regard, the respondent save for alleging in her answering affidavit that she is not elderly; a mother of two children, one being a 16 year old disabled child and that she had occupied the land in question since 1999, she has placed no additional evidence before this Court as to the steps she had taken to secure alternative accommodation in the event of this Court ordering her eviction. At the hearing when she was invited to address the court as to factors to be taken into account by the Court, in determining a just and equitable date she elected not address the Court in that regard. This Court also took into account that the respondent the head of a household.
- [27] In determining a just and equitable date a Court must weigh up the property owner's rights protected under section 25 of our Constitution as against the basic human rights of the occupier and in so doing exercise a judicial discretion.
- [28] The Courts have a duty to ensure that the constitutional rights of all the parties are protected and enforced.[12]

ORDER

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

29.1 The Respondent and all persons living through or under her are ejected from the premises situated at Portion 98 of Erf 772 situated at [.....], Groblersdal, Extension 9.

29.2 The Respondent and all persons living through or under her are ordered to vacate the said premises within 60 days from date of service of this order, failing which the Sheriff of this Court is authorised to evict the Respondent and all persons living through or under her from the said premises.

29.3 The Respondent is ordered to pay the costs of this application.

C J. COLLIS

ACTING JUDGE GAUTENG DIVISION PRETORIA

APPEARANCES:

FOR APPLICANT: ADV M RILEY

INSTRUCTED BY: SEBUENG ATTORNEYS

FOR RESPONDENT: IN PERSONA

DATE OF HEARING: 4 JUNE 2015

DATE OF JUDGMENT: 5 JUNE 2015

- [1] Cape Killarney Property Investments IPty Ltd v Mahamba and Others 2001 (4) SA 1222 (SCA) at 1229E
- [2] Founding affidavit para 2 and 3
- [3] See in this regard Index pages 24 & 25.
- [4] See in this regard Answering Affidavit para 6
- [5] See in this regard Replying Affidavit para 5
- [6] See in this regard Van As v Appolus 1993
- (1) SA 606 (CJ)
- [7] See in this regard Marks & Kantor v Van Diggelen 1935 TPD 29
- [8] See in this regard Nestle (SA) (Pty) Ltd v Mars Inc 2001 (4) SA 542 (SCA)
- [9] See in this regard Williams v Shub 1976
- (4) SA 567 (CJ)
- [10] See in this regard Index paginated page 112, Annexure MMS 3
- [11] See in this regard the decision Guman NO v Ansari and Others (2011/2648) [2011] ZAGPJHC 124 at 11
- [11] See in this regard the decision Guman NO v Ansari and Others (2011/2648) [2011] ZAGPJHC 124
- at 11
- [12] See in this regard the decision Port Elizabeth Municipality v Various Occupiers 2005
- (1) SA 217 (CC) at 224H, 229F-G.

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