

SOUTH AFRICA / JUDGMENT

Moodley v Moodley and Others (45879/2016) [2018] ZAGPJHC 713 (28 November 2018)

[2018] ZAGPJHC 713

COURT

South Gauteng High Court, Johannesburg

BEFORE

N.E. Ramapuputla

CASE / FILE NUMBER

45879/2016

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NO: 45879/2016

In

the matter between:

MOODLEY,
NISHA Applicant
and
MOODLEY,
NESAN First
Respondent
MOODLEY,
PUROSHOTMAN Second
Respondent

JUDGMENT

INTRODUCTION

1. The applicant is the owner of the immovable property in Derby Road, Kensington, Johannesburg (“the property”). The property was improved by the erection of three buildings which have been sub-divided into flats which the applicant lets out for rental income. The applicant’s title in and to the property is unassailable and not in dispute.
2. The first and second respondent are the brother and father of the applicant respectively. Both respondents took occupation of the property in terms of an oral lease agreement concluded with the applicant. The terms and conditions of the oral agreement are not stated in the papers. The plan of the Flats is also not attached to the papers.

FACTS OF THE CASE

3. The 1st and 2nd respondents are the tenants of property owned by the applicant in terms of an oral lease agreement. The applicant alleges that the respondents assaulted her and caused one of her flats to be hijacked for their own benefit. The respondent also caused the applicant to be wrongfully arrested. The applicant terminated the oral lease agreement between the parties on 16 January 2017 as a result of the above conduct. It is not disputed whether the respondents are up to date with the payment of their rent. The applicant seeks a final order of eviction of the first and second respondent under the provisions of section 4 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (“the Act”).

APPLICANTS ARGUMENT

4. It is submitted for the applicant that as a result of the respondents assaulting the applicant, causing one of the applicant’s flats to be hijacked for their own benefit; and causing the applicant to be wrongfully arrested, the applicant terminated the oral lease agreement between the parties.
5. It is further submitted that by virtue of the applicant’s termination of the oral agreement between the parties, the respondents do not hold a lawful right of occupation and are therefore unlawful occupiers[1] as contemplated by section 1 of the Act. Consequently, the applicant seeks a final order of eviction of the first and second respondent

under the provisions of section 4 of the Act.

6. The high-water mark of the first and second respondent’s defence to this application rests on three arguments:

6.1. This application has been instituted whilst an “essentially” similar application remains pending under case number 2017/04359.

6.2. The first and second respondents occupy the property in terms of a “verbal lease agreement and/or “family home agreement””.

6.3. Their right of lawful occupation derives from paragraph 4.7 of the court order dated 16 February 2017. Here is the extract of the order:-

*“4. Pending the finalization of the proceedings in section 4 of the PIE Act, the following order is made:
4.7. The area of the property*

identified as area “A” may be occupied by the First Respondent, his spouse and his two minor children and the Second and Third Respondents. 4.8 The order in paragraph 4.7 above does not confer any right of occupation on the Respondents other than that as provided for in this Order”.

7. Two fundamental aspects are evident from a complete reading of the order which are destructive of the first and second respondents’ interpretation –

7.1. Firstly, the prescribed occupation by the first respondent and his family, and the second respondent is clearly interim in nature and is subject to the finalization of final eviction proceedings under section 4 of the Act.

7.2. Secondly, the right of occupation as being limited to the interim relief granted by the order is clarified by the proviso contained in paragraph 4.8, and can in no way be construed to confer a permanent right of occupation on the first and second respondents.

8. The apparent interpretation of the respondents of paragraph 4.7 is therefore clearly misplaced. The order evidently confines the occupation of the respondents to the duration of the finalization of the section 4 proceedings and its endurance is therefore dependent upon the success thereof.

The Lease Agreement

9. In consequence of the termination of this agreement, the first and second respondents are unlawful occupiers of the property.

10. The first and second respondents plead, in somewhat uncertain terms, the existence of a “family home agreement”. It is unclear whether this agreement is pleaded together with the oral lease agreement or in the alternative to the oral agreement.

11. However, and more importantly, the concept of such an agreement is unknown in law and the first and second respondents fail to plead any terms of the agreement so as to establish the basis upon which such an agreement can justify their continued occupation of the property.

12. In the absence of any particularity, the first and second respondent have failed to prove the defence of a “family home agreement”, thus rendering the contention unsustainable and the defence must therefore be dismissed.

13. Having terminated the agreement, the respondents' continued occupation of the property is unlawful.

Accordingly, and on these papers, the applicant's title in and to the property is unassailable. Similarly, the respondent has failed to establish any right or entitlement, recognised in law, to remain on the property.

Homelessness

14. Notwithstanding the bare and unsubstantiated contentions of the respondents, this is not a case where the first and second respondents' eviction will render them homeless.
15. As pointed out above, the first and second respondents cannot actually make out that case: they demonstrate, on their own version, that they are able to pay rent. This is evidenced by their allegation that they are making the payments per paragraph 4.12 of the order of 16 February 2017 in the amount of R3 000.00 per month.

Execution period of the Eviction Order

16. The only issue that remains to be determined in this matter is the issue as to when the order must become executable.
17. Given that the respondents' oral lease agreement was terminated by the applicant on 16 January 2017, the first and second respondents have now enjoyed a period of some 18 months of unlawful occupation of the property. There is no reason why they should be afforded a further prolonged period before the eviction order takes effect.
18. In this case, the respondents have failed to prove the existence of any circumstances which support the bare allegation that they are unable to find alternative housing and be it in a relatively short space of time. Furthermore, they have not indicated that they are unable to pay or meet an alternative monthly rental obligation due to financial constraint and therefore would be in a position to find and afford alternative accommodation. To the contrary and on the respondents' own version, the respondents

are both beneficiaries of an income and therefore able to pay rental elsewhere. Furthermore, it is their version that they have been maintaining the payments mandated by this Court in paragraph 4.12 of the order dated 16 February 2017.

19. When the respondents' lease agreement was terminated, they ought then to have begun arranging their affairs. It is inappropriate for them to expect to have additional time under these circumstances.

In the circumstances, it is just and equitable that an eviction order be granted, which order ought to be made executable within 30 days.

RESPONDENT'S ARGUMENT

BREACH OF ORAL AGREEMENT

20. It is not a seriously disputed fact that the respondents occupied the property from which they are sought to be evicted from through an oral lease agreement with the applicant.

21. The allegation that the respondents exhibited a deliberate and unequivocal intention no longer to be bound by the terms of the oral agreement of lease is without factual basis for the following reasons:

21.1.The applicant has not provided evidence of this breach as to persuade this Court that the respondents' conduct attracted such a classification; and

21.2.The allegation flies in the face of the documentary evidence proffered by the respondents in the form of proof of payments evincing the payments that they made for rental.

21.3.Absent a reply to deal with these payments, the respondents' version must be accepted and preferred over that of the applicant. Essentially, at a probative level, the applicant has failed to disturb the respondents' version.

BARE ALLEGATIONS IN THE FOUNDING AFFIDAVIT

22. The founding affidavit axiomatically fails to deal substantively and in evidentiary terms with allegation of the abuse attributed to the respondents; the alleged breach of the oral agreement which is the basis of the lease agreement; and that the respondents have defaulted on payment.

23. Yet, the applicant seeks final relief evicting the respondents from a dwelling they are entitled to be at by virtue of the oral agreement that remains extant, notwithstanding applicant's charge of repudiation.

POINTS TO BE DETERMINED BY THE COURT

24. The court is required to determine the following:-

24.1.Whether the respondents have advanced a valid defense to an eviction order and whether the defence would entitle the respondents to remain in occupation as against the owner of the property.

24.2.Whether the respondents' alleged assault on the applicant and causing her arrest is a breach of the oral agreement in the form of repudiation. Whether such repudiation is a sine qua non which entitles the applicant to an eviction order.

24.3.Whether the respondents will be rendered homeless if an eviction order is granted.

Lis Pendens

25. The Respondents submitted that these current proceedings for final relief of eviction are lis alibi pendens because the applicant launched similar proceedings out of this Court for substantially the same relief. This submission was later abandoned. The court is therefore no longer required to make a ruling on this submission.

26. However, it is worth mentioning that the requirements for a successful plea of *lis pendens* are akin to those in a plea of *res judicata*.^[2] Therefore, in order to succeed in a plea of *lis pendens*, the parties are required to demonstrate to the Court that an application (being the second of the two applications) is between the same parties, about the same matter and on the same cause.

REASONS FOR JUDGMENT

27. For an eviction order under section 4(8) of the act to be successful the requirements of the section must have been complied with. Compliance with the requirements refers to both service formalities and the conclusion that an eviction will be just and equitable.
28. Another requirement is that the unlawful occupier must have failed to advance a valid defence to an eviction order. The valid defence raised refers to a defence that would entitle the occupier to remain in occupation as against the owner of the property, such as the existence of a valid lease.
29. If the above requirements are satisfied, the Court is obliged to order an eviction of the unlawful occupier. The Court must come to a decision that is just and equitable to all parties. All relevant circumstances must be considered by the court, including the availability of alternative land and the rights and needs of people falling in specific vulnerable groups. All the above was confirmed by the Supreme Court of Appeal in the case of *City of Johannesburg v Changing Tides 74 (Pty) Ltd & Others*^[3] (herein referred to as the *Changing Tides* case).
30. The court must be satisfied that it is in possession of all the information necessary to make findings based on justice and equity.^[4] Further, there is no dispute regarding compliance with service formalities.
31. Counsel for the applicant argued that insofar as the first and second respondents rely on the conclusion of an oral lease agreement, much is common cause with the applicant. However, this agreement was subsequently terminated by the applicant upon the abusive and malignant conduct of the first and second respondent which rendered a relationship of lessor and lessee untenable. It was an implied term of the oral lease agreement, she says, that the respondents will not conduct themselves in such a manner. This conduct it is argued, constitutes repudiation of the oral lease agreement. In consequence of the termination of this agreement, the first and second respondent are unlawful occupiers of the property.
32. I have a problem with the applicant's argument. The respondents have provided proof of monthly rental payments and this fact is not disputed by the applicant. The applicant has failed to provide any terms of the oral agreement so as to establish the basis upon which such an agreement can be terminated. On the contrary, the applicant avers that the respondents failed to plead the existence and terms of a so-called "family home agreement".

33. It is settled law that repudiation is a conduct which fairly interpreted exhibits a deliberate and unequivocal intention no longer to be bound by the terms of an agreement. The question whether a conduct repudiates the whole contract entitling the other party to treat as non-existent is difficult and no rules can be laid down. The question is one of fact to be decided upon the circumstances of each case[5]. There is also no proof that the alleged abusive and malignant conduct of the first and second respondent rendered a relationship of lessor and lessee repudiated. There is also no proof that the aforementioned conduct repudiates the whole oral lease agreement entitling the applicant to treat it (oral lease agreement) as non-existent. There is no proof that the conduct complained about was a term of the oral lease agreement. On the contrary there is proof that the respondents continue to pay rent and that fact is not in dispute. This conduct of due and punctual payment of rent exhibits a deliberate and unequivocal intention to be bound by the terms of the oral lease agreement. The continued occupation of the property is justified by the consistent rental payments and it is therefore lawful. In the absence of any particularity, the respondents cannot be regarded as unlawful occupiers.
34. I therefore find that the respondents have succeeded to prove the defence of the existence of an oral lease agreement. Their continued payment of the rent clearly indicates that they have every intention to be bound by the terms of the oral lease agreement. The respondents' continued occupation of the property is lawful. The occupation by the first respondent and his family, and the second respondent is not interim in nature and is not subject to the finalization of final eviction proceedings under section 4 of the Act.

HOMELESSNESS

35. The respondents contend that eviction will render them homeless. This issue was not satisfactorily canvassed by the respondents. In the case of *Johannesburg Housing v Unlawful Occupiers, Newtown*[6] (referred to as *Johannesburg Housing case*) the court held that

"all counsel who have struggled to resist an application for summary judgment will be familiar with the case of *Breitenbach v Fiat SA (Edms) Bpk*, in which Coleman J made it plain that it would be difficult indeed to show good cause why such a judgment should not be granted where the defence has been set out "badly, vaguely or laconically". There is no reason why this principle should not apply to occupiers seeking to resist the application for their eviction."

36. This means occupiers wishing to rely on the homelessness defence must set out clear and sufficient facts to prove this. Those facts must be enough to resist an eviction order when an occupier has to remain in occupation of a particular property. A case for remaining in occupation of a property has to be set out sufficiently.
37. The first and second respondents do demonstrate on their own version, that they are able to pay rent. This is evidenced by the fact that they are making the payment in the amount of R3 000.00 per month.

38. Section 25(1) of the Constitution states that “no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
39. The right to have access to adequate housing is protected in section 26 which states that:-
“(1) Everyone has the right to have access to adequate housing. (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
- (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions”.
40. It is argued on behalf of the applicant that the respondents fail to take the Court into their confidence, and disclose and substantiate the exact salary received by the first respondent’s wife and the quantum of the state pension received by the second respondent, as well as their respective expenses. In the absence of a proper assessment of their financial standing, it must be concluded that, in the face of their concession that both respondents benefit from an income, they would be able to afford and pay for alternative rental accommodation in another property. As a result, this is not a case where the occupiers have demonstrated themselves to be persons who as a result of poverty and disadvantage, are unable to make alternative accommodation arrangements themselves. The respondents’ position is the exact opposite.
41. The 1st respondent on the other hand avers he is unemployed, occupies the property with his wife and their minor children aged 12 (twelve) and their dependent child aged 18 (eighteen). He is dependent on his wife’s income. He further avers that the other property is occupied by his 77 (seventy seven) year old father who receives a state pension. He avers that the respondents are unable at this stage to secure alternative accommodation.
42. In considering what is just and equitable to both the applicant and respondent, I have to balance the interests of the land owner and those of the occupiers. Some of the relevant factors to be taken into consideration include that the investment of the owner in property should not be sterilised; that the landowner retains the protection against arbitrary deprivation of property; and that alternative land or accommodation is available. The rights of both the applicant and respondents are protected by sections 25 and 26 of the Constitution respectively.[7]
43. The respondents have dismally failed to make a case for homelessness. In fact I find that the applicant as the landlord is entitled to know the credit standing of the tenants. This is a routine credit check that is conducted by any landlord in any lease agreement. However what counts in favour of the respondents is that there is a vulnerable minor child and a 77 (seventy seven) year old staying on the property. Further, what counts more in favour of the respondents is the fact that this is an oral lease agreement between family members.

44. I am therefore unable to conclude that an amount of R 3000- is sufficient to enable the respondents to secure alternative accommodation in the absence of sufficient evidence indicating that such an enquiry was ever made by both the applicant and the respondents. After all the 2nd respondent is the applicant's father.
45. The applicant has failed to make out a case to sustain the relief she seeks. Therefore, the termination of the oral lease agreement is unlawful.
46. Until the terms of the oral lease agreement as understood by the applicant and the so-called "family lease agreement" as understood by the respondents are clarified by both parties to each other an eviction order cannot be granted. In fact the parties must get together and clarify the terms of the agreements with the assistance of both their legal representatives in order to avoid future misunderstandings and avoid wasting the court's time over family disputes.
47. I won't deal with the issue of execution of the eviction order since its' relevance is dependent on the success of the eviction order.
48. I now turn to the issue of costs. It was argued that as a direct consequence of the first and second respondents' conduct, the applicant has been driven from her own home and property, and obliged to rely on the goodwill of others for accommodation. Her need for possession must therefore be measured against the defence advanced by the first and second respondents.
49. The affidavits provided by the parties did not provide photos or a plan of the flats on the applicant's property. Instead of conducting an inspection in loco I requested the parties to draw and provide the court with a layout of the flats owned by the applicant. This I requested in the quest to be in possession of all the relevant information to enable me to make an appropriate order based on justice and equity. A court is obliged to take a proactive approach in eviction cases in order to ensure that it is sufficiently informed to enable it to take a just decision. In fact courts must ensure that proper investigations have been undertaken.[8]
50. The layout of the properties revealed that the applicant still lives in a three bedroom house which has an office and a studio rented by a tenant. This is in contrast to what applicant alleged in her affidavits. Therefore, the need for possession as averred by the applicant does not exist.
51. The fact that the applicant lied under oath by averring that she is not staying in her house knowing that to be untrue, clearly indicates the frivolous nature of this application.

52. The respondents Counsel did not seek costs because “the attorneys and I act on a pro bono basis”. The misconception that pro bono attorneys and counsel are not entitled to costs should be obliterated. Once this misconception is so done away with, the lifelong and honourable quest for access to justice will become a reality. Impecunious

litigants will have the services of enthusiastic and proficient legal representation readily available.

53. The scale of costs will depend on the facts of each case. In the case of *Zeman v Quickelberge & another*[9] the court noted that the point of pro bono service is to provide access to justice to those who cannot afford it otherwise, not to focus on whether the legal representative of the pro bono client profits or not. This is a misplaced focus, the court said, that has bedevilled the issue whether a pro bono litigant can recover costs. In the court's view access to justice to indigent litigants should be encouraged.
54. My opinion is that the courts can encourage access to justice by awarding costs in favour of pro bono lawyers. It must be borne in mind that pro bono lawyers are driven by their virtues of generosity, benevolence and desire to see justice being done. The courts should encourage these kinds of virtues by awarding costs as a way of appreciation to pro bono legal representatives where circumstances warrant such an award. In making the award for costs, the court must be satisfied that the pro bono legal representative has prepared his case thoroughly. Relevant authorities in the form of case law must be cited, issues must be properly ventilated, and the argument must be convincing. In this case the respondents' legal representatives are entitled to costs despite the fact that they are acting pro bono. I am also awarding those costs on an attorney and own client basis because the applicant lied under oath by averring that she no longer stays on her property. Therefore, the order I make is just and equitable.

WHEREFORE I MAKE THE FOLLOWING ORDER:-

1. The application for a final eviction order is dismissed.
2. The oral lease agreement remains extant.
3. Costs on attorney and own client scale.

N.E. RAMAPUPUTLA

Acting Judge of the High Court,

Johannesburg Local Division

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[1] Section 1 defines an “unlawful occupier” as “a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land...”

[2] Caesarstone Sdot-Yam Ltd v The World of Marble and Granite 2000 CC 2013 (6) SA 499(J) (SCA) .

[3] 2012 (6) SA 294 (SCA) para 12.

[4] Ibid, para 25.

[5] Pema v Rasmussen 1959

(1) SA 196 (T) 200.

[6] 2013 (1) SA 583 (GSJ) para122.

[7] Occupiers of Erven 87 and 88 Berea v De Wet N.O. and Another (2017 (5) SA 346 (CC) para 80 -81.

[8] Johannesburg Housing case supra page 11 para 27.

[9] (1)

(2011) 32 ILJ 453 (LC)

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