

SOUTH AFRICA / JUDGMENT

Murray N.O. and Another v Rayman and Others (25888/2015) [2016] ZAGPPHC 459 (3 May 2016) [2016] ZAGPPHC 459

COURT

North Gauteng High Court, Pretoria

BEFORE

Brenner

CASE / FILE NUMBER

25888/2015

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IN THE

HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION,

PRETORIA)

REPUBLIC

OF SOUTH AFRICA

CASE

NUMBER: 25888/2015

DATE:3/5/2016

(1)

REPORTABLE: NO

(2) OF

INTEREST TO OTHER JUDGES: NO

In the matter between: CLOETE MURRAY
N.O First
Applicant
WELCOME NORMAN
JACOBS N.O. Second
Applicant
and
MUHAMMED REZA
RAYMAN First
Respondent
ALL OTHER UNLAWFUL
OCCUPIERS RESIDING
AT [...],
CENTURION Second
Respondent
THE CITY OF TSHWANE
METROPOLITAN MUNICIPALITY Third
Respondent

JUDGMENT

BRENNER AJ

1. This is an application for the eviction of the first and second respondents, in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998 ("the PIE Act").
2. For ease of reference, the first and second applicants will be referred to as "Murray" and "Jacobs" or collectively as "the trustees" where appropriate. A previous trustee, who was substituted by Murray, and who was originally the first applicant, namely, Mathole Serofo Motshekga, will be referred to as "Motshekga".
3. The first respondent, Muhammed Reza Rayman, will be referred to as "Rayman".
4. The second respondent includes all other occupiers who occupy the property in question with Rayman and will be referred to as "the occupiers". The current known occupiers are Rayman, his wife Aneesa Rayman, their two minor children, Muhammed Zephan Rayman (currently 14), Muhammed Zubair Rayman (currently 13), and boarder Frank Saenger ("Saenger") who, as at May 2015, was employed by Geopile Africa.
5. Rayman was provisionally sequestered on 5 May 2014 and finally on 7 July 2014. The trustees are seized with the winding up of Rayman's insolvent estate, and have launched this application in such capacity.
6. The third respondent, being the City of Tshwane Metropolitan Municipality, has not opposed the application or filed any report on the subject.

7. On 14 February 2005, Rayman took transfer of certain immovable property described as erf [...], Pretoria, Gauteng, corresponding with [...] Centurion, Pretoria, Gauteng ("the property"). He acquired same on 31 July 2004 for a price of R550 000,00. Initially, no bond was registered with the transfer, which means that the transaction was for cash. In 2007, however, a bond for

R1 353 000,00 was registered in favour of FirstRand Bank Limited ("FRB"). It is not clear from the papers what the monies

were used for.

8. Notwithstanding Rayman's sequestration in July 2014, however, he and the occupiers have continued to remain in occupation of the property without tendering any consideration for the value of such occupation, apart from the imposts mentioned below. Indeed, it is an undisputed fact that the last date on which Rayman paid an instalment on the bond was 9 December 2011.

9. There are three primary issues in casu.

10. The first issue relates to the competence of the then provisional trustees, Jacobs and Motshekga, to apply in terms of section 18(3) of the Insolvency Act 24 of 1936 ("the Insolvency Act"), for the approval of the Court to pursue this application, such application having been made ex parte, without prior service on the respondents.

11. The second issue pertains to whether the Court can confirm the substitution of Murray for Motshekga in terms of Rule 15(4), pursuant to a Rule 15(2) notice served on the respondents on 13 August 2015.

12. And finally, on the merits, the Court is enjoined to determine whether the first and second respondents enjoy a complete defence to the eviction relief sought against them by the trustees. In essence, the issues revolve around the balancing of competing interests: the rights of Rayman and the occupiers, on the one hand, against the rights of the bondholder over the property, FRB, and the creditors of Rayman's insolvent estate, on the other.

13. It is important at the outset to mention the statement made by Rayman, in his opposing affidavit dated 21 May 2015, as follows:

"Save to admit that we cannot expect to occupy the Property free of charge for an indefinite period of time, the remainder of these paragraphs are denied."

14. The following sequence of events merits mention.

15. As a consequence of Rayman's default on the bond in favour of FRB, the latter instituted an action against him in the North Gauteng High Court and took judgment, including an order declaring the property specially executable. FRB proceeded to attach the property and advertise same for sale in the Government Gazette, the sale date being 20 June 2012. In toto, FRB advertised the sale on five occasions, namely 20 June 2012, 21 November 2012, 15 April 2013, 9 December 2013, and 3 March 2014.
16. On every occasion following the placement of the adverts, Rayman published a notice to surrender his estate as insolvent, in the Government Gazette. Such notices being dated 15 June 2012, 16 November 2012, 11 October 2013, 6 December 2013, and 24 February 2014.
17. On 5 May 2014, Rayman was provisionally sequestrated at the behest of one Amlanathan Naidu. The final order was granted on 7 July 2014.
18. Motshekga and Jacobs were appointed on 5 September 2014 as joint provisional trustees to Rayman's estate.
19. On 24 November 2014, the trustees obtained a written valuation of the property from professional associated valuer Jolandi Kok. The value provided by her amounted to R1 100 000,00 on a forced sale basis.
20. Circa December 2014, at the invitation of Rayman, Saenger took occupation of the property, in addition to Rayman and his family.
21. In March 2015, according to the trustees, Rayman promised to pay rent for the property and to vacate same by 31 July 2015. The vacation date was extended to 31 August 2015.
22. By 13 April 2015, Rayman and the occupiers had, despite his insolvency, continued to remain in occupation without paying any rent. The provisional trustees accordingly commenced eviction proceedings under the PIE Act. At the time, the provisional trustees were Messrs Motshekga and Jacobs.
23. On 29 April 2015, following the ex parte application envisaged under the PIE Act, this Court granted an order for leave to serve the entire application and the mandatory notice in terms of section 4(2) of the PIE Act on the respondents, with the appearance date being 27 May 2015. Simultaneously, the Court granted leave to the provisional trustees to bring the proceedings and to bring the ex parte application under section 18(3) of the Insolvency Act 24 of 1936.

24. The above documents were thereafter served on the respondents and, on 30 April 2015, Rayman and the occupiers gave notice of their intention to oppose the application. An opposing affidavit was served on 22 May 2015 and the replying affidavit was served on 18 August 2015.

25. In the meantime, on 10 July 2015, Messrs Murray (in lieu of Motshekga) and Jacobs were appointed as final trustees in Rayman's

insolvent estate. On 13 August 2015, the applicants served a rule 15(2) notice to substitute Murray for Motshekga. On 10 September 2015, Rayman and the occupiers launched an application to set aside the rule 15(2) notice. This application was opposed by the applicants, and their opposing affidavit was served on 15 October 2015.

26. On 22 September 2015, the trustees' conduct in these eviction proceedings was ratified by a meeting of creditors in the estate.

27. On 22 April 2016, four days before the hearing, Rayman and the occupiers served a further application, this time to set aside

paragraph 4 of the ex parte order of 29 April 2015 which gave leave to the trustees in terms of section 18(3) of the Insolvency Act, to launch the eviction application. I placed on record that I could regard this application as pro non scripto since it was not before

me. Nevertheless, in argument, Counsel for Rayman and the occupiers addressed oral argument to me concerning the invalidity of paragraph 4 of the ex parte order, this because it prevented the first and second respondents from challenging the trustees' authority to launch the application in the first place.

28. I refer to the rule 15(2) notice. Counsel for Rayman and the occupiers maintains that the notice attempts to substitute one legal party for another. This is a misconception of the facts. There is no attempt to substitute litigating parties. The litigating party has remained at all times the insolvent estate of Rayman. The identity of one of the trustees of the estate has changed., Murray has been finally appointed as trustee instead of Motshekga, who was a provisional trustee. At all times material hereto, Motshekga and Jacobs represented the estate of Rayman, qua provisional trustee, and thereafter, on the final appointment, Murray and Jacobs represented the estate as final trustees.

29. Moreover, in terms of section 76(2) of the Insolvency Act, the Court may permit substitution in the given circumstances.

30. In terms of rule 15(4) of the Uniform Rules, and section 76(2) of the Insolvency Act, I hereby confirm the substitution of Murray for Motshekga as joint final trustee, with Welcome Jacobs, in the insolvent estate of Rayman.

31. On 22 June 2015, the ex parte order was served personally on Rayman, and on Rayman as representative of the occupiers. No steps were taken until 22 April 2016 to apply to set aside paragraph 4 of this order.
32. In my respectful view, there is no merit in the contention that Rayman and the occupiers were prejudiced by the grant of authorisation by the Court in their absence. In the ex parte application, the Court was satisfied that the requirements of section 18(3) of the Insolvency Act had been met and that authorisation could be granted ex parte. Indeed, the launch of the application as an ex parte application is a process prescribed by the PIE Act, so there was no alternative avenue to pursue in casu.
33. Unless and until this part of the order is set aside, I am entitled to assume the validity of the order in its entirety. See further *Warricker and ano NNO v Liberty Life Association of Africa Limited* 2003 (6) SA 272 (W) at 276.
34. The requirements for section 18(3) were indeed met, and endorsed by the Court on 29 April 2015. To the extent necessary, they are hereby endorsed again, namely, that, at inception of proceedings, some degree of urgency existed, that the cause of action was prima facie enforceable, and that the interests of the creditors would not be prejudiced by such proceedings.
35. On the assumption that paragraph 4 of the order was not correctly granted, for whatever reason, albeit that this has not been proved, then, in any event, this Court has the jurisdiction to ratify the conduct of the provisional trustees. See *Kessack's Provisional Trustee v Kessack and Kessack* 1919 WLD 31 at 32. Without conceding the necessity herefor, but to the extent to which this is appropriate, this Court, in the exercise of its discretion, authorises the launch of this application, ex post facto.
36. I turn to the merits of the defence raised.
37. These are the reasons which Rayman and the occupiers give in motivating their refusal to vacate: The property is his family home, where the family has lived since 2004. It is safe and comfortable enough to enable the family to "tackle the challenges of everyday life". He maintains the property and effects repairs. He causes no damage to it. He has co-operated with the trustees in affording their agents access to the property. The property is secured against theft and vandalism while if vacant this would not be the case. He always ensures that the water, rates and taxes are timeously paid. (In May 2015, rates and utilities amounted to about R2 800,00 per month.) There are two minor children living on the property.
38. He is insolvent. He is currently unemployed and in the process of trying to obtain work. His wife is employed by Momentum limited

earning R12 000,00 per month. His wife has been working there for the past sixteen years. He lives off his wife's income which is also used for daily household necessities, living expenses, school related expenses and costs associated with the property. His wife's income is insufficient for their needs. They had been forced to seek financial assistance from the children's schools.

They cannot afford alternative accommodation. The property is close to his wife's place of work, and the schools. The children's schooling will be disrupted if the family is evicted. If they are evicted, his wife's depression and anxiety might recur. She had been on anti-depressant medication for three years but was no longer taking this. When he secures a job, he would make an arrangement with FRB to save his home.

39. Rayman articulates the cause for his insolvency as follows: "During 2010, due to circumstances beyond my control and due to no fault of my own, I had begun to experience financial difficulties. I sought assistance from Debt Rescue, an authorised debt councillor (sic), and restructured my debts so that I could re-build my income stream to a point where I could afford to pay for whatever liabilities I had...However, my attempts had failed."
40. For the following reasons, the trustees seek the eviction of Rayman and the occupiers. Rayman and the occupiers are in occupation free of charge, to the detriment of the insolvent estate and its creditors, including FRB. Rayman and the occupiers have no right at law to remain in occupation of the property. The value of the property is diminishing at an alarming rate. Access to the property for prospective buyers is problematic. The sale of the property whilst it is unlawfully occupied would deter any prospective purchasers from acquiring same. The property is not being properly maintained. The first and second respondents are "dragging their feet and playing for time at the expense of the insolvent estate." As trustees, the applicants are obliged to protect the interests of the insolvent estate and to wind same up as expeditiously as possible, by selling assets and attending to the distribution of dividends to creditors.
41. In weighing the interests of the concursus creditorum against those of the occupiers of the property, I am mindful of the dictum in the case of *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 (6) SA 294 (SCA) at 311F - 312C:

"A court hearing an application for eviction at the instance of a private person or body, owing no obligations to provide housing or achieve the gradual realisation of the right of access to housing in terms of s 26(1) of the Constitution, is faced with two separate enquiries. First it must decide whether it is just and equitable to grant an eviction order having regard to all the relevant factors. Under s4(7) these factors include the availability of alternative land or accommodation. The weight to be attached to that factor must be assessed in the light of the property owner's protected rights under s25 of the Constitution, and on the footing that a limitation of those rights in favour of the occupiers will ordinarily be limited in duration. Once the court decides that there is no defence to the claim for eviction and that it would be just and equitable to grant an eviction order, it is obliged to grant that order. Before doing so, however, it must consider what justice and equity demand in relation to the date of implementation of that order and it must consider what conditions must be attached to that order. In that second enquiry it must consider the impact of an eviction order on the occupiers and whether they may be rendered homeless thereby or need emergency assistance to relocate elsewhere. The order that it grants as a result of those two discrete enquiries is a single order. Accordingly it cannot be granted until both enquiries have been undertaken and the conclusion reached that the grant of an eviction order, effective from a

specified date, is just and equitable. Nor can the enquiry be concluded until the court is satisfied that it is in possession of all the information necessary to make both findings based on justice and equity. (my emphasis).

42. I have taken note of the fact that Rayman had the financial wherewithal, in 2005, to acquire a home for over half a million rand, (R550 000,00 to be precise), in cash. Thereafter, in 2007, he procured a bond for the substantial sum of R1 353 000,00. There is no indication in his opposing affidavit as to what he did with this money.
43. Rayman was obviously generating enough income to qualify for a substantial bond, and he generated enough income to pay the bond

instalments from 2007 until December 2011. Cognisance can therefore be taken of Rayman's income potential. There is no reason given,

compelling or otherwise, as to why this income potential cannot be resuscitated and exploited in the future.

44. It is plain from the papers that Rayman was patently mala fide in deliberately frustrating FRB in its legitimate efforts to sell the property in execution, by publishing a notice to surrender on five occasions, in alignment with FRB's notices advertising the sale in execution. The last bond instalment paid to FRB was on 9 December 2011.
45. By May 2016, Rayman was four years and four months in arrears with his bond instalments, and with no stated intention of wishing to enter into any form of arrangement at all at any defined date in the future.
46. Since his sequestration in May 2014, Rayman has steadfastly refused to vacate the property, while simultaneously refusing to make any payments for rent to the trustees.
47. Rayman himself has admitted that he and the occupiers "cannot expect to occupy the property free of charge for an indefinite period of time". (my emphasis). This admission was made almost a year ago, in May 2015. One may infer from this that, a year ago, Rayman had the expectation that his unlawful occupation had to have a cut-off date, and that this was realistic.
48. By May 2016, some two years have elapsed since Rayman's provisional sequestration. For some two years, the trustees of Rayman's estate have been unable to discharge their duty to realise the assets in the insolvent estate so as to pay dividends to creditors, and complete the winding up process, as they are obliged to do. If they did not launch this application, they could have stood accused by the creditors in the estate of a dereliction of duty.
49. On material issues, Rayman is less than candid. Rayman is silent on whether his close friend Saenger pays any rent for his occupation of part of the property, considering that Saenger is working. He does not state that Saenger is not making contributions. Rayman also gives no detail of the efforts made by him to secure gainful employment. He does not aver that he is physically or mentally unable to work. One cannot exclude the possibility that his continued

unlawful occupation of the property at no charge might have disincentivised him against securing work.

50. He is disturbingly vague about the cause of his insolvency. While he asserts that his wife has suffered from depression and anxiety, it is clear that she is still functional in the work place and has been in stable employment with her employer, Momentum, for the past sixteen years. Presumably, certain benefits arise from such long term employment, and this may include advances of money to employees, but no disclosure is made about this.
51. If the eviction occurred, the same reasons for obtaining financial assistance from his children's schools as now would prevail, and so would the basis for such assistance. The sum of about R2 800,00 per month, previously paid on rates and utilities, will become available to pay towards the rent for alternative accommodation.
52. There is no suggestion that there is no accommodation available in the first and second respondents' suburb for rental, or that such rental is beyond their means.
53. A notice period of just under three months will afford the occupiers a fair and reasonable time within which to rearrange their affairs. In my respectful view, they will not become homeless. They possess the potential to re-arrange their affairs so as to find the wherewithal to make payment for alternative accommodation.
54. If bondholders were expected to grant indefinite moratoriums on the repayment of their bonds, and to permit the indefinite occupation of their only security, to accommodate recalcitrant debtors, the commercial rationale behind the money lending business would cease.
55. If trustees were expected to defer the winding up process, and to permit indefinite occupation of property falling within the estate, to accommodate recalcitrant insolvents, insolvent estates would take decades to wind up, and this would redound adversely on the interests of creditors.
56. The dire economic repercussions aside, the parties who would ordinarily discharge their debts could be deprived of the benefit of housing, through financial assistance from the banks, when this is the only avenue available to them to do so.
57. Taking all relevant facts into consideration, I find it just and equitable that Rayman and the occupiers should be evicted from the property, on just two days short of three months' notice.
58. The application being successful, costs should follow the result, albeit that the costs order against Rayman will be against his insolvent estate.
59. In the result, the following order is made:

- a. The first and second respondents, (and all other persons and/or individuals who occupy and/or claim the property through them) are ordered to vacate the property known as erf [...] Pretoria, Gauteng, corresponding with [...], Centurion, Pretoria, Gauteng ("the property"), by no later than 12h00 midday on 31 July 2016;
- b. Should the first and second respondents (and all other persons and/or individuals who occupy and/or claim the property through them) fail to comply with the order in paragraph a above, the sheriff of this Court is hereby authorised to take all necessary steps to execute this order to evict the first and second respondents, (and all other persons and/or individuals who occupy and/or claim the property through them) from the property and, if necessary, to obtain the assistance of the South African Police Services to assist him/her in this regard;
- c. Directing the first and second respondents to pay the costs of this application, jointly and severally.

BRENNER AJ

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

3 May 2016

Appearances

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