

SOUTH AFRICA / JUDGMENT

O v O (2015/8185) [2017] ZAGPJHC 88 (22 March 2017) [2017] ZAGPJHC 88

COURT

South Gauteng High Court, Johannesburg

BEFORE

M A Makume

CASE / FILE NUMBER

2015/8185

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION,

JOHANNESBURG

CASE

NO: 2015/8185

Reportable: No

Of interest to other judges: No

Revised.

22/3/2017

In the matter between:

O,
R Applicant
and
O,
I Respondent

JUDGMENT

MAKUME, J:

[1] In this application the Applicant seeks an order more or less in the following terms:

1.1 That the Respondent be interdicted from conducting any form of business at the residential property known as Erf [...]

Montgomery Township, Registration Division IQ, Province of Gauteng situated at [...] Drive, Montgomery Park, Johannesburg (“the property”).

1.2 That the Applicant and/or his duly authorised agents be granted access to the property to enable them to renovate a certain portion of the property which is being used as business premises and to alter it into residential living quarters.

1.3 That the Respondent be ordered to pay the costs of this application.

[2] The Applicant relies on his ownership in and to the property to establish the prima facie right required for the temporary relief and the clear right for the permanent relief. That right is disputed by the Respondent

on the following grounds:

2.1 The Respondent instituted action in this Court wherein she asserts that a universal partnership had been established between the parties since their marriage in 1994 until they divorced and as such the property is in fact jointly owned by the Applicant and the Respondent.

2.2 That the Respondent paid for part of the renovations and extensions to the property in particular the portion on which she conducts her business as a Market Researcher.

2.3 That the business that she conducts is her only source of income to fend for herself and her three children two of whom are still minors.

[3] The Respondent further argues that the Applicant has failed to satisfy the requirements for a final interdictory relief.

[4] It is necessary at this stage to set out a brief narrative of the facts and circumstances that gave rise to this litigation which bear on the question to be decided in this application.

[5] The parties were married to each other on the 9th January 1994 in terms of the tenets of Islamic law. That marriage which was out of community of property came to an end on the 20th June 2014.

[6] Three children were borne out of that marriage two of whom are still minors and reside on the property with the Respondent. The Applicant on his own will vacated the property on the 14th April 2014.

- [7] During or about the year 2010 the Respondent registered the company “Research 247” and commenced trading under that name from the property as a Market Researcher. The Applicant was at that time still resident on the property and the business of Research 247 was commenced with his full knowledge and blessing.
- [8] The Applicant insists that the Respondent commenced the business during 2012 and not 2010 as alleged by the Respondent. In my view nothing turns on this date. What is of importance is that the business was commenced with whilst the Applicant lived on the property and he gave his consent that it be conducted from there.
- [9] During or about 2012 the Respondent with the consent and full cooperation of the Applicant caused renovations to be made to the property which renovations included the extension to the garage to facilitate the growth of the business. The Applicant denies that the Respondent made any formal contributions to such renovations however once again nothing turns on that dispute as it will most certainly feature prominently in the upcoming action for declaration of universal partnership. What is pertinent and crucial in this matter is the fact that he the Applicant also paid for the renovations. It is unthinkable that such renovations would have been undertaken without his cooperation since the submission of building plans must have his signature.
- [10] If there were no approved plans as Applicant would like this Court to believe then the Municipality would have long ordered that such unauthorised extensions be demolished. This has not happened notwithstanding the fact that an officer of the Johannesburg Municipality has been to the property. It is also strange that Applicant has not sought confirmation from the Municipality that the building extensions and renovations were never authorised. All that the Applicant says in his replying affidavit is that he intends to investigate the matter further. He has not done so for a period of 4 years now.
- [11] During 2014 the relationship between the Applicant and the Respondent came to an end what then followed thereafter was an era of acrimonious conduct between the litigants which included amongst others the Applicant seeking to terminate water and electricity services to the property. The Respondent ultimately applied to this Court which granted an order against the Applicant prohibiting him from entering the property without the consent of the Applicant.
- [12] It is that court order that the Respondent obtained against the Applicant on the 15th December 2014 that in my view spurred the Applicant to launch this application. His intention in my view is to achieve an eviction of the Respondent and the children from the property and to do so he now hides behind the so-called illegal business being conducted from this property.

[13] The Applicant seeks a final order in this matter interdicting the Respondent from earning a living from the property on the basis that the Municipality has not granted the Respondent the right to use the property or part thereof as a business in contravention of the Johannesburg Town Planning Scheme of 1979.

[14] Before this relief can be granted I must be satisfied that the requisites which are necessary to be proved in this type of application are present. Such requisites are the following:

14.1 A clear right on the part of the Applicant.

14.2 An injury actually committed on the part of the person to be interdicted or a well-grounded apprehension that such an injury will be committed.

14.3 That there is no other ordinary remedy available to the Applicant.

14.4 That the balance of convenience favours the granting of the relief.

CLEAR RIGHT

[15] I have already in this judgment alluded to the fact that there is a dispute about ownership of the property.

[16] In paragraph 14 of the answering affidavit the Respondent makes it very clear that she has launched an action for a declarator that a universal partnership had been established between her and the Applicant. In his reply the Applicant simply denies the existence of a partnership agreement. There is a difference between a partnership agreement and a claim based on the existence of universal partnership. The latter is based on the existence of some form of a marriage whilst a partnership agreement is not.

[17] The Applicant has in my view failed to prove a clear right in the face of what the Respondent has put up as a defence to the existence of that right and in applying the Plascon-Evans Rule I am persuaded to accept the version put up by the Respondent.

[18] When the Applicant consented to the Respondent to commence business on the property he waived his right to later object to the Respondent conducting the business. He the Applicant has no locus standi to bring any action to stop the Respondent to continue with the business. It is only the Local Authority that has powers to prevent the Respondent from continuing to do business on the property.

[19] In any case the Respondent tells the court in her affidavit at paragraph 7.3 that after a discussion with an official of the City Council Mr Rammala she was told to get the permission of the Applicant so that application can be made for consent to do business. Thereafter the City Council has not taken any action and it can safely be argued that they are awaiting receipt of the application and in the meantime by their silence do not have a problem in the Respondent conducting the business from the property.

- [20] The Respondent continues to say that she has reduced the floor space of the portion on which she is conducting the business and accordingly that she is complying with the requirements. In his replying affidavit the Applicant in paragraph 50 concedes that he is unable to prevent the contravention of the by-laws by the Respondent. This is further confirmation that he has no clear right to protect and as a result this application must fail.

AN INJURY ACTUALLY COMMITTED

- [21] In the matter of *Setlogelo v Setlogelo* 1914 AD 221 at 227 it was held that the words “injury actually committed or reasonably apprehended” means and are used to describe an act of interference with or an invasion of the Appellant’s rights and resultant prejudice.
- [22] This application is directed at preventing the Respondent from conducting business on the property and yet in attempting to establish that an injury in being visited upon him the Applicant says that he wants to sell the property and secondly that he has no place to live and as a result he is suffering hardship. The Applicant has failed to demonstrate any harm or injury. Firstly, the sale of the property cannot take place prior to a decision on the application for a declaration of a universal partnership. Secondly, the Applicant himself concedes that he is the owner of three other residential properties where he could stay whilst the domestic violence protection order stands against him.

BALANCE OF CONVENIENCE AND ALTERNATIVE REMEDY

- [23] The Applicant has in my view failed to present any evidence that the balance of convenience favours the granting of the relief in that the harm he would suffer if the relief is not granted outweighs the harm that the Respondent and the three children would suffer if the relief is granted.
- [24] In my view the Applicant has not been open with the truth. He does not tell the court what his income is despite admitting that he is the owner of three properties which he rents out. He has not been living in the property since the year 2014. He cannot suddenly come up with a story that he has no place to stay. On the other hand the Respondent lives on the property with three children of the marriage and has been maintaining them singlehandedly since 2014 out of the proceeds of the business. It will not be in the best interest of the children to suddenly deprive them not only of accommodation but also of a source of maintenance by their mother. Section 28 of the Constitution of the Republic of South Africa guarantees certain basic rights for all children.
- [25] The Applicant is not without an alternative remedy depending on what he wants to achieve with his interdict. It is clear that this interdict is aimed at eventually achieving an eviction of the Respondent and the minor children. If that be the case then he should follow the procedure in terms of the PIE Act. If his intention is to stop the Respondent from conducting the business this cannot be achieved through motion court proceedings as there is a dispute of fact. The Respondent has established a business and to prevent her from doing so will in my view amount to arbitrary deprivation of property in contravention of Section 25 of the

Constitution of South Africa.

[26] The Applicant is losing nothing by allowing the Respondent to conduct her business from the property as she has been doing so for the past five years. His alternate remedy lies in the outcome of the application for a declaration of a universal partnership.

[27] It follows that this application stands to be dismissed. Accordingly I make the following order:

27.1 The application is dismissed with costs.

DATED at JOHANNESBURG this the day of MARCH 2017.

M A MAKUME

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

DATE OF HEARING

22nd FEBRUARY 2017

DATE OF

JUDGMENT

MARCH 2017

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