

SOUTH AFRICA / JUDGMENT

Properties in Motion (Pty) Ltd v Lunkanga and Others (2021/9110) [2022] ZAGPJHC 248 (22 April 2022)

[2022] ZAGPJHC 248**COURT**

South Gauteng High Court, Johannesburg

BEFORE

VM Movshovich

CASE / FILE NUMBER

2021/9110

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REPUBLIC**OF SOUTH AFRICA****IN****THE HIGH COURT OF SOUTH AFRICA****(GAUTENG****LOCAL DIVISION, JOHANNESBURG)****CASE****NO: 2021/9110****REPORTABLE:**

YES

OF

INTEREST TO OTHER JUDGES: YES

REVISED

YES

22

April 2022

In

the matter between: PROPERTIES
 IN MOTION (PTY) LTD
 (REGISTRATION
 NUMBER: 2015/419321/07)
 Applicant
 and
 A
 PERSON KNOWN AS MR LUNKANGA
 First Respondent
 THE
 UNLAWFUL OCCUPIERS OF
 ERF
 [...] SOUTH HILLS EXTENSION 1
 Second Respondent
 THE
 CITY OF JOHANNESBURG
 Third Respondent

Heard: 26 January 2022

Judgment: 22 April 2022

JUDGMENT

MOVSHOVICH AJ:

Introduction

and background facts

1. This is an application for the eviction of Lukanga Mukinda and any other occupants (including his family) (collectively, "the respondents") from a property described as Erf [...] South Hills Extension 1 Township, Registration Division IR, Gauteng situated at 38 Amalia Street, South Hills Extension 1, Johannesburg South, 2197 ("the property").
2. The applicant was legally represented; the respondents were not. The first respondent spoke on their behalf at the hearing.
3. The applicant seeks an eviction on the basis that it is the owner of the property and it has validly terminated any right of occupation on the part of the respondents prior to launching the eviction application.
4. I sketch out only the essential facts.
5. In 2017, the first respondent (as lessee) entered into a lease of indefinite duration with a certain Mr Dawid H Jeremiah van der Lith (as lessor) in relation to the property ("the lease"). The rental payable in terms of that lease was R2,500.00 per month. It is unclear whether Mr Van Der Lith was entering into the agreement in his own right or as agent for another party, such as the property's owner, who at that stage appears to have been Ramos Family

Properties CC ("Ramos Properties"). The respondents appear to have remained in occupation of the property to date (on their version pursuant to the lease).

6. On 14 August 2020, Ramos Properties entered into an agreement to sell the property to the applicant ("the sale agreement"). The applicant alleged in its founding papers that in terms of the sale agreement, the risks and profit in relation to the property would pass to the applicant upon signature of the sale agreement. The lease acknowledged that there were occupants on the property.
7. On 26 October 2020, representatives of the applicant sought to engage with the respondents in person in respect of a possible "normalisation"[1] of the respondents' tenancy of the property (as the applicant termed it in the founding papers). When those efforts were rebuffed, the applicant engaged attorneys, who sent two letters on behalf of the applicant to the respondents.
8. In the first letter, on 13 November 2020, the applicant recorded that the respondents' right of occupation arose "by, through and under the previous owners of the property" and, as the applicant purchased the property, the huur gaat voor koop principle applied. It then called on the respondents to "engage" with the applicant "to make arrangements in respect of your tenancy" by 16 November 2020, "failing which we will consider this a repudiation of your agreement of lease. [The applicant] will accept this repudiation and demand that you vacate the unit immediately."
9. Given the lack of engagement on the part of the respondents, on 20 November 2020, the applicants' attorney sent a further letter on the applicants' behalf, purporting to cancel any right of occupation of the respondents on the basis of the respondents' repudiation.
10. On 14 December 2020, the transfer of ownership of the property from Ramos Properties to the applicant was registered in the Deeds Registry.
11. The eviction application was launched on 24 February 2021.

The issues between the parties

12. The applicant contends that it took over the lease (and any other agreement of occupation) from the erstwhile owner by virtue of the huur gaat voor koop principle and was exercising its rights under that principle and as owner vis-à-vis the respondents. It avers that it followed all necessary processes to cancel the right of occupation and is entitled as owner to seek the respondents' eviction.
13. The respondents, on the other hand, contest the claim to ownership on the part of the applicant, deny that the applicant has or had a right to evict them and, in any event, contend that an eviction will render them homeless contrary to constitutional and statutory prescripts.

14. It is common cause on the pleadings that the respondents had some right of occupation (probably as tenant) prior to the events of October and November 2020. The first key question is thus whether the right to occupation was lawfully terminated. The applicant bears the onus to prove that the right of occupation was lawfully, clearly and unequivocally cancelled.[2]
15. If the above is established, the question is whether an order for eviction should issue and, if so, on what terms, having regard to all the relevant factors, including the personal circumstances of the respondents.

Analysis

16. The applicants' case for eviction is based squarely on its rights as owner and any rights and obligations which accrue to it by virtue of the huur gaat voor koop principle. In this particular case, the applicant effectively sought to act as landlord prior to the transfer of ownership of the property. It took the steps to place the respondents in default and to cancel their right of occupation prior to 14 December 2020. It did so in its own name and not as agent for or on behalf of the then owner, Ramos Properties. The applicant contends that it was entitled to do so by virtue of the huur gaat voor koop principle.
17. It is thus necessary to determine the proper scope of the principle. The Appellate Division in Genna-Wae held as follows:

"Accordingly, I hold that in terms of our law the alienation of leased property consisting of land or buildings in pursuance of a contract of sale does not bring the lease to an end. The purchaser (new owner) is substituted ex lege for the original lessor and the latter falls out of the picture. On being so substituted, the new owner acquires by operation of the law all the rights and obligations of the original lessor under the lease".[3]

18. The above does not expressly answer the question as to when the huur gaat voor koop principle becomes effective, but in my view, it is clear from the above quotation and the earlier authorities on which the Appellate Division relied that the rights and obligations under the relevant lease agreement only transfer pursuant to the principle upon the change of ownership. Thus, while the principle refers in its language to the personal rights and contracts (lease, being huur) and (purchase, being koop), it becomes operative upon the "alienation" of property and the substitution of the purchaser for the seller as landlord only occurs when the purchaser becomes the "new owner". In the case of fixed property in South African law, that occurs on the date of registration of transfer in the Deeds Registry. Prior to that date, it is only the seller who may exercise the rights associated with the lease agreement and ownership. If a notice of default is to be sent, the seller (or someone acting on its behalf) must do so. The purchaser has no standing until the date of transfer.
19. Indeed, were it otherwise, anomalies could eventuate. The transfer of property does not become final until registration. Thus, anything

could happen until that time to upend the transaction and the sale may never be finalised or implemented. It would be peculiar were the purchaser to exercise rights under a lease for an interim period for those rights to revert to the seller simply ex lege. Such a construction would in any event undermine the requirements of legal certainty, a central tenet of the rule of law.[4] It would be difficult for lessees to know the identity of their landlord, as this would depend on the personal (and potentially

confidential) transactions between seller and purchaser, and the implementation thereof, rather than on a public, known and accessible

act of registration of ownership.

20. I note that the applicant has not sought to rely in its pleadings on any specific terms of the sale agreement to invest itself with rights which it would otherwise not have in terms of the huur gaat voor koop principle. The only provision it cited is that the sale agreement envisaged the applicant assuming the risk in and profit of the

property from the signature date of the sale agreement. Such a provision in itself would not, in my view, confer any additional

rights of action relevant in this matter and did not confer on the applicant the rights and obligations of landlord over the respondents. Moreover, even if the parties to the sale agreement sought to confer such rights and obligations on the applicant prior to transfer by agreement, it is unclear that this could be achieved without the respondents' informed consent (after the contents of sale agreement were communicated to the respondents). Certainly, obligations could not be transferred without consent, and it is difficult to see how concomitant rights could be either. But I need not come to a final view on this given that this was not part of the pleaded case.

21. In all the circumstances, the applicant has not established that it lawfully, clearly and unambiguously terminated the respondents' right of occupation and the eviction application must fail on this basis alone. This renders it unnecessary to consider any other requirements or issues.

Costs

22. I see no reason why the costs should not follow the result in this case. Of course, adverse costs may be limited given that the respondents were self-represented.

Order

23. I thus make the following order:

23.1 the application is dismissed with costs.

Hand-down and date of judgment

24. This judgment is handed down electronically by circulation to the parties or their legal representatives by email and by uploading the judgment onto Caselines. The date and time for hand down of the judgment are deemed to be 10:00 on 22 April 2022.

VM MOVSHOVICH

ACTING JUDGE OF THE HIGH COURT

Applicant's Counsel: L Peter

Applicant's Attorneys: Vermaak Marshall Wellbeloved Inc.

1st and 2nd respondents: Lukanga Mukinda (in person, and representing the second respondent)

Date of Hearing:

26 January 2022

Date of Judgment: 22 April 2022

- [1] The applicant wrote that it wanted to "normalise" the leasing arrangements.
- [2] *Davidan v Polovin* NO [2021] 4 All SA 37 (SCA), para [23]; *Thepanyega NO v Letsoalo* [2022] ZASCA 30 (24 March 2022), paras [9] and [10].
- [3] *Genna-Wae Properties (Pty) Ltd v Medio-Tronics (Natal) (Pty) Ltd* 1995 (2) SA 926 (A), 939.
- [4] *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* 2021 (11) BCLR 1263 (CC), para [1]; *Public Servants Association obo Ubogu v Head of Department of Health, Gauteng and Others* 2018 (2) SA 365 (CC), para [50]; and *Gcaba v Minister for Safety and Security and Others* 2010 1 SA 238 (CC), para [62].

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