

SOUTH AFRICA / JUDGMENT

Rees-Gibbs and Another v Zikhali and Another (39681/ 2017) [2018] ZAGPJHC 557 (11 October 2018) [2018] ZAGPJHC 557

COURT

South Gauteng High Court, Johannesburg

BEFORE

B A Mashile

CASE / FILE NUMBER

39681/ 2017

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NO: 39681/ 2017

Date

of Hearing: 03 September 2018

Date

of Judgment: 11 October 2018

In

the matter between: KENNETH
 ALAN
 REES-GIBBS First
 Applicant
 BARBARA
 REES-GIBBS Second
 Applicant
 And
 ZWELIBANZI
 GRIFFITHS
 ZIKHALI First
 Respondent
 THOBEKA
 JOYCE
 ZIKHALI Second
 Respondent

JUDGMENT

MASHILE J:

INTRODUCTION

[1] This application concerns the eviction of the Respondents as contemplated in the Prevention of Illegal Eviction from and Unlawful

Occupation of Land Act 19 of 1998 ('the PIE Act'). The Applicants seek relief in the following terms:

'1 That the First and Second Respondents ("the Respondents") and any other person occupying the immovable property under the Respondents' title or with her permission, be ordered to vacate the property situate at [...], Ext 3 more fully described as [...], Extension 3, Johannesburg (hereinafter referred to as "the property").

2 The Respondents are ordered to vacate the property on or before a date to be determined by the Honourable Court.

3. That in the event of the Respondents failing to comply with the order in paragraph 1 herein above, that the Sheriff of the above named Honourable Court and/or his/her deputy be and is hereby authorised to evict the Respondents and those occupying through or under her, from the premises and secure the services of a locksmith, and the assistance of the South African Police Service, if necessary, to effect such eviction.
4. That the Respondents pay the costs of this application, including the costs of the ex-parte application in terms authorising the Section 4 (2) Notice in terms of the Prevention of Illegal Eviction and Unlawful Occupation of Land Act of 1998 on the scale of attorney and client.'

- [2] The Respondents are opposing the application and have counterclaimed for payment of an amount of R150 000. The amount is alleged to be damages suffered caused by defects to the property that should have been repaired by the Applicants.

FACTUAL

BACKGROUND

- [3] The facts in this matter are largely common cause except for a few details here and there. On 5 November 2014, the First Applicant and the Respondents concluded a written deed of sale ('the deed') in terms of which the former sold to the latter an immovable property described as [...], Extension 3, Johannesburg ('the property'). Following the Respondents' failure to comply with the terms of the deed, the Applicants cancelled the agreement but subsequently entered into another agreement ('the lease') in terms of which they permitted the Respondents to stay on the property provided they paid monthly rentals in the sum of R15 000.
- [4] The deed provided as follows:
- 4.1 The purchase price of the property would be R 2 600 000;
- 4.2 The Respondents would, against acceptance of the deed by the Applicants, make payment of a deposit amount of R300 000;
- 4.3 The Respondents would make monthly instalments of R15 000 in reduction of the purchase price commencing on 1 December 2014;
- 4.4 There would be a total of 13 monthly instalments in the amount of R15 000;
- 4.5 The Respondents would settle the balance of the purchase price, R2 105 000, at the end of the 13 month period, not later than 1 January 2016;
- 4.6 The Respondents would be liable for payment of electricity charges, property insurance, rates and taxes and related costs;
- 4.7 In terms of clause 3.3 of the Deed, the Applicants would not be entitled by reason of any breach on behalf of the Respondents to terminate the deed unless the Applicants had by letter notified the Respondents of the breach concerned and made demand to the Respondents to rectify the breach in question and the Respondents have failed to comply with such demand. Such notice shall be handed to the Respondents or sent via registered post to their domicilium address and would contain:
- 4.7.1 a description of the Respondent's breach;
- 4.7.2 a demand that the Respondents rectify the breach within a period of not less than 30 days calculated from the date on which the notice was handed to the Respondents or sent via registered post; and

4.7.3 an indication of the steps that the Applicants intend to take if the breach was not rectified.

4.8 Should the Respondents fail to comply with any obligation in terms of the agreement within the periods prescribed in clause 3.3 thereof, the Applicants would be entitled in addition and without prejudice to any other rights available to them in law but subject to the provisions of clause 3.3 and section 12 (5) of the Act to:

4.8.1 terminate the deed and withdraw therefrom, in which event the Respondents would forfeit the right to claim restitution of anything performed by them in terms of the deed, and notwithstanding such withdrawal, the Applicants would be entitled to claim payment of all arrear instalments and performance of all and any other arrear obligations that the Respondents have failed to perform by the date of such withdrawal;

4.8.2 to cancel the deed and claim and recover such damages as the Applicants may claim and recover such damages as they may be able to prove that they sustained, in which event they would be entitled to retain all amounts previously paid by the Respondents in terms of the deed until the actual amount of damages has been determined at law and thereupon to set off such damages against the amounts thus retained.

4.9 The Respondents would take occupation and possession of the property on 1 December 2014;

4.10 Upon the cancellation of the deed for any reason whatsoever the Respondents and all other persons in occupation of the property claiming through them under the Respondents would be obliged to vacate same immediately, it being recorded that any rights of occupation granted to the Respondents flow only from this deed and are in no way to be interpreted as any form of tenancy;

4.11 The Respondents would jointly and severally, and in solidum be liable for the payment of all monies and for the carrying out of all the terms of the deed;

4.12 The Respondents would be responsible for and would be liable to the Applicants for all expenses, costs and charges which the Applicants would incur arising out of the default of the First and Second Respondents, collection commission at the ruling as well as all legal costs as between attorney and client.

[5] On 1 December 2014, the Respondents, together with their four minor children, took occupation of the property, it being common cause that it is their primary residence. By March 2015, the Respondents had still not paid the deposit of R300 000.00 in full and were in arrears with their monthly instalments, utilities and repairs to the property were outstanding. The value of all that was still outstanding amounted in all to R120 000.

[6] The Applicants invoked the procedure for cancellation of the deed as described in Clause 19.1 of the deed. When the Respondents failed to remedy their default, the Applicants cancelled the agreement by notifying the Respondents and the Deeds Registries Office in Johannesburg. The Respondents continued to lag behind with their monthly instalments arising in terms of the deed and even at the time when the parties concluded the oral lease agreement in March 2016, they were still behind.

[7] From March 2016, the Respondents occupied the property in terms of the lease for which they had agreed to pay an amount of R15 000

monthly reckoned from April 2016. The Respondents have since occupation of the property in terms of the lease in March 2016 failed

to make any payment and yet they refused to vacate notwithstanding notification that the lease has been cancelled due to their

non-payment.

[8] The Respondents have been aware that the Applicants have been wanting to take possession of the property. In this regard, their attorneys wrote to the Applicants on 7 April 2017 indicating that they were willing to vacate the property. Again, on 30 June 2017, their attorney advised the Applicants that the Respondents would vacate the property on 31 July 2017. The date of 31 July 2017 came and went. On 30 August 2017, their attorney made another undertaking that they would move out on 22 September 2017 yet to date they are still in occupation.

ISSUES

[9] This Court must decide whether or not the Applicants are entitled to evict the Respondents. Put differently, are the Respondents in lawful occupation of the property? If they are not, it will follow that the Applicants have a right to eject them.

LEGAL POSITION

[10] Section 1 (xi) of the PIE Act provides that:

‘unlawful occupier’ means 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, excluding a person who is an occupier in terms of the Extension of Security of Tenure Act, 1997, and excluding a person whose informal right to land, but for the provisions of this Act, would be protected by the provisions of the Interim Protection of Informal Land Rights Act, 1996 (Act No. 31 of 1996). (vii).’

[12] Section 4(7) of the PIE Act stipulates:

‘If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women.’

[13] Section 4(8) of the PIE Act describes what the Court can do once it is satisfied that all the requirements of the section have been observed and that no valid defence has been raised by the unlawful occupier:

‘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).

- (9) In determining a just and equitable date contemplated in subsection (8), the court must have regard to all relevant factors, including the period the unlawful occupier and his or her family have resided on the land in question.’

[14] The above provisions of the PIE Act have been given meaning and expression by various cases. Thus, in *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 (6) SA 294 (SCA) the court stated at paragraph 25:

“First, it must decide whether it is just and equitable to grant an eviction order having regard to all relevant factors. Under section 4(7) those 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 section 25 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.”

The second enquiry which the Court hearing an eviction application must consider is, ‘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.”

[15] Weighing on what meaning to assign to ‘just and equitable’ in the context of Section 4(7) of the PIE Act, this Court per Willis J, as he then was, in *Johannesburg Housing Corporation (Pty) Limited v The Unlawful Occupiers of the Newtown Urban Village* 2013

(1) SA 583 (GSJ) said at paragraph 21:

“Having regard to the provisions of section 4(7) of PIE (and the interpretation given to those provisions and the requirements in respect thereof subsequently laid down by the Constitutional Court and the SCA), this case has to be decided according to whether it would be just and equitable to grant an eviction order against the respondent, after considering all the relevant circumstances, including the availability of land for the relocation of the occupiers, the rights and needs of the elderly, children, disabled persons and households headed by women. A conundrum arises from what is meant by “just and equitable”.”

[16] It has been stated in a number of decisions that a party resisting eviction ought to divulge all circumstances pertinent to the eviction order. The upshot of such failure will be an order granting the eviction. In this regard the remarks of the court in *Ndlovu v Ngcobo, Bekker & Another V Jik* 2003

(1) SA 113 (SCA), at paragraph 19, could be instructive:

“Unless the occupier opposes and discloses circumstances relevant to the eviction order, the owner, in principle will be entitled to an order for eviction. Relevant circumstances are nearly without fail facts within the exclusive knowledge of the occupier and it cannot be expected of an owner to negative in advance facts not known to him and not an issue between the parties.”

[17] In *Johannesburg Housing Corporation (Pty) Ltd supra*, this Court also shed light on how detailed and specific the circumstances should be for a party facing eviction to successfully

ward off ejection. The court stated that:

*“All counsel who have struggled to resist an application for summary judgment, will be familiar with the case of *Breitenbach v Fiat*, in which Colman J made it plain that it would be difficult indeed to show good cause why such judgments should not be granted where the defence had been set out ‘baldly, vaguely or laconically’. There is no reason why this principle should not apply to occupiers seeking to resist the application for their eviction. Of course, every move from one dwelling to another carries with it its own traumas and disadvantages. That is not enough to resist an eviction order where an occupier has no right, recognised at common law, to remain in occupation of a particular property.”*

APPLICATION

[18] The first question that requires consideration by this Court is one pertaining to the lawfulness of the Respondents’ occupation of the property. The Respondents first entitlement to the occupation of the property was the deed. They failed to execute their obligations as prescribed in the deed. The Applicants, as they were entitled to do, brought the breach provisions of the deed into operation culminating in cancellation. The cancellation of the deed drew the Respondents into the fold of unlawful occupiers in terms

of the PIE Act.

[19] Subsequent to the cancellation of the deed, the Applicants gave the Respondents a reprieve by entering into the oral lease agreement with them. The lease agreement prolonged their occupation of the property. Their failure to perform as per the provisions of the lease agreement, however, prompted the Applicants to cancel the lease. Thus, the cancellation left them vulnerable to eviction once again as they reverted to being unlawful occupiers as per the definition in Section 1 of the PIE Act.

[20] It is manifest from the provisions of the PIE Act and cases above that the finding that the Respondents are unlawful occupiers does not of itself lead to eviction. The next question that needs consideration is whether or not it will be just and equitable to evict having regard to all relevant factors. See *Changing Tides* supra.

[21] The Respondents have breached the terms of two agreements from which they derived their right to occupy the property. The perusal of the Respondents' papers does not give a picture that the Respondents are struggling financially, besides, the property

concerned in this matter is well above what one would describe as 'sub-economic structure ordinarily occupied by the poorer

stratum of the population in this country'.

[22] Given the above, it should not be a struggle for the Respondents to find affordable alternative accommodation. The only information that this Court has on the Respondents' personal circumstances is that they live with four minor children. I am inclined to believe that the mentioning of the four minor children was not meant to persuade this Court to be circumspect in granting an eviction order. The requirements for wanting a Court to pay a particular attention to such information have been set out in various cases including the *Johannesburg Housing Corporation* and the *Ndlovu* cases supra. The information furnished is too terse and inadequate for this Court to make a decision based thereon.

[23] What is plain is that the Respondents have no defence against the claim of the Applicants. In the circumstances, I am constrained to grant an order for their eviction. However, prior to leaping that far, this Court is enjoined to consider the effect that such an order would have on the Respondents. I have already stated earlier in this judgment that the socio-economic status of the Respondents mitigates against any possible negative effect which the eviction might have otherwise had.

[24] Against that background I find that:

24.1 The Respondents are in unlawful occupation, their right to occupy the property having ended when both the deed and the lease were terminated;

24.2 The Respondents have no valid defence against the claim for eviction; and

24.3 Their socio-economic status puts them outside of the bracket of people who would find it difficult to find affordable alternative accommodation.

COUNTERCLAIM

[25] I now want to briefly turn to the Respondents' counterclaim against the Applicants. In their counterclaim, the Respondents seek this Court to direct the Applicants to pay half of the amount that they (the Respondents) paid as a deposit plus 9% interest to them in lieu of the damages sought against the Applicants as a result of the alleged defects and vandalism of the property.

[26] The damages claim sought against the Applicants is contested. The basis of the challenge to the claim being that the invoices attached to the Respondent's papers are for aesthetic work such as shower heads and arms, toilet pans and taps, and municipal charges for which the Applicants are not liable. In short, the proof alleged to have been attached as proof of the damages sustained does not go anywhere towards R150 000.

[27] The amount of R150 000 has therefore not been established at all. Accordingly, argue the Applicants, the Respondents should not have launched a counter application because disputes of fact under such circumstances would be hard to avoid. Furthermore, the Respondents should have anticipated that this would be the case. In this respect this Court has been referred to the case of *Lombaard v Droprop CC and Others* 2010

(5) SA 1 (SCA) where it was held:

'...Therefore, if a party has knowledge of a material and bona fide dispute, or should reasonably foresee its occurrence and nevertheless proceeds on motion, that party will usually find the application dismissed.'

[29] It certainly ought to have occurred to the Respondents at the time when they attached the invoices that they could not be sufficient to prove their claim of R150 000.00 against the Applicants. Mindful of this fact, they nonetheless proceeded to launch the counter application regardless of the distinct possibility of disputes of fact. This is an appropriate case on which this Court should exercise its discretion in terms of Uniform Rule of Court 6(g). In the result, the main application succeeds and the counterclaim is dismissed.

ORDER

[30] The following order is therefore made:

31.1 The Respondents and any other person occupying the immovable property under the Respondents' title or with her permission, is ordered to vacate the property within 45 (forty five) days of this order;

31.2 In the event of the Respondents failing to comply with the order above, the Sheriff of this Court and/or his deputy is authorized to evict the Respondents and those occupying through or under her, from the property and to secure the services of a locksmith, and the assistance of the South African Police Service, if necessary, to effect such eviction;

31.4 The Respondents are to pay the costs of the application.

B A MASHILE

Judge of the High Court of South Africa

Gauteng Local Division, Johannesburg

APPEARANCES:

For the Applicant: Adv V Vergano

Instructed by: LG Gouveia Attorneys

For the Respondent: In person

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