

SOUTH AFRICA / JUDGMENT

Scenic Route Trading 502 CC v Sigauke and Another (73328/17) [2018] ZAGPPHC 359 (11 May 2018)

[2018] ZAGPPHC 359

COURT

North Gauteng High Court, Pretoria

BEFORE

N.M. Mavundla

CASE / FILE NUMBER

73328/17

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IN THE NORTH GAUTENG HIGH COURT, PRETORIA

[REPUBLIC OF SOUTH AFRICA]

CASE NO: 73328 /17

11/5/2018

In

the matter between:

SCENIC
ROUTE TRADING 502
CC
APPLICANT
And
BRIAN SIGAUKE & 1
OTHER
RESPONDENT

JUDGMENT

MAVUNDLAJ

[1] The applicant brought against the respondent an urgent application for Mandament van Spolie for the restoration of undisturbed and exclusive possession of an immovable property, to wit Erf 397 Noordwyk Extension 63, Midrand ("the property").

[2] The applicant was unsuccessful in persuading the Court that the matter was extremely

urgent, accordingly it was struck from the urgent roll with costs on the 10th November 2017. It was placed before this court in the opposed motion roll.

[3] It is common cause that the applicant is a building contractor with whom the respondents entered into a building contract for the construction of the property. The applicant commenced with the building works on the property during 2015, in terms of the agreement and towards that end had access to the property.

[4] The applicant contended that it had not handed the property over to the respondents who are the registered owners thereof. It further contended that it exercised exclusive possession and access to the property and that it was until 21 October 2017 in sole possession of the keys to the property, to the exclusion of the respondents.

[5] The applicant further alleged that on 23 October 2017 its employees were prevented from gaining access to the property to continue with building works, as a direct result of the locks having been changed by the respondents. The first respondents, according to the applicant, in particular, refused the applicant and its employee's access to the property, thereby preventing the applicant from exercising undisturbed possession of the property.

[6] The respondent in opposing the application contended that there is no allegation made in the founding affidavit as to the manner in which it is alleged to have been in possession of the property, given the fact that the property is located in a controlled townhouse estate. The respondents deny that the applicant had exclusive access to the location of the property in issue. The applicant averred that they leave directly opposite the building site, they gain access to the building site freely as and when they so wish. They deny that the applicant's workers were denied access on the 23 October 2017, but attempted to break into the property by using a locksmith company.

[7] In so far as the applicant may supposedly be relying on a builder's lien, the respondents contended that the applicant signed a waiver of the builder's lien not only in favour of Investec, but also in favour of the owners, the latter being the second respondent. The correctness of this averment can be gleaned in attached annexure BS11 which was signed by the applicant.

[8] The respondents further denied that the applicant was in possession of the property, but merely conducted building work, and access the property simply for that purposes.

[9] The applicant further sought leave to file a supplementary affidavit, which indulgence was not opposed by the applicant, and accordingly granted by the court. Through the supplementary affidavit, the respondents

presented photographs showing the relevant property having been completely built. According to the respondents, because they were not happy with the tardy workmanship and slow pace of the applicant, they terminated its work and engaged another construction to complete the building project, which has since been done. Therefore, they contended, that granting the relief sought by the applicant would be merely academic and of no purpose. Besides, the applicant was not entitled to bring the application as a starting point, as it was not in exclusive let alone possession of the property.

[10] In casu, on the version of the respondents, which has not been denied by the applicant, it is accepted that the applicant did not have possession neither exclusive possession over the property; had waived its builder's lien; there is no further building work to be done by the applicant on the property since it has been completely built.[1]

[11] In the circumstances the application stands to be dismissed. The applicant had asked for costs to be granted on a punitive scale against the respondents. There is no reason, in my view, why the same punitive costs should not be granted against the applicant. In this regard I take into account the fact that whereas the applicant sought to be restored of property, well knowing that it was not in possession of, thus unnecessarily burdened the respondents of legal costs. They need to be restored to the same financial position they were in prior to this action. This can be achieved through a punitive costs order.

[12] In the result it is ordered:

1. That the application is dismissed;
2. That the applicant is ordered to pay the costs on attorney and client scale.

N.M. MAVUNDLA

JUDGE OF THE HIGH COURT

DATE OF JUDGMENT : 11 / 05 / 2018

APPLICANT'S ADV : ADV. C. ZIETSMAN

INSTRUCTED BY : BARES & SASSON ATTORNEYS

1ST & 3RD RESPONDENT : ADV S.J. VAN RENSBURG

INSTRUCTED BY : VAN DER MERWE

[1] Vide Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd

[1984] ZASCA 51; 1984 (3) SA 623 (A); Wightman v Headfour (Pty) Ltd [2008] ZASCA 6; 2008

(3) SA 371 (SCA) at para 12-13.

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