

SOUTH AFRICA / JUDGMENT

Silo v Labiti and Another (CA163/2016) [2017] ZAECHGC 19 (28 February 2017) [2017] ZAECHGC 19

COURT

Eastern Cape High Court, Grahamstown

BEFORE

J.D. Pickering, J.M. Roberson

CASE / FILE NUMBER

CA163/2016

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, GRAHAMSTOWN)

Case no: CA163/2016

Date heard: 24 February 2017

Date delivered: 28 February 2017

In the matter between

NOKHAYA SILO

Appellant

vs

PHIKOSILE ALFRED LABITI

First Respondent

MAKANA LOCAL MUNICIPALITY

Second Respondent

JUDGMENT

PICKERING J:

- [1] This is an appeal against an order of the magistrate's court, Grahamstown, evicting the appellant from certain premises.
- [2] Appellant, Nokhaya Silo, is an adult female residing at [...], E. [...], J., Grahamstown. First respondent is Phikisile Alfred Labiti, an adult male of [...], E. [...], J., Grahamstown. Second respondent is the Makana Local Municipality.
- [3] During February 2014, first respondent applied to the magistrate's court, Grahamstown, for an order in the following terms:

"1. Directing that the "NOTICE OF PROCEEDINGS IN TERMS OF SECTION 4(2) OF THE PREVENTION OF ILLEGAL EVICTION FROM AND UNLAWFUL OCCUPATION OF LAND ACT, ACT NO 19 OF 1998 (hereinafter referred to as the Notice) attached to the Founding Affidavit of Phikisile Alfred Labiti as Annexure A, complies with the requirements of the said Act;

2. Directing that the said Notice and this Application with Affidavits be served by the Sheriff of the district upon the First and Second Respondents;
3. Directing the First Respondent to show cause, on 11 March 2014 at 09h00, why an order for eviction and costs should not be made against the First Respondent."
- [3] The matter was eventually heard and argued during December 2014. On 14 December 2014 the magistrate granted the eviction order sought. Appellant now appeals against the magistrate's judgment and order and seeks leave from this court to adduce further evidence in terms of section 19(b) or (c) of the Superior Courts Act 10 of 2013. For the sake of convenience I shall refer to the parties as they were referred to in the magistrate's court, namely applicant and first respondent.
- [4] The property on which the first respondent is presently residing, namely erf number [...], E. [...], J., is at the centre of the dispute between the parties. Applicant alleged in his founding affidavit that he was the person in control thereof by virtue of Letters of Authority issued to him by the Master of the High Court authorising him to take control of the assets of the estate of the late Duduse Ethelena Labiti who died on 28 June 2013, and to pay the debts and transfer the residue of the estate to the heirs thereof.
- [5] The deceased, who was the mother of applicant, was at the time of her death the registered owner of erf [...], referred to above.
- [6] Applicant averred that first respondent and deceased entered into a verbal agreement during 1991 in terms whereof first respondent would erect a "moveable structure" on erf [...], which at that time was vacant, until she acquired alternative accommodation. According to applicant first respondent, contrary to this agreement, erected an immovable structure on the erf, such consisting of a four roomed house.

Thereafter first respondent continued to occupy the premises without paying rent, water or rates. Despite applicant advising first respondent after the death of the deceased that the verbal agreement was cancelled and serving a notice to vacate upon her she has refused to vacate the premises.

- [7] In reply hereto first respondent states that she is a domestic worker and is married to a self-employed builder. She has four minor children.
- [8] She states that during 1991 she was renting a shack in Tanti Location, Grahamstown, when applicant, who is her nephew, proposed to her that she purchase the deceased's site from "Unifound Company" for the sum of R200,00. First respondent agreed and paid the said sum whereafter she and her husband proceeded to build a brick and mortar house on the erf, which building was completed during 1998.
- [9] At some stage thereafter applicant indicated his unhappiness with the fact that first respondent was occupying the premises and demanded "his site" back. Things came to a head during January 2010 when, according to first respondent, applicant instructed Makana Local Municipality

to cut off the water supply to the erf. First respondent then met the deceased and reported to her what was happening. In consequence of this the deceased deposed to an affidavit on 20 January 2010 in the following terms:

"I am the owner of the above mentioned premises which I therefore handed to my nephew Nomvuyo Marriam Silo. From now on she is therefore authorised to possess the above mentioned premises." (sic)

- [10] On the same day first respondent deposed to an affidavit stating:

"I am the niece of Duduse Labeti who owns the premises mentioned above and whom she now hands over the premises to me as a beneficiary or to possess it." (sic)

- [11] According to first respondent she and deceased were intending to have the property registered in first respondent's name but, before this could happen, deceased suffered a stroke and eventually passed away during June 2013.
- [12] First respondent, who in opposing the application was represented at all times by an attorney, then makes the following somewhat

astounding statement in her answering affidavit:

"It is clear, however, that we entered into a valid sale agreement with the deceased in respect of the property and that ownership thereof should be transferred into our names. I, accordingly, request the above Honourable Court to make such an order. In the event that this Honourable Court is not amenable to make such an order at this stage, I hereby state my intention to do so in a separate action/application."

- [13] Fortunately, this averment was not persisted with in the course of argument before the magistrate.
- [14] First respondent then states that, in any event, she and her husband having erected the house on the property, have a claim against applicant for undue enrichment, a claim which they intend in due course to pursue.
- [15] The magistrate seized with the matter heard argument on 14 December 2014 whereafter she delivered a judgment which, in its entirety, reads as follows:

“The respondent has no basis for opposing the eviction. If I get it the only allegation is their undue enrichment as the respondent has built a structure, however, there is another forum which they have to follow for the claim of what they have spent on that land, so it cannot be dealt with by this Court. Therefore an eviction order is granted as per the application.”

- [16] It is regrettable to have to state that this judgment falls far short of what can reasonably be expected of a magistrate dealing with an application of this nature where the eviction is sought of a respondent who has been in possession of the disputed property for a period in excess of 23 years as at the time of the application.
- [17] In *S V Mcoseli 2012 (2) SACR 82 (ECG)* I unfortunately had occasion to deal with a similarly deficient judgment. What I stated therein at 85 i – j is applicable to the present matter:

“It is regrettable to have to criticise the calibre of a judgment of a regional magistrate, but this particular judgment falls so far short of the minimum standard which can reasonably be expected of a magistrate, much less a regional magistrate, that I would be failing in my duty were I not to do so. So shoddy and careless is the judgment that it amounts, in my view, almost to a dereliction of the regional magistrate’s duty as a judicial officer.”

- [18] At 86 b – d I referred to the judgment of Plasket J in *Value Truck Rental (Pty) Ltd v John Dirker Engineering (Pty) Ltd* ECD case number 127/2007 where the learned Judge commented on a magistrate’s judgment in a civil trial where the magistrate

failed to set out the evidence, merely stating that “proceedings were mechanically recorded therefore I will not dwell much on facts. Plasket J remarked that the word “much” was out of place because the magistrate thereafter did not deal with the facts at all. He then stated in paragraph 5:

“He is required to do so in a judgment: the facts, whether they are common cause or contested have to be applied to the applicable legal principles in order for a judicial officer to arrive at a rational conclusion; and where the facts are in dispute, it is incumbent on the magistrate to decide, on the basis of well established rules, whether the facts asserted by the plaintiff or defendant are more probably true.”

- [19] The magistrate’s judgment is all the more disturbing when it is borne in mind that she was addressed at considerable length by first respondent’s attorney, Mr. Yokwana, who stressed that first respondent had been in occupation of the property for more than 23 years at that

stage and stressed in particular that, having regard to the relevant legislation, the Court should obtain a report from the second respondent as to “whether is there available piece of land that you can accommodate to them or alternatively whether we can allocate a piece land to applicant instead.”

[20] A lengthy application for leave to appeal was then filed in which, inter alia, the following grounds were set out:

“The Court a quo did not comply with the requirements of section 4(7) of the Prevention of Illegal Eviction from and Occupation of Land Act 19 of 1998 (PIE), in that:

1.1 The court a quo gave no consideration to whether or not it was just and equitable to grant the eviction order sought by the first respondent in the terms as requested, and/or in the terms as ordered and/or at all;

1.2 The court a quo did not enquire from the second respondent whether or not there was land made available or could reasonably be made available for the appellants should the order for eviction be granted;

1.3 The court a quo did not order the second respondent to provide a report regarding whether or not there was land available which could reasonably be made available to the appellant should the order for eviction be granted;

1.4 The court a quo gave no consideration to the fact that the appellant is a domestic worker, who has two minor children and a husband who is self employed and therefore whether or not they had the financial means to find alternative accommodation.”

[21] The magistrate’s response hereto, in handwriting, reads as follows:

“1. It was not in dispute that applicant was the holder of the title relating to the property concerned.

2. Applicant is the private owner of the property and has no responsibility of towards first respondent as to award alternative accommodation.

3. Makana Municipality (2nd respondent) is responsible to avail land on application by first respondent alternative to pay/compensate the applicant whilst first respondent occupies the said premises.”

[22] It is apparent from the magistrate’s judgments that she failed entirely to apply her mind either to the issues raised by Mr. Yokwana during the course of his submissions before her, or to those issues raised in the Notice of Appeal, despite it being incumbent upon her to do so.

[23] It is common cause that first respondent is presently an unlawful occupier of the premises, having been given proper notice to vacate, and that at the time the eviction proceedings against her were initiated she had been in occupation thereof in excess of six months. In these circumstances the provisions of section 4(7) of PIE are applicable to the matter. They read as follows:

“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 ... 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 an unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by woman.”

[24] The magistrate has paid no regard whatsoever to these provisions and, in particular, whether, having regard to all the relevant

circumstances it was just and equitable to grant an order for eviction. She could also only have come to a decision as to

whether such an order was just and equitable after having obtained the relevant report from the Municipality.

[25] We were addressed at some length concerning the application by appellant to adduce further evidence. It is not necessary to deal with the legal niceties of such an application because, in my view, the following dictum in *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7; 2005 (1) SA 217 (CC) at para 32 is applicable to the present matter:

“[32] The obligation on the court is to 'have regard to' the circumstances, that is, to give them due weight in making its judgment as to what is just and equitable. The court cannot

fulfil its responsibilities in this respect if it does not have the requisite information at its disposal. It needs to be fully apprised of the circumstances before it can have regard to them. It follows that, although it is incumbent on the interested parties to make all relevant information available, technical questions relating to onus of proof should not play an unduly significant role in its enquiry. The court is not resolving a civil dispute as to who has rights under land law; the existence of unlawfulness is the foundation for the enquiry, not its subject-matter. What the court is called upon to do is to decide whether, bearing in mind the values of the Constitution, in upholding and enforcing land rights, it is appropriate to issue an order which has the effect of depriving people of their homes. Of equal concern, it is determining the conditions under which, if it is just and equitable to grant such an order, the eviction should take place. Both the language of the section and the purpose of the statute require the court to ensure that it is fully informed before undertaking the onerous and delicate task entrusted to it. In securing the necessary information, the court would therefore be entitled to go beyond the facts established in the papers before it. Indeed, when the evidence submitted by the parties leaves important questions of fact obscure, contested or uncertain, the court might be obliged to procure ways of

establishing the true state of affairs, so as to enable it properly to 'have regard' to relevant circumstances.

[26] It is clear therefore that the order of eviction granted by the magistrate must be set aside and the matter remitted to the

magistrate to comply properly with s 4(7) of PIE including obtaining a report from second respondent as to the availability of land.

[27] In all the circumstances the appeal must succeed. There was some debate as to the issue of the costs of the appeal in the event of the appeal succeeding. Applicant's legal representatives are acting for him in forma pauperis in terms of Rule 40(2)(b). In my view, taking into account the circumstances of this matter and the unfortunate disregard by the magistrate of the provisions of section 4(7) the most appropriate and fair order would be that each party pay their own costs of the appeal.

[28] Accordingly the following order will issue:

1. The appeal succeeds.
2. Each party will pay their own costs of the appeal.
3. The order of eviction granted by the magistrate is set aside and the matter is remitted to the magistrate in order for her to hear such further evidence as may be adduced by the parties concerning the relevant circumstances and to comply with the provisions of section 4(7) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

J.D. PICKERING

JUDGE OF THE HIGH COURT

I agree,

J.M. ROBERSON

Appearing on behalf of Appellant:

Instructed by: Yokwana Attorneys, Mr. Yokwana

Appearing on behalf of Respondents:

Instructed by: Neville Borman and Botha Attorneys, Mr. Powers

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