

SOUTH AFRICA / JUDGMENT

Teaca Properties (Pty) Ltd and Others v John Banza and Others (2017/36741) [2018] ZAGPJHC 72 (9 February 2018) [2018] ZAGPJHC 72

COURT

South Gauteng High Court, Johannesburg

BEFORE

Kathree-Setiloane

CASE / FILE NUMBER

2017/36741

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2017/36741

In the matter between

TEACA PROPERTIES (PTY) LTD

(REGISTRATION NUMBER: 2006/009429/07) FIRST APPLICANT

JIKA PROPERTIES (PTY) LTD

(REGISTRATION NUMBER: 2005/035424/07) SECOND APPLICANT

MYSO HOLDINGS (PTY) LTD

(REGISTRATION NUMBER: 1969/001980/07) THIRD APPLICANT

DALEM INVESTMENTS (PTY) LTD

(REGISTRATION NUMBER: 2015/081394/07) FOURTH APPLICANT

NDF15 INVESTMENT AND TRADING

(REGISTRATION NUMBER: 2012/162772/07) FIFTH APPLICANT

KENWYN FLATS (PTY) LTD

(REGISTRATION NUMBER: 1997/020093/07) SIXTH APPLICANT

INDLUPLACE PROPERTIES LTD

(REGISTRATION NUMBER: 2013/226082/06 SEVENTH APPLICANT

G AND N TARN ENTERPRISES (PTY) LTD

(REGISTRATION NUMBER: 1069/015283/07) EIGHTH APPLICANT

ERF [...] WINDSOR (PTY) LTD

(REGISTRATION NUMBER: 1995/002627/07) NINETH APPLICANT

HELEN JOY HOLDINGS (PTY) LTD

(REGISTRATION NUMBER: 1996/015071/07) TENTH APPLICANT

EARLS DEN (PTY) LTD

(REGISTRATION NUMBER: 2015/082427/07) ELEVENTH APPLICANT

KARAVAS (PTY) LTD

(REGISTRATION NUMBER: 2012/178347/07) TWELTH APPLICANT

and

JOHN BANZA AND 167 OTHERS FIRST RESPONDENTS

CITY OF JOHANNESBURG SECOND RESPONDENT

Summary - Eviction of 70 occupants who occupied units in terms of lease agreement – settlement agreement reached between parties for rental arrears and made an order of the court – respondents failed to comply fully with order – urgent matter as applicants will not be afforded substantial redress at a hearing in due course – just and equitable to evict 70 respondents – they resorted to self-help through rent boycott – the respondents conduct is characterised by acts of intimidation and threats of violence

J U D G M E N T

KATHREE-SETILOANE J:

- [1] The applicants are associated companies that own 33 residential buildings comprising 330 units in the suburb of Windsor (“the buildings”). The 1st to 104th respondents occupy residential units in the buildings as tenants of the applicants. The applicants seek in this application to evict 70 of the respondents from their respective units in the building. They occupied these units in terms of written lease agreements concluded with the applicants or their agents.

Background

- [2] During May 2017, certain of the respondents suddenly, and without explanation, stopped paying rent to the applicants. The applicants discovered that their failure to pay rent was part of a broader rent boycott which was called by the Windsor Community Recovery Movement. (“WCRM”).
- [3] The de facto leader of the WCRM was Ms Shumani Ndou. The stance adopted by the WCRM was that the applicants are not the legitimate owners of the buildings; that they had to prove to them that they were; that they were stealing money from their tenants; and that they were not paying over to the municipality any service charges and rates, presumably received from the tenants.
- [4] Subsequent to its establishment, the WCRM opened a bank account, in which tenants were encouraged to deposit their rental payments, rather than paying them over to the legitimate owners. In an effort to curb the WCRM’s incitement of a rent boycott, the applicants approached this Court on 22 June 2017 for an order interdicting the WCRM’s leaders from, inter alia, “...inciting, demanding or publicising a rental boycott in respect of the Windsor Properties...”
- [5] The interdict did not deter the WCRM from inciting further rent boycotts, with the number of participants having increased substantially. The individuals cited as the 104th to 167th respondents joined the rent boycott after the service of the interdict on the WCRM and its’ attorneys.
- [6] In accordance with their Constitutional obligations, the applicants made numerous attempts to resolve the rent boycott prior to proceeding with eviction proceedings against tenants. The steps taken included engaging with the tenants, seeking an interdict against the WCRM and freezing its bank account; making a formal settlement proposal to the WCRM through its attorneys. These efforts were, however, to no avail and the applicants were ultimately obliged to institute eviction proceedings out of this Court.
- [7] Consequently, the lease agreement in respect of which the 1st to the 167th Respondents occupied units in the buildings were terminated; culminating in the launch of this application on 28 September 2017.
- [8] The matter ultimately came before this Court on 23 November 2017. At Court, the matter stood down for the parties to explore the potential of a settlement agreement. An inspection in loco was conducted of the buildings that the respondents alleged were overcrowded, unhygienic and rubbish dumps.

- [9] Attending the inspection in loco were the Chief Executive Officer of the applicants, alongside their attorney and counsel for the respondents, the Chairman and other committee members of the WCRM alongside their attorney and counsel; and City of Johannesburg's attorney, Graeme McMaster, and one of its senior housing officials. In addition, there were a number of Mafadi officials (agents of the applicants) and tenants in attendance.
- [10] These individuals inspected several dwelling units in a number of the buildings nominated by the respondents. The respondents alleged that the buildings were unfit for human habitation. In the course of inspecting the buildings occupied by the respondents, it became evident that their allegations regarding the condition of the units were untrue as the general condition of the buildings and the individual units in particular; especially the kitchens and bathrooms were in very good condition.
- [11] The WCRM were also concerned about a number of slum buildings in Windsor. Although the applicants accept that these buildings exist in Windsor, they make it clear that they do not own to them. The WCRM was also concerned about certain structural and service delivery issues such as refuse, which the applicants point out, are not within their control. The applicants, nevertheless, agreed to collaborate with their tenants and others in the broader community towards the uplifting the entire suburb. This included making representations to the City Council.
- [12] The inspection dispelled the respondents' allegations of the units being in poor condition. On the advice of their legal representatives, the respondents sought to enter into negotiations with the applicants to settle the pending eviction application. Notably, this course of conduct was proposed by the respondents' legal representative.

The settlement agreement

- [13] A settlement agreement was ultimately concluded between the applicants and respondents, each duly represented. This agreement of settlement related to 71 of the respondents cited in the application. Their names are listed in annexure SA-2 of the order of 24 November 2017. By consent between the parties, the settlement agreement was made an order of court on 24 November 2017 ("the Consent Order").
- [14] The Consent Order provided as follows:
- '1. Subject to 2 Below, the Applicants will fulfil their obligations in terms of the refurbishment and maintenance schedule annexed here to "X", which refurbishment and maintenance will commence on 7 December 2017.
 2. The Respondents will notify the Applicants through their managing agents of any urgent refurbishment or maintenance that needs to be included on the list.

3. The Respondents shall pay their “rental” to the applicants in the amount reflected under the heading “Rental on schedule “Y” annexed hereto, on or before 1 December 2017, and on or before the first day of each subsequent month.
 4. The Respondents, in addition to their obligations recorded in 3 above, will repay the arear rental to the Applicants in the amount reflected under “arrears” in schedule “Y” annexed hereto, in the amount of R500.00 (Five Hundred Rand) per month.
 5. Should the Respondents fulfil their obligations in terms of prayer 3 and above in full for a period of 3 (Three) months, then the parties shall enter into a fresh lease agreement, the name of the lessee to be advised by the Respondent’s attorney.
 6. Until the leases entered into in terms of 5 above are concluded, the parties agree that the leases are not novated.
 7. The Respondents agree that, should they fail to make payment as agreed herein, then the Applicants shall be entitled to issue a warrant of execution in the amount reflected under the heading “arrears” on annexure “Y” hereto, less any arrears payments that have been made.
 8. That once the parties have entered into fresh leases as recorded above, the parties shall simultaneously enter into acknowledgement of debt in respect of any arrears as at the date of the lease in the repayment of R500.00 (Five Hundred Rand).
 9. The Applicants and the Respondents will collaborate with each other over the course of the next 12 (Twelve) months in order to reduce any overcrowding that may be taking place as prohibited by the City Council By-Laws.
 10. To compensate the Respondents in this regard there shall be no Rental increase for the 2018 calendar year.
 11. The Respondents agree to withdraw their complaints made to the Rental Housing Tribunal.
 12. The Respondents agree that, should any issues of a landlord and tenant nature not be dealt to their satisfaction in the future, they shall approach the Gauteng Rental Housing Tribunal for adjudication without withholding rent.
 13. The parties agree that this matter is urgent, that the matter shall be removed from the roll with the issue of costs reserved, and that should it become necessary, the matter mat be re-enrolled on 1 (One) week’s notice on the same papers, duly supplemented as necessary.’
- [15] Notwithstanding that the settlement agreement was made an order of Court, all but one of the 71 respondents who agreed to the terms of the order, have refused to comply fully therewith.
- [16] The non-compliance prompted the applicants’ to file a supplementary affidavit in accordance with clause 13 of the Consent

Order, and set the matter down for hearing in the urgent court again. The applicants seek to enforce the Consent Order which contemplates

approaching the court for an order of eviction in the event of the respondents' breach.

[17] The Applicants seek relief in terms of Section 4(6) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 1998 ("PIE").[1] Annexure SA-2 to the applicants' supplementary affidavit lists the names of the individual tenants against whom relief is sought. By agreement, the applicants recorded these names as provided by the respondents' attorney of record at the time. Annexure SA-2 identifies the names of the respondents reflected in the schedule annexed to the order of 24 November, the unit number occupied; the name of the owner of the individual unit occupied by each of the respondents; the amount owing in terms of the Court Order by each respondent for the months of December 2017 and January 2018, the total amount paid by each respondent subsequent to 24 November 2017, and the arrears of the individual respondents in terms of the Consent Order. [2]

Urgency

[18] I found this matter to be urgent as the applicants will not be afforded substantial redress at a hearing in due course. The

applicants contended that no hearing in due course will undo the harm that the respondents' rent boycott has done to its business, and the ongoing harm to its law abiding tenants and to the Rule of Law. From November 2017 to the time this application came before the Court, the Applicants' losses as a result of the rent boycott has increased by over R1 000 000.

[19] The interests of the applicants that require protecting (in terms of section 34 of the Constitution[3]-) are, therefore, not only commercial[4] but also relate to the safety and well-being of all its other tenants in the buildings -- who have a right to live in the building free of threats of violence and intimidation. I accordingly agreed that no hearing in due course will redress the unlawful conduct of the respondents whose resort to self-help by means of a protracted and on-going rent boycott in defiance of the Consent Order is inimical to the constitutional cornerstone of the Rule of Law.

Defences Raised By the respondents

[20] The occupiers' defence to their eviction prior to the Consent Order was that upon their grievances being addressed by the applicants, they will honour their obligations arising from the lease agreements. They undertook to pay their arrears rentals when their grievances had been resolved because, so they alleged, the rent was being paid into the WRCM's banking account.

[21] The applicants contend that the defences raised are an attempt to perpetuate the unlawful conduct that is taking place by delaying the hearing of this matter through an ex post facto attempt at justification, for conduct that is undisputed and amounts to self-help.

- [22] The respondents raise essentially the same defence for their failure to comply fully with the Consent Order as they did prior thereto. They also peg their defence on the allegation that the applicants are not the owners of the buildings and accordingly have no locus standi in this application.
- [23] This issue had been put to rest prior to the first hearing of this his application in November 2017, when the City of Johannesburg gave the WCRM an undertaking to conduct a verification audit of all of the properties listed in the annexure to the notice of motion in this application. Mr McMaster, the City's legal representative conducted the verification audit on 19 October 2017, the audit confirmed that the buildings which are the subject of this application were owned by the applicants. The WCRM, and in particular Ms Ndou, was informed of this in a letter from Mr McMaster on the same day.
- [24] This notwithstanding, it is impermissible, by virtue of the Consent Order, for the respondents to rely on the defences

relating to the ownership and condition of the buildings which they now raise in answer to the applicants' supplementary affidavit. The necessary implication of the Consent Order is that all the respondents' defences are waived or abandoned. In law, the conclusion of the settlement agreement/Consent Order is a compromise of those defences. Therefore, at this stage of the proceedings, what the respondents are required to demonstrate is why they do not have to perform in terms of the Consent Order to establish a defence. They have, however, failed to do so.

- [25] The case advanced by the respondents is an entitlement to resort to self-help by, first, engaging in the rent boycott and, thereafter inciting others to join in that boycott. This was done through threats of violence and acts of intimidation.
- [26] The ostensible basis for this "right" to self-help is pegged to a whole series of allegations that the buildings are in a poor state and that the applicants have not met their obligations to remedy this. As I understand these allegations, they are nothing more than a series of conclusions, presented without any primary facts. There is not a single fact or evidence advanced as to the alleged poor state of any of the buildings. On the contrary, the inspection in loco conducted by all the parties cited in this matter dispelled the respondents' contentions. In terms of the Consent Order, the respondents had a duty to notify the applicants of any refurbishment or maintenance that needs to be included on the list referred to in paragraph 1 of the order. To the extent that the respondents allege that the applicants have not met their obligations under paragraph 1 of the Consent Order, the onus to bring this to the attention of the applicants was on the respondents. They have, however, failed to do this.
- [27] The Respondents offer no further justification, nor do they suggest any reason as to why the Consent Order may not be complied with. Conversely, during argument counsel for the respondents conceded that the Consent Order is binding on all parties and that to the extent that the Court may deem it just and equitable to do grant an order of eviction against the 15

non-complying respondents, but not against the remainder who have complied partially. The difficulty I have with separating out these 15 Respondents from the remaining partially complying respondents is that they provide me with no explanation for why they were justified in not complying fully with the Consent Order.

[28] The Consent Order, however, renders the respondents' obligation to pay rent *res judicata*. It furthermore disposes of the defences raised to not paying rent and to the right to insist on proceeding before the Housing and Rent Tribunal on the complaints raised on the answer to the applicants' founding affidavit in this application. Their defences were compromised and the position that the respondents themselves is akin to *res judicata*. [5]

[29] A settlement agreement is an agreement of compromise. In *Van Zyl v Nieman* [6], the learned Judge in the Appellate Division, opined:

"it is clear that an agreement of compromise has the same effect as res judicata and consequently excludes an action on the original cause of action except where the compromise agreement expressly or by clear

implication provides that in the event of non-compliance with the provisions thereof a party may fall back upon his original

right of action."

This is precisely what clause 13 of the Consent Order, which is a conditional compromise, entitles the applicants to do in the event of non-compliance with its terms. The respondents, on the other hand, did not reserve their rights to raise their original defences again.

[30] Accordingly, the terms of the Consent Order in this matter render it common cause that:

30.1 The respondents had leases with the applicants, which leases were terminated. The respondents are estopped from disputing the applicants' ownership of the properties or the Cancellation of the leases any longer; and

30.2 The respondents' referral of "disputes" to the Rental Housing Tribunal were spurious as indicated by the occupiers, cannot contend for poorly maintained buildings or any other right for the non-payment of rent.

Is it just and equitable to evict the 70 respondents?

[31] In the circumstances, it is only necessary to determine whether it is just and equitable to evict the 70 respondents. In determination of this issue, I must have regard to all the legally relevant circumstances in the parties' affidavits.

[32] Section 4(6) of PIE provides:

“if an unlawful occupier has occupied the land in question for less 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 the rights and needs of the elderly, children, disabled persons and households headed by women.”

[33] The legally relevant circumstance that I am obliged to consider[7] include the following:

- a) The occupiers have organised themselves into a militant body that has seen it fit to take the law into their own hands. This sort of conduct is repugnant to Constitutional values and the rule of law[8];
- b) Pursuant to resorting to self-help through a rent boycott, the respondents have set about to deprive the applicants of a revenue stream. They ostensibly did so to coerce the applicants into maintaining the properties, while being unable to identify any failure on the applicants' part in this regard. The evidence shows, to the contrary, that the buildings are well maintained. There

is accordingly no basis in fact or in law for the respondents to withhold their performance in terms of the Consent Order.

- c) The Occupiers are all, by their admission, people who are able to pay rent and who would have paid rent but for the WRCM's conduct. This is obvious from the fact that they had, without demur, done so for many years prior to May 2017. The question of homelessness does not therefore arise, and there is no role for the City Council to play in providing them with temporary shelter.
- d) The half-hearted submission on behalf of the respondents, during argument, that they will be rendered homeless if evicted, cannot trigger the City Council's obligation to provide temporary shelter or alternative housing. As pointed out by the City in its answering affidavit, its obligations are only triggered if there is reason for it to assist people who, for reasons beyond their control, find themselves in an emergency housing situation that they are unable to address.
- e) As put by the City in answer: “The, to date, muted plight of the [respondents] becoming homeless is ... a consequence of their own conduct.” The respondents have furthermore failed to make out a case of homelessness or that there are women, children, the elderly or disabled, whose rights to shelter would be violated if evicted. There is, in this regard, no shortage of immediately available accommodation for the occupiers.
- f) The respondents' conduct is profoundly characterised by acts of intimidation and threats of violence. This, too, has no place in a society based on the Constitutional values of the Rule of law and Supremacy of the Constitution.
- g) When, at the inspection, the respondents' defence to this application was demonstrated to be palpably dishonest, they concluded a settlement agreement with the applicants and consented to it being made an order of court;

h) The Occupiers then reneged on the Consent Order. They did this without any attempt to have it set aside.

[34] Accordingly, and in determining whether or not it is just and equitable to evict the respondents, the Court is faced with enforcing

their compliance with a consent order and the Rule of Law or a situation where there are simply no consequences to resorting to

self-help and wilful disregard of court orders.

[35] The Constitutional Court has on more than one occasion held that the resort to self-help cannot be sanctioned. By aligning themselves with the illegal conduct of the WCRM, in the face of an order interdicting it and its leaders from encouraging tenants to participate in a further rent boycott, and an order (granted by consent) to meet their rental obligations to the applicants, the respondents have simply taken the law into their own hands.

[36] In the circumstances, I consider it just and equitable to evict the 70 respondents listed in Annexure X hereto from the applicants'

buildings in Windsor (described in the order below).

[37] In the circumstances, I consider it just and equitable to evict the 70 respondents listed in Annexure X hereto from the applicant's

buildings in Windsor.

Order

[38] I accordingly make the following order:-

1 The respondents listed in Annexure "X" hereto are evicted from the Windsor properties described as and situated at:

UNIT [...]

[...] P. AVENUE

WINDSOR EAST, JOHANNESBURG

& OTHER UNITS LISTED IN ANNEXURE "X"

(hereinafter referred to as "the Windsor properties")

2 The respondents listed in Annexure "X" above are ordered to vacate the property on or before 9 April 2018.

3 In the event that the respondents listed in Annexure "X" do not vacate the Property on or before 9 April 2018, the Sheriff of the Court or his lawfully appointed deputy is authorised and directed to evict the Respondents from the property.

4 The Respondents listed in Annexure “X” are directed to pay the costs of this application.

F KATHREE-SETILOANE

JUDGE OF THE GAUTENG LOCAL DIVISION OF THE HIGH COURT OF SOUTH AFRICA

JOHANNESBURG

Counsel for the Plaintiffs:

Mr. Pullinger

Instructed by:

Vermaak Attorneys

Counsel for the Defendants:

Mr Kunene

Instructed by:

Manamela Attorneys

Date of Judgement:

09 February 2018

Date of hearing:

02 February 2018

- [1] “if an unlawful occupier has occupied the land in question for less 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 the rights and needs of the elderly, children, disabled persons and households headed by women.”
- [2] Annexure SA-3 is a schedule reflecting the amounts due and the payments received from the 71 respondents. As indicated, only one respondent has paid in full and complied with his obligations in full. 12 have paid in excess of R10 000,00 but failed to comply fully with their obligations in terms of the consent order. 43 respondents have paid amounts between R2 000,00 and R10 000,00 and yet have failed to comply with their obligations in terms of the Consent Order. 15 respondents have paid nothing at all.
- [3] Section 34 of the Constitution provides: Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.
- [3] Section 34 of the Constitution provides:

Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

[4] In *Twentieth Century Fox Film Corporation and another v Anthony Black Films (Pty) Ltd* 1982 (3) SA 582 (W) it was held at 586 G that: “In my opinion the urgency of commercial interests may justify the invocation of Uniform Rule of Court no less than any other interests. Each case must depend upon its own circumstances. For purposes of deciding upon the urgency of this matter I assumed, as I have to do, that the applicant’s case was a good one and that the respondent was unlawfully infringing the applicant’s

copyright in the films in question.”

[4] In *Twentieth Century Fox Film Corporation and another v Anthony Black Films (Pty) Ltd* 1982 (3) SA 582 (W) it was held at 586 G that:

“In my opinion the urgency of commercial interests may justify the invocation of Uniform Rule of Court no less than any other interests. Each case must depend upon its own circumstances. For purposes of deciding upon the urgency of this matter I assumed, as I have to do, that the applicant’s case was a good one and that the respondent was unlawfully infringing the applicant’s

copyright in the films in question.”

[5] *Nager v Nagar* 1982 (2) SA 263 (Z) at 267C

[6] 1964 (4) SA 661 (A) at 669-670

[7] *Ndlovu v Ngcobo; Bekker and another v Jika* 2003 (1) 113 (SCA) at [19]

[8] *Ngqykumba v Minister of Safety and Security and Others* 2014 (5) SA 112 (CC) at [21]

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Prepared on 14 October 2026 · Esheria