

SOUTH AFRICA / JUDGMENT

Eastern Cape Development Corporation v Occupiers of Erf 117 and Erf 118 Umtata, Windsor Hotel, 36 Sutherland Street, Mthatha and Others - Reasons (3333/2023) [2024] ZAECMKHC 9 (30 January 2024)

[2024] ZAECMKHC 9

COURT

Eastern Cape High Court, Makhanda

BEFORE

Rugunanan

CASE / FILE NUMBER

3333/2023

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, MAKHANDA)

CASE NO. 3333/2023

In the matter between: EASTERN CAPE DEVELOPMENT CORPORATION APPLICANT and OCCUPIERS OF ERF 117 AND ERF 118 UMTATA, WINDSOR HOTEL, 36 SUTHERLAND STREET, MTHATHA FIRST RESPONDENT KING SABATA DALINDYEBO LOCAL MUNICIPALITY SECOND RESPONDENT THE MINISTER OF POLICE THIRD RESPONDENT

REASONS

FOR ORDER

Rugunanan J

- [1] This is an eviction application in which the subject matter is a six storey building known as the Windsor Hotel which is located in the central business district of Mthatha.
- [2] It is alleged that a syndicate of unidentified persons illegally gained control of the property and let it out to the respondent occupiers, and that the syndicate went as far as forcing the lawful tenants of the applicant to pay their monthly rental to them or to vacate the property if they refused to do so.
- [3] The property is invaded and is no longer under the control of the applicant.
- [4] The applicant asserts that it is the owner of the property and that the first respondent occupiers are in unlawful occupation.

- [5] The application primarily resorts in section 5 of The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (the Eviction Act) in terms of which the applicant, as owner, seeks urgent relief posited inter alia on the presence of real and imminent danger to person or property specifically the occupants of the property and to other members of the public.
- [6] Fundamentally, the applicant's claim is vindicatory.
- [7] On 30 November 2023, I made an order dismissing the application and directed the applicant to pay the costs – on the attorney and client scale – of those respondent occupiers who filed answering affidavits in opposition to the application (of which there were only two, amid concerns of delayed service of the rule nisi herein and a considerable but indeterminate number of occupiers who, due to geographical and economic constraints, could not present themselves or procure representation to oppose the proceedings instituted in this Court).
- [8] At the hearing of the matter the parties (barring the second and third respondents who made no appearance) fully ventilated their arguments on record and upon making the order I stated that I was persuaded by the case presented in argument by counsel for the respondents.
- [9] To repeat the totality of the parties' arguments at length would be a superfluous exercise since it is not intended to descend into a full-blown exposition thereof.
- [10] What follows are my reasons, informed as they are by my view of the substantial issue/s identified for determination and flowing fairly from the material before me. In sketching my reasons I intend confining myself to saying only that which is considered absolutely necessary to substantiate the order, this in deference to the caveat that it does not necessarily follow that because something has not been mentioned it has not been considered[1].
- [11] In its papers the applicant raised concerns about the conduct and safety of several role players in the matter. While maintaining a measure of sensitivity by avoiding any mention of names of individuals or entities in this judgment, I am however impelled to state that the applicant's concerns are a staggering manifestation of hyperbole on an industrial scale. In expressing this sentiment it is not intended to make light of the fact that an executive official of the applicant was shot and sustained serious injuries. However, there is no satisfactory proof that the incident was an attempt to derail this application or that the police are investigating an offence.
- [12] Driving to the heart of the matter the flaw in the applicant's case lies both in its failure to properly establish its alleged ownership of the property and in its reliance on a letter dated 13 July 2023 from the third respondent notifying of a report that the building is 'seriously shaking' as well as a 'Drone Conditional Assessment' dated 1 September 2023 (the drone survey). Though purporting to suggest that the building structure and condition of the property presents a real and imminent danger, the limitation presented by the letter and the

drone survey is the overall hearsay nature of the evidence which detracts from their reliability and credibility. The findings contained in the drone assessment are provisional, and in the absence of information about the technical specifications and capability of the drone, the process through which its data was extracted and by whom, the limitation in the applicant's case becomes obvious particularly where no confirmatory affidavit has been forthcoming from its author (ostensibly due to fear of reprisal).

- [13] The preceding reflections are the principal aspects that influenced my decision to make the order which I did once it became immediately apparent that the case presented by the applicant is founded essentially on hearsay matter in the expectation that the Court would be inclined to throw it a lifeline to regain control and possession of property now in the hands of a syndicate.
- [14] The burning question is – how or why did this happen? The material contained in the court file will enable the interested reader to draw their own conclusions.
- [15] In vindicatory claims proof of ownership has to be adequate.[2]
- [16] It is settled that the best evidence for the proof of ownership of fixed property is a title deed. [3]
- [17] The applicant relied on a DeedsWEB report that was issued on 12 September 2023. It has a disclaimer limiting the validity of the information it contains to a cycle of seven days. I am unpersuaded that the information in the report survived the disclaimer by the time the matter was fully argued on 30 November 2023.
- [18] The report was introduced by the applicant; it took the risk of doing so without forethought of the implications of the disclaimer and offered no explanation why it was unable to obtain the title deed in the passage of several weeks since instituting the proceedings on 15 September 2023.
- [19] Tellingly, the information reflected in the DeedsWEB report is hearsay. The applicant has not put up an affidavit by the person responsible for compiling the information,[4] nor has a properly motivated case been put forward to motivate its admissibility (as to which see below).
- [20] With these deficiencies the claim to ownership loses legal traction and renders the application hopeless.
- [21] Turning to section 5 of the Eviction Act, the court may grant an eviction order if it is satisfied that:
- ‘(a) there is a real and imminent danger of substantial injury or damage to any person or property if the unlawful occupier is not forthwith evicted from the land;

(b) the likely hardship to the owner or any other affected person if an order for eviction is not granted, exceeds the likely hardship to the unlawful occupier against whom the order is sought, if an order for eviction is granted; and

(c) there is no other effective remedy available.’

[22] The legislated jurisdictional factors are to be read conjunctively and in the aggregate they place an onus on the applicant.

[23] The outcome of the matter turned on the primary question whether the applicant has established a real and imminent danger of substantial injury or damage – as it were, that the building is unstable, unsafe and in a state of deterioration.

[24] I do not intend traversing the contents of the letter nor of the drone survey (hereinafter for simplicity, the documents), save to state that the applicant has not adduced evidence from any individual who has personal knowledge of the facts, events, observations, recommendations and/or the conclusions expressed therein.

[25] I have no doubt that the deponent to the applicant’s founding affidavit lacks personal knowledge of the contents of the documents

including the DeedsWEB report despite his assertion that he has control of the documents and the facts to which he deposes are within his knowledge.[5]

[26] The upshot is that the material stands as hearsay.

[27] Their probative value of depends upon the credibility of the person/s who gathered information and compiled them and not upon that of the deponent to the founding affidavit.

[28] Hearsay is, in the absence of agreement to receive same, to be excluded unless its admission is sought in terms of section 3(1) of the Law of Evidence Amendment Act 45 of 1988 (the Evidence Act).

[29] Hearsay evidence not so admitted in terms of the Evidence Act is no evidence at all.[6]

[30] No case in terms of section 3(1) of the Evidence Act was made out in the applicant’s papers and no such case was advanced in argument.

[31] I acknowledge that hearsay evidence is more readily admitted in urgent matters, but this does not mean that the requirements of the Evidence Act may be bypassed. It merely means that a court, having regard to exigencies on the urgent roll, will approach the admission of hearsay with some degree of latitude, if in appropriate circumstances, it is properly advanced and motivated. Differently put, a proper motivation must be set out in an affidavit by the party relying on the hearsay matter having regard to the requirements in section 3(1) of the Evidence Act. But this is not the only basis upon which the applicant’s reliance on the hearsay evidence fails.

- [32] Prior to the enactment of the Evidence Act, it was incumbent on a party relying on hearsay evidence to, inter alia, assert that the deponent believes the hearsay matter to be correct and to furnish grounds for such belief.[7] There is nothing in section 3(1) of the Evidence Act to suggest that this requirement is abandoned.[8] In point, section 3(1)(c)(vii) of the Evidence Act enjoins the court to have regard to 'any other factor which in the opinion of the court should be taken into account'. A deponent who seeks to have hearsay evidence admitted must, at least, in terms of this section state that such evidence is believed to be true and set out the grounds upon which their belief is founded.[9] The replying affidavit does not do so and the deponent's assertion of his belief in information furnished by others leaves me unpersuaded that the issue has been seriously and unambiguously addressed, still less was any persuasive argument advanced.
- [33] The applicant's preoccupation with maintaining anonymity of identity, and in so doing by presenting unconfirmed opinion evidence does not in my view, justify the eviction of the respondents much less in circumstances where the second respondent does not have a plan for providing emergency shelter. Parenthetically, the temptation to comment on the affidavit filed by the second respondent on this particular issue, is resisted. The need to do so does not arise but may yet emerge in another context. In any event, by the time of the hearing of the matter the application had already lacked the requisite element or degree of urgency. By then the exercising of my discretion in the admission of the hearsay evidence did not even come into consideration as no proper motivation for its admission was before me.
- [34] To grant the applicant relief on the basis of the aforementioned documentation included amongst its papers would be tantamount to a mere rubber-stamping exercise and an uncritical acceptance of evidence that has not been competently presented.

[35] No substantiated or sustainable basis exists for granting the eviction order, caedit quaestio.

S RUGUNANAN

JUDGE OF THE HIGH COURT

Appearances:

For the Applicant: G J Gajjar, Instructed by Joubert Galpin Searle Inc., c/o Carinus Jagga Inc., Makhanda, Tel: 046-904 0086 (Ref: EAS68/0002).

For the opposing Respondents: D Skoti, Instructed by S R Mhlawuli & Associates c/o Yokwana Attorneys, Makhanda, Tel: 046-622 3561 (Ref: Mr Yokwana/Ms Bulube).

Date heard: 30 November 2023.

Reasons:

30 January 2024.

[1] R v Dhlumayo and Another 1948 (2) 677 (A) at 678.

- [2] Rusken N O v Thiergen 1962 (3) SA 737 at 744A-B.
- [3] Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd
[1992] ZASCA 208; 1993 (1) SA 77 (A) at 81J-82A.
- [4] See Dwele v Phalatse and Others
[2017] ZAGPJHC 146 para 9 and the cases referred to therein.
- [5] Joni v MEC Social Development, Eastern Cape
[2009] ZAECMHC 27 para 9.
- [6] S v Ndhlovu 2002 (6) SA 305 (SCA) para 12.
- [7] Galp v Tansley NO & Another 1966 (4) SA 555 (C) at 559G; also Masazie Logistics (Pty) Ltd v Fan
[2022] ZAGPJHC 98 para 12.
- [8] Masazie Logistics ibid para 12.
- [9] Masazie Logistics ibid para 12.
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