

SOUTH AFRICA / JUDGMENT

Wales v Myburgh (2017/16776) [2018] ZAGPJHC 505 (31 July 2018) [2018] ZAGPJHC 505

COURT

South Gauteng High Court, Johannesburg

BEFORE

Z Carelse

CASE / FILE NUMBER

2017/16776

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REPUBLIC OF SOUTH

AFRICA

HIGH COURT OF SOUTH

AFRICA

GAUTENG LOCAL

DIVISION, JOHANNESBURG

Case

no: 2017/16776

In the

matter between:

PETER

JAMES

WALES Applicant

and

GUDRUN

MYBURGH Respondent

JUDGMENT

CARELSE, J:

- [1] The applicant seeks an order to evict the respondent from his property situated at [...], Hyde Park, Johannesburg (“the residence”) in terms of section 4(1) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (“PIE”).
- [2] The respondent counterclaims[1] for a temporary stay of the eviction proceedings pending the outcome of an action which has been instituted where pleadings have closed. The declarator the respondent seeks, inter alia is for a life-long right to the property to the extent that the respondent is obliged to be accommodated by the applicant at the

residence, alternatively, to accommodation of similar ilk. Initially in the counterclaim the respondent sought a transfer of the property into her name. However the respondent seeks to amend the relief sought in the counter application. I will return to this amended relief later on in the judgment.

- [3] The central issue to be determined in this matter is whether the respondent has a sustainable defence that will prevent her from being evicted from the residence. The applicant submits that the respondent has no sustainable defence to either the eviction or the action that prevents her eviction.

Background facts

- [4] To give context to this matter, it is important to set out the background facts. When the applicant and the respondent entered into a romantic relationship sometime in 2014, they were married to third parties. The respondent alleges that the applicant ‘vigorously’

pursued her well knowing that she was married. This conduct caused the irretrievable breakdown of the respondent’s

marriage, so the respondent submits. The respondent further alleges that the applicant told her that they should divorce their respective spouses. The applicant promised to marry her. This is denied by the applicant.[2]

- [5] On 12 August 2016, the applicant bought the residence in order for them to live together. Transfer of the property took place on 15 December 2016. The respondent and her adult daughter took occupation of the property at the end of November 2016. By then the respondent’s divorce was finalised. The terms of her settlement inter alia included rehabilitative maintenance for a period of two years.

- [6] On 29 November 2016, the applicant left his matrimonial home and moved in with the respondent and her daughter. On 13 December 2016, the applicant, together with the respondent and her daughter went on holiday to Mauritius. They returned on or about 21 December

2016. The respondent alleges that the applicant told her that he had to leave for Cape Town to attend a family meeting. After this meeting, the respondent alleges that the applicant sent her a WhatsApp message terminating their relationship. The applicant denies this, instead alleges that after the Mauritius trip he realised he made a mistake and decided to terminate their relationship and to reconcile with his wife. It is not disputed that the applicant terminated the relationship by way of a WhatsApp message.[3]

[7] It is the applicant's case that sometime in January 2017 he advised the respondent that he intended to sell the property and requested the applicant to vacate the property.[4] This is denied by the respondent who in turn submits that a meeting between them took place on 16 January 2017 to discuss practical

issues concerning the up-keep of the residence, namely the payment of utilities. Pertinently, the applicant submits that she reminded the respondent that he intended to register the residence in her name. This would have entitled her to the full value of the residence.[5] This alleged agreement is denied by the applicant.

[8] A number of e-mails were sent demanding that the respondent vacate the residence. The respondent refused to vacate the property. The applicant submits that he has a mortgage bond registered over the property in favour of ABSA Bank Limited which he services, including payments to the Home Owners Association. He has a monthly commitment in respect of the property in the amount of R80,

000. The applicant denies that he has any obligation in law to maintain the respondent and her daughter and seeks an order on the basis that it is just and equitable to evict the respondent from the residence.

The Law

[9] Section 4(1) of PIE provides:

“(1) Notwithstanding anything to the contrary contained in any law or the common law, the provisions of this section apply to proceedings by an owner or person in charge of land for the eviction of an unlawful occupier.”

An “unlawful occupier” is defined as “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... [6]

Who has locus standi to apply for an eviction in terms of PIE is the owner or a person in charge of the land in question may approach the court. An ‘owner’

means “the registered owner of land.” 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.[7] If a 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 just and equitable date on which the unlawful occupier must vacate the land under the circumstances; and the date on which an eviction order may be carried out if the unlawful occupier has not vacated.[8]

[10] It is common cause that the applicant is the registered owner of the property. The applicant submits that the provisions of PIE have been complied with, in other words, the jurisdictional requirements have been met. This is not challenged at all by the respondent. The applicant further submits that it is just and equitable to evict the respondent from the property on the following grounds: firstly, the applicant requires possession of his property because he is liable for all the costs associated with the property which costs are in the region of R80, 000 per month; and secondly, the respondent will not be destitute despite her say-so if she is evicted from the premises because the respondent receives a monthly payment from her ex-husband. Part of the payment is an amount R15 000 a month for rental, which has never been used until now and it is still ongoing until later this year. So, this is not a case, that if the respondent is evicted she will be on the street and destitute. She will be able to rent other accommodation.

[11] What I am required to determine is whether the respondent has raised a valid defence. If no valid defence is raised then eviction should be ordered and no stay of the proceedings should be contemplated, so the applicant submits.

[12] This matter broadly speaking proceeded under two headings. Firstly, is there a triable issue/ a valid defence and secondly the issue of *lis pendens*. During argument the respondent conceded that the issue of *lis pendens* does not apply in this case. I agree and therefore there is no need to deal with this issue in my judgment.

Is there a triable issue/ valid defence

[13] In her answering affidavit the respondent's submits that she has become the owner of the residence on three alternative basis. Firstly, there is an oral agreement of donation. As a result hereof the residence belongs to the respondent, so the respondent submits. Secondly, there was an oral agreement of compromise. Compromise was the breach of promise to marry. Thirdly, arising out of the oral agreement, the respondent alleges that "I have a lifelong right to this property which is a real right which must also be registered in my name."

[14] Section 2(1) of the Alienation of Land Act[9] provides:

"No alienation of land . . . shall . . . be of any force or effect unless it is contained in a deed of alienation signed by the parties."

All three of the defences raised in the answering affidavit arises out of an oral agreement and is unsustainable in law because it is not permissible to seek the transfer of immovable property by way of an oral agreement. These defences fall foul of section 2(1) of the Alienation of Land Act. The respondent in argument conceded that she has no right to have the property transferred into her name on the basis of a donation in terms of section 2(1) of the Alienation of Land Act.

[15] This is not the end of the matter because her answering affidavit goes a step further to the extent that she states: “I

will bring an action in which I will seek this relief, namely to transfer the property to me.” The respondent also seeks an interdict to stay the eviction proceedings based on the fact that an action will be brought.

[16] The transfer of the property was the main defence raised in the answering affidavit. The action on the other hand that was instituted was not for the transfer of the residence, alternatively a similar residence but for the right to occupy. The respondent in the action pleads a contract of maintenance. It is clear that the action instituted was for different relief. After the applicant filed their heads of argument the respondent filed an amendment to her notice of the counter application. The original relief, namely, the transfer of the residence on the basis of the oral agreement of donation, compromise and lifelong title which is a real right entitling the respondent to the transfer of the residence in her name.

[17] The amendment reads: “By insertion of the following words at the end of paragraph 1.3 thereof, “ further alternatively that it be declared that the Respondent is entitled to be accommodated by the Applicant and that the Applicant is obliged to accommodate the Respondent at [...], (“ House”) , alternatively of a similar ilk to her satisfaction which

accommodation includes the furniture presently at the House or like furniture (“the Accommodation”) in the above mentioned

proceedings. Hyde Park, Johannesburg. The action was for a right to occupy this property alternatively, and this is important,

alternatively a similar property.” This new defence amounts to a maintenance claim, so the applicant correctly submits.

[18] As at the date of hearing, it bears mention that the amendment has never been effected. Even if I assume that the amendment was effected, it is clear that the amendment was intended to bring the action in line with the notice of the counter application.

[19] There is no evidence in the answering affidavit to support the amended relief sought. Neither has the answering affidavit been supplemented to support the amended relief.

[20] In her answering affidavit the respondent states that[10]:

“ 6.5 He again agreed that the property belonged to me after his breach of promise, the last occasion being on 9 January 2017 when in the presence of Sabrina, he stated in these exact words to Sabrina: “Don’t worry, I will take care of you, the house is yours.” I accepted this donation alternatively the compromise in settlement of the breach at that time. It is implicit that the applicant would have to do all things necessary to transfer the property into my name.

6.6 I annex hereto as annexure “GM2” a copy of an email I sent to the applicant on 17 January 2017 wherein the further undertaking of 16 January 2017 to take care of me financially is recorded. I accepted this to be the position. I will revert to this annexure in context herein below.”

The primary case of the respondent is that as a result of the donation, the residence must be transferred into her name; in addition, she seeks an undertaking to take care of her financially. This verbal agreement was concluded on 16 January 2017.

[21] I understand the respondent’s case to be that the alleged express term of the verbal agreement was that the residence was donated to her. At the same time the respondent also relies on an alleged tacit term of the verbal agreement that she will not be the owner but will be accommodated in terms of a contract of maintenance. In my view the respondent cannot intend on the one hand that she becomes the owner and on the other hand she agrees that she will not be the owner, but will be accommodated in terms of a contract of maintenance. The alleged verbal agreement of maintenance contained in the action is not supported under oath and is clearly stillborn on the basis of the contradictory version.

[22] There is a second basis upon which the alleged verbal agreement is stillborn. The respondent in an e-mail to the applicant, marked GM2[11] states:

“Apart from the devastating emotional consequences, there are serious financial consequences to consider going forward for my future many of which I discussed with you last night at our meeting. . . ”

This email is dated 17 January 2017. Thus the meeting alluded to was the meeting of 16 January 2017 which is common cause. The email goes further:

“In the spirit of our meeting it was agreed that we would try and resolve this honourably and with dignity ...

“ Last night and even before you agreed that you would financially take care of me. The details now need to be worked out...” (My underlining)

The foregoing demonstrates that the meeting was to resolve issues but pertinently no agreement was reached. The email further states:

“ . . . It was also agreed that I could stay in the house as long as I choose until it was sold, and you would pay the monthly, the costs of this. . . ”

This paragraph indicates that it is the applicant that will decide when the residence is sold and she will stay in the residence for as long as she chooses.

“ . . . You suggested that I could have a third value of the house, but I disagree and feel half is fair, as you made it clear from the outset that we would be in a 50/50 partnership in our relationship and marriage. Do you recall you wanted to put the house in my name?”

This paragraph pre-supposes that the house can be sold, but it was not agreed what will happen once the residence is sold. In other words, there is no agreement what the respondent will be entitled to once the residence is sold. This paragraph certainly contradicts the donation story. It also contradicts the respondent's version that “I may stay in the house for as long as I want to”. This paragraph contradicts the respondent's version that the residence was donated to her. The email further reads:

“Please let's meet up again soon so that we can discuss further and resolve in the spirit of goodwill.”

This paragraph is destructive of the respondent's version that an agreement had been reached.

[23] In an e mail to the respondent dated 17 January 2017 the applicant states:

“I agree that once Hyde Park is sold but there is no pressure to sell, I will allocate your 33 percent of the value after all costs that I have incurred for [t]he up keep and maintenance of the property.”

Even in this correspondence there is no hint of an undertaking/ agreement to maintain the respondent.

[24] That the parties entered into a verbal agreement on 16 January 2017 is not borne out by this email. At best for the respondent there was an agreement to agree.

[25] That no agreement was reached is further supported by a letter from the respondent's erstwhile attorney dated the 12 February 2017[12] a month after the meeting of 16 January 2017. In the letter the following agreement is alluded to:

“ . . . Your client thereafter verbally agreed with our client that despite the termination of the relationship, she would be entitled to remain in the property for as long as she wished and upon the eventual sale of same, he would allocate to our client 33% of the value of the property, which your client equated to approximately R5million. The aforesaid agreement was recorded in an email dated 17 January 2017 from your client to ours, a copy of which is attached.”

The agreement now being relied upon is not contained in this letter.

[26] Turning to the respondent's particulars of claim she states[13]:

“3. During or about 16 January 2017 and at Johannesburg the Plaintiff and the Defendant both acting personally, concluded a verbal agreement (“the agreement”)[14].

4. The material express, alternatively implied, further alternatively tacit terms of the agreement were inter alia as follows:

4.1 The Defendant would maintain and support the Plaintiff financially and in accordance with the lifestyle to which she was accustomed (“the obligation to maintain”).

4.2 As part of the obligation to maintain, the Defendant undertook to accommodate the Plaintiff in the house, alternatively other accommodation of a similar ilk, which accommodation includes . . . “

It is apparent from the foregoing that the essential terms of the alleged verbal agreement set out above is that the applicant would maintain and support the respondent financially and give an undertaking to accommodate the respondent in the residence, alternatively, provide accommodation of similar ilk.

- [27] The agreement contended for by respondent in the action, which is what the respondent wants the stay for, is not only destroyed because it will rely on a tacit term which conflicts with the express intention of the parties but also fails, because the very correspondence which supposedly records the agreement the next day shows that there was no agreement. No final agreement was reached. At best it amounted to an agreement to agree.
- [28] To seek an interdict in the action to prevent the applicant from ejecting the respondent until another property has been provided is unsustainable in law because the contract of maintenance relied upon only gives rise to a personal right. At best, the respondent may sue the applicant in order to enforce the contract, if she can prove a contract of maintenance. Even if the respondent is able to prove a contract of maintenance she could sue for specific performance which will still not give her a real right in the property. Without a real right she cannot enforce a right of retention over the property. Because the respondent does not have a real right there is no reason for such security to be given. Effectively the respondent is saying is that she is entitled to hang on to the residence until she gets what she wants. Neither is there a debtor–creditor lien that can arise because nowhere in the papers does the respondent state that the applicant owes her any money and that she is entitled to half of the property as security. Therefore no case for a right of retention has been made on the papers.
- [29] I understand the respondent’s case to be that the undertaking by the applicant to provide for the respondent financially would include her accommodation in either the disputed residence or a property of similar ilk. The respondent submits that notwithstanding the fact that the applicant is the owner of the property she is entitled to interdict the applicant from selling it until such time that he has found or tendered accommodation of a similar ilk to her. To stay the eviction proceedings in the circumstances of this case would be in the interest of justice. Pertinently if she is evicted on 31 August 2018 she will not be able to enforce her right to alternative accommodation because she would have already vacated the residence, so the respondent submits. In other words until the applicant has tendered alternative accommodation the respondent is entitled to stay at the residence.

[30] To support her case for the stay of the eviction proceedings the respondent relies on a recent judgment of the Constitutional Court, *Mokone v Tassos Properties CC and Another*.

[15] In this matter the eviction proceedings relating to a commercial lease were stayed because the applicant was seeking to enforce a right of pre-emption, because if she succeeds in the action, the eviction would be unnecessary and unfair. The Constitutional held that the interest of justice dictates that the eviction be stayed.

[31] In *Mokone supra* there were prospects of success on the basis of the right of pre-emption. Furthermore, *Mokone* case she running a business from the premises and if evicted, it would have ended her ability to do so. Part of the conditions that were laid down by the Constitutional

Court was that she continue paying the rent.

[32] The applicant correctly submits that it is not a general just and equitable basis where one feels sorry for a litigant and applies the interest of justice test. There must be a basis. In my view the relief in the action will not rescue the eviction because the respondent cannot hang on to the residence until her personal right for alternative accommodation is satisfied. The respondent has not made a case to hold the residence as security. When considering the interest of justice test the merits of the action must be considered.

[33] In my view, the respondent has not made out a case for the eviction proceedings to be stayed on the basis that she is entitled to remain on the residence and if the action succeeds she will be entitled to stay on the premises. She may have a claim to be put up in a similar property. But she cannot hang onto the property until a similar property is provided. The applicant correctly submits that even if a contract is established it is one in perpetuity and terminable on reasonable notice. The applicant submits that reasonable notice has been given. Six months' notice was given which starts to run from February 2018 until the end of August 2018. It is therefore just and equitable to evict the respondent as at the end of August 2018, so the applicant submits.

Costs

[34] The applicant submits that costs should follow the result and cost of two counsel where two counsel were used. The applicant also seeks the cost of the Rule 30 application which is opposed by the respondent. The applicant submits that in response to the notice to the counter-application, the applicant did not put up an answering affidavit, instead the applicant filed a notice of points of law in terms of Rule 6(5)(d)(iii) of the Uniform Rules of Court. In response to this notice, the respondent filed a replying affidavit which applicant submits is an irregular step. A replying affidavit follows an answering affidavit. There is no such thing as a replying affidavit to a notice of a point of law. For this reason the Rule 30 application was launched and the applicant submits that he is entitled to the costs of the Rule 30 application.

- [35] The respondent submits that the Rule 30 application went beyond points of law. It deals with factual issues to which the respondent was entitled to respond. The respondent further submits that the costs should not be awarded because the applicant was not successful on the point of law and the debate has become moot. In my view each party should pay the cost relating to the Rule 30 application.
- [36] I am satisfied that the applicant, the registered owner of the premises has met the jurisdictional requirements for an eviction and having regard to all the relevant circumstances of both the applicant and the respondent in my view it would be just and equitable if the date for eviction is 30 November 2018.
- [37] In result of the following order is made:
1. The respondent is evicted from the property situate at: [...] Hyde Park.
 2. The respondent is ordered to vacate the property on the 30 November 2018, the Sheriff of the Court or his Deputy is authorised to evict the respondent from the property on 7 December 2018, if the respondent has not done so.
 3. The respondent is to pay the costs of this application including the costs of the application in terms of section 4(2) of PIE, such costs to include the costs of two counsels where two counsels were engaged.
- [4] Each party is to pay their costs of the Rule 30 application.

Z Carelse

Judge of the High Court

Gauteng Local Division, Johannesburg

Appearances

Counsel for the Applicant: Mr A Gautsch SC and Mr Pullinger

Instructed by: Messrs Vermaak and Partners

Counsel for the Respondent: Mr Smith

Instructed by: Natalie Lubbe & Associates Inc.

Date heard

Date judgment delivered: 31 July 2018

[1] Page 136 GM1

[2] Annexure JPW5

- [3] FA – GM 2 “ Have had my meeting and I would like you to respect my decision to stay with my family and so will not be back tomorrow I am sorry it is over between us and this final decision regards”.
 - [4] FA page 8 para 10
 - [5] AA page 120 para 35
 - [6] Section 1
 - [7] Section 4(6)
 - [8] Section 4(7)
 - [9] 68 of 1981
 - [10] Vol 1 page 94 par [3]
 - [11] Page 141 – GM2
 - [12] Page 19 annexure JPW4
 - [13] Volume 4 page 368 par 3
 - [14] Vol 4 page 368 para[3]
 - [15] 2017(5) SA 456 (CC)
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