

SOUTH AFRICA / JUDGMENT

Ward and Others v Key Lettings (Pty) Ltd (2022/3751) [2023] ZAGPJHC 1302 (14 November 2023) [2023] ZAGPJHC 1302

COURT

South Gauteng High Court, Johannesburg

BEFORE

K Hopkins

CASE / FILE NUMBER

2022/3751

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AFRICA
IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG DIVISION,
JOHANNESBURG
CASE NUMBER: 2022/3751
NOT REPORTABLE
NOT OF INTEREST TO
OTHER JUDGES
REVISED
In

the matter between:

WALTER
FREDERICK WARD
First
Applicant
COLEI
VAN DYK
Second
Applicant
EDWARD
MARDWANGWA
Third
Applicant
and
KEY
LETTINGS (PTY) LTD
Respondent
In

re:

KEY
LETTINGS (PTY) LTD
Applicant
And
WALTER
FREDERICK WARD
First
Respondent
COLEI
VAN DYK
Second
Respondent
J.M
VAN DYK
Third
Respondent
MRS
VAN DYK
Fourth
Respondent
EDWARD
MARDWANGWA
Fifth
Respondent
ALL
OTHER UNLAWFUL OCCUPIERS OF
ERF
[...] PORTION 0, BRYANSTON,
JOHANNESBURG
Sixth
Respondent
THE
CITY OF JOHANNESBURG

METROPOLITAN
MUNICIPALITY
Seventh
Respondent

JUDGMENT

(LEAVE TO APPEAL)

HOPKINS AJ

[1] This is an application for leave to appeal against the order that I handed down on 15 February 2023. That order reads as follows:

After having read the documents filed of record, having heard the submissions made by counsel for the respective parties and having considered the matter, the following order is made:

1. The counter application of the first, second and fifth respondents is dismissed with costs.
2. That the first, second, third, fourth, fifth and sixth respondents and all persons holding under them, be evicted from the property known as Erf [...], Bryanston, Registration Division IR, Gauteng.
3. That the first, second, third, fourth, fifth and sixth respondents vacate the property within 30 days from the date of this order, failing which the Sheriff for the area within which the property is situated is authorised to evict the first, second, third, fourth, fifth and sixth respondents and all persons holding under them.
4. That the first, second, fifth respondents, jointly and severally the one paying the other to be absolved, pay the costs of this application.

[2] Before I deal with this application for leave to appeal, it is perhaps helpful to recap the proceedings of 12 February 2023 which culminated in the order. First, there was the main application, instituted by the applicant (“Key Lettings”), which sought to evict the first to sixth respondents (“the occupiers”). Mr Jooste represented the applicants and Dr Botha

represented the occupiers. There was also a counter application, instituted by three of the respondents, namely the first (“Dr

Ward”), the second (“Ms Van Dyk”) and the third (“Mr Mardwangwa”). The precise relief sought in the

counter application was a moving target. It underwent various iterations, but without ever seemingly complying with the provisions

of rule 28. I will say more about the counter application a little further along. For now, I begin with the eviction application brought by Key Lettings.

- [3] Key Lettings is the registered owner of Erf [...] Bryanston. However, prior to it acquiring ownership, the property was owned by a company known as Port Ferry Properties 53 (Pty) Ltd (“Port Ferry”). However, during 2014, Port Ferry was placed under business rescue. Dr Ward was a director of Port Ferry, but he resigned his directorship on 16 August 2016. The business rescue proceedings were subsequently terminated and Port Ferry was placed in final liquidation on 31 March 2017. The liquidators sold the property by way of a public auction on 8 November 2017 for R3,3 million to Mr Nathan Len on behalf of a company to be formed. Mr Len subsequently nominated Key Lettings as the purchaser and communicated this to the liquidators who accepted it.
- [4] Dr Ward and Ms Van Dyk, who is described in the papers as Dr Ward’s fiancé, brought an application to stop the liquidation and keep Port Ferry under business rescue. That application was unsuccessful. It was dismissed on 11 September
2018. Subsequently, a further application was brought by an entity which appears to be related to Dr Ward known as Orange Financial Holdings Ltd, also to terminate the liquidation and place Port Ferry back under business rescue. That application, too, was unsuccessful and it was dismissed on 5 February 2019. Also on 5 February 2019, the court ordered that the transfer of Erf [...] Bryanston to Key Lettings must proceed. This happened and the property was registered to Key Lettings on 25 November 2021. This is how Key Lettings became

the owner of Erf [...] Bryanston.

- [5] In the eviction application, Key Lettings sought to evict Dr Ward, Ms Van Dyk, and the other occupiers who are cited as the third, fourth, fifth and sixth respondents. The eviction application was brought in terms of section 4 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act No. 19 of 1998 (“the PIE”). It is, of course, trite that an eviction application under the PIE must be instituted by “an owner or person in charge of the land” and that the proceedings must be for the eviction of “an unlawful occupier”. Moreover, an eviction order can only permissibly be granted by the court where it is “just and equitable” to do so. Applicants seeking to evict unlawful occupiers must comply with the procedural requirements, specifically those in section 4(2) of the PIE. It is only if the court is satisfied that all of the requirements have been complied with, and that no valid defence has been raised by the occupiers, that an eviction order may be granted.
- [6] At the hearing on 12 February 2023, during argument, Mr Jooste referred me to *City of Johannesburg vs. Changing Tides 74 (Pty) Ltd*

[2013] 1 All SA 8 (SCA) where, at para 25, the Supreme Court of Appeal held that:

A court hearing an application for eviction at the instance of a private person or body, owing no obligations to provide housing or achieve the gradual realisation of the right of access to housing in terms of section 26(1) of the Constitution, is faced with two separate inquiries. First, it must decide whether it is just and equitable to grant an eviction order having regard to all relevant

factors. Under section 4(7) those factors include the availability of alternative land or accommodation. The weight to be attached to that factor must be assessed in light of the property owner's protected rights under section 25 of the Constitution, and on the footing that a limitation of those rights in favour of the occupiers will ordinarily be limited in duration. Once the court decides that there is no defence to the claim for eviction and that it would be just and equitable to grant an eviction order, it is obliged to grant that order. Before doing so, however, it must consider what justice and equity demands in relation to the date of implementation of that order and it must consider what conditions must be attached to that order. In that second inquiry, it must consider the impact of an eviction order on the occupiers and whether they may be rendered homeless thereby or need emergency assistance to relocate elsewhere. The order that it grants as a result of these two discreet inquiries is a single order. Accordingly, it cannot be granted until both inquiries have been undertaken and the conclusion reached that the grant of an eviction order, effective from a specified date, is just and equitable. Nor can the inquiry be concluded until the court is satisfied that it is in possession of all the information necessary to make both findings based on justice and equity.

- [7] In arriving at my decision, which culminated in the order of 15 February 2023, I accepted as a fact that Key Lettings is the owner of Erf [...] Bryanston because the property is registered in its name. I also accepted, as a fact, that Key Lettings did not consent to the occupiers occupying the property. As to whether or not the eviction of the occupiers is just and equitable, I had regard to the arguments advanced to me by Mr Jooste on behalf of Key Lettings. I was mindful of the fact that Key Lettings has paid the full purchase price but derived no benefit at all from the property because the occupiers have remained in occupation of it throughout. Moreover, Key Lettings is liable to pay all municipal accounts in respect of the property whilst Dr Ward, Ms Van Dyk, Mr Mardwangwa and the other occupiers remain on the property. The occupiers, for their part, placed very few facts before the court as to why it would be unjust or inequitable to evict them. Dr Botha, who acted for the occupiers, was unable to persuade me that it would be unjust and inequitable for the occupiers to be evicted.
- [8] The counter application, as stated above, was instituted by Dr Ward, Ms Van Dyk and the fifth respondent who I understand is a gardener on the property ("Mr Mardwangwa"). They instituted it on 14 March 2022. The primary relief was a request for a stay of the application for eviction for a period of two months to enable them to bring a substantive application to set aside Dr Ward's sequestration and the liquidation of several companies linked to him, including Port Ferry. That counter application, as I stated above, underwent various iterations. In March 2022, a notice in terms of rule 28(1) was delivered and it indicated that, instead

of seeking the order as initially formulated, a new order will be sought declaring the sale and transfer of Erf [...] Bryanston null and void. The proposed amendment was, however, never perfected. An amended counter application was then served during April 2022, but without complying with the provisions of rule 28. In this non-compliant proposed amendment, the

respondents were seeking a stay of the application for eviction pending an application which they intended to bring to set aside Dr Ward's sequestration and the liquidation of Port Ferry which application they were going to bring within six months. The order sought in that particular version of the counter application underwent a further purported amendment in May 2022, again without following the process prescribed by rule 28. This time the order being sought was one to declare the sale and transfer of Erf [...] void alternatively to stay the eviction application pending an application to be instituted within six months requesting the court's consent to conduct the proceedings as required in terms of the 16 April 2019 order. And then, finally, shortly before I heard argument on 12 February 2023, a supplementary affidavit was delivered in which it was stated that Dr Ward, Ms Van Dyk and Mr Mardwangwa will seek an order cancelling the sale and transfer of Erf [...] to Key Lettings. This is not how relief should be formulated and it is not how counter applications, once formulated, should be amended. The haphazard way that Dr Ward, Ms Van Dyk and Mr Mardwangwa have gone about formulating the relief that they seek in the counter application has created some confusion and left the true relief that they seek unclear and uncertain. It is precisely to avoid this type of situation that the court has rules. Those rules must be complied

with litigants. Whilst I accept that non-compliance may occur, it is proper that when it does, the non-compliant party should bring an application for condonation. That did not happen in this case either.

[9] At the hearing on 12 February 2023, it emerged that the occupiers' main defence to the eviction was that Key Lettings is not the lawful owner of Erf [...] Bryanston because the transaction from which it acquired ownership from Port Ferry was allegedly tainted by fraud. This line of argument formed the backbone of the counter application, ie. the reason that an order was sought cancelling the sale and transfer of the property and/or declaring the transfer null and void. However, I found there to be four impediments that precluded me from granting this relief to Dr Ward et al. First, I found that they lacked locus standi. Dr Ward was the only one who had a connection to Port Ferry. He used to be a director of it, but he resigned his directorship on 16 August 2016 which is before Port Ferry was placed in final liquidation on 31 March 2017. It was never contended by Dr Botha, on behalf of the occupiers, that anybody other than Dr Ward may have had the requisite standing to bring the counter application. Moreover, it is common cause that Dr Ward is an unrehabilitated insolvent. He therefore has diminished legal capacity. His ability to litigate is limited primarily to matters relating to his own status as an insolvent. In other matters, such as the one that forms the subject matter of his counter application, he needs the consent of the trustees of his personal estate. Fatally, in my view, he did not obtain their consent, nor were the trustees joined to the litigation. Secondly, to the extent that Dr Ward et al sought to impugn the legality of the transaction that underpinned the transfer of ownership in Erf [...] Bryanston from Port Ferry to Key Lettings, a number of necessary parties had not been joined. The liquidators of Port Ferry had not been joined despite the fact that they sold Erf [...] Bryanston to Key Lettings. The initial purchaser who bought the property from Port Ferry on behalf of Key Lettings, Mr Nathan Len, was also not joined despite the fact that he,

according to Dr Ward et al, was the main culprit in the alleged fraud. I was being asked to red card players that were not even on the field. Thirdly, an interdict had been granted against Dr Ward on 16 April 2019 effectively prohibiting him from instigating or launching proceedings

on behalf of or in respect of an entity in which he had an interest prior to his sequestration. The interdict, by design, included Port Ferry. The interdict also prohibited Dr Ward from making any further allegations that the order sequestering him was fraudulently

obtained and that ABSA Bank via its representatives fraudulently facilitated the transfer of Erf [...] Bryanston from Port Ferry to Mr Nathan Len and/or Key Lettings. The counter application, which sought to impugn the legality of that transaction, was based on documents that contained numerous statements which fall foul of the interdict. Fourth and finally, notwithstanding the other three impediments, the motion court is not an appropriate choice of forum for challenging matters that implicate fraud in these types of circumstances because they are typically animated by disputes of fact.

[10] On 15 February 2023, for the reasons given above, I granted the eviction with costs and dismissed the counter application with costs.

[11] Now we get to the current application, Dr Ward, Ms Van Dyk and Mr Mardwangwa's application for leave to appeal which was argued before me on 31 October 2023. Mr Jooste, again, represented Key Lettings (who is now the respondent). However, on this occasion Dr Ward represented himself and Ms Van Dyk and Mr Mardwangwa (who are now the applicants for leave to appeal). In terms of section 17(1)(a)(i) of the Superior Courts Act No. 10 of 2013, leave to appeal may only be given where the judge concerned is of the opinion that the appeal would have reasonable prospects of success. In other words, Dr Ward had the job of persuading me that I may have erred to the extent that there are reasonable prospects that another court, tasked with an appeal against my order of 15 February 2023, would (not may) find differently.

[12] At the hearing, Dr Ward focussed on the alleged illegality of the transaction in terms of which Erf [...] Bryanston was transferred from Port Ferry to Key Lettings. His argument, as I understood it, was that the transfer of the property is tainted by no less than 32 instances of illegality or fraud. He submitted, on the authority of Nedbank Ltd vs. Mendelow N.O. and Another 2013

(6) SA 130 (SCA), that the court has no discretion but to set aside the transfer of the property if there is fraud. Dr Ward relied specifically on para 12 of Mendelow which reads as follows:

It is trite that where registration of a transfer of immovable property is effected pursuant to irregular or a forged document ownership of the property does not pass to the person in whose name the property is registered after the purported transfer. Our system of deeds registration is negative: it does not guarantee the title that appears in the deeds register. Registration is intended to protect the real rights of those persons in whose names such rights are registered in the deeds

office... registration does not guarantee title, and if it is effected as a result of a forged power of attorney or of an irregular document, then the right apparently created is no right at all.

[13] I understood Dr Ward's submission to be that the presence of fraud vitiated the transfer from the seller who, in this instance, was Port Ferry. The result of this, he said, is that Key Lettings is not the owner of Erf [...] Bryanston and therefore does not have the right to evict the occupiers from the property. I reminded Dr Ward of the difficulties that I had when the matter was argued before me on 12 February 2023. Specifically, I reminded him that there are a number of extant court orders that stand in the way, or seem to me to stand in the way, of engaging his allegations of illegality and fraud. For example, there was the application brought to interdict the sale of Erf [...] Bryanston which was struck from the roll on 8 November 2017. Then there was the application to terminate the liquidation and place Port Ferry back under business rescue which was dismissed on 11 September 2018. After that there was the further application to terminate the liquidation and place Port Ferry under business rescue which was also dismissed

on 5 February 2019 coupled with the order that directed that Erf [...] Bryanston to be transferred to Key Lettings. Last but not least there is the 16 April 2019 interdict which prohibits Dr Ward from instigating or launching proceedings on behalf of Port Ferry, or in respect of it. These orders have not been appealed. I asked Dr Ward on what basis another court could find differently given that these unchallenged orders remain unchallenged and are extant. His answer was that Mendelow is authority that these other court orders do not stand in the way of another court declaring the transfer null and void because that is the automatic consequence of fraud. Even if Dr Ward is correct, a fraud still needs to be established.

[14] On 12 February 2023, I found that Dr Ward did not have locus standi to institute the counter application. For a person to have locus standi, he or she must have a "sufficient interest" in respect of the subject matter of the proceedings, which is constituted by having an adequate interest and not merely a technical one. The interest that the applicant has must be actual and not merely abstract or academic. The interest must be current and not merely hypothetical. The requirement of a "sufficient interest" acts as an important safeguard to prevent busy bodies from instituting litigation with sometimes misguided or trivial complaints. If the requirement of having a "sufficient interest" did not exist, our courts would be flooded by people instituting litigation in respect of which they have no adequate interest. It seems to me, therefore, that in order for an applicant to have standing, that person must have been aggrieved by some act or omission. To be aggrieved, a person must have a substantial, immediate and direct interest in the subject matter and outcome of the proceedings. Not only must the person who is applicant in the litigation have a direct interest in the issue being litigated, but his or her interest must be immediate and not merely a remote consequence of the judgment. The interest must also be substantial. An interest is substantial when it surpasses the common interest that other ordinary citizens may have in procuring obedience to the law. For an interest to be direct, there must be a causal connection between the conduct complained of and the harm that has been alleged.

Finally, an interest can be said to be immediate where the causal connection is sufficiently proximate so as not to be remote or speculative.

- [15] At the hearing of the application for leave to appeal, I asked Dr Ward why he believed that he had a sufficient interest such as to confer upon him locus standi to institute the counter application. Relying on Mendelow, he submitted that if a fraud is established in the transfer, the transfer is automatically null and void. He submitted that anybody

can point out a fraud to the court and when they do, questions of locus standi do not enter the equation.

- [16] It is useful to consider the facts of Mendelow a bit more closely. Mrs Emily Valente owned immovable property in Gauteng. In her will, which she signed in 1994, she left her estate in equal shares to her two sons, Evan and Ricardo. In 2001, the property was sold to a company, U Valente Africa (Pty) Ltd. A week later Mrs Valente died. As it turned out, Ricardo had forged his mother's signature on the deed of sale. Evan picked this up and pointed it out to Mr Mendelow and Mr Ledwaba N.N.O. who were the joint executors of the deceased estate. They instituted an application alleging that the sale and transfer of the property from Mrs Valente to U Valente Africa (Pty) Ltd was vitiated by fraud and should therefore be set aside. The High Court agreed and ordered that the property must be returned to the deceased estate. The matter went on appeal to the Appellate Division. In the appeal it was argued that the executors, Messrs Mendelow and Ledwaba N.N.O did not have locus standi and that the application was a sham because the executors were nothing more than the alter ego of Evan, meaning that Evan should have instituted the action to set aside the impugned transaction and not the executors. In paragraphs 12 and 13 of the judgment it was held that where the registration of a transfer of immovable property is effected pursuant to a fraud or a forged document, ownership of the property does not pass to the person in whose name the property is subsequently registered. Fraud vitiates consent. In para 21 of the judgment, the court held that it could not condone the fraud because that would give life to an illegal and fraudulently obtained right. Dr Ward submitted that Mendelow is authority for the proposition that as an applicant seeking to set aside a fraudulent transfer of property he need not demonstrate that he has locus standi, all that he need do is demonstrate the fraud in which case the impugned transaction is automatically null and void. I disagree.

- [17] In my view, Dr Ward has conflated two concepts: an applicant's right to institute legal proceedings and the consequences that flow from the legal proceedings that have been instituted if a fraud is established. I accept that if a fraud is established, the transfer must be set aside. The question, however, is who is entitled to approach the court for the purposes of establishing the fraud. In our law, it is trite that the plaintiff in a trial, and the applicant in an application, must allege and prove locus standi, see *Mars Incorporated vs. Candy World (Pty) Ltd* [1990] ZASCA 149; 1991 (1) SA 567 (AD) at 575H. I know of no authority which suggests that a plaintiff in a trial, or an applicant in an application, need not establish locus standi. Even in public law, where the rules that confer standing are considerably more liberal, plaintiffs and applicants must still prove that they have locus standi. I do not think

that Mendelow is authority for the proposition that “anybody” can institute litigation to set aside a transfer tainted by fraud. In Mendelow, although it was argued that Evan Valente should have brought the application and not the executors, the mere fact that the court held that the executors could bring it does not mean that “anybody” can do so. Executors, by virtue of the office that they hold, clearly have the capacity to apply to court to set aside fraudulent transactions. They get that power after being issued with letters of executorship by the Master of the High Court. It is not correct, as Dr Ward suggests, that locus standi is irrelevant when there is a fraud. If that were the case, our law would have to entertain litigation brought by busy bodies (by this I mean that a “busy body” is someone who cannot establish an interest in the relief that he or she seeks nor can he or she establish a right to seek that relief).

- [18] As I have stated above, for a person to have locus standi, he or she must have a “sufficient interest” in respect of the subject matter of the proceedings. Although Dr Ward was not a director of Port Ferry at the time that he alleges a fraud to have occurred, he was a shareholder. In fact, he was Port Ferry’s sole shareholder. A question that I raised *mero motu* is whether Dr Ward’s shareholding in Port Ferry gave him a “sufficient interest” to institute a counter application based on Port Ferry being defrauded. I gave both Dr Ward and Mr Jooste an opportunity to consider this question and to submit to me, if they so wished, additional written heads of argument on this point only. I am indebted to both Dr Ward and Mr Jooste for the trouble that they took in doing so.
- [19] Having considered the issue, both independently and in light of the additional heads of argument that I received, I remain of the view that Dr Ward, as the shareholder of Port Ferry, lacked the requisite locus standi to institute a counter application in which the cause of action is essentially premised on a fraud perpetrated on Port Ferry. He does not, in my estimate, have a “sufficient interest”. To appreciate this, we must start at the beginning. Port Ferry is a company and Dr Ward its shareholder. We know from basic company law that a company is a separate legal person in the eyes of the law, distinct from its shareholders, *la Saloman vs. Saloman & Co. Ltd* [1897] AC 22 (HL) which has been routinely followed in South African law, see *Letseng Diamonds Ltd vs. JCI Ltd*; *Trinity Asset Management (Pty) Ltd vs. Investec Bank Ltd* 2007 (5) SA 564 (W) at 573-574, *De Bruyn vs. Steinhoff International Holdings NV* 2022 (1) SA 442 (GJ) at para 137, and *Naidoo and Another vs. Dube Tradeport Corporation* 2022 (3) SA 390 (SCA) at para 11. Under the common law, if a wrong is done to the company then only the company may institute proceedings against the wrongdoers. This is known as the “proper plaintiff rule”. If the wrongdoers are the people in control of the company and are therefore able to prevent the company from instituting the necessary proceedings, then a shareholder can institute a so-called “derivative action” in his or her own name against the wrongdoers for relief to be granted to the company. A shareholder may not sue to recover a loss that he or she has suffered if that loss is reflected in the loss suffered by the company. This is known as “the rule against reflective loss”. Thus, if a wrong is done to a company and the company has a claim against the wrongdoer, a shareholder of the company will have no action in his or her own right against the wrongdoer because the

shareholder has not been independently wronged. When a person acquires a share in a company, he or she accepts the fact that the value of his or her investment follows the fortunes of the company. These common law rules found expression in one form or another in company legislation, via the Companies Act of 1973 and more recently the Companies Act No. 71 of 2008.

[20] Erf [...] Bryanston was owned, prior to the transfer, by Port Ferry. If the sale from Port Ferry to Key Lettings was tainted by fraud then Port Ferry, as the legal person divested of its property, would unquestionably have a “sufficient interest”

to challenge the legality of the transfer. It could do that under the proper plaintiff rule. The legal challenge would ordinarily be instituted by the directors of the company on behalf of the company. Ordinarily, a shareholder will not have a sufficient interest to do so for reasons that flow from the consequences of the rule in *Saloman vs. Saloman & Co.* (supra). There may well be scope for exceptions, but they will be fact-dependant. Dr Ward has not relied on any exceptional facts. In fact, Dr Ward relied on very few facts to support any contention that he has locus standi given his primary submission that locus standi is irrelevant if fraud is implicated in the transfer.

[21] I remain of the view that my order of 15 February 2023 granting the eviction and dismissing the counter application was the correct one.

[22] As stated above, in terms of section 17(1)(a)(i) of the Superior Courts Act No. 10 of 2013, leave to appeal may only be given where the judge concerned is of the opinion that the appeal would have reasonable prospects of success. For reasons that I have advanced, I do not believe that an appeal would have reasonable prospects of success. I do not think that an appeal against the eviction order that I granted would succeed nor do I think that an appeal against the order that I made dismissing the counter application would have any reasonable prospect of success.

[23] In the circumstances, I make the following order:

1. The application for leave to appeal is dismissed with costs.

K. HOPKINS

Acting Judge of the High Court

Gauteng Local Division, Johannesburg

Heard: 31 October 2023

Judgment:

14 November 2023

APPEARANCES

For Applicant:

Dr. Ward (personally)

For Respondent:

Adv. JH Jooste

Instructed by:

Van Dyk Oosthuizen Attorneys Inc.

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