

SOUTH AFRICA / JUDGMENT

Wintertide Trading 89 CC v Thompson and Others (2534/2009) [2010] ZANWHC 14 (20 May 2010)

[2010] ZANWHC 14

COURT

North West High Court, Mafikeng

BEFORE

Landman

CASE / FILE NUMBER

2534/2009

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Source record

NORTH

WEST HIGH COURT, MAFIKENG

CASE NO.

2534/2009

In the matter

between:

WINTERTIDE
TRADING 89 CC
.....APPLICANT
and
CH THOMPSON
.....1ST
RESPONDENT
SS MULINDWA
.....2ND
RESPONDENT
SK JAYALATH
.....3RD
RESPONDENT
P FERNANDEZ
.....4TH
RESPONDENT
JL MOTSHEGWE
.....5TH
RESPONDENT
NE MBEDZI
.....6TH
RESPONDENT

K TSHENKENG
.....7TH
RESPONDENT
NN DIBAKOANE
.....8TH
RESPONDENT
OP PHUDUKUDU
.....9TH
RESPONDENT
MV MOKATE
.....10TH
RESPONDENT
MTA SHABELE
.....11TH
RESPONDENT
T MWANNASWANI
.....12TH
RESPONDENT
W MATLABA
.....13TH
RESPONDENT
MG TLADI
.....14TH
RESPONDENT
NM MTJALI
.....15TH
RESPONDENT
GH GALENG
.....16TH
RESPONDENT
T SEKUDU
.....17TH
RESPONDENT
JK MOLWANA
.....18TH
RESPONDENT
M MOREBODI
.....19TH
RESPONDENT
T MONGALE
.....20TH
RESPONDENT
S HANCOCK
.....21ST
RESPONDENT
TP MOLELE
.....22ND
RESPONDENT
GM MASITENYALE
.....23RD
RESPONDENT

EM KGATSHE
.....24TH
RESPONDENT
THE FURTHER
UNLAWFULL OCCUPANTS OF ERF 82
UNIT3, MMABATHO
DATE OF HEARING
: 29 APRIL 2010
DATE OF
JUDGMENT : 20 MAY 2010
FOR THE
APPLICANT : ADV M HITGE
FOR THE
RESPONDENT : ADV I OSCHMAN

JUDGMENT

LANDMAN J

- [1] Wintertide Trading CC, the applicant, is the owner of erf 824, Unit 3, Mmabatho, known as Tlotli Flats. The respondents are in possession of various flats in the building. The applicant seeks to evict them.

The

facts

- [2] The property in question consists of a total of 38 flats of which two are bachelor flats, 20 are two bedroom flats and 16 thereof are three bedroom flats. This application is directed at the occupants of 24 of the flats situated in the building.
- [3] The property was previous owned by the North West Housing Corporation (“the NWHC”), a statutory and independent body corporate established in terms of the North West Housing Corporation Act 24 of 1982.
- [4] The property was initially sold at a public auction during December 2006 to one Isaac Makwela for of R7 million.
- [5] Isaac Makwela did not provide the required security. The property was subsequently sold by private treaty to the applicant on 31 August 2007 for R9 000 000,00. This price was nearly R6 000 000,00 in excess of its non-sectionalised value and nearly R2 000 000,00 in excess of its sectionalised value.

[6] The property was registered in the name of the applicant on 20 October 2008. The NWHC informed the applicant that prior to the sale of the property it had written lease agreements with some of the respondents. The respondents, however, allege that they all had written lease agreements with the NWHC. The respondents contend that the terms of the lease were standard and included the following:

6.1 The duration of a lease agreement did not exceed one year.

6.2 The tenants (occupiers) choose their domicilium citandi et executandi at the specific flat so occupied.

6.3 No variation or amendment of the lease agreement shall have any force or effect unless reduced to writing and signed by both the NWHC and the tenant.

[7] No new lease agreements have been entered into by the NWHC since the beginning of

2007. All the written lease agreements had expired, at the latest, by the end of 2007. Neither the applicant nor the NWHC entered into any new lease agreements with the respondents after the termination of the fixed period. A tacit month to month lease came into being.

[8] The respondents refuse to pay rental to the applicant.

[9] All occupants of the property were invited to attend a meeting on 6 November 2007, convened in terms of section 10 of the Sectional Titles Act 95 of 1986, to inform them of the applicant's intention to register the flats as a sectional title scheme. The applicant invited the occupants attending the meeting to purchase the flats at the following selling prices:

Bachelor flats: R275 000,00;

Two bedroom flats: R495 000,00; and

Three bedroom flats: R545 000,00.

[10] The attendance at the meeting was poor. The deponent to the founding affidavit, Mr Botha, was threatened with physical violence. The occupants of flats 7, 17 and 33 purchased the sectional title units on offer and are not parties in this matter.

[11] The applicant bears a heavy financial burden. It receives no rental from the respondents. It is unable to market the remaining sectional title units because it is obliged to guarantee vacant possession to prospective purchasers.

[12] The applicant caused letters of demand to be served on 25 February 2009 on the occupants of all 24 flats which are the subject matter of this application. Payment of the arrears rental was demanded within seven days and the occupants were informed that in the event of payment not being effected, the applicant would terminate the agreements with effect from 31 March 2009.

- [13] Despite the demand, no rental payments were made. The occupants were notified in writing on 1 April 2009 that the lease agreements were cancelled. The occupants were given notice to vacate the respective flats on or before 7 April 2009. Despite the notices, the respondents and all persons residing in the flats in question remained in occupation of the premises and are refusing to vacate them.
- [14] It is not disputed that the applicant has complied with all the procedural steps imposed upon it by the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (“the PIE Act”). In principle, the applicant in this matter, on its facts, is entitled, subject to the discretion given to this Court by the PIE Act, to an order of eviction. See *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003
- (1) SA 113 (SCA) at paragraph [19], where it is said:

“Another material consideration is that of the evidential onus. Provided the procedural requirements have been met, the owner is entitled to approach the Court on the basis of ownership and the Respondent’s unlawful occupation. Unless the occupier opposes and discloses circumstances relevant to the eviction order, the owner, in principle, will be entitled to an order for eviction. Relevant circumstances are nearly without fail facts within the exclusive knowledge of the occupier and it cannot be expected of an owner to negative in advance facts not known to him and not in issue between the parties.”

Application for a postponement

- [15] The respondents (in the main application) delivered a notice of motion informing the applicant (in the main application) that on 27 May 2010 they would seek an order referring the main dispute to mediation and an order that the MEC and Mafikeng Local Authority facilitate mediation within 30 days of the date of the order and that the main application be stayed pending the outcome of mediation. The application was served on 28 April 2010.
- [16] On 29 April 2010 Ms Oschman, who appeared for the respondents, sought a postponement of the main application until 27 May 2010. I declined to do so. It was then agreed that I would hear the merits of the interim application as none of the respondents wished to file papers. The Municipality merely expressed concern about the costs of mediation but otherwise agreed to abide by the order of this Court.
- [17] Mediation is a process and it is difficult to predict the outcome of the mediation. In this case the main reason for mediation would be for the respondents to persuade the MEC to honour what they say is an undertaking that they could buy the flats. This would also require the consideration of financial assistance. Mediation would also address the respondents’ desire to purchase their respective flats from the applicant which they are “enthusiastic and willing” to purchase but cannot afford to do so.

- [18] In the second place the mediation, according to the respondents, would be to find alternative accommodation for occupants that are “destitute” and not in a position to afford alternative accommodation elsewhere.
- [19] The interim application was delivered a day before the main application was to be heard (a year after the main application was launched). If granted, an eviction order would be delayed by some three months, with no benefit to the applicant.
- [20] The facts relating to the alleged destituteness of the respondents are not set out. This should have been done. It would have enabled this Court to consider the personal circumstances (means, age, state of health, marital and other status) of the respondents and their dependants. In fact these circumstances should have been set out in the opposing affidavit in the main application. But it appears that the respondents deliberately declined to do so. Instead the respondents complain that the applicant has not dealt with their circumstances. Therefore, it was submitted, this Court could not issue an eviction order as it would not have sufficient material upon which to exercise a discretion.
- [21] The respondents have not played open cards with the court. The purpose of the PIE Act is to protect the vulnerable from the contingencies of eviction as directed by the Constitution. But the PIE Act enjoins some co-operation from unlawful occupiers of property both as regards the question whether the decision to evict them should be made and, if so, what may be done to mitigate its effects. Mediation at this stage of the proceedings and against the background of the many attempts, which I will detail, to solve the problem is unlikely to be successful. The interim application is an undisguised attempt by the respondents to secure a rent free tenure for at least a further three months. In any event mediation, in the circumstances of this case, is not warranted in so far as its purpose is to facilitate an examination of the personal circumstances of the respondents. The respondents are represented and it would have been an easy task to place their circumstances on record.
- [22] There is no suggestion on the papers that the MEC or the Municipality were at any time requested to mediate the dispute. It is a prerequisite of our legal system that litigation should be avoided. This means, inter alia, that extra-judicial steps should be taken before a party resorts to litigation. At the very least the respondents should have approached the MEC and the Municipality to facilitate mediation. This was not done.
- [23] Ms Oschman very helpfully, identified the defences upon which the respondents rely. They are:
- (a) The respondents have an oral agreement with NWHC, which gives them an option to buy the flats and it is agreed that they may occupy the flats until they are in a position to effect the option.
 - (b) The applicant was obliged to comply with section 10 of the Sectional Titles Act.

- (d) The applicant has failed to show the relevant circumstances of the occupiers to this Court. Therefore this Court is not in a position to decide whether it is just and equitable in the circumstances to grant an order for their eviction.
 - (e) Whether rental was paid.
 - (f) Whether the respondents are all cited in this application.
 - (a) Oral option
- [24] The respondents allege that they have or had an oral option agreement with NWHC in terms of which they were to purchase the flats at purchase price of between R40 000,00 and R50 000,00 each and, by agreement, they are allowed to remain in the flats until they are in a position to “effect the option agreements”.
- [25] Even assuming that the respondents’ version is correct, it does not assist them in so far as they may rely upon it as a defence to this application. In the first place, the only legal right, which may arise, is a personal one and may only be enforced as regard the NWHC. Secondly, both an option to purchase land or a right of pre-emption of land must be in writing and must be accepted in writing. See *Brand v Spies* 1960
- (4) SA 14 (E); *Hartswater Boerdery (Edms) Bpk v Van Niekerk* 1964
 - (3) SA 702 (T); and *Hirschowitz v Moolman* 1985
 - (3) SA 739 (A). Even a pactum de contrahendo to alienate land must be in writing. See *Hirschowitz v Moolman* (supra) at 766 – 767.
- [26] Erf 824, Unit 3, Mmabatho and the improvements thereon (“Tlotli flats”) is “land” as defined in section 1 of the Alienation of Land Act 68 of 1981. Section 2(1) of the Alienation of Land Act of 1981 reads as follows:
- “No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a Deed of Alienation signed by the parties thereto or their agents on their written authority.”*
- [27] The oral option has created no enforceable rights and does not preclude this Court from granting an eviction order. An oral agreement, linked to the oral option that the respondents may remain in occupation of their flats pending the exercise of their oral options is likewise not a defence.
- (b) The Sectional Titles Act

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