IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE, PORT ELIZABETH)

Case No. 4165/12
Date Heard: 27/6/13
Date Delivered: 9/7/13
Reportable

In the matter between:

IMRAN AFZAL **Applicant**

and

MAHNAZ KALIM **Respondent**

***Mandament van spolie* – dispute of fact – whether the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 applies.**

JUDGMENT

PLASKET, J:

[1] It is common cause that the applicant and the respondent, a man and a woman in the throes of an acrimonious divorce, had not lived together as husband and wife for over three years when, on 15 December 2012, the respondent returned from Cape Town and moved into the house in Port Elizabeth where the applicant was living. The applicant brought an urgent application for a *mandament van spolie* and, on 18 December 2012, Smith J granted an order in the following terms:

'1 That a rule nisi do hereby issue calling upon the Respondent to show cause at 09h30 on 29 January 2013 why the following order should not issue:

1.1 That the Respondent be and is hereby ordered to immediately vacate the property situated at 60 Westview Drive, Mill Park, Port Elizabeth;

1.2 The Respondent be and is hereby prohibited from interfering with the Applicant's use and enjoyment of the property in question;

1.3 That in the event of the Respondent failing to comply with prayer 1.1 and 1.2 above the sheriff be and is hereby authorised to enlist the services of the South African Police in order to give effect thereto;

1.4 That the Respondent pay the costs of this application.

2 That prayer 1.1, 1.2 and 1.4 above act as an interim interdict pending the return day.'

The applicant now seeks the confirmation of the rule nisi.

[2] Two defences have been raised by the respondent. They are that she was entitled to return to the house by virtue of an agreement and that the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) apply and, because PIE was not complied with by the applicant, his application is fatally defective and must be dismissed.

[3] In order to determine the first, factual, issue it is necessary to traverse the allegations made by the parties in some detail. I shall commence with those facts that are either common cause or not disputed by the respondent.

[4] Both the applicant and the respondent are medical doctors. They married, in accordance with the laws of Pakistan, in 1993. Three children were born of the marriage. For most of 2009, the respondent was absent from the common home in Port Elizabeth because she found employment in East London. On 10 November 2009, the applicant issued summons against the respondent for divorce. That action is still pending and is clearly hard-fought and acrimonious.

[5] On 1 January 2010 the respondent, who was no longer employed in East London, left Port Elizabeth and moved to Cape Town. She took the children with her. There appears to have been little communication between the parties since then, and they have been involved in litigation concerning the pending divorce and access by the applicant to the children.

[6] Subsequent to the respondent leaving Port Elizabeth to live in Cape Town, the applicant divorced her in terms of Islamic law and re-married in terms of the laws of Pakistan. I express no view on the effect of the divorce and re-marriage in South

African law but I shall refer to the woman that the applicant married after the divorce as his second wife. I do so simply for the sake of convenience.

[7] The applicant lived in the house that is the subject matter of this dispute with his second wife, a son by her and his mother. At the time that he deposed to the founding affidavit his second wife was pregnant and he stated that the child would be born in February 2013. I presume that this has happened and that this child also resides in the house.

[8] On 15 December 2012, the respondent and the children returned to Port Elizabeth. When the applicant allowed them entry to the house, the respondent moved into the applicant's bedroom and forced the applicant and his second wife to vacate it. The applicant and the respondent are co-owners of the house. How this asset is to be dealt with appears to be a hotly disputed issue in their divorce proceedings. Their co-ownership of the house is largely irrelevant in these proceedings, which are concerned with possession, rather than ownership.

[9] The applicant stated that he had had little contact with the respondent after she had moved to Cape Town. He had no idea that she planned to return to Port Elizabeth, much less that she intended to move into the house. He, his second wife and his mother were shopping on the afternoon of 15 December 2012 when he received a telephone call from the respondent. She asked him whether he wished to see the children and when he said that he did, she informed him that she and the children were waiting outside the house. He assumed that the purpose of the visit was for him to have access to the children and he allowed the respondent in on this basis. He states that 'quite naturally, I expected the Respondent to leave'.

[10] The respondent, on the other hand, stated that she had moved to Cape Town in order to further her medical studies. After completing her studies she had returned to the house in Port Elizabeth. She claimed that this had been agreed between her and the applicant. The agreement relied upon is dealt with in the respondent's answering affidavit in response to an allegation made by the applicant in his founding affidavit to the effect that he had experienced difficulties in exercising his right of access to the children after the respondent had moved to Cape Town, that he had

launched an application to remedy the problem and that he attached the papers in that matter and referred to, and incorporated into his founding affidavit, paragraph 6 of his affidavit in that matter. Paragraph 6 of the access application sets out the applicant's averments in respect of the respondent 'surreptitiously' moving to Cape Town with the children, his attempts to prevent her from removing the children from Port Elizabeth and the difficulties he had experienced in obtaining access to his children brought about, he said, by the obstructive and uncooperative attitude of the respondent.

[11] Her answer to all of this was the following:

'The content hereof is noted and I question the relevance that same has to the present eviction application which is before the Honourable Court; which has arisen at the point in time when the Applicant was aware that as per the agreement concluded between the Applicant herein and myself I would be returning to the matrimonial home together with the children to restore the status quo which had existed prior to my beginning my studies in Cape Town, upon finalisation of my studies.'

[12] It is apparent that the existence of an agreement is referred to in the vaguest terms. The respondent does not say when or where the agreement was entered into, whether it was oral or written, the circumstances in which it came about or what its full and precise terms were. This is of fundamental importance because the applicant's cause of action is that he had been in peaceful and undisturbed possession of the house when the respondent gained access to the house and wrongfully deprived him partially of his possession.

[13] Generally speaking, in motion proceedings in which final relief is sought, factual disputes are resolved on the papers by way of an acceptance of those facts put up by an applicant that are either common cause or are not disputed as well as those facts put up by the respondent that are in dispute.[1] I have said that this rule applies 'generally speaking' because there are exceptions to it. As Harms DP said in *National Director of Public Prosecutions v Zuma*,[2] the situation may be different 'if the respondent's version consists of bald or uncreditworthy denials, raises fictitious

[1] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-I.
[2] *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 26. See too *Plascon-Evans* (note 1) at 634I-635D.

disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers'.

[14] In *Wightman t/a JW Construction v Headfour (Pty) Ltd & another*[3] Heher JA dealt with the way in which courts should consider the adequacy of a respondent's denial in motion proceedings for purposes of determining whether a real, genuine or bona fide dispute of fact had been raised. He stated:

'[11] The first task is accordingly to identify the facts of the alleged spoliation on the basis of which the legal disputes are to be decided. If one is to take the respondents' answering affidavit at face value, the truth about the preceding events lies concealed behind insoluble disputes. On that basis the appellant's application was bound to fail. Bozalek J thought that the court was justified in subjecting the apparent disputes to closer scrutiny. When he did so he concluded that many of the disputes were not real, genuine or bona fide. For the reasons which follow I respectfully agree with the learned judge.

[12] Recognising that the truth almost always lies beyond mere linguistic determination the courts have said that an applicant who seeks final relief on motion must, in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers . . .

[13] A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say "generally" because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he

[3] *Wightman t/a JW Construction v Headfour (Pty) Ltd & another* 2008 (3) SA 371 (SCA) paras 11-13.

commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter.'

[15] In *Naidoo & another v Sunker & others*[4] Heher JA, after referring to his judgment in *Wightman*, stated that what he had said in that case about the adequacy of allegations in answering affidavits for purposes of the *Plascon-Evans* rule 'applies with equal force to a respondent who endeavours to raise a special defence'.

[16] In my view, the raising of the alleged agreement as a defence to the applicant's application is so inadequate, because of the deficiencies that I have alluded to in paragraph 12 above, that it cannot be said that the respondent has raised a real, genuine or bona fide dispute of fact.

[17] If I am wrong in this respect, I am also of the view that when taken in the context of the common cause and undisputed facts, the respondent's version that an agreement was reached between her and the applicant that she could return to the house is palpably implausible, far-fetched and untenable: it is belied by the fact that the respondent spent most of 2009 in East London; that the applicant issued summons for divorce against her towards the end of 2009; that he brought an urgent application to try to prevent her from removing the children from the jurisdiction of this court and another for access to the children; that he divorced the respondent in terms of Islamic law; and that he has re-married in terms of Islamic law. All of these facts point to an irretrievable breakdown in the relationship between the applicant and the respondent from as early as 2009 that is incompatible with an agreement that the respondent could return to the house. The status quo she refers to was, in fact, a situation in which she and the applicant no longer lived together as husband and wife. That being so, I am able to reject her version on the papers that she and the applicant had agreed that she could return to the house. The defence raised by her therefore fails.

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[4] *Naidoo & another v Sunker & others* (126/11) [2011] ZASCA 216 (29 November 2011) para 23.

[18] The *mandament van spolie* protects possession – it depends not on a right to possess but on the 'fact of quiet possession'[5] – and is premised on the 'fundamental principle that no man is allowed to take the law into his own hands' by dispossessing another 'forcibly or wrongfully and against his consent' of that person's property, whether it be movable or immovable.[6]

[19] In order to succeed, an applicant for a *mandament van spolie* is required to establish two requirements: that he or she was in possession of the property concerned and that he or she was unlawfully – i e without his or her consent and against his or her will – deprived of that possession.[7] Furthermore, the *mandament van spolie* is available even when a person has only been dispossessed of part of the property he or she possessed.[8] It is also, as a matter of principle and logic, a remedy that can, in appropriate cases be granted in favour of one spouse against another.[9]

[20] It is evident from the applicant's affidavit that he was in peaceful and undisturbed possession of the house prior to 15 December 2012. It is also clear that the respondent gained entry through a stratagem, refused to leave and in fact took over the main bedroom, which the applicant and his second wife were forced to vacate. The applicant has therefore established the requirements for a *mandament van spolie*.

[21] I turn now to the second issue, namely whether the application is fatally defective because it has not been brought in compliance with PIE. Section 4(1) of PIE provides:

'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.'

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[5] *Oglodzinski v Oglodzinski* 1976 (4) SA 273 (D) at 275B-C.
[6] *Nino Bonino v De Lange* 1906 TS 120 at 122.
[7] *Yako v Qana* 1973 (4) SA 735 (A) at 739E-F; *Burnham v Neumeyer* 1917 TPD 630 at 633; *Nino Bonino v De Lange* (note 6) at 122.
[8] *Van Rooyen & 'n ander v Burger* 1960 (4) SA 356 (O) at 363G-H; *Burger v Van Rooyen & 'n ander* 1961 (1) SA 159 (O) at 160G-161C; *Bennett Pringle (Pty) Ltd v Adelaide Municipality* 1977 (1) SA 230 (E) at 233 A-B.
[9] *Oglodzinski v Oglodzinski* (note 5) at 275A-276B.

The remainder of the section deals with the procedure for eviction applications. It is not in dispute that this procedure was not followed in this case.

[22] The word 'evict' is defined in s 1 of PIE to mean to 'deprive a person of occupation of a building or structure . . . against his or her will' and 'eviction' has a corresponding meaning. An unlawful occupier is defined as 'a person who occupies land without the express or tacit consent of the owner or person in charge . . .'.

[23] The question as to whether the *mandament van spolie* is available to an applicant when PIE applies was dealt with by Selikowitz J in *City of Cape Town v Rudolf & others*.[10] The learned judge, after an extensive discussion of the purpose and interpretation of PIE proceeded to say that to 'permit an applicant to use the mandament to evict a person who has established a home on land and who would otherwise qualify as an "unlawful occupier" would, as in the case of the other common-law remedies, overlook the wording and purpose of PIE and would permit the statute to be undermined by a simple device'.

[24] In the passage that I have cited, Selikowitz J makes it clear that the *mandament van spolie* cannot be used to circumvent the protection given to occupiers of homes by PIE. The reason for this is that PIE has its origin in s 26(3) of the Constitution[11] which states:

'No one may be evicted from their home, or have their home demolished, without an order of court made after considering all relevant circumstances. No legislation may permit arbitrary evictions.'

PIE's preamble after first making reference to the property right in s 25(1) of the Constitution, then also makes reference to s 26(3). It thus applies only in respect of buildings or structures upon land that are the homes of unlawful occupiers, and it does not cover the case of the eviction of a person from a building or structure on land that is not his or her home.[12]

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[10] *City of Cape Town v Rudolf & others* 2004 (5) SA 39 (C).

[11] *Ndlovu v Ngcobo; Bekker & another v Jika* 2003 (1) SA 113 (SCA) para 3; *Cape Killarney Property Investments (Pty) Ltd v Mahamba & others* 2001 (4) SA 1222 (SCA) at 1229E.

[12] *Ndlovu's* case (note 11) para 20; *Barnett & others v Minister of Land Affairs & others* 2007 (6) SA 313 (SCA) para 37.

[25] A home is defined in the *New Shorter Oxford English Dictionary* as the 'place where one lives permanently, esp as a member of a family or household; a fixed place of residence'.[13] In *Barnett & others v Minister of Land Affairs & others*,[14] a case concerning evictions from unlawfully constructed holiday cottages on the Transkei Wild Coast, Brand JA stated:

'This leads to the next question: can the cottages on the sites that were put up by the defendants for holiday purposes be said to be their homes, in the context of PIE? I think not. Though the concept "home" is not easy to define and although I agree with the defendants' argument that one can conceivably have more than one home, the term does, in my view, require an element of regular occupation coupled with some degree of permanence. This is in accordance, I think, with the dictionary meanings of: "the dwelling in which one habitually lives; the fixed residence of a family or household; and the seat of domestic life and interests" (see eg *The Oxford English Dictionary* 2 ed vol VII). It is also borne out, in my view, by the following statement in *Beck v Scholz* [1953] 1 QB 570 (CA) at 575 - 6:

> "The word 'home' itself is not easy of exact definition, but the question posed, and to be answered by ordinary common sense standards, is whether the particular premises are in the personal occupation of the tenant as the tenant's home, or, if the tenant has more than one home, as one of his homes. Occupation merely as a convenience for . . . occasional visits . . . would not, I think, according to the common sense of the matter, be occupation as a 'home'."'

[26] Can it be said that the house in issue in this matter was the respondent's home? In my view, it cannot be said that it was. She had spent most of 2009 living in East London and returned to the house sporadically at best. Fairly soon after the summons for divorce was issued, she left for Cape Town where she and her children resided in her own house, purchased with funds advanced to her by her family. She appears to have returned to the Port Elizabeth house on only a few isolated occasions of short duration. By the time of her return to Port Elizabeth, the house there was the family home of the applicant and his second family.

[27] The respondent's connection with the house in Port Elizabeth was tenuous. From the beginning of 2009, she had not occupied it regularly and with any degree of permanence. She cannot be said to have habitually dwelt in the house for more than

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[13] See too the similar dictionary definitions in *City of Cape Town* (note 10) at 59D-E.
[14] Note 12 para 38.

three years. It is not, from her perspective, her and her family's fixed residence, much less the seat of her domestic life. In these circumstances, the house is not her home, even if she is a co-owner of it. (That, as the applicant has correctly stated in his affidavit, is a separate issue that will be dealt with in the divorce proceedings.)

[28] I conclude that PIE does not apply to the circumstances of this case because the house in respect of which the applicant seeks the return of his possession from the respondent is not her home. The applicant is entitled to the confirmation of the rule nisi.

[29] The matter was postponed on 25 April 2013 and the costs were reserved. A postponement was required because the respondent filed heads of argument that day. In these circumstances, the respondent ought to pay the costs of that day.

[30] In the result, the rule nisi issued on 18 January 2013 is confirmed with costs, including the costs of 25 April 2013.

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C Plasket
Judge of the High Court

APPEARANCES

Applicant: Mr N Mullins, instructed by Cecil Kerbel Attorneys

Respondent: Ms B Carruthers of Carruthers Attorneys