

IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Case number: A213/2017

In the matter between:

MOSITO S MOKHELE

Appellant

and

FREE STATE HOUSING COMPANY (PTY) LTD

Respondent

CORAM: REINDERS, J *et* MHLAMBI, J

HEARD ON: 30 OCTOBER 2017

JUDGMENT BY: REINDERS, J

DELIVERED ON: 30 JANUARY 2018

[1] This is an appeal against an order for eviction granted by the Magistrate Bloemfontein ("the Magistrate"). The Appellant Mr Mosito Mokhele was the First Respondent in the court a quo whilst the Respondent, Free State Social Housing Company (Pty) Ltd, was the Applicant. For sake of clarity reference to the parties would be as in this appeal.

[2] On 8 May 2017 the Magistrate granted an eviction order against the Appellant. In terms thereof the Appellant is to vacate the property situated at and known as B. Flats, Block [...], Flat [...], [...] F. Street, Bloemfontein ("the property") on or before the 11th June 2017 by no later than 12h00. The Appellant was further ordered to pay all costs on a scale as between attorney and client.

[3] The Respondent leased to the Appellant the property in terms of a written lease agreement ("the lease agreement") signed by both parties on 7 November 2014. The monthly rental amounted to R 570,00.

[4] In terms of the lease agreement entered into and more in particular clause 15.2 thereof, it was agreed that should the lessee (the Appellant) fail to make payments in terms of the lease, the lessor would be entitled to give notice of the breach, and should the lessee not correct the breach within the said twenty days, the lease will be deemed to be cancelled.

[5] It is common cause that the Appellant fell into arrears and a Jetter dated 31 July 2015 and headed "Notice of Breach" ("the letter") was hand delivered to the Appellant by the Respondent's attorney on 1 August 2015. The letter demanded payment of the arrear rental at the time. In the founding papers it is stated that 20 (twenty) working days were afforded to Appellant to make payments or payment arrangement or to settle the arrear debt, but Appellant failed to do so. This allegation is not denied by the Appellant in his opposing affidavit, but it is stated that the alleged breach was made good after delivery of the letter.

[6] It was averred by Respondent that the Appellant failed to make the necessary monthly payments since taking occupation of the property on 7 November 2014. The Appellant concedes that he did not make timeous payments but denies being in arrears. Appellant in amplification of his denial avers that he paid rental from July 2016. These payments respectively are:

R 570 on 5 July 2016;

R 650 on 4 August 2016;

A 500 on 7 September 2016;

R 1700 on 3 October 2016; and

R 627 on 1 November 2016.

Copies of proof of these payments are attached to the opposing papers.

[7] The Respondent in the final analysis avers that he sent a notice of cancellation to the Appellant on 16 May 2016 which informed the Appellant of the cancellation of the agreement. The Appellant denies having received same.

[8] The Magistrate in a comprehensive judgment dealt with the matter whereafter the eviction order was granted. In the Notice of Appeal filed on 22 May 2017 it was not contended that the Magistrate erred in her factual findings, nor that she misunderstood the matter at hand. In the Notice it is rather averred that the Magistrate erred in finding that the Notice of Breach attached to the Respondent's founding affidavit constituted a notice of intention to cancel the lease agreement as is contemplated in clause 15.2 of the lease agreement. The Magistrate is criticised for her finding that the Appellant was in unlawful occupation of the property, and that it was just and equitable for the eviction order to be granted. Criticism is also levelled against the Magistrate in as far as she found that the Respondent is not "part of the government", notwithstanding such a description of the Respondent in clause 2 of the lease agreement.

[9] The Magistrate was satisfied that the prescribed procedural measures of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("the Act") had been complied with. It was not contended that she erred in this regard and I am also so satisfied. It was found by the court a quo that the Appellant's allegation that the breach was made good is a bare allegation which was unsupported by information as to when and how it was remedied. The Magistrate (in my opinion rightly so) found that the listing of the payments by Respondent indicates that payments started approximately a year after the admitted receipt of the letter, and concluded that payments accordingly only started from that date forward. I find it difficult in view of the evidence tendered by the Appellant to find that he has paid the arrears. The list of payments rather confirms that the Appellant remained in arrears as the Respondent stated under oath. I therefore agree with the Magistrate's finding that the Appellant, having received the notice, remained in arrears.

[10] The trial court found that no further notice needed to be sent out to confirm the cancellation should the breach not be rectified within the 20 business days required. I agree. The lease agreement included a non variation clause confirming the agreement to

be the entire agreement between the parties, and that any amendment thereof must be in writing and signed by both parties. It is not the Appellant's case that he did not understand the lease agreement or interpreted the relevant clause differently. It has to be accepted therefore that the Appellant knew that should he not correct the breach within the said 20 days, the lease would be deemed to have been cancelled in terms of clause 15.2 of the lease agreement. So seen it really became common cause that on failure by the Appellant to correct the breach, both parties knew that the lease was deemed to be cancelled as this was exactly what the parties agreed upon. But even if this viewpoint is wrong, and the Appellant was entitled to a notice of cancellation properly served on him, this concern had been addressed when the notice in terms of Section 4(2) of the Act had been served on the Appellant after the court authorised service of the notice, or at worst when the Notice of Motion for eviction was served on the Appellant.

[11] I therefore am not convinced that the Magistrate erred in granting the order that she did. The Magistrate considered the factors contained in Section 4(6) to 4(9) of the Act. She came to the conclusion that it was just and equitable to grant the order of eviction.

Although the court orders were made on 8 May 2017, the Magistrate granted a period of six weeks from the date of judgment and considered same to be a sufficient time for the Appellant to find alternative accommodation. Those dates have by now expired and thus necessitate directions by this court. I intend to set the date for eviction on 29 March 2018, which is even more than the six weeks granted by the Magistrate.

[12] For sake of clarity and due to effluxion of time, I intend to issue new amended orders in respect of those granted by the trial court, notwithstanding my conclusion that the appeal stands to be dismissed. In the result the following orders are made:

12.1 The appeal is dismissed with costs.

12.2 The court order dated 8 May 2017 is amended to read as follow:

1. First Respondent (Mosito Stephen Mokhehle) and any other person occupying

through the First Respondent, is ordered to vacate the property situated at and known as B. Flats, Block [...], Flat [...], [...] F. Street, Bloemfontein (“herein further” referred to as “the property”) on or before Wednesday, 28 March 2018, by no later than 12:00, being the just and equitable date as determined by Court.

2. The date on which the Sherriff may evict the First Respondent, and any person occupying through the First respondent, if the First Respondent, and any person occupying through the First Respondent has not vacated the property by the date set on paragraph 2 hereof, is Thursday, 29 March 2018 at 08:00.

3. The First Respondent is ordered to pay the costs of the application, apart from the postponement from 4 May 2017 to 8 May 2017, on a scale as between attorney and client.

C. REINDERS, J

I concur.

J.J. MHLAMBI, J

It is so ordered.

On behalf of appellant: Mr MS Litheko

Instructed by:

Litheko Motsoeneng Incorporated

c/o Mphafi Khang Incorporated

Bloemfontein

On behalf of respondent: Adv PT Masihlelo

Instructed by:

Ramothello Inc

Bloemfontein