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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED: |

Date: **2nd November 2020** Signature: _____

APPEAL CASE NO: A3133/2019

COURT A QUO CASE NO: 10029/2019

DATE: 2nd NOVEMBER 2020

In the matter between:

MBONAMBI, SIPHIWE

Appellant

and

JOHANNESBURG HOUSING COMPANY NPC

Respondent

Coram: Adams J et Majavu AJ

Heard: 14 October 2020

Delivered: 02 November 2020 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* digital system of the GLD and by release to SAFLII. The date and time for hand-down is deemed to be 15:30 on 2 November 2020

Summary: Unlawful occupation – eviction of lessee in breach of lease agreement – statutory eviction of unlawful occupiers – factors to be taken into

account by trial court – Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ('the PIE Act') –

ORDER

On appeal from: The Johannesburg Magistrates Court (Magistrate P J Stanford sitting as Court of first instance):

- (1) The appellant's appeal is dismissed with costs.
- (2) Save to the extent that there is an amendment of the date on which the respondent and her family are required to vacate the premises (as provided in the orders 3, 4 and 5 below), the order of the Johannesburg Magistrates Court is confirmed.
- (3) The appellant, together with all those occupying the property by virtue of her occupation thereof, including her family and/or employees, are evicted from the property, being [...], Fordsburg, Johannesburg ('the property').
- (4) The appellant, together with all those occupying the property by virtue of her occupation thereof, including her family and/or employees, are to vacate the property by no later than the 15th of December 2020.
- (5) In the event that the appellant, together with all those occupying the property by virtue of her occupation thereof, including her family and/or employees, do not vacate the property on or before the 15th December 2020, the eviction order may be executed and the sheriff of the court or his lawfully appointed deputy is authorised and directed to evict the appellant, together with all those occupying the property by virtue of her occupation thereof, including her family and/or employees, from the property.
- (6) The appellant, together with all those occupying the property by virtue of her occupation thereof, including her family and/or employees are interdicted and restrained from entering the property at any time after they have vacated the property or have been evicted therefrom by the sheriff of the court or his lawfully appointed deputy.

- (7) In the event that any of the appellant, and those occupying the property by virtue of her occupation thereof, including her family and/or employees, contravene the order in para 6 above, the sheriff of the court or his lawfully appointed deputy, is authorised and directed to remove them from the property as soon as possible after their reoccupation thereof.
- (8) The appellant shall pay the respondent's costs of this appeal.

JUDGMENT

Majavu AJ (Adams J concurring):

[1]. This is an appeal against an order issued by the Johannesburg Magistrate Court on 9 September 2019 in terms of which the respondent and her family were evicted from their primary residence in a block of flats in Fordsburg. The appeal is with the leave of the court *a quo*, which was granted on the 23 September 2019, and the appeal is opposed by the respondent.

[2]. The order was granted on application by the appellant, which was brought on notice in terms of section 4 (2) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act¹ ('the PIE Act').

[3]. In terms of the notice of such application, and in compliance with the PIE Act and the related legislation and the case authorities, the appellant (respondent *a quo*) was amongst others, invited to deal with the following pertinent factors: (1) '[your] personal circumstances, including whether the property is occupied by elderly persons, children or disabled persons or is a household headed by women.' (2) '[your] right to housing, whether you will be rendered homeless should an order for your eviction be granted by this court and whether alternative accommodation is or can be made available to you.'

[4]. The central issue for determination is whether or not the court below erred when it found that all the requirements of the PIE Act had been complied with and further that no valid defence had been raised by the appellant in terms

¹ Act 19 of 1998

of section 4 (8) of the same Act and subsequently granting an order for the appellant's eviction.

The PIE Act

[5]. The act was promulgated to provide for the prohibition of unlawful occupation of land and to put in place fair procedures for the eviction of unlawful occupiers who occupy land without permission of the owner or person in charge of such land. It further provides that no one may be evicted from their home or structure utilized for dwelling purposes (see *Ndlovu v Ngcobo; Bekker and another v Jika* 2003 (1) SA 113 (SCA))

Brief background

[6]. The appellant and respondent concluded a lease agreement on 19 December 2013. The essential terms were that such lease would be on a month-to-month basis and terminable by either party by giving each other one calendar month's written notice of termination. The tenant would pay monthly rental in the amount of R5500, excluding consumables, which costs would be added. Upon taking occupation the tenant would also be liable for an additional month's rental which will be deducted from the deposit. It was further agreed that such monthly rental and parking charges would increase on 1 July each year, even though the percentage or extent of such an annual increase was not stated.

[7]. On 26 March 2019 the respondent issued a notice of termination of lease to the appellant and accordingly gave her one calendar month notice and called upon her to vacate the premises by 30 April 2019. As at the date of the said notice, the appellant was already in arrears to the tune of R18 257.50 as per a warrant of execution which had been already issued on 19 February 2019.

[8]. In the intervening period, it would appear that the appellant had also referred a dispute to The Gauteng Rental Housing Tribunal ('the tribunal') under case number: RT 1266/18. The tribunal subsequently issued a ruling on 22 January 2019 in terms of which it incorporated a settlement agreement between the parties the terms whereof were recorded as follows:

'Ruling

The tribunal therefore rules as follows:

Settlement Agreement

the parties have agreed to the following settlement agreement:

- 6.1 the respondent to pay an amount of R12 000 (twelve thousand rand) on or before the end of November 2018.
- 6.2 the respondent further agrees to pay an amount of R6149 (six thousand one hundred and forty-nine rand) for the utilities.
- 6.3 the respondent further agrees to continue renting the property and pay rent every month.'

[9]. It seems to be common cause that the amount recorded in the warrant of execution arises from failure to comply with the order of the tribunal.

[10]. Two months and four days later, the appellant had failed to effect the necessary payments as directed by the tribunal, which prompted the respondent to issue the notice of eviction referred to earlier dated 26 March 2019.

[11]. Having failed to heed the termination of lease notice incorporating the eviction date (30 April 2019), the respondent on 23 May 2019 proceeded to issue an application out of the Johannesburg Magistrates' Court. The sole purpose of that application was to seek the eviction of the appellant through the court order as required.

[12]. It is common cause that the appellant at various stages of their tenancy breached the lease agreement by failing to make payment of the full rental due by her resulting in the accumulated amount of R18 257,50, which she admitted. By and large she attributed her failure to keep up with rental payments due to sudden financial difficulties which she and her husband experienced, which I do not deem relevant for purposes of this judgement.

[13]. The respondent persisted with its application resulting in the matter being argued fully before the Honourable Presiding Magistrate Stanford. In the end Magistrate Stanford granted the order sought by the respondent on 9 September 2019, to the effect that the appellant be evicted from the said premises.

[14]. Aggrieved by the order, the appellant filed an application for leave to appeal the order of the Magistrate, as she was perfectly entitled to do so and such leave to appeal was granted on 23 September 2019.

In this court

[15]. The appellant persisted with her appeal before us. She was however not legally represented. Through her husband, Mr Sicelo Mbonambi, who indicated that she mandated him to appear on her behalf and further that she is desirous to having the matter finalized on the basis of the submissions made, most importantly the record of the proceedings *a quo*.

[16]. This was against the backdrop of the appellant earlier indicating that she would seek a further postponement of this matter. In the interest of justice and expedition, we deemed it prudent to allow the appellant's husband to stand in her stead.

Is the respondent's (applicant *a quo*'s) application assailable?

[17]. It is common cause that the lease agreement in question clearly makes provision for termination by either party on a month's written notice, for whatever reason.

[18]. It is also commonly accepted that failure to pay the full rental on due date is itself a breach which could give rise to a lawful termination, provided the provisions as contained in the lease agreement are complied with. In this instance, any party who seeks to resile from the lease agreement, is simply required to give one month's written notice of intention to do so. This step, the respondent took in the form of the letter dated 26th March 2019. It is also clear that this was brought about as a result of the appellant's persistent failure to comply with the contractual terms as recorded in the lease agreement. This is over and above a referral to the tribunal in which the appellant admitted liability as alleged and further undertook to extinguish the debt by the end of November 2019, which to date she has not done.

Applicability of the Rental Housing Act²

² Act 50 of 1999

[19]. This dispute between the parties falls squarely within the ambit of The Rental Housing Act, which in turn creates housing tribunals. This is precisely why a dispute under case number RT: 1266/18 was referred to the Gauteng Rental Tribunal in Johannesburg and in which both parties fully participated.

[20]. The premises concerned are managed by the Johannesburg Housing Company, a non-profit Company, on behalf of the City of Johannesburg.

[21]. The dispute which was referred to the tribunal was finalized with the pronouncement of the tribunal on 22 January 2019, thus rendering the tribunal *functus officio*. The appellant contends that in so evicting her, the respondent is committing an unfair practice or otherwise an infringement of her constitutional rights, in particular s 26(1) of the Constitution of the Republic of South Africa, which provides as follows:

- '26 (1) everyone has the right to have access to adequate housing.
- (2) the state must take reasonable legislative and other measures within its available resources to achieve the progressive realization of this right.
- (3) no one may be evicted from their home or have their home demolished *without an order of court* made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.'

[22]. The dispute referred to the Housing Tribunal revolved around non-payment of rent and the municipal account. The issue of an unfair practice was not before the tribunal at all. Of importance, the appellant failed to comply with the order of the tribunal in spite of having been warned with reference to the provisions of section 13 (13) of the Act³.

[23]. During argument in this appeal, the appellant also referred us to a constitutional court case of *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* (CCT57/11) (CC) [2012] ZACC2; 2012(3) SA 531 (CC); 2012 BCLR 449 (CC) (13 March 2012), presumably to strengthen her submissions that the conduct of the respondent in persisting with the eviction, on the strength of the Magistrates Court order, is indeed unlawful and/or a violation of her constitutional rights.

³ "any person who fails to comply with any ruling of the tribunal in terms of section 13 (4) will be guilty of an offence and liable on conviction to a fine or imprisonment not exceeding 2 years or to both such fine and imprisonment"

[24]. This case is clearly distinguishable from the one before us, in that in the present case there is no decision pending the referral of the complaint to the tribunal. In *Maphango* the central question was whether or not it was open to the landlord to proceed with an eviction when there was a pending referral to the tribunal. The court then ruled that the matter should be remitted back to the tribunal for decision before it could be entertained by the High Court. As indicated *supra*, in this case the tribunal had made its decision and is accordingly *functus officio*. The very narrow question for consideration in that case was when can a lessor evict its tenants. This question was considered against the backdrop of the Constitution and the impact of the protection afforded against evictions. It has now become settled law that no arbitrary evictions are unlawful and not permissible.

[25]. In this case, the eviction which is sought to be challenged (and not effected yet) is duly authorized by a court of law, having considered all relevant factors as per the order of the Magistrates Court. The fact that the appellant is aggrieved thereby, does not by any stretch of imagination make it arbitrary.

[26]. This case does not even implicate the appellant's section 26 rights as asserted, but rather is simply about the comity or sanctity of contracts. The reason for the termination of the lease agreement was as a result of the appellant's failure to keep up with the monthly rental payments. There was a subsequent arrangement on the back of the order of the tribunal, which afforded the appellant a further opportunity to comply with her contractual obligations in terms of the lease agreement. That was also not complied with, for reasons which the appellant explained. The respondent never waived its right regarding the cancellation of the lease agreement and the consequential eviction.

[27]. As regards the important consideration that the eviction of persons should not render them homeless, it cannot be said to be the case in this matter. Far from it. The question is whether suitable alternative accommodation is available to the respondent and her family. The relevant authority is *Blue Moonlight Properties 39 (Pty) Limited v Occupiers of Saratoga Avenue and Another*⁴. However, the case before us does not identify the respondent and her

⁴ [2008] ZAGPHC 275; 2009 (1) SA 470 (W).

family as persons who are within the class of persons who can be described as the poorest of the poor. There is no evidence before us that they may face the prospect of being homeless. No such case was made out in the court *a quo*.

[28]. In *Blue Moonlight* the occupiers were identified and represented and had placed undisputed information before the court regarding their personal circumstances and demonstrated that, if evicted, they would be rendered homeless. *Blue Moonlight* further held that affected individuals, including children, elderly people, and people with disabilities or women headed households, for whom the need for housing is particularly great, homelessness would result in particularly disastrous consequences. No such case was made out *in casu* in the Johannesburg Magistrates Court.

[29]. The appellant was given a further extended period within which to vacate the premises, but to date she and her family remain in occupation. The right of tenure is not in perpetuity, especially in circumstances where the respondent and her family are clearly, and on their own version, unable to fully meet their financial obligations due to her financial challenges. In any event, the landlord has elected to exercise its right to terminate and has done so in compliance with the provisions of the self-same lease agreement, namely, giving a month's written notice to the appellant. Factually, there is nothing offensive to public policy about that particular and non-exclusive clause. It affords either party the same right and process to terminate - one month's written notice, that's all.

[30]. The statute was enacted to give effect to the constitutional right of access to adequate housing, which includes the right not to be evicted *without* an order of court after taking into account all the relevant circumstances. This was done, so the *arbitrariness*, as a mischief sought to be avoided, was indeed avoided, as per the order of the Magistrates Court.

[31]. The ambit of the Act cannot be said to limit, beyond what is just and equitable, all things considered, the landlord's right to expect due and timeous payment of rent from its tenant. Absent payment of rental for any lawful reason, nothing precludes the landlord from terminating the lease agreement and seeking (through a court process) the eviction of the errant tenant, such as the appellant.

[32]. The protection and realization of the right of access to housing is recognized, however, like all other rights, they carry corresponding obligations, namely, to pay for the enjoyment and the use of the 'thing let' – *commodus usus* or the 'snugness and benefit of the thing let during the term of the lease'.

[33]. As was said, albeit in the context of an executability order against immovable property, by Mokgoro J in *Jaftha v Schoeman; Van Rooyen v Stoltz*, [2004] ZACC 25; 2005 (2) SA 140 (CC) at par [42]:

'The interests of creditors must not be overlooked. There might be circumstances where, notwithstanding the relatively small amount of money owed, the creditor's advantage in execution outweighs the harm caused to the debtor. In such circumstances, it may be justifiable to execute. It is in this sense that a consideration of the legitimacy of a sale in execution must be seen as a balancing process'.

[34]. Also at par [43]:

'However, it is clear that there will be circumstances in which it will be unjustifiable to allow execution. The severe impact that the execution process can have on indigent debtors has already been described. There will be many instances where execution will be unjustifiable because the advantage that attaches to a creditor who seeks execution will be far outweighed by the immense prejudice and hardship caused to the debtor. Besides, the facts of this case also demonstrate the potential of the section 66(1)(a) process to be abused by unscrupulous people who take advantage of the lack of knowledge and information of debtors similarly situated to the appellants. Execution in these circumstances will also be unjustifiable'.

[35]. In terms of the Consumer Protection Act⁵, acceptable notice of termination by either party is twenty working days which is still shy of a calendar month as per the lease agreement. It is also noteworthy that while the matter was pending before the tribunal, the eviction, which had already been ordered by a court, was not effected. The same is true while the matter was pending appellate decision.

Was there any misdirection by Magistrate Stanford?

[36]. A perusal of the appeal record does not, in my judgment, reveal any misdirection, either on the facts or the law, on the part of the Magistrates Court. Did the appellant disclose any defence or any basis on which to assail the

⁵ Act 68 of 2008.

landlord's contractually entrenched claim or relief? I could not find any. Is the landlord expected or required to house unlawful occupiers indefinitely? I do not think so.

[37]. As I have indicated above, the rights of a landlord also enjoy protection by the constitution and the Act against the arbitrary deprivation of their own property, especially in instances like in *casu* in which they have sought and obtained a court order permitting the eviction of such occupier. I am inclined to accept that the constitutional protection which is at the heart of arbitrary evictions, applies with equal force to arbitrary deprivation of the landlord's property, especially having obtained a court order as a prerequisite.

[38]. At the end of the day, it should be borne in mind that landlords are also victims of economic hardships in their own right. In that regard, see the comments by Mokgoro J in *Jaftha* and *Van Rooyen* (supra). How will the provision of housing, which is so undeniably needed, be achieved if those social partners of government cannot receive a return on their investment in the form of rental? I ask this question rhetorically.

[39]. Chapter 3 of the Act regulates relations between tenants and landlords. Most importantly, it also records the landlord's rights against the tenant. These expressly include the right to 'terminate the lease in respect of rental housing property on any ground that do not constitute an unfair practice'. We know in *casu* that is not the issue. The issue here is that the landlord exercised its right to cancel in accordance with the lease agreement and followed it through. Delayed and/or non-payment of rental in some instances might have been the trigger, but for purposes of exercising a contractually ordained right, it is with no force or little, if at all.

What does fairness and equity dictate?

[40]. Such a consideration would be permissible in the context of determining whether or not the enforcement of a contractual term (see 3.1) is contrary to public policy and, if answered in the affirmative, invalid and thus unenforceable, one will always have regard to the bargaining position of the parties. This will have to counter balanced against the constitutional values of our society as well. In our society, it is accepted and encouraged, that each must live in

accordance with their relative means, otherwise, graft will creep in incrementally. What is morally repugnant in one party seeking to exercise a term of a contract that binds both of them? This is more pronounced as it seems that, what might have triggered this election, is the appellant's own failure to stick to his end of the contractual bargain due to his admitted precarious financial position at the time. It was accepted in the hearing of this appeal that to date, the appellant has still not been able to regularize his rental account.

[41]. It remains my considered view that fairness would dictate that the landlord be permitted to lease the premises to another tenant who will be able to afford the rental. It is also unfair for other would be tenants whose financial position is such that they could afford that rental. By implication, the landlord would thus be able to receive a return on their investment in relation to those premises.

[42]. In the circumstances of this matter, I am of the view that there are no circumstances that might be regarded as extraordinary which could have persuaded the court *a quo* to decline an order for the eviction of the respondents. Accordingly, there is no reason why this court should not confirm the order that the respondent and her family be evicted from the property.

[43]. The only other issue which requires my consideration, and which is an aspect relevant to the enquiry relating to whether it is just and equitable to evict, is the time period which I ought to give to the respondents to vacate the premises. In that regard, it should be noted that in terms of the order of the Magistrates Court the appellant and her family were required to vacate the premises by the 30th of November 2019. It is now almost one year later, and still the appellant and her family are in unlawful occupation of the respondent's property. I am therefore of the view that, in the circumstances of this matter, the appellant and her family should be afforded a further period of just over one month within which to vacate the property.

[44]. In the circumstances, I am of the view that the appeal against the order of the Magistrates Court should be dismissed.

Order

In the result, the following order is made:

- (1) The appellant's appeal is dismissed with costs.
- (2) Save to the extent that there is an amendment of the date on which the respondent and her family are required to vacate the premises (as provided in the orders 3, 4 and 5), the order of the Johannesburg Magistrates Court is confirmed.
- (3) The appellant, together with all those occupying the property by virtue of her occupation thereof, including her family and/or employees, are evicted from the property, being [...], Fordsburg, Johannesburg ('the property').
- (4) The appellant, together with all those occupying the property by virtue of her occupation thereof, including her family and/or employees, are to vacate the property by no later than the 15th of December 2020.
- (5) In the event that the appellant, together with all those occupying the property by virtue of her occupation thereof, including her family and/or employees, do not vacate the property on or before the 15th December 2020, the eviction order may be executed and the sheriff of the court or his lawfully appointed deputy is authorised and directed to evict the appellant, together with all those occupying the property by virtue of her occupation thereof, including her family and/or employees, from the property.
- (6) The appellant, together with all those occupying the property by virtue of her occupation thereof, including her family and/or employees are interdicted and restrained from entering the property at any time after they have vacated the property or have been evicted therefrom by the sheriff of the court or his lawfully appointed deputy.
- (7) In the event that any of the appellant, and those occupying the property by virtue of her occupation thereof, including her family and/or employees, contravene the order in para 6 above, the sheriff of the court or his lawfully appointed deputy, is authorised and directed to remove them from the property as soon as possible after their reoccupation thereof.
- (8) The appellant shall pay the respondent's costs of this appeal.

Z M P MAJAVU

*Acting Judge of the High Court
Gauteng Local Division, Johannesburg*

I agree, and it is so ordered,

L R ADAMS

*Acting Judge of the High Court
Gauteng Local Division, Johannesburg*

HEARD ON: 14th October 2020

JUDGMENT DATE: 2nd November 2020

FOR THE APPELLANT: In person

INSTRUCTED BY: In person

FOR THE RESPONDENT: Ms Adèle Le Roux

INSTRUCTED BY: A Le Roux Attorneys, Johannesburg