

15/6/17

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA



CASE NO.: 2007/15

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

15/06/2017

In the matter between:

ANY OF THE OCCUPIERS OF THE PROPERTY
KNOWN AS PORTION 110 OF THE FARM
BULTFONTEIN 533 JQ

APPLICANT

and

CONRAD ALEXANDER STARBUCK N.O.
(In his capacity as trustee of the insolvent estate
of THOMAS WILLIAM LYONS)

FIRST RESPONDENT

MOHERANE WILLIAM MATHIBEDI N.O.
(In his capacity as trustee of the insolvent estate
of THOMAS WILLIAM LYONS)

SECOND RESPONDENT

JUDGMENT

VAN DER WESTHUIZEN, A J

- [1] This is an application for rescission of an order granted on 30 April 2015 for the eviction of unlawful occupiers of the property known as Portion 110 of the Farm Bultfontein 533 JQ.
- [2] The events leading up to the present application have taken a curious twist since the granting of the aforesaid order, only to be outshone by the peculiar facts submitted by the present applicant in the person of Mr Dewald Ryan. Mr. Ryan appeared on his own behalf.
- [3] It would be prudent to set the background facts leading up to this application.
- [4] During 2014 the first and second respondents were appointed as the joint trustees of the insolvent estate of one Thomas William Lyons. The latter is the registered owner of the aforementioned property. Following on their appointment as trustees as aforesaid, and during 2015, the respondents applied for an order evicting "*any of the occupiers of the property known as Portion 110 of the Farm Bultfontein 533 JQ.*" On 30 April 2015, Jansen, J. granted an order evicting the occupiers from the said property.
- [5] On or about 14 June 2015, a party identifying itself as "Any of the Occupiers of the property known as Portion 110 of the Farm Bultfontein 533 JQ" caused an application for the rescission of the aforementioned court order to be issued. The deponent to that application for rescission was one Deon Wellan. An attorney represented the occupiers in those rescission proceedings. In the founding affidavit, Mr Wellan stated that he occupied the said property since February 2012 together with his wife, his ten year-old son and sister-in-law. At the date of the issuing of the rescission application, 14 May 2015, they were the only occupiers of the said property. Their said occupation was on behalf of a company by the name of Nulane Investments 332 (Pty) Ltd (Nulane). Furthermore, Mr. Wellan stated that the said

company undertook some repairs to the property during Mr. Wellan's tenancy of the property.

- [6] Mr Wellan further stated in his affidavit that on or about 5 April 2014 he received a notice to vacate the property. He further received the application for eviction during the course of February 2015. The order presently under consideration was issued in that application. His only defence in that matter was that he was a tenant on the property, had not defaulted on the lease agreement nor breached the terms thereof. The aforesaid application for rescission was dismissed on 8 August 2016.
- [7] Out of the blue, on or about 26 October 2016, and under the guise of "Any of the Occupiers of the Property known as Portion 110 of the Farm Bultfontein 533 JQ" the same applicant, now through Mr. Ryan, issued the present application for rescission.
- [8] In stark contrast to the statements of Mr. Wellan, Mr. Ryan states he, together with his wife, has been occupying the said property since March 2014. That occupation is allegedly in terms of a verbal lease agreement with the company Nulane Investments 332 (Pty) Ltd. Mr. Ryan further alleges that when he commenced occupation of the said property, it was not occupied for quite some time and that he was obliged to remove vagrants from the property. He alleged that he too was obliged to undertake necessary repairs to the said property.
- [9] Mr Ryan further alleges that there are other occupiers of the property who are over the age of sixty and one other who is a cancer patient and the latter's life partner. No further details of the other occupiers are supplied, nor the basis of their occupation of the said property. It is telling that no supporting affidavits in that respect were attached to the application for rescission. These allegations are in stark contrast to that of Mr. Wellan.

[10] The defences Mr. Ryan raises are the following:

- (a) A copy of the application for eviction was never served on him nor was a copy left at the premises, nor was he made aware of the existence of the application;
- (b) His alleged *bona fide* defence is limited to alleged dire financial constraints that hinder him in affording alternative accommodation.

The forgoing statements are the high watermark for rescission. I shall deal therewith below.

[11] The first defence raised in respect of having no knowledge of the application, is in direct contrast to the version of Mr. Wellan, as recorded above, for what follows.

- (a) Mr. Wellan occupied the property together with three other people, who are all related to him, since February 2012. They were the only occupiers as at 14 May 2015 when he issued his application for rescission;
- (b) The company Nulane Investments (Pty) Ltd effected repairs to the said property during the tenancy of Mr. Wellan;
- (c) Mr. Wellan received the notice to vacate the said property and also received the application for eviction;
- (d) Mr. Wellan's occupancy of the property was on behalf of the aforementioned company, Nulane Investments (Pty) Ltd.

[12] Mr. Ryan conceded in his oral argument that there was an overlap with the occupancy of Mr. Wellan. That concession puts paid to the allegation that no notice to vacate was given, or that the application for

eviction had been served at the property. Attorneys were in fact appointed to assist. Mr. Ryan was accordingly well aware of the eviction proceedings.

[13] It follows that there is no merit in the applicant's contention that the "occupiers" of the said property were not notified of the application for eviction. This is clearly a guise to remain indefinitely on the property.

[14] The second defence, namely that of dire financial constraint, has equally no merit for what follows.

[15] Mr. Ryan is cautious not to supply any detail of his alleged precarious financial status. Though admitting to having employment, no detail thereof, and in particular that of the income derived is supplied. Furthermore, Mr. Ryan states that in the event that he is compensated for the repairs he affected to the said property, he would be in a financial position to seek alternative accommodation. However, Mr. Ryan is glaringly silent on the amount of reimbursement and the repairs undertaken. The terms of the occupancy arrangement with Nulane are also not supplied. It follows that no determination can be made in respect of Mr. Ryan's financial means. From submissions made in Mr. Ryan's oral argument, it is inferred that Nulane employs him. The absence of a supporting affidavit from Nulane is telling.

[16] It is trite that a party is obliged to place facts before the court in respect of why an eviction order should not to be granted. In view of all of the foregoing, Mr. Ryan has miserably failed on that score.

[17] There remains the issue of the delay in bringing the application for rescission. In a judgment delivered on 23 September 2016, Mr. Ryan was granted leave to institute an application for rescission of the order of 30 April 2015. That application for rescission was to be instituted within 21 days from the date of handing down that judgment. Failing such institution of rescission proceedings, the order staying the eviction

order lapses. The 21 days expired on 24 October 2016. Mr Ryan only instituted this application on 26 October 2016, two days late. No explanation was provided in the founding affidavit, or in his oral argument. Furthermore, after instituting this application for rescission, Mr. Ryan did not prosecute the application. The respondents were obliged to set the matter down for adjudication. The set down was affected on 23 March 2017.

[19] On the eve of the hearing of this matter, Mr. Ryan approached the respondents' attorneys for a postponement. The apparent premise for the request for postponement related to a potential purchaser of the property, who is currently abroad. No details of the identity, or of the terms of the imminent purchase of the said property were supplied. In the absence of verifiable detail that request was declined.

[20] At the commencement of the hearing, Mr. Ryan again sought a postponement from the bar. Vague submissions were made in that respect. That application for postponement is opposed. I refused the request to have the matter postponed and indicated that I would give my reasons in this judgment.

[21] As recorded above, vague submissions were advanced in respect of the request for postponement. Mr. Ryan was at a loss to supply cogent reasons or facts *inter alia* relating to the identity of the potential purchaser. He merely stated that his superiors, presumably at Nulane Investments (Pty) Ltd, told him that there was a potential purchaser who alas was abroad at the moment and that he was to seek a postponement. It is telling that no supporting affidavit is provided to bolster that allegation.

[22] Mr. Ryan further was at a loss to explain why he had not prosecuted this application or why he had not approached the attorneys earlier after the matter was set down. His only submission related to a loss of his laptop computer due to a burglary during April 2017. He, however,

conceded that he acquired a new laptop since the theft. The lack of further detail deafens the silence.

[23] It is trite that the assets in an insolvent estate devolve upon the Master. In terms of the provisions of the Insolvency Act, the trustees are empowered to cancel any lease agreement in respect of immovable property in the insolvent estate. That lease agreement was terminated. Hence, neither Mr. Ryan, nor Nulane, the alleged lessee of the property, has any right in and to the said immovable property, in particular the right to dispose thereof.

[24] In oral argument, Mr. Ryan conceded that the "other occupiers" having caught wind of the eviction order, left the said property and left him alone to battle the eviction. That battle was lost in August 2016.

[25] It follows that the grant of a postponement would not enhance the prospects of success of the application for rescission.

[13] In view of all of the foregoing, it follows that the application for rescission cannot succeed.

I grant the following order.

- (a) The application for rescission instituted by Mr. Dewald Ryan in terms of the judgment by Legodi, J., and delivered on 23 September 2016 is dismissed;
- (b) Mr. Dewald Ryan is to pay the costs of this application.


C J VAN DER WESTHUIZEN
ACTING JUDGE OF THE HIGH COURT

On behalf of Applicant: P I Oosthuizen
Instructed by: S Roux Inc.

On behalf of Respondent: In person (Mr. D Ryan)