

IN THE KWAZULU-NATAL HIGH COURT
DURBAN AND COAST LOCAL DIVISION
REPUBLIC OF SOUTH AFRICA

CASE NO: 14921/2009

In the matter between:

ETHEKWINI MUNICIPALITY

Applicant

and

KWAZULU NATAL RENTAL HOUSING

First Respondent

TRIBUNAL AND TWO OTHERS

M.T MAGIGABA N.O

Second Respondent

P. JOSPHER

Third Respondent

Delivered:

26 November 2010

JUDGMENT

HUGHES-MADONDO AJ

In these motion court proceedings the applicant seeks to review and set aside the ruling of the first respondent of 22 September 2008.

According to the ruling the letter of 30 January 2008 to cancel the lease between the

applicant and the third respondent was declared invalid as it was contrary to clause 1 of the agreement. The Municipalities conduct to lock out P. Jospher, the third respondent, was unlawful and the Municipality was ordered to reinstate the third respondent.

The salient background facts which are relevant to the adjudication of the application are set out in brief outline below.

The third respondent brought proceedings against the applicant before the first respondent. These proceedings were in terms of section 13(3) of the Rental Housing Act 50 of 1990. They were, based on a complaint against the applicant in respect of the ‘eviction/notification to vacate, illegal lockout’ of the third respondent from a council flat that she had leased from the applicant.

At the hearing on the 22 September 2008 the only party who testified was the third respondent.

Her evidence was that she had occupied 1 Ixia Court Walton Place, Kenneth Gardens. This was one of the applicant council flats. At some stage she was working out in Umzimkhulu and she left the premises in the care of a relative, Mary Angeline Kinloch. She testified that she had advised the applicant of this arrangement. On her return to the premises she alleges that she could not get into to the flat as she had been locked out. She

attended on the applicant's offices to pay her rent and established that the premises were no longer registered in her name but in the name of another person. It emerged during cross examination that she was aware that a single male was occupying the premises. It was put to her that it would then be difficult for the applicant to allow her to occupy the premises as they were already occupied. The third respondent responded as follows:

"You'll rather take a woman, a single woman with children and throw them her out in the street and put *a single male there, because the person that is staying there is a single male...*" (My emphasis in italics)

On the third respondents evidence before the tribunal there was a single male in occupation of the premises and the premises was no longer registered in her name. This was the evidence before the first respondent.

In terms of section 7 of the Rental Housing Act 50 of 1990 ("the Act"), the first respondent is duly constituted as an organ of the state. This court has jurisdiction to review proceedings conducted by the first respondent within its jurisdiction- section 17 the Act. The first respondent's ruling is therefore subject to the Promotion of Administrative Justice Act 3 of 2000("PAJA").

The applicant brought the review application in terms of section 6 of PAJA in that, in

terms of:

- section 6 (c) there was procedural unfairness;
- section 6 (e) (iii) relevant considerations were not taken into account ;
- section 6 (h) the decision taken by the first respondent was so unreasonable that no reasonable person could have taken same; and
- section 6(e) (vi) the decision was arbitrary or capricious.

The evidence that a single male was occupying the premises was before the first respondent. This evidence emerged from the third respondent herself. The first respondent chose to disregard this evidence in *toto* and made a decision without taking this important information into account. The first respondent therefore failed to take into account a relevant consideration which was pertinent in reaching a decision.

Further, the decision of the first respondent that “...*the Municipality [be] is ordered to reinstate the complainant with immediate effect.*” cannot be seen as a reasonable one, as the premises were occupied. It therefore stands to reason that the actions of the first respondent fall to be arbitrary and as such the entire hearing is rendered procedurally unfair.

Mr. Lombard representing the third respondent argued that this matter be dealt with in terms of section 8 (1) (c) (ii) (aa) of PAJA, that is, this court use its discretion and substitute or vary the decision or correct the defect that has arisen.

I am however mindful of the remark made in *Johannesburg City Council v Administrator, Transvaal, and Another* **1969 (2) SA72 T76D-E** that ‘the Court is slow to assume a discretion which has by statute been entrusted to another tribunal or functionary’. It’s a question of fairness to all the parties concerned when the court considers exercising its discretion and all the facts of a case need to be considered before doing so.

In the matter at hand this court cannot exercise its discretion as the evidence of an interested party, the person in occupation of the premises is not before court. It would be unfair to make a decision without hearing their view on the matter at hand. I am therefore of the view that this is not a case where this court could exercise its discretion as envisaged by section 8 (1) (c) (ii) (aa) of PAJA.

Mr. Quinlan for the applicant argued that each party pay their own costs as it was no fault of the third respondent that she had to defend this application. This proposal was not rejected by the third respondent and I am inclined to agree.

The following order is made:

1. The decision of the first respondent is set aside and the first respondent is

directed to conduct the hearing *de novo*.

2. Each party is ordered to pay their own costs in respect of this review application.
3. The first respondent is directed to give notice of the aforesaid hearing to the occupants of , 1 Ixia Court Walton Place, Kenneth Gardens.

HUGHES-MADONDO AJ

(i) costs of such proceedings

APPEARANCES:

Counsel for the applicant: P.D.QUINLAN

Attorneys for applicant: LINDA MAZIBUKO &ASS.

Counsel for the third respondent: W.D. LOMBARD

Attorney for third respondent: PEARCE, DU TOIT & MOODIE

Heard on: 5 November 2010

Delivered on: 26 November 2010

