IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA CASE NO. 1168/2012

In the matter between:

AMANGWE VILLAGE (Project of the Zululand Chamberof Business Foundation RegistrationNumber 1995/09342/08) FIRST APPLICANT

MONDI LIMITED SECOND APPLICANT

and

QONDILE J MTHEMBU FIRST RESPONDENT

JABULANI MANTENGU SECOND RESPONDENT

NICHOLAS G SIBIYA THIRD RESPONDENT

RAPHIK BIYELA FOURTH RESPONDENT

ELPHAS N BUTHELEZI FIFTH RESPONDENT

SIYABONGA P MDIMA SIXTH RESPONDENT

GIRLIE L MTHEMBU SEVENTH RESPONDENT

MBONI T MABUYAKHULU EIGHT RESPONDENT

MANDLA MENTENGU NINTH RESPONDENT

BONGANI T NXUMALO TENTH RESPONDENT

ZODWA P M SIBISI ELEVENTH RESPONDENT

THEMBI MNHWAMBE TWELFTH RESPONDENT

SIHLESENKOSI P ZULU THIRTEENTH RESPONDENT

J U D G M E N T
Date Delivered : 10 April 2013

S R MULLINS, A J:

[1] This is an application in which the applicants seek orders declaring that lease agreements between the first applicant and individual respondents relating to houses in the Amangwe Village in Kwambomambi are cancelled, together with orders for their ejectment. Costs are sought in respect of any respondents who oppose the application.

[2] The “Amangwe Village” is a cluster of buildings located in Kwambonambi, KwaZulu-Natal and owned by the second applicant, Mondi Limited. The buildings were previously usedto house employees of Mondi Limited, but were subsequently leased to the first applicant, the Zululand Chamber of Business Foundation, in about 2002 or 2003.

[3] The latter commenced with the “Amangwe Village Project”, upgrading and using certain of the buildings as an HIV/Aids Clinic, for the housing of orphans and vulnerable children, as administrative offices and as a bakery, intended to both generate income and provide for skills transfer.Certain of the dwellings were improved and used for accommodation.

[4] The remainingdwellings (33 in all, each consisting of four separate bedrooms with communal kitchen and ablution facilities) were leased to private individuals. The objective, apart from providing housing to people in need, was apparently to generate income from rental to fund the other activities of the project.

[5] For the most part, identical written lease agreements were concluded. The fixed term of the lease agreements at issue in this case all expired at the end of February 2011. In terms of clause 2.2, it was expressly provided that, should the lessee remain on the premises with the express or tacit consent of the lessor, the parties would be

"… deemed to have entered into a periodic tenancy agreement on the same terms and conditions as specified in this Lease, except that at least 1 (ONE) calendar month written notice by either party to the other must be given."

[6] The letting of the dwellings did not generate much income. The monthly rental was fixed at R100.00 and, despite provision for annual escalation, none was applied. According to the first applicant's records, those lessees who made payment at all did so irregularly and the first applicant took no steps to enforce payment.

[7] Preparatory to a "rezoning" and transfer of the property from the second applicant to the first applicant, the theMfolozi Municipality was requested to and did inspect the buildings within the Amangwe Village. Those inspections were apparently carried out by both the Director: Technical Services and by the building inspector.

[8] The building inspector, a Mr Anton Deyzel, reported on his inspection via email on 01 April 2011.In that email he records the following:

"As requested I did my inspection at Amangwe Village and this is my findings.

The hospital and houses 01 – 19 is in good condition there is no structural damage.

I strongly recommend that the following houses be condemned.

22 – Foundation is sagging causing the walls to crumble which makes the structure to be unsafe.

23 – Foundation is sagging causing the walls to crumble.

25 – Foundation is sagging causing walls to crack therefore not safe.

30 – Walls badly cracked due to poor foundation.

44 and 45 – Foundation sagging causing structural damage to walls. I also noticed that the roofs are not safe due to incline and rafters that's rotten.

The rest of the houses has no serious structural damage, however I strongly recommend that six monthly inspections should be done to monitor the structures and roofs."

[9] Concerned at Mr Deyzel's conclusion that the structures were unsafe, the applicants resolved that the identified houses should be demolished. The applicant addressed written notice to the various occupants of houses 22, 23, 25, 30, 44 and 45, dated 6 April 2011 and reading as follows (in both English and isiZulu):

"We hereby inform you that the building inspector and the engineer of Mfolozi Municipality have condemned the house and it will be demolished on 06 May 2011.

You are hereby given one month'snotice as from the date on the letter to find alternative accommodation before **06 May 2011**. The house will be demolished on 06 May 2011 and you need to ensure that all your furniture and other belongings are removed from the house by 05 May 2011.No extension of time will be allowed."

[10] The letters were delivered to the various respondents during the course of that day and the next three days (6-9 April 2011). Although each letter reflected the house occupied by the particular lessee below his or her name, the heading to the letter read "RE: NOTICE TO DEMOLISH HOUSE 22"

[11] A subsequent notice, dated 28 April 2011 (in isiZulu only) was delivered during the first few days of May. This reminder did not make reference to house 22, but only to the houses occupied by the relevant lessee. Following the delivery of these reminders, a meeting was held at the Amangwe Village on 04 May 2011. According to the minutes of that meeting, Mr Deyzel (the building inspector of the Mfolozi municipality) reiteratedthat the houses needed to be demolished and also recorded that an assessment had previously been done by the Director of Technical Services who had come to the same conclusion.[1]

[1]There is some reference in the minutes to one "AF" recording that the issue of the demolition of certain of the houses had been raised before. AF is noted to have recorded that inspections had been done 2 - 3 years before and that the residents had been advised at that time that their houses were dangerous and required demolition - but this is not dealt with in the affidavits.

[12] At the meeting it was resolved by the representatives of the first applicant that a final extension to 13 May would be afforded to the occupants of the houses scheduled for demolition.

[13] The residents of house 44 and 45 vacated those buildings and they were demolished on 13 May 2011.

[14] Notwithstanding further discussion, the respondents declined to vacate the dwellings occupied by them, hence the application for their ejectment which was ultimately commenced in February 2012, coupled with an application for directives regarding notice in terms of section 4(2) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act No 19 of 1998 ("the PIE Act").

[15] In response to the notice of motion and the PIE notice, the Empangeni Justice Centre delivered notice of intention to oppose on behalf of the second, seventh, eighth, eleventh, twelfth and thirteenth respondents. In due course answering affidavits of thesecond, third, seventh, eighth, twelfth and thirteenth respondents were delivered.[2]

[16] Apart from a number of formal issues relating to the existence of the first applicant (cited as a "project of the Zululand Chamber of Business

[2] The 3rd respondent accordingly appears to have replaced the 11th respondent in opposing the relief sought.

Foundation") and the authority of the deponent to the founding affidavit, the respondents resist the application on the following bases:

(a) The respondents dispute that the buildings in question are structurally unsound or unsafe. They further contend that there is no admissible evidence to that effect since no affidavit from Mr Deyzel was delivered in support of the application and, in any event:

(i) there is no evidence that Mr Deyzel has the particular expertise which would entitle him to express what is an expert opinion; and

(ii) correspondence from the municipality is equivocal, suggesting that the first applicant obtain the expert advice of a structural engineer to provide guidance on the subject; and

(b) The respondents further deny that there has been any valid termination of the periodic leases under which they occupy the houses. They deny that the notices calling upon them to vacate the dwellings operated to validly terminate the leases, so that there is no legal basis for their eviction.

[15] In argument, the respondents' representative furthercontended that:

(a) there has not been proper compliance with Section 4(2) PIE because the notice should have been given after all of the affidavits had been filed and specifically with regard to the date of the hearing of the argument on 12 March 2013; and

(b) the Court should, in any event, conclude that it is not, in all of the circumstances, just and equitable that the respondents be evicted. The Court should further exercise its discretion to require that the Mfolozi Municipality be joined in the preceding and be directed to provide alternative accommodation for the relevant respondents before they are ordered to vacate the dwellings in question.

[16] I deal with these in turn.

Citation of the first applicant and authority to bring the proceedings

[17] It would undoubtedly have been more appropriate to identify the first applicant as the Zululand Chamber of Business Foundation (the Section 21 company) rather than as a named “project” thereof. It is, however, clear that the first applicant is the “Section 21” company and the contention that the first applicant does not exist is without substance.

[18] There was no challenge to the authority of the attorneys bringing the application on behalf of the applicants. In those circumstances, intention that the application is an authorised is misplaced. See ANC and Umvoti Council v Umvoti Municipality 2010 (3) SA 31 (KZP).

Cancellation of the periodic leases

[19] the position, it seems to me, is that the applicants are entitled to an order for the ejectment of the respondents only if they can demonstrate on the papers that the respondents have no continued legal right to remain in occupation. That, in turn, entails the applicants proving that the respondents' leases have been validly cancelled or that there is some other basis upon which their continued occupation of the dwellings in question is unlawful.

[20] It is common cause that each of the respondents was, at least until April 2011, a lessee in terms of a continuing periodic lease either by virtue of clause 2.2 of the standard lease[3] or because there existed a tacit monthly lease on the same terms. The first applicant was accordingly entitled to bring the leases to an end, provided that a valid notice terminating the lease was given to each of the respondents.

[21] The applicants allege in the founding affidavit of Ms Sternberg that the respondents are in unlawful occupation of the houses because their leases have been terminated. The danger allegedly posed by the structures is given as the reason for the cancellation and for the urgency in securing vacant possession.

[3] Quoted in paragraph [5] above

[22] The notices dated 6 April 2011 addressed to the respondents recorded that the houses had been "condemned" by the building inspector and engineer of the Mfolozi Municipality and that demolition was scheduled for 6 May 2011. The notices did not purport to be notices of termination of the leases in terms of clause 2.2 of the standard lease. Indeed, there was no express mention of the termination of the leases, although the notion that the leases would come to an end is necessarily implicit in notice that the buildings were to be demolished.

[23] Clause 2.2 of the standard lease requires "at least one calendar month written notice" for a valid cancellation of the lease based purely on notice (i.e. without the need to provide any particular justification. Reference to a "calendar month", seems to me to be reference to a complete calendar month, ending on the last day of a calendar month. Clause 2.2 consequently does not envisage notice running from a day in one month to the corresponding day in the following or a subsequent month. Since the rental period was monthly (with payment to be made on or before the first day of every month) even without regard to clause 2.2, a tacit relocation of the lease would require notice of at least one calendar month ending on the last day of a calendar month. The authorities to this effect are usefully summarised in AJ Kerr The Law of Sale and Lease (3rd Edition) at pages 488-489.[4]

[4] Inter alia: Tiopazi v Bulawayo Municipality1923 AD 320; Moyce v Estate Taylor 1948 (3) SA 822 (A) at 830.

[24] The notices dated 6 April 2011, even if actually delivered on that date (and in most cases they were not) could consequently not operate as effective notices of termination of the periodic monthly leases at the will of the lessor.

[25] There are other provisions of the standard lease which provided for a right of cancellation. I refer, by way of example, to clauses 2.3 and 2.4 and to the provisions of clauses 9 and 17. None of these, however, seem to me to provide a basis for the conclusion that there has been a valid termination of the periodic leases in question.

[26] The particular point that any notice to terminate the leases of the respondents was required to be a calendar months' notice, ending at the end of the particular calendar month, was not specifically raised in the answering affidavits. The respondents did, however, expressly challenge the notion that the notices were "notices validly terminating any lease agreements between the applicant and any of the respondents" (as for example in paragraph 28 of the second respondent's answering affidavit).

[27] When the issue regarding the validity of the notices to effect a cancellation in terms of the lease was raised in argument, I invited the representatives of the parties to deliver supplementary written argument. Ms Olsen, who represented the applicants accepted that a "calendar months' notice" had not been given and they have consequently not been a valid

notice of cancellation in terms of the lease agreements. She submitted, however, that the respondents' failure to have raised the issue specifically amounted to a waiver of the right to do so. I cannot agree. The valid termination of the leases was always in dispute.

The existence of a right to summarily cancel the leases

[28] I assume, in favour of the applicants and without deciding the matter, that the first applicant would be entitled to summarily cancel the leases or to secure the end of the respondents from the buildings if it could be shown that the buildings had in fact been "condemned" in the sense that they could no longer be legally occupied or if it was demonstrated that the buildings were structurally unsound and posed an immediate threat to the occupants thereof. The question then is whether the applicants have produced admissible and satisfactory evidence to that effect.

[29] The applicants were clearly concerned at the views expressed in the e-mail report of Mr Deyzel. That much is clear. There is no suggestion that the applicants' endeavour to secure vacant possession of the houses is or was motivated by any ulterior motive.

[30] The applicants relied on the opinion expressed in the e-mail report of the "building inspector" Mr Deyzel, in which he "strongly recommends" that the

houses in question be “condemned” and describes a number of the houses as “unsafe”.

[31] The founding affidavit refers to a letter received from the municipality dated 17 May 2011 which it is said again confirmed the building inspector’s view that the houses are unsafe and must be demolished. The letter dated 17 May 2011, however, does not in fact do so. The letter appears rather to distance the local authority from any firm conclusion that the identified buildings require demolition. It records that “*movement of portions of the foundations under houses 22, 23, 25, 30, 44 and 45 were noted, being the cause of crumbling and/or cracking of the walls*”, refers to the need to repair or replace roof trusses in houses 44 and 45 “*as part of a maintenance plan*” (which at least superficially is not consistent with the notion that those houses should necessarily be condemned and demolished) and recommends “*the appointment of a structural engineer to certify the individual buildings as structurally sound or not, as and when the management body anticipates demolishing of the structures*”. Finally, it is recorded that “*It should be noted that the municipality in its capacity as regulatory authority, has not issued any building control notices to the owner of these properties*.”

[32] The founding affidavit records that the costs associated with the employment of a structural engineer were considered prohibitive and that the

first applicant accordingly "*relies on the opinion of the Mfolozi Municipality building inspector*".

[33] The answering affidavits raised the fact that, in the absence of an affidavit from Mr Deyzel (and evidence of his qualification to express the opinion in question) there was in fact no admissible evidence at all to support the proposition that the houses were unsafe and required demolition. In response, the applicants reiterated that the leases had been cancelled on notice. In addition, the applicants:

(a) Recorded that Mr Deyzel (i) is the municipal building inspector and is consequently qualified to make the findings expressed in his e-mail; and (ii) had advised that he cannot provide an affidavit in support of the application "*because he is of the opinion that the municipality cannot condemn houses on farmland*."; and

(b) Produced a number of photographs of the buildings in question, showing the existence of significant cracks, both vertical and horizontal, in the walls, but unsupported by any expert explanation.

[34] To my unqualified eye, the photographs do appear in some instances to show significant movement of the foundations and to support the notion that the buildings are unsafe.

[35] It seems to me, however, that the applicants have not placed admissible evidence before the court as would justify the conclusion that the buildings are, objectively, so entirely unsafe that the leases may be regarded as terminated owing to supervening impossibility of performance.

[36] It follows that the application cannot succeed. That being the case, there is no need for me to deal with the question as to whether there has been compliance with the requirements for the giving of notice in terms of section 4(2) of PIE. Neither am I required to deal with the question as to whether the municipality should be joined as a respondent.

[37] In the result, the application must be dismissed. None of the respondents have sought an order for costs, and that is appropriate, given that the first applicant has nothing other than the respondents' best interests at heart. The respondents have been permitted to reside in houses forming part of the Amangwe Village without making payment of rental for a considerable period of time.

[38] The first applicant is fully within its rights to give one calendar months' notice of termination of the respondents' leases and, having so cancelled the leases, to obtain their ejectment from the buildings so that they may be demolished.

[39] In the result, the only order which I make is an order that the application is dismissed.

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S R MULLINS A. J.

APPEARANCES:

APPLICANTS COUNSEL:	Ms Olsen, instructed by Shepstone & Wylie, Umhlanga Rocks, Durban.
RESPONDENTS COUNSEL:	Ms T Gopal, instructed by Durban Justice Centre, Durban.
Date of hearing:	11 March 2013.
Date of judgment delivered:	10 April 2013.