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



CASE NO: 26598/2017

Delete whichever is not applicable
(1) Reportable No
(2) Of interest to other Judges No
(3) Revised: Yes

Date: /05/2019

Signature.....

In the matter between:

**NATIONAL SAVINGS AND INVESTMENTS
(PROPRIETARY) LTD**

Applicant

and

HESTON CHIMALIRO

First Respondent

THE UNLAWFUL OCCUPANTS OF [...]

Second Respondent

**EKURHULENI METROPOLITAN MUNICIPALITY
BOKSBURG**

Third Respondent

J U D G M E N T

MAIER-FRAWLEY AJ:

Introduction

1. This is an application for the eviction of the first respondent, Mr. Heston Chimaliro (Chimaliro) and all persons occupying through him (second respondent) of an apartment described as [...], situate at [...], Eveleigh, Boksburg ('the property').
2. National Savings and Investments (Pty) Ltd (applicant) is the registered owner of the property, having purchased same from the appointed Liquidators of *Erf [...]* Kelvin CC¹ on 12 August 2016. Registration of transfer took place on 31 March 2017, and it is not in dispute that the applicant enjoys the necessary *locus standi* in the matter. It is further common cause that the first respondent and his family are in occupation of the property.
3. The third respondent (local municipality) is joined in the proceedings by virtue of the provisions of the Prevention of Illegal Eviction From and Unlawful occupation of Land Act, 19 of 1998 (PIE).
4. The applicant alleges that the first and second respondents (the respondents) are in unlawful occupation of the property as the applicant did not conclude any lease agreement with the respondents, nor was a valid lease agreement in place between the previous owner and the respondents entitling them to occupy the premises.

¹ *Erf [...]* Kelvin CC (Erf 80) is the erstwhile owner of the property. It was the developer of Eveleigh Estates and had owned the unit since it was constructed in 2009. Erf [...] was placed into final liquidation by order of Court on 25 November 2013.

5. The respondents oppose the application² on grounds that: (i) Chimaliro (and his family) lawfully occupy the premises by virtue of a written lease agreement concluded between Chimaliro and the previous owners of the property,³ which lease agreement had not been terminated prior to the institution of the eviction proceedings; and (ii) Chimaliro's minor son lives at the property with him, and evicting them would render them homeless.

Factual background

6. After purchasing the property, the applicant delivered a letter (dated 3 April 2017) to the respondents, in which the respondents were notified, *inter alia*, of the fact that the property had been purchased by the applicant and had been registered in the applicant's name. The respondents were informed that '*we are advised by the sellers [liquidators] that there is no valid written lease agreement in place with them in terms of which you are in occupation of the property*'. The respondents were requested to vacate the property by 14th April 2017, failing which eviction proceedings would be instituted against them. It is common cause between the parties that Chimaliro received this letter.
7. In December 2017, the preliminary notices in terms of (PIE) were served by the Sherriff and an order was obtained on 30 January 2018 authorising the service of the eviction application on the applicants. Thereafter, the Sheriff filed his return indicating that a copy of the notice of eviction had been served on the respondents on 25 October 2018 at the property, as required in terms of section 4(2) of PIE. On 26 October 2018, the Sheriff also served a section 4(2) notice on the third respondent (Ekurhuleni Metropolitan Municipality). It is

² A composite answering affidavit, deposed to by Chimaliro, was filed on behalf of the first and second respondents.

³ See para 10 at p. 55 of the papers, where Chimaliro states that '*there is an existing lease agreement between us and the owners of the property which lease is enforceable between us and any other subsequent owner of the property and or owners in succession and or title.*' A copy of the lease agreement relied on, appears at pp. 74-85 of the papers.

not in dispute that the respondents were given fourteen days' notice of the eviction application as required in terms of PIE.

Evaluation

Lawfulness of occupation

8. The applicant's case is that the respondents have not paid any occupational rent,⁴ nor is there any lease agreement in place entitling them to occupy the property.

9. Chimaliro contends that the respondents occupy the property under and by virtue of a written lease agreement concluded with Rawson Properties t/a Blue Grass Trading 1112 CC (Rawson), the latter acting on instructions of or as agents of the erstwhile owners of the property. In support thereof, Chimaliro relies on a document titled '*Application to lease a property*'⁵ as well as a written lease agreement⁶ in the answering papers. The application specifically provides that '*No agreement shall be deemed to exist between the Landlord and/or his agent and the Applicant and/or Applicants until the lease agreement has been duly signed by, or on behalf of the Landlord, and monies paid, or arrangements made to pay the monies*'.⁷ The copy of the lease agreement (annexed to the answering affidavit) appears to be signed by a representative of Rawson, merely for purposes of accepting the benefits thereunder. It is not signed by the landlord (whose identity is also not specified therein). The lease agreement provides that the lease will endure for

⁴ This fact was indeed conceded during oral argument presented by Mr Hadebe (attorney) who appeared on behalf of the respondents at the hearing.

⁵ A copy of the application appears at pp. 68-72 of the papers.

⁶ A copy of the lease agreement appears at pp. 74-85 of the papers and contains the signature of a representative of Rawson (at p.85) which appears to have been inserted merely for purposes of accepting the benefits contained therein. The landlord's particulars are not inserted in the space provided therefore in the lease agreement.

⁷ See para 2 below the heading 'Acceptance' at p. 71 of the papers.

a fixed period of one year only, commencing on 1 June 2016 and terminating on 31 May 2017.

10. According to Chimaliro, he has resided at the property for over a year in terms of the said lease agreement, which he contends, entitles him to occupy the property, which lease was never terminated against him (or those who occupy through him), at least not prior to the launch of the eviction application. He alleges that *‘the complex is safely secured by 24 hour security and no one would gain access to the complex except by having your finger prints captured and stored by permission of the owners’*.⁸ In addition, Chimaliro has provided proof of his payment of a deposit in the sum of R11,100.00 in the answering papers.

11. In reply, the applicant avers that the liquidators of Erf [...] merely mandated Rawson to source potential tenants for the various units in the complex (including the property in question), however, a lease agreement would only be concluded with a potential tenant if the latter was approved by the liquidators. The applicant alleges that Rawson was never authorised to conclude lease agreements for and on behalf of the liquidators - the liquidators were never presented with the ‘lease agreement’ and also never signed same – consequently, there was never any ‘lease agreement’ between the liquidators and Chimaliro. These allegations are confirmed by Mr Lutchman (one of the liquidators) in an affidavit in the replying papers.

12. The defence contended for by Chimaliro, namely, the existence of a valid lease agreement, has in my view, created a material dispute of fact on the papers. As an eviction order is being sought in application proceedings, the court is therefore bound to accept those facts averred by the applicant (owner) that are not disputed by the respondents (i.e, the occupants, represented by

⁸ See paras 39 & 40 at p 60 read with para 44 at p. 61 of the papers.

Chimaliro) and the respondents' version in so far as same is tenable and credible. The well-known Plascon-Evans test,⁹ as adumbrated in *National Director of Public Prosecutions v Zuma*,¹⁰ requires the court to accept the version of Chimaliro in so far as there is any dispute of fact and his version is not far-fetched, not credible or implausible.¹¹

13. The applicant contends that even if the respondents' version were to be accepted, namely, that a valid lease agreement was in existence, the lease had terminated by effluxion of time on 31 May 2017.¹² Besides, the eviction application was launched on 20 July 2017 in circumstances where it could never be contended that a tacit relocation had been concluded. The submission is persuasive, for a tacit relocation is only concluded if the occupant continues to occupy the property in question with the tacit or express consent of the owner.¹³ This may occur tacitly if the parties conducted themselves in a manner that gives rise to the inescapable inference that both desired to continue the contractual relationship on the same terms as existed before.¹⁴

⁹ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635D.

¹⁰ *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1 2009 (1) SACR 361 (SCA) para 26.

¹¹ See too: *ACSA v Exclusive Books* (945/2015) [2016] ZASCA 129 (27 September 2016) at para 5; *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) para 55.

¹² See clause 3 at p. 76 of the papers. The lease was for a fixed period of 12 months, commencing on 1 June 2016 and terminating on 31 May 2017.

¹³ See: s 5(5) of the Rental Housing Act 50 of 1999, which provides as follows: '*If on the expiration of the lease the tenant remains in the dwelling with the express or tacit consent of the landlord, the parties are deemed, in the absence of a further written lease, to have entered into a periodic lease, on the same terms and conditions as the expired lease, except that at least one month's written notice must be given of the intention by either party to terminate the lease.*' (own emphasis).

In terms of s 1 of the said Act, ' "**landlord**" means the owner of a dwelling which is leased and includes his or her duly authorised agent or a person who is in lawful possession of a dwelling and has the right to lease or sub-lease it'.

¹⁴ See: *Golden Fried Chicken (Pty) Ltd v Sirad Fast Foods CC* 2002 (1) SA 822 (SCA) at para 4.

14. Whether or not there was an implied agreement to renew an existing lease (a so-called ‘tacit relocation’), or to conclude a new lease on the same terms as the previous one, is dependent on the facts and circumstances of the case. More specifically, it must be able to be unequivocally inferred from the conduct of the parties (lessor and lessee) that a renewed or new lease has come into existence. Under normal circumstances this would be the case when the lessor allows the lessee to remain in occupation of the leased premises after termination of the lease, and the lessee continues to pay rent that the lessor accepts.¹⁵ The mere fact that a lessee remains in occupation of the leased premises after the expiration of the term of the lease does not, of course, mean that there is a tacit renewal of the lease. Similarly the belief, or impression, of one of the parties to the lease that there has been a tacit relocation, is not sufficient to bring a new lease into existence. There must be compliance with the requirements for an implied or tacit agreement.¹⁶ In *Bowhay v Ward* 1903 TS 772 at 779, Innes CJ held as follows:...’*[T]acit relocation depends upon this, that both parties adopt and continue the position which the termination of the lease found them in; in other words, that the lessor is content that the lessee should remain, and the lessee is content to remain.*’¹⁷ (own emphasis)
15. In the present case, I am unable to find that Chimaliro continued to occupy the property after 31 May 2017 with the tacit or express permission of the owner (applicant), when regard is had to the applicant’s express stance to the contrary as set out in its letter of 3 April 2017 (referred to in para 6 above).¹⁸ The applicant, as owner, consistently maintained that the respondents were in

¹⁵ See in general: W E Cooper, *Landlord and Tenant* (2nd edition 1994) at 350 & 352; W A Joubert (editor) *The Law of South Africa* (first reissue 1999) volume 14, para 217.

¹⁶ See: *Muller v Pam Snyman Eiendomsconsultante (Edms) Bpk* [2000] 4 All SA 412_(C) at 417g-j.

¹⁷ See too: *Tiopaizi v Bulawayo Municipality* 1923 AD 317 at 325.

¹⁸ Chimaliro was aware in April 2017 of the applicant’s attitude that no lease agreement existed between the parties and of the applicant’s demand that he vacate the premises (see applicant’s letter dated 3 April 2017, at p. 11 of the papers). Chimaliro confirms having received the letter in para 36 at p. 60 of the papers.

unlawful occupation due to no lease being in existence, which stance in any event undermines the existence of a tacit relocation to continue the contractual relationship on the same terms as existed before, which, on the respondents' version, is what he ostensibly believed. The (undisputed) facts *in casu* point indelibly to the conclusion that Chimaliro and his family remained in occupation of the leased premises after termination of the lease on 31 May 2017, without paying any rent for such occupation either to the rental agents (Rawson) or the liquidators of the previous owners or the applicant.¹⁹ Moreover, he was not occupying the property with the unqualified consent of the applicant, as evidenced by the letter of 3 April 2017.

16. I therefore conclude that the respondents' occupation of the property was unlawful as from 31 May 2017 when the lease (on the respondents' version) had terminated by effluxion of time.

Is it just and equitable to evict?

17. As pointed out in *Occupiers of erven 87 & 88 Berea v Christiaan Frederick De Wet N.O* 2017 ZACC 18 at paras 40-44, the starting point of the enquiry is section 26(3) of the Constitution which *inter alia*, provides that no one may be evicted from their home without an order of court made, after considering all the relevant circumstances. I am enjoined in terms of the Constitution and PIE²⁰ to have regard to the interests and circumstances of the occupier/s and to pay due regard to broader considerations of fairness and other

¹⁹ Mr. Hadebe, who appeared on behalf of the respondents, conceded during oral argument presented to court at the hearing of the application that no rent had been paid since at least April 2016.

²⁰ In terms of s 4(7) of PIE, 'If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women.'

constitutional values, so as to produce a just and equitable result.²¹ It is only once the court concludes that there is no defence to the claim for eviction and that it would be just and equitable to grant an eviction order that it is obliged to grant that order.²²

18. The following relevant circumstances emerge from the papers:

- 18.1. As far back as 3 April 2017, Chimaliro was given notice to vacate the property by the new owner (applicant) who had purchased the property from the liquidators of the erstwhile owner. Albeit that such notice occurred prior to the termination of the lease, after the termination thereof, further notices to vacate were given in the s 4(2) notices (served in terms of PIE) as well as in the main application;
- 18.2. Chimaliro has occupied the premises without paying rent for a period in excess of two years (i.e., as from April 2017 to the present date);
- 18.3. On his own version, Chimaliro is financially able to afford payment of rent, having tendered to pay a market related amount if a new lease were to be concluded with the applicant;
- 18.4. The applicant has indicated that it is not prepared to conclude a new lease with Chimaliro. Notwithstanding that Chimaliro has indicated that he is desirous of continuing to lease the property, it is trite that a court cannot make a contract for the parties,²³ and as such, Chimaliro cannot force the applicant to lease the property to him;
- 18.5. There is nothing in the papers to indicate that there are no alternate premises for rental available to Chimaliro, either in the same area where the property is situated or its surrounds or even further afield;

²¹ See: *Occupiers of erven 87 & 88 Berea v Christiaan Frederick De Wet N.O* 2017 ZACC 18 at paras 40 -44 together with cases therein cited, as read with s 26(3) of the Constitution and s 4(7) of PIE.

²² See: *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 (6) SA 294 (SCA) at para 25.

²³ See: *B v B* [2014] ZASCA 14 (24 March 2014) at para 20.

- 18.6. Chimaliro is in any event silent about what attempts, if any, have been made by him either to locate or to secure alternative accommodation;
- 18.7. Chimaliro has a minor child who will be impacted by an eviction order, although the needs of this child have not been particularised in the answering papers;
- 18.8. Chimaliro has enjoyed the benefit of legal representation in the eviction proceedings and has presumably paid for same, and he cannot thus be regarded as economically vulnerable, or unable to obtain alternate accommodation;
- 18.9. Chimaliro enjoys no further right to occupy the premises and indeed never enjoyed the right to occupy the property without paying for such occupation;
- 18.10. Chimaliro and his wife are both gainfully employed;
- 18.11. Chimaliro has enjoyed the benefit of free occupation for some two years without having paid, as a bare minimum, the relevant the municipal charges levied in respect of the property;
- 18.12. On his own version, he has the financial means to secure alternate accommodation elsewhere and to pay for same;
- 18.13. He has known of the real risk of eviction for a period in excess of two years and as such, he ought reasonably and responsibly to have made contingent plans in the event that an eviction order is granted;
- 18.14. The professed risk of homelessness is not borne out by the undisputed facts of the matter and Chimaliro cannot be characterised as indigent by any means;

19. I am constrained to conclude that it would be just and equitable to grant an eviction order having regard to all the relevant factors²⁴ and the peculiar circumstances outlined above.²⁵

Date of implementation of the order

20. The second enquiry, which the court must undertake before granting an eviction order, is to consider -

“what justice and equity demand in relation to the date of implementation of that order and it must consider what conditions must be attached to that order. In that second enquiry it must consider the impact of an eviction order on the occupiers and whether they may be rendered homeless thereby or need emergency assistance to relocate elsewhere. The order that it grants as a result of these two discrete enquiries is a single order. Accordingly, it cannot be granted until both enquiries have been undertaken and the conclusion reached that the grant of an eviction order, effective from a specified date, is just and equitable. Nor can the enquiry be concluded until the court is satisfied that it is in possession of all the information necessary to make both findings based on justice and equity.”²⁶

21. The facts of the matter do not support a conclusion that Chimaliro and his family may be rendered homeless by an eviction order or that they are in need of emergency assistance to relocate elsewhere.
22. However, because the interests of a minor child will be impacted by the order, I am of the view that justice and equity demands that a slightly longer period than that suggested by the applicant’s counsel during argument (i.e., five

²⁴ As mentioned in *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 (6) SA 294 (SCA) at para 25, where the following is said: “First, it must decide whether it is just and equitable to grant an eviction order having regard to all relevant factors. Under section 4(7) those factors include the availability of alternative land or accommodation. The weight to be attached to that factor must be assessed in the light of the property owner’s protected rights under section 25 of the Constitution, and on the footing that a limitation of those rights in favour of the occupiers will ordinarily be limited in duration. Once the court decides that there is no defence to the claim for eviction and that it would be just and equitable to grant an eviction order, it is obliged to grant that order. ” “

²⁵ The respondents have not advanced any facts to evidence that it would *not* be just and equitable to grant an eviction.

²⁶ See: *Occupiers of erven 87 & 88 Berea supra*, at para 45 (quoting from *Changing Tides supra* at para 25).

weeks) be afforded to Chimaliro within which to relocate his family. I propose giving Chimaliro (and his family) a period of eight weeks from date of order in which to vacate the premises.

23. The general rule is that costs follow the result. I see no reason to depart therefrom.

24. Accordingly, I grant an order in the following terms:

1. The first and second respondents, being the unlawful occupants of [...], Boksburg, Province of Gauteng, measuring 71 square metres, presently held by the applicant under Deed of Transfer ST10812/2017 ('the property'), are hereby evicted from the property;
2. Should the first and second respondents' fail to vacate the property on or before Friday the 19th July 2019, the Sherriff of this Court or his lawful deputy is hereby authorised to evict them and all persons holding under them from the property;
3. The first and second respondents (excluding minor children) are ordered to pay the costs of the application jointly and severally, the one paying the other to be absolved.

MAIER-FRAWLEY AJ

Date of hearing:
Judgment delivered

20 May 2019
24 May 2019

APPEARANCES:

Counsel for Applicant: Adv. J. Hoffmann
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