



**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE HIGH COURT, KIMBERLEY)**

Case No: 2303/2018
Heard on: 11/10/2018
Delivered on: 02/11/2018
Not Reportable

In the matter between

GERTRUIDA BOTHA/BARNARD

(IDENTITY NUMBER [..])

GERTRUIDA FLEMING

(IDENTITY NUMBER [...])

And

JOHN-ROSS HENDERSON

SOL PLAATJE MUNICIPALITY

First Applicant

Second Applicant

First Respondent

Second Respondent

JUDGMENT

PAKATI J

- [1] The first applicant, Ms Gertruida Botha/Barnard ("Ms Barnard") and Ms Gertruida Fleming ("Ms Fleming") the second applicant, approached this Court on an urgent basis seeking eviction of first respondent, Mr John-Ross Henderson, from the immovable property owned by Ms Barnard, situated at 1 Constantia Avenue, Rooydene in Kimberley, in terms of section 4 (1) read with section 4 (7) of the Prevention of Illegal Eviction from and Unlawful

Occupation of Land Act¹ ("the Act"). Ms Fleming is Ms Barnard's mother. The second respondent is Sol Plaatje Municipality as contemplated in section 2 of the Local Government Municipal Systems Act² situated at the Civic Centre, Kimberley.

[2] On 21 September 2018 O' Brian AJ ordered that the notice in terms of section 4 (2) of the Act be served personally upon the first respondent's attorney of record, Mr Gqadushe, which was done on 21 September at 11h15. The order was granted on urgent basis in terms of s 5 of the Act. Mr Henderson filed an opposing affidavit on 26 September 2018. The applicants filed their replying affidavits on 05 October 2018.

[3] Sections 4(1) and (2), 4(7) and 5(1) of the Act provide:

'4. Eviction of unlawful occupiers

(1) Notwithstanding anything to the contrary contained in any law or the common law, the provisions of this section apply to proceedings by an owner or person in charge of land for the eviction of an unlawful occupier.

(2) At least 14 days before the hearing of the proceedings contemplated in subsection (1), the court must serve written and effective notice of the proceedings on the unlawful occupier and the municipality having jurisdiction.

(7) 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. **5. Urgent Proceedings for eviction**

(1) Notwithstanding the provisions of section 4, the owner or person in charge of land may institute urgent proceedings for the eviction of an unlawful occupier of that land pending the outcome of proceedings for a final order, and the court may grant such an order if it is satisfied that –

¹ Act 19 of 1998

² Act 32 of 2000

- (a) There is a real and imminent danger of substantial injury or damage to any person or property if the unlawful occupier is not forthwith evicted from the land;
- (b) the likely hardship to the owner or any other affected person if an order for eviction is not granted, exceeds the likely hardship to the unlawful occupier against whom the order is sought, if an order for eviction is granted; and
- (c) There is no other effective remedy available.'

BACKGROUND FACTS

[4] It is common cause that Ms Botha/Barnard is the registered owner of the property known as Erf 14924 Kimberley situated at 1 Constantia Avenue, Roildene in Kimberley as alluded to earlier.³ It is also common cause that Mr Henderson occupied the said immovable property by virtue of a lease agreement concluded between the applicants' agent, Mr H van der Merwe, from Keuro Properties (Pty) Ltd at [...]D S Road, Kimberley, and Mr Henderson on 01 September 2015.⁴ The material terms of the agreement can be summarised thus:

4.1 The lease agreement was for a period of twelve months with effect from 01 September 2015 and terminating on 31 August 2016;

4.2 Mr Henderson had to pay rental of an amount of R 9 500-00 per month on or before the third day of each succeeding month;

4.3 If he fails to pay rent on the due date Ms Barnard would be entitled to cancel the agreement; and

4.4 Mr Henderson agreed to pay for water, electricity, refuse and sewerage account levied in respect of the property during his stay.

[5] On 01 September 2016 the lease agreement was extended to 31 August 2017 in terms of an addendum signed by the parties on the same date. Mr Van der Merwe handed the addendum to Mr Henderson for signature. In terms of the addendum the agreed rental was R 10 000-00 per month and the other terms of the agreement remained the same. In terms of the addendum

³ See *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd* 1993 (1) SA 77 (A) at 88

⁴ See *Schnehaage en 'n Ander v Bezuidenhout* 1977 (1) SA 362 (O); *V Saitis & Co (Pty) Ltd v Feniake (Pty) Ltd* [2002] 4 All SA 50(W); and *Matador Buildings (Pty) Ltd v Harman* 1971 (2) SA 21 (C)

all other provisions and conditions in the original lease agreement remained the same except for the adjustments contained in the addendum.

- [6] Before the termination of the agreement Ms R Gagiano, the applicants' attorney of record, addressed a letter to Mr Henderson on 13 July 2017 informing him that the lease agreement would not be extended and that he would therefore have to vacate the immovable property on 31 August 2017. The said letter was served by the Sheriff upon Mr Henderson's father on 14 July 2017 at 11h50. The dispute between the parties started on 31 August 2017. Mr Henderson argues that the lease agreement was further extended to 31 August 2018.
- [7] Mr Henderson chose the address of the immovable property as his *domicilium et executandi* in terms of Clause 16.2 of the agreement. In Clause 16.3.2 of the agreement he agreed that any notice sent by registered mail should be deemed as received on the eighth day after its posting.
- [8] An application for eviction of Mr Henderson during 2017 under Case Number 297/2018 was subsequently dismissed on 22 June 2018 due to the fact that Mr Van der Merwe did not file a confirmatory affidavit confirming that the lease agreement was not extended further. It has now been filed.
- [9] On 28 June 2018 Ms Gagiano forwarded another letter to Mr Henderson informing him that there was neither written nor oral extension of the lease agreement. He was directed to paragraph 15 of the lease agreement signed on 15 September 2015 where it states that should the lessee dispute the lessor's right to cancel the lease agreement and continue to occupy the immovable property then the lessee should continue to pay all amounts falling due by him in terms of the lease on the due date pending the determination of the dispute. The lessor should recover and accept those payments. The said payments should not prejudice the lessor or affect her claim for cancellation of the agreement. Mr Henderson's arrears at that stage stood at R60 675-61. He was given 14 working days to make good the said arrears and sixty days' notice to vacate the property by 31 August 2018. This letter was served upon Mr Henderson's father on 29 June 2018. The lease agreement was then cancelled in July 2017.

[10] In response to Ms Gagiano's letter Mr Henderson, in a letter dated 29 June 2018 stated thus:

'Dear Madam,

I refer to your letter dated 2018 regarding the lease agreement as per your letter.

I need to remind you that the application before court on 22nd of June 2018 was dismissed for reasons known to yourselves. I further dispute that the lease agreement was cancelled in July 2017. This fact was in any event well ventilated in my affidavit before court wherein your application was dismissed. It is clear that your letter is a further attempt to set out reasons for a further eviction application. Your attempt to ignore the fact that I am still being owed monies by your client is not fair and cannot be justified by you.

Any attempt by your client to abuse the Court process will be defended as it has now become clear that your clients are being ill advised and are acting *mala fide*. This matter could have been resolved amicably had it not been for Mr Alten Oosthuizen from Keuro Properties who spread false WhatsApp messages. I will however, contact my attorney for legal representation in the event of any further attempt of an eviction.'

[11] Notably, Mr Henderson did not vacate the property on 31 August 2017 and still occupies it. He last paid rent and the municipal account on 12 January 2018 and had refused to make further payments. He is presently in arrears to the amount of R 94 961-74. On 27 July 2018 the total amount due to the municipal account was R 24 829-88. The applicants dispute that he effected repairs to the house and that they owe him some money.

[12] Ms Barnard states that her mother is 84 years old and resides at Trompsburg Retirement Village at 25 Kotze Street, Trompsburg. The rental generated from the immovable property is required to pay for her accommodation, care and expenses in the amount of R 6 756-00 per month as appears in Annexure "GF10". If Mr Henderson continues to stay in the immovable property without paying rent she would be unable to pay for her accommodation in the retirement village. She states further that her mother has exhausted her funds and medical aid and is presently not in a position to live in the retirement village. Her expenses are as follows:

12.1 Rates and taxes on the immovable property;

12.2 Cell Phone – R300-00;

12.3 Medical aid – R 2 600-00;

12.4 Excess on medical aid – R250-00;

12.5 Accommodation at Trompsburg Sentrum vir Bejaardes – R 6 756-00;

12.6 Transport – R300-00; and

12.7 Annual insurance premium – R12 039-06 and the outstanding arrears of R 12 273.84.

[13] The applicants submit that they have made out a case that Mr Henderson is an illegal occupier and is in a position to find alternative accommodation.

[14] Mr Henderson does not dispute that the last rental and municipal accounts were made in January 2018. He states that he stays with his fiancé, his elderly parents who are unemployed and minor children. He says:

‘...it will therefore be extremely impossible for me to find alternative accommodation on my own especially in a period shorter than 2 (two) months in the event that the court finds in the applicants’ favour. This therefore means that should this application succeeds and a short period be granted, I, my elderly parents and my minor children will be left destitute. ’

[15] According to Mr Henderson, Mr Oosthuizen, the principal agent of Keuro Properties, forwarded a group WhatsApp message to all estate agents in Kimberley advising them not to rent out their property to him or anyone in his immediate family. He states further that when Mr Oosthuizen was confronted about it he refused to retract the said message.

[16] Mr Henderson alleges that during March 2018 a meeting was held between Mr Van der Merwe, Mr Oosthuizen, Mr Henderson’s mother and himself about the invoices showing the amount that he incurred for the repairs to immovable property when he first occupied it. According to him the immovable property was in a bad state such that, out of necessity, he had to repair it at great cost. It was then resolved between the parties that the invoices would be reconciled to establish he claims he was owed. Importantly, Mr Henderson does not deny the amounts reflecting as owed by him for rent and municipal account.

Nevertheless he retained the monthly rental in order to cover his loss when the applicants failed to pay him.

- [17] According to Mr Henderson the urgency claimed by the applicants is self-created and they had not complied with section 5 (1) (a)-(c) of the Act. He alleges that on 01 November 2017 he paid R 8 794-85 for '*credit passed for repairs paid by tenant*' although the applicants dispute that effected repairs to the property. This amount indeed shows in the statement of account attached to the founding affidavit as Annexure "GF9". The applicants submit that acceptance of this amount was an attempt to settle the dispute between the parties and not an acknowledgement that Mr Henderson was entitled to any payment for the repairs.
- [18] It is undisputed that the first respondent agreed to pay for water, electricity, refuse and sewerage accounts. Mr Henderson further does not dispute that the lease agreement was extended in terms of a signed addendum. However, he disputes that Mr Van der Merwe provided him with a signed copy of the addendum. Importantly, he disputes that the lease agreement was terminated on 31 August 2017 and alleges that it was extended for a further twelve months period ending on 31 August 2018. He alleges further that he and Mr Van der Merwe extended the agreement on 01 September 2017 to 31 August 2018. It is common cause that the applicants issued summons in the Magistrates Court against Mr Henderson for the arrear rental under Case Number 2185/2018 and the case is *sub judice*.
- [19] The following averments are in dispute by Mr Henderson; (a) the alleged hardship likely to be suffered by the second applicant as in the summons issued on 22 August 2018, a month before this application was issued, under Case Number 002185/2018 Ms Fleming was alleged to reside on Farm Khuis Road, Vanzyls, Northern Cape. He also disputes the insurance premium that she claims she pays. No basis is laid for this.
- [20] The issue to be determined is whether the applicants have made out a case for the eviction of the first respondent from the immovable property in terms of section 4 (1) read with s 4 (7) of the Act. Mr Van der Merwe filed a confirmatory affidavit dated 17 September 2018 in which he confirms the

extension of the lease agreement in terms of the addendum signed on 01 September 2016 extending the agreement to 31 August 2017 and that he provided Mr Henderson with the copy thereof. He denies that the agreement was further extended which supports the applicants' version.

[21] It appears on record of 22 June 2018 (Annexure "RA1") during argument when the Court mentioned that on his own version Mr Henderson would have difficulty justifying his occupation of the immovable property after 31 August 2018 if his version was assumed in his favour. Mr Khokho, who appeared on his behalf, submitted that if he continued staying beyond that date he would be staying at his own risk. This means that if for a moment it would be accepted that the lease agreement was extended to 31 August 2018 which is denied by the applicants then he would be an unlawful occupier beyond the said date.

[22] Mr Kammies submits that the sixty days given to Mr Henderson to vacate the property should be calculated from 31 October 2018 when one considers a letter (Annexure "GF6") addressed to Mr Henderson by Ms Gagiano dated 28 June 2018. The two last paragraphs put the respondent on terms that he should pay the arrear rental of R60 675.61 within fourteen working days from receipt of the letter. Mr Kammies' interpretation of this letter is clearly wrong. What is evident is that Mr Henderson is not prepared to vacate the immovable property and wants to continue occupying it free of charge.

[23] Regard should be had to Clauses 7.3, 7.4, 7.5, 7.8 and 7.9 of the lease agreement which record:

'7.2 The lessee:-

...

7.3 shall endeavour to prevent any blockages in any sewerage or water pipes or drains on or connected with the premises and shall remove at the Lessee's cost, any such obstruction or blockage;

7.4 shall at his own cost maintain the leased premises and all improvements thereon in good order and condition and shall at the expiration or earlier termination of this lease, reinstate and return to the lessor, the leased

premises and the improvements thereon in the same good order and condition as they were at the commencement date. Fair wear and tear (shall be accepted) and the lessee agrees to replace and maintain at the lessee's costs all defective or broken fluorescent or incandescent light bulbs, starters, broken windows or plate glass (howsoever that damage or breakage may have been caused) and effect minor repairs in respect of electrical and water installations;

7.5 shall not be entitled to withhold or delay payment of any amount due to the lessor in terms of this lease because of any defect or in failure by the lessor to repair the leased premises or any part thereof;

7.6 & 7.7...

7.8 shall take the leased premises in their present condition as they are, and shall have no claim for cancellation or otherwise against the lessor on account of the leased premises' condition;

7.9 shall by written notice to be received by the lessor within three (3) days of the commencement date advise the lessor of any defects in the leased premises, failing to so advise the lessor, the leased premises shall *ipso facto* be deemed to have been received by the lessee free of any defects.'

[24] The terms mentioned above clearly indicate that the lessee had the obligation to maintain the premises without expecting a refund. He therefore has no right to withhold or delay any amount in terms of the agreement. Paragraph 2.3 of Mr Van der Merwe's confirmatory affidavit confirms that at no stage did Mr Henderson request to repair any defects on the immovable property either orally or in writing. This corroborates the version of the applicants.

[25] Mr Henderson did not take this Court into his confidence when stating that his father, Mr Ross Kirby Henderson, is elderly and unemployed yet in his father's confirmatory affidavit his father states clearly that he is the Provincial Chairperson of the Northern Cape Civic Organisation and Head of the Legal Department of the same organisation. Annexure "RA2" attached to the replying affidavit shows a business card with the following words: **'RK HENDERSON & ASSOCIATES, Consultants, Forensic Investigators,**

**Corporate & Labour Law Advisors, ROSS K HENDERSON B.Com, LLB
(Diploma Labour Law Practice) Cell: [...].'**

- [26] In paragraph 35 of his opposing affidavit Mr Henderson states that he sees no need why the immovable property has to be leased to a new tenant whereas he is a willing payer who is waiting for the agent to furnish him with a reconciled amount owed to him. Even if his version is correct that he financially attended to necessary repairs, the amount that he claims for such repairs is far less than the amount he owes for rent.
- [27] Mr Henderson denies that he received the letter dated 28 June 2018 referred to in paragraph 9 *supra* yet it was emailed to '[..]@yahoo.com' and a copy served upon his father on 29 June 2018. He does not dispute that the said email address does not belong to him. His father is also silent about it in his confirmatory affidavit. Mr Henderson's fiancé also did not attach a confirmatory affidavit confirming his version that she and the minor children stay with him.
- [28] According to the applicants the matter became urgent when the matter was dismissed on 22 June 2018 and a new notice to vacate the immovable property had to be reissued to Mr Henderson. This delay resulted in the depletion of Ms Fleming's funds and the first applicant could not afford her expenses, the argument goes.
- [29] Importantly, the second applicant is 84 years old as alluded to earlier and requires assistance provided by a nursing home facility. If she is unable to afford her accommodation she would be vulnerable to imminent harm and danger as alleged by the applicants. In my view there is the likely hardship to her than there is to Mr Henderson if the eviction order is not granted. The applicants have no other remedy available as they presently suffer financial hardship.
- [30] The first respondent has been given more than enough time to get alternative accommodation from 31 August 2017 when the agreement terminated and again on 29 June 2018 when he was given a further sixty days to vacate the property on 31 August 2018. It is so that if he paid R 10 000-00 rent per month for his accommodation, he is in a position to do the same somewhere

else. He and his family would not be destitute as he wants the Court to believe.

[31] I am satisfied that the applicants made out a case for the relief sought and that the matter is indeed urgent. I am also satisfied that all the requirements have been complied with. After considering all the relevant circumstances it is just and equitable to grant an eviction order.

In the circumstances I grant the following order:

- 1. Mr John-Ross Henderson and all persons occupying the immovable property under him are ordered to vacate the property known as Erf [...], Kimberley, held by title deed[...], also known as [...] C Avenue, Royldene, Kimberly, on or before 20 November 2018.**
- 2. In the event that Mr John-Ross Henderson and all persons occupying the immovable property under him fail to adhere to this order, the Sheriff or his Deputy for the district of Kimberley are authorised and ordered to give effect to this order in a manner the he deems practical and necessary and in the event that he deems it necessary, to obtain the assistance of the South African Police Services in order to give effect to this order.**
- 3. Mr John-Ross Henderson is ordered to pay the costs of this application on a scale as between party and party.**

BM PAKATI
JUDGE- NORTHERN CAPE DIVISION, KIMBERLEY

On behalf of the Applicant: ADV A STANTON
Instructed by: HUGO MATHEWSON & OOSTHUIZEN INC.

On behalf of the Respondent: ADV KAMMIES
Instructed by: N GQADUSHE INSTRUCTING ATTORNEY