

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, MTHATHA**

Case no. CA&R14/18

Date heard: 22/6/18

Date delivered: 3/7/18

Not reportable

In the matter between:

PELEKA SITYATA

Appellant

and

EASTERN CAPE DEVELOPMENT CORPORATION

Respondent

JUDGMENT

Plasket J

[1] The appellant, after being evicted from her home at the instance of the respondent on the basis of an eviction order issued some two years previously, applied urgently for a spoliation order and for related relief. Her application was dismissed with costs by the magistrate, Butterworth. Unfortunately, no reasons were given for that order. The appellant now appeals against the magistrate's order.

[2] It is common cause that the appellant entered into a lease agreement with the respondent in October 2002; that the respondent instituted proceedings against her on 11 November 2014 in which it sought the cancellation of the lease and an order directing the appellant to pay R52 740.02 in arrear rental; and that the parties thereafter agreed on a payment plan in respect of the arrear rental. The appellant

remained in occupation and the respondent continued to accept the rental that she paid. Clearly, a new lease on the same terms replaced the cancelled lease.

[3] The appellant stated in her founding affidavit that she complied with her undertaking to pay the arrear rental that she owed. This was denied by the respondent who said that, in October 2017, the appellant defaulted and that she still owed a substantial amount. It was not denied, however, that the appellant had paid a significant amount of the arrears.

[4] On 15 August 2017, the regional manager of the respondent wrote a letter to the appellant that informed her that the rental would be increased and that henceforth a month-to-month tenancy would apply, this new lease being terminable by the giving of one month's notice by the respondent.

[5] On 15 November 2017, the appellant was served with an order, granted on 8 May 2015, giving her 30 days to vacate her home failing which she would be evicted. This order was a parallel process to the proceedings for the cancellation of the 2002 lease and the claim for arrear rental. The appellant went to the respondent's offices and entered into what she termed a 'debit order arrangement' in respect of the payment of rental. In addition, she paid rental for December 2017 in advance because the debit order would only become operational in January 2018.

[6] On 19 January 2018, the appellant was informed that the sheriff was carrying her goods out of her house and evicting her. She consulted with the respondent's attorneys who advised her that in having the eviction effected they were simply acting on their client's instructions. On 22 January 2018, she consulted with her attorneys and the application was brought soon thereafter.

[7] The appellant's version, based largely on the letter of 15 August 2017 is that from that date on, she had a new month-to-month lease with the respondent in which the rental had been increased to R2 500 per month. She stated that the order of 19 January 2015 cancelling the original lease had been 'overtaken by events', and that after 15 August 2017, she never was informed of any cancellation of the month-to-month lease. She concluded:

'It is my submission that my ejectment is unlawful as it was executed without any cancellation of the lease agreement. At all material times I was under the knowledge that I am occupying the premises under a lease agreement which still subsists and the conduct of the Respondent confirmed such.'

[8] The respondent denied paragraph 7 of the appellant's founding affidavit in which the above appears. It did so in general terms. The deponent to the answering affidavit said that the letter of 17 August 2017 'clearly stipulates that the lease having expired, the applicant is liable to pay the monthly holdover rental as despite such expiry the applicant had continued to reside on the premises'.

[9] The deponent also said that the respondent, 'by accepting the rental payments did not amount to an implied lease agreement coming into existence' and that 'prolonging the ejectment stage was not in any way a waiver of the eviction order obtained by the respondent' as it had merely been 'held in abeyance pending the fulfilment of the undertaking by the Applicant'.

[10] This version does not accord with the plain, unambiguous words of the letter. On that basis, it is not a creditworthy denial of a new lease having come into being, as alleged by the appellant.¹ The letter makes it perfectly clear that a new lease came into being. It stated:

'The continued occupation of the leased premises after 31 October 2005 will be subject to the terms and conditions of the existing lease agreement between the parties save that the rental amount will be adjusted as indicated above.

The lease agreement is then on a month to month basis & ECDC has a sole discretion to terminate the said month to month arrangement on one month notice.'

[11] It is not in dispute that notice had never been given to the appellant for the termination of the lease. As a result, the appellant was not an unlawful occupier of the premises and, on that account, could not have been evicted.² The eviction order of 8 May 2015 had, indeed, been overtaken by events and could not be used to evict

¹ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634I-635C; *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 26

² *Transnet Limited v Tebeka & others* [2012] ZASCA 197 paras 21-23.

the appellant two years later and after the appellant's occupation of the premises had been regularised.

[12] Has the appellant established the requirements for a spoliation order? Two allegations must be established. They are that the appellant was in possession of the property and that the respondent dispossessed her unlawfully and against her consent.³ In my view, both elements have been established: the appellant was undoubtedly in possession of her home until she was evicted without her consent by the sheriff on the instructions of the respondent. Her eviction was unlawful because she was not an unlawful occupier, and so could not have been evicted in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) and the order relied upon did not relate to her current occupation of the premises.

[13] The respondent has raised one defence. It is that it cannot restore possession of the property to the appellant because, on the day following her eviction, it let the property to a third party. Impossibility of restitution may be a defence to spoliation proceedings when the spoliator cannot restore possession either because the property has been lost, destroyed or damaged beyond repair, or because he or she has relinquished possession to a third party.⁴

[14] The second situation applies in this case. In *Painter v Strauss*⁵ the respondent, having dispossessed the applicant of a house, placed his employee in it. Brink J stated the position in these circumstances as being that, in order to avail himself of the defence, the spoliator was required to allege that 'it would not be possible for him to restore possession of the dwelling house to applicant and that he will not be able to make the necessary arrangements to do so'. In *Malan v*

³ *Scoop Industries (Pty) Ltd v Langlaagte Estate and GM Company Ltd (In Vol. Liq.)* 1948 (1) SA 91 (W) at 98-99; *Yeko v Qana* 1973 (4) SA 735 (A) at 739E-F.

⁴ See generally P J Badenhorst, Juanita M Pienaar and Hanri Mostert *Silberberg and Schoeman's The Law of Property* (5 ed) at 304-305.

⁵ *Painter v Strauss* 1951 (3) SA 307 (O) at 318D.

*Dippenaar*⁶ property had been let to a third party after the respondent had deprived the applicant of possession. De Villiers J held:⁷

‘Na my mening is ‘n Hof geregtig om ‘n bevel te maak teen ‘n spoliator vir teruglewering van die besit van gespolieerde eiendom al is hy nie meer in besit daarvan nie tensy, om een of ander rede – bewys waarvan op die spoliator is – dit duidelik is dat dit onmoontlik vir hom sal wees om die Hof se bevel uit te voer.’

He held that a *mandament van spolie* could be granted in the circumstances because the respondent had not stated that it would be impossible for him to restore possession to the applicant and the terms of the lease with the third party were not placed before the court. For all he knew, De Villiers J concluded, the lease could be terminated by the respondent giving a month’s notice.⁸

[14] In this case, the respondent has stated that it is not possible to restore possession to the appellant because of the lease with the third party. Somewhat ironically, given the respondent’s conduct in evicting the appellant, the deponent to the answering affidavit stated that ‘placing the applicant back onto the premises and removing the third party would be tantamount to an unlawful eviction without adherence to the provisions of “P.I.E”’. The respondent has also attached the lease with the third party to its answering papers. In the schedule to the lease, it appears that the period of the lease is 12 months from 1 February 2018, which is described as the commencement date, to 31 January 2019, which is described as the expiry date. Despite this, the occupation date is 19 January 2018, the day after the appellant’s eviction, that also being the date on which the lease was signed by the parties. The possibility of a 12 month renewal period is envisaged by clause 5.5.

[15] Clause 3 of the lease deals with its duration. It provides:

‘3.1 This lease agreement shall come into operation on the commencement date and shall subsist for the period specified in paragraph 5.1 of the lease schedule to which these terms and conditions are attached and will come to an end on the expiry date.

⁶ *Malan v Dippenaar* 1969 (2) SA 59 (O).

⁷ At 65G-66A. ‘In my view a court would be justified in making an order against a spoliator for the return of possession of spoliated property even though he is no longer in possession thereof unless – proof thereof being on the spoliator – that it is clear that it will be impossible for him to carry out the Court’s order.’

⁸ At 66A-C.

3.2 In the event of the period of the lease expiring before the parties reach agreement on the renewal thereof as provided for in clause 3.4, this lease shall continue on a month to month basis on the same terms and conditions as contained in this agreement.

3.3 In the event of a month to month lease agreement coming into effect as envisaged in clause 3.2 either party may terminate the lease by giving one months written notice by the party wishing to terminate the lease to the other party hereto.

3.4 The LESSEE shall have the option to renew the lease for a further period as specified in paragraph 5.5 of the lease schedule on 6 months prior written notice to the LESSOR. The rental payable for such further period shall be in accordance with the prevailing lease rates of the LESSOR.'

[16] Clause 17 provides that the lessor may cancel the lease in the event of the lessee failing to pay rent, being in breach of a material term, being placed in liquidation, in the event of a judgment taken against the lessee being unsatisfied for 21 days or if the lessee sublets the property without consent.

[17] It is clear that it is not possible for the respondent to restore possession to the applicant even though it may well have transferred possession to the third party with unseemly haste and with the intention of defeating a *mandament van spolie*. If it purported to cancel the lease with the third party, in the absence of one of the circumstances mentioned in clause 17, it would act unlawfully. Unfortunately, the *mandament van spolie* cannot be stretched to come to the aid of the appellant. This is a case in which the application of the law does not equate to doing justice.⁹ The appeal cannot succeed.

[18] The respondent is an organ of state. It bears constitutional obligations. It has treated the appellant's fundamental right of access to housing and not to be evicted without an order of a court, made after the consideration of relevant circumstances, with disdain.¹⁰ It has conducted itself in an unacceptable manner. It surreptitiously obtained an eviction order. It held it in abeyance for over two years, having settled the dispute with the appellant and having created the impression that her tenure as a

⁹ See *In re Dube* 1979 (3) SA 820 (N) at 821F-G in which, albeit in a different context – the influx control system that was part of the apartheid policy of the government of the day – Didcott J drew a distinction between the law and justice, making the point that they do not always coincide.

¹⁰ Constitution, s 26(1) and (3).

tenant was secure. And, when it used the eviction order, it must have known that a new lease was in place that rendered the eviction order irrelevant. In these circumstances, the respondent's conduct is deserving of censure, especially because organs of state are supposed to be role models of propriety.¹¹

[19] That brings me to the question of costs. Mr Bodlani, who appeared for the respondent, conceded fairly and properly that it was difficult to justify the conduct of the respondent. He conceded too that the respondent's silence concerning the lease to the third party, until the answering affidavit was filed, ought to have had costs implications in the court below. In the light of this concession, I intend amending the order of the court below to the limited extent that the appellant will be entitled to costs in the court below until 8 February 2018. In addition, however, and as a mark of our displeasure as to the conduct of the respondent, we shall order that each party pay their own costs of the appeal, despite the substantial success of the respondent.

[20] I make the following order.

(a) The appeal succeeds only to the limited extent that the order of the court below, insofar as it relates to the costs of the application, will be amended.

(b) The order of the court below is set aside and replaced with the following order.

'The application is dismissed with costs, save that the respondent is directed to pay the applicant's costs up to and including 8 February 2018.'

(c) Each party shall pay their own costs of the appeal.

C Plasket

Judge of the High Court

I agree.

¹¹ *Madibeng Local Municipality v Public Investment Corporation Ltd* [2018] ZASCA 93 para 30.

Z M Nhlangulela

Deputy Judge President

APPEARANCES

For the appellant:

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For the respondent:

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