

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION: MTHATHA

CASE NO. 2288/09

22/9/2016

BONGIWE PHILDA FIKELA & ORS

Applicants

and

MINISTER OF SAFETY & SECURITY

1st Respondent

KING SABATA DALINDYEBO MUNICIPALITY

2nd Respondent

APPEAL JUDGMENT

BROOKS J

[1] The appellants initially opposed individual applications brought against them by the respondent. On 20 September 2011 the respondent gave notice of an application to consolidate those applications. The notice was supported by an affidavit deposed to by the attorney of record instructed by the respondent in which it was alleged that all the applications involved exactly the same merits, being based upon the same cause of action and being opposed upon the same

grounds. Accordingly on 29 September 2011 the applications were consolidated under the case number allocated originally to the application brought against the first appellant.

[2] Argument was eventually heard on 30 August 2012 and judgment was reserved. On 11 February 2014 judgment was given and an order issued in the following terms:

- “1. 1 to 26 respondents and any other person occupying the premises listed herein under respectively, at each respondents’ instance be and directed to vacate the said premises within ninety (90) days of the grant of this order.
2. That the respondents and/or any other person occupying the premises at the respondent’s instance or otherwise be and is/are hereby interdicted and restrained from being in the premises for the purpose of unlawfully occupying it or residing therein;
3. That the Sheriff of this Honourable Court be authorised to request the South African Police Service (“SAPS”) to assist in the eviction of the respondent and/or any other person occupying the premises at the respondent’s instance or otherwise, in the event of the respondent or such other person/s not adhering to the order referred to in paragraph 1 and 2 herein above;
4. That the respondents are ordered to pay costs of this application, jointly and severally one paying the other to be absolved.” (*sic*)

(A description of the premises included at the foot of the order has been omitted from this judgment).

[3] On 23 October 2014 an application for leave to appeal against the judgment and order of the court *a quo* was dismissed with costs.

[4] On petition to the Supreme Court of Appeal the following order was granted on 23 February 2015:

- “1) Leave to appeal is granted to the Full Court of the Eastern Cape Division of the High Court.
- 2) The cost order of the court *a quo* in dismissing the application for leave to appeal is set aside and the costs of the application for leave to appeal in this court and the court *a quo* are costs in the appeal. If the applicant does not proceed with the appeal, the applicant is to pay these costs.”

[5] Thereafter some logistical difficulties appear to have arisen necessitating a further approach by the appellants to court. On 29 October 2015 an order was made in the following terms:

- “1. The applicants are hereby condoned for their non-compliance with Rule 49(7)(d) of the Uniform Rules of Court.
2. The applicants are directed to prepare the appeal record within twenty one (21) days from the date of this order.
3. There is no order as to costs.”

[6] The substantive relief claimed by the respondent against each appellant being a final order of eviction, the matter was governed by the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (“PIE”). Some of the grounds of appeal which have been included in the notice of appeal amount to no more than a tautologous repetition of the submission that the court *a quo* erred in granting an order for eviction in circumstances where the respondent had failed to place before the court jurisdictional factors as required by the provisions of s6 of “PIE”. Other

grounds of appeal included in the notice of appeal amount to a submission that the court *a quo* erred in not applying the so-called “*Plascon-Evans*” test to the application when considering whether or not substantive relief should be granted.

[7] Inasmuch as the respondent sought final relief in motion proceedings in the court *a quo*, it is indeed so that the correct approach to the resolution of the dispute between the parties as ventilated in the exchange of affidavits was an application of the “*Plascon-Evans*” rule.

[8] It is convenient to set out in full a recent re-statement¹ of the principles embodied in the “*Plascon-Evans*” rule:

“Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the *Plascon-Evans* rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant’s (Mr Zuma’s) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent’s version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.² The court below did not have regard to these propositions and instead decided the case on probabilities without rejecting the NDPP’S version.”

¹ NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS v ZUMA 2009(2) SA 277(SCA) par [26].

² PLASCON-EVANS PAINTS LTD v VAN RIEBEECK PAINTS (PTY) LTD 1984 (3) SA 623 (A) 634-635; FAKIE NO v CC 11 SYSTEMS (PTY) LTD 2006 (4) SA 326 (SCA) par [55]; THINT (PTY) LTD v NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS AND OTHERS; ZUMA v NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS AND OTHERS 2009 (1) SA 1 (CC) (2008 (2) SACR 412; [2008] ZACC 13) paras [8]-[10].

[9] The first appellant is an adult person in the employ of the Department of Safety and Security. It is common cause that at the time the application for her eviction was brought she held the rank of senior superintendant. In the founding affidavit the respondent relied for the substantive relief contended for upon what was alleged to be the applicable “Housing Policy”. One of the salient points of the policy was alleged to be that “in allocating official housing, priority shall, as far as possible be given to employees at lower levels than superintendant.” A copy of the policy was attached to the founding affidavit as annexure “FAI”. It was alleged that the first appellant was in occupation of certain premises unlawfully in that she had been in occupation thereof for a period in excess of the three years allegedly provided for in the policy, she held the rank of senior superintendant and that she had been notified by the South African Police Service to vacate the premises but had not done so.

[10] An examination of the content of annexure “FAI” in preparation for the appeal revealed that no mention is made therein of the limitation of occupation to a period of three years. The only reference to a time period occurs in paragraph 9.1 thereof, which reads:

“The official housing will be allocated for a period of two years to qualifying employees based on the following criteria...”

[11] Similarly, no reference is made in annexure “FAI” as included in the record to the priority of allocation of official housing to employees at levels lower than superintendant. Paragraph 3.1.5 thereof reads:

“in allocating official housing, priority should, as far as possible be given to employees at lower levels;”

What is meant by lower levels is not defined.

[12] Moreover, no annexure is referred to or included in the founding affidavit in support of the general allegation that the first appellant remained in occupation of the premises despite having been given notice to vacate them by the South African Police Service.

[13] During argument, Mr SISHUBA, who appeared on behalf of the respondent, expressed surprise at the criticisms levelled against the court's inability to reconcile the allegations made in the founding affidavit pertaining to the respondent's housing policy with the content of annexure "FAI". He informed the court that the document placed before the court as annexure "FAI" was not the document which had served as annexure "FAI" before the court *a quo*. He referred the court to a copy of annexure "FAI" in his possession which he insisted had served before the court *a quo* and in which indeed the content was supportive of the allegations made in the founding affidavit. Neither he, nor Mr KUNJU, who appeared on behalf of the appellants, were able to explain why the incorrect annexure formed part of the appeal record. That such a state of affairs can arise before an appeal court is a matter of great concern. Ultimately, it is the duty of an appellant's attorney of record to ensure that the record of proceedings in the court *a quo* which is placed before the appeal court is compiled correctly. Plainly, in this instance, this duty was not discharged in an acceptable manner. Fortunately, for reasons which will become apparent, this failure to provide the court with an accurate record of the proceedings in the court *a quo* did not lead to a postponement of the appeal. Were such a postponement to have been necessary a punitive costs order made against the appellants' attorney of record *de bonis propriis* may well have been made.

[14] The first appellant alleged that her occupation of official premises was not governed by the content of annexure “FAI” but by the content of a document dated 4 July 1995, a copy of which is annexed to her answering affidavit. A reading thereof reveals that whilst much of its content reflects wording contained in annexure “FAI” to the founding affidavit, notably absent therefrom is any reference to a fixed period of time, whether that be three years or two years, and similarly to any disqualification from occupation of official premises based upon rank. The answering affidavit specifically disputes that the first appellant occupies the premises based upon the housing policy relied upon by the respondent. In it the first appellant also denies that she was given notice to vacate the premises.

[15] The replying affidavit deposed to on behalf of the respondent does nothing to displace the allegations made by the first appellant relating to the applicable housing policy. It merely re-asserts the allegations made in the founding affidavit, the deponent stating simply:

“The department’s premises can only be lawfully occupied in terms of the department’s policy as set out in “FAI”.”

The respondent attaches a copy of an email set out by the Divisional Commissioner Supply Chain Management of the South African Police Service on 23 April 2008 to all Provisional Commissioners in purported proof of the implementation of the department’s policy.

[16] The entire matter appears, subsequent to the order of consolidation, to have proceeded and to have been considered on the basis of these allegations. It is apparent that this approach was appropriate.

[17] Paragraph [16] of the judgment of the court *a quo* contains a summary of the salient points of the housing policy relied upon by the respondent. In doing so, reference is made only to the content of the founding affidavit. No comparative analysis is made between the content of the affidavit or annexure “FAI”. Nor is any reference made to the absence of independent proof that notice to vacate the premises was given. Paragraph [17] of the judgment states simply:

“This has not been placed in dispute by the respondents.”

[18] In my view, the court *a quo* erred in the assessment of the competing allegations made in the affidavits exchanged. Not only did the appellants dispute the salient points of the housing policy set out in the founding affidavit and its annexure, whichever version of “FAI” may have been included as that annexure, but the appellants relied upon a competing document in amplification and as proof of the allegations made in the answering affidavit. Accordingly, the appellants’ version did not consist of bald or uncreditworthy denials, nor did it raise a fictitious dispute of fact or present a version which was palpably implausible, far-fetched or so clearly untenable that it fell to be rejected merely on the papers. In accordance with the accepted “*Plascon-Evans*” test, the appellants’ version ought to have been accepted as part of the consideration of whether or not the respondent was entitled to final relief.

[19] Mr SISHUBA submitted that the version placed before the court *a quo* could safely be rejected as not *bona fide* because the alteration in the housing policy introduced and encapsulated in annexure “FAI” had been accepted by representatives of various employee organisations acting on behalf of the appellants. In support of his submission he referred the court to a document

included at the end of annexure “FAI” dated variously 30 June 1995 and 28 June 1996 and headed “Agreement Reached by South African Police Negotiation Forum”. In my view, this document is of little assistance. Even if the new housing policy had been agreed to by representatives of various employee organisations within the South African Police Service, there is no evidence that the appellants are members of such organisations or, even if they were, that the content of the new housing policy had been brought to their individual notice. Their tenancy in official housing is governed by individual contracts, whether written or oral, which can only be amended, replaced or terminated by personal communication between the appellants and the relevant authorities.

[20] Any suggestion that the appellants’ occupation of official premises currently is governed by the housing policy set out in annexure “FAI” is dealt a further blow by the content of the answering affidavit. In terms of the provisions of annexure “FAI”, the entitlement to official housing is assessed by the respondent upon the production of a completed application form. The first appellant attached a blank copy of this application to her answering affidavit stating that she had never completed one and challenging the respondent to produce one completed by her when filing the replying affidavit. This challenge was not met. Even if the policy was circulated to Provincial Commissioners, the papers are silent as to what steps were taken to implement it in respect of individual employees.

[21] Had the court *a quo* given proper consideration to the challenge made by the first appellant in her answering affidavit to the allegations made in the founding affidavit and to the version advanced in the answering affidavit, in

accordance with the “*Plascon Evans*” test, it would have been clear that the respondent was not entitled to the final relief contended for and that the application must be dismissed.

[22] Nothing in this judgment is to be construed by the appellants as granting them any immunity from the obligation in the future to bring their occupation of official premises in line with current departmental policy. Whilst they may have demonstrated that at the time of deposing to the answering affidavits the housing policy set out in annexure “FAI” was either not brought to their individual attention or was not implemented by the appropriate regional authority on an individual basis, and that accordingly their tenancy was governed by previous policy, it cannot now be stated by any of the appellants that they are ignorant of the amended housing policy of the respondent. It would be reasonable to assume that whilst it is apparent that the relevant regional representative of the respondent did not seek to implement the amended housing policy in a proper manner negotiated between the appellants and their relevant regional housing authority, their intention to do so remains.

[23] In light of the conclusion reached upon an assessment of the application of the “*Plascon-Evans*” rule upon the application papers, it is not necessary to give specific consideration to the submissions made on behalf of the appellants pertaining to the paucity of the compliance by the respondent with the jurisdictional requirements of “PIE”.

[24] It follows that the appeal must succeed. No reason exists why costs should not follow the result.

[25] The following order is made:

- “1. The appeal succeeds, with costs.
2. The judgment and order of the court *a quo* dated 11 February 2014 are hereby set aside and replaced with the following:

“The application against the twenty-six respondents is dismissed with costs.””

RWN BROOKS

JUDGE OF THE HIGH COURT

SMITH J:

I agree.

J SMITH

JUDGE OF THE HIGH COURT

NOTUNUNU AJ:

I agree

M NOTUNUNU

JUDGE OF THE HIGH COURT (ACTING)

Appearances:

For the appellants: ADV V. KUNJU

Instructed by Clayton Mkhululi

Manxiwa & Co

512 Nelson Mandela Drive

MTHATHA

For the respondent: ADV M. H. SISHUBA

Instructed by M. B. Mda & Associates

46 Wesley Street

MTHATHA

Appeal heard on: 16 September 2016

Judgment delivered on: 22 September 2016