

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

CASE NO. CA & R 61/15

In the matter between:

ALEX SARPONG

Appellant

and

NANEEM AHMAD

Respondent

APPEAL JUDGMENT

GRIFFITHS, J.:

[1] The facts of this appeal are not at all clear, a conclusion which might best be described by the quote: *Oh, what a tangled web we weave, when first we practise to deceive!*¹ A tangled web this matter is, but its weaver remains anonymous.

[2] The matter served before the magistrate, Mthatha, in the form of an application for eviction, the appellant (as applicant and to whom I shall refer for

¹ A quote from "Marmion", a poem by Sir Walter Scott. Often incorrectly attributed to Shakespeare.

convenience as "the applicant") seeking to evict the first respondent (who was, at that stage, the only respondent in the matter) "*together with any other occupiers of the premises in the nature of business partners and/or lodgers...*". His claim was based simply on a written lease agreement between himself and the first respondent which was allegedly breached by the first respondent in the form of rental non-payment. This spawned an application to intervene by the second respondent, the basis being that he was the lawful occupier of the leased premises by virtue an agreement of lease concluded directly with the owner of the property, the NMD Trust, which was subsequently joined as third respondent. By way of the same joinder application the fourth respondent, being the trustee of the third respondent, was also joined.

[3] To compound matters further the fourth respondent subsequently died and her trustee, who was not joined as a party, entered the fray by filing an affidavit in which he challenged the applicant's *locus standi* alleging that no lease agreement existed between the applicant and the third respondent, the owner of the property.

[4] In his replying affidavit, the applicant made mention of the fact that the first respondent had approached him to discuss settlement. The first respondent, at this meeting, introduced the second respondent as being his cousin who was "working with him". It was agreed that in order to settle the matter the applicant should send a taxed bill of costs to the second respondent. This was done, and payment was apparently received by return. A subsequent default and letter from the applicant's attorneys resulted in the matter being opposed by the first and second respondents. Despite this, their attorneys once again sought to settle the matter which ultimately came to naught.

[5] The question of the applicant's *locus standi* was, after all the papers had been filed, argued before the magistrate on behalf of the second, third and fourth respondents as a point *in limine*. After hearing argument, the magistrate ruled that indeed the applicant had not established the existence of the verbal lease on a preponderance of probabilities and that accordingly the substratum of his claim, being the verbal lease with the owner of the property, had fallen away. He thus concluded that the applicant had no right to sue for the eviction of either the first or second respondents.

[6] In coming to his conclusion the magistrate dealt with the law as follows:

"Mr. Zilwa indeed correctly submitted that it cannot be said that the Applicant does not have locus standi merely because he is not the owner of the property as he has a direct interest in the property as a lawful possessor. The problem with this statement however is that Applicant's title as lawful possessor was not proved. *It is trite that a lessee is not allowed to question the title or rights of the lessor* as per **Boompret Investments v Paardekraal Concessions 1990 (1) a 347 A 351**... In casu however the title of the Applicant is not only challenged by the lessee but more importantly by the owner of the property. With reference to 2nd Respondents rights I also considered what was held in **Pretoria Stadsraad v Ebrahim 1979 (4) SA 193 (T) at 196 B** to the effect that if a tenant can show a stronger right to the premises than his landlord, such right would enjoy protection. On appeal, this view was approved of (**Ebrahim v Pretoria Stadsraad 1980 (4) SA 10 (T) at 13 H**)."

[7] I cannot fault the magistrate's reasoning with regard to the second respondent particularly when one takes into account what was said by Van Heerden JA at page 353 of the Boompret Investments case by way of *obiter dictum* and after a thorough analysis of the law in this regard²:

"For reasons which follow I find it unnecessary, however, to express a firm view on this point and I shall assume, in favour of the appellants, that a lessee may refuse to vacate leased property if the

² At page 353F – G

lessor has no title thereto and the lessee has acquired an independent right to remain in occupation thereof."

[8] The first respondent did not enter the lists and thus made no averment that he had an independent title to the property or any right superior to that of the applicant. However it appears to have been common cause that the first respondent was not in occupation of the premises and thus an eviction order could not have been granted against him.

[9] Again, I cannot fault the magistrate's conclusion on the facts to the effect that the applicant did not establish, on a preponderance of probabilities, that a verbal lease indeed existed between him and the owner, the third respondent. The very fact of the existence of this verbal agreement was directly challenged by the respondents. The applicant argued that its existence could not have been challenged as the person with whom he would have concluded the verbal lease (the fourth respondent) has passed away. However the trustee, who apparently was involved with the trust from its inception, also directly challenged the existence of such a verbal agreement. It seems to me to be rather strange that the applicant would have concluded a verbal agreement relating to a business property such as this but when subleasing would conclude a full-blown written lease. This alone, in my view, counts against the appellant. In addition, when he was challenged on this aspect the applicant failed to place any form of documentary evidence or other evidence before the court to substantiate the existence of the verbal agreement.

[10] The onus on this issue ultimately rested on the applicant. This was not a situation of a bald or frivolous denial on the part of the respondents or a denial such as not to raise "*a real, genuine or bona fide dispute of fact*"³. The executor

³ PLASCON-EVANS PAINTS LTD V VAN RIEBEEK PAINTS (PTY) LTD 1984 (3) SA 623 (A)

was clearly within his rights to challenge the applicant on this point particularly as the applicant apparently had no documentary proof of the alleged agreement and the executor had no knowledge whatsoever of it. Furthermore, why would the fourth respondent conclude an agreement directly with the second respondent if she, on behalf the trust, had concluded a verbal agreement of lease with the appellant? At best for the appellant, he should have sought a referral to oral evidence on the question as to whether or not he had concluded the oral lease with the trust.

[11] Mr. Hobbs, on behalf of the second respondent, has argued that the appeal should be dismissed simply on the basis that it has no practical effect, pursuant to section 16(2)(a)(i) of the Superior Courts Act⁴. In my view this is not correct. The applicant sought an eviction order not only as against the first respondent but also against the second respondent by virtue of the wording of the relevant prayer which also sought the eviction of "*any other occupiers of the premises in the nature of business partners and/or lodgers*". Had the order been granted, the second respondent, as an occupier of the premises, would also have been evicted.

[12] In my view therefore the magistrate's conclusions with regard to the second respondent were correct. In these circumstances, the following order will issue:

1. The appeal is dismissed;

2. The appellant is ordered to pay the costs of the appeal.

⁴ No. 10 of 2013

R E GRIFFITHS
JUDGE OF THE HIGH COURT

MBENENGE, J. : I agree

JUDGE OF THE HIGH COURT

COUNSEL FOR APPELLANT : Mr Botma
INSTRUCTED BY : X. M. Petse Inc.

COUNSEL FOR RESPONDENT : Mr Hobbs
INSTRUCTED BY : J. A. Le Roux Attorneys

HEARD ON : 15 November 2015
DELIVERED ON : 17 December 2015