

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL, PIETERMARITZBURG

CASE NO : 363/2009

In the matter between:

**ITHUBALETHU HOSPITALITY ENTERPRISE
(PTY) LIMITED**

Applicant

and

B T NTENGA AND 507 OTHERS

First to 507th Respondents

IN an application for the rescission
of an eviction order and ancillary
relief

JUDGMENT

SKINNER, AJ:

The present application was brought as a matter of urgency by the respondents (and I will deal subsequently with who the respondents are) for rescission of an order granted in this Court on 1 April 2009 evicting the respondents from the Ingqayizivele Hostel and adjoining properties in

Madadeni, Newcastle. The relief which is sought before me is to interdict the applicant from effecting or causing to be effected any evictions in terms of the said order, allowing all and any respondents already evicted pursuant to the order to resume occupation and directing the sheriff to assist the respondents to return to their places of occupation all possessions removed pursuant to such evictions.

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In the founding affidavit of the rescission application, the deponent one Ndwandwe averred that he had authority “to cause this application to be brought on behalf of all the respondents who have not yet opposed the application”. This rather vague allegation was, not surprisingly, challenged on behalf of the applicant. In reply the deponent annexed a power of attorney which he averred had “been signed by most if not all of the respondents”. The power of attorney indicated that the attorneys had been authorised to act in the rescission application on behalf of the signatories. Annexed to it were approximately 19 pages with various signatures appearing thereon next to the numbered respondents or, where the persons had not already been identified in the main application as being respondents, next to a manuscript entry reflecting name and surname. Mr Rall SC on behalf of the applicant very fairly and properly conceded that for the purposes of the present application, he was not

going to pursue the point any further that the deponent to the founding affidavit in the present application was authorised to represent various respondents.

3

It is necessary to deal briefly with the concept of who the respondents are/were. In the main application (being the earlier application for the eviction of the respondents) the deponent on behalf of the applicant had averred that the first to 508th respondents were the persons who resided in flats at the Ingqayizivele Hostel, Madadeni, Newcastle, and were persons who had originally had leases with Iscor Limited to occupy such premises. The 509th and further respondents were the occupiers of various other flats or shacks whose names and personal particulars were not known to the applicant. It was averred that adjoining the hostel site was Erf J6 which had no permanent structures on it but on which various illegal temporary shacks had been erected. The manuscript list annexed to the replying affidavit in the rescission application reflected the names of the persons who fell into the category of occupying the flats or Erf J6 but without any lease ever having been concluded and therefore not being part of the 508 identified respondents. Other than where it is necessary to distinguish separate categories of defences, I refer in my judgment loosely to

“respondents” as indicating the hostel dwellers as well as those occupying Erf J6.

4

It is also necessary to deal briefly with the main application. It was launched on 16 January 2009. According to the returns of service at pages 130 and 135 of the main application, service was effected on 26 and 27 January 2009 from 8am to 12 noon, either by personal service or by service on a person apparently residing/employed at the particular flat or where no occupant was found by affixing copies to the main entrance door of the dwelling. Notices of opposition were delivered on behalf of the 49th, 53rd, 129th, 184th, 245th, 254th, 315th, 338th, 357th, 385th and 444th respondents. The applicant then brought an application in terms of Rule 6(11) for an order in terms of Section 4(2) of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act No. 19 of 1998 directing the sheriff to serve copies in English and Zulu of the notice indicating that the matter would be heard on 31 March 2009. An order was granted on 12 March 2009 authorising such service.

5

This order required, *inter alia*, service on the Newcastle Municipality by no later than 17 March 2009. Service was in fact effected on the municipality

on 18 March 2009 and accordingly the hearing on 31 March 2009 was adjourned to the following day to enable the respondents and the municipality to have the full number of requisite days to oppose the matter.

6

On 1 April 2009 the matter was not opposed (other than by the eleven respondents previously referred to by numbers) and an order was granted ordering all the various respondents occupying the hostel and Erf J6 (other than the eleven numbered respondents referred to previously in respect of whom notice of opposition had been entered) to vacate the property by no later than 8 April 2009. It is this order which the present respondents seek to rescind.

7

It emerges from the affidavits in the present application that a committee was apparently formed by the occupiers of the properties and this committee met with an attorney in Newcastle, one Arndt. According to the deponent in the rescission application, this delegation of respondents instructed the attorney to oppose the application on behalf of all the respondents. As I have indicated, notice of opposition was only delivered on behalf of eleven of the various respondents.

Mr Arndt deposed to an affidavit which he made available to both the applicant and the respondents' representatives. According to his affidavit three persons consulted him at the beginning of February 2009 and handed to him a notice of motion in the present matter. He said that he tried to explain to them in English what the application was about but "clearly got the impression that they did not fully understand me". He then requested a secretary of his firm who was fully fluent in English and, he thought, in isiZulu to interpret for him. His affidavit states that he:

"...enquired through the interpreter, Iris Griffiths, as to whether all or only certain of the respondents wished to instruct us to oppose the application on their behalf. Those consulting me enquired through the interpreter, Iris Griffiths, as to whether at all it is possible that a committee consisting of a number of respondents could oppose the application on behalf of all the respondents involved. I indicated to those consulting me that as far as I am concerned, each and every respondent should give notice to oppose the application".

He stated further that the delegation then left his office indicating that they wished to consider and discuss the matter. He did not at that stage open a file nor charge a consultation fee. He continued that on or about 12 February 2009 a number of persons met with him and advised that they had a deposit. He again made use of the same person as interpreter and **“instructed her to enquire as to exactly whom Acutt & Worthington is to act for. Iris Griffiths later informed me that we are only to act on behalf of eleven respondents”**. He instructed counsel to draft an opposing affidavit which was then served in respect of those eleven respondents.

10

During the beginning of April 2009 certain respondents consulted him with a copy of the court order dated 1 April 2009. He stated:

“I at that stage explained to those instructing me that instructions were given to Acutt & Worthington Incorporated to oppose the application only on behalf of certain respondents. I furthermore explained to those consulting me that the respondents against whom the court order was granted will be subject to being ejected if they are prepared to vacate voluntarily. No one at that stage consulting me indicated to me that Acutt & Worthington Incorporated had instructions to

oppose the application on behalf of all the respondents.”

11

In reply an affidavit was filed on behalf of the respondents by one Mkhonza. Page 2 of such affidavit was missing from the telefaxed copy placed before me as well as from the copies of all the representatives in court. What emerged however was that the deponent averred that:

“We understood, from what was relayed to us by the interpreter, that Mr Arndt recommended that we should appoint a group of 10 “named” respondents to represent all the respondents. We were told that if the application was successfully opposed by this group, such action would benefit all the respondents..... I confirm that we did, at our second meeting of Mr Arndt, give him a list of eleven named respondents as we understood the application would be opposed in the name of these eleven respondents for the benefit of all respondents. In particular, we were told that if the application was successfully opposed in the name of these eleven respondents it would benefit all the respondents, since the application would be defeated.”

12

In dealing with the meeting subsequent to the eviction order being received, the deponent significantly does not confirm or deny the averment by Mr Arndt that instructions had only been given to him to oppose on behalf of certain respondents. He merely avers that:

“I confirm that Mr Arndt did explain to us that all respondents, but for the eleven, would be evicted in terms of the eviction orders. But he said that, if the eleven respondents were successful, the other respondents would be entitled to go back because the victory would be theirs as well.”

13

As is apparent, there is a vast difference between the two versions. Mr Crampton, on behalf of the respondents, attached great weight to the statement by Mr Arndt that because he himself did not understand isiZulu he could not exclude the possibility that there could have been an error in communication. I find it difficult to understand how, even if Ms Griffiths was not perfectly fluent in isiZulu, an indication by Mr Arndt that each and every respondent should give notice to oppose the application could have been conveyed as a recommendation from Mr Arndt that a group of ten respondents should be appointed to represent all the respondents.

14

It is trite that parties seeking interim relief must establish a *prima facie* right though open to some doubt (if it is open to considerable doubt then such a right has not been established) a well grounded apprehension of irreparable harm if the interim relief is not granted, that the balance of convenience is in such parties' favour and that there is not other satisfactory remedy. I am prepared to assume the latter three requisites are in favour of the respondents. An eviction with its consequent problems of finding shelter would cause a well grounded apprehension of irreparable harm, the balance of convenience is in favour of the respondents while damages is not a satisfactory remedy for the hardship and inconvenience. To my mind the primary question is whether the respondents have established a *prima facie* right though open to some doubt. As was held in the well-established cases of **Webster v Mitchell** 1948(1) SA 1186 W and **Gool v Minister of Justice** 1955(2) SA 682 C, this involves taking the factors set out by the party seeking the interdict (the present respondents) together with any facts set out by the other side (the applicant here) which cannot be disputed and considering whether, having regard to the inherent probabilities, such party should obtain final relief at trial. In the present application that of necessity involves a consideration of the prospects of success by the respondents in the application for rescission.

Even accepting that the present respondents have *locus* to bring the rescission application, it is by no means clear that the non-hostel dwellers were amongst the persons who consulted with Mr Arndt. If they were not then the fact that they have now authorised representatives to appear for them in the rescission application is of no assistance because they would have no valid reason for having failed to oppose the main application for eviction. On a reading of the founding affidavit in the rescission application, it would appear that these non-hostel dwellers were not part of the persons who consulted with Mr Arndt. I say so because in paragraph 4 of the founding affidavit for rescission, the deponent says:

“When we first received notice of this application [the eviction application], we respondents authorised a committee to act on our behalf in instructing attorneys to oppose the application. For obvious reasons it would not be possible for all 508 of us to consult with attorneys for this purpose.”

16.

The reference to “508” respondents is significant. As appears from what I have set out these are the named respondents in the main application, being those persons who occupied flats originally in terms of a lease with Iscor Limited. The persons occupying Erf J6 or otherwise allegedly unlawfully occupying flats were described in the eviction application as

“further unlawful occupiers” and cited as the “509 and further respondents”. On this ground alone, if I am correct in my assumption, the respondents whose names appears in manuscript annexed to the power of attorney furnished in the replying affidavit cannot succeed. In the light however of the view I have formed, they would, even if they were part of the original respondents whose committee consulted with Mr Arndt, not be successful in the main application and accordingly cannot succeed in the present application. It is common cause that the persons occupying Erf J6 never had any leases in their favour and their defence appears to be limited to a challenge as to whether the applicant has *locus standi* to claim their eviction.

17.

Mr Crampton relied on two bases - a rescission under the common law and a rescission in terms of Rule 42(1)(a) on the ground that the order was erroneously sought and erroneously granted. The requirements for a rescission under the common law are set out **Colyn vs Tiger Food Industries Limited t/a Meadow Feed Mills (Cape)** 2003 (6) SA 1 SCA – the party seeking relief on this ground must establish good cause: in other words, he was not in wilful default and that he has a *bona fide* defence.

18.

As far as the wilful default was concerned, this submission rested on the breakdown of communication between those persons who consulted with Mr Arndt and the view Mr Arndt had of his instructions. While Mr Rall SC urged me to find that they could not have understood Mr Arndt and that they were accordingly in wilful default (and in my view there is much merit in this submission), it must be remembered that the test for rescission on this aspect is a reasonable explanation of the circumstances in which default judgment was taken. Accordingly, since Mr Arndt himself concedes that there may have been a misunderstanding, I must find that the respondents did intend to oppose the eviction application and were not in wilful default.

19.

With regard to the defence raised, the identified respondents contended that they were tenants whose leases had never been cancelled nor expired. There is however no allegation as to whether such lease was in writing, or oral or a tacit month to month lease. This lack of the relevant averments is significant as casting considerable doubt on the veracity of the allegations regarding a lease. Further, as pointed out by Mr. Rall SC, the deponents have not set out any basis for having any knowledge of the lease agreements of the other respondents.

20.

In the affidavit filed on behalf of the eleven respondents previously referred to in the main application, the respondents averred that they had been occupying the hostel for a considerable period of time having entered into a rent agreement with Iscor Limited. It was common cause that Iscor Limited had donated the property to the applicant who had “full responsibility” for it. The allegation is then made that the respondents as tenants were informed (presumably by or on behalf of the applicant) that it would be “business as usual” and that the rental agreements would continue. The respondents contend that the applicant failed to see to the upkeep of the property and the supplying of essential services such as electricity and accordingly the tenants **“decided not to pay any further rent until such time as the service delivery by applicant was up to standard”**. According to the deponent to such affidavit:

“Our rent agreements were never cancelled and we had been advised that the hostel was going to be done up and that the KZN Housing Department was going to see to the development of the hostel whereafter we would commence paying rent again”.

21.

No indication is given as to who made this representation to the respondents. The documents furnished in support of this allegation do not take the matter anywhere.

22.

I am in agreement with Mr Rall SC that the conduct of the respondents in refusing to pay their rent was a material breach and amounted to a repudiation of whatever lease agreement was then in existence. It is clear that where there is a repudiation, the party relying on the breach must show that an unequivocal notice of rescission was conveyed to the other party (**Swart v Vosloo** 1965(1) SA 100 A). As was held at page 105G “**a party to a contract who exercises his right to cancel must convey his decision to the mind of the other party; and cancellation does not take place until that happens**”.

23.

Mr Rall SC contended that the notices to vacate the property and the launching of the application itself constituted unequivocal notification by the applicant indicating that it had accepted that the leases were at an end and as a result was seeking the eviction of all the respondents. The application papers in the main application do indicate that a census was conducted in July 2008 of the occupants of the “Ingqayizivele Village” – a

“census form” was furnished which apart from identifying the occupant of each particular flat, also contained questions such as “Have you been notified of the relocation to H39 by the council?” and “Have you received written notice to vacate the site?”. The main application also indicates that after a public meeting held on 2 July 2008 notices to vacate (in English and isiZulu) were distributed to each dwelling on the hostel property. In the circumstances, it must have been clear to all the occupants that for whatever reason the applicant regarded the leases as being at an end and was seeking that the occupiers leave the property. In my view, this conduct constituted an unequivocal indication by the applicant that it was exercising its right to cancel the leases. Accordingly, I do not believe that the defence that the lease were still in existence would succeed at trial.

24.

The respondents further disputed the applicants’ title to evict them from the properties contending that the properties were registered in the name of the Newcastle Municipality. This defence can of course only apply to the persons who were not relying on a lease because it is not open to a tenant to dispute the title of a landlord (see **Cooper : Landlord and Tenant** pages 27 and 28 and footnote 70 and the cases cited therein).

Accordingly those respondents who contend they had any lease cannot rely on this as a possible defence.

25.

The respondents annexed what were referred to as “Windeed reports”. No allegations were made as to the reliability of these reports but even accepting them at face value they indicate that the applicant was the owner of various properties. In respect of Erf J6, the printout merely reflects “there are no records available for the criteria specified”. Mr Crampton submitted from the Bar that his understanding was that this means that the properties were *bona vacantia* or state property and that such report meant that the applicant was not the owner. Mr Rall SC disputed that any reliance could be placed on the report in respect of Erf J6 other than that no records were available. I am in agreement with Mr Rall SC. In the absence of a certificate or affidavit from a conveyancer indicating that this is the meaning of the relevant search report, I cannot find that such document indicates that the applicant is not the owner of the property. There is therefore nothing to gainsay the averment by the applicant that it is the owner of the properties. In any event, it was common cause that the applicant had been given “full responsibility” for the site and in my view this of necessity must entail that it had sufficient

locus to bring an application for eviction of the occupiers who were not present in terms of any lease.

26.

In my view therefore, the respondents have not shown, even *prima facie*, that they had a defence under common law to the claim by the applicant for eviction and accordingly their prospects of succeeding in the rescission on this basis are very much against them. For that reason I cannot find that they have established a *prima facie* right to occupy the premises though open to some doubt – as I have indicated there is considerable doubt that they have any right at all to occupy the premises.

27.

With regard to the claim in terms of Rule 42(1)(a), Mr Crampton submitted that in its founding affidavit in the main application the applicant had:

“Created the impression that if an eviction order was granted, the entity known as Southern Palace Investments 228 (Pty) Limited would promptly erect 450 temporary shelters on the property described in the papers as H39. These would provide temporary alternative accommodation for respondents evicted in terms of an order granted in the application....”

28.

It appears that an attempt was made in a supplementary affidavit deposed to on 26 March 2009 by applicant's representative Eloma Celeste Du Plessis to withdraw or at least water-down this undertaking. That affidavit however was not served on the respondents. The deponent to the founding affidavit in the rescission application stated : **"I respectfully submit that by filing the supplementary affidavit and withdrawing or watering down the undertaking, the applicant was seeking an eviction order in circumstances that rendered the eviction more drastic and draconian than (sic) the circumstances portrayed in the founding affidavit. In such circumstances I respectfully submit that the order should not have been granted without affording the respondents a reasonable opportunity to make representations having regard to what was alleged in the supplementary affidavit. In particular this affidavit materially affected the position as far as concerns what would be a "just and equitable" date for the respondents to vacate the property or be evicted."**

29.

Mr Rall SC pointed out that since (other than the eleven named respondents) all the respondents were in default, there was no obligation on the applicant to serve the supplementary affidavit on them. He

submitted that the court in granting the order of 1 April 2009 was clearly alive to the position as to whether any temporary shelters or other amenities were to be erected by the applicant and took this into account in granting an order for eviction but indicating that such could only be given effect to after 8 April 2009.

30.

In my view there is much substance to the submission. In the affidavit filed on behalf of the eleven respondents in the main application, the stance was not to make any issue out of the undertakings by the applicant regarding the provision of temporary shelters. On the contrary those allegations by the applicant were dealt with simply by the deponent averring that he had no knowledge of the averments contained in the relevant paragraphs. The respondents were accordingly not placing reliance on those “undertakings” and indicating that based on such representations they were prepared to move. There was no submission in the alternative that in the event that a court did grant an order for eviction, such should not operate until all the temporary shelters and any other amenities had been constructed.

31.

In my view it cannot be said that the order of 1 April 2009 was in those circumstances erroneously sought or granted. The court which heard the application had the supplementary affidavit before it and took all the factors set out in that affidavit and the other affidavits filed before it reached the decision that it would grant an order for eviction but allow the respondents a week to vacate the premises voluntarily. Accordingly I do not consider that the respondents would succeed in rescinding the judgment by relying on Rule 42(1)(a).

32.

It is in the circumstances clear that I do not consider that the respondents have a reasonable prospect of success in the application for rescission. It cannot then be said that they have established the requisites for interim relief pending the determination of the rescission application because they have not shown any *prima facie* right. Costs must in the premises follow the result. I grant the following order :

1. The application for interim relief is dismissed.
2. The respondents are directed to pay the applicant's costs of opposition in the application for interim relief jointly and severally, the one paying the others to be absolved.

SKINNER, AJ

**ACTING JUDGE OF THE HIGH COURT
KWAZULU-NATAL, PIETERMARITBURG**

Date of hearing : 21 April 2009

Date of Judgment : 24 April 2009

Counsel for Applicant : Mr. A.J. Rall S.C.

Counsel for Respondents : Mr. D. Crampton