

NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL, PIETERMARITZBURG

APPEAL NO. AR 151/2009

In the matter between:

STANLEY SEITI

Appellant

and

BRIAN BERLEIN

First Respondent

VEENA BERLEIN

Second Respondent

JUDGMENT

GORVEN J

1. On 15 October 2008 two applications were set down for hearing by the magistrate, Pinetown. The first was an application for the eviction of the appellant from the premises at 7 Heaton Nicholls Road, Kloof. This had been preceded by an *ex parte* application brought in terms of section 4 (2) of the Prevention of Illegal Eviction from and Occupation of Land Act No 19 of 1998 ("PIE"). It is common cause that the relevant notices were served on the appellant and the municipality concerned. The second application was one brought by the appellant to discharge the order granted *ex parte*. The magistrate granted the eviction pursuant to the eviction application and did not deal with the application to set aside the order granted *ex parte*. This is an appeal against the

eviction order and the failure to grant the application to set aside the order granted *ex parte*.

2. The respondents launched an application for condonation for the late noting of the appeal and for the late filing of their heads of argument. The appellant initially opposed this application and put up a lengthy affidavit and annexures. The notice of opposition was considerably out of time but the heads of argument were served on the appellant timeously. They were, however, only filed with the registrar one day late. The attorney for the respondents has put up an affidavit. This explains that her office has a record in the petty cash register of a registered item, presumably containing the notice of opposition, being sent to the appellant on 27 February 2009 but that she cannot locate the registered slip which proves that the notice of opposition was in fact sent. As pointed out, the respondents' heads of argument were served on the appellant in time and no prejudice to him can ensue. The reason for the late filing of the heads of argument at court is likewise explained. The affidavit of the appellant opposing condonation mentioned that he will be prejudiced since he has not seen the notice of opposition and cross appeal. There was no cross appeal and the notice of opposition simply notified that the respondents opposed the appeal. Faced with this information the appellant, at the hearing of the appeal, withdrew his opposition to the application for condonation. A case was made out for condonation and the application for condonation was therefore granted.
3. The respondents instituted action against the applicant in the Magistrate's Court, Pinetown, by way of a summons bearing the date 31 January 2008. In the

particulars of claim delivered in support of the summons, the respondents made the following material averments:

4. On or about the 4 September 2004 and at DRUMMOND, within the jurisdiction of this honourable court, the parties entered into an Agreement of Lease. A copy of the agreement is attached hereto marked "A".

5. The material terms of the Agreement were as follows:

'4a The rent for the fixed period is R5 500 ... per month payable monthly in advance on the first day of each month, without any deduction whatever, to be paid to the Lessor at Standard Bank, Hillcrest Acc No 253725550 or to such other place as the Lessor in writing from time to time directs.

6 a Pay all charges for electricity and water supplied to the property.

b Pay all amounts due in terms of this lease free of exchange.

f Keep the property clean, habitable and tidy and care for and maintain the garden and swimming pool.'

6. On or about 25 July 2007, the parties entered an Agreement to Extend the lease whereby the monthly rental payable by the Lessee increased to R6200.00 and the terms and conditions of the original Lease were deemed to apply. A copy of the Agreement is annexed hereto marked "B".

7. The Defendant has failed to pay the rental for the months of October, November, December 2007 and January 2008.

8. The Defendant has failed to pay the full monthly rental for the month of September 2007 in an amount of R100.00, failed to pay the full monthly rental for four months during 2006 in the sum of R800.00, failed to increase the deposit in July 2007 in the sum of R1000.00 and withheld

the sum of R1 000.00 during July 2005 for repairs to the gate which in terms of the lease agreement, is his responsibility.

9. The Defendant is in arrears with his rental in the sum of R27 700.00.
 10. Despite demand, the Defendant has failed, refused and/or neglected to pay the aforesaid sum or any portion thereof to the First and Second Plaintiffs.
4. The prayer to the particulars of claim was for payment of the total amount which the respondents claimed was in arrears and costs. The summons was in the form of a rent interdict summons provided for in section 31 (1) of the Magistrates' Court Act, No 32 of 1944. This section allows for an interdict to prevent removal of furniture or other effects subject to a landlord's hypothec for rent where a summons is issued claiming the rent for any premises. It therefore protects such a hypothec which would be lost if goods subject to it were removed from the leased premises.
 5. The action was defended and a plea put up. In it the appellant denied being in arrears with rental payments but admitted having withheld rent for repairing the electric gates on the property. He set up alternative defences in the event of the court finding that he had failed to pay rent on the basis that he was entitled to an abatement of rent on various grounds.
 6. The respondents thereafter launched what was referred to as an *ex parte* application. This document appears in the record along with a document headed Notice of Application, one headed "Notice of Proceedings in terms of Section 4

(2) of the Prevention of Illegal Eviction from and Occupation of Land Act No 19 of 1998” (“PIE”), an affidavit, a Draft Order Prayed and an Order Prayed.

7. The *ex parte* application sought an order in terms of section 4 (2) of PIE. This was correctly granted and, for some reason, adjourned to 15 October 2008 when no such adjournment was necessary. This is because it is an outright order to issue and serve the relevant notice alerting the appellant and the municipality that an application for the appellant’s eviction would be sought on the specified date. This was in accordance with the approach set out by the Supreme Court of Appeal¹. The Notice of Application indicated that it would be heard on 15 October 2008 and sought the eviction of the appellant and allied relief. It is pursuant to this application that the magistrate granted the order. The affidavit appears to have been delivered in support of both the applications.
8. At the hearing on 15 October 2008 the appellant launched an application termed an Application to Discharge. In it he sought a “discharge of the Order granted *ex parte* herein”. Although some debate took place as to the purpose of this application between the magistrate and the appellant, this application was not separately argued and the magistrate made no order on it. In argument the appellant indicated that he did not persist with this aspect of the appeal. Accordingly, nothing further needs to be said about it.
9. The application for eviction was vindicatory in nature. The respondents asserted ownership of the property concerned. In order to succeed in a vindicatory

¹ *Cape Killarney Property Investments (Pty) Ltd v Mahamba and Others* 2001 (4) SA 1222 (SCA) Para [11] at p 1227G-H

application, only ownership and the possession by someone other than the owner need be asserted. Our law is to the effect that “*Prima facie*, therefore, proof that the appellant is owner and that respondent is in possession entitles the appellant to an order giving him possession...”² This is because one of the rights arising from ownership is the right to possession. However, where it is conceded that a right of occupation was given to the person in possession, the owner attracts an *onus* to prove the lawful termination of that right of occupation. If, in other words, the owner does not “concede an existing right to hold, but, nevertheless, says that a right to hold now would have existed but for a termination which has taken place, then *ex facie* the statement of claim he must at least prove the termination, which might, in the case of a contract, also entail proof of the terms of the contract.”³

10. This is the situation which confronted the magistrate in the court *a quo*. The respondents relied upon their ownership. They further conceded that the appellant had been given occupation pursuant to the lease and the amendment to it. It was therefore necessary for them to prove a lawful termination of the lease as amended. The first respondent deposed to the affidavit in support of the application. In it he did not deal at all with the position of the second respondent or what interest she had in the application, testifying that he was the owner of the property in question and then went on to say:

5. Respondent is presently in unlawful occupation of the property. The Respondent has no legal right to occupy the property.

² *Graham v Ridley* 1931 TPD 476 at 479

³ *Chetty v Naidoo* 1974 (3) SA 13 (A) at 20 F-G

6. Despite negotiations between myself and the Respondent, and requests and demands by myself that Respondent vacate the property, the Respondent has refused and/or failed to do so.

.....

8. The Respondent ... gained occupation of the property pursuant to an agreement of lease entered into between myself and the Respondent during or about 4 September 2004.

9. The Respondent has failed to pay rental due in terms of the said lease, and as such, the Applicant has, in terms of summons and particulars of claim dated 31 January 2008, cancelled the agreement of lease and reclaimed possession of the leased premises. A copy of the said summons is annexed hereto marked "A".

10. The Respondent and all those claiming occupation under him have been in unlawful occupation of the property since the said lease was cancelled by myself as abovementioned.

11. The summons and particulars of claim annexed are those to which I have referred above.

12. The appellant put up an answering affidavit in which he denied that he was in unlawful occupation, denied that he had failed to pay rent, claimed that the respondents failed to comply with their obligations which excused his compliance and stated that the affidavit contradicted the summons referred to since the summons did not in fact allege cancellation or claim eviction.

13. No replying affidavit was delivered by the respondents.

14. It can therefore be seen that the respondents attracted an onus to prove the termination of the appellant's right to occupy which had admittedly been granted to him pursuant to the lease as amended. It was necessary, accordingly, for them to prove that the lease had been lawfully cancelled. In her main heads of argument, Ms Lange submitted that a number of matters were common cause by referring to the transcript of the argument. The argument should not have formed part of the record. The reason for this is that argument is not evidence since the evidence is contained in the affidavits and their annexures in the application papers. This transcript must therefore be ignored in dealing with the appeal and should have been ignored by the magistrate. Ms Lange, correctly in my view, conceded this point in argument. However, she submitted that the magistrate correctly held that the appellant was not entitled to abate rent. There is nothing in the agreement which precludes the abatement of rent if a case is made out. The common law position is that, unless a lease agreement provides otherwise, a tenant is entitled to a remission of rent.⁴ The appellant claimed in his plea to base this on clause 8 of the lease and referred to this in his answering affidavit. The evidence at the trial may reveal partial destruction of the property and thus entitle the appellant to invoke the provisions of clause 8 rather than the common law. It is correct, as Ms Lange submitted, that a more appropriate place to resolve this issue would be in the pending action. However, since it was raised as a defence to the claim by the respondents that the agreement has been cancelled, it had to be dealt with in the application.
15. Ms Lange submitted in her supplementary heads of argument that the lease provides a basis for cancellation if the appellant remains in breach seven days

⁴ *Poynton v Crann* 1910 AD 205

after receiving notice requiring payment of the rent. This is correct and appears from clause 9 of the lease. She went on to submit that the lease does not specify the form in which the notice must be given and that the arrears rental summons suffices as notice demanding payment. This is also correct.⁵ It is, however, important to distinguish *Noble v Laubscher* from the present matter. In that case, the clause in question provided that, if the tenant had breached the agreement, the landlord “should immediately have the right to declare the lease cancelled...”⁶ No notice to remedy the breach was required prior to cancellation. Accordingly, the service of summons alleging a breach and cancellation was held to have amounted to communication that the landlord had elected to cancel the lease. In the present matter, the clause provides that should the appellant fail to pay rent “and remain in default for seven days after receipt of notice... requiring payment of the rent...the LESSOR shall have the right forthwith to cancel this lease...” In other words, the present lease provides for a notice requiring payment of the rent. Should the appellant not pay within seven days of receipt thereof, a right to cancel accrues. The respondents must then exercise this right and cancel the agreement.

16. Ms Lange went on to submit that it was not in dispute that the appellant remained in breach after receiving the summons. This is not so. It was not disputed that the appellant made no further rental payments after receipt of the summons but it is in dispute that he was ever in breach. She further submitted that, as soon as the seven day period elapsed without payment of the arrears, “the lessee became an illegal occupier, and the lessor became entitled to cancel,

⁵ *Noble v Laubscher* 1905 TS 125 at 125

⁶ *Loc cit*

forthwith". Even assuming that the appellant was in breach and, seven days after receipt of the summons remained in breach, the occupation by the lessee under the lease can only become illegal once the lease has been cancelled. A mere entitlement to cancel on the part of the respondents did not render the appellant an illegal occupier. What was required to do so was the act of cancellation. This is because cancellation only takes effect when it is communicated to the other party to the contract unless the contract in question provides otherwise.⁷ No provision is made in the lease as amended that cancellation can take place without communication. There was therefore a need for the respondents to communicate their election to cancel to the appellant before cancellation can be said to have taken place.

17. The basis for cancellation of the lease made out in the application for eviction is contained in paragraph 9 of the first respondent's affidavit. In it he alleged, "the Applicant has, in terms of summons and particulars of claim dated 31 January 2008, cancelled..." That was the cancellation relied upon in the application and no other cancellation. That was the cause of action which the appellant was invited to meet. However, as pointed out by the appellant in his answering affidavit, his argument in the court *a quo* and his heads of argument in this court, no averment of cancellation appears from the summons and particulars of claim. As appears from a perusal of what is set out above, they are limited to a claim for arrear rental. As such, as pointed out above, they constitute the requisite demand to the appellant to pay any arrear rental. Accordingly, even accepting the version of the first respondent, no case for cancellation of the lease as amended on the basis claimed by the respondents was made out. It was not

⁷ *Swart v Vosloo* 1965 (1) SA 100 (A) at 105G-H

stated in the affidavit that, insofar as the cancellation relied upon “in terms of summons and particulars of claim” may not have taken place, the respondents there and then in the application cancelled the lease as amended. Ms Lange submitted that the service of the application itself in which eviction is claimed should be held to have amounted to communication of an election to cancel. But this was not the case of the respondents on the papers and they are bound by the cause of action set out in the application. It has been held that, in application proceedings, “... an applicant must stand or fall by his petition and the facts alleged therein...”⁸ This is because the affidavits stand in place of pleadings in defining the issues. Since no cancellation is disclosed on the basis set out in the founding affidavit, the respondents did not discharge the *onus* to show that the right of the appellant to occupy had been lawfully terminated. It follows, accordingly, that on their own version the respondents were not entitled to the order granted by the court *a quo*.

18. The respondents have even greater difficulty when the principles applying to applications are brought to bear. It is trite that an order in an opposed application can only be granted if “the facts as stated by the respondents together with the admitted facts in the applicant’s affidavits justify such an order.”⁹ This test is only relaxed if the version put up by the respondent is so clearly untenable as to warrant rejection on the papers.¹⁰

⁸ *Pountas’ Trustee v Lahanas* 1924 WLD 67 at 68, approved in *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 635H-636A

⁹ *Stellenbosch Farmers’ Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) at 235E-F

¹⁰ *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 635C

19. In the present application the appellant denied that he had failed to pay rent due. He went on to assert the *exceptio non adimpleti contractus* as a defence, stating that the respondents had prevented him from complying with his obligations by failing to comply with their obligations.¹¹ As indicated above, he then mentioned that if this were not available to him, he claimed an abatement of rent having demanded that the respondents comply with their obligations to maintain and repair aspects of the exterior of the premises.¹² As a result, the entitlement of the respondents to give notice to remedy any breach was disputed. If there had been no breach, which is what he said, no right to cancel could arise and the respondents were not entitled to cancel. This means that on the tests set out above relating to opposed applications, even if the respondents are held to have made out a case on their version, they could not have succeeded in the court *a quo* in the light of the factual disputes raised by the appellant.

20. In the result, the following order is granted:

20.1.The appeal against the grant of the relief to the respondents under the eviction application is upheld with costs.

20.2.The orders of the magistrate are set aside and substituted by the following order:

“The application by the applicants in the eviction application is dismissed with costs.”

¹¹ This is a permissible defence to a claim for rent where obligations are reciprocal as between the parties cf *Ntshiqe v Andreas Supermarket (Pty) Ltd* 1997 (3) SA 60 (TkSC) at 67B-J

¹² *Poynton v Crann* 1910 AD 205 at 227

NDLOVU J

GORVEN J

Date of Hearing: 29 May 2009

Date of Judgment: 5 June 2009

For the Appellant: Stanley Seiti (In Person)

For the Respondents: Ms N D Lange, instructed by Sarah Pugsley & Associates