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IN THE HIGH COURT OF SOUTH AFRICA

[CAPE OF GOOD HOPE PROVINCIAL DIVISION]

CASE NO.: A741/98

In the matter between:

VANESSA ROSS Appellant

and

SOUTH PENINSULA MUNICIPALITY Respondent

JUDGMENT DELIVERED THIS 3RD DAY OF SEPTEMBER 1999

JOSMAN, AJ:

The appellant Mrs Ross occupied premises at 15 Lilac Court, Lotus River which belonged to the Respondent, South Peninsula Municipality. In July 1997, the Respondent issued summons against Mrs Ross claiming her eviction from the premises on the simple basis that the Respondent was the owner of the property, she was in occupation and had no right to be so. Respondent also alleged that there was no agreement which entitled Mrs Ross to occupy the property and that she and all the people living with her were doing so illegally.

The form that the summons took was based on the principle of pleading established in the case of *Graham v Ridley 1931 TPD 476,* in which Mr Justice Greenberg quoted the following portion of a prior unreported decision with approval:

> "One of the rights arising out of ownership is the right to possession; indeed Grotius (Introd. 2, 3, 4) says that ownership consists in the right to recover lost possession. *Prima facia,* therefore, proof that the appellant is owner and that respondent is in possession entitles the appellant to an order giving him possession, i.e., to an order for ejectment. When an owner sues for ejectment an allegation in his declaration that he has granted the defendant a lease which is terminated is an unnecessary allegation and is merely a convenient way of anticipating the defendant's plea that the latter is in possession by virtue of a lease, which plea would call for a replication that the lease is terminated. It is the defendant and not the owner (plaintiff) who relies on the lease, and if the lease itself is denied by the defendant, as in the present case, the allegation of the lease is surplusage". (page 479)

Dealing with the status of a replication to a plea alleging a lease Greenberg J said that the plaintiff's reply does not set up a new cause of action although it may set up a different history. The main cause of action arises from ownership of the property and the owner's entitlement to possession. Accordingly any allegation relating to a lease does not affect the real cause of action though it may have a significant bearing on the onus of proof in relation to the lease.

In *Myaka v Havemann and Another 1948 (3) SA 457A,* the plaintiffs sued as cessionaries of the right of action of owners of a farm for the eviction of the defendant, alleging in addition that the agreement with the defendant entitling him to occupation had been terminated by notice. The court held that the plaintiffs could have relied solely upon their rights as cessionaries of the owner's rights but since they had pleaded additional facts they had attracted the onus of proving those additional facts; an onus that would not have been upon them had they relied simply upon the rights flowing from ownership as determined in *Graham v Ridley.*

At issue in this case is the question of whether Section 26 (3) of the Constitution, Act 108 of 1996, has altered the common law as established in *Graham and Ridley*. Section 26 (3) stipulates that:

> "no one may be evicted from their home or have their home demolished without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."

This provision forms part of the Bill of Rights protecting everyone's rights to adequate housing. It is therefore necessary to consider to what extent the Constitution has limited the rights of an owner of property to sue for the eviction of a person in possession and what allegations, if any, are to be made by the owner in attempting to do so.

It is however necessary to consider certain other issues raised in this appeal before doing so. The first relates to an application for condonation of the late filing of the appeal, which was not seriously opposed by the Respondent. In the Magistrate's Court Mrs Ross, who was assisted in her defence of the action by the Legal Aid Board, took an exception to Respondent's summons, alleging that by virtue of section 26(3) of the Constitution the Respondent should have alleged that it was seeking to evict

Mrs Ross from her home and should have placed before the court relevant circumstances which would have entitled it to such an order.

The exception was heard and dismissed on the 3rd of March 1998. Through her attorneys Mrs Ross filed a request for reasons for judgment on the 17th of March 1998. The Magistrate's reasons for judgment were thereafter furnished on 26th of May 1998, although the date on which they were supplied to Mrs Ross's attorneys is not known. Because legal opinion was required by the Legal Aid Board as to the prospects of success on appeal the notice of appeal was only filed on the 24th of July 1998. Since the delay was not excessive and the explanation is acceptable, the importance of the legal issue raised justifies the condonation of the late appeal.

The next issue raised stems from the fact that on the same day that Mrs Ross's attorneys requested reasons for judgment, they filed an amended plea because of the Magistrate's dismissal of the exception. The Respondent alleges that this plea is inconsistent with an intention to pursue the appeal and that accordingly the right of appeal has been perempted. What is more particulars were requested to the amended plea, they were supplied on the 29th of June 1998 and a replication was filed by the

Respondent on the 19th of July 1998. All this took place before the filing of the notice of appeal on the 23rd of July 1998.

In listing the chronology of events the respondent in its heads of argument in support of its claim for peremption omitted to state that on the same day that the amended plea was served by Mrs Ross's attorneys the request for reasons for judgment was lodged with the clerk of the magistrate's court. Thereafter there had been discussions between the respective attorneys relating to the appeal.

The test for determining whether there has been peremption of an appeal was laid down by the Appellate Division in 1920 in the case of *Dabner vs SA Railways and Harbours 1920 AD 583 and 594.* Peremption is only established where the conduct of the unsuccessful litigant points indubitably and necessarily to the conclusion that there had been acquiescence in the judgment appealed against.

More recently, in *Natal Rugby Union vs Gould 1999 (1) SA 432,* the Appellate Division considered a decision by the Rugby Union to hold a re-election which, so it was alleged, was inconsistent with the Union's intention to attack an adverse judgment of the Natal High Court in this respect. In that case the members of the Union were not in accord as to whether there should be an appeal and the reelection was held before the decision to appeal was finally taken. Even so the court held that the *onus* of showing peremption had not been discharged and that it was not an indubitable and necessary conclusion that the holding of the re-election was inconsistent with an intention to appeal.

Based on the facts in the case before this Court it is clear that Mrs Ross is not perempted from proceeding with the appeal.

THE ONUS

The issue to be decided is whether the Constitution has now placed an onus on an owner of land to inform the court of circumstances justifying the eviction of a person in possession of the owner's property if it is his or her home. *Appellant contends that there is such an onus and that the relevant

*In this case the respondent is a municipality so that the issue of horizontality does not arise. But see in this regard *South African Journal of Human Rights* Volume 15 Part I page 25 especially page 28 following on the indirect application of the Bill of Rights in relation to the common law.

allegations must be made by the plaintiff, supported by facts as required by our rules of pleading. This will be the first step required to enable the court hearing the matter to consider all the relevant circumstances before issuing an eviction order. Clearly the appellant contemplates that in her plea she too will allege relevant circumstances and also answer the respondent, who will be entitled to reply to the plea in a replication.

The question of where the onus lies in a given instance is determined by substantive law. In 1990 the Appellate Division reviewed the question of where the onus of proof lies in matters which are *res nova* in *During N.O. vs Boesak and Another 1990 (3) SA 661 (A).* At issue in that case was the question of whether the divisional commissioner of police for the Western Province, in exercising the right conferred on him by emergency regulations under the Public Safety Act of 1990 (53) to prohibit public gatherings, was required to prove, and thereby accept the onus of proving, that his discretion had been properly exercised. Although the court was divided as to the outcome of the appeal, all the judges were unanimous about the imposition of the onus; the reasoning appears from the judgment of Mr Justice Grosskopf, at page 672 H.

He confirmed that the underlying substantive law determines where the onus of proof lies and quoted Hoffmann and Zeffertt, the South African Law of Evidence, in support thereof. The learned judge went on to state that in matters where the incidence of the onus has not been previously determined the courts have laid down guidelines in order to do so. He emphasised however that in the last resort that there is no generally applicable rule and quoted *Wigmore* on Evidence with approval to the effect that -

> "the truth is that there is not and cannot be any one general solvent for all cases. It is merely a question of policy and fairness based on experience in the different situations."

This passage from *Wigmore* had been previously approved by the Appellate Division in *Mbaso vs Felix 1981 (3) SA 685(A)*. In this case the court concluded that in actions for damages for delict the onus of proving the excuse or justification for the alleged delict, for example self defence, lay upon the defendant. Quoting *Wigmore* the court held that if the onus were on the plaintiff then one would have to assume the presence of such a defence and require the plaintiff to disprove the existence thereof. As a matter of policy and of fairness all that plaintiff should be required to do is prove the nature of the harm, the fact that the defendant caused it, and then leave it to the defendant to prove the justification. One of the reasons for so doing is that the facts relating to the justification are likely to be peculiarly within the knowledge of the defendant, although *Wigmore* hastens to add that there is no universal principle to this effect. In *Mbaso* the court concluded that it would "be fair and accord with experience and common sense" to place the onus on a defendant to prove such excuse or justification.

To return to the *During* case Grosskopf JA stated that as a matter of substantive law the right to hold meetings and attend gatherings is a fundamental right in our legal system and that this should be the starting point of any consideration of the incidence of the onus. In support of this he referred to the earlier Appellate Division case of *Minister of Law and Order vs Hurley 1986 (3) SA 568* in which the court considered the validity of the arrest of the respondent in that matter. It held the onus of proving by way of presenting facts to the court that the arrest was lawful should be placed on the person affecting the arrest. Mr Justice Grosskopf quoted with approval the following statement of Chief Justice Rabie in *Hurley's* case:

"I would add that I consider it to be good policy that the law should be as there stated. (referring to *Brand vs Minister of Justice 1959 (4) SA 7128).* An arrest constitutes an interference with the liberty of the individual concerned, and it therefore seems to be fair and just to require that the person who arrested or caused the arrest of another person should bear the onus of proving that this action was justified in law."

At page 673 g Grosskopf JA said the following:

"Wat ek hier veral wil beklemtoon is die beginsel standpunt dat, as 'n saak van beleid, dit reg en billik is dat 'n persoon wat inbreuk maak op die vryheid van die individu die bewyslas behoort te dra om te bewys dat sy optrede regmatig is. Aangesien die ligging van die bewyslas tot groot hoogte deur beleidsoorwegings bepaal word (sien die pasassie uit *Wigmore* hierbo) is *Hurley* se saak sterk gesag daarvoor dat ook by inbreuk op ander fundamentele regte, dit wil sê op die vryheid van die individu in 'n breër sin, die bewyslas om die regmatigheid van sy optrede te bewys behoort te rus op die persoon wat die inbreuk maak."

Grosskopf JA went on to state that a further, if less important policy consideration which tended in the same direction, was the fact that the person arrested would often not know in terms of what regulation and on what grounds he was being arrested. He stated at p674 f:

> "As 'n kwessie van praktiese doelmatigheid sou dit dus gewoonlik makliker wees vir die arresteerder om die regtmatigheid van die inhegtenisneming te bewys as vir die gearresteerde om die teendeel te bewys."

That the incidence of the onus can be affected by a constitutional requirement is beyond question. The Constitutional Court had occasion to consider the extent of which the incidence of the onus can be affected by statute and to measure this against Constitutional imperatives in the case of *Prinsloo vs van de Linde and Another 1997 (3) SA 1012.* The statute in question was the Forest Act 122 of 1984 which provided in section 84 that there is a presumption of negligence, until the contrary is approved, in any action in which the question of negligence arises in relation to a veld, forest or mountain fire occurring on land outside a fire controlled area. After reviewing the reasons for imposing the presumption the court concluded that there was a rational relationship between the purpose sought to be achieved and the means chosen. The Constitutional Court again cited *Wigmore* as approved in *Mbaso vs Felix* to the effect that -

> ".....all rules dealing with the subject of the burden of proof rest "for the ultimate basis upon broad and undefined reasons of experience and fairness"" (p1028 g.)

The court held that the difficulty of establishing who caused a fire required that as between the person who suffered the damage and the owner of the land on which the fire started, the latter would be in a much better position to show how and where the fire originated.

Accordingly in deciding this case we need to consider broad reasons of experience and fairness to determine where the onus should be placed. Section 26 (3) of the Constitution in effect requires a court hearing an application or action for the eviction of a person from his or her home, not to issue the order until it has had an opportunity to consider all the relevant circumstances. This means that not only may an eviction order not be issued by for example a clerk of the Magistrate's Court or the Registrar of the High Court in an application for default judgment, but that the presiding judicial officer alone can issue such an order and then only after considering all the relevant circumstances. At issue is how those circumstances should be placed before the court.

In systems of jurisprudence employing the inquisitorial system, a judicial officer is able to call for and gather whatever information is required. Where the adversarial system is employed the parties are required to place the information before the court and it is in this context that the onus of proof is of such importance. Once determined the onus prescribes which party has to place particular facts and circumstances before the court and therefore what has to be alleged in pleadings or affidavits.

Since the Constitution only protects eviction from a Home, Section 26 (3) would not apply in the case of eviction sought from business premises or any other premises that do not constitute a home. As the court has to consider all the relevant circumstances the adversarial system predicates that the plaintiff should place such information before the court as it considers relevant, to which the defendant can plead by answering the allegations as well as by raising additional issues. The plaintiff in turn can respond to those allegations in reply. In this manner the pleadings will introduce the issues and define them, the evidence will provide the substance and detail, and the court will then be able to exercise its discretion after having considered all the relevant circumstances. In this manner the adversarial system allows for and in most instances will ensure that all such circumstances are placed before the court. The court can presumably call for amplification if after considering the issues raised in the pleadings, it deems it necessary.

If both parties to a case involving eviction from a home raise the issues which they consider to be relevant, the court should ultimately have sufficient information before it to consider all the relevant circumstances prescribed by the Constitution. A different situation might arise however where the defendant occupier does not enter an appearance to defend and the plaintiff is seeking judgment by default. To the extent that some or even most of this information might be within the knowledge of the defendant rather than the plaintiff land owner, it is worth noting that it is not a principle of our law that the onus of proof of a fact lies on the party who has either intimate knowledge thereof or the means of establishing that fact. *Eskom vs First National Bank of Southern Africa Limited 1995 (2) SA 386 (A).*

Grosskopf JA in the *Eskom* case made it clear that this is no reason for removing the burden of the onus of proof from the plaintiff, in such a case, although less evidence will be required from a plaintiff in relation to knowledge which is peculiarly within the domaine of the defendant. *Union government (Mr Railways) vs Sykes 1913 AD 156 et 173, Gericke vs Sack 1978 (1) SA 821 A and 827 E-G.*

It is the conclusion of this court therefore that Section 26(3) of the Constitution has indeed modified the common law as laid down in *Graham v Ridley* to the extent that a plaintiff seeking to evict a person from his or her home is now required to allege relevant circumstances which entitle the court to issue such an order. The respondent did allege that Mrs Ross was occupying the property illegally but this is not sufficient to satisfy the above requirement.

It is beyond the scope of this appeal to consider what circumstances will be of relevance to the court, though some guidance in this respect might be gleaned from the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 which came into effect on the 5th of June 1998. It is necessary to consider this Act because it has already been the subject of judicial interpretation and critical review relevant to the issues raised in this case.

In an article which appeared in the June 1999 issue of De Rebus, Ranjit Purshotam of the Legal Resources Centre in Durban analysed the Act and concluded that its terms are broad enough to encompass a range of eviction orders, wide enough to have included an occupier such as Mrs Ross. Because the Act came into effect on the 5th of June 1998 and the action against Mrs Ross was commenced in 1997, this court was not required to consider whether it might have been of application in the circumstances of this case.

Mr Purshotam's thesis derives from an analysis of the Act itself, the preamble to which recites *inter alia* the wording of Section 26(3) of the Constitution. The rest of the preamble is also worthy of mention, and reads as follows:

> "And whereas it is desirable that the law should regulate the eviction of unlawful occupiers from land in a fair manner, while recognising the right of land owners to apply to a court for an eviction order in

appropriate circumstances;

And whereas special consideration should be given to the rights of the elderly, children, and disabled persons, and particularly households headed by women, and that it should be recognised that the needs of those groups should be considered."

Thereafter the Act prescribes the requirements for the issuing of such an eviction order.

Mr Purshotam points out that the definition of "building or structure" includes temporary structures such as huts, shacks and tents as well as a permanent dwelling. Furthermore the definition of "evict" refers to the deprivation of a person of occupation of a building house or structure, or to the land on which it is erected, against his or her will. Since the definition of land includes a portion of land, his submission is that any reference to land in the Act includes any building or structure on the land in question.

An unlawfull occupier is defined as a person who occupies the land without the express or tacit consent of the owner or person in charge or without any other right in law to occupy such land, with certain exceptions which are not relevant in this instance.

Section 4(1) of the Act then provides as follows:

> "Notwithstanding anything to the contrary contained in any law or the common law, the provisions of this section apply to proceedings by an owner or person in charge of the land for the eviction of an unlawful occupier."

Section 4(2) requires fourteen days notice to be given by the court for the hearing of proceedings for eviction and notice in writing must be given both to the unlawful occupier and the "municipality having jurisdiction".

Sub-sections (6) and (7) of Section 4 prescribe in some detail the type of circumstances that have to be taken into account by a court hearing an application or action for eviction.

It is Mr Purshotam's conclusion therefore that an eviction order such as that sought by the respondent against Mrs Ross would have fallen within the purview of the Act that had it been in force. He did not however refer to a decision of the Witwatersrand Local Division in which judgment was given on the 23rd of February 1999 by Mr Justice Schwartzman in the case of *Absa Bank Limited v Amod;* in which the learned judge considered the ambit of the Act. In so doing he applied certain established principles governing the interpretation of statutes.

The case concerned an application for eviction of an occupier from a house in a residential suburb and is therefore directly comparable to the matter before this court. The case is reported in Volume 2 of the All South African Law Reports at page 423, and at page 428 D the learned judge said the following:

> "In resolving the issue as to whether the Act does apply to these proceedings, I will have regard to the following principles that govern the interpretation of statutes. It is permissible to look at the law at the time of the enactment and the reason for passing the Act. It is similarly permissible to look at the preamble to an Act or other express indications in it to ascertain the object sought to be achieved by the Act. That a statute must not be presumed to alter the common

law. That once it is clear that that is its object, effect must be given thereto to the extent that the statute clearly alters the common law. A statute must not be interpreted to lead to an absurdity which the legislature did not intend"

He then stated that the laws repealed by the 1998 Act included the Prevention of Illegal Squatting Act of 1951, the Black Laws Amendment Act of 1963, the Abolition of Influx Control Act of 1986 and various related Acts. After reviewing the Illegal Squatting Act which the 1998 Act deliberately reversed in what he described as "a response by Parliament to one of the social phenomena of the post apartheid era" he stated at page 429 (C):

"Against this background what is significant is that like its predecessor the emphasis throughout the 1998 Act is on the unlawful occupation of land. The Act does not purport to deal in general or specific terms with the unlawful occupation of immovable property lawfully built on land. In the context of the 1998 Act, the word "land" must mean vacant land (an expanse of country; ground; soil - (See Concise Oxford Dictionary) and **does not include permanent structures that have acceded to land.** Had this been the legislature's intention it would have been clearly indicated in the Act.

Regard being had to the diametrically opposed objects of the 1951 Squatters Act and the 1998 Act, and notwithstanding what is said in Section (4)(1) of the Act, I find it difficult to accept that the 1998 Act can be interpreted as turning on its head the common law of landlord and tenant or the common law right of an owner of immovable property who has, in terms of a contract, given another the right to occupy his or her immovable property to recover the same" (emphasis added)

Then finally at page 429 (I) he says the following:

"Section 4 of the 1998 Act limits the common law rights of an owner of land to evict an unlawful occupier from his or her land. An unlawful occupier in turn means 'a person who occupies land without the express or tacit consent of the owner'. In the context of the Act and notwithstanding the definition of "evict" the meaning I give to these words is that the person referred to is a person who has without any **formality or right moved on to vacant land of another and constructed or occupied a building or structure thereon.** Had it been the intention of the legislature to affect the common law right of property owners, to which I have referred, the definition of unlawful occupier would have included a person who, having had a contractual right to occupy such property, is now in unlawful occupation by reason of the termination of the right of occupation. The absence of such a provision must affect the extent to which it can be said that the 1998 Act was intended to affect persons' common law right to determine who may occupy their immovable property in terms of agreements." (emphasis added)

I respectfully agree with Schwartzman J in his interpretation of the application of the 1998 Act.

What might be helpful about the 1998 Act is its interpretation, or rather the legislature's interpretation of the constitutional requirement that the rights of the elderly, children, disabled persons and households headed by women should be protected. These are to be found in Section 4 sub-sections (6) and (7) of the 1998 Act. Even though the Act would not have applied in a case such as this, following the *Absa Bank* case, the courts might derive some guidance from the legislature in trying to implement the constitutional requirement that all relevant circumstances should be considered before any one is evicted from his or her home.

Since it is commmon cause that the premises from which Mrs Ross is still to be evicted are occupied by her as her home, what the respondent would have been required to do is allege the relevant circumstances which it says would entitle it to the eviction order.

Of course if the question of whether the premises are in fact occupied as a home is in issue, then it would not be necessary for a plaintiff to allege that it is not the defendant's home, but for the defendant to raise that issue by way of a plea. That will be the issue on which the matter will go to trial. If the defendant is successful in showing that it is her home, he or she will be entitled to have the plaintiff's claim dismissed. The plaintiff can avoid this situation in circumstances where there is doubt, by pleading in the alternative.

In the result the appeal succeeds and the magistrate's order is amended to read that:

"The defendant Mrs Ross's exception to the plaintiff's particulars of claim is upheld and the plaintiff's claim is dismissed for failure to make the necessary allegations mandated by Section 26(3) of the Constitution Act 108 of 1996. The plaintiff is given leave to amend its particulars of claim accordingly within 21 days of the date of this order.."

The respondent is ordered to pay the costs of this appeal and also the costs of the exception.

JOSMAN, AJ

I agree, and it is so ordered.

DESAI, J