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**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GQEBERHA)**

Case No.: 1671/2024

Date Heard: 12 September 2024

Date Delivered: 26 November 2024

In the matter between:

WILMA SYNMAN

APPLICANT

and

ANDRIES JACOBUS FERREIRA

FIRST RESPONDENT

BARENDINA FERREIRA

SECOND RESPONDENT

VARIOUS OCCUPIERS HOLDING TITLE

THROUGH THE FIRST RESPONDENT

THIRD RESPONDENT

NELSON MANDELA BAY MUNICIPALITY

FOURTH RESPONDENT

JUDGMENT

MULLINS AJ:

[1] This is an application in accordance with Prevention of Illegal Eviction From And Unlawful Occupation Of Land Act, 19 of 1998 (“PIE”), for the eviction of the First and Second Respondents from a property owned by the Applicant.¹

[2] When the matter was called the First Respondent advised me that he was acting in person on behalf of the Respondents and wished to address the court in Afrikaans, as it was his constitutional right to do so. In this regard see section 30 of the Constitution. See also section 35(1)(k) which, although the section deals with an accused person’s rights in a criminal trial, is equally applicable to civil proceedings.

[3] I advised the First Respondent that he was absolutely correct in this regard, but in that case it would be necessary for an interpreter to translate his argument into English.² After a short deliberation the First Respondent elected to address the court in English.

[4] As it turns out the First Respondent spoke fluent English and I am satisfied that not only did he understand the nature of the proceedings, but that he was more than able to argue the case on behalf of the Respondents.

[5] The background facts may be summarised as follows:

- (a) The Applicant is the registered owner of a property in Despatch, Nelson Mandela Bay Municipality. Through an agent the property was advertised to rent;
- (b) On 3 December 2023 the First Respondent filled in an application form presented to him by the agent, the purpose of which was to provide the Applicant, as lessor, with the details of the potential lessee so as to make an

¹ As there are no Further Respondents (Third Respondent) and the Nelson Mandela Bay Municipality (Fourth Respondent) did not enter the fray, the First and Second Respondents will be referred to collectively as the “Respondents”, unless the context requires otherwise.

² See: *Oosthuizen and Another v The State* (CA&R 248/2021; CA&R 45/2023) [2024] ZAECKMKHC 101 (19 September 2024).

informed decision as to whether or not to conclude a contract with that person;

- (c) In addition to completing the form the First Respondent pointed out a number of faults with the property and I quote the first few sentences thereof:³

“This property needs a lot of money to bring it up to standard. There is no security or burglar bars, the garden needs a lot of attention as well as the swimming pool and the steel rondavel and the house paint. There is furniture from the previous owners in the garage.”

- (d) He goes on to make proposals as to how to deal with the faults, *inter alia*, suggesting that the deposit be utilized to effect the work that needed to be done to the property;
- (e) The Applicant states that she did not see the application form at the time, only becoming aware thereof in March 2024 (the implication being that had she seen it she would have rejected the application);
- (f) Notwithstanding the First Respondent’s dissatisfaction with the condition of the property, on 6 December 2023 he signed a lease agreement which was to commence on 14 December 2024, the termination date being 31 December 2024. The monthly rental was R7,000.00, payable on the 1st day of the month. I will return to various other terms in the course of the judgment, but highlight at this stage the “Special Conditions”, which amounts to a voetstoots clause. It provides:

“Property will be rented out as is, any changes the tenant have to put in writing and owner have to approve and all changes will be on tenants own cost.” [sic]⁴

³ Translated into English by the Applicant.

⁴ Despite the poor grammar and syntax, the meaning is clear.

- (g) Things got off to a rocky start. Prior to taking occupation the First Respondent wrote to the agent complaining about the garage being full of furniture. He advised that he would be selling this furniture and keeping the proceeds as “*compensation for inconvenience*”. He also requested a meeting with the agent to discuss the installation of DSTV, security and burglar bars;
- (h) On being advised of this development the Applicant wanted to walk away but was advised by the agent that as the First Respondent had paid the deposit she could not do so. In any event, the Applicant refused to sign the contract;
- (i) In response to the First Respondent’s complaints the agent responded that the garage was not part of the contract (hence the furniture that was stored in it) and that the property had been leased “*as is*”;
- (j) As the rent was not paid on the due date, on 1 January 2024 the Applicant’s attorney wrote to the First Respondent demanding payment of the rental and other charges within eight days as “... *you are currently in breach of your Lease Agreement.*” There was no response from the First Respondent at that stage;
- (k) It is the First Respondent’s case that he had orally agreed with the Applicant’s husband that the rent could be paid by the 6th of the month. He also maintained that the law provided for payment by the 7th of the month;
- (l) Despite her earlier advise to the Applicant, on 10 January 2024 the agent wrote to the First Respondent stating that as the parties had not been *ad litem* as to the terms of the lease agreement no contract had been concluded and the Respondents were called upon to vacate the property by 29 February 2024;
- (m) In a lengthy (and largely irrelevant response) the First Respondent refused to vacate the property and pointed out that the Applicant had accepted the rent and that, therefore, a contract had been concluded;

- (n) Things went from bad to worse, with numerous issues arising on both sides, the details of which (except to the extent dealt with below) it is fortunately not necessary to go into;
- (o) The main complaints from the Applicant's side is that the First Respondent regularly paid the rental late and that he did not pay the municipal account, which resulted in the Applicant having to do so on at least one occasion;
- (p) The main complaint from the First Respondent's side was the condition of the property;
- (q) Given his attitude to the request that he vacate by 29 February 2024, on 26 February 2024 the Sheriff served a notice on the First Respondent disputing the existence of a contract and calling upon the Respondents to vacate the property by the 29th. The letter goes on to state that if there was a lease agreement the First Respondent was in breach of the terms thereof. The First Respondent was warned that if the Respondents did not comply they would be faced with an application in accordance with PIE;
- (r) The First Respondent replied on the 29th, once again raising numerous issues which are not germane to the application before me. What is of relevance is that he refused to vacate and stated further that he would continue to pay the rent by the 6th of the month: "*Geen argument nie*", (to quote him);
- (s) As a result of the foregoing the Applicant instituted proceedings in accordance with PIE. On 9 May 2024 the requisite section 4(2) notices were personally served on the Respondents.

[6] So much for the background. I should add that in an effort to resolve the stand-off the agent had been actively looking for alternative accommodation for the Respondents. The First Respondent wasn't interested. In respect of a property the agent had identified and wanted to show the Respondents the Second Respondent sent her a WhatsApp which reads:

“Oom stel nie belang nie. Gaan bly totdat ons hofbevel kry ons moet trek”

[Uncle is not interested. [We] are going to stay until we get a court order [that] we must move].⁵

[7] It is not in dispute that the formal statutory requirements have been complied with. No more need be said in that regard.

[8] The Applicant’s first hurdle is to establish that the Respondents are unlawful occupiers as defined in section 1 of PIE. An unlawful occupier is defined as “... *a person who occupies 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...*”.

[9] The Applicant’s case as to how the Respondents acquired occupation of the property is contradictory, to say the least. On the one hand a written lease is pleaded, which lease she alleges has been cancelled due to the First Respondent’s breach thereof; on the other hand, it is alleged that no lease was concluded because the Applicant refused to sign; then again, a month-to-month lease is alleged, on what terms it is unclear. On the other hand the First Respondent maintains that a written lease agreement was concluded.

[10] Although it was an appeal against the granting of summary judgment, a similar situation arose in **Morgan v Blue Beacon Investment 206 (Pty) Ltd**⁶ where Matsemela AJ stated (at paragraph [16]):

“It was argued on behalf of the appellant that she did not enter into contract with the Respondent. The fact that the lease agreement was not signed, means that there was no contract. I am unable to agree to agree with counsel of the appellant on this argument. It is trite that the lease agreement does not have to be signed in order to be binding. If one of the parties did perform in terms of the unsigned contract that should suffice for the contract to be binding.”

[11] Ironically, although he relied upon the lease agreement the First Respondent’s version of what had been agreed to was equally muddled. While he was adamant that a

⁵ My translation.

⁶ [2019] ZAGPJHC 65 (7 February 2019).

written lease agreement had been concluded, he disputed – and certainly did not comply with – a number of the material terms thereof. That he was in breach of the contract upon which he relies appears from his own version.

[12] The third option, a month-to-month lease is the Applicant's fall-back position. Exactly how this came about it never explained.

[13] Fortunately, I am of the view that it is not necessary to resolve this confusing situation. On any one of the three scenarios, the Respondents are unlawful occupiers as defined. If there was a written lease the First Respondent, on his own version, was in breach thereof and the lease was validly cancelled. If there was no lease agreement the occupation is *per se* unlawful. If there was a month-to-month, it was validly terminated.

[14] In his lengthy and very detailed opposing affidavit the First Respondent repeats his dissatisfaction with the condition of the property and that the lease agreement did not correctly record all the terms and conditions agreed upon. If he is to be believed the property was in a dilapidated state (oven not working, broken tiles in the bathroom, and so on), but that does not assist the First Respondent because of the voetstoots clause.

[15] That the lease agreement does not correctly reflect all the agreed terms is also of no assistance to the First Respondent. Clause 32 thereof provides:

“32.1. No addition to or variation or cancellation of this Lease Agreement, including this clause, has effect unless it is in Writing and signed by both parties.

32.2. The Landlord and the Tenant agree that this Lease Agreement is the whole agreement between the Parties in regard to its subject matter.

32.3. The Parties undertake at all times to do all such things, to perform all such acts and to take all such steps as may be open to them and necessary for or incidental to the putting into effect or maintenance of the terms, conditions and import of this Lease Agreement.”

[16] As already alluded to, on his own version the First Respondent was in breach of the very agreement upon which he relies. In the circumstances I find that the Respondents fall within the definition of unlawful occupiers as defined in PIE.

[17] As the Respondents were in unlawful occupation for less than six months when the proceedings were initiated section 4(6) of PIE applies. This section provides that the court may grant an eviction order if it is of the opinion that it is just and equitable to do so after considering all the relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women.

[18] Section 4(8) provides that if the court is satisfied that the requirements of section 4 have been complied with it must grant an eviction order and determine a just and equitable date upon which the unlawful occupier is to vacate, alternatively be evicted.

[19] The factors to be taken into account when considering what is just and equitable were dealt with extensively in **Rustenburg Platinum Mines Ltd v The Unlawful Occupiers**⁷ in which judgment numerous very helpful authorities are quoted. Due to its length the relevant paragraphs, namely [26] – [55], will not be repeated herein, but I have had regard thereto in coming to my decision.

[20] It is vitally important when considering a just and equitable remedy (a moving target, if ever there was one) for the court to take a proactive role in balancing the respective rights of the parties. There is no one-size-fits-all approach.

[21] The First Respondent is 80 years old and the Second Respondent is of a similar age. Despite his age the First Respondent still works and is self-employed in the agricultural sector working with his son. The work he does is sporadic. He has no pension. The Second Respondent is not employed.

[22] On the other hand it is not suggested that the Respondents are destitute. The First Respondent can afford to pay R7,000.00 a month rental, albeit late, and the municipal charges, albeit irregularly. His bank account for September, October and November 2023

⁷ [2024] ZANWWHC 227 (9 September 2024).

reflects a healthy positive balance. There also appears to be ample alternative accommodation available in the First Respondent's price range (but unfortunately he spurned all the agent's efforts and refused to even view the properties she sourced).

[23] What appears to have been overlooked by both parties, particularly the First Respondent, as it is his case that a binding lease agreement was concluded, is that the contract terminates on 31 December 2024. On that date the Respondents will be obliged to vacate the property and if they don't do so they will become unlawful occupiers on their own version.

[24] Taking all the factors into account in coming to a just and equitable remedy, even although the disputed lease agreement terminates on 31 December 2024, given the time of year the Respondent should be given until 31 January 2025 to vacate the property, provided the rental and service charges are paid timeously. In the event of the rent and service charges not being paid, or not being paid timeously, the Applicant shall be entitled to immediately obtain the eviction of the Respondents.

[25] Which brings me to costs. Clause 28 of the lease agreement provides that the parties consent to the jurisdiction of the Magistrates' Court and may at their discretion litigate in that court.

[26] The First Respondent repeatedly made the point that the Applicant should have brought this application in the Magistrates' Court and that litigating out of the High Court amounted to an unnecessary escalation of the costs.

[27] Clause 28 would only come into contention if there was a valid lease agreement. The First Respondent is adamant that there is one. The Applicant argued that there isn't, but not very convincingly and even prayer 1 of the notice of motion prays for the confirmation of the cancellation of the lease agreement, which is odd given her ambivalent attitude thereto.

[28] But even if there is a no lease agreement PIE confers jurisdiction on the Magistrates' Court and I am in agreement with the First Respondent that bringing the application in the High Court, when it could just as easily have been brought in the Kariega (Uitenhage)

Magistrates' Court, was an unnecessary escalation of the costs. I accordingly intend to order costs on the scale applicable in that court. However, given the extensive issues involved, which were largely caused by the First Respondent, I intend to make it a punitive order.

[29] In the circumstances I make the following order:

1. The First and Second Respondents are hereby ordered to vacate the property, Erf 3[...], situated at [...] S[...] Street, Despatch, by 31 January 2025.
2. Paragraph 1 is subject to the First Respondent continuing to pay the monthly rental (R7,000.00) and service charges timeously in accordance with the written lease agreement. In the event of the First Respondent failing to do so the Applicant shall be entitled to immediately obtain the eviction of the Respondents in the manner referred to in paragraph 3 below.
3. In the event of the First and Second Respondents failing to vacate the premises on the date prescribed in paragraph 1, or failing to comply with paragraph 2 above, the Sheriff and/or his deputy be authorised and directed to take such steps as are necessary, including enlisting the assistance of the South African Police Service, to evict the First and Second Respondents, the costs occasioned thereby to be paid by the First Respondent.
4. That the First Respondent shall pay the costs of the application on scale C of the Magistrates' Court tariff on an attorney and client scale, with the costs of counsel to be taxed at three (3) times the tariff and to include the costs of heads of argument and preparation.

NJ MULLINS
(ACTING JUDGE OF THE HIGH COURT)

REPRESENTATION:

Obo the Applicant:

Adv. M Van Schalkwyk

Instructed by:

DEON VAN DER MERWE ATTORNEYS INC.

101 Main Road

DESPATCH

Obo the Respondents:

First Respondent in person