IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

JOHANNESBURG

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE ~~YES/NO~~
(2) OF INTEREST TO OTHER JUDGES YES/NO
(3) REVISED.

DATE 2/0/2008 SIGNATURE

CASE NO: 4453/08

DATE: 2008-11-13

In the matter between

MAILULA, MAROFANE WILLIAM Applicant

and

ANDREW, MASHELE AND 67 OTHERS Respondent

J U D G M E N T

WILLIS J:

On 5 November 2008 I dismissed an application by Phulani Ma Afrika, which was a section 21 company, to set aside the sale of a property know as Angus Mansions, being erf 4562, Johannesburg, as well as the subsequent transfer thereof.

It seemed that it was common cause at that time, and certainly implicit in the ruling of Gildenhuys J, that the question of eviction hung crucially on the question of whether the transfer of the property should

be set aside. Consequent upon dismissing the application for setting aside of the sale of the property and the transfer thereof, I directed that the 67 occupiers of the building be evicted.

Mr Mailula, the currently registered owner of the property, has now sought an application for leave to execute upon that eviction by reason of the fact that on the same day, 5 November 2008, I granted leave to appeal against both my order dismissing the application to set aside the sale and transfer of the property and my order evicting the occupiers. Of course, unless I give leave to execute the granting of leave to appeal will automatically suspend the executability of the orders which I granted.

Mr Mailula is content that the following persons, Tulane Mthembu, Elizabeth Dladla, Andrew Mashele, Dennis Sifiso Khoza and Petrus Joseph Chauke, who were members of the section 21 company and who remain in occupation of the building, should be allowed to continue their occupation pending the outcome of the appeal, but he is adamant that the remainder, in other words, some 62 other respondents, be evicted.

The respondents, namely the persons to whom everyone has been referring to as the "unlawful occupiers", made a tender to pay rentals into a trust account pending the determination of the appeal. That tender was revised in open court to include a payment of R90 000,00, which the managing agent apparently holds in trust, in respect of arrear rentals and to pay the rentals which they are currently paying directly to Mr Mailula with a 10% annual escalation.

It appears from the affidavit filed on behalf of the unlawful occupiers that there are three sizes of units at Angus Mansions, namely bachelor flats (of which there are 24), one bedroomed units (of which there are also 24) and two bedroomed units (of which there are 21). The monthly rentals in respect of these flats are R685, R785 and R885 respectively.

The court has a discretion in an application such as this which must, of course, be exercised judicially. In the case of *South Cape Corp v Engineering Management Services* 1977 (3) SA 534 (A) Corbett JA, as he then was, said at 545 (D):

> "In exercising this discretion the court should, in my view, determine what is just and equitable in all the circumstances and in doing so would normally have regard *inter alia* to the following factors:
>
> 1. The potentiality of irreparable harm or prejudice being sustained by the appellant on appeal (respondents in the application) if leave to execute were to be granted;
> 2. The potentiality of irreparable harm or prejudice being sustained by the respondents on appeal (applicant in the application) if leave to execute were to be refused;
> 3. The prospects of success on appeal, including more particularly the question as to whether the appeal is frivolous or vexatious or has been noted not with the *bona fide* intention of seeking to reverse the judgment but for some indirect purpose, e.g. to gain time or to

harass the other party;

4. Where there is potentiality of irreparable harm or prejudice to both appellant and respondent the balance of hardship or convenience, as the case may be."

It is clear there is prejudice to persons who are to be evicted. That much is obvious and was vigorously argued by Ms Steinberg this afternoon.

It is also clear that there is prejudice to Mr Mailula, the owner of the property. He has a substantial debt arising from his purchase of the property, which is secured by a mortgage bond registered in favour of the second respondent in the application for the setting aside of the sale and transfer of the property. Interest is ticking away on that sum.

Mr Mailula has also indicated in his affidavit for leave to execute that there is a risk of foreclosure by the bank which has lent the money precisely because the owner is not in a position to repay the debt.

There is also the undisputed allegation that some R1 million is owing in respect of arrear electricity and water accounts in respect of which, obviously, the providers enjoy a high degree of preference and according to Mr Mailula there is the risk that they may foreclose.

Mr Cohen, who appears for Mr Mailula, (I have referred to him by his surname so as to avoid confusion) has submitted that the revised tender by the unlawful occupiers does not address the principal concern of his clients.

The principal concern is not so much that he receives the rental which the unlawful occupiers are currently paying to the managing agent of the property (who does not act for Mr Mailula) but that this old building in a considerably rundown state cannot be developed and accordingly proceeds made in respect of which the debt can gradually be liquidated and the substantial amount of interest met.

In respect of the prospects of success on appeal it must be borne in mind that the *South Cape Corporation* case was decided when there was an automatic right of appeal and obviously I accept that the appeal in this matter is not frivolous or vexatious. I also accept that it is not done to gain time or to harass the other party.

It is very difficult for a court sitting in judgment on its own judgment to determine what the prospects of success on appeal are likely to be. It is common cause that the facts in this particular case are novel and therefore I think it would be unwise for me to express a view as to whether the prospects of success on appeal are a good or bad or somewhere in between.

I shall take that issue no further than I obviously had to go in granting leave to appeal, namely, I accept that there is a reasonable prospect that another court may come to a different conclusion. It does not mean necessarily that the prospects of success are good.

Finally, there is the point which Corbett JA raised, namely, that where there is the potentiality of irreparable harm or prejudice to both the appellant and the respondent the balance of hardship or convenience, as the case may be, must be considered.

It is really this last point that is the one that must be addressed and, in my view, is determinative of the issue precisely because, as I have already indicated, I accept that there is prejudice to all parties in this matter regardless of what order I make. I also accept that there are reasonable prospects of success as this concept is legally understood.

It is important that Mr Mailula makes an exception and, in my view, an important exception in regard to those persons who are members of the section 21 company and who remain in occupation. After all, it was that particular application on behalf of the company that was the foundation stone upon which this whole case rested. Mr Mailula is prepared to make an exception for those five, and, in my view, that is important.

As regards the others, it is clear that although they are not affluent they are not indigents. In other words these are not the poorest of the poor. They are people who are paying rentals, as has already been indicated, of R685, R785 and R885 per month respectively.

The City Council was unable to offer any reason why these person should not be evicted. They have not being paying rentals to Mr Mailula, although it is true that they have now tendered to do so. This would have been a highly persuasive factor were it not for the fact that I accept as self-evident, if one has regard to the sums of money that are undisputed, that if Mr Mailula cannot be free to make progress in respect of the other flats, in other words the flats not occupied by Mthembu, Dladla, Mashele, Khoza and Chauke, that huge sums of money will be irrevocably lost, there would ultimately be a threat to

everybody because if the bank forecloses on this particular debt, never mind persons such as those to whom arrear water and electricity is paid, then everybody in the building would have serious difficulties.

I also think that it is important to bear in mind that there has never been a tender to repay Mr Mailula the R3.6 million that he paid for the property and from which he has borrowed money from the bank. Had there been a tender to restore to him that sum of R3.6 million the matter might well have been different.

It has been a difficult decision. I wish to make that clear. One does not lightly make the order sought, but I accept that, on a balancing of the respective interests, if I do not come to the assistance of Mr Mailula the consequences, as I have already indicated, would be grave, not only for those affected, but I would imagine for the city as well.

Let me try and explain. If the bank forecloses there would have to be a sale in execution of that building. There would be huge difficulties in attracting buyers where the status of tenants was singularly uncertain. That could have all sorts of implications in terms of the debts that are due to the service providers of water and electricity, it would also have serious implications for the bank, it would have serious implications for the willingness of banks to lend money for future urban development and obviously would seriously impact on the willingness of persons to buy these buildings.

I am sure everyone in this court today is aware of the fact that there has been a lot of criticism and complaint about so-called urban flight of capital, a lot of criticism of the fact that money seems to have

flown out of the city and gone to places like Sandton and that what has been happening is that the City of Johannesburg is slowly descending into decrepitude with rundown buildings.

I happen to be aware, as a judge who has sat on this division for some ten years, that the City Council is most anxious that there should be urban renewal taking place, is most anxious that this state of affairs of neglect, of rundown buildings should gradually be righted.

I cannot see how that process is likely to have any chance of success whatsoever if one countenances the continued occupation of this building by tenants who, after all, were not the persons originally assisted to acquire housing through the form of a section 21 company.

I wish to record that the court is packed today. I fully understand the sentiments of those persons who are tenants. I very much regret having to make a decision such as this, but sometimes judges have to make some hard choices and, as what is now the Supreme Court of Appeal, and was then the Appellate Division, indicated one has to carefully balance a whole lot of competing interests.

Accordingly, in my view, the applicant must succeed and an order is granted in terms of prayers 1 and 2 of the application for leave to execute dated 11 November 2008.