iAfrica Transcriptions (Pty) Ltd

IN THE SOUTH GAUTENG HIGH COURT OF SOUTH AFRICA

JOHANNESBURG

CASE NO: 51254/2009

DATE: 2010-05-18

In the matter between

ZEVENFONTEIN BELEGGINGS (Pty)Ltd	Applicant
and	
CEDRIC MORGAN-JONES	1st Respondent
DIANE MORGAN-JONES	2nd Respondent
CORENZA MORGAN-JONES	3rd Respondent

J U D G M E N T

WILLIS, J:

[1] This is an application for the eviction of the respondents from the property of the applicant. The application was initially brought as an urgent application in terms of the provisions of Section 5 of the Prevention

of Illegal Eviction from an Unlawful Occupation of Land Act 19 of 1998 and was set down for hearing on 11 December 2009.

[2] The matter was heard before my brother Kgomo J on 11 December 2009. It appears that he was of the view that the application substantially complied with the requirements of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act , No. 19 of 1998 (PIE) and granted an eviction order on the basis that the applicant is the owner and the respondents are in unlawful occupation of the property.

[3] The learned judge granted an eviction order, but allowed the respondents to show cause on 4 February 2010 why the previous order should not be made final. He also allowed the respondents to file answering affidavits by 14 December 2009 and further allowed the applicants to file a replying affidavit, if any, by 28 December 2009.

[4] On the 14 December 2009 the respondents delivered a notice of application for leave to appeal against the whole judgment granted by Kgomo J and this notice, of course, suspended the previous order. It appears that there were difficulties in reconstructing the file, which went missing and in Kgomo J's reasons have been in the process being reconstructed.

[5] In any even,t the parties agreed that the application would be re-enrolled and that the respondents would withdraw the application for leave to appeal and that the matter would be adjudicated on the merits in the motion court for this week. That agreement was reached before my sister, Nicholls J.

[6] The applicant is indeed the owner of the immovable property. The

respondents operate an Equestrian Centre on this property. The applicant has received an attractive financial offer to sell the property. The purchaser requires vacant possession and, for this reason, the applicant seeks the eviction of the respondents.

[7] The respondents have resisted the application for eviction on the basis that there was a prior oral agreement concluded between Mr Keith Van Der Spuy, who acts on behalf of Zevenfontein Beleggings, and the respondents in terms of which they could occupy the property. The argument of the respondents is that this agreement is still extant. I might point out that the respondents, it is common cause, have paid no rental whatsoever.

[8] The difficulty for the respondents is that the written agreement, which is not in dispute, and which was attached to the papers was concluded by Keith Van Der Spuy, Cedric Morgan-Jones, the 1st Respondent and Zevenfontein Beleggings (Pty) Ltd, the applicant in these proceedings records that:

> "This agreement constitutes the entire agreement between the parties and supersedes all prior written or verbal agreements or understandings or representations by or between the parties regarding the subject matter of this agreement and the parties will not be entitled to rely in any dispute regarding this agreement on any terms, conditions or representations not expressly contained in this

agreement".

The agreement also provides that:-

> "This agreement is the entire agreement between the parties and the parties record that save for what is contained herein there are no understandings, warranties or conditions agreed to between them. In particular the parties record that no warranty relating to the turnover or potential profitability of the business has been given."

And:

> "No amendment to or cancellation of agreement shall be valid and binding unless reduced to writing and signed by all the parties".

And:

> "No relaxation or indulgence that either party may grant to the other in respect of such obligations in terms hereof shall in any way prejudice or constitute a waiver or novation of such parties' rights in terms of this agreement".

[9] In my view, the agreement between the parties is as clear as one can reasonably hope to find in as much as it excludes the possibility of there being an oral agreement that prevailed over this written agreement in terms of which, it is common cause, the respondents no longer have any right to occupy the property.

[10] I may record that I am unimpressed by Mr *Hollander's* submissions

that the case of *Affirmative Portfolio CC* v *Transnet Ltd T/A Metro Rail* 2009 (1) SA 196 (SCA) provides an opportunity for the respondents to escape the consequences of the written agreement. This written agreement was quite clear and all embracing. Accordingly, it seems to me to be clear that the respondents have no right in terms of any lease agreement to continue occupying these premises at all.

[11] There was a further string to the bow of the respondents, namely that they claimed a *jus retentionis* by reason of certain useful improvements, which they claimed they had effected on the property, which enhance its value. Until this morning the value of these useful improvements was very vaguely set out. Furthermore, the amount that had actually been expended by the respondents on making these useful improvements was not set out.

[12] There is a supplementary affidavit that was filed this morning suggesting that the value of these useful improvements is some R1,6 million. The applicants have, however, tendered to pay this sum into a trust account consequent upon the sale proceeding to be held as security subject to certain conditions provided that the respondents institute an action for the recovery of the expenditure relating to the useful improvements.

[13] Of course, it is trite law that not only must the respondents have spent money on making useful improvements, but that the value of the property must have been increased. This is disputed by the applicants, but the law is that the person effecting the useful improvements recovers whichever is the lesser of the expenditure or the improvement in the value of property.

[14] I was referred by both parties to the case of *Rekdurum (Pty)*

Ltd v *Weider Gym Athlone (Pty) Ltd* 1997 (1) SA 646 (C). Counsel for the applicants emphasised the point appearing at 654 C that:

> "The logical consequence of the finding is that the respondent by utilising the premises for the purpose of conducting a health and fitness centre business thereon is wrongfully infringing the applicant's *dominium minus plenum.* It is that infringement which the applicant seeks to restrain by means of an interdict."

[15] I was also referred to the case of *Brooklyn House Furnishers (Pty) Ltd* v *Knoetze And Sons* 170 (3) SA 264 (A) and I myself found the case of *Fletcher and Fletcher* v *Bulawayo Waterworks Co Ltd* 1915 AD 636 particularly instructive. In that case Solomon JA delivering a judgment with which the Chief Justice and Maasdorp JA concurred (in those days it was common for all the judges hearing an appeal to deliver their separate judgments) indicated after a reference to the Digest (6,1,36) that, ultimately, a court must make an order that if fair to all the parties and must ensure that that order is not unfair to the owner of the land.

[16] After all, the purpose of a *jus retentiois* is not to enable an occupier of premises to use this as a guise to continue to remain occupying property in respect of which the occupier is not paying a rental or in respect of which it has no claim to ownership or possession, but rather to ensure that it is not left empty-handed in respect of useful improvements that it may have effected *bona fide*.

[17] The applicants in this matter have addressed this concern by, as I have already indicated, agreeing that the court may order, subject to certain

conditions, an amount to be paid over into a trust account as security for any claim, which the respondents may have in respect of useful improvements.

[18] Mindful of the fact that the respondents have been in occupation of this property on which there is an equestrian centre for a long time, I do not think that it would be appropriate that they be evicted today or tomorrow. They should be allowed a reasonable time in which to vacate the premises. The applicants have apparently conferred with the purchaser of the property and can afford the respondents 30 days in which to vacate the property. They have also offered alternative accommodation on a temporary basis to the respondents in their personal capacity. This also will be reflected in the court order. The respondents have sought an order that the applicants will not, in the interim, pending the vacation of the premises frustrate or undermine the operation of the respondents' business in the meantime. This also seems to me to be a reasonable element to be included in the order of the court.

[19] Against this background I have asked the parties to settle a draft order, not on the basis that it is made by consent, but simply that it fairly, after debate with counsel, reflects the intentions of the court, which have already been conveyed to the parties. This draft order will be given to me at 14:00 this afternoon, after the court now takes the normal adjournment. Provided there are no serious mishaps, an order will be made in terms of that draft as "X".

COURT ADJOURNS

COURT RESUMES

WILLIS J:

[21] In the Zevenfontein Beleggings v Morgan-Jones matter, a short while before the 13:00 adjournment, I said I would hand down the order which, I wish to emphasise, was not agreed between the parties. I afforded the parties an opportunity to design a properly crafted order which, nevertheless, would ensure that my intentions were fairly reflected. The draft handed up to me now does indeed meet these requirements.

[22] For the sake of completeness, I wish to add the following: not remotely and not under most radical, revolutionary, most far reaching interpretation of PIE, can the respondents be considered to be the poorest of the poor and the kind of persons deserving of any kind of special protection from eviction.

[23] I did not understand Mr *Hollander* to argue as much. I wish to add that if anyone suggests that one should, in a case such as this, call upon the municipality to provide a report as to why the respondents should not be evicted from this Equestrian Centre, my mind may well snap.

[24] An order is made in terms of the draft marked “X”.

Counsel for the applicant:	Advocate A Vorster.
Counsel for the respondents:	Advocate L Hollander.
Attorneys for the applicant:	Horak Inc.
Attorneys for the respondents:	Botha and Bekker.
Date of Hearing:	18 May 2010.
Date of Judgment:	18 May 2010.

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