IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: A5016/2014

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: Yes

In the ex parte application of:

UNLAWFUL OCCUPIERS OF ERF [2……] [V……] Appellant

KGANYAGO, KGADI JOYCE First Respondent

KHALO, RAISIBE SINKE Second Respondent

Coram: SATCHWELL ET WEPENER ET WINDELL JJJ

Heard: 29 MARCH 2016

Delivered: 31 MARCH 2016

JUDGMENT

WEPENER J:

[1] This is an appeal against the judgment and order of Mbongwe AJ, with leave of the Supreme Court of Appeal. The court a quo granted an order evicting the appellants from residential immovable property. The background facts found by the court a quo, and which are not in dispute, are the following:

'(T)he respondents acquired the property during 1989 and were issued with a 99 year lease certificate. They then obtained the loan and offered this property as security for such loan. A mortgage bond was duly registered on the property. The respondents defaulted at some stage and, despite being called upon to rectify the default, the respondents failed to do so. The mortgage bond holder issued a summons, attached the property and subsequently resold it ultimately to the applicants'

[2] In this summary the 'respondents' are the appellants in this matter. I need to add one aspect to the summary and that is that, after the default of the appellants, the property was attached and a sale in execution was held. The subject of the sale in execution included the appellants' right title and interest in the leasehold in respect of the immovable property.

[3] Based on these facts, the court concluded that the respondents were lawful owners of the property and granted and order to evict the appellants.

[4] At a previous hearing of this appeal the attorney appearing for the appellants withdrew as their representative and the presiding judge's secretary assisted the appellants to attempt to obtain legal representation. Despite all efforts, the appellants

were again not represented at the hearing. Due to the lapse of time since the judgment was given by Mbongwe AJ, this court decided that the matter had to be concluded.

[5] The appellants' appeal is based on three main grounds. I deal therewith in turn.

Non-compliance with Rule 17(4)B)

[6] The first ground is an alleged non-compliance with Rule 17(4)B) of the Rules of Court. The appellants argue that the failure of the respondents to set out their respective residential or work addresses in motion proceedings was fatal to the application. The absence of these addresses, it was submitted, was relevant as it

'. . . impeded adjudication of the following relevant circumstance:

(i) Whether applicants were merely use as a front by Mercantile Bank to mislead the court into believing that natural people were in need of assistance by ours courts.
(ii) Whether the failure to include the details was designed to obstruct the appellant in his case from recovery of costs that may be awarded to the appellant.'

[7] In my view neither of the issues impeded the adjudication of the matter. Whether the respondents were a front for a bank would not have been disclosed had they given their residential or work addresses. The question as to whether the appellants were able to recover costs is not alive. No costs order was granted in favour of the appellants nor are they seeking to enforce any costs order.

[8] The question of the addresses of the respondents is irrelevant to this matter. In addition, the appellants' remedy was to utilise the provisions of Rule 30(A) to compel compliance with provisions of Rule 17, which they failed to do. Had the appellants utilised the provisions of Rule 30(A) the allegations now raised could have been fully canvassed and dealt with. I am of the view that the appellants failure to invoke the provisions of Rule 30 at the appropriate time as they could have done, disentitles them to do so at a later stage.

Title relied upon by the appellants for prayer of eviction

[9] The appellants relied on their own title in support of their right of occupation of the property. It is alleged that, despite the ownership of the respondents, the lease held by the appellants is stronger than the rights of an owner. Although this may be true at first blush, there are several answers to this argument. Firstly, the respondents are indeed the registered owners of the property and this is not in dispute. Secondly, the only issue raised on appeal concerns a registered leasehold over the property allegedly held by the appellants. The leasehold is relied upon by virtue of a document issued to the appellants by a local authority in 1989. However, that leasehold no longer vests in the appellants. The appellants, after obtaining a leasehold entered into an agreement of loan with Bifco (Pty) Limited (who was later taken over by and ceded its rights to Mercantile Bank) and a bond was registered over the property. Due to the appellants' default under the bond, Mercantile Bank obtained judgment, had the property attached and sold it in execution. This sale in execution included the appellants' right, title and interest in the leasehold in respect of the immovable property which was bought by Mercantile Bank resulting in Mercantile Bank becoming the registered owner of the leasehold.

[10] These facts were set out in an affidavit resisting an application brought by the appellants in 2011 when they sought to interdict the transfer of the property to Mercantile Bank. The appellants failed in their attempt to interdict the transfer and knew full well that the leasehold had been lawfully transferred to Mercantile Bank. The appellants however, failed to disclose these facts when they filed their answering affidavit in this matter and persisted with their reliance on the leasehold. They elected to simply rely on the document which originally afforded them the leasehold without disclosing the subsequent events that lawfully terminated that leasehold.

[11] Until and unless the sale in execution and subsequent transfer of the leasehold to Mercantile Bank, which occurred in May 1997, are set aside, the leasehold which was transferred to the Mercantile Bank vested in the latter to deal with as it wished. The respondents became owners subsequent to Mercantile Bank disposing of the property.

[12] The only consideration in this matter is that the appellants were lawfully divested of the leasehold and their reliance thereon is consequently misplaced.

Failure to ensure the participation of the municipality

[13] The three further headings in the heads of argument all pertain to the failure to ensure the participation of the municipality in the proceedings in some or other form.

[14] This ground is raised on the basis that the court a quo ought to have ensured participation of the municipality to adjudicate upon whether suitable alternative accommodation was available for the appellants. The appellants relied on *Blue Moonlight Properties 39 (Pty) Limited v Occupiers of Saratoga Avenue and Another*[1] for this argument. However, the case before the court a quo did not identify the appellants as persons who are within the class of persons who are referred to as the poorest of the poor or the fact that the appellants may face the prospect of being homeless. It is only in such cases that it is required that the local authority be joined in proceedings. No such case was made out in this matter.

[15] Whether it is necessary to join a party in legal proceedings will depend on the circumstances and nature of the dispute of every specific case.[2] On the issue of joinder, the Constitutional Court found that, generally, a party must be joined in proceedings if it has a direct and substantial interest in any order the court might make or where an order cannot be effected without prejudicing it.[3]

[16] In *Blue Moonlight* the occupiers were identified and represented and had placed undisputed information before the court regarding their personal circumstances and

[1] 2009 (1) SA 470 (W).
[2] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Limited* 2012 (2) SA 104 (CC) (*Blue Moonlight*) para 45.
[3] *Blue Moonlight* para 44.

demonstrated that, if evicted, they would be rendered homeless.[4] *Blue Moonlight* further held that affected individuals, including children, elderly people, people with disabilities or women headed households, for whom the need for housing is particularly great, homelessness would result in particularly disastrous consequences.[5]

I

[17] In *City of Johannesburg v Changing Tides 74 (Pty) Limited and 97 Others (The Socio-Economic Rights Institute of South Africa intervening as amicus curiae),*[6] the court was faced with a situation where the occupied building was unsuitable for human habitation and in a state of disrepair, with no toilet or ablution facilities, no water supply or sewage disposal and illegal electricity connections, inadequate ventilation and refuse removal including human waste strewn in open spaces. The building was high-jacked. The court found that two factors loomed large in our case law on eviction, both under the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act*[7] (PIE) and otherwise, namely the risk of homelessness and the availability of alternative land or accommodation, in particular the constitutional obligations of the arms of government to address the plight of those who face and emergency situation of homelessness.[8]

[18] In *Changing Tides* the court found as follows:[9]

'What is clear and relevant for present purposes is that the State, at all levels of government, owes constitutional obligations to those in need of housing and particularly to those whose needs are of an emergency character, such as those faced with homelessness in consequence of an eviction.'

[19] The Constitutional Court has on several occasions stressed that in the present situation in South Africa where housing needs are so great and resources are so limited there cannot be an absolute right to be given accommodation.[10]

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[4] Para 39.
[5] Para 92.
[6] 2012 (6) SA 294 (SCA).
[7] Act 19 0f 1998.
[8] Para 13.
[9] Para 14.
[10] *Changing Tides* supra para 15.

[20] With regards to s 6(3)(c) of PIE it has been held that there is no unqualified constitutional duty on local authorities to ensure that there cannot be an eviction unless alternative accommodation has been made available.[11]

[21] In some circumstances a reasonable response to potentially homeless people may be to make permanent housing available and in others it may be reasonable to make no housing at all available.[12]

[22] In the *Occupiers of Erf 101, 102, 104 and 112, Shorts Retreat, Pietermaritzburg v Daisy Dear Investments (Pty) Ltd and Others*[13] and *Shulana Court*[14] the circumstances in which the occupiers were living indicated the likelihood that at least some of them might be rendered homeless as a result of the eviction. Accordingly, it was held that the municipality should have been engaged in the process before granting an eviction order.[15]

[23] In *Changing Tides* the court found that there was an 'overwhelming probability' that the grant of an eviction order would result in at least some of the occupiers being rendered homeless. That allegation was specifically made and not challenged. It was further found that once that was the case, the grant of an order would necessarily result in the City's constitutional obligations to such persons being engaged, which would necessarily include conditions relating to the provision of temporary emergency accommodation. On the strength thereof, and as the City manifestly had a direct and substantial interest in the outcome of litigation, it had to be joined as a necessary party.[16] More importantly, in *Changing Tides*[17] it was found as follows:

'Whenever the circumstance alleged by an application for an eviction order raise the possibility that the granting of that order may trigger constitutional obligations on the part of the local

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[11] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) at para 28; *Changing Tides* para 15.
[12] *Changing Tides* para 15; *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC) para 18.
[13] [2009] 4 All SA 410 (SCA).
[14] *Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* 2010 (9) BCLR 911 (SCA).
[15] *Changing Tides* paras 22-23; *Shorts Retreat* para 10; *Shulala Court* paras 14-15.
[16] Para 37.
[17] Para 38.

authority to provide emergency accommodation, the local authority will be a necessary party to the litigation and must be joined.'[18]

[24] In *Changing Tides* the court further stated that it does not mean that the local authority will need to become embroiled in every case in which an eviction order under PIE is sought.[19] The question, in the first instance, is whether the circumstances of the particular case are such as may trigger a local authority's constitutional obligations in regard to the provision of emergency accommodation. Having regard to the aforegoing, it is inevitably so that the focus must fall on the best way of identifying the persons to whom the City owes an obligation and ensuring that their needs are catered for. As a final point, the following in *Changing Tides*[20] is apposite:

'In considering the grant of an eviction order the court is concerned with the plight of those who, as a result of poverty and disadvantage, are unable to make alternative accommodation arrangements themselves and require assistance from the local authority to do so. It is particularly concerned to ensure, so far as possible, that those who face homelessness are provided at least with temporary emergency accommodation. The ancillary orders attaching to an eviction order will not affect those who are able to find a roof for their heads and a place of shelter without assistance, nor those who for reasons of their own, such as an unwillingness to have any involvement with a public authority, will not seek assistance, even if it means nights spent on the streets.'

[25] Griffiths J summarised position as follows in *Mtshelakana:*[21]

'[9] As I understand these cases, the function of a court in performing its judicial oversight is to examine the papers before it and determine therefrom whether or not there is an apparent abuse of a fundamental right or the rights of the respondent or respondents. In practically every case which has come before me in this regard it is generally clear from the papers as to whether or not this is the case. On the extreme, there are the cases generally dealt with in the above-mentioned judgments involving extremely poor, landless people who are merely attempting to exercise the rights afforded them by the Constitution in claiming a small portion of land and erecting a modest shelter in order tom protect themselves from the elements. On the other

[18] Also see *Shorts Retreat* para 11.
[19] Para 38.
[20] Para 47.
[21] *Premier, Eastern Cape v Mtshelakana* 2011 (5) SA 640 (ECM) paras 9-11.

extreme, there are those cases where well-heeled tenants have remained in occupation of rented premises well beyond the rights accorded them in terms of the lease without paying rental therefor, despite being in a position to do so.

[10] It seems to me that in the former case, and depending on the circumstances thereof, the court may well decide (in the exercise of its judicial oversight) that the local municipality should be joined as a party to the proceedings on the basis that it may in those circumstances have a direct a substantial interest in the proceedings in that it is obliged to ensure adequate accommodation for such persons in dire need of adequate shelter.

[11] In the latter case, however, it does not appear to me that the municipality would have a direct and substantial interest in the matter in that the respondent concerned would clearly have the means to be able to source accommodation elsewhere, either on a rental basis of by purchasing his or her own property. Thus, in such a case, there would be no obligation on the court to ensure that the municipality is joined as a party.'

[26] The appellants in this case occupied the property and obtained a loan under a mortgage bond in order to effect certain extensions to the property. They attached proof of payment of a number of amounts to Bifco in relation to the bond. There are no facts which would justify a court to regard the appellants as falling into the class of persons requiring intervention by the local authority.

[27] Having regard to the facts of this matter there was no necessity to join the local authority.

[28] During argument before us, it became apparent that counsel representing the respondents was at sea regarding the matter. When questioned about the quality of his appearance before us, counsel had to concede that he was indeed of extremely limited, if any, assistance to the court in his presentation of his clients' case.

[28] In the circumstances the appeal is dismissed with costs. The 45 days ordered by Mbonge AJ runs from the date of this judgement. The costs of counsel's appearance before this court on behalf of the respondents are disallowed.

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W L WEPENER

JUDGE OF THE HIGH COURT

I agree.

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K SATCHWELL

JUDGE OF THE HIGH COURT

I agree.

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L WINDELL

JUDGE OF THE HIGH COURT

Appellants: In Person

Counsel for Respondents: Adv Nxumalo

Attorneys for Respondents: Mbele Attorneys