IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: A3056/2014

DELETE WHICHEVER IS NOT APPLICABLE

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

In the matter between:

IRFAN KHAN Appellant

And

PASSENGER RAIL AGENCY OF SOUTH AFRICA First Respondent

CITY OF JOHANNESBURG METROPOLITAN Second Respondent

Coram: Tshabalala J and Crouse AJ

Heard: 2 February 2015

Delivered: 13 February 2015

Summary: Eviction proceedings. Section 26 of the Constitution does not allow for an individualised specific claim to particular housing at a particular place. The Appellant is not entitled to a specific home, ie a three bedroomed home in a specific neighbourhood at a specific rental and if this is not available, claim entitlement on state aided housing in conflict with the Municipality's policy.

JUDGMENT

CROUSE AJ:

1. This is an appeal against the decision of the learned magistrate, Johannesburg, that it was just and equitable, as contemplated in the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE), to evict the Appellant and his family from premises belonging to the First Respondent. It was accepted that the First Respondent is an organ of State. On 14 April 2014 the learned magistrate ordered that the Appellant and his family had to vacate the premises on 15 August 2014. The Appellant and his family are still in occupation of the premises pending the decision on appeal. It should be added that although relief other than eviction was sought in the First Respondent's notice of motion, there is no indication on the papers that relief other than eviction was requested.

2. I will briefly deal with the facts of this matter. The Appellant emigrated from Pakistan in 1996. He married his wife, Michelle Lydia Irfan Khan in 1999. She is a South African citizen. They have three children, respectively born on 12 October 2001, 26 July 2004 and 19 February 2008. The Appellant, his wife and two older children took occupation of the house belonging to the First Respondent at 67 Railway Street Mayfair Station, Mayfair, Johannesburg in August 2004 as the apartment in which they were living became too crowded and they wanted a more spacious home. This house in Mayfair is a three bedroomed home, with separate domestic quarters.

3. According to the Appellant he entered into yearly lease agreements with the First Respondent since 2005. In support thereof the Appellant attached proof of rental payments to the First Respondent in 2005 and 2006. The lease agreement relevant to these proceedings was entered into on 1 March 2007 for a period of two years. In terms of this agreement the Appellant had to pay rental of R2069.30 per month with a 6% escalation after one year. I pause to mention that during argument of the matter in the Magistrate's Court, the parties realised that the terms of the agreement, which the First Respondent attached to the founding

papers, were not signed by the Appellant. The Appellant's counsel however placed on record that the agreement was in any event not placed in dispute. Although it is regrettable that this oversight occurred, nothing turns thereon.

4. This lease terminated 28 February 2009. As no further written lease was entered into and the Appellant and his family remained in occupation, it is presumed that the lease continued on a month-to-month basis, until cancellation. According to a letter of demand dated 12 May 2010 the Appellant was in arrears with his rental payments in the amount of R43 423.80 as at May 2010. The Appellant failed to make good this deficit and the First Respondent cancelled the lease due to non-payment of outstanding arrears.

5. The outstanding rental escalated according to the First Respondent to R60 692.28 by January 2011. The First Respondent thereafter brought an application for the Appellant's eviction.

6. In his answering affidavit[1] the Appellant's initial reaction to the eviction application was to deny that the First Respondent had any right to cancel the lease. He stated that the property was in such a state of disrepair ("a dump") that he had to spend R32 000 to make it habitable by doing regular maintenance work to maintain the property. As a result of the maintenance done, the Appellant contended that he could not afford to pay the agreed rent any longer. I pause to state that this amount spent on maintenance work just highlight the numerous discrepancies in the Appellant's papers concerning the joint household income, which will be dealt with hereunder. In addition, the Appellant stated that the First Respondent sent him a letter dated July 2012 acknowledging that there was an agreement that the Appellant could remain in the property. This letter could not be attached to the Appellant's papers as, according to him, it had gone missing at the time of making the affidavit.

7. The first leg of the Appellant's defence as set out in the answering papers was that he was not an unlawful occupier. In the alternative, his defence was that it

[1] The answering affidavit bound in the appeal record was not commissioned. However, counsel for the Appellant gave the assurance that the affidavit before the Magistrate was commissioned, but was mislaid.

would not be just and equitable to evict him, as the First Respondent did not meaningfully engage him prior to the application for eviction, and he and his family would be rendered homeless, should they be evicted.

8. During argument in the Magistrate's Court, the first leg of the defence was abandoned and the first leg of the alternative argument was not proceeded with. The remaining issue was decided in favour of the First Respondent. The Magistrate specifically found that the Appellant's financial situation could no longer sustain the lifestyle that he had chosen for himself.

9. The Appellant's contention on appeal is that his family would be rendered homeless should they be evicted, and therefore the Second Respondent has a constitutional obligation to provide temporary emergency accommodation. A new point which has never been raised at any prior stage was also raised, namely that procedurally the First Respondent's papers did not comply with PIE requirements. There is no merit in this argument.

10. In my opinion the issue to decide is this: Will the eviction of the Appellant *sans* the availability of emergency housing render the Appellant and his family homeless? Or put differently: Can the Appellant refuse to vacate the First Respondent's property until such time as the Second Respondent provides emergency accommodation to him?

11. Section 26 of our Constitution reads that:

> *"(1) Everyone has the right to have access to adequate housing;*
> *(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.*
> *(3) 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."*

12. Evictions of people from their homes may only take place under judicial control. The judicial officer must ensure that evictions are justifiable and that all relevant circumstances have been taken into account. PIE creates a tension between the

interests of landowners and those in occupation of property and under threat of eviction. *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter & others 2000 (2) SA 1074 (SE)* at 1081D-E. Our Constitution in section 25 and 26 provides protection for the rights of both landowners and persons under the threat of eviction. As stated in *Ndlovu v Ngcobo*; *Bekker and another v Jika 2003 (1) SA 113 (SCA)* paragraph 17, it must be remembered that PIE does not sanction expropriation of the landowner directly or indirectly; PIE could merely delay or suspend the exercise of the landowner's full proprietary rights until a determination has been made whether it is just and equitable to evict the unlawful occupier and under what conditions to evict.

13. In *Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC)* the Constitutional Court held that a case-specific approach is required, meaning that relevant circumstances in a particular eviction application will be determined by its factual and legal context. In similar vein the Constitutional Court held in *President of the RSA v Modderklip Boerdery (PTY)LTD 2005 (5) SA 3 (CC)* at paragraph [43] that the precise nature of the State's obligation in any particular case and in respect of any particular right depended on what was reasonable in the light of the right and the interest at risk, as well as on the circumstances of each case.

14. In *Malan v City of Cape Town 2014(6) SA 315 (CC)* the following statement is made:

> *"On the one hand, public policy, as informed by the Constitution, requires in general, that parties should comply with contractual obligations that have been freely and voluntarily undertaken. This consideration is expressed in the maxim pacta sunt servanda, which, as the Supreme Court of Appeal has repeatedly noted, gives effect to the central constitutional values of freedom and dignity. Self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity. The extent to which the contract was freely and voluntarily concluded is clearly a vital factor as it will determine the weight that should be afforded to the values of freedom and dignity. The other consideration is that all persons have a right to seek judicial redress. These considerations express the constitutional values*

> *which must now inform all laws, including the common-law principles of contract."*

15. In *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others 2005 (2) SA 140*; (CC) paragraphs 28 – 29, Mokgoro J held "any measure which permits a person to be deprived of existing access to adequate housing, limits the rights protected in section 26(1)." Such a limitation can of course be justified in terms of section 36 of the Constitution. That Court went on to find that the right to adequate housing is 'the right to live somewhere in security, peace and dignity". The Court further stated that the idea of security of tenure envisaged by section 26 of the Constitution was to reject invasive legislation of the past. Therefore, while it is so that PIE is currently applicable in the eviction of persons who default on their contractual obligations in a lease situation, PIE did not have as its primary concern the protection of debtors who voluntarily entered into lease agreements and then default.

16. In *The Occupiers, Shulana Court,11 Hendon Road, Yeoville v Mark Lewis Steele19 2010 (9) BCLR 911 (SCA)* paragraph 16, the SCA held that: "It will, generally, not be just and equitable for a court to grant an eviction order where the effect of such an order would be to render the occupiers of the property homeless." In *Ives v Rajah 2012 (2) SA 167 (WCC)*, at paragraph [26] the applicant's failure to proactively find a solution or alternative accommodation, where she was unable to pay rent or compensate the owner of the property for a period of nearly two years and where she merely sat back and criticised the owner was found to be a consideration in assessing what is just and equitable.

17. *In NDPP v Zuma* 2009 (2) SA 277 (SCA) the SCA stated at paragraph 26:

> *'Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP),*

> *together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.'*

18. The first issue to be decided is whether the Appellant will be rendered homeless, if evicted, bearing in mind the Plascon-Evans test principle, referred to above.

19. The Appellant's assertion that he would be homeless is based on the fact that he is currently in a more precarious financial position than the position he was in when he entered into the lease agreement. In his papers he indicates conflicting dates as to when he lost his formal employment. In his affidavit of December 2012, he stated that his employment was terminated in August 2012, but in the later affidavit he stated that he was unfairly dismissed in April 2011. In the December 2012 affidavit he states that his wife is self-employed and earns approximately R2 000 per month. In the same affidavit he contradicts himself as to his earning capability in that he states that he earns less than R2 000 per month, while later in the same affidavit he states that he earns between R2 000-R3 500 per month. In his affidavit on his personal circumstances filed in April 2014, he states that his average monthly earnings are R3 500 after his travelling, lunch and telephone expenses are deducted. In this affidavit he also states that in late 2012 his wife had to stop working due to an eye disease. His wife testified *viva voce* - also in April 2014 - that she had to stop working as a result of the said eye disease in 2008 already. Both the Appellant and his wife stated that in addition to his income, they received R2 100 in social grants. His wife also testified that the Appellant has commenced with doing extra work and that this brings in an income.

20. On the Appellant's version, when he entered into the lease with the First Respondent, he was earning R3 000 per month and his wife was earning R2 000 per month. It must be accepted that he *bona fide* entered into the 2007 lease agreement on the premises that on a joint income of R5 000 per month, he could make rent payments. On this joint income of R5 000 they were also capable of

spending R32 000 on maintenance to the house. In conflict with the provisions of the lease, the Appellant chose on his version to withhold the rent, even after the maintenance was done. Taking into consideration the Appellant's last affidavit and the evidence of his wife, their joint income is now at least R5 600 per month. In addition the Appellant is doing extra work. The Appellant had not taken the Court into his confidence as to the value of this additional work. In terms of the Municipality's report there are rental options available from R1 200 per month. The only logical conclusion is therefore that on the family's monthly income, they will not be homeless. The learned magistrate's finding that the family would not be able to maintain their current life style in a 3 bedroomed home is no doubt correct, but that will not render them homeless. The Appellant can by no means be considered rich though.

21. When consideration is given the requirement as set out in PIE, the following observations needs to be made:

21.1. The Appellant was not homeless when he entered into the contract with the First Respondent. He merely wanted a more comfortable environment to live in. His position is therefore not akin to that of a person making use of informal and make-shift housing because of a lack of resources. In contrast to such a person, the Appellant was/is not living in unsatisfactory living conditions.

21.2. The Appellant has been in occupation of the property for nearly 10 years, from 2004 until present. The lease contract was already terminated for non-payment of the rent more than 4 years ago in October 2010. Since that date the Appellant has been holding over. Therefore although the Appellant has become fairly settled, this settlement was at the expense of the First Respondent's business venture and at the expense of *bona fide* honouring his contractual obligations.

21.3. But for a belated and inadequate investigation, the Appellant has not endeavoured to find alternative housing. Even in argument before us it was the Appellant's contention that the duty to find alternative accommodation for him rested squarely on the State and not on him. As he is not a homeless person, to place no obligation on him to seek a solution to the problem, is in my opinion absurd. A constitutional democracy does not mean that there are

no obligations on citizens. In *Residents of Joe Slovo Community v Thubelisha Homes 2010 (3) SA 454 (CC) at [408]* Sachs J stated that citizens have to be active, participatory and responsible, and make their own individual and collective contributions towards the realisation of benefits and entitlements that they claim for themselves, not to speak of the wellbeing of the community as a whole.

21.4. The Appellant in conflict with public policy has not sought to honour his contractual agreements with the First Respondent, even though he was in a position to do so. The Applicant had rather sought to entertain other unnecessary endeavours such as clothing accounts and financial services and clubs.

21.5. As the financial circumstances of the Appellant has not worsened after his wife illness, her illness is at best a neutral element in the eviction application.

21.6. A Court is also enjoined to look with special interest to the interest of the minor children. It was contended that their respective schools are near to their current home, and that it would not be in their best interest to be moved to another school. Many a child has relocated to another school without adverse influence warranting court interference. This aspect alone is insufficient to authorise the holding over *vis-à-vis* the First Respondent's right to use the property as a commercial enterprise as intended.

22. The Appellant's contention is further that there is a constitutional duty on the Second Respondent to provide emergency housing. Section 153 of the Constitution states that: "A municipality must- (a) structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community; and (b) participate in national and provincial development programmes." The above requires the municipality to interpret the national and provincial policy and programmes, and to make choices on how to practically implement it and how to best achieve its objects. This is a matter of policy. The Second Respondent has determined a specific socio-economic approach to emergency housing, namely that emergency housing is only available to households with an income of R3 500 and less. The Appellant does not qualify

for emergency housing when this means test is applied. In argument the Appellant's counsel was specifically asked whether the Appellant can contend that the Second Respondent's policy was unreasonable. The Appellant does not contend this and there is no review of this policy before this Court, nor is there an obvious reason for it at this stage. As section 26 of our Constitution deals with the progressive realisation of the right to housing within the state's available resources, the Second Respondent's response thereto must of necessity entail matters of policy and therein lies scope for reasonable differences of approach and prioritisation. For this reason a court must handle such policy with circumspection, because of the separation of powers principle.

23. There can be no unqualified constitutional duty on local authorities to provide alternative accommodation in all evictions. In *Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC)* at paragraph [16], the Constitutional Court stated that section 26 of our Constitution did not "entitle the applicants to claim shelter or housing immediately upon demand".

24. In my opinion a progressive realisation of the right to adequate housing cannot be translated into an individualised specific claim to a particular instance of housing of a particular kind at a particular place. Therefore the Appellant is not entitled to a specific home, i.e. a three bedroomed home in a specific neighbourhood at a specific rental and if this is not available, claim his entitlement to state aided housing.

25. In returning to the interest of the children, it must be added that if the Appellant had been successful in his bid for emergency housing, it was then within his contemplation of moving the children away from their current schools. This in itself is an indication that the Appellant did not regard moving the children to another school would necessarily be adverse to their best interest.

26. Consequently, I am of the opinion that it would be just and equitable for the Appellant and his family to be evicted.

27. I would propose an order whereby the Appellant's appeal is dismissed. As the First Respondent's counsel indicated that he does not seek a cost order, I propose that no order as to costs be made.

28. However, the Magistrate's date for the eviction, namely 15 August 2014 is now in the past. It would therefore be incumbent on this Court to determine a fair period within which the Appellant and his family must vacate the house. Bearing in mind that the First Respondent had previously suggested a period of two months as a fair period, and that a period of just less than two months will conveniently be during a long weekend wherein there is no school, the Appellant is given until 31 March 2015 to vacate the property.

29. Counsel and attorneys for the Appellant are thanked for going beyond the call of duty to present Appellant's case on a *pro bono* basis.

30. **In the circumstances the following order should be made**:

    30.1. The appeal is dismissed;

    30.2. The Appellant must vacate the premises at 67 Railway Street, Mayfair Station, Mayfair, Johannesburg on 31 March 2015.

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E CROUSE

Acting Judge of the High Court

Gauteng Local Division, Johannesburg

I Agree. It is so ordered.

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N.D TSHABALALA

Judge of the High Court

Gauteng Local Division, Johannesburg

Heard: 2 February 2015

Judgment delivered: 13 February 2015

Appearances:

For Appellant: Adv.A Rawhani

Instructed by: Bell Dewar Inc

For Respondent: Adv.T.Machaba

Instructed by: Mncedisi Ndlovu and Sedumedi Attorneys