REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

Case No.: A3101/2019

Reportable: No

Of interest to other judges: No

DATE: 2/06/2021

In the matter between:

KIEWIET ELIAS TSHABALALA **Appellant**

And

THABO VICTOR MOLETSANE **First Respondent**

EMFULENI LOCAL MUNICIPALITY **Second Respondent**

JUDGMENT

VAN DER MERWE AJ:

INTRODUCTION

[1] The appellant appeals against the judgment and order handed down by magistrate N. Kamba on 8 October 2018, dismissing the appellant's application to evict the first respondent from the property situated at Erf [....], Sebokeng, Unit 13 also known as [....] Zone 13 Sebokeng. ("the property")

[2] The second respondent did not oppose the proceedings.

RELEVANT FACTS

[3] The property was registered in the names of the appellant and his wife on 22nd September 1999 as per title deed number [....], annexed as "KET1" of the founding affidavit in support of the eviction application. "KET1" is a Certificate of Registered Grant of Leasehold (the "leasehold"), granted to the Appellant and his wife.

[4] The appellant avers that he and his wife had allowed the appellant's niece (the daughter of his brother), Mrs. Nkutha to occupy the property. Neither he nor his wife had any knowledge as to how the first respondent gained access to the property and came to occupy it. At the end of 2016 the appellant was approached by his niece and the first respondent to hand over the title deed of the property, which he refused as he did not sell the property to anyone.

[5] There is no lease agreement between the appellant and first respondent. The first respondent is occupying the property and he pays no rent to the appellant or anyone else.

[6] The Emfuleni Local Municipality rates and taxes account dated 7 February 2018 is addressed to the appellant and shows an outstanding amount of R100 104.18 at the time. The first respondent is not paying anything towards the account.

[7] A letter of demand was sent to the first respondent to vacate the property in February 2017, which demand is attached to the founding affidavit, indicating that despite numerous requests the first respondent failed to vacate the property and accordingly affording the first respondent 30 days at the time to vacate the property.

[8] The first respondent denied all these allegations and stated that he took occupation of the said property in 2001 after he purchased the property for R52 000 from the appellant's daughter and son-in-law, Mr. and Mrs. Nkutha ("the Nkuthas"),

who in turn purchased the property from the appellant and his wife. He paid the full purchase price to the Nkuthas.

[9] In this regard he relied on two separate deeds of sale. The first deed of sale is dated 20 September 2000 from which it appears that the Appellant and his wife sold the property to the Nkuthas for an amount of R22 000.00. The second deed of sale is dated 24 July 2001 (10 months later) from which it appears that the first respondent purchased the property from the Nkuthas for an amount of R52 000. In both deeds of sale Messrs Pienaar Swart & Nkaiseng Incorporated ("PSN") were authorized to attend to the necessary registration.

[10] The first respondent attaches no proof that registration of the property was effected into his name or into the names of the Nkuthas at the time when he signed the deed of sale with the Nkuthas (the second deed of sale). No explanation is given with regards to the instructions to PSN pertaining to the registration, payment of transfer duty and the like.

[11] The first respondent then states further that he was under the *bona fide* belief that he was the lawful owner and attended to several improvements to the property. He changed the doors, painted inside and outside, the ceilings, the gates and the outside room.

[12] At the time of signing his opposing affidavit the first respondent reserved his right to file a valuation report in support thereof and it was submitted on his behalf by his legal representative that he had a lien over the property based on unjustified enrichment.

[13] The first respondent stated in the opposing affidavit that he lives on the property with his son who was 7 years old at the time as well as with an older child who was a student at the time. He indicated that he had no alternative accommodation because he earned no income at that time, although he added in his opposing affidavit that he is an educator at the Mbali Combined Private School, Orange Farm ext.1. According to the appellant the first respondent can stay with family, apply for his own RDP house or rent his own place.

[14] Regarding the transaction between the appellant, his wife and the Nkuthas (the first deed of sale), the appellant replied under oath that he never received the purchase price from the Nkuthas and their transaction never realised.

[15] The appellant furthermore denied knowledge of the transaction between the first respondent and the Nkuthas (the second deed of sale) and denied that the Nkuthas had the authority to sell his property.

[16] The court *a quo* dismissed the application for eviction with costs, reasoning that the issue of ownership is in dispute and that the court a quo lacks jurisdiction to decide on the issue of who the rightful owner is.

[17] The magistrate was not satisfied that the first respondent is an unlawful occupier for the following reasons:

a. The first deed of sale between the Nkuthas and the Appellant and his wife remains undisputed evidence before the court *a quo*.
b. The second deed of sale between the Nkuthas and the first respondent also remains undisputed evidence before the court a quo.
c. Reliance is also placed on a supporting affidavit of Mr. Nkutha in respect of the purchase of the property from the appellant and his wife in the court *a quo*.
d. Nowhere does it appear from the appellant and his wife's papers that the deed of sale as per "M5" (the first deed of sale) never existed or that it was not a valid purchase of the property in question from the appellant and his wife.

THE GROUNDS OF APPEAL

[18] In the notice of appeal filed in the magistrate's court on 2 April 2019, the appeal turns on the issues that the court *a quo* erred in:

a. Dismissing the application for the eviction of the first respondent.

b. Finding that the first respondent is not an unlawful occupier of the immovable property.

c. Finding that the first respondent had, on a balance of probabilities, shown that he was a lawful occupier of the immovable property.

d. Failing to consider, properly or at all, the argument by the appellant and his wife that the principles of prescription apply to the claim by the first respondent that he had a legal right to ownership of the immovable property.

e. Stating that the magistrate's court cannot decide on issues of ownership of immovable property, when such ruling was never expected or required from her.

f. Finding that the sale agreements, alluded to by the first respondent as "M4" and "M5" [being the first and second deeds of sale], was "undisputed evidence" of the fact that he was not an unlawful occupier.

g. Finding that the appellant and his wife were not regarded as the registered owners of immovable property by virtue of TL [....], when this was never denied by the first respondent.

h. Accepting, without reservation, the first respondent's submission that he was under the *bona fide* belief to be the lawful owner of the property – even though it was shown that he has neglected to

i) attend to registration of transfer of ownership of the property into his name, or ii) ever attended to payment of the municipal accounts pertaining to the property.

[19] After receipt of the transcripts from the court *a quo* on 8 August 2019, a notice of appeal was filed in this court on 16 September 2019 on the grounds that the court *a quo* erred in finding that:

a. It is not a competent court to decide on the issue of ownership
b. It cannot make a determination as to the validity of the sale agreement
c. The first respondent is not an unlawful occupant
d. The first respondent had a valid defence to the claim for eviction
e. The claim for eviction should be dismissed
f. The appellant should be paying the costs.

ISSUES TO BE DECIDED ON THE DAY OF THE APPEAL

[20] On the day of the appeal the appellant was represented by Mr. Prinsloo employed by the Legal Aid Board and the first respondent appeared in person. At the commencement of the hearing the first respondent applied for the matter to be postponed. After discussion with the parties it became clear that the issues to be decided were:

a. Whether the application for postponement ("THE POSTPONEMENT APPLICATION") should be granted

b. Whether an application for condonation by the Appellant regarding his failure to file his appeal within the time periods provided in terms of the Uniform Rules of Court ("THE CONDONATION APPLICATION") should be granted.

c. Whether the appeal had any merits ("THE MERITS OF THE APPEAL").

THE POSTPONEMENT APPLICATION

The facts

The submissions by the first respondent

[21] The first respondent initially during argument requested a postponement for a period of three months and later that it be postponed for six months, which he submitted would grant him sufficient time to find employment, enabling him to afford attorneys who could represent him in the appeal.

[22] The first respondent submitted that after his attorneys of record had withdrawn, he, on 4 December 2019, approached the offices of the Legal Aid South Africa in Vereeniging to assist in the matter. He initially submitted that they declined to take on his case on the basis that they are already representing the Appellant. The first respondent then read the contents of a letter in his possession from the Legal Aid office in Vereeniging, which states that his application for legal aid failed because his case lacked merit. The writer of the letter also informed the first respondent that should he be aggrieved by the decision to refuse him legal assistance with his case, he may appeal the decision, which appeal should be raised with the National Office of Legal Aid South Africa. The court stood the matter down and asked the appellant's representative, Mr. Prinsloo, to enquire from the National

Office regarding the status of the appeal. Upon resumption of the hearing Mr Prinsloo informed the court that the National Office reported to him that there is no record of the first respondent's appeal.

[23] The first respondent submitted further that he is trying to collect funds from his family members to assist him with funding for the litigation.

Submissions on behalf of the appellant

[24] The application for postponement by the first respondent was opposed on two bases: firstly, the prejudice the appellant would suffer should the matter pend for another six months, bearing in mind that the first respondent resides on his property without compensating the appellant for the use thereof and secondly, the first respondent had sufficient time to obtain other legal representation since his erstwhile attorneys withdrew, which was on or about 15 November 2019.

The legal principles relating to postponements

[25] In Erasmus, Superior Court Practice, Vol 2, pp D1-552A, the following is said about postponements (footnotes omitted):

> "The legal principles applicable to an application for the grant of a postponement by the court are as follows:
>
> (a) The court has a discretion as to whether an application for a postponement should be granted or refused. Thus, the court has a discretion to refuse a postponement even when wasted costs are tendered or even when the parties have agreed to postpone the matter.
>
> (b) That discretion must be exercised in a judicial manner. It should not be exercised capriciously or upon any wrong principle, but for substantial reasons. If it appears that a court has not exercised its discretion judicially, or that it has been influenced by wrong principles or a misdirection on the facts, or that it has reached a decision which could not reasonably have been made by a court properly directing itself to all the relevant facts and principles, its decision granting or refusing a postponement may be set aside on appeal.

(c) An applicant for a postponement seeks an indulgence. The applicant must show good and strong reasons, i.e. the applicant must furnish a full and satisfactory explanation of the circumstances that give rise to the application. A court should be slow to refuse a postponement where the true reason for a party's non-preparedness has been fully explained, where his unreadiness to proceed is not due to delaying tactics, and where justice demands that he should have further time for the purpose of presenting his case.

(d) An application for a postponement must be made timeously, as soon as the circumstances which might justify such an application become known to the applicant. If, however, fundamental fairness and justice justify a postponement, the court may in an appropriate case allow such an application for postponement even if the application was not so timeously made.

(e) An application for postponement must always be bona fide and not used simply as a tactical manoeuvre for the purpose of obtaining an advantage to which the applicant is not legitimately entitled.

(f) Considerations of prejudice will ordinarily constitute the dominant component of the total structure in terms of which the discretion of the court will be exercised; the court has to consider whether any prejudice caused by a postponement can fairly be compensated by an appropriate order of costs or any other ancillary mechanism.

(g) The balance of convenience or inconvenience to both parties should be considered: the court should weigh the prejudice which will be caused to the respondent in such an application if the postponement is granted against the prejudice which will be caused to the applicant if it is not."

[26] It is common cause that the first respondent's erstwhile attorneys McLoughlin Porter Incorporated withdrew on or about 15 November 2019. The date of withdrawal is after the notices of appeal were filed in the court *a quo* (2 April 2019) and this court (16 September 2019) respectively. The first respondent had known since November 2019, alternatively by 4 December 2019 after he had applied for legal aid, further alternatively by 27 January 2020 (more than a year ago) when he again applied for legal aid that he would in all probability not be able to obtain legal assistance from Legal Aid South Africa. The first respondent submitted that he is

trying to collect funds from his family members to assist in funding the litigation, but was unable to proffer any explanation as to why he was unable to make any progress in this regard for over a year.

[27] The record reveals that in the court *a quo*, the matter was postponed on three occasions, firstly on 22 May 2018 to afford the first respondent an opportunity to obtain legal representation, secondly on 12 June 2018 and thirdly on 16 July 2018, the reason being that the 1st Respondent had only placed his legal representatives in funds the week before and delivery of the opposing affidavit was accordingly only effected on the morning of the hearing on 16 July 2018. The appellant and his wife needed time to deliver a reply and the first respondent tendered costs. The matter was eventually heard on 20 August 2018.

[28] In *Olerilwe Daniel Koagile v PRASA* the following was stated by Van der Linde J:

> "Generally, if a bona fide reason is furnished for such a postponement and if the defendant will not be unduly prejudiced by a postponement, such an application is granted, provided of course there is any point in the postponement"[1]

[29] Taking into consideration the merits of the appeal, if a postponement is allowed the Appellant will be severely prejudiced, suffer irreparable harm and it is not in the interests of justice to grant a postponement.

[30] The first respondent had not made out a case for the postponement.

[31] The application for postponement was accordingly refused.

THE CONDONATION APPLICATION

The facts

[1]Unreported judgment *Daniel v PRASA (01663/14) [2019] ZAGPJHC 139 (19 May 2019)*

[32] The application for condonation was served on the first respondent's erstwhile attorneys on 18 September 2019. This was approximately two months before the first respondent's attorneys of record had withdrawn. The application for condonation was not opposed at the time.

[33] The first respondent opposed the application for condonation on the day of the appeal stating that he was not aware of such application.

Chronology

[34] The appellant was formerly represented by Lautenbach Attorneys when the application for eviction was heard in the magistrate's court.

[35] Shortly after judgment on 8 October 2018, the Appellant approached Legal Aid South Africa for assistance regarding the possibility of an appeal against the judgment. He is not sure why the file was only opened during February 2019.

[36] Legal Aid office in Vereeniging opened a file on 4 February 2019.

[37] The attorney representing the appellant received the file on 21 February 2019.

[38] On 26 February 2019 he attended to the Sebokeng Magistrate's court and obtained copies of the court file.

[39] On 2 April 2019 a Notice of Appeal, dated 12 March 2019 was filed at the court *a quo.* The magistrate filed her reasons on the same day, stating that she had nothing further to add to her written judgment dated 8 October 2018.

[40] On 3 April 2019, the appellant's attorney requested a typed record of the proceedings, but only received same on 8 August 2019 due to a backlog of cases awaiting transcription.

[41] On 16 September 2019 the appellant delivered a notice of appeal and an application for condonation for failure to file his appeal within the time periods prescribed.

[42] The application for a the date for the hearing of the appeal, dated 31 January 2020 was served by the sheriff on the first respondent on 23 March 2020 and filed in this court on 14 October 2020. On 8 March 2021 a date for the appeal was allocated by the registrar.

[43] The notice of set down of the appeal was served on the first respondent on 31 March 2021.

[44] On behalf of the appellant it is submitted on the papers that the delay in bringing the appeal did not prejudice the first respondent as he all along continued to live on the property. The first respondent confirmed that he is still residing at the property.

[45] As a result of the failure to prosecute the appeal within the prescribed time periods, the appeal had automatically lapsed in terms of rule 50(1) of the Uniform Rules of Court. However, the condonation application is essentially an application for the appeal to be reinstated.

The law

[46] In the matter of *Uitenhage Transitional Local Council v South African Revenue Services* the following was stated:

> "one would have hoped that the many admonitions concerning what is required of an applicant in a condonation application would be trite knowledge among practitioners who are entrusted with the preparation of appeals to this court: condonation is not to be had merely for the asking; a full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. It must be obvious that, if the non-compliance is time-related then the date, duration and extent of any obstacle on which reliance is placed must be spelled out" [2]

[2] 2004(1) SA 292 (SA) para 6

[47] As a general rule a court, when considering an application for condonation is required to have regard to the following factors:

a. The degree of non-compliance
b. The explanation therefor
c. The importance of the case
d. the [respondent's] interest in the finality of the judgment sought to be appealed from
e. the convenience of the court
f. the avoidance of unnecessary delay in the administration of justice[3]

[48] In considering the above factors and taking into consideration that the affidavit in support of condonation is somewhat sketchy, it is nevertheless important to bear in mind that the appellant's prospects of success are very good. These are discussed below.

[49] It is for this reason that the application for condonation is granted and the appeal is reinstated.

THE MERITS OF THE APPEAL

[50] The appellant asks that the order made by the court a quo on 8 October 2018 be set aside and that the first respondent be evicted from the property three months after the date of the order of this court.

[51] At the hearing of the appeal the first respondent admitted that the title deed (being the leasehold) relating to the property rests with the appellant. He agreed that the property was never transferred into his name.

Whether the first respondent is an unlawful occupier

[52] An application for eviction can be based on contract or on the owner's ownership. In order to succeed with eviction, the owner of the property has to allege

[3] *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd and Others*[2013] ZASCA 5; [2013] 2 All SA 251 (SCA) para 11 and the authorities cited therein

and prove his ownership and the fact that the said property is held by another without his consent. The owner of a property will produce a title deed indicating that the property is registered in his name. The occupier will on the other hand have to prove that he has a valid right to occupy the property.

[53] The appellant and his wife are the lawful holders of a leasehold.

[54] There exists no agreement between the appellant and the first respondent allowing the latter to occupy the property.

[55] Accordingly, the first respondent is an unlawful occupier.

Whether the first respondent has a valid defence

[56] The first respondent laboured under a wrong impression that he was the owner of the property and improved the property as described (changing the doors and painting inside, outside, the ceilings, the gates and the outside room).

[57] He claimed in the opposing affidavit dated 16 July 2018 that he has a lien over the property based on unjustified enrichment and reserved his right to file a valuation in support thereof.

[58] In the matter of *Guman NO v Ansari and others*, the legal principles around the dilatory defence of a lien were reiterated and it was stated that among other things:

> "To successfully raise the defence of a lien, the defendant must allege and prove a lawful possession of the object" [4]

[59] The first respondent did not ever have lawful possession of the property.

CONCLUSION

[60] It is my finding that the first respondent is an unlawful occupier.

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[4] *Guman NO v Ansari and others* (2011/2648) [2001] ZAGPJHC 124 (23 September 2011) at para [15] and authorities cited therein.

[61] In considering all the facts and circumstances on the papers filed of record, it is just and equitable to order the first respondent's eviction. Taking into consideration that a minor child, now approximately ten years old also resides at the property, it would in my judgment be prudent and fair to grant the first respondent approximately three months to arrange his affairs and acquire alternative accommodation.

ORDER

[62] In the result the following order is made:

1. The appeal is reinstated.
2. The appeal succeeds.
3. The decision of the court *a quo* made on 8 October 2018 is set aside.
4. The first respondent and any person occupying the property through him are to vacate the property situated at Erf [....] Sebokeng Unit 13, also known as [....] Zone 13 Sebokeng and remove their belongings by no later than 30 August 2021, failing which the sheriff is hereby authorized to carry out the eviction.
5. The first respondent is ordered to pay the costs of the application in the court *a quo*.

A.M. VAN DER MERWE
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

I AGREE

B. VALLY
JUDGE OF THE HIGH COURT
JOHANNESBURG

APPEARANCES

DATE OF HEARING : 11 May 2021
DATE OF JUDGMENT : 2 June 2021

APPELLANT'S ATTORNEY	: Mr. N.H. Prinsloo (Attorney) Legal Aid South Africa Vereeniging - : Local Office
FIRST RESPONDENT	: In person