

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NO: 16742/22P

In the matter between:

SOLEPROPS 145 CC

APPLICANT

and

MANDLA FELIX NDLOVU

FIRST RESPONDENT

**THE UNLAWFUL OCCUPIERS
OF 3[...] B[...] STREET, PIETERMARITZBURG**

SECOND RESPONDENT

MSUNDUZI MUNICIPALITY

THIRD RESPONDENT

JUDGMENT

Nicholson AJ:

Introduction

[1] Soleprops 145 CC ('Soleprops'), the applicant, is the owner of a property situated at 3[...] B[...] Street, Pietermaritzburg ('the property'). It seeks an order in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ('PIE Act') for the eviction of Mandia Felix Ndlovu (Mr Ndlovu), the first respondent, all those occupying through Mr Ndlovu, and the unknown unlawful occupiers of the property, being the second respondent.

[2] It is common cause that the second respondent occupies the property with the permission of, and as tenants of Mr Ndlovu.

Factual background

[3] On 24 March 2016, Soleprops and Mr Ndlovu entered into an agreement of lease whereby Soleprops leased the property to Mr Ndlovu.¹ A material condition of the agreement was that Mr Ndlovu would take occupation of the property in exchange for rental payments.

[4] While it is not apparent from the papers when Mr Ndlovu took occupation of the property, as a deposit was payable on or about 1 April 2016 with the rental to be paid on 1 May 2016, it may be inferred from the papers that Mr Ndlovu took occupation during this period.

[5] On 10 November 2016, Soleprops and Mr Ndlovu entered into a written deed of sale whereby Soleprops agreed to sell the property to Mr Ndlovu for an amount of R22 million.²

[6] Mr Ndlovu has since rented out individual portions of the property to students who attend the university in Pietermaritzburg, and has not made any allegation, neither in the papers or from the bar, that Mr Ndlovu resides on the premises. Accordingly, while this application is prosecuted under the PIE Act, the interest of Mr Ndlovu is merely commercial. The second respondents, being the students occupying through Mr Ndlovu have not opposed this application.

Common Cause

[7] Upon perusal of the papers, the following is either axiomatic or common cause:

7.1 Second respondent does not oppose the application.

¹ Answering affidavit para 3.1 at page 45 and annexure 'AA1' at page 51.

² Founding affidavit para 10 at page 8 and annexure 'FA2' at page 21.

7.2 Mr Ndlovu has neither paid the rental amount, nor the purchase price. Accordingly, he is in breach of both the deed of sale and the lease agreement.

7.3 Mr Ndlovu's interest in the property is commercial; accordingly, the PIE Act finds no application in Mr Ndlovu's circumstances.

7.4 Soleprops, through its attorney, sent two letters to Mr Ndlovu cancelling the deed of sale; the first letter was drafted on 6 January 2022³, and a second letter was drafted on 3 October 2022.⁴

7.5 Mr Ndlovu responded on 31 January 2022, and merely sought an extension but raised no other query.

7.6 Second respondent occupies the property for purposes of student accommodation and not as a primary residence.

7.7 In as far as the second respondent is concerned, it has not been disputed, neither in the papers, nor in argument before me, that Section 4 of PIE has not been complied with.

Dispute

[8] In his answering affidavit, Mr Ndlovu raises a single defence, namely that they do not occupy the property through the deed of sale but through the lease agreement, and accordingly, the wrong agreement had been cancelled. In the circumstances, they are not illegally on the property as they occupy the property through a lease agreement. In the premises, the single issue to be determined is whether or not the lease agreement had been cancelled.

[9] It is instructive that no defence relevant to the PIE Act has been raised. Accordingly, no grounds have been placed before me that it would not be just and equitable to evict second respondent.

³ Founding affidavit para 11.9 at page 10 and annexure 'FA3' at pages 26-27.

⁴ Founding affidavit para 15 at page 12 and annexure 'FA4' at pages 28-31.

Argument

[10] Mr Blomkamp, who appeared for Soleprops, made three submissions in motivation for the eviction order:

10.1 Firstly, when answering to the letter of cancellation, Mr Ndlovu merely sought an extension but did not raise the issue of the incorrect agreement being cancelled.

10.2 Secondly, at common law a lease may be cancelled either in the founding affidavit or in the summons, and accordingly, the lease has been cancelled in these papers.

10.3 Thirdly, he called upon the court to use pragmatism and common sense in dealing with this matter because if the matter is not dealt with on these papers, it would merely mean that Soleprops will immediately issue a cancellation letter putting Mr Ndlovu on terms to come up to date with the arrears which are in excess of R1 million, plus unpaid utilities in excess of R1.8 million and thereafter cancelled the lease, and return to court thereafter.

[11] Mr Zondi, who appeared for Mr Ndlovu, argued that in light of the deed of sale never having come into existence due to the fact that the condition precedent to raise the finance did not materialise, the lease agreement was revived and the occupation of the property is therefore not unlawful because Soleprop purported to cancel the non-existent agreement, and not the lease agreement. Accordingly, the lease agreement has not been cancelled and since they occupy the property through the lease agreement, their occupation is not unlawful.

[12] As I have already pointed out, it is common cause that Mr Ndlovu has complied with neither the lease agreement, nor the deed of sale. Furthermore, save for stating that he has effected various repairs to the property, he does not state when he intends complying with either of the agreements or bringing the arrear rental up to date. Accordingly, it appears that Mr Ndlovu intends remaining on the property indefinitely, at the expense of Soleprops.

[13] It is apparent that the deed of sale was concluded after the lease agreement. The two agreements cannot run parallel to each other, which would mean that the deed of sale would have cancelled the lease agreement. Accordingly, should the argument of Mr Ndlovu be followed, it would mean that before the deed of sale could have been concluded, Soleprops would have needed to ensure vacant occupation of the property by evicting Mr Ndlovu and thereafter giving him back occupation. This, in my view, would be unintelligible.

[14] Further, Mr Ndlovu failed to respond to the first letter of cancelation and in the second letter of cancelation. hemerely requested time to respond without denying that they are in unlawful occupation and asserting that they occupy through the lease agreement and not the purchase and sale agreement. In this regard, *McWilliams v First Consolidated Holdings (Pty) Ltd*⁵ is instructive, where the court observed:

'I accept that "quiescence is not necessarily acquiescence" (see *Collen v Rietfontein Engineering Works* 1948 (1) SA 413 (A) at 422) and that a party's failure to reply to a letter asserting the existence of an obligation owed by such party to the writer does not always justify an inference that the assertion was accepted as the truth. But in general, when according to ordinary commercial practice and human expectation firm repudiation of such an assertion would be the norm if it was not accepted as correct, such party's silence and inaction, unless satisfactorily explained, may be taken to constitute an admission by him of the truth of the assertion, or at least will be an important factor telling against him in the assessment of the probabilities and the final determination of the dispute. And an adverse inference will the more readily be drawn when the unchallenged assertion had been preceded by correspondence or negotiations between the parties relative to the subject-matter of the assertion.'

[15] In the premises, Mr Ndlovu's failure to set the record straight once receiving the cancelation notices, and his failure to explain the reason for not setting the record straight, infers that Mr Ndlovu too believed that he occupied through the

⁵ *McWilliams v First Consolidated Holdings (Pty) Ltd* 1982 (2) SA 1 (A) at para 10

purchase and sale agreement, and raises the issue of the non-cancellation belatedly in the answering affidavit in a last-ditch attempt to conjure a defence.

[16] Even if I am wrong, various authorities encourage this court to use common sense and pragmatism⁶ as suggested by Mr Blomkamp. In light of the fact that Mr Ndlovu, is not complying with the lease agreement that he purports to be in effect and has not given any indication when and how he intends to comply with the agreement, it is not in the interest of justice to allow him to continue to occupy the property. Accordingly, applying common sense and pragmatism, the application must succeed.

[17] In the premises, I am of the view that sale agreement has been properly cancelled, and therefore, the application must succeed.

[18] Turning to the second respondent, it is trite that I have a discretion with regard to the eviction date and such discretion must be exercised judicially, in the interest of justice, and taking into account just and equitable considerations. It is common cause that second respondent are tertiary education students. The term for tertiary education comes to an end late November or early December. Accordingly, staying the eviction for six months will allow second respondent to complete the school year without disruption and without any prejudice to them.

[19] With regard to costs, it is usual for costs to follow the result. Mr Blomkamp has requested the costs of Senior Counsel to be awarded, in the event the applicant is successful. The respondent has not made any submissions in that regard. In light of the costs of the property and the importance of the matter, I see no reason not to grant the costs of Senior Counsel.

Order

⁶ Chief Executive Officer, South African Social Security Agency, and others v Cash Paymaster Services (Pty) Ltd 2012 (1) SA 216 (SCA) para 29; Canton Trading 17 (Pty) Ltd t/a Cube Architects v Hattingh NO 2022 (4) SA 420 (SCA) para 80; Thoroughbred Breeders' Association of South Africa v Price Waterhouse 2001 (4) SA 552 (SCA) para 52; LagoonBeach Hotel (Pty) Ltd v Lehane NO and others 2016 (3) SA 143 (SCA) para 15 and 16; Born Free Investments 247 (Pty) Ltd v Kriel NO [2019] ZASCA 21 para 10; Solomon NO and others v Spur Cool Corporation (Pty) Ltd and others 2002 (5) SA 214 (C) para 46

[20] In the result, I make the following order:

1. The first respondent and the second respondent, and all those occupying through the first respondent are ordered to vacate the property described as Portion 11 of Erf 2[...] Pietermaritzburg, situated at 3[...] B[...] Street, Pietermaritzburg within six months of the granting of this order.
2. Should the first and second respondents, and all those occupying through the first respondent, fail to vacate the property described above, within the timeframe referred to above, the Sheriff or her duly appointed Deputy, together with the assistance of the South African Police Services and/or private security company, is directed to evict such persons from the property.
3. The first respondent is ordered to pay the costs of this application which include
the costs of senior counsel where employed.

NICHOLSON AJ

Date heard: 19 July 2023

Date handed down: 22 August 2023

Appearances

For applicant: PJ Blomkamp SC

Instructed by: Vathers Attorneys
13 Prince Edward Street
Pietermaritzburg
Ref: UJ VATHER/Nikita/Soleprops 145 CC

For first respondent: SH Zondi

Instructed by: MS Dlamini Attorneys
222 Hoosen Haffejee Street
Pietermaritzburg

No appearances for second and third respondents