THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 126/11

In the matter between:

RAJAGOPAUL VENEKETAS NAIDOO	**FIRST APPELLANT**
MRS NAIDOO	**SECOND APPELLANT**

And

RABIND SUNKER	**FIRST RESPONDENT**
MUTHU PILLAY	**SECOND RESPONDENT**
RUKMANY PILLAY	**THIRD RESPONDENT**
SURIMA INVESTMENTS CC	**FOURTH RESPONDENT**

Neutral citation: *Naidoo v Sunker* (126/11) [2011] ZASCA 216 (29 November 2011)

Coram: CLOETE, HEHER, CACHALIA, SHONGWE JJA and PLASKET AJA

Heard: 8 November 2011

Delivered: 29 November 2011

Updated:

Summary: Practice – application – special defence – sufficiency of averments – whether case for referral to evidence made out.

ORDER

On appeal from: KwaZulu Natal High Court (Pietermaritzburg) (Msimang JP, Giyanda and Mokgohloa JJ sitting as court of appeal):

The appeal is dismissed with costs including the costs of two counsel. The appellants are ordered to vacate the property by no later than 29 February 2012.

JUDGMENT

HEHER JA (CLOETE, CACHALIA, SHONGWE JJA AND PLASKET AJA concurring):

[1] The respondents are the registered owners of the Remainder of Portion 1 of the farm Umkomanzi Drift No 1357, Registration Division ET situate at Umkomaas, KwaZulu-Natal, in extent 27,5186 hectares. The property is situated in a proclaimed township and has been zoned for commercial purposes.

[2] The first appellant is a man of about 84 years of age. He has lived on the property for forty years or more. The second appellant is his wife. She is in her seventies.

[3] On application by the respondents to the KwaZulu-Natal High Court, Durban (Sishi J) the appellants were ordered to vacate the property by 15 October 2009. Their counter-application declaring them entitled to retain possession and occupation pending the furnishing by the respondents of security for the payment of compensation for improvements effected on the property was dismissed. An appeal to the Full Court (Mokgohloa J, Giyanda J and Msimang JP concurring) against the order of eviction was likewise dismissed. This Court granted the appellants special leave to appeal further.

[4] The facts are slightly unusual and induce some sympathy for the appellants. At all relevant times until his death in 1975 the property was owned by one C S Naidoo.

According to the first appellant he worked as Naidoo's 'right hand man' in relation to social upliftment projects for the Indian community. Naidoo offered to sell him a small portion of the property on which to build a house. Until the property was subdivided to enable a sale to take place the first appellant was permitted to erect the house and occupy it with his family at a nominal rental of R5 per month. The first appellant and Naidoo demarcated an area about a quarter of an acre in extent and pegged the boundaries. Initially the first appellant had in mind a temporary wood and iron structure, but when Naidoo heard of his intentions he persuaded him to construct a permanent building of bricks and mortar, undertaking that, if the property was not subdivided and sold to the first appellant, he and his family could nevertheless live on it for the rest of their lives at the previously agreed rental. As the first appellant regarded Naidoo as a man of his word he felt no need of a written agreement.

[5] The first appellant duly built a substantial dwelling house on the property with the intention that it should serve him and his family for the rest of their lives. Until 1982 he continued to pay rental at the agreed amount. About the beginning of 1983 he and Naidoo's heirs agreed to double the rent and the first appellant honoured that agreement until December 1992 when he was told that payment was no longer required.

[6] The first appellant married the second appellant in 1981 after the death of his first wife. They have lived continuously on the property ever since, with, apparently, a break of a year or so some ten years ago to which I refer below. The first appellant's children have long since left the property and established their own homes. Such right of occupation as the second appellant may have derives only through the first appellant.

[7] The respondents purchased the property from Naidoo's heirs on 27 February 1998 for R500 000,00. They currently own 25,8242 hectares of it including that portion on which the appellants reside.

[8] In his answering affidavit the first appellant deposed as follows:

'The Applicants, Rabind Sunker, Muthu Pillay (and his wife) and the member of the Fourth

Applicant (Sushilla Devi Sunker) were all aware prior to purchasing the property and prior to taking transfer that I occupied the property. They were also aware of the terms of my occupation, namely, that I was a tenant and that my wife and I were entitled to occupy the property for the rest of our lives. Most pertinently, they were fully aware of the improvements which I made to the property.'

[9] By contrast, the first respondent, speaking for all the respondents, deposed in reply (subject to a general denial of such of the appellants' allegations that were not consistent with the content of his affidavits) as follows:

'At the time of us purchasing the property we were informed by the Sellers, one of whom is Tej Naidoo, that there were certain tenants on the property and that such tenants did not have written leases but that they were paying rental on a monthly basis.

One **SANDRA MOODLEY**, who was the Estate Agent negotiating for the sale of the property to us, informed the tenants including the First Respondent that the property was being acquired by us.

We purchased the property in terms of a written Agreement dated the 27th February 1998 and shortly thereafter the Second Applicant and I went to the property and informed the tenants including the First Respondent of the fact that we had purchased the property and that they should vacate the property.'

[10] The tenants, including the first appellant, apparently ignored the request. The respondents then caused letters of demand to be sent to them. Thereafter they instituted actions in the Scottburgh magistrate's court. The proceedings against the first appellant in that court are fully described in the application papers before the court of first instance and form part of the record before us.

[11] In the magistrate's court the respondents alleged that the first appellant was in unlawful occupation of their property and claimed damages of R500 per month for the duration of such occupation. They claimed ejectment of the first appellant and all persons claiming occupation through him from the property and damages of R9500,00. The first appellant defended the action. He raised the following defences:

1. That he was an occupier as defined in s 1 of the Extension of Security of Tenure Act 62 of 1997 ('ESTA') and he pleaded a failure on the part of the appellants to comply with ss 9(2)(a), (d)(i), (ii) and (iii) of that Act.

2. That he had resided on the land since 1961 with the consent of the previous owners of the property and the appellants and invoked the deeming provision in s 3(4) of ESTA.

3. That the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ('PIE') applied to the proceedings and that the appellants had not made allegations necessary to sustain a cause of action with regard to that Act.

4. That he was entitled to the protection afforded by s 26(3) of the Constitution, which provides that no one may be evicted from their home without an order of court made after consideration of all relevant circumstances.

5. That the respondents acquired ownership of the property well aware of the occupation by the first appellant and his family and with full knowledge of the first appellant's rights of occupation of the house arising from an oral agreement of lease at a monthly rental of R10 and further that the respondents acquired ownership subject to the first appellant's rights as they existed in the oral agreement.

[12] The first appellant did not, in the magistrate's court proceedings, aver or rely upon a lease which was to extend indefinitely or for life, although, of course, there had been nothing to prevent him from raising a defence based on such a lease. Nor did he aver that the respondents were aware of a lease for that duration. His case was a monthly tenancy. He was at all material times represented by attorneys.

[13] For reasons which are obscure the respondents amended their particulars of claim. While continuing to allege unlawful occupation by the first appellant they deleted the claim for ejectment.

[14] The magistrate concluded that the respondents had proved their case. He granted judgment as prayed, ie damages for unlawful occupation. Whether the appellants complied with the order is not clear. But they did not vacate the property. Nor did they appeal against the order.

[15] In November 2008 the respondents initiated the present proceedings. They applied on motion to the KwaZulu-Natal High Court, Durban for the eviction of the

appellants. As I have noted earlier they were successful both then and later in the appeal to the Full Court.

[16] The court a quo held that the appellants carried an onus to prove that the respondents had knowledge of the long lease when they acquired the property and that they had failed to discharge that burden. But these were proceedings on motion for final relief. All that was required of the appellants was to adduce evidence sufficient to provide a prima facie answer to the case for eviction. If the evidence so presented was such as to give rise to a bona fide conflict of fact then the application could not be resolved in favour of the appellants without a referral to evidence, which the appellants had not sought. The onus in relation to the special defence played no role in that regard. *Ngqumba / Damons NO / Jooste en Andere v Staatspresident en Andere* 1988 (4) SA 224 (A) at 260I-263D.

[17] Before us the appellants' counsel chose to argue his case on only two grounds. The first was that the appellants were 'occupiers' as defined in s 1 of ESTA and entitled to the protection provided by that Act. The second was that the first appellant was a tenant under a lease for longer than ten years of which the respondents had knowledge at the time of their purchase of the property and by the terms of which they were accordingly bound.

The ESTA argument

[18] It was common cause that the appellants had not raised the applicability of the Act or placed an indirect reliance on it in their affidavits. Nevertheless their counsel relied on s 2(2) of the Act:

'Land in issue in any civil proceedings in terms of this Act shall be presumed to fall within the scope of the Act unless the contrary is proved.'

He submitted that the fact that the appellants had relied in argument on the Act in all the courts was sufficient to render the proceedings 'proceedings in terms of this Act'. He cited no authority for the proposition which appears to be clearly wrong.

[19] In application proceedings the notice of motion and affidavits define the issues

between the parties and the affidavits represent their evidence. If an issue is not cognisable or derivable from these sources there is little or no scope for reliance on it. It is a fundamental rule of fair civil proceedings that parties, both plaintiffs and defendants, should be apprised of the case which they are required to meet; one of the manifestations of the rule is that he who relies on a particular section of a statute must either state the number of the section and the statute, or formulate his case sufficiently clearly so as to indicate what he is relying on: *Yannakou v Apollo Club* 1974 (1) SA 614 (A) at 623G; *Naude and Another v Fraser* 1998 (4) SA 539 (SCA) at 563D-564A. That the appellants did not do.

[20] At a factual level, the importance of the principle is illustrated in the present case by the reliance placed by appellant's counsel on s 2(1) of ESTA. Not all land falls within the application of the statute:

'Subject to the provisions of section 4, this Act shall apply to all land other than land in a township established, approved, proclaimed or otherwise recognised as such in terms of any law, or encircled by such a township or townships, but including-

(a) any land within such township which has been designated for agricultural purposes in terms of any law; and

(b) any land within such a township which has been established, approved, proclaimed or otherwise recognised after 4 February 1997, in respect only of a person who was an occupier immediately prior to such establishment, approval, proclamation or recognition.'

Thus if s 2(1) is not engaged, the presumption does not operate. In such circumstances any attempt to introduce reliance on ESTA would carry with it the onus to allege and prove that the land in question falls subject to the Act. It will be recalled that the respondents stated in their founding affidavit that the property fell within a proclaimed township without identifying the date of proclamation. The appellants did not in their answer take issue with that averment. As it is common cause that the appellants were occupiers with consent of the owner as at 4 February 1997 their counsel submitted that s 2(1) of ESTA prima facie applied to the property occupied by the appellants. That however depends on a question of fact, the date of proclamation. Because the appellants did not raise ESTA in their answering affidavit, the respondents were not put on notice to deal with the date in their reply and did not do so.

[21] In my view the appellants have not relied upon ESTA in these proceedings in any manner sufficient to bring themselves within s 2(2) of ESTA. I recognise that ESTA is social legislation designed to protect the poor and dispossessed and that a more flexible approach may be necessary to ensure that unrepresented persons are not deprived of that protection. This is not such a case.

The knowledge of the respondents at the time of purchase

[22] I have quoted, in paragraph 8 of this judgment, from the answering affidavit of the appellants in which they allege, baldly and without substantiating facts, that the respondents were all aware prior to purchasing the property of the terms of the appellants' occupation including the fact that they were entitled to such occupation for the rest of their lives. Relying upon the rule in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634 counsel submits that the case fell to be decided on the appellants' version.

[23] In *Wightman t/a J W Construction v Headfour (Pty) Ltd and another* 2008 (3) SA 371 (SCA) paras 11 to 13, I had occasion to consider the adequacy of allegations in answering affidavits in the context of the rule. What I said there applies with equal force to a respondent who endeavours to raise a special defence as here. See also *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (CC) para 26. The alleged knowledge of the respondents concerning the long lease was averred without reference to any detail as to when, where and how the information was communicated to them. Such facts being peculiarly within the knowledge of the first appellant, his silence on the matter is inexcusable and explicable only by the inference that the bald allegation was false or not capable of substantiation. As I have pointed out the defence was not raised in the magistrate's court proceedings, a fact which is unexplained and merely strengthens the inference. In these circumstances it cannot be concluded that a bona fide defence has been made out by the appellants founded on the respondents' knowledge of the existence of a long lease.

[24] The appellants' counsel submitted that it might be possible to establish by cross-examination of the respondents or other witnesses that the respondents did, as a fact,

know of the existence of the long lease. The submission fails because the appellants have not brought themselves within the parameters laid down in *Minister of Land Affairs and Agriculture v D & F Wevell Trust* 2008 (2) SA 184 (SCA) at 205A-C:

'It would be essential in the situation postulated for the deponent to the respondent's answering affidavit to set out the import of the evidence which the respondent proposes to elicit (by way of cross-examination of the applicants' deponents or other persons he proposes to subpoena) and explain why the evidence is not available. Most importantly, and this requirement deserves particular emphasis, the deponent would have to satisfy the court that there are reasonable grounds for believing that the defence would be established. Such cases will be rare, and a court should be astute to prevent an abuse of its process by an unscrupulous litigant intent only on delay or a litigant intent on a fishing expedition to ascertain whether there might be a defence without there being any credible reason to believe that there is one. But there will be cases where such a course is necessary to prevent an injustice being done to the respondent.'

In this instance the shortcoming is manifest. No credible reason exists to believe that evidence is available to establish the defence and any injustice that might result would be attributable solely to the inaction of the appellants themselves.

[25] There is a further consideration. The principal issue between the parties in the magistrate's court was the lawfulness of the first appellant's occupation. That issue was decided against him. Although the facts set up by the respondents are sufficient to justify a conclusion that lawfulness was *res judicata* at the time of the application in the present case such a case has not been raised or relied on in express terms by or on behalf of the respondents. It is accordingly unnecessary to take the question further.

[26] The appellants have not sought to impugn the order for eviction. It was common cause that the respondents had complied with all the formalities required of them under the PIE Act. Section 4(7) of that Act provides:

'(7) If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by

women.'

The court of first instance did consider the appropriateness of an order with regard to the provisions of the section. We have not been asked to reconsider that question but I have nevertheless done so because of the special circumstances of this case, the delay in its finalisation (for which the respondents are at least in part responsible) and the advanced age of the appellants. I am satisfied that the order of eviction was properly made for the following reasons:

(1) the appellants have known since at least the conclusion of the proceedings in the magistrate's court in January 2006 that their occupation was unlawful;

(2) they contested the application without a bona fide defence to it;

(3) the first appellant has several adult children and the evidence adduced by the appellants prima facie established the ability of each child to care for them if required;

(4) the appellants have previously left the property to take up residence in an old age home or a similar place of residence but later returned to the property of their own volition;

(5) there is evidence on record of the availability of suitable alternative accommodation;

(6) despite being represented by attorneys and counsel in all three courts no attack was made on their behalf on the propriety of an order of eviction.

[27] For all these reasons the appeal is dismissed with costs including the costs of two counsel. The appellants are ordered to vacate the property by no later than 29 February 2012.

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J A Heher
Judge of Appeal

APPEARANCES

APPELLANTS:	M Pillemer SC (with him Z Rasool)
	Govender Pather & Morgan, Durban
	Bezuidenhouts Inc, Bloemfontein
RESPONDENTS:	N D Hollis SC (with him K Naidu)
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	Honey Attorneys, Bloemfontein