Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: **A393/18**

In the matter between:

MARK WAYNE VAN STADEN First Appellant

ALL OTHER OCCUPIERS OF ERF […], J ROAD, NOORDHOEK Second Appellant

vs

ANDRE LOUIS VAN HEERDEN Respondent

Coram: **Dolamo J *et* De Waal AJ**
Hearing: 1 March 2019
Judgment: 7 March 2019

JUDGMENT

DE WAAL AJ:

[1] This is an appeal against an eviction order granted by the Magistrate's Court for the district of Simons Town (per Mr Brown) on 23 August 2018. In terms of that order the First Appellant was required to vacate Erf […], J. Road, Noordhoek ("**the J. Road property**") on or before 31 October 2018, failing which the Sheriff of the Court was to evict him and all persons holding title under him by 1 November 2018. The Court *a quo* further granted costs in favour of the Respondent.

[2] On 19 February 2019, the Respondent's attorneys withdrew as attorneys of record for him in this appeal. The Respondent abides the decision of this Court in the appeal.

[3] Appellants have applied for condonation for the late noting of the appeal. The appeal should have been noted by 21 September 2018 but was only served and filed by 29 October 2018. The reasons for the late noting were the First Appellant's lack of knowledge of the Court Rules; difficulty in obtaining suitable representation; and the fact that the verbal Judgment of the Court *a quo* had to be transcribed. There is no prejudice to the Respondent by virtue of the fact that the appeal was noted approximately one month and one week out of time. In the circumstances the application for condonation is granted and no order as to costs is made in respect of that application.

[4] Turning to the background facts. On 3 April 2014, the First Appellant and the Respondent entered into a written agreement of sale in respect of the J. Road property. The purchase price was R335 000.00 and the agreement recorded

that R35 000.00 had already been paid to the Respondent. The agreement further stipulated that the balance had to be paid by 30 June 2014, failing which the contract would be deemed void and of no force and effect. That period was subsequently extended by twelve months in an addendum to the agreement. The addendum further recorded that the First Appellant had paid a further R20 000.00 to the seller and that the balance of the purchase price was R280 000.00. The agreement was further subject to the successful subdivision of Erf […], Noordhoek.

[5] Important for present purposes is that the agreement of sale provided in clause 5 thereof that possession and vacant occupation of the property shall be given on transfer. It is common cause that transfer is yet to take place. The Appellants accordingly have no right to occupation flowing from the agreement of sale.

[6] On what basis was the Appellants then placed in possession of the J. Road property? In the founding affidavit, the Respondent claims that the First Appellant occupies the property in terms of a month-to-month oral lease agreement. It is in terms of this agreement that First Appellant took occupation during April 2012. The Respondent further alleged that the monthly rental was set at R2 500.00, subject to an annual increase of 7%. The oral lease agreement is further allegedly contained the following clause regarding breach by the First Appellant:

> *"Should the tenant breach the lease agreement the owner would be entitled to place the tenant on notice of such breach and demand that the tenant remedy such breach within a reasonable period, failing*

which the owner would be entitled to cancel the lease agreement and demand that the tenant vacate the premises."[1]

[7] It is remarkable that an oral agreement would contain such a detailed *lex commissoria*. Be that as it may, in the founding affidavit, the Respondent contends that the First Appellant breached the lease agreement in that "*he failed to pay the rental and was in arrears in the sum of R185 667.00; operated an illegal scrap business; illegally sub-letted space for caravans; and used the premises as an overflow from First Appellant's scooter repair business*".

[8] It is further alleged in the founding affidavit that, on 9 June 2017, the Respondent's attorneys of record served via the Sheriff a letter of termination on the ground that the lease was on a month-to-month basis and that the Respondent was accordingly entitled to give notice to the First Appellant to vacate by 30 July 2017. It is further stated in the founding affidavit that a copy of the termination letter is attached to the affidavit and marked **"AVH2"**.

[9] No such letter forms part of the appeal record before this Court. Attached to the answering affidavit, there is only a letter dated 8 June 2017 from the Respondent's attorneys which does not relate to the lease but only to the agreement of sale. There is also a letter from the Respondent's attorneys dated 15 June 2017 in which it is stated that the First Appellant's formal response is required to the demand for "*arrears rental*" as well as the demand to "*seize and desist from unlawful activities at the premises*". This suggests

[1] For ease of reading, I substituted the reference to First Appellant with "*tenant*" and the Respondent with "*owner*".

that the First Appellant may have been placed on terms regarding breach, but not that he was notified to vacate by 30 July 2017.

[10] It appears from the First Appellant's answering affidavit that he admitted that he received the letters dated 8 June 2017 and 15 June 2017. The main point taken in the answering affidavit was that the lease was not on a month-to-month basis but until the transfer of the J. Road property into the First Appellant's name took place. First Appellant claimed in the answering affidavit that he has "*an occupational rental dispute*" with the Respondent "*which is not relevant to the application*".

[11] On appeal, the main point taken by Mr Walters, who acted for the Appellants, is that the lease agreement was cancelled without complying with the terms of the *lex commissoria* which formed part thereof. According to the Appellants, the alleged letter of termination was premature as the Appellants were not given an opportunity to remedy any alleged breach as required by the *lex commissoria*. As a result of this failure, the Appellants contended that no case had been made out that the Appellants were unlawful occupiers as required by the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("**the PIE Act**").

[12] This is not an argument which was considered by the Court *a quo*. The Court *a quo* found that the Appellants were illegal occupiers on the basis that they failed to pay the agreed rental in the sum of R2 500.00 per month and because of the failure of the Appellants to deal with the alleged arrears other than the vague and unuseful response that First Appellant has an "*occupational rental dispute*" with the Respondent. The Court *a quo* also

referred to the letter of 15 June 2017 in which the Respondent's attorneys requested a formal response to the demand for arrears rental. The Court *a quo* further stated that the First Appellant seemingly used the agreement of sale as an excuse not to pay the rentals due and owing.

[13] Having found that the Appellants were unlawful occupiers, the Court *a quo* went on to consider the relevant circumstances in order to determine whether it was just and equitable to grant an eviction order. On this aspect, the Court *a quo* found that it was not contended by First Appellant that he would become homeless should he be evicted and furthermore, that the structure in which he was staying was in fact moveable (it is a caravan) and could be taken to any number of other premises or caravan parks.

[14] In the Appellants' heads of argument various submissions are made to the effect that all the conditions in the agreement of sale have been fulfilled and that the Respondent has no basis on which to refuse to effect transfer.

[15] In my view, the agreement of sale is irrelevant to the present matter. The present matter turns on whether the lease agreement was lawfully terminated.

[16] In this regard, even though the Respondent alleged in the founding affidavit that the lease agreement was breached on various grounds, the basis for termination was the allegation that the lease operated on a month-to-month basis and that the letter of 9 June 2017 terminated the lease by giving more than one month's notice to the First Appellant to vacate.

[17] In my view the Court *a quo* erred by finding that the lease agreement was lawfully terminated. I say so for two reasons:

17.1. Firstly, the termination letter of 9 June 2017 was not annexed to the Respondent's founding papers. As explained above, the First Appellant only admits to receiving a letter dated 8 June 2017, which deals with the agreement of sale only and not with the lease agreement. The letter of 15 June 2017, on the other hand, implies that there was breach, not that there was termination by notice. In the circumstances, termination by giving a month's notice was not proven.

17.2. The First Appellant claimed in his answering affidavit that the lease was not on a month-to-month basis but until transfer. There was a dispute of fact which could not be resolved on the papers and the matter accordingly had to be decided on First Appellant's version in terms of the ordinary approach to factual disputes applicable to applications for final relief in motion proceedings.

[18] In the circumstances, the appeal has to succeed on the basis that it was not proven that the First and other Appellants were unlawful occupiers of the J. Road property. I do not believe that a costs order against the Respondent is warranted in respect of the appeal. The Respondent abided the outcome and the less than forthright manner in which First Appellant presented his case in the answering papers (no response to allegations of non-payment of rent) no doubt contributed to the unfavourable outcome in the proceedings *a quo*.

[19] The following orders are made:

(a) The appeal succeeds and the orders of the Court *a quo* are set aside and replaced with the following:

(i) The application is dismissed; and

(ii) the Applicant shall pay the First Respondent's costs.

(b) There is no order as to the costs in the appeal.

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HJ DE WAAL AJ

Acting Judge of the High Court

Cape Town

7 March 2019

I concur.

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DOLAMO J

Judge of the High Court

Cape Town

7 March 2019

APPEARANCES

Appellants' counsel: Adv A Walters

Appellants' attorneys: Smith & Hugo, Kuils River

Respondent appeared in Person