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

REPORTABLE
Case number: 4180/2021

In the application for leave to appeal between:

BENJAMIN MOUTON	First applicant
GERTRUIDA DOROTHEA MOUTON	Second applicant
ROBI PARKS (PTY) LTD	Third applicant

and

ANTOINETTE DU PLESSIS	First respondent
PETRUS GESPARUS DU PLESSIS	Second respondent
SWARTLAND MUNICIPALITY	Third respondent

In re the eviction application between*:*

ANTOINETTE DU PLESSIS	Applicant

and

BENJAMIN MOUTON	First respondent
GERTRUIDA DOROTHEA MOUTON	Second respondent
SWARTLAND MUNICIPALITY	Third respondent
ROBI PARKS (PTY) LTD	Fourth respondent

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL
DELIVERED ON 24 MARCH 2022

VAN ZYL AJ:

Introduction

1. On 7 February 2022 I granted an order in the following terms in an eviction application:

1.1. The counter-application is dismissed.

1.2. The first, second and fourth respondents ("the respondents") are to vacate the property known as **ERF [....] YZERFONTEIN**, situated at **[....] VERSVELD STREET**, **YZERFONTEIN**, **WESTERN CAPE** ("the premises") by no later than Monday, 28 March 2022.

1.3. In the event of the respondents failing to vacate the premises by Monday, 28 March 2022, then the Sheriff of this Court is directed and authorized to evict the respondents from the premises.

1.4. The Sheriff is authorized and directed to employ the services of the South African Police Service to assist him, if it is necessary to do so, to remove the respondents from the premises.

1.5. The respondents are to pay the costs of the main application and the counter-application jointly and severally, the one paying, the other to be absolved, on the scale as between attorney and client.

2. I gave full reasons for the order on 21 February 2022.

3. The respondents in the eviction application (to whom I shall now refer as the applicants) have now brought an application for leave to appeal against the order

granted against them.

4. They seem to have conflated this application for leave to appeal with another application for leave to appeal, against an order (an interdict) granted by the Honourable Justice Ndita on 27 January 2022 under case number 8319/2022.

5. The situation is nevertheless unclear because the applicants refer to an "Appeal A" as being against the order of 27 January 2022, but thereafter refer to "Appeal A" as being against the order in the eviction application that I handed down on 7 February 2022, and "Appeal B' against the reasons that I handed down on 21 February 2022.

6. Be that as it may, I can for obvious reasons not consider an application for leave to appeal under case number 8319/2021, as the matter did not serve before me and I did not give judgment therein. I have requested that the court file relating to that matter be furnished to the Honourable Justice Ndita for determination in so far as the applicants intend to apply for leave against the order that she granted. The parties are to liaise with her registrar to make arrangements for the hearing of any such application for leave to appeal.

The application for leave to appeal under case number 4180/2021

7. This is the application for eviction upon which I gave judgment. I point out that Mr Du Plessis, now cited as the third respondent in this application for leave to appeal, was not a party to the eviction application. The applicants do not explain why he has been "joined" as respondent in the application for leave to appeal.

8. As stated, I have given detailed reasons for the order that I had made and do not intend to repeat them. I shall comment on certain aspects of the application for leave to appeal. Nothing new has come to light in the course of the oral argument presented to me.

"Appeal A": Prospects of success

9. Under this heading, in paragraph 1.1 of the application for leave to appeal, the applicants refer to matters that clearly pertain to case number 8319/2021. They are thus irrelevant for present purposes.

10. In paragraph 1.2(a) and (b) of the application for leave to appeal, the applicants traverse their previous argument regarding the sale agreement purportedly concluded following the exercise of the option, which I found to have constituted a counter-offer that had never been accepted in writing. I have dealt with this issue in detail in the reasons given.

11. In paragraph 1.2(c) the applicants erroneously state that I found that a valid and binding agreement to purchase was concluded. This is not the case – I found that no valid agreement had been concluded.

12. Paragraph 1(2)(c)(i) sets out an interpretation of certain of the provisions of the lease. I dealt with these in my reasons. This rest of the paragraph, as well as paragraphs 1(2)(ii), (iii) and (iv), relates to the application under case number 8319/2021.

13. Paragraph 1(2)(c)(v) refers to the transfer process followed after the purported exercise of the option. I have explained in my reasons why no valid agreement of sale had come into existence. The subsequent conduct of the parties under a mistaken premise does not change the situation.

14. As regards paragraphs 1(2)(vi) to (x), read with paragraphs 1.1.1 and 1.2, I explained in my reasons why, even had a valid agreement come into existence, the first respondent (Mrs Du Plessis) was entitled to cancel it. This was because of the failure to deliver a guarantee for the payment of the purpose price. The provision of a certificate of compliance was not relevant at that stage, as it would have been due only prior to transfer taking place. In any event, the alleged report by Mr Izak Schrader referred to by the applicants did not form part of the papers before me. It might have been included in the application under case number 8139/2021.

15. I have explained why the applicants qualify as unlawful occupiers under PIE,

and thus that the Act is applicable. The sublease, whether “non-existent” or not, does not change the position as regards the first and second applicants as natural persons who resided at the property. The submissions in paragraph 1.3 of the application for leave to appeal have no merit.

16. As regards paragraph 1.4, I dismissed the counter-application for the reasons stated previously. Given the finding that no binding agreement of sale had come into existence, the counter-application for specific performance had to fail.

17. Paragraphs 1.4(a) and (b) seem to relate to the application under case number 8319/2021 which interdicted the applicants’ catering business at the property. So do the rest of the submissions set out on pages 13, 14 and 15 of the application for leave to appeal. As mentioned, I did not grant the relief against which leave to appeal is sought in that regard.

18. Insofar as the submissions under this heading related to the eviction application, I am of the view that there is no reasonable prospect of success on appeal.

Appeal B against the reasons given

19. As regards paragraph 1 and 2 of the application for leave to appeal under this heading, it is clear from the papers that although Robi Parks was the lessee, the first and second applicants in fact occupied the property. Whether this was done under a sublease or under some other arrangement is irrelevant, and even if this statement in the reasons is incorrect, it does not take the applicants’ complaints anywhere.

20. I have explained why, as a matter of law, the guarantee would have been due within a reasonable period. It was precisely because the option did not cater for a specified time period. The submission in paragraph 4 of the application for leave to appeal has no merit.

21. As regards paragraphs 5, 6 and 7 of the application for leave to appeal under this heading, the reasons provided set out the bases for my findings in respect of the

validity of the agreement of sale, as well as the first respondent's right to cancel any such agreement had it in fact come into existence. I have also explained why the PIE Act cannot be ignored in the circumstances in which the first and second applicants occupied the property.

Further allegations set out in the application for leave to appeal

22. The allegations set out on pages 23 to 25 of the application for leave to appeal either constitute evidence that did not serve before me at the hearing of the eviction application, or submissions in support of the counter-application. They do not indicate a basis for a successful application for leave to appeal.

Conclusion

23. In all of these circumstances, I am of the view that there is no reasonable prospect of success on appeal in the eviction application under case number 4180/2021.

Order

24. The following order is granted:

24.1. Leave to appeal is refused.

24.2. The applicants in the application for leave to appeal are to pay the first and second respondents' costs, the one paying, the other to be absolved.

P. S. VAN ZYL
Acting judge of the High Court

HEARING DATE: 1 February 2022

Appearances:

The applicants in person

For the first and second respondents: L. Wilkin, instructed by Von Lieres, Cooper & Barlow