



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 90835/2016

Reportable: NO

Of interest to other judges: NO

Revised: YES

Date: 17/8/20

Signature: 

In the matter between:

ALLAN FRANCIS OSBORN

Applicant

and

ETTIENE ERASMUS

1st Respondent

ALL OCCUPIERS OF NUMBER 81 ALBATROSS DRIVE

FOURWAYS, JOHANNESBURG, GAUTENG (Also

known as ERF 115, Fourways Township, Registration

Division I.Q. Province of Gauteng

2nd Respondent

CITY OF JOHANNESBURG METROPOLITAN

MUNICIPALITY

3rd Respondent

JUDGMENT

PRINSLOO AJ

Introduction

[1] There were two applications before me. An opposed rescission application ("the Rescission Application") brought by one of the 2nd Respondents, a Mr Stefanus Tjaart Terblanche and an opposed application for eviction in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act no. 19 of 1998. ("the Act") against the First Respondent ("the Eviction Application").

The Rescission Application

[2] It was agreed between the parties that the Rescission application be dealt with first.

[3] Mr Scholtz, for the 1st Respondent, advised that he had no instructions or mandate to act for the Second Respondent or Mr Terblanche. He handed up a notice of withdrawal of attorneys of record filed by the 2nd Respondents attorneys of record and submitted that the attorneys withdrew as they were without instructions.

[4] Being satisfied that the withdrawal only followed after the matter had been enrolled, and having read the papers, I am satisfied to have dismissed the application with costs as between Attorney and Client. A draft order marked "AJP1" was made an order of court.

[5] It is worth mentioning that I felt a punitive cost order was appropriate as it was clear that the application was not *bona fide* and brought purely to delay the Applicant. The 2nd Respondent and Mr Terblanche, never filed a replying affidavit or ever took steps to enrol the rescission application. The Applicant had to enrol the matter. It is also significant that both First and Second Respondents have the same attorney.

The eviction application against the 1st Respondent

[6] It is common cause that the Applicant is the Lawful owner of the property described as Number 81 Albatross Drive, Fourways, Johannesburg, Gauteng (Also known as ERF 115, Fourways Township, Registration Division I.Q. Province of Gauteng), ("the property").

[7] The Applicant alleges that the 1st Respondent is an unlawful occupant of the premises.

[8] The 1st Respondent denies that he is an unlawful occupant of the premises and alleges that he permanently resides in Mozambique, and opposes the Application on that basis.

Points in limine

[9] The 1st Respondent had raised two points in *limine*. After some debate the 1st Respondent did not persist with the points and they were abandoned.

Onus of proving occupation

[10] Seemingly the crisp issue on which this matter turns is whether the 1st Respondent is an unlawful occupier of the premises or not. The Applicant's ownership is common cause between the parties.

[11] The first question is whether the onus lies on the Applicant as owner to convince the court on the probabilities that 1st Respondent is an occupant for purposes of the Act or whether the 1st Respondent must convince the court on the probabilities.

[12] A second question which arises is whether partial occupancy of the property on an ad hoc basis would entitle the Applicant to relief.

[13] The Act is silent on both these counts. The Act does not place an onus on the Owner of the property to prove that the occupier is in actual possession, nor does it give a definition of what occupation entails.

[14] I think the reason the legislature did not consider this is quite simply because it is in very unusual circumstances such as this where the alleged occupier would deny occupation.

[15] The same should apply on the other count whether it is a requirement that there should be full time occupation. I think that would be absurd. Even unlawful occupiers leave the premises for temporary periods that they occupy for whatever reasons, work, medical care, family commitments, consultations with legal representatives, etc. It is conceivable that whatever the circumstances, it may mean that an unlawful occupier may be away from the occupied property for days. That does not mean that he or she is not in occupation. They may have occupation for example by having the keys to the premises or having other people occupy in their absence.

[16] Both Applicant's and 1st Respondent's heads of argument did not really assist me in answering these questions. Careful scrutiny of the Act also

revealed that the legislature did not specifically state who bears the onus. In the classic case of *Ndlovu n Ngcobo : Bekker and another v Jika*¹, Harms JA states that "Whether the ultimate onus will be on the owner or the occupier we need not now decide."² I am certain that if the Act had created a statutory onus the learned judge would have pointed it out. It appears therefore that one should look to the common law to determine the onus. Of assistance is the work referred to by Mr Prinsloo for the Applicant, namely *Smith's Eviction and Rental claims: A practical guide (LexisNexis)* wherein it is stated under the heading "Common Law principles" that "In addition, the owner will have to provide proof that the defendant is in occupation of the property."³

[17] I therefore find that the usual onus would be applicable, that the Applicant must convince me on a balance of probabilities that the 1st Respondent is an unlawful occupier.

Probability findings

[18] I have read the 522 paginated pages relating to this matter as well as both of the parties' heads of argument. I do not wish to cloud this matter any further by summarizing all those papers and deal rather with the facts as I find them to be on the probabilities.

[19] The Applicant advances the following:

[20] The 1st Respondent clearly has a very long history with this property, having been involved since at least 2005 when he signed a lease for the

¹ 2002 All SA 384 (SCA)

² Page 391 at i.

³ Page 1-4

property in his representative capacity and as surety and co-principal debtor of Dual Intake Investments (Pty) Ltd⁴ and thereafter in his representative capacity on behalf of Trans Border Express Services (Pty) Ltd⁵. He also signed as surety for that lease. Thereafter in 2013 another lease was entered into between the Applicant and 1st Respondent's ex-wife Debbie De Jongh⁶. 1st Respondent concedes that he stayed at the property with Mrs De Jongh in terms of that lease⁷. It is clear that the 1st Respondent was in occupation of the premises at least at that time. This was conceded by Mr Scholtz.

[21] The next ground is annexure "AFO9"⁸, being the sheriff's return of service of the Applicant's letter of demand. It states that the letter was served on Ms Thandi Ndlovu an employee at the property. It does not pertinently say that she confirms that she is an employee of the 1st Respondent. What it does say is that the nature of the letter was a demand for 1st Respondent, and that that was the address for the 1st Respondent. If the 1st Respondent was unknown at the premises, the return and Ms Ndlovu would have stated so. This justified the Applicant in citing the 1st Respondent as an unlawful occupant and proceeding against him.

[22] The next ground advanced by the Applicant is the sheriff's return in respect of the Section 4(2) order⁹. Again, the return states that the service is effected at the property being the "place of residence" of the 1st Respondent.

⁴ Page 334 of the paginated papers.

⁵ Page 340 of the paginated papers.

⁶ Annexure "AFO1", page 31 of the paginated papers.

⁷ Paragraph 4.3 on page 89 of the paginated papers.

⁸ Page 56 of the paginated papers.

⁹ Page 67 of the paginated papers.

Service is accepted by Mr S De Barnch, who on the probabilities is in fact Mr Terblanche.

[23] Mr Scholtz argues that the returns are not confirmed by affidavit or carry that weight of evidence. He however did not dispute the content. I am compelled however by the fact that neither of the two persons listed in the returns deny knowing the First Respondent or deny that the property is the 1st Respondent's place of residence. The First Respondent in his answering affidavit also never contested the content of these returns. It is trite that a sheriff's return of service is *prima facie* evidence of the proof of its contents and it would have been for the First Respondent to provide clear and adequate proof that the content was incorrect.¹⁰

[24] On this basis alone it was justified for the First Respondent to proceed with the eviction steps against the 1st Respondent.

[25] To place the 1st Respondent at the property after proceedings had commenced, the Applicant refers to the fact that the 1st Respondent had his answering affidavit commissioned at the Douglasdale SAPS. Mr Scholz had much to say that the Applicant lived only a few houses from the property where the 1st Respondent resided and could have checked if 1st Respondent was in fact in occupation. The irony is not lost on me that both 1st Respondent and Applicant signed their respective answering and founding affidavits at the same police station in the closest proximity to the property!

¹⁰ *Van Vuuren v Jansen* 1977 (3) SA 1062 TPD at 1062 H.

[26] The next aspect is the allegation made in Mr Terblanche's founding affidavit that he would rely on 1st Respondent to sort out problems at the property when he was in "the vicinity"¹¹.

[27] The next is the fact that 1st Respondent knows who is residing at the premises, namely two elderly people, who he does not name, nor does he attach confirmatory affidavits from them. He knows that they are married, are older than eighty-one years of age¹² and have dogs. He knows them intimately to the extent that he wants to protect them, but does not want to name them. The First Respondent makes these allegations. He clearly has intimate knowledge by his own admission of the goings on at the property. As the Applicant alleges, how would 1st Respondent know this if he did not actually visit or stay at the premises.

[28] I am satisfied that the Applicant has provided *prima facie* evidence that the Respondent was in occupation of the premises at least when the demand was made, justifying the commencement of proceedings and citing the First Respondent and further has provided *prima facie* evidence that the Respondent was in occupation after proceedings commenced.

[29] I then consider the 1st Respondent's allegations. All that he does is allege under oath that he denies that he occupies the property and that he resides in Mozambique.

[30] This is the critical factor. 1st Respondent could with the greatest of ease have attached a copy of his passport as well as proof of his residence in

¹¹ Paragraph 4.2, page 362 of the paginated papers.

¹² Paragraph 93 Page 89 of the paginated papers.

Mozambique in the form of a lease, letter from his landlord, title deed, or whatever the circumstances were. He could have also attached confirmatory affidavits of neighbours, family members and especially the two elderly people at the property that he is so concerned about. He could easily have elaborated in his affidavit that he vacated the property on so and so date, moved to Mozambique on so and so date, but he doesn't. I have to ask why would that be.

[31] I asked and challenged Mr Scholtz repeatedly about why the 1st Respondent did not take the court into his confidence by making these simple disclosures and providing the simple proof at the outset to prove his case. The only answer that he could give was that it was not the 1st Respondent's onus to convince the court that he was not in occupation.

[32] As indicated, the Applicant had provided *prima facie* evidence by the time the Respondent had to file his answering affidavit and the question is whether there is now an evidentiary burden on the 1st Respondent. I believe there is such a duty on an occupier. Harms JA in the *Ndlovu* case states that "Unless the occupier opposes and discloses circumstances relevant to the eviction order, the owner in principle, will be entitled to an order for eviction. Relevant circumstances are nearly without fail facts within the exclusive knowledge of the occupier and it cannot be expected of an owner to negative in advance facts not known to him and not in issue between the parties." Clearly the circumstances of when the 1st Respondent vacated the property and his residence in Mozambique are facts exclusively within his knowledge. He could have so easily, if his version were true that he resides in Mozambique and had nothing to do with the property, convinced me.

[33] The first Respondent does not do this and in so doing allows me to make two irresistible inferences.

[34] The first is that quite simply he does not reside in Mozambique and is still an occupant at the premises.

[35] The second is that he intentionally was vague in his affidavit to try and convince the court that there was a *bona fide* factual dispute. Mr Scholtz pressed the point that there was a factual dispute and the matter should have been referred to trial for the hearing of oral evidence. Of course, this would have delayed proceedings endlessly due to the backed-up trial roll at this court.

[36] The 1st Respondent elected not to take the court into his confidence, either because he couldn't, because his version was not true or he intentionally elected not to. In other words, he took a tactical decision. The following passage from *The South African Law of Evidence*¹³ is enlightening:

[36.1] A prima facie inference which does not amount to a mandatory conclusion is merely something which creates the necessity of the accused's making a tactical decision about taking the risk of not leading evidence in rebuttal. Whether an inference that he is guilty may properly be made depends upon the nature of the case and the evidence which has been adduced. It may depend upon the "relative ability of the parties to contribute evidence on that issue". If it lies exclusively within the power of a party to show what the true facts were, his failure to do so may entitle the court to infer that the truth

¹³ DT Zeffert and AP Paizes, 2nd edition, LexisNexis, page 131.

would not have supported his case; but if there is no reason to expect a party to be able to throw light on the facts, his silence can add nothing to the evidence adduced by his opponent.

[37] I have already indicated that the nature of this case creates an obligation on an occupier to disclose circumstances falling within his exclusive knowledge. I am therefore justified in the absence of a proper disclosure by the 1st Respondent, which he could have done with ease, to infer that the 1st Respondent's version is untrue and that he took a tactical decision not to make such a disclosure. The failure entitles the owner to an eviction order. I am therefore satisfied to grant such an order in favour of the Applicant.

Section 4 of the Act

[38] It is clear to me that the Applicant has complied with Section 4(2) of the Act by having the Section 4(2) notice authorized by this court and serving the notices.

[39] It is clear to me also that the 1st Respondent, on his own version is a businessman with interests in Mozambique and is not an affected person such as the elderly, children or a disabled person as envisaged in the act.

[40] Therefore, after careful consideration of what is required of me in terms of the Act, I find that it would be just and equitable in terms of the Act for me to grant an order of eviction against the 1st Respondent. I do however find that due to the long history of the matter that the 14 days allowed in the draft order for the vacation of the property to be too short a period and would extend this to a period of thirty days.

Costs

[41] The Applicant only asks for party and party costs against the First Respondent, but leaves it in my hands to consider a punitive cost order. *Mala fides* would constitute a basis for a punitive cost order. It is not an easy decision to make to give more than what an Applicant asks for. I am compelled however by the First Respondent's conduct in the matter to make such a consideration.

[42] If The First Respondent was *bona fide*, and his version true that he had absolutely nothing to do with the property and was resident in another country he could have simply instructed his attorneys to write a letter to the Applicant's attorneys attaching proof that he was no longer resident in the country and inviting the Applicant to withdraw his application and tender costs while the application was still in its infancy. A letter was written, and was handed up by Mr Scholtz. The letter does not provide proof of residence but rather only confirms an intention to oppose. It does mention also affidavits from the tenants, by implication in support of the First Respondent. The letter was written in 2017 and the affidavits never materialised.

[43] What has further become clear to me on the papers, is that the 1st Respondent's version that he has nothing to do with the property is patently untrue and that he is clearly involved in what is going on, on the property.

[44] The first clue of this is the email exchange between the Applicant and Mrs De Jongh attached as Annexure "AFO3" to the Applicant's Founding

affidavit¹⁴. It is clear that Mrs De Jongh had fallen into arrears with the lease and in receiving the Applicant's email terminating the lease, she sends an email to the 1st Respondent asking him to respond to the Applicant. The email of 29 April 2014 reads as follows:

"Ettiene, Allan just send me this email. Please send him an email on my behalf that I am renting the House with the flat and that the whatsapp was ONLY as a friend telling him that I am working in Tete and will still be on the premises when I am in South Africa and NEVER gave him NOTICE. I can let anybody stay in the premises that I am renting from him he just trying to be clever. I did not answer this email as I know you are the one that will answer this in the correct way. Debbie.

[45] The 1st Respondent does not deny the existence of this email exchange in his Answering affidavit, neither does Mr Scholtz at the hearing. He only denies that he was party to the lease agreement. Clearly Mrs De Jongh looked to the First Respondent regarding her occupation of the premises. Why would she do that if the 1st Respondent has nothing to do with the property and only stayed there many years ago.

[46] The next is the First Respondent's knowledge of the elderly people at the premises and his overwhelming desire to protect them. The First Respondent's reason is that he feels that it is his civic duty to protect these people, this while he no longer has any connection with the property and lives hundreds of kilometres away in Mozambique is quite simply not accepted. If

¹⁴ Page 40-42 of the paginated papers.

he is such a good Samaritan, why does he not take the court into his confidence by saying how he knows these people and why they would phone him for assistance when they are allegedly being accosted by the Applicant's "thugs"¹⁵. Surely the best possible protection for these people would be this court.

[47] Another troubling aspect is the allegations made by Stephanus Tjaart Terblanche, one of the Second Respondent occupants, that he calls the 1st Respondent when there is trouble at the premises, and that 1st Respondent suggested that Mr Terblanche could use 1st Respondent's attorney and that he phones 1st Respondent to find out what is going on with the court case, which can only be this case.¹⁶

[48] The only inference that I can make is that the 1st Respondent knows exactly who is on the premises, that they rely on his assistance to protect them and that his failure to name them is an effort to shield them from eviction. The fact that both First and Second Respondents share the same attorney also flies in the face of the defence that 1st Respondent has nothing to do with the property.

[49] Further if the 1st Respondent was such an upstanding citizen and protector of the elderly, why does he not weigh up the Applicant's prejudice. He does not dispute that the Applicant is elderly and suffers from ill health, but only denies the Applicant's prejudice.

¹⁵ Paragraph 4.23 of the Answering affidavit, page 93 of the paginated papers.

¹⁶ Paragraph 4.1- 4.8 of Terblanche's affidavit. Page 362 of the founding affidavit.

[50] Another compelling reason is that the 1st Respondent makes repetitive mention of elderly people in his affidavit is to play heavily on this court's mind when considering circumstances in terms of the Act before making a decision to make an eviction order. The First Respondent is not even subtle about this in dropping the hint in paragraph 5.5 of his Affidavit¹⁷ where he states that "he has been advised that where there are elderly residing on a property special attention should be given in terms of the law and certain procedures followed. When he is back in the country he will see if he can take them to an attorney to file affidavits with regard to this application."

[51] It is now more than two years later and no such affidavits have been filed. This can only lead me to believe that the Applicant is untruthful about the presence of such elderly people at the property. It is clear that by including this statement it was a tactical decision to delay proceedings and nothing more. This is clearly an abuse of the Act. Such an abuse warrants a punitive cost order. This is why I am moved to penalise the 1st Respondent even when the Applicant didn't ask for a punitive cost order, because not only does the 1st Respondent frustrate the Applicant, but he also abuses the court and legislation.

[52] I find the 1st Respondent to be *mala fide* and dishonest and doing his utmost to frustrate the Applicant and to interfere with the Applicant's rights to his own property.

¹⁷ Page 95 of the paginated papers.

[53] I am also mindful of Nienaber JA's words in the *Ndlovu* judgment¹⁸ that "Occupation delayed is occupation denied. Occupation denied can be hugely detrimental to the party so affected". It is very clear from the protracted litigation that the Applicant has been denied occupation of his property for years and that the litigation must have cost him a fortune.

[54] I accordingly see no reason why the Applicant should be out of pocket by only being awarded costs on the party and party tariff and also why the 1st Respondent should be allowed to abuse the Act and this Court and therefore I intend to award costs on an Attorney and client basis.

Order

[27] Consequently, I make the following order:

The draft order marked "AJP2" as amended to the effect that the occupants are ordered to vacate the property within thirty days and that the 1st Respondent is ordered to pay for the costs of the Application on an Attorney and Client scale is made an order of Court.



AC PRINSLOO

Acting Judge of the High Court

¹⁸ Page 394, c-d.

APPEARANCES:

Applicant: Advocate Prinsloo

Innes R Steenkamp Attorneys

Respondent: Advocate Scholtz

Taute, Bouver and Cilliers Inc.

Date heard: 04 March 2020

Judgement delivered on: 17/03/2020.

9/ AJP 211
-7- Prinsloo

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

**On 4 March 2020
Before Acting Judge Prinsloo**

CASE NO: 90835/16

In the matter between:

**ALLAN FRANCIS OSBORNE
(ID: 450114 5105 089)**

Applicant

and

**ETTIENE ERASMUS
(ID: 681226 5101 081)**

1st Respondent

**ALL OCCUPIERS OF NUMBER 81
ALBATROS DRIVE, FOURWAYS,
JOHANNESBURG, GAUTENG
(ALSO KNOWN AS ERF 115
FOURWAYS TOWNSHIP, REGISTRATION
DIVISION I.Q, GAUTENG)**

2nd Respondent

**THE CITY OF JOHANNESBURG
MUNICIPALITY**

3rd Respondent

DRAFT ORDER

After having listened to counsel on behalf of both parties and having read the indexed and paginated documents filed on record, the following is ordered:

1. That the First Respondent and all those occupying the property or holding under him or any other person presently occupying the premises known as:

**NUMBER 81 ALBATROSS DRIVE, FOURWAYS, 2055,
JOHANNESBURG,
GAUTENG PROVINCE (ALSO KNOWN AS ERF 115
FOURWAYS TOWNSHIP, REGISTRATION DIVISION I.Q,
PROVINCE OF GAUTENG)**
(HEREINAFTER CALLED "THE IMMOVABLE PROPERTY")

Be declared not to be in lawful possession of the immovable property, declared to have no legal right to occupy the immovable property and the they currently occupy the immovable property unlawfully.

2. The First Respondent and all those holding under him or

any other person presently occupying the immovable property, be ordered to vacate the immovable property within ~~14~~ [fourteen] from date of this order.

30 [Thirty]

AMM

3. That the Sheriff of this honourable court is authorised and ordered to, with the help and assistance of the South African Police Services, if required, carry out the eviction of the First Respondent and all those holding occupation under them or any other person presently occupying the immovable property, who fails to voluntarily vacate the immovable property within a period of 14 [fourteen] days from the date of this order.

4. That the First Respondent is ordered to pay the cost of this application on an Attorney and Client scale.

AMM

BY ORDER

REGISTRAR