IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 40642/2020

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

DATE: 14 April 2022

In the matter between:

ABDUR-RAHMAN ESSAT	**APPLICANT**
and	
JOHN MAURICE FLETCHER	**FIRST RESPONDENT**
LYNN DIANA FLETCHER	**SECOND RESPONDENT**
CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY	**THIRD RESPONDENT**

JUDGMENT

ALLY AJ

INTRODUCTION

[1] This is an opposed application for the eviction of the First and Second Respondents, hereinafter referred to as the Respondents for the sake of convenience, as well as all those occupying through or under them from the property described as Erf 146 Emmarentia situate at 50 Judith Road, Emmarentia, hereinafter referred to as 'the property' and to interdict the First and Second Respondent from returning to 'the property'.

[2] The first relief in terms of the Notice of Motion, is sought in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998, as amended, hereinafter referred to as 'PIE'. The second relief relates to the normal interdictory relief which is a common occurrence in our Courts.

[3] After enquiring into the circumstances of the First and Second Respondents and whether they needed legal representation from the Pro Bono Organisation or the Legal Aid Board, the Court was advised by the Respondents that they did not meet the threshold of the said organisations. The matter thus proceeded on the basis that they would represent themselves.

[4] Whilst the relief sought appears simple in nature, this application is far from simple in that the Rental Housing Act[1] must also be interpreted to ascertain its application in these proceedings. This is so, because the First Respondent laid a complaint with the Rental Housing Tribunal which Tribunal made a ruling on 24 September 2019 based on a settlement agreement between the parties.

THE BACKGROUND FACTS

[1] 50 of 1999

[5] The Applicant and the Respondents entered into a written lease agreement on 27 April 2018.[2] The lease was to terminate on 30 April 2020, whereafter the Lessees, that is, the Respondents, had the option to extend the lease subject to clause 19 of the agreement[3].

[6] The Applicant and the Respondents agreed that the Rental Housing Act and the Unfair Practice Regulations, 2001,[4] apply to the lease agreement.

[7] The Applicant gave notice to cancel the agreement and on various occasions requested the Respondent to vacate the premises. The response to the Applicant's request by the Respondents was firstly to deny any breaches of the lease agreement and to indicate that the lease agreement had been extended in accordance with Section 5 (5) of the Rental Housing Act and Clause 19 of the Lease Agreement; therefore that they were in lawful occupation.

ANALYSIS AND EVALUATION

[8] The crux of this matter rests in determining whether the Applicant as owner of 'the property' is entitled to eviction of the Respondents in the circumstances of this case and the further relief claimed in the Notice of Motion.

[9] Section 5 (5) of the Rental Housing Act provides as follows:

> "*If on the expiration of the lease the tenant remains in the dwelling with the express or tacit consent of the landlord, the parties are deemed, in the absence of a further written lease, to have entered into a periodic lease, on the same terms and conditions*

[2] Caselines @ 002-26
[3] Clause 4 and Clause 19 of the Lease Agreement supra
[4] Clause 2.4

as the expired lease, except that at least one month's written notice must be given of the intention by either party to terminate the lease."

[10] Is there sufficient evidence before this Court, to conclude that the provision above is of application and complied with?

[11] The Applicant has set out at length the communications and correspondence between his legal representatives and the Respondents. In this regard the Applicant, through his legal representative, sent a letter[5] dated 27 March 2019 to the Respondents setting out the breaches of the lease agreement. The Applicant has annexed, the communications and correspondences, insofar as relevant to the dispute, to his Founding Affidavit.[6]

[12] One of the correspondences responded to by the Respondents by email[7] on 29 February 2020 rejected Applicant's cancellation of the lease agreement and went further to renew the lease in terms of Clause 19 of the lease agreement. It is convenient to set out Clause 19 in detail in order to evaluate whether a renewal did in fact take place:

"19. ***Option of Renewal***

19.1 The Lessee shall have the right to renew this lease upon the terms and subject to the conditions set out below.

19.2 The period for which this lease may be so renewed is (12) twelve months.

[5] Caselines: 002-46
[6] Caselines: 002- 46 to 192
[7] Caselines: 002-94

19.3 All the terms of this lease shall continue to apply as is, during the renewal period, save that

19.3.1 A rental amount shall be agreed upon between the Lessor and Lessee;

and

19.3.2 there shall be no right of renewal thereafter.

19.4 The right of renewal shall be exercised by notice in writing from the Lessee to the Lessor given and received not later than 2 (Two) months prior to the date on which the renewal period is to commence is to commence, and shall lapse if not so exercised.

19.5 If the right of renewal is duly exercised, this lease shall be renewed automatically without the need for any further act of the parties. An Addendum to the Lease will be concluded to reflect the new Rental amount agreed.

19.6 The Lessee may not, however, while in breach or default of any terms of this lease.

19.7 If this lease does not endure at least for the full term of for which it is initially contracted, the right of renewal shall lapse and any notice of exercise given prior to such lapsing shall be null and void.

19.8 In the case of the Property having been sold to new owners, the renewal option will then be void on transfer and will have to be renegotiated with the new owner."

[13] Now the Applicant maintains that the Respondents cannot unilaterally renew the lease agreement between the parties. This is actually not completely correct, because the lease agreement states and empowers or enables the lessee to renew the lease. However, such renewal must comply with Clause 19.6 of the lease

agreement. Namely, where the lessee is in breach or default, such renewal cannot take place. The Applicant in regard to this contention of the Respondents, contends that the Respondents cannot rely on Clause 19 for the submission that they are still in lawful occupation and that the lease is still in effect, because, the Respondents have in actual fact been in breach and default as outlined in the communications and correspondences above.

[14] The question, however, remains, whether the Respondents were indeed in breach and default of the provisions of the lease agreement. On a preponderance of probabilities I am satisfied that the Applicant has shown that the Respondents were indeed in breach. In this regard, the Court has had regard to the correspondence with the Respondents which detail the breaches committed, which breaches, in my view, entitled the Applicant to cancel the agreement in accordance with the letter[8] sent to the Respondents.

[15] There are no facts before this Court, in my view, for the Respondents to argue that the email of 29 April 2020 amounted to a valid renewal, taking into account what has been stated regarding the breaches.

[16] Should I, however, be wrong in this regard, there is still the issue of whether the lease had run its course and was terminated by effluxion of time.

[17] As stated above, the lease was to endure until 30 April 2020, this date is also reflected in the settlement agreement in the Rental Housing Tribunal Ruling[9]

[8] Caselines: 002-92
[9] Caselines: 002-52

mentioned above. The settlement agreement furthermore explicitly states at paragraph 1.4.:

> *"The parties have agreed that there shall be no extension of the lease agreement and the complainant shall vacate both the main house and the adjacent cottage on or before the 30th of April 2020."*

[18] The abovementioned Clause thus substantiates the view by the Applicant that there could never have been a renewal by the Respondents of the lease as the Respondents were aware already on and after 24 September 2019 aware that the lease agreement would terminate and no extension could take place.

[19] The answer to the question posed in paragraph 10 above, based on what has been stated hereinbefore, must be that Section 5(5) of the Rental housing Act is not of application in this this matter because it cannot be stated that there was express or tacit consent for the Respondents to remain in the leased premises beyond 30 April 2020.

[20] The Respondents raised an issue that the Ruling at the Rental Housing Tribunal is under review and such application is pending which in their view, negates this application before this Court or that the application should be stayed pending the 'review' application. Put differently, the Respondents submit that this Court cannot consider this application as the dispute between the parties in another Court has not been determined.

It is convenient at this point, to set out the full text of Section 17 of the Rental Housing Act dealing with the question of review:

> *"Without prejudice to the constitutional right of any person to gain access to a court of law, the proceedings of a Tribunal may be brought under review before the High Court within its area of jurisdiction."*

[21] It is trite that a creature of statute is bound by the powers given them in terms of that statute and cannot assume powers they do not have. The Rental Housing Tribunal has no powers of review and therefore the Respondents contention that there is a pending action in another Court, is misplaced and without merit as is further elaborated hereunder in paragraph 22.

[22] It is clear from the above quoted Section 17 of the Rental Housing Act that a review lies to the High Court within the area of jurisdiction of the Tribunal. It is further clear from the papers filed in this matter that no review to the High Court has been launched by the Respondents and thus this point by the Respondents stands to be dismissed.

[23] The Applicant's Counsel submitted further that whilst the Rental Housing Amendment Act has been gazetted, the President has not determined when it will come into force and therefore has no application in these proceedings. The reason for this submission, as I understand it, is that the Respondents maintain that a review is pending in the Rental Housing Tribunal. In favour of the Respondents, I will regard the review to include appeal for purposes of this submission.

Section 17A of the Rental Housing Amendment Act, 2014 provides as follows:

> *''Appeals*
>
> *17A. (1) Any person who feels aggrieved by the decision of the Tribunal may, in writing and within 14 days of receipt of the decision, file an appeal against that decision with the MEC.*
>
> *(2) The Minister must prescribe the circumstances under which an application for appeal may be submitted, including the procedure for filing and hearing of an appeal.*
>
> *(3) The MEC must select a panel of adjudicators who possess legal qualifications and expertise in rental housing matters or consumer matters pertaining to rental housing matters.*
>
> *(4) When appeals are lodged in terms of this section, the MEC must within one day of receipt of the appeal, appoint one or two adjudicators from the panel on a rotation basis to consider the appeals and must so refer the appeals for hearing.*
>
> *(5) When an appeal has been lodged, the operation and execution of the order in question shall be suspended, pending the decision of the appeal.*
>
> *(6) The appeal must be finalised within 30 days of referral by the MEC.*
>
> *(7) The adjudicators may refer the matter back to the Tribunal or confirm, set aside or amend the decision.''*

[24] I agree with the submission of Applicant's Counsel that the Amendment Act has no application in this matter for the reason that the Amendment Act has not come into force as yet.

[25] The next issue for this Court to determine is whether it is just and equitable to evict the Respondents in accordance with Section 4 (7) of PIE:[10]

> *"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."*

[26] The Respondents have placed no facts before this Court to indicate that they are indigent or that they would be homeless nor that they do not have funds to seek other accommodation. The Respondents have chosen, to defend this application on the basis that the Applicant, in law, is not entitled to the relief claimed in the Notice of Motion.

[27] A report has been uploaded on Caselines[11] wherein the Third Respondent provides an updated situational report within the City of Johannesburg. It is clear from this report that the Third Respondent does not have the means to cater for all persons resident within its area of jurisdiction. That being said, as stated above, the Respondents have not submitted that they have no alternative accommodation nor that they cannot afford other accommodation.

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[10] 19 of 1998
[11] Caselines: 039-1

[28] The identity numbers of the Respondents show clearly that they are elderly people. This fact in itself, however, does not rise to the level of preventing the eviction of Respondents in the circumstances of this particular case and such a case has not been made out by the Respondents.

CONCLUSION

[29] Having considered the evidence and submissions of Applicant's Counsel and the Respondents, I am satisfied that a case has been made out for the eviction of the Respondents and that it is just and equitable to do so. The so-called defences raised by the Respondents and dealt with above are without merit.

[30] Having ruled on the eviction of the Respondents, I am further satisfied that the requirements for an interdict[12] prohibiting the Respondents from returning to 'the property' have been met. The Applicant has established a clear right to undisturbed ownership and possession of 'the property'. In actual fact the Respondents have not responded to this relief claimed by the Applicant. However, it is still this Court's duty to determine whether the Applicant has made out a case for the relief claimed. The Applicant, in my view, has established the harm that will be suffered if the Respondents returned to 'the property' in that such occupation by the Respondents would be without any payment of rental and furthermore there exists the impediment of not being able to market, without interference from the Respondents, 'the property' for sale. Finally, this Court accepts that there is no other remedy available to the Applicant.

[12] Setlogelo v Setlogelo 1914 AD 221 @ 227

[31] The next question that needs to be decided is whether the Applicant has made out a case for the immediate eviction of the Respondents. This question, in my view, raises principles of reasonableness, justice and fairness in the circumstances of this particular case.

[32] It is clear from the papers that the Respondents have been living at 'the property' for several years and that time would be needed for them to vacate and find other accommodation. It is my view that it would be reasonable and in the interests of justice and fairness that the Respondents be afforded 60 (sixty) days from the date of this judgment to vacate 'the property' and therefore the immediate eviction in the circumstances of this particular case is not warranted.

[33] The Respondents also raised the issue of the rescission of the Order of Makume J which Order was handed down on 27 July 2021 and related to the service of process in terms of Section 4 (1) of the PIE[13]. This was an *Ex parte* application. In my view, the Respondents have not made out a case for the rescission of this order and thus the rescission application in this regard falls to be dismissed with costs.

[34] Finally insofar as is necessary, no basis has been established for the staying of this application pending proceedings in the Rental Housing Tribunal as outlined above.

COSTS

[13] supra

[33] It is trite that the award of costs falls within the discretion of the Court which discretion must be exercised judicially. Furthermore the norm maintains that a successful party is entitled to their costs unless the facts of the case fall within the **Biowatch case**[14]**.** It is my view that the *Biowatch principle* does not pertain to this matter and that the norm should apply, that is, that the Respondents are ordered to pay the costs of this application jointly and severally, the one paying the other to be absolved.

Accordingly, the following Order will issue:

a) The First and Second Respondent and all those occupying through or under them are to vacate 'the property' described as Erf 146 Emmarentia, situate at 50 Judith Road, Emmarentia, Johannesburg, within 60 (sixty) days from the date of this Order failing which the Sheriff of this Honourable Court is authorised to eject them;
b) The First and Second Respondents and all those occupying through or under them are interdicted from returning to 'the property' described as Erf 146 Emmarentia, situate at 50 Judith Road, Emmarentia, Johannesburg;
c) The First and Second Respondents are ordered to pay the costs of this application as well as the costs relating to the application for rescission of the Order dated 27 July 2021 jointly and severally, the one paying the other to be absolved.

G ALLY

[14] Biowatch trust v Registrar, Genetic Resources 2009 CC 14

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION OF THE HIGH COURT, JOHANNESBURG

Electronically submitted therefore unsigned

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 14 April 2022.

Date of virtual hearing: 1 February 2022

Date of judgment: 14 April 2022

Appearances:

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