IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2021/13340

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

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DATE

In the matter between:

CIRCLE PROPERTIES (PTY) LTD

Applicant

And

CALFONIA MASHAVANA **First Respondent**

THE CITY OF JOHANNESBURG **Second Respondent**
METROPOLITAN MUNICIPALITY

Delivered: This judgment 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 of the judgment is deemed to be 2 June 2022.

JUDGMENT

MALINDI J:

Introduction

[1] On 27 January 2022 the Court granted a section 4(2) notice in terms of the Prevention of Illegal Eviction from Unlawful Occupational Land Act 19 of 1998 ("PIE") the effect of which is to authorise an Applicant to notify a Respondent of an application that will be sought for their eviction from premises terms of section 4(1) of PIE.

[2] The section 4(1) application sets out a date on which such eviction will be sought at a court hearing and sets out the essential averments of ownership, the basis of the Respondent's occupation, the reason for termination and continued unlawful occupation. The Respondent is then called upon to appear in court if they wish to advance a defence or opposition to the eviction application.

[3] The section 4(2) notice was served on the First Respondent on 18 February 2022, together with the application calling upon the Respondent to appear in court on 7 March 2022.

Background

[4] The Respondent was legally represented until 20 August 2021 when her attorneys of record withdrew. Before then opposition was entered and an Answering Affidavit and Replying Affidavit filed. The reason why this application was not proceeded with earlier is that the Respondent was granted and indulgence to file her Answering Affidavit at the previous hearing on 1 June 2021.

[5] Following an order compelling the Respondent to file her heads of argument on 18 September 2021 within five days, and she having failed to do so, this application was then enrolled for 18 January 2022. Notice of this application was delivered and telephonic and WhatsApp communications conducted with the Respondent in order to sign a joint practice note on or about 25 February 2022.

Analysis

[6] The Respondent's defences are that:

"14.1. She allegedly entered into an oral agreement in terms of which he would pay 1/3 of the rental amount.

14.2. The amount claimed in the breakdown attached to the founding affidavit marked as annexure "NOC 5" is allegedly incorrect.

14.3. The Regulations ("the Regulations") promulgated in terms of the Disaster Management Act 57 of 2002 ("the DMA") states that a tenant may not be evicted from their place of residence for the duration of the lockdown."

[7] The first defence has to fail because clause 14.4 of the lease agreement provides that there will be no variation of the agreement unless reduced to writing and signed by both parties.

[8] The second defence has to fail because the payments made by the Respondent in June 2021 were made after the date of cancellation of the lease agreement. They are allocated to defraying the arrears as a matter of law although the Applicant is not seeking payment thereof. The Applicants is therefore entitled to bring the application.

[9] What remains are the considerations of justness and equitability in terms of section 4(7) of PIE Add the applicability of the regulations in terms of the Disaster Management Act during the COVID-19 period. Judging just and equitable factors is a very difficult judiciary exercise as it involves considering whether a property owner's protected rights under section 25 of the Constitution of the Republic of South Africa ("the Constitution") should bend to the unlawful occupier's plight of lack of alternative accommodation and other personal, but often heart-rending circumstances. Where such factors exist a property owner's rights may be limited in favour of the unlawful occupier for a limited duration. Where the existence of such factors have not been established, the courts is obliged to grant the eviction if there is no defence to the statutory formalities.[1]

[10] In this case I am satisfied that the Respondent has had the necessary time and opportunity to provide all information necessary to make a finding based on justice and equity. The Court therefore has all the information about the occupier and all those that occupy under her.

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[1] City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others 2012 (6) SA 294 (SCA) at [11]-[25].

[11] I am exercising the Courts discretion in favour of the owner in this case because the Respondent has not, besides stating that she is self-employed and without stating her income and nature of the business, alleged any difficulties with obtaining alternative accommodation especially as to how such lack of accommodation would affect her and other occupier's vulnerabilities.

[12] The existence of Regulation 22: Alert Level 3 of the Disaster Management Act at the time of the launch and close of pleadings, including the delivering of heads of argument, does not affect the conclusion reached above. It added a further factor to be taken into account where an eviction to be granted during the COVID-19 pandemic that is, that it must not lead to either exposing the occupiers to the virus or lead to its mismanagement if evicted, expose other persons if the occupiers are evicted and may infect others if they are already infected, and whether the owner has taken reasonable steps to alleviate the dangers inherent in moving of persons during the pandemic. The Respondent has not suggested that any of these precautions would be negatively affected by her eviction. The Respondent based the onus in this regard.[2]

[13] The Applicant has satisfied the provisions of section 4(8) of PIE and therefore the Respondent and all those that occupy under her are evicted. The following order is made:

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[2] FHP Management (Pty) Ltd v Theron NO and Another 2004. (3) SA 392 (C) at 404 I – 405B.

1. The form and contents of the draft notice in terms of s 4 (2) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, which is annexed hereto as annexure “A” is hereby authorised.

2. The Applicant’s Attorney of record is authorised to serve the notice referred to in paragraph 1 together with a copy of this order on the Second Respondent.

3. The Sheriff is authorised to serve the notice referred to in paragraph 1 together with a copy of this order on the First Respondent in terms of the Uniform Rule 4 (1) at the property described as Flat 16 Circle Court, 137 Twist Street Hillbrow, corresponding to Erf 4017 and 4018 Johannesburg (“the property”).

4. The Sheriff is authorised to serve the notice referred to in paragraph 1 together with a copy of this order on the below mentioned occupants of the property in terms of the Uniform Rule 4 (1) at the property described as Flat 16 Circle Court, 137 Twist Street Hillbrow, corresponding to Erf 4017 and 4018 Johannesburg (“the property”):

    4.1 Patience Gwiza;

    4.2 Tryphina Khumalo; and

    4.3 Philip Baloyi.

5. The costs of this Application are to be determined at the hearing of the main Eviction Application.

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G MALINDI J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

FOR THE APPLICANT: Adv. V. Vergano

INSTRUCTED BY: Joshua Apfel Attorneys

FOR THE FIRST RESPONDENT: Self-represented

DATE OF THE HEARING (MATTER DECIDED ON PAPER): 7 March 2022

DATE OF JUDGMENT: 2 June 2022