



**THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA**

Reportable
Case no: 589/06

In the matter between:

WEBTRADE INV NO 45 (PTY) LTD First Appellant

CHERALEE SABY Third Appellant

and

ANDRIES VAN DER SCHYFF EN SEUNS Respondent
(PTY) LTD t/a COMPLETE CONSTRUCTION

Coram: *Navsa, Brand, Lewis, Ponnan JJA et Malan AJA*

Date of hearing: **10 September 2007**

Date of delivery: **17 September 2007**

Summary: The provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) do not apply in circumstances in which the owner of land takes possession from a builder exercising a builder's lien.

Neutral citation: This judgment may be referred to as *Webtrade v Van Der Schyff* [2007] SCA 104 (RSA).

JUDGMENT

NAVSA JA

NAVSA JA:

[1] This is an appeal, with the leave of the court below, against a judgment in terms of which possession of immovable property was restored to the respondent, a construction company, which at the time of dispossession was exercising a builder's lien.

[2] The first appellant is a company which is the owner of the land and improvements at 463 Rooibekkie Lane, Featherbrooke Estate, a gated community estate consisting of approximately 1 000 freehold properties. The erstwhile second appellant, Mr Mark Saby was, prior to his untimely death – which occurred after judgment in the court below and before the present appeal was heard – the controlling shareholder of the first appellant. The third appellant, Mrs Cheralee Saby, is Mr Mark Saby's widow.

[3] The respondent constructed the house on the property at the instance of Mr and Mrs Saby, acting through the medium of the first appellant. The erf on which the house was constructed was purchased by the first appellant on 3 July 2000 for an amount of R200 000 and was transferred to it on 26 March 2001. A tender for the construction of the house by the respondent in an amount of R2.3 million was accepted by the first appellant.

[4] During October 2004 the respondent took possession of the erf and commenced construction work in terms of the tender. It is not disputed that the original and spare keys to the locks of all the doors were at the time of the commencement of construction in the possession of Mr Brendon De Reuck, the respondent's site supervisor.

[5] It is common cause that, during May and June 2005, a dispute arose between the respondent and Mr and Mrs Saby regarding the costs of the construction of the house. This manifested itself, according to the respondent, in frequent and repeated short payments of invoices presented to the first appellant for payment. In its founding affidavit in the court below, the

respondent alleged that the first appellant owed it more than R100 000. This was disputed by the appellants.

[6] According to Mr De Reuck, when he arrived at the premises on Friday 20 January 2006, he found that Mr and Mrs Saby had taken possession of the house, gaining entry by way of keys they had somehow acquired and thereby depriving the respondent of its possession of the house. Shortly thereafter Mr De Reuck handed to Mr and Mrs Saby a letter from the respondent's attorney seeking restoration of possession. This resulted in Mr De Reuck being forcibly escorted off the estate by security guards.

[7] The respondent applied in the Johannesburg High Court for an order restoring it forthwith to possession of the premises — it relied on the *mandament van spolie*.

[8] In answering affidavits in the court below, the first appellant and Mr and Mrs Saby alleged that, on 20 January 2006, they had obtained possession with the consent of Mr De Reuck. What is undisputed, however, is that on 20 January 2006, while Mr and Mrs Saby were attempting to move into the premises, Mr De Reuck attempted to prevent them from doing so. Notwithstanding his resistance, they took occupation.

[9] It was probably the realisation of the difficulties posed by the facts set out in the preceding paragraph that led the first appellant and Mr and Mrs Saby to change tack. They sought to rely on the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE). They submitted that, in the prevailing circumstances of the case, the provisions of PIE rendered the *mandament van spolie* inapplicable.

[10] The court below (Tshiqui J) said the following:

'The respondents in this matter are the affluent private owners of the property which they occupied in the midst of a dispute surrounding workmanship and money. In utilising the provisions of PIE, [Mr Saby] seeks to shield himself against his own unlawful conduct.

The protection under PIE was clearly not intended to protect affluent property owners who deliberately placed themselves in unlawful occupation of their property.'

[11] The court below made an order restoring the respondent to the property and ordered that costs be paid by the first appellant and Mr and Mrs Saby jointly and severally.

[12] Section 4(1) of the Act prescribes procedures to be followed before an owner or person in charge of land may evict an unlawful occupier. The relevant part of s 1 of the Act defines an unlawful occupier as follows:

'[A] person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land, . . . '.

[13] In *Ndlovu v Ngcobo, Bekker and Another v Jika* 2003 (1) SA 113 (SCA) at para 8 this court said in relation to the application of the Act that a mortgagor, being an owner, cannot be an unlawful occupier. In the present appeal the first appellant is the owner of the property and Mr and Mrs Saby its controlling mind.

[14] Section 1 of the Act, in defining 'unlawful occupier', categorises persons who can seek protection under its provisions. It is important to note that the relevant part of s 1 of the Act is disjunctive in that a person is an unlawful occupier if he or she occupies land without the express or tacit consent of the owner **or** the person in charge. In terms of s 4(1) of the Act an unlawful occupier has protection against summary eviction. Thus, an occupier who has the permission of either the owner or the person in charge of land does not qualify for procedural or substantive protection in terms of the Act. It is clear that Mr and Mrs Saby were acting with the consent of the owner, the first appellant. They accordingly are not unlawful occupiers as defined and must therefore fail in their quest to invoke the protection afforded by the Act.

[15] At common law owners of land can, in certain circumstances, be unlawful occupiers. However, having regard to the provisions of the Act, which is what the first and second appellants rely on, it would be absurd, as pointed

out in *Jika's* case, to hold that owners can be unlawful occupiers. The Act seeks to protect persons who are homeless and who do not own the land they occupy. The Act intended to protect them and not persons such as the appellants. Tshiqui J was correct to conclude that the provisions of the Act do not apply to the circumstances of this case.

[16] The court below referred to the judgment of the Constitutional Court in *PE Municipality v Various Occupiers* 2005 (1) SA 217 (CC) where Sachs J (para 12) said the following concerning the Act:

'Squatting was decriminalised and the eviction process was made subject to a number of requirements, some necessary to comply with certain demands of the Bill of Rights. ... Thus, ... the new law emphasised a shift in thrust from prevention of illegal squatting to prevention of illegal eviction. The former objective of reinforcing common-law remedies, while reducing common-law protections, was reversed so as to temper common-law remedies with strong procedural and substantive protections; and the overall objective of facilitating the displacement and relocation of poor and landless black people for ideological purposes was replaced by acknowledgment of the necessitous quest for homes of victims of past racist policies. While awaiting access to new housing development programmes, such homeless people had to be treated with dignity and respect.'

[17] In the *PE Municipality* case the role of courts in the application of the Act was spelt out (para 13) as follows:

'The courts now had a new role to play, namely to hold the balance between illegal eviction and unlawful occupation. Rescuing the courts from their invidious role as instruments directed by statute to effect callous removals, the new law guided them as to how they should fulfil their new complex, and constitutionally ordained, function: When evictions were being sought, the courts were to ensure that justice and equity prevailed in relation to all concerned.'

[18] The purpose and the background to the application of the Act are set out in the *dicta* referred to in the two preceding paragraphs. The circumstances of the present case are far removed from the main purpose of the Act, to prevent evictions of the landless — a category of vulnerable persons which by its very nature excludes owners of land. To uphold the

appeal would in the immortal words of Charles Dickens render the law an 'ass'.¹

[19] There is one further aspect that requires attention. As mentioned earlier Mr Saby has passed away. Regrettably, there has been a delay in the appointment of an executor to his estate. Mr Saby's erstwhile attorneys, having initially failed to persuade the respondent to agree to a postponement of the appeal, withdrew from the matter. Counsel on behalf of the first and third appellants informed the court that there were difficulties in relation to the appointment of an executor and that the delay would not be less than six months. He agreed with submissions on behalf of the respondent that the matter should proceed to finality, notwithstanding that the estate was not represented. The costs order that follows will therefore only apply in respect of Mrs Saby and the first appellant.

[20] The following order is made:

'The appeal is dismissed with costs, such costs to be paid by the first and third appellants jointly and severally.'

M S NAVSA
JUDGE OF APPEAL

CONCUR:

Brand JA
Lewis JA
Ponnan JA
Malan AJA

¹ Attributed to the literary character, Mr Bumble, in *Oliver Twist*.