



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 71/14

In the matter between:

MC DENNEBOOM SERVICE STATION CC

First Applicant

NOLA ELISON CHILOANE

Second Applicant

and

MOLEFE IAN PHAYANE

Respondent

Neutral citation: *MC Denneboom Service Station CC and Another v Phayane*
[2014] ZACC 29

Coram: Mogoeng CJ, Moseneke DCJ, Cameron J, Froneman J, Jafta J,
Khampepe J, Leeuw AJ, Madlanga J, Nkabinde J, Van der
Westhuizen J and Zondo J

Decided on: 3 October 2014

Summary: Prevention of Illegal Eviction from and Unlawful Occupation of
Land Act 19 of 1998 — Act must be complied with before
eviction of residential occupants can be ordered

Prevention of Illegal Eviction from and Unlawful Occupation of
Land Act 19 of 1998 — Act does not apply to eviction of juristic
persons or persons not using property as a form of dwelling or
shelter

ORDER

On appeal from the North Gauteng High Court, Pretoria (per Cambanis AJ):

1. Leave to appeal is refused, except insofar as it relates to the amendment of the order granted by the North Gauteng High Court, Pretoria.
2. Paragraph 1 of the order of the High Court is set aside and replaced with the following order:
 - “1. Ejecting MC Denneboom Service Station CC, and all those persons working for it or for Mr Nola Elison Chiloane, excluding Mr Nola Elison Chiloane as a residential occupant, and any other residential occupants, from Erf 22104, City of Tshwane Metropolitan Municipality, Registration Division JR, Province of Gauteng, situated at 95 Tsamaya Road, Mamelodi.”
3. There is no order as to costs.

JUDGMENT

KHAMPEPE J (Mogoeng CJ, Moseneke DCJ, Cameron J, Froneman J, Jafta J, Leeuw AJ, Madlanga J, Nkabinde J, Van der Westhuizen J and Zondo J concurring):

[1] This is an application for leave to appeal against a judgment of the North Gauteng High Court, Pretoria. It relates to an order granted by that Court evicting the

first and second applicants, MC Denneboom Service Station CC (Denneboom) and Mr Nola Alison Chiloane (Mr Chiloane) respectively, from certain immovable property registered under the name of the respondent, Mr Molefe Ian Phayane (Mr Phayane).

Background

[2] This matter concerns Erf 22104¹ (the property) which was previously owned by Mr Chiloane and his wife, to whom he was married in community of property. Mr Chiloane and Denneboom operate a service station and convenience store on the property.

[3] In 1992 Mr Chiloane was sequestrated. Thereafter the duly appointed trustee caused the property, which formed part of the estate, to be sold on public auction in October 2009. Mr Phayane purchased the property and took transfer in May 2010.

[4] The applicants subsequently instituted an action in the High Court against Mr Phayane and the trustee of Mr Chiloane's insolvent estate. They sought an order declaring Mr Chiloane the owner of the property, declaring the sale null and void and directing the Registrar of Deeds to transfer the property back into Mr Chiloane's name. The pleadings closed in those proceedings in June 2013. The applicants have since not taken any further steps to have the matter allocated a trial date.

¹ The property's full designation is Erf 22104, City of Tshwane Metropolitan Municipality, Registration Division JR, Province of Gauteng, situated at 95 Tsamaya Road, Mamelodi.

Litigation history

[5] In September 2012 Mr Phayane lodged an eviction application in the High Court. He contended that he is the registered owner of the property and that the applicants have no right to remain in occupation and are thus unlawful occupiers. The applicants disputed Mr Phayane's ownership of the property, but not that they were in occupation. They also noted that there were a number of persons residing on the property, including Mr Chiloane, and that Mr Phayane had failed to comply with the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act² (PIE) in seeking their eviction.

[6] In response, Mr Phayane applied for an amendment of his pleadings to exclude the eviction of "residential occupants" from their ambit. Ultimately, the High Court (per Cambanis AJ) granted the following order:

"15.1 Ejecting [Denneboom and Mr Chiloane] and/or all those persons working through or under them excluding any residential occupants from the premises known as Erf 22104, City of Tshwane Metropolitan Municipality, Registration Division JR, Province of Gauteng, situated at 95 Tsamaya Road, Mamelodi;

15.2 That the costs of this application be paid by [Denneboom and Mr Chiloane] on a party and party basis."³

[7] The applicants sought leave to appeal to a Full Court of the High Court. They contended, among other things, that the order was ambiguous and wrongly authorised

² 19 of 1998.

³ *Molefe Ian Phayane v MC Denneboom and Another*, unreported judgment of the North Gauteng High Court, Pretoria, Case No 2012/51724 (20 November 2013).

the eviction of Mr Chiloane, who is a residential occupant. Ledwaba DJP, who heard the application in Cambanis AJ's absence, found no merit in the applicants' arguments and dismissed the application. The Supreme Court of Appeal later dismissed a further application for leave to appeal.

In this Court

[8] The applicants now seek leave to appeal the order of the High Court in this Court. They state that Mr Phayane failed to comply with the Uniform Rules of Court when seeking an amendment of his pleadings; Mr Phayane is not the rightful owner of the property; the sale of the property was defective because Mr Chiloane's wife was a joint owner of the property and her estate was not sequestrated; and Ledwaba DJP, who heard the application for leave to appeal in the High Court, was biased.

[9] None of these contentions has any merit. A High Court is at liberty to grant a party leave to amend pleadings at any stage before judgment.⁴ It is generally sufficient, for the purpose of proving ownership for an ejection order from commercial premises, for a plaintiff to demonstrate that he is the registered owner of the property.⁵ Mr Phayane did this by attaching the deed of transfer to his application and the High Court was satisfied that he was the registered owner of the property. The applicants have also produced no compelling evidence to place his ownership in dispute. The applicants' contention that Mr Chiloane's wife's estate was not

⁴ See rule 28(10) of the Uniform Rules of Court.

⁵ See *Chetty v Naidoo* 1974 (3) SA 13 (A) at 20A-D; *Shimuadi v Shirungu* 1990 (3) SA 344 (SWA) at 347C-D; and *Gemeenskapsontwikkelingsraad v Williams and Others* 1977 (2) SA 692 (W) at 696H.

sequestered is implausible. They admit that he and his wife were married in community of property. A marriage in community of property forges a joint estate between the married parties, with the consequence that the sequestration of one entails the sequestration of the other. Moreover, the applicants have not pursued the pending proceedings in the High Court. And the allegations of bias are wholly unsubstantiated, resting on nothing more than the applicants' assertion that Mr Phayane is an acquaintance of Ledwaba DJP.

[10] But the applicants also argue that the High Court's order infringes Mr Chiloane's rights under section 26(3) of the Constitution.⁶ They contend that the order permits the eviction of Mr Chiloane notwithstanding that he resides on the property and that Mr Phayane did not comply with the prescripts of PIE in seeking his eviction.

[11] In the light of this latter argument, this Court issued directions to the parties inviting them to make submissions on the meaning of the High Court's order and whether it authorises the eviction of Mr Chiloane from the property. Responding to these directions, the applicants contend that the order is ambiguous and confusing in a number of respects, particularly as it expressly provides for the eviction of Mr Chiloane who resides on the property, despite the order's purported exclusion of residential occupants. According to the applicants, the express reference to

⁶ See [16] for the text of the provision.

Mr Chiloane in the order takes “him out of the proviso” that excludes residential occupants and therefore authorises his ejection.

[12] Mr Phayane submits that, even on the applicants’ version in the High Court, the property is divided into two portions: a commercial portion and a residential portion. According to him, the High Court’s order authorises the eviction of both Denneboom and Mr Chiloane, and all those persons working under them, from the commercial portion of the property. It does not, however, apply to Mr Chiloane in his capacity as a resident on the residential portion of the property. Mr Phayane says that the order must be read against this background.

[13] This Court decided to dispose of the matter on the basis of these submissions, without oral argument.

Leave to appeal

[14] Whether one adopts the stance of the applicants or Mr Phayane, there is little doubt that the order, as it stands, is ambiguous. It seems that the intention of the High Court was to evict the commercial, and not the residential, occupants of the property. Thus, the unqualified reference to Mr Chiloane in the order appears to have been an error.

[15] The order potentially authorises the eviction of Mr Chiloane, as a residential occupant, without compliance with PIE. PIE was enacted to protect unlawful

occupiers' right to housing under section 26 of the Constitution. This is a constitutional issue sufficient to invoke our jurisdiction. It is also in the interests of justice to grant the applicants leave to appeal on this narrow issue. The application has prospects of success in this respect. In all other respects, however, the application for leave to appeal is meritless and must fail.

Amending the order

[16] Section 26(3) of the Constitution provides:

“No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.”

PIE gives practical effect to this right and regulates the eviction of unlawful occupiers,⁷ even those who reside on commercial premises.⁸ Having no right to reside on the property, Mr Chiloane is an “unlawful occupier” under the Act and thus enjoys its protections.⁹ The Court was required to ensure that PIE’s requirements had been met before ordering his eviction. While it is common cause that Mr Phayane did not comply with these requirements, the High Court’s order appears to expressly authorise the eviction of Mr Chiloane, notwithstanding that it purports to exclude residential

⁷ Section 4 of PIE provides the requirements that must be complied with before an unlawful occupier may be evicted.

⁸ See, for example, *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* [2011] ZACC 33; 2012 (2) SA 104 (CC); 2012 (2) BCLR 150 (CC), especially at paras 1 and 30.

⁹ Section 1 of PIE defines an “unlawful occupier” as—

“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, excluding a person who is an occupier in terms of the Extension of Security of Tenure Act, 1997, and excluding a person whose informal right to land, but for the provisions of this Act, would be protected by the provisions of the Interim Protection of Informal Land Rights Act, 1996 (Act No. 31 of 1996).”

occupants from its operation. This ambiguity may potentially result in his eviction. In this respect the High Court's order is defective.

[17] The eviction of commercial occupants and juristic persons does not, however, fall within PIE's remit. As the Supreme Court of Appeal correctly held in *Ndlovu*,¹⁰ the Act does not apply to the eviction of juristic persons and persons that do not use buildings and structures as "a form of dwelling or shelter". Mr Phayane therefore was not obliged to comply with the requirements of PIE in seeking the eviction of Denneboom and persons working for it or working for Mr Chiloane, provided those persons do not also reside on the property. The High Court's order was thus justified in respect of these persons.

[18] This Court is empowered to make any order that is just and equitable.¹¹ An amendment of the High Court's order to exclude Mr Chiloane, as a residential occupant, from its operation is warranted. This is a simple solution that would accord with the body of the High Court's judgment and would have the benefit of correcting a court order that may not comply with PIE. The emendation would make explicit that the order authorises the eviction of only commercial, and not residential, occupants.

¹⁰ *Ndlovu v Ngcobo; Bekker and Another v Jika* [2002] ZASCA 87; 2003 (1) SA 113 (SCA) (*Ndlovu*) at para 20.

¹¹ Section 172(1)(b) of the Constitution.

Costs

[19] The applicants are successful only on one narrow issue, which relates to the amendment of the order. In all other respects they are unsuccessful. In these circumstances it is appropriate for each party to bear its own costs.

Order

[20] In the result, the following order is made:

1. Leave to appeal is refused, except insofar as it relates to the amendment of the order granted by the North Gauteng High Court, Pretoria.
2. Paragraph 1 of the order of the High Court is set aside and replaced with the following order:
 - “1. Ejecting MC Denneboom Service Station CC, and all those persons working for it or for Mr Nola Elison Chiloane, excluding Mr Nola Elison Chiloane as a residential occupant, and any other residential occupants, from Erf 22104, City of Tshwane Metropolitan Municipality, Registration Division JR, Province of Gauteng, situated at 95 Tsamaya Road, Mamelodi.”
3. There is no order as to costs.

For the Applicants:

Bertus Verster Attorneys.

For the Respondent:

Magda Kets Inc Attorneys.