THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 35/12

Reportable

In the matter between:

Transnet Limited	First Appellant
and	
Tatise Jackson Tebeka	First Respondent
Nelson Mandela Bay Metropolitan Municipality	Second Respondent
Evelyn Tebeka	Third Respondent

Neutral citation:	*Transnet Limited v Tatise Tebeka & others* (35/12) [2012] ZASCA 197(30 November 2012)
Coram:	MTHIYANE DP, SHONGWE JA, SOUTHWOOD, PLASKET AND MBHA AJJA
Heard:	**22 November 2012**
Delivered:	**30 November 2012**

Summary:
Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) – whether first and third respondents unlawful occupiers of house – house occupied in terms of agreement of sale between appellant and first respondent – first respondent in default – appellant failed to establish that notice of rescission communicated to him – agreement not cancelled – first and third respondents not unlawful occupiers.

ORDER

On appeal from: Eastern Cape High Court, Port Elizabeth (Tshiki J sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

PLASKET AJA (MTHIYANE DP, SHONGWE JA, SOUTHWOOD and MBHA AJJA concurring)

[1] Applications for the eviction of people from their homes in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) invariably raise a two-way tension between the interests of landowners and those in occupation of property and under threat of eviction.[1]

[2] These tensions certainly arise in this appeal from the Eastern Cape High Court, Port Elizabeth (Tshiki J) in which the application of the appellant (Transnet) for an order, in terms of PIE, for the eviction of the first and third respondents (Mr and Mrs Tebeka) from a house owned by Transnet was dismissed with costs. The second respondent, the Nelson Mandela Bay Metropolitan Municipality, did not oppose the application, filed no papers and took no part in the proceedings. The appeal is before this court with the leave of Tshiki J.

[3] The court below dismissed the application because it found that it had not been established that Mr and Mrs Tebeka were unlawful occupiers for purposes of PIE, having decided what it identified as a dispute of fact as to whether Mr Tebeka had paid for the house in his favour. Secondly, it held

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[1] *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter & others* 2000 (2) SA 1074 (SE) at 1081D-E. See too Sandra Liebenberg *Socio-Economic Rights* (2010) at 271.

that, even if it was wrong in this respect, it would not, in the circumstances, be just and equitable to evict the Tebekas.

The legal context

[4] The interests of property owners and those under threat of eviction are both catered for in the Constitution. Section 25(1) of the Constitution provides that '[n]o one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property', while s 26(3) states that '[n]o one may be evicted from their home, or have their home demolished, without an order of court made after considering all relevant circumstances' and that '[n]o legislation may permit arbitrary evictions'.

[5] In its preamble PIE refers to both of these provisions before stating that it 'is desirable that the law should regulate the eviction of unlawful occupiers from land in a fair manner, while recognising the right of land owners to apply to a court for an eviction order in appropriate circumstances'.

[6] Section 4 of PIE is central to why, how and when persons may be evicted from land on which they live. Section 4(1) provides, in the first place, that, generally speaking, the section applies 'to proceedings by an owner or person in charge of land for the eviction of an unlawful occupier'. Sections 4(2) to 4(5) prescribe procedures for the initiation of an application for eviction and ss 4(6) and (7) provide for the way in which courts are to consider the merits of applications to evict persons who have been in occupation of land for less than six months and more than six months respectively.

[7] This case concerns occupiers who have been in occupation for longer than six months. Section 4(7) states that '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 . . . 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'.

[8] In order for a person to be liable to eviction, he or she must be an 'unlawful occupier' of property. That term is defined in s 1 to mean '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 . . .'.[2] An owner is defined as 'the registered owner of land, including an organ of state' and consent means 'the express or tacit consent, whether in writing or otherwise, of the owner or person in charge to the occupation by the occupier of the land in question'. Although this is not expressly stated in PIE, it only applies to evictions from dwellings – the homes of persons – and not to evictions from land used for commercial purposes or for holiday purposes.[3]

The facts

[9] It is common cause that Transnet is the registered owner of the house situated at 76 Cerus Street, Motherwell, Port Elizabeth; that this property is the home of Mr and Mrs Tebeka, their unemployed son and daughter and her minor child; and that the Tebekas have resided in the home since July 1989 at least. The proceedings to evict them were instituted in February 2010, after they had lived in the home for over 20 years.

[10] Mr Tebeka had been an employee of Transnet. In July 1989, as part of Transnet's house ownership scheme for its personnel, it had acquired the property and had sold it to him. The most important terms of the agreement of sale were that: (a) the purchase price would be R47 407.78; (b) Mr Tebeka's indebtedness to Transnet would be paid in equal monthly instalments over a period of 38 years; (c) ownership of the property would remain vested in Transnet until Mr Tebeka had paid his indebtedness to it, at which point Transnet would issue him with a deed of grant; (d) the monthly instalments

[2] As to this definition and the meaning of 'consent' see *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes & others* 2010 (3) SA 454 (CC) paras 36-39 and 54-71.
[3] *Ndlovu v Ngcobo; Bekker & another v Jika* 2003 (1) SA 113 (SCA) para 20; *Barnett & others v Minister of Land Affairs & others* 2007 (6) SA 313 (SCA) paras 37-40.

would be paid to Transnet from Mr Tebeka's salary; and (e) in the event of Mr Tebeka leaving Transnet's employ, his pension being insufficient to settle the amount outstanding and him failing to settle the balance on demand, Transnet would be entitled to cancel the agreement.

[11] In December 1999, Mr Tebeka was dismissed by Transnet and his pension was allocated to the settlement of what was owed on his home. This was insufficient to pay the full amount outstanding. Despite this, Transnet appears not to have taken any steps to enforce its rights for close to a decade. Mr Tebeka paid nothing to Transnet during this period.

[12] According to the deponent to the founding affidavit, Mr Johan van der Spuy, Transnet's manager: collections, Transnet's attorneys wrote a letter dated 19 October 2009 to Mr Tebeka to inform him that he had not paid his monthly instalments on the house and that as a result, he was in arrears in the amount of R95 635.44. The letter stated that he was required to either settle his indebtedness or make suitable arrangements to do so and to communicate his intentions by 15 November 2009, failing which the agreement of sale would be cancelled.

[13] According to Mr van der Spuy, on 26 November 2009, the same attorneys sent a further letter to Mr Tebeka in which they recorded that they had received no reply to their previous letter and informed him of the cancellation of the agreement of sale. The letter concluded as follows:

'As a consequence of the cancellation effected herein, your continued occupation has become unlawful and accordingly we hereby request you to vacate the premises by no later than **31 DECEMBER 2009**, and to contact our offices in order to make adequate arrangements with regards to the delivery of the keys. We confirm our instructions to make an application for your eviction, should you fail to adhere to our request herein.'

[14] Mr and Mrs Tebeka denied having received either of these letters. The words '**PER REGISTERED MAIL**' appear on the face of each letter but no registered mail slips were attached to the papers to establish that they were

indeed posted and delivered to the post office nearest the Tebekas' home. No affidavit was filed by the attorney who purportedly wrote the letters to confirm that he wrote them or that he attended to their postage by registered mail. Mr van der Spuy's assertions that the attorney wrote them and posted them is inadmissible hearsay. Furthermore, the issue was not dealt with at all in reply, which one would have expected, given the Tebekas' denial. In these circumstances, the Tebekas' denial that they received these letters must prevail in accordance with the well-known rule in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*.[4]

[15] Mr Tebeka stated that he had initially believed that his pension had paid his indebtedness on the house in full. He later thought he only owed R5 000, was under the impression that a housing subsidy from the provincial government had been obtained on his behalf and that this amount had been credited to his account to pay his debt in full. It appears from a statement of account put up by Transnet in reply to these allegations, however, that nothing was paid into his account after his pension was allocated to it on 14 July 2000. At that stage a balance of R23 974.21 remained. On 25 January 2008, the last date reflected on the statement of account, the balance is reflected as being R40 373.42. (How that amount escalated to R95 635.44 by 1 October 2009 is not explained by Mr van der Spuy and, I venture to suggest, probably cannot be explained.)

[16] Be that as it may, I am prepared to accept for present purposes that Mr Tebeka was in arrears and that the statement of account reflected accurately what he owed on 25 January 2008.

The issue

[17] On the basis of the facts set out above (including the assumption that I have made in favour of Transnet that Mr Tebeka had not paid in full for the house), I turn now to the central issue in this matter, whether Transnet

[4] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H-I.

cancelled the agreement of sale, thus terminating any right in law that the Tebekas had to occupy the house and thereby rendering them unlawful occupiers for purposes of PIE.

[18] How a creditor may cancel a contract on the basis of a debtor's non-performance will depend on the terms of the contract and, in some cases, the nature of the obligation involved. A contract may contain a forfeiture clause (or *lex commissoria*) – a clause to the effect that if a party fails to perform an obligation by a set date, the other party may cancel, or a provision that requires performance of an obligation by a set date coupled with a statement that time is of the essence. In either event, the contract may be cancelled forthwith when the date for performance has passed and performance has not occurred. If a contract contains no such provisions, it may be inferred from the nature of the transaction and the facts that time is of the essence, and cancellation may also be effected forthwith. This is, in truth, a tacit forfeiture clause. Finally, where no express or tacit forfeiture clause forms part of the contract and time is not of the essence, an innocent party may make time of the essence. This is done by giving the party in default a notice of rescission – a demand that if the non-performance is not remedied by a specified date, the contract will be cancelled.[5]

[19] The position in the last category of cases was set out thus by Wessels JA in *Breytenbach v Van Wijk*:[6]

'Immediate performance having been impossible and not contemplated, and no date for transfer having been fixed by the contract, the respondent, if he considered that sufficient time had elapsed to enable him, on that ground, to procure his own release should have taken steps – as the civilians express it – to place the appellant in *mora* by demanding that transfer should be passed on or before a specified date, reasonable under the circumstances. . . Not having placed the appellant in mora the

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[5] *Birkenruth Estates (Pty) Ltd v Unitrans Motors (Pty) Ltd (formerly Malbak Consumer Products (Pty) Ltd) & others* 2005 (3) SA 54 (W) para 17; R H Christie and G B Bradfield *Christie's The Law of Contract in South Africa* 6 ed (2011) at 527-530; Francois du Bois, Graham Bradfield, Chuma Himonga, Dale Hutchinson, Karin Lehmann, Rochelle le Roux, Mohamed Paleker, Anne Pope, C G van der Merwe and Daniel Visser *Wille's Principles of South African Law* 9 ed (2007) at 860-861.

[6] *Breytenbach v Van Wijk* 1923 AD 541 at 549.

respondent was not entitled to sue for cancellation of the contract merely because in his opinion transfer was not effected within a reasonable time.'

[20] The issue was analysed in detail, in two separate judgments of this court, in *Nel v Cloete*.[7] In a minority judgment (in which he only differed from the majority on a factual issue) Jansen JA made the point, with reference to *Breytenbach's* case, that despite the use of the term *mora* in the passage cited above, 'is dit moeilik om die gevolgtrekking te vermy dat die geleerde Regter hier basies die Engelse "notice of rescission" in gedagte het'.[8]

[21] In the majority judgment of Wessels JA, the following is stated concerning the way in which a party may cancel a contract on the basis of the other party's non-performance:[9]

'Daar bestaan, na my mening, geen rede waarom versoening tussen die twee regstelsels bewerkstellig behoort te word deur die tydperk vir vervulling wat 'n "notice of rescission" in Engelse reg beoog, eenvoudig by die tydperk, wat intrede van *mora* volgens Romeins-Hollandsereg voorafgaan, aan te las nie. Waar dit, soos hierbo aangedui is, volgens ons regspraak beoog is dat in bepaalde omstandighede die intreding van *mora* 'n bykomstige regsgevolg het, nl., die ontstaan van 'n terugtredingsreg, indien 'n "notice of rescission" aan die skuldenaar gerig is, verval die praktiese noodsaaklikheid om op twee aparte kennisgewings aan te dring. Wanneer 'n skuldeiser, soos hy geregtig is om te doen, die skuldenaar aanmaan om op of voor 'n sekere dag te voldoen, kan hy gerieflik in dieselfde kennisgewing meedeel dat, by gebreke aan voldoening binne die gestelde tydperk, hy hom die reg voorbehou om uit die kontrak te tree. . . Dit kan, wat die skuldenaar betref, nie onbillikheid in die hand werk nie; hy word 'n redelike geleentheid gegun om sy verpligting ooreenkomstig die kontrak te vervul. Dit kan nie gesê word dat 'n skuldeiser langs hierdie weg deur eensydige optrede 'n *lex commissoria* aan die skuldenaar opdring nie. Waar 'n geskil ontstaan aangaande die redelikheid, al dan nie, van die gestelde termyn, word dit deur 'n hof beoordeel na gelang van al die betrokke omstandighede. Slegs waar 'n skuldeiser redelik optree wat die kennisgewing betref, kan *mora* intree, en slegs dan kan 'n terugtredingsreg

[7] *Nel v Cloete* 1972 (2) SA 150 (A).
[8] At 172E-F.
[9] At 163D-H.

uitgeoefen word. By koopkontrakte staan dit die partye vry, indien hulle verkies, om te beding dat prestasie nie voor 'n bepaalde dag geverg kan word nie.'

[22] The agreement of sale in this case contains no express or tacit forfeiture clause and nor can it be inferred from the nature of the transaction and the facts that time is of the essence. In order to place itself in a position to cancel in due course on account of Mr Tebeka's failure to comply with what was certainly a material term, therefore, Transnet had to make a demand of Mr Tebeka, calling on him to comply within a specified period, reasonable in the circumstances, failing which the contract would be cancelled.

[23] As to the purpose of the notice of rescission, Kotze JA, in *West Rand Estates Ltd v New Zealand Insurance Co Ltd*,[10] said that 'we must bear in mind that a defendant cannot be said to be *in mora* unless he knows the nature of his duty or obligation; that is to say when and how much he has to pay'. From this, it follows that 'it is the receipt, not the dispatch, of the demand that matters'.[11]

[24] Transnet has not established that the notice of rescission that was allegedly written by its attorneys was ever communicated to Mr Tebeka. It was consequently not in a position to cancel the agreement of sale, and consequently never did so. That being so, it has not been established that the Tebekas did not have a right in law to occupy the house. They are not unlawful occupiers for purposes of PIE and are therefore not liable to be evicted. The appeal must fail.

[10] *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1926 AD 173 at 195.
[11] Christie and Bradfield (note 5) at 526. *Swart v Vosloo* 1965 (1) SA 100 (A) at 114H-115E.

The order

[25] The following order is made.

The appeal is dismissed with costs.

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C Plasket

Acting Judge of Appeal

APPEARANCES:

For appellant: B Pretorius

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