

IN THE HIGH COURT OF SOUTH AFRICA

NATAL PROVINCIAL DIVISION

CASE NO. AR709/99

In the matter between:

PETER NDLOVU

APPELLANT

and

MPIKA LAWRENCE NGCOBO

RESPONDENT

J U D G M E N T

GALGUT J:

This appeal raises the question whether the protection provided by section 4 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, No 19 of 1998 ("the Act"), which undoubtedly applies to squatters, was intended to go further and as such to extend to a tenant whose lease has been lawfully terminated or otherwise expires.

The facts are simple enough. In terms of an oral lease with the respondent the appellant has since 1990 lived in house No 4016 at KwaNdengezi with his wife and seven children. The lease was terminable on one month's notice, and on 24 July 1998 the respondent gave the appellant a proper written notice that he was thereby cancelling the lease

with effect from 31 August 1998. The appellant failed to vacate the premises and in September 1998 the respondent caused summons to be issued out of the Magistrate's Court in which he claimed an order for the appellant's eviction.

In the summons, in which the abovesaid facts were pleaded, it was said that the claim was one in terms of the common law, and in the alternative that it was in terms of the Act. Summary judgment was not applied for, but for a reason that is not apparent from the record the appellant filed an opposing affidavit and the respondent a replying affidavit. At a hearing on 6 January 1999 the Magistrate was asked to make a decision on the alternative claim only. She ruled that the protection afforded by section 4 of the Act did not extend to a tenant who holds over. She nevertheless dismissed the respondent's application for eviction, apparently because the main claim had still to be dealt with. On the main claim the respondent then filed a special plea and a plea, and the matter was ultimately enrolled for trial on 16 August 1999. *In limine* the attorney representing the appellant attempted on that day once again to argue that the protection afforded by section 4 of the Act did extend to the appellant, but the Magistrate refused to entertain that argument because the matter was *res judicata*. The attorney thereupon formally withdrew the

appellant's defence to the main claim, and an order for the appellant's eviction was made by the Magistrate.

It is against that order that the appellant now appeals. The appeal was initially argued before two other judges of this Division but they could not agree, which is why the appeal is now before us as a bench of three judges. While there has been no appearance before us by or on behalf of the respondent, Mr Bundlender has represented the appellant, in so doing favouring us with an able and helpful argument.

The purpose and preamble of the Act are stated therein to be as follows:

"To provide for the prohibition of unlawful eviction; to provide for procedures for the eviction of unlawful occupiers; and to repeal the Prevention of Illegal Squatting Act, 1951, and other obsolete laws; and to provide for matters incidental thereto.

Preamble. - WHEREAS no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property;

AND WHEREAS 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;

AND WHEREAS it is desirable that the law should regulate the eviction of unlawful occupiers from land in a fair manner, while recognizing the right of land owners to apply to a court for an eviction order in appropriate circumstances;

AND WHEREAS special consideration should be given to the rights of the elderly, children, disabled persons and particularly households headed by women, and that it should be recognised that the needs of those groups should be considered."

The protection concerned extends to what is called an "unlawful occupier", who in section 1 is defined 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". It is section 4 which provides the protection, the subsections relevant to it reading as follows:

- "(1) Notwithstanding anything to the contrary contained in any law or the common law, the provisions of this section apply to proceedings by an owner or person in charge of land for the eviction of an unlawful occupier.
- (2) At least 14 days before the hearing of the proceedings contemplated in subsection (1), the court must serve written and effective notice of the proceedings on the unlawful occupier and the municipality having jurisdiction.
- (3) Subject to the provisions of subsection (2), the procedure for the serving of notices and filing of papers is as prescribed by the rules of the court in question.
- (4) Subject to the provisions of subsection (2), if a court is satisfied that service cannot conveniently or expeditiously be effected in the manner provided in the rules of the court, service must be effected in the manner directed by the court: Provided that the court must consider the rights of the unlawful occupier to receive adequate notice and to defend the case.
- (5) The notice of proceedings contemplated in subsection (2) must –
 - (a) state that proceedings are being instituted in terms of subsection (1) for an order for the eviction of the unlawful occupier;
 - (b) indicate on what date and at what time the court will hear the proceedings;
 - (c) set out the grounds for the proposed eviction; and
 - (d) state that the unlawful occupier is entitled to appear before the court and defend the case and, where necessary, has the right to apply for legal aid.
- (6) If an unlawful occupier has occupied the land in question for less 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 the rights and needs of the elderly, children, disabled persons and households headed by women.
- (7) 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.
- (8) If the court is satisfied that all the requirements of this section have been complied with and that no valid defence has been raised by the unlawful occupier, it must grant an order for the eviction of the unlawful occupier, and determine –
- (a) a just and equitable date on which the unlawful occupier must vacate the land under the circumstances; and
 - (b) the date on which an eviction order may be carried out if the unlawful occupier has not vacated the land on the date contemplated in paragraph (a)."

It can be seen that the protection in section 4 in essence embraces two aspects. The one is procedural, and is contained in subsections (2) to (5), which lay down that, as a prerequisite to the granting of an eviction order, the party who applies for the order must follow certain procedures, the effect of which is to inform the unlawful occupier expressly and effectively of his or her rights. The other is substantive, and is contained in subsections (6) and (7). Subsection (6) provides for the situation where the occupier concerned has occupied for less than six months, and subsection (7) where he or she has occupied for more than six months. The only difference is that in the case of occupation for more than six months one of the considerations that must be taken into account (save in the case of a sale in execution pursuant to a mortgage), is whether land has been or can reasonably be made available for the relocation of the

unlawful occupier. Subsection (8) goes on to lay down, in the cases of both subsections (6) and (7), that if the court is satisfied that the requirements of the section have been complied with, and that no valid defence has been raised by the unlawful occupier, it must grant the eviction order, and it must at the same time determine a just and equitable date upon which the unlawful occupier must vacate the land and the date upon which the eviction order may be carried out.

It is not in dispute that the respondent was at all relevant times the person "in charge" of the property concerned, and that subsections (2) to (5) were complied with. The sole question, as I indicated earlier, is whether the protection offered by section 4 extends to the appellant as a tenant who is holding over. To state it more precisely, the question is whether section 4 was intended to protect someone who had taken occupation in terms of a lease, but who has since become an unlawful occupier because the lease has been lawfully terminated or has otherwise expired.

On this question the Magistrate held that the Act only applies to persons who at the time of taking occupation had done so without the consent of the owner or person in charge. It applies in short to no one but so-called squatters.

Of the seven cases which have thus far come before our courts and which deal in some way or other with the matter, only two have been directly relevant. In both it was held that the Act had been intended to apply to squatters, and not to parties who take occupation in terms of an agreement and whose right of occupation is thereafter terminated.

One is the case of **ABSA BANK LIMITED v AMOD** 1999 (2) All SA 423 (W), in which an occupier claimed to be a lessee. The existence of a lease was in dispute, but it was common cause that, whatever the true nature of the agreement had been, his right of occupation in terms thereof had been terminated. In this regard **SCHWARTZMAN J**, sitting alone, said (at 429e):

“... I find it difficult to accept that the 1998 Act can be interpreted as turning on its head the common law of landlord and tenant or the common law rights of an owner of immovable property who has, in terms of a contract, given another the right to occupy his or her immovable property to recover same”.

He concluded (at 430g) that

“... the provisions of the Act cannot and do not apply to ... common law relationships and in particular to agreements pursuant to which parties agree that land or the improvements built thereon shall be occupied for a period of time as determined by them in terms of their agreement.”

The other involved a person who had taken occupation in terms of an arrangement of *precarium*, the owner's consent having thereafter been withdrawn. It had come before **GRIESEL J** in the Cape Provincial

Division, and he approved of and applied the conclusion reached in AMOD's case. It went on appeal under the name **ELLIS v VILJOEN** in case No A320/2000, which is as yet unreported. On 7 February 2001 **THRING J** delivered a judgment, concurred in by **BLIGNAULT J** and **VAN HEERDEN J**, in which he held (at page 15) that AMOD's case had been correctly decided -

"... at least as regards the finding that the Act does not apply to a situation where property is occupied by a person who initially took occupation thereof in terms of a contract, or with the consent of the owner, but whose right to remain in occupation has since been terminated."

While the remaining five cases are only indirectly relevant, it is nevertheless significant that in not one of them was a different view expressed; on the contrary, in each the decision in AMOD's case, albeit *obiter*, was referred to with approval.

The first is **ROSS v SOUTH PENNINSULA MUNICIPALITY**, an as yet unreported judgment in case No A741/98 delivered by **JOSMAN AJ** (as he then was) in the Cape Provincial Division on 3 September 1999. What he had to deal with was section 26(3) of the Constitution of the Republic of South Africa Act, No 108 of 1996, which provides that no-one may be evicted from his or her home without the court first considering all of the relevant circumstances. (Mr Bundlender accepts that on its own, section

26(3) is irrelevant to the issue, and that it is only together with a further Act, such as the one at issue in the instant appeal, that it plays any role.) The issue in ROSS's case was whether the form of pleading held to be proper in the well known authority of **GRAHAM v RIDLEY** 1931 TPD 476 was still permissible in the light of section 26(3). In **GRAHAM v RIDLEY** it had been held that because an owner of property *prima facie* has the right of possession, all that he has to plead in order to claim an order for eviction is that he is the owner and that the other party is in possession. It is then up to the other party, if he seeks to avoid an eviction order, to plead and prove facts, such as a lease, which justify his occupation. In ROSS's case it was held that in the light of section 26(3) the abovesaid form of pleading by an owner no longer holds good. The matter is irrelevant to the issue in the instant appeal, of course, firstly because it did not deal with the Act at issue before us, and secondly because in the instant case the respondent did not seek to rely on the form of pleading approved in **GRAHAM v RIDLEY**, but instead set out the existence of the lease, and alleged that it had been properly terminated. In ROSS's case **JOSMAN AJ** nevertheless found it helpful (at pages 20 – 24) to consider **AMOD's** case and concluded by saying that he agreed with **SCHWARTZMAN J's** conclusion.

The second is the case of **BETTA EIENDOMME (PTY) LTD v EKPLE-EPOH** 2000 (4) SA 468 (W). Although that case dealt with a lessee who had originally had the right of occupation, the court was not called upon to consider the Act now in issue. The sole issue before it was whether **ROSS's** case had been correctly decided. **FLEMING DJP** held that it was wrongly decided, and that section 26(3) of the Constitution had not changed the rule regarding the form of pleading approved in **GRAHAM v RIDLEY**. He ordered the eviction sought, in so doing expressing his approval (at paragraph 6.2) of the decision in **AMOD's** case.

The third is also an unreported judgment, one delivered on 1 October 1999 in case No A7318/99 in the Cape Provincial Division by **HLOPE DJP** (as he then was) in **CAPE KILLARNEY PROPERTY INVESTMENTS (PTY) LTD v MAHAMBANDA AND OTHERS**. The respondents concerned had been squatters, and had in any event not had any right to take or remain in occupation. The court was not called upon to decide, and therefore did not deal with, the position had the respondents been in occupation in terms of lease agreements, but the learned judge (at paragraph 14) nevertheless referred to **AMOD's** case with apparent approval.

The fourth case is **PORT ELIZABETH MUNICIPALITY v PEOPLE'S DIALOGUE ON LAND AND SHELTER AND OTHERS**, an unreported

judgment in an appeal to the Full Court delivered in November 2000 in case No CA24/2000 in the Eastern Cape Division. The occupiers in that case had all been squatters and an eviction order was issued. Because the occupiers were squatters the decision is to that extent unhelpful, but Mr Bundlender points out that the eviction order was made despite the fact that it was with the owner's consent that at least some of them had originally moved onto the land concerned, such consent having thereafter been withdrawn. The court held that, because those squatters who had originally had the owner's permission had not been properly identified in the papers, it was not possible for the court to differentiate between them and those that had never had consent. The court was therefore constrained (page 8 of the judgment) to consider the matter on the assumption that the Act was indeed applicable to all of the occupiers, and did so despite the fact that in this regard it referred to AMOD's case with apparent approval.

The fifth and last case is an unreported decision of the Land Claims Court delivered by DODSON J on 24 July 2000 in case No LCC 49R/00 in VAN ZYL NO v MAARMAN. The case does not help, however, because it did not deal with the Act at issue before us. It dealt solely with the Extension of Security of Tenure Act, No 62 of 1997. To the extent that it may have

been relevant to the issue under that Act, however, **DODSON J** expressly agreed (at paragraph 11) with the "findings" in **AMOD's** case.

Against this array of judicial opinion, albeit *obiter* in all but the first two I have dealt with, there is not a single judgment in which it was held or even suggested that the protection afforded by the Act was intended to extend to a tenant whose lease has been lawfully terminated or has otherwise expired.

While I do not, with respect, agree with all of **SCHWARTZMAN J's** reasoning, I do support his conclusion that the Act was intended to protect squatters, and not tenants whose leases have been lawfully terminated or otherwise expired. I certainly endorse the following views expressed by **SCHWARTZMAN J** (at 429f)

"... a property owner say in Hyde Park, Bishops Court or La Lucia, who leases his or her residential property for 12 months to say a millionaire, cannot recover possession of the property on termination of the lease from what is then an "unlawful occupier" unless and until he or she complies with section 4 of the 1998 Act. Nor can the property owner recover any amount for the holding over by the tenant who is at common law in unlawful occupation of the property (see s 3(1) of the 1998 Act). Nor can an eviction order be granted unless the court is satisfied that it is just and equitable to do so and then only after considering whether there is land available to which the millionaire tenant can be relocated. A similar position would arise if such property owner sold the property to a purchaser who took occupation of the property and then failed or refused to pay the purchase price. Here again such property owner's right to evict would be subject to equitable consideration and the court being satisfied that the occupier has alternate land that he or she can occupy (see s 4(6) and 4(7) of the 1998 Act). These apparently absurd results can only follow if it is clear from the 1998 Act that this was the clear and manifest intention of parliament. I cannot find such intention in the 1998 Act."

The Act's expressly stated purpose and preamble, which I have quoted above, apply *a fortiori* to squatters and not to tenants, and the repeal of the Prevention of Illegal Squatting Act, No 52 of 1951, is a clear indication that the legislature intended the 1998 Act to apply to squatters. In this regard SCHWARTZMAN J said (at 429i – 430c):

"Had it been the intention of the legislature to affect the common-law right of property owners, to which I have referred, the definition of unlawful occupier would have included a person who, having had a contractual right to occupy such property, is now in unlawful occupation by reason of the termination of the right of occupation. The absence of such a provision must affect the extent to which it can be said that the 1998 Act was intended to affect persons' common-law right to determine who may occupy their immovable property in terms of agreements. Furthermore, the words "the person who occupies land" in the context of the definition of unlawful occupier can only, as I understand it, mean a person who moves onto the land of an owner without the permission of the owner and cannot without more be said to include a person who has, in terms of a contract or otherwise, been in lawful occupation of a property but whose common-law right to possession has ended."

He concluded (at 430d – g):

"The above interpretation is, in my judgment, consistent with the purpose of the Act and its preamble which is to give rights to and a means to control persons who have for historic or other reasons and without the permission of the owner moved onto an owner's land and created an informal settlement. Reading the 1998 Act as a whole, it is (sic) clear object is to bring about some form of control over these informal settlements. In the circumstances I find that I cannot interpret the 1998 Act otherwise and cannot accept that an Act designed to deal with this particular social phenomenon can be reasonably interpreted or understood to mean an Act designed to change the common law of landlord and tenant or to affect the common-law right of an owner of an immovable property to recover his or her immovable property from a person who took occupation in terms of a contract but whose contractual right to occupy has terminated. On my reading of the 1998 Act it is intended solely to regulate and control persons who occupy what are called informal settlements. I also conclude that the reference to the common law in section 4 of the Act is limited to the common law insofar as it may deal with persons who move onto another's land without the owner's express or tacit approval, eg a trespasser."

Aside from the reasons given by SCHWARTZMAN J, there are in my view further considerations which point in the same direction.

The Rent Control Act, No 80 of 1976, laid down limits to a lessor's right to evict a lessee from so-called controlled premises. If it were correct that the 1998 Act was intended to apply to leases, it is difficult to understand why the Rent Control Act would not at the same time have been repealed, or why nothing was said in the 1998 Act about those provisions in the Rent Control Act which are inconsistent with the 1998 Act. The Rent Control Act was only repealed in 1999 by the Rental Housing Act, No 50 of 1999. The further question that arises, if the 1998 Act had been intended to apply to leases, is why the Rental Housing Act was necessary, especially because the express terms of its purpose and preamble, in part at any rate, are the same as those in the 1998 Act. Its provisions are furthermore to some extent inconsistent with those of the 1998 Act, yet it contains no further provision to explain how the two Acts are to be reconciled.

One of the many absurd results that would follow if the 1998 Act were to apply to lessees could arise in the case of a sublease. If the tenant sublets the premises concerned, and does not therefore use them as his own home, section 4 would not necessarily protect him, because he will

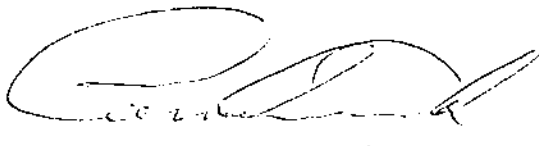
not strictly be in "occupation" of the land concerned and, for the purposes of subsection (7) of section 4 at any rate, there would be no question of enquiring into whether other land is available for his occupation. If he fails to pay the rental an order for his eviction may therefore be made. The sub-lessee who uses the premises for his home will not, however, be in the same position. He will not necessarily be liable to be evicted, at the instance of either the landlord or the tenant.

Finally, contracts form the basis of the functioning of the commercial world, and it goes without saying that when parties conclude contracts they do so seriously. When a party to a contract conscientiously undertakes an obligation the other acquires a right which the law recognises and enforces. The legislature would therefore not lightly interfere with the sanctity of contracts, and in particular with rights properly acquired thereby, especially in an established field, such as landlord and tenant, which has been with us for ages. There are in the Republic doubtless hundreds of thousands of houses or flats that have been let as homes to the lessees concerned. If the Act had been intended to apply to those leases, it would drastically and prejudicially affect the rights of the landlords concerned, and it would have done so without any prior warning. The result would unquestionably give rise to alarm, if not chaos, in the industry, and I find it difficult to imagine that the legislature could have intended such results.

The appeal is dismissed with costs.

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COMBRINCK J: I agree.

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ABOObAKER AJ: I agree.

A handwritten signature in black ink, appearing to be 'A. B.', written in a cursive style.

~~COUNSEL~~^{Attorney} FOR THE APPELLANT : MR G M BUDLENDER
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NO APPEARANCE FOR THE RESPONDENT

DATE OF HEARING : 1 FEBRUARY 2001

JUDGMENT DELIVERED ON : 23 FEBRUARY 2001

