REMEDIES OF THE LESSEE: THE DEVELOPMENT OF SPECIFIC PERFORMANCE AND REDUCTION IN RENT

Mpange v Sithole 2007 6 SA 578 (W)

1 Introduction

This judgment arose from issues attendant upon the legal dilemma faced by desperate tenants who find themselves at the mercy of an unscrupulous landlord/lessor (so-called "slum landlords"). The case dealt with the remedies available to such tenants/lessees who are confronted with two equally unpalatable alternatives: on the one hand, homelessness and, on the other, paying rent for residence in an unsafe and defective building.

According to the court (Satchwell J paras 2 and 35) there are a number of possible remedies available to the court where a slum landlord has failed to maintain the leased premises in a safe and proper condition. One such remedy is an order for specific performance, that is, that the landlord render the premises fit for the accommodation purposes for which he has rented it out. Another remedy is an order that the rent payable by the tenants is reduced in proportion to the reduction in use and enjoyment of the leased premises. Earlier court decisions tended to refuse to grant such orders. In *Mpange*, the court first considered judicial and academic criticism of these decisions. Thereafter the court examined these remedies in light of the obligation on the court to develop the common law, the right to adequate housing as embodied in section 26 of the Bill of Rights as well as the rights to dignity and privacy provided for in the Constitution of 1996.

2 Facts

The matter, which was brought by way of an application, dealt with the situation where a building (Leyland House, which was originally a factory) in the Johannesburg CBD was leased for residential purposes by a slum landlord (respondent). Rooms were made in the factory by means of board partitions and were leased by the tenants (applicants) at R420 per month. Additional amounts ranging from R450 to R900 were paid to the respondent for the erection of brick walls to create more permanent rooms (which were, at the date of the application, still not erected). The applicants complained about the condition of the building and alleged a lack of privacy between rooms, illegal and unsafe electrical connections, insufficient and unhygienic sanitation facilities, accumulation of

refuse, broken walls and windows, and general decay and disrepair. It was also alleged that some problems were a result of non-payment of municipal charges and levies by the landlord.

The applicants were all residents of Leyland House. They prepared their own pleadings and represented themselves in the application. They pleaded in some detail that several of their constitutional rights had been infringed by the behaviour of the landlord/respondent. On this basis they sought orders to prohibit the landlord from collecting rentals, to refund to the applicants monies unlawfully received by the landlord and that the respondent be prohibited from contacting the applicants or other occupiers of Leyland House or from entering the property. The applicants also included the catch-all prayer for "further or alternative relief" (para 4).

The applicants had primarily formulated their case on the basis of the alleged non-ownership of the leased property by the respondent and that he was accordingly not lawfully entitled to extract rentals from the occupants. The court held that the applicants were not persons of education or means and that the court should make allowance for the inexperience of lay litigants. If they had been able to obtain legal representation, the legal issues arising from the facts which they had set out in the papers, might have been correctly identified and the relief sought might have been formulated accordingly (para 14). The court therefore approached members of the Johannesburg bar who appeared as *amici curiae*. During the course of the case the true legal issues and remedies possibly available to the applicants were argued and discussed in great detail notwithstanding the fact that they were not all identified in the original notice of motion and supporting affidavits by the applicants. This included the possibility of an order for specific performance and an order for a reduction in rent.

3 Decision

3 1 Ownership of the property and non-joinder of the owner

An agreement to purchase the leased property was entered into by the respondent but transfer in his name had not yet taken place. The court found that the registered owner was Jeppe Industrial Properties (Pty) Ltd which was not joined as a party to the proceedings (para 18). It was, however, apparent from this document that the respondent took possession of the property and was the person in control thereof.

The court held that the issue of ownership and the non-joinder of the registered owner did have relevance to the ability of the court to implement the remedies available to it (para 17). The validity of a lease agreement between a lessor and lessee is, however, not affected by the fact that the lessor is not the registered owner of the premises (para 24).

3 2 Breach of lease by the respondent

On the papers before the court, it held that the respondent was the lessor and the applicants the lessees of the premises. The court held (para 28), referring to various cases including *Poynton v Cran* 1910 AD 205; *Hunter v Cumnor Investments* 1952 1 SA 735 (C) and *Cape Town Municipality v Paine* 1923 AD 207, that it was trite that a lessee is entitled to the full use and enjoyment of the property during the full term of the lease. The respondent therefore had a duty to deliver and maintain the property in a condition reasonably fit for the purpose for

which it had been let. The duty includes the obligation that lessees shall not be exposed to any unnecessary risk to life or property and that lessees shall occupy the premises with safety (*Amin v Ebrahim* 1926 NPD 1; *Tee v McIlwraith* 1905 ECD 286).

Even though the property in question was an old warehouse, it was common cause that the property, having been turned into a warren of boarded bedrooms, was let by the respondent for the specific purpose of providing residential accommodation for the applicants,. The court noted, however, that the premises were completely unfit for housing and was in no doubt that the landlord (respondent) had failed to hand over the premises in a proper and habitable condition, and also failed to maintain the premises in a proper state of repair. The respondent was therefore in breach of the lease agreement (para 32). The important question, however, was what the appropriate remedy/remedies in these circumstances would be.

3 3 Remedies available to the applicants (tenants)

Where the lessor fails to deliver or maintain the property in a condition fit for the purpose for which it was let there are a number of remedies available to the lessee which include cancellation of the contract or a claim for specific performance from the lessor. A reduction in rent is also possible (para 35).

3 3 1 Specific performance

The court held (para 36) that although a contracting party is entitled to specific performance of the contract, the granting of such an order remains within the discretion of the court. The courts tend to refuse to order the lessor to effect the necessary repairs (*Marais v Cloete* 1945 EDL 238; *Barker v Beckett & Co Ltd* 1911 TPD 151; *Hunter v Cumnor Investments* 1952 1 SA 735 (C)).

The basis for this reluctance was described by De Villiers J in *Nissenbaum and Nissenbaum v Express Buildings* 1953 1 SA 246 (W) 249G–H who held that a court will not order specific performance "because it is a difficult matter for the Court to supervise and see that its order is carried out, and as the question whether there has been specific performance of the Court's order was difficult to determine, it would be difficult to enforce it".

Satchwell J, however, held that, although the cases may establish a general tendency on the part of the courts not to order specific performance, such tendency ought not to be elevated to an absolute rule. She referred to the Appellate Division's criticism of the courts' general reluctance to order specific performance in such cases (para 41). In *ISEP Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd* 1981 4 SA 1 (A) 5G, Jansen JA described this reluctance as a "limitation developed from the English practice and not consonant with our law". Satchwell J went further and declared that English courts have also repudiated the rule not to grant specific performance (*Tito v Waddell (No 2)* 1977 Ch 306). The court also referred to well-founded academic criticism of the reluctance of the court not to grant specific performance (Kerr *Principles of the law of sale and lease* (1998) 56). It added that the notion that an order for specific performance would be difficult to enforce would arise only when the person in whose favour it was granted alleges that the defendant had failed to comply with it (para 44).

The court held (para 37) that it has generally been accepted that a lessee who is unable to persuade a court to make an order requiring the lessor to effect the

necessary repairs will be able to achieve the same result by effecting the repairs himself and at his own cost. The lessee may then recover the costs from the lessor by way of set-off against the rent payable. Such an option was, however, not readily available to the tenants in this case, the main reason being that they did not have the means and the necessary skills to do the repairs themselves and to effect the renovations needed to render the premises habitable.

To suggest that the applicants could decline to rent the premises and seek accommodation elsewhere ignores the realities of the shortage of accommodation for poor people and residents who are at the mercy of the slum landlords (para 47).

3 3 2 Development of the common law in view of the Constitution

In view of the rights to dignity, privacy and access to adequate housing set out in the Constitution, the court held (para 48) that it was obliged by section 39(2) of the Constitution to develop the common law in a manner that permitted it to grant specific performance in situations such as the present (see also para 4 below). According to Satchwell J (para 55) a general rule of the common law which regards orders of specific performance as inappropriate in the context of a lessor's failure to properly maintain the premises leased, presupposes a class of lessees who have the means, themselves, to effect the necessary repairs. Where the class of lessees (as in this case) does not have the means to cover the costs of such repairs themselves, the failure of the court to exercise their discretion in favour of an award of specific performance will entail that such lessees are required to remain in occupation of premises that severely compromise their dignity.

3 3 3 Reduction in rent

The court held that there was another remedy available which would best suit the particular circumstances, namely a reduction in rent. The court discussed the approach where the lessee remains in occupation (para 66). In *Arnold v Viljoen* 1954 3 SA 322 (C) the court held that where the lessee remains in occupation of the thing let, he or she remains liable for the full amount of rent even though there was not full use and enjoyment of the leased property. This case was purportedly based on the Appellate Division authority of *Sapro v Schlinkman* 1948 2 SA 637 (A). According to Satchwell J (para 66) if such a line of thought is followed the test for a lessee's liability for paying rent is whether he or she is in occupation of the leased premises and not whether such occupation is beneficial or not (*Tooth v Maingard and Mayer (Pty) Ltd* 1960 3 SA (N)). There has been criticism of the "continuing occupation" approach from both academic circles (De Wet and Van Wyk *Die Suid-Afrikaanse kontraktereg en handelsreg* Vol 1 (1985) 359) as well as judicial quarters. In *Ntshiqa v Andreas Supermarket (Pty) Ltd* 1997 3 SA 60 (Tk) the full bench refused to follow the *Arnold* decision and Miller J highlighted the *ratio decidendi* of *Sapro*'s case that a lessee who enjoys the full use and enjoyment of the premises must pay the full rent even though the lessor defaults in complying with a non-essential term of the contract. It did not relate to cases where the lessee did not have the full use and enjoyment of the premises. In *Thompson v Scholtz* 1999 1 SA 232 (SCA) the court followed the approach and criticism as set out in the *Ntshiqa* case (para 69).

The court proceeded to explain why a reduction in rent would be an appropriate remedy in the circumstances (para 71). According to Satchwell J, the applicants

in these particular circumstances definitely did not have full use and enjoyment of adequate housing at Leyland House, the reason being a lack of privacy, insufficient lavatories, one water tap for all residents and an illegal and dangerous supply of electricity.

The court held that a reduction in rent would be a more appropriate remedy than specific performance. According to the court the significant advantage of the remedy of reduction in rent was the fact that it speaks only to the relationship between the respondent and the applicants (para 74). An order for specific performance would also impact on the rights of the parties not before the court (that is, the registered owner, liquidator or creditors). Any order requiring a non-owner-lessor to effect repairs to the property would necessarily have impacted on the owner's rights in respect of the property. The court also held that it was unclear what recourse the owner might have against a lessor who effected repairs with which the owner is dissatisfied (para 79). The direct and substantial interest of the registered owner in an order for specific performance suggested that its non-joinder or non-notification in this case militated against the appropriateness of such an order (para 80).

The *Thompson* case was followed in calculating the reduction in rent. In this case it was explained that the general principle remained that "where a lessee is deprived of or disturbed in the use or enjoyment of leased property to which he is entitled in terms of the lease, either in whole or in part, he can in appropriate circumstances be relieved of the obligation to pay rental, either whole or in part" (247A). The court in *Mpange* determined that there was sufficient information before it to determine a reduction in occupational rent. The court accepted that it was very difficult to make an assessment with any degree of accuracy but added that this should not be a deterrence, more so, according to the court, because there is after all no "self-evident method or formula" in terms whereof one can calculate the reduction in rental (*Thompson* 249D) (para 86)). The court took all relevant facts into consideration and believed that it would be fair to the applicants as well as the respondent if the rentals which were currently being paid were reduced to an amount of R170 per month (para 87).

4 Comment

This decision is a clear way forward in the development of two important but often unutilised remedies available to the lessee. There is no doubt that, with the current shortage of housing in South Africa and the rising number of the poorest of the poor living in dilapidated properties within the inner cities, the practical implications of remedies and the manner in which they have been granted by the courts in the past will have to be altered and developed.

It is regrettable that the practical implications of an order for specific performance could not be carried out in this instance, because no direct order for specific performance was made by Satchwell J in the final order (para 89). That being said, the court framed the order for reduction in rent in such a way that the implications thereof seem to have the same effect as an order for specific performance, the reason being that the court ordered that, should the respondent take steps to renovate and repair the building and render it fit for human habitation, he (the respondent/lessor) was not precluded from approaching the court for a variation of the order with regard to the reduction in rent (para 88). This compelled the lessor in an indirect manner to specifically provide full use and enjoyment of the leased premises and to maintain the property. A major concern would obviously be the implications that an order for specific performance would have for the registered owner. The non-joinder of the registered owner did have an

effect on the order made by the court. The court, however, encouraged the applicants to seek a claim for specific performance after joining the owner (para 82).

Satchwell J illustrated the importance of the use and development of specific performance as a remedy in two important ways. Firstly, by discussing the change in the approach of the judiciary in both South African and English courts (paras 39 40 41 48). To reinforce this notion Satchwell J also referred to the academic criticism with regard to the hesitance in granting specific performance as a remedy (para 44).

The second way of illustrating the importance of the development of specific performance as a remedy available to the lessee is by way of development of the common law in terms of section 39(2) of the Constitution. According to Satchwell J, the Constitutional Court has repeatedly stressed that the obligation contained in section 39(2) should always be borne in mind by the high courts and Supreme Court of Appeal (para 49; *Phumelela Gaming and Leisure Ltd v Grundlingh* 2006 8 BCLR 883 (CC)). Where a court's exercise of discretion implicates constitutional rights, it must be interpreted and applied with appropriate regard to the spirit, purport and objects of the Bill of Rights. The court stated that at common law the courts have already acknowledged a need for flexibility in this area (para 76) and held that the constitutional imperative to consider the applicant's rights of access to adequate housing, dignity and privacy in the exercise of a court's discretion to grant an order of specific performance points towards the appropriateness of such a remedy in this particular case (para 76). Satchwell J succeeded in ensuring that the Constitution influenced the common-law contract of lease.

The question may be asked whether the applicants could have brought their application to the Rental Housing Tribunal or even the magistrate's court. The Gauteng Rental Housing Tribunal was established by the Rental Housing Act 50 of 1999. Section 13(9) and 13(13) of the Act bestows the same jurisdiction upon the tribunal as a magistrate's court. Where the tribunal makes a ruling with regard to an unfair rental practice such a ruling is deemed to be an order of a magistrate's court. Section 13(10) provides that a competent court may grant urgent relief under circumstances where it would have been able to do so had it not been for the said Act or in the absence of an unfair practice. According to De la Harpe "Aantekeninge oor die Wet op Huurbehuising" 2002 *PER* 14, the question arises what the position is with other relief not mentioned, for example a claim for specific performance. It would seem that a magistrate would have the jurisdiction to hear any matter relating to an unfair rental practice. The Rental Housing Tribunal Procedural Regulations (GN 4003 in Gauteng *PG* 124 of July 2001) published under the Rental Housing Act states under regulation 7B that the tribunal may in urgent disputes dispose of such a matter "at such time and manner and in accordance with such procedures as it deems fit". Thus, the possibility does exist that the grievances of the applicants might have been addressed by the Rental Housing Tribunal but only under the flag of an unfair practice which was not the application made by them. Specific performance may also have been granted in accordance with regulation 7B but then urgency becomes a factor. A magistrate's court could only have had jurisdiction in this specific case if a claim for specific performance included a claim for damages as well (s 46(2)(c) of the Magistrates' Courts Act 32 of 1944 provides that a magistrate court has no jurisdiction in matters where specific performance is sought without an alternative of payment of damages).

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