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REAL ESTATE MATTERS

DEVELOPERS BEWARE

In the matter, of *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another (CCT 37111) [2011] ZACC 33 (1 December 2011)*, the Constitutional Court held that the state, including municipalities, must provide shelter to those persons that are evicted from private land. This means that the needy should not be dispossessed of occupation unless the state acts on its obligations to provide housing. As such, a private landowner's interest in developing a property necessarily takes second place until the state has achieved this result, especially where the landowner was aware of the situation when he acquired the property.

Blue Moonlight was the owner of a property in the inner city of Johannesburg. It wanted to develop the property but could not proceed with the plans because of illegal occupiers (occupiers) on the property. Blue Moonlight initiated legal proceedings to evict the occupiers from the property. The occupiers, all poor people who had lived on the property for many years, claimed that eviction would render them homeless and that this result contravened their constitutional rights to housing and human dignity.

They joined the City of Johannesburg Municipality (the municipality) in the matter, maintaining that:

- It was obliged to provide them with emergency housing.
- The municipality's housing policy was unconstitutional because it did not oblige the municipality to furnish them with emergency housing and it violated their rights to equality and to housing as it excluded them from consideration for temporary emergency accommodation.

IN THIS ISSUE

The municipality disagreed and argued that it was not constitutionally obligated to provide alternative accommodation, as this duty rested on the shoulders of provincial and national government.

The Court acknowledged that in terms of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act, No 19 of 1998, read with the Constitution, Blue Moonlight could, in principle, evict unlawful occupiers from its property if this was just and equitable and took into account the following factors:

- the occupiers had lived on the land for long a period of time;
- their occupation was once lawful;

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- Blue Moonlight was aware of the occupiers presence when it purchased the property to develop it; and
- Blue Moonlight would not be rendered homeless if the eviction was delayed.

The Court found that the municipality's housing policy was unconstitutional. This was because its policy made provision for the housing of desperate people removed from unsafe buildings, but did not address the needs of those desperate people evicted from land that was privately owned. In addition, the Court noted that it was insufficient for the municipality to allege that it did not have funds to provide housing where it could not show that this was indeed addressed in its budget. It was further noted that it was unreasonable for the municipality to provide temporary accommodation to people relocated by it from hazardous buildings and not to people who would be rendered homeless as a result of eviction by a private owner.

The Constitution (read with the Housing Act, No 107 of 1997 and the National Housing Code) obliges a municipality to provide temporary accommodation to poor people facing homelessness as a result of eviction, whether from state-owned or privately-owned land, as far as it is capable of doing so.

With regards to a private landowner, the Court recognised a private landowner's right to evict illegal occupants from his property. However, it also noted that where a property owner purchases land knowing it is occupied (as Blue Moonlight did in this matter) "an owner may have to be somewhat patient, and accept that the [owner's] right to occupation may be temporarily restricted" if an eviction would lead to homelessness.

The Court accordingly ordered that the occupiers be evicted on a certain future date that coincides with the date the municipality was ordered to have alternative housing available for the occupiers.

For the many developer clients, this decision is of fundamental importance as often properties may be bought at an auction or through private treaty with the intention of turning the property around speedily to minimise holding time (and costs) and maximise profits through development and disposal. Developers who know that the property/ies are subject to illegal occupiers will have to consider the timing implications and delays which will be caused as evictions will now also be dependent on the municipality's ability to deliver alternate housing in accordance with this case.

Fatima Valli-Gattoo

ELECTRICAL COMPLIANCE CERTIFICATES

The Occupational Health and Safety Act, No 85 of 1993, that aims to provide for the health and safety of persons at work, prohibits the sale and even marketing of an electrical installation, unless the prescribed safety requirements have been complied with. These requirements are set out in the Electrical Installation Regulations (Regulations) promulgated in terms of the Act.

A person may find it difficult to understand how the 'health and safety of persons at work' affects residential properties but the Regulations apply to the electrical installations in residential properties and as a consequence the sale and marketing of such properties.

The aim of the Regulations is to ensure that an electrical installation in a residential, commercial or industrial building is safe. This does not necessarily mean that every aspect of such an electrical installation should be in working order.

The Regulations stipulate that the user (owner) or lessor of an electrical installation is responsible for the safety and maintenance of the electrical installation used or leased and must be in possession of a valid certificate of compliance for such installation his certificate is commonly referred to as an Electrical Compliance Certificate (ECC).

Only an accredited person can issue an ECC. In terms of the Regulations, this means that an electrical contractor must be duly registered as such and the registration is to be renewed every two years.

In certain limited circumstances, the owner or lessor of an electrical installation need not be in possession of an ECC. This exemption applies only if the electrical installation on a property existed before 23 October 1992 and there was no change of ownership in respect of the property after 1 March 1994. However, if any additions or alterations were made to the installation, the owner or lessor will have to obtain an ECC in respect of the entire electrical installation and not only the portions affected by the addition or alteration.

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The validity period of an ECC was clarified in the 2009 Regulations that provide that the owner or lessor of an electrical installation may not allow a change in ownership of the property if the ECC is older than two years. The effect of this provision is that an ECC remains valid indefinitely, provided that there is no change in ownership of the property. The two year validity period is relevant only when the owner wishes to pass ownership of the property. It is not clear what the rationale is for the proviso – this seems to be absurd as it implies that as long as ownership remains unchanged, the electrical installation is safe but as soon as the property is transferred the electrical installation is no longer safe.

The two year validity period is also affected when additions or alterations are done to an electrical installation in which event a new ECC must be obtained. The new certificate can be issued in respect of the additions or alterations only or in respect of the whole of the property.

The requirement of a valid ECC cannot be waived. Parties to a sale agreement may, however, agree to shift the responsibility for obtaining an ECC from the seller to the purchaser. The party undertaking to obtain the ECC shall be liable for the costs thereof.

An attorney attending to the transfer of a property is not required to have the ECC before registration of transfer can take place. The sale agreement however may provide that transfer may not take place unless a valid ECC is issued, in which event it will be the responsibility of such attorney to ensure that the provision is complied with before proceeding with the registration.

Muriel Serfontein

WHEN IS AN ALLEGED NON-TRADING ENTITY STILL REGARDED AS A 'TRADER' IN TERMS OF SECTION 34 OF THE INSOLVENCY ACT

Kotze v Axal Properties 2 CC and Others (2011/35866) [2012] ZAGPJHC 119 was about the application of section 34(3) of the Insolvency Act, No 25 of 1936 (Act), and the proper meaning to be attributed to the term 'trader' and the phrase 'in connection with the business' as they appear in the section relating to the interest of the judgment creditor, Kotze (the Applicant), in respect of a judgment against Mega Super Cement CC, a close corporation in liquidation (Mega).

Section 34(3) states:

"Voidable sale of business –

> (1) If a trader transfers in terms of a contract any business belonging to him, or the goodwill of such business, or any goods or property forming part thereof (except in the ordinary course of that business or for securing the payment of a debt), and such trader has not published a notice of such intended transfer in the Gazette, and in two issues of an Afrikaans and two issues of an English newspaper circulating in the district in which that business is carried on, within a period not less than thirty days and not more than sixty days before the date of such transfer, the said transfer shall be void as against his creditors for a period of six months after such transfer, and shall be void against the trustee of his estate, if his estate is sequestrated at any time within the said period.
>
> (3) If any person who has any claim against the said trader in connection with the said business, has before such transfer, for the purpose of enforcing his claim, instituted proceedings against the said trader —
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> (a) in any court of law, and the person to whom the said business was transferred knew at the time of the transfer that those proceedings had been instituted; or
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> (b) in a Division of the Supreme Court having jurisdiction in the district in which the said business is carried on or in the magistrate's court of that district,

the transfer shall be void as against him for the purpose of such enforcement".

The opposition to the Applicant's case, that various dispositions were void against him, was premised on the contentions that Mega was not a 'trader' as defined in the Act and that even if it was, the applicant had not shown that its claim was 'against the trader in connection with the [said] business'.

For purposes of this article, we have focussed only on the first contention, of whether or not Mega was a 'trader'. The Court investigated certain core facts relating to dispositions made by Mega. In December 2007, Mega sold its business (our emphasis) to Sethaba Power (Pty) Ltd (Sethaba) who at once took possession of the assets but the sale was cancelled and before Mega could

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re-possess the assets, First National Bank (FNB) intervened to perfect a notarial bond. On 14 April 2007, Mega was placed under a provisional winding up order from which time the liquidator disposed of some assets. On 24 June 2008, the provisional winding up order was discharged at which time Mega had a secured creditor for R22 million, called What May Come CC (WMC), whose controlling member was a Mr Shepherd (Shepherd). Shepherd was also a co-member of Mega with a Mr Stricker (Stricker).

In consultation with WMC, Mega, sold the contended assets to Axal and to KBS (both represented by Stricker). This was the contested disposition of 3 July 2008 to which it was alleged that Mega was not a 'trader' on 3 July 2008, as Mega employed nobody and did not engage in any trading at the time.

The Counsel on behalf of Axal and KBS, pointed to the decisions in *Kelvin Park Properties CC v Paterson NO 2001 (3) SA 31 (SCA) (at [17]),* and *Bank of Lisbon International Ltd v Western Province Cellars Ltd 1998 (3) SA 899 (W),* which were authority for the proposition that the mere absence of trading activity does not mean the entity is not a trader and that, in particular, a trader who has debts outstanding, after the cessation of trading, remains a trader as defined. But the Counsel contended that the circumstances in the present case differed from the authorities referred to, in that at the relevant time, Mega could not have engaged in trade even if it wanted to and as such an 'inability to trade' removed an ex-trader from the realm of continuing liability to a creditor. The inability was the supposed *de facto* destruction of the capacity to trade whilst Mega was in the hands of Sethaba and the liquidator.

The Court stated that the policy purpose of s34 of the Act is important. The point of the protection given to the creditor of a debtor is to prevent a fraud on the creditor by the debtor divesting itself of resources to satisfy the claim. Therefore a liberal construction of the definition of a 'trader' is required otherwise an artful trader would be able to wriggle out of its liabilities.

The Court found that both the law and the facts defeated the contention of being unable to trade as Stricker and Shepherd were in no different a position than the shopkeeper whose lack of working capital forces him to take down his shingle. Furthermore, Stricker had deposed to free Mega from FNB in order to carry on its business and a shortage of ready money induced them not to pursue trading de facto but to sell the assets to two juristic persons controlled by him.

Accordingly, the Court found that Mega was a 'trader', as defined in the Act, at all material times and s34 of the Act was applicable to it and the dispositions made were therefore void as against the Applicant.

Although this case deals specifically with the applicability of s34(3) of the Act, the findings relating to the definition of 'trader' applies equally to s34(1) of the Act. This is of crucial importance in matters where parties try to avert complying with s34(1) of the Act on the alleged basis that the seller is not a 'trader', especially to financiers that are providing funding to a purchaser pursuant to such sale or disposal.

Muhammad Gattoo

SPOILING COMPLEXITIES

The *Fisher v Body Corporate of Misty Bay 2012 94) SA 215 (NGP)* decision highlights the consequences a body corporate should consider before summarily denying an occupier the right of access to a complex.

According to the body corporate of the Misty Bay Complex (Respondent), an owner of one of the units (Applicant) had fallen into arrears in respect of his rates and levies. Due to the Applicant's failure to make the necessary payments, the Respondent made the hasty decision of suspending his access tag. This suspension resulted in the Applicant being unable to enter and exit the complex as and when he pleased.

Reacting to this decision, the Applicant brought an urgent application in the North Gauteng High Court for 'the restoration of the applicant's possession and access to the house.' In defence of its actions, the Respondent's legal representatives submitted two arguments. The first was that the Applicant's car, rather than the Applicant himself, had been barred from accessing the complex. Thus the Respondent submitted that the Applicant was only restricted 'when using his vehicle,' as opposed to being restricted in general. The basis for the second argument was that even if the Court found against the Respondent on the first submission, the Respondent was nevertheless entitled to suspend the Applicant's access on account of the arrears.

To bolster this second submission, the Respondent submitted that the Rules of Conduct of the" Misty Body Corporate (Rules) stipulated that a failure to pay rates and taxes entitled the Body Corporate to suspend occupiers' access tags.

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Judge Legodi readily dismissed the technicality of the first argument, categorically stating that such action amounted to spoliation. He went on to discuss the Rules relied on by the Respondent and concluded that the Rules contained no reference that justified the Respondent's actions. More importantly, Judge Legodi pointed out that even if such a rule had been found to exist, it would not have entitled the Respondent to 'take the law into its own hands,' which, according to the Court, is exactly what the Respondent had done in this case.

Interestingly, Judge Legodi expressed the view that the suspension of access amounted to spoliation of the house as well as the motor vehicle. Accordingly, he suggested that the Applicant's prayer in his notice of motion should be amended to include the restoration of the motor vehicle. For no apparent reason, the Applicant declined to take advantage of this opportunity.

Judge Legodi went on to point out that the robust remedy of *mandament van spolie* is only applicable in circumstances when the access in question is required for the 'use of the house and/or motor vehicle.' In other words the peaceful and undisturbed possession of the property must be dependent on the right of access to the premises in order for the remedy to find application.

In drawing to the close of his judgment, Judge Legodi took exception to the Respondent's insistence, which continued right up to the actual hearing, that it was entitled to restrict the Applicant's access to the complex. To demonstrate this distaste, he awarded a punitive costs order against the Respondent.

The Misty Bay decision reveals the harsh stance the Court takes in circumstances where a party takes the law into its own hands. It is clear that the provision for such action in the rules of a complex, does not exempt a body corporate from following the due process of the law.

Lucia Erasmus and Lara Thomas

CONVEYING RISK

In *Mokala Beleggings v Minister of Rural Development 2012 (4) SA 22 SCA*, the Court sought to determine whether a purchaser is liable to a seller for mora interest in circumstances where the purchaser deliberately delays the transfer of a property and payment of the purchaser price.

It is a widely recognised practice for the seller to select the conveyancers for the transfer of property. Contrary to this custom, in the *Mokala Beleggings* case, the agreement stipulated that the purchaser was entitled to appoint the transferring conveyancers.

Taking advantage of this uncommon leverage over the transferring conveyancers, the purchaser's instructed its conveyancers to delay the transfer of the property. Clause 5.2 of the agreement, presumably offered the seller some protection against the purchaser's delay tactics, by containing an undertaking by the transferring attorney to 'effect the transfer of the properties in the name of the purchaser within two months from the date of signature of the agreement'.

Once the case had escalated to the Supreme Court of Appeal (SCA), the only outstanding issue to determine was the seller's claim against the purchaser for *mora* interest. It is common cause that in circumstances where contracts fix the time of performance, *mora ex re* is created from the contract itself. In other words, mora runs automatically from the lapsing of the stipulated time period. After relinquishing the election of the transferring conveyancers to the purchaser, the seller sought protection against the purchaser's disingenuous actions by relying on clause 5.2 or the automatic flow of interest from the lapse of a particular date. In the alternative, the seller relied on *mora ex persona,* which requires the creditor to place the debtor on terms.

Dismissing the seller's claim for *mora ex re,* the SCA stated that clause 5.2 could not be interpreted as fixing the date for registration of transfer as such an event is dependent on multiple extraneous events outside of the conveyancers' control. Turning to the claim for *mora ex persona,* the SCA emphasised **that** such interest may only flow once the debtor is placed on terms. Despite the purchaser's arguments to the contrary, the SCA found that the letters of demand had placed the purchaser in *mora.* Following from this finding, the seller's appeal succeeded against the decision of the Land Claims Court, which had denied any interest claim.

This decision provides a valuable warning to sellers against allowing the purchaser to elect the conveyancers. As has become clear from this case, countervailing protections in favour of the seller cannot necessarily protect the seller against the risks associated with relinquishing the safeguards created by choosing the transferring conveyancers.

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