

REPUBLIC OF SOUTH AFRICA



IN THE GAUTENG HIGH COURT
(LOCAL DIVISION JOHANNESBURG)

CASE NO:30023/2013

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

29 OCTOBER 2014 Signature: _____
T MOSIKATSANA

In the matter between

MANDISA OLIVE KHUMALO

FIRST APPLICANT

**ALL OTHER UNLAWFUL OCCUPANTS OF
PORTION 15 OF ERF 899, 4 MANGENI ROAD,
PAULSHOF**

SECOND APPLICANT

And

POLKADOTS PROPERTY (PTY) LTD

RESPONDENT

J U D G M E N T

Summary: *Rescission of judgment – Good cause shown – Bona fide
defence based on non-compliance with s 4(6) and (7) of the Prevention*

of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 and s 26(3) of the Constitution.

MOSIKATSANA AJ:

Introduction

[1] This is an application for rescission of judgment granted against the applicants on 9 October 2013. First applicant relies on Uniform Rule of Court 42(1)(a) in so far as she alleges that the eviction order was erroneously sought and erroneously granted due to defective service. Alternatively, first applicant relies on the common law.

[2] First applicant raises a further point *in limine* that the respondent failed to cite or jointly sue the Mzilikazi Trust, who, allegedly are the owners of the property. The record indicates that the Mzilikazi Trust, are no longer the registered owners of the property as it was sold in execution to the respondent.

[3] Respondent opposes the application requesting that the rescission application be dismissed with costs.

Factual Background

[4] First applicant's version is that she bought the property situated at Portion 15 Erf 899, 4 Mangeni Road, Paulshof, Gauteng on or about May 2003. The property was placed under the Mzilikazi Trust ('the trust'). The first applicant and a Mr Linda Leonard Khumalo were the only trustees. She has been living at the property with her two minor children aged 8 and 14 and her major child aged 21 in 2013.

[5] The first applicant applied for and was granted a loan by Nedbank (the bank) for R600 000. A bond was registered against the property as security for the loan. The

property was registered under the Mzilikazi trust at the deeds registry's office. She has been paying on the bond since June 2003 until June 2012 when she admittedly started defaulting on her bond payments. In an effort to remedy her default, she entered into a verbal arrangement with the bank to pay back the overdue amounts in extended instalments.

[6] First applicant states that she was caught by surprise when on 18 June, 2013 a certain Mr Ilia Davidovich Lechtman, whom she incorrectly refers to as a 'Mr Eli', attended at her home to inform her that he has purchased the property she is residing at and that he was the new owner.

[7] On 21 June, 2013 at approximately 19h00 Mr Lechtman returned with the police to inform the first applicant that she should vacate the house. The first applicant informed them that she has nowhere to go, whereupon they left.

[8] On 10 October, 2013 the first applicant was informed, apparently by a representative of the respondent's law firm that she was to be evicted from the house she was residing in the following week. On the 11 October, 2013 the respondent's legal representatives sent the first applicant a letter informing her of the eviction order and advising her to vacate the property by the 14 October, 2013.

[9] Subsequently, first applicant attended at the Courthouse to obtain copies of the eviction process. After obtaining the Court papers the first applicant was directed to consult an attorney for legal advice. She then approached her attorney of record, who advised her to apply for rescission of the judgment of this Court which was granted in favour of the respondent against the applicants on 9 October 2013.

[10] In her rescission application, first applicant contends in her founding affidavit, that the judgment was erroneously sought and erroneously granted in that she was

not duly served with a Notice of Motion, Ex parte and a Draft Order pursuant to s 4(2) Of the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act*¹ (PIE).

[11] In his return of service, the Sheriff deposes that the notice in terms of s 4(2) of PIE was personally served on the first applicant at 4 Mangeni Road, Paulshof on 20 August, 2013. Apparently service was frustrated allegedly due to the first applicant's uncooperativeness.

[12] Finally, on 12 September, 2013 service was effected by affixing the process on first respondent's main door. The Sheriff also deposes, in his affidavit that the first applicant, informed him, that the house belongs to a trust, and that she could not move nor can the house be 'action'² (sic).

[13] First applicant's version is that on 20 August, 2013 the day which is indicated on the Sheriff's return as the date on which she was personally served and apparently refused her cooperation, she was at home attending to her business and that if the Sheriff attended at her home as stated in the Sheriff's return, she would have seen him and obliged to being served in the same manner that she obliged when Mr Lechtman, attended at her home to inform her that he had purchased the house and wanted her to vacate the house.

[14] First applicant also contends that she is not in wilful default to oppose the eviction application, as she was not aware of the launching of the application, and that if she was aware of it, she would have obtained legal assistance in opposing it.

¹ Act 19 of 1998 hereafter referred to as PIE.

² I presume this was intended to mean that the house could not be auctioned off.

[15] First applicant contends that because there was no proper service, the eviction order was erroneously granted and that this is a proper case for rescission in terms of Rule 42(1)(a)³.

[16] First applicant further states that to her knowledge, the property is owned by the Mzilikazi Trust. She states that she does not know how the property was sold and registered in the respondent's name, as she did not receive any summons.

Evidently, first applicant knew of the proceedings instituted against her as the proceedings were opposed. First applicant was granted a postponement on 23 November, 2011 to the 31 January, 2012 to allow her to file opposing papers.

Despite being granted an opportunity to file opposing papers, first applicant did not do so. Consequently, an order declaring the property executable was granted on 01 February, 2012.

[17] Respondent opposes the rescission application on the basis that:

[17.1] the first applicant's contention that the s 4(2) notice in terms of PIE was not served at her home is without merit in that the s 4(2) notice had been properly served at her home; and

[17.2] the first applicant does not have a *bona fide* defence to the respondent's claim.

Issues for Determination:

[18] The issues for determination are whether:

³ Rule 42(1)(a) stipulates that: 'The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary: (a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;'

[18.1] the eviction order was erroneously sought or erroneously granted in that the s 4(2) PIE notice was not properly served or at all; and

[18.2] there was wilful default by the applicant at common law.

Irregular Service:

[19] Sheriff deposed to the fact that on the 16 August, 2013 and 20 August, 2013 he attended at the home of the applicant who refused to accept service of the s 4(2) PIE notice. Instead, of leaving the notice in terms of s 4(2) of PIE with respondent or affixing it to her door, the Sheriff leaves with the process unserved and returns to attempt service again on 12 September, 2013 only to find that respondent is not home. According to the Sheriff, only then does he affix the process to the door of the first applicant's home.

[20] First applicant disputes the Sheriff's claims. She, on the other hand, deposed that she was home on 20 August, 2013 and that the Sheriff never showed up at her home. She also states that it would not have been practical for the Sheriff to affix process on her door on 12 September, 2013 as there are physical security barriers that would have prevented the Sheriff from going past the gate to affix the s 4(2) PIE notice to her door.

[21] In weighing the probabilities, it is difficult to understand why the Sheriff elected not to effect service by affixing the process on the door of the applicant's home either on the 16 August, 2013 or particularly on the 20 August, 2013 which is the day that he allegedly found the applicant home and she allegedly refused to accept service.

[22] Instead, the Sheriff claims to have made a third attempt at service on 12 September, 2013 on which day, he affixed the notice on first applicant's door, which surprisingly, is what he could have done on the 16 August, 2013 and 20 August,

2013 especially because on the 20 August, 2013 the first applicant was present at home and would have seen the process being affixed to her door.

[23] First applicant further deposed that she has never resisted lawful process. To this end, she states that on 18 June, 2013 Mr Lechtman attended at her home to inform her that he is the new owner of the property and that he intends to have her evicted. There is nothing on the record to indicate that she was in any manner unreceptive or even hostile to Mr Lechtman's overtures, which, I suppose, would have been unwelcome news to her

[24] Mr Lechtman, attended at applicant's home again on 21 June, 2013. On this occasion, he was accompanied by police officers. I would imagine that on this particular occasion, first applicant already knew Mr Lechtman, having seen him previously on 18 June, 2013. It is also reasonable to assume that the police would have been fairly visible and having had previous contact with the new owner, Mr Lechtman, the applicant would have known the purpose of their visit and would if she was so inclined, have attempted to evade them. Instead, the record shows that she received them without incident. This clearly begs the question why the applicant would have resisted service on 20 August, 2013 when she did not resist all the other encounters with the new owner and the police whose aim was to facilitate the eviction process?

[25] In these circumstances the first applicant's denial that she was duly served must prevail consistent with the well- established rule in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*⁴

Common Law:

⁴ 1984 (3) SA 623 (A) at 634 H-I

[26] In order to succeed under the common law, first applicant must demonstrate that:

[26.1] she is not in wilful default;

[26.2] the application is brought *bona fide*; and

[26.3] she has a *bona fide* defence which holds some prospect of success.

The issues of wilful default and her *bona fides* have, by and large, been addressed above. However, what remains to be considered is the question of a *bona fide* defence to the respondent's claim for eviction.

[27] Respondent has argued that first applicant does not have a *bona fide* defence. First applicant asserts that she has a *bona fide* defence in that as a mother with two minor children who have nowhere to go if evicted, she is entitled to legal protection under PIE. Upon examining the relevant papers, I am inclined to believe that the first applicant is an indigent person and that she is the head of a household which includes her three children, two of whom are minors. Accordingly, the first applicant's personal circumstances bring her within the purview of PIE, read with s 26(3) of the Constitution, which states that:

‘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.’

[28] The history and purpose⁵ of PIE, point decisively to the fact that it is not aimed at defeating the rights of property owners that are protected in terms of s 25 of the Constitution. Its main thrust, is to balance the rights of property owners against the

⁵ For an insightful elucidation of the history and purpose of PIE, see *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7; 2005 91) SA 217 at paras: 8-15

interests of illegal occupiers of land, by reinforcing the provisions of s 26(3) of the Constitution which seeks to ensure that evictions are conducted in a manner that is consistent with our Constitutional values.⁶ Sachs J points out that:

‘PIE expressly requires the court to infuse elements of grace and compassion into the formal structure of the law. It is called upon to balance competing interests in a principled way and promote the constitutional vision of a caring society based on good neighbourliness and shared concern.’⁷

He goes on to emphasise that:

‘...[T]hose seeking eviction should be encouraged not to rely on concepts of faceless and anonymous squatters automatically to be expelled as obnoxious social nuisance. ...At the same time those who find themselves compelled by poverty and landlessness to live ... on the land of others, should be discouraged from regarding themselves as helpless victims, lacking the possibilities of personal moral agency.’⁸

[29] The current dispute is regulated by s 4(6) of PIE which applies to proceedings by an owner or a person in charge of land for the eviction of an unlawful occupier of land, who has been in occupation of the property, for longer than six months.

[30] Section 4(7) envisages that a person in the position of first applicant, can only be evicted if a court,

‘...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.’

[31] Section 8 of PIE further provides that:

‘(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).’

⁶ Id at para:16.

⁷ Id at para: 37.

⁸ Id at par: 41.

[32] Further, in determining a just and equitable date on which the occupier must vacate the property, the court must have regard to all the relevant factors, including the period the unlawful occupier and her family resided on the property.

[33] I now turn to consider whether the Court in granting the eviction order, properly executed its constitutional and statutory mandate. Evidently, all the relevant information relating to the circumstance of the first applicant, were not placed before the court. The court was also bereft of the views of the municipality⁹ which is favourably placed to inform the court as to available land within its jurisdiction and processes that the court could implement to temporarily or permanently accommodate the first applicant and her minor children.¹⁰

[34] The fact that information pertinent to the personal circumstances of first applicant and her children was not placed before the court granting the eviction as prescribed under PIE and that the municipality was not joined in the action suggests that the court granting the eviction order was deprived of the opportunity to fulfil its constitutional and statutory mandate in terms of PIE.

[35] In the result, first applicant has shown good cause for a rescission order under the common law. It is therefore unnecessary to consider whether first applicant would be entitled to claim rescission in terms of Uniform rule 42(1) and whether the failure to join the municipality as a party to the eviction proceedings was fatal.

Order:

[36] The following order is made:

⁹ See *Occupiers of Erf 101,102, 104 and 112 Shorts Retreat, Pietermaritzburg v Daisy Dear Investments (Pty) Ltd & others* [2009] 4 All SA (SCA); [2009] ZASCA 80 at para: 11.

¹⁰ Compare: *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* ZASCA 28; 2010 (9) BCLR 911 (SCA); [2010] 4 All SA 54 (SCA) (25 March 2010).

[36.1] The default judgment granted against the first applicant on 9 October, 2013 is rescinded and the first applicant is granted leave to oppose the application for her and her children's eviction.

[36.2] The first applicant is directed to file opposing affidavits within the time period prescribed by the Uniform Rules of this Court and the *dies* in this respect will be calculated as from the date of this order.

[36.3] Costs are reserved for the court hearing the matter.

T MOSIKATSANA

ACTING JUDGE OF THE HIGH COURT

COUNSEL FOR FIRST APPLICANT

FIRST APPLICANT'S ATTORNEYS

COUNSEL FOR RESPONDENT

UNREPRESENTED

***LINDA MAQHEYANA
ATTORNEYS***

MRS E LE ROUX

INSTRUCTED BY

DATE OF HEARING

DATE OF JUDGMENT

STEYN, STEYN & PARTNERS

25 MARCH 2014

29 OCTOBER 2014