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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 2013/25560

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

.....
DATE

.....
SIGNATURE

In the matter between:

ODIRILE SYDNEY LETSOGO KHOSA

Applicant

And

NTLEMEZA S'BUSISO CECIL

First Respondent

NOMBEU YANDISA

Second Respondent

SUMMARY

Eviction in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998 (*"the PIE Act"*) – ownership of property –

eviction order granted by default – subsequently application for leave to appeal – unmerited grounds of appeal – application for leave to appeal unsuited instead of rescission application – current practical procedure in respect of applications for leave to appeal in this local division not waterproof – application for leave to appeal dismissed – and eviction order declared not suspended as there were no exceptional circumstances as envisaged in sec 18(1) of the Superior Courts Act.

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

MOSHIDI, J:

INTRODUCTION

[1] This is an application for leave to appeal against the whole of my judgment and order delivered on 16 April 2014.

THE PARTIES

[2] The present applicant was the first respondent in the main application, whilst the respondents were the two applicants in the eviction proceedings. I shall henceforth, and for the sake of convenience, refer to the parties as they were, namely (*“the applicants”*), and (*“the first respondent”*).

THE GROUNDS OF APPEAL

[3] The first respondent's for leave to appeal are as set out in the application for leave to appeal dated 5 May 2014. I must at the outset place on record that the application for leave to appeal, filed with the registrar on 8 May 2014, was never brought to my attention, nor that of my clerk, until recently when the applicants lodged a complaint. The delay is regrettable. The application is in any event opposed.

THE MAIN APPLICATION

[4] In the main application, the applicants applied for the eviction of the first respondent and others from the property situated at [Erf 1.....], [E.....] [P.....] [E.....] 1 Township, Gauteng ("*the property*"). The matter came before me in the unopposed motion court. Pursuant to hearing argument on behalf of the applicants, and having been satisfied that the applicants had made out a case, I duly granted the order evicting the first respondent and the second respondent (unknown and unlawful occupiers) from the property. At the time, I gave an *ex tempore* order not accompanied by comprehensive reasons. What follow hereafter are such reasons.

[5] In the founding papers, commissioned as far back as July 2013, the applicants contended that they are the joint owners of the property. In support of this allegation, the applicants attached the Deeds Office register, annexure "scn2", as well as a conveyancer certificate ("scn1") confirming that the property was registered in their names on 27 May 2013. The applicants

acquired the property through a mortgage loan granted by First Rand Bank Limited in the amount of approximately R380 000,00 (three hundred and eighty thousand rand).

[6] The documentary evidence as well submissions made on behalf of the applicants proved on a balance of probabilities that the applicants are the registered lawful owners of the property. The applicants complained that since the property was registered in their names, and since the mortgaged bond was registered over the property, they are obliged ineluctably to pay to the local municipality the rates and taxes, various charges and other charges levied, as well as the monthly bond instalment to the bank this, without enjoying the benefits of occupation of their property. On the other hand, all that is known of the first respondent is that he is one of the previous occupiers/owners of the property which occupation is unlawful. This prompted the applicants to launch the eviction application in terms of the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (*“the PIE Act”*).

OWNERSHIP OF THE PROPERTY AND THE LAW

[7] The applicants' right of ownership to the property is unassailable. Indeed, the *onus* of proof of ownership, and that the first respondent is in unlawful occupation of the property was on the applicants. In *Chetty v Naidoo* 1974 (3) SA 13 (A) at p 20, the Court said that:

“The incidence of the burden of proof is a matter of substantive law (Tregea and Another v Godart and Another, 1939 AD 16 at p 32), and in the present type of case it must be governed, primarily, by the legal concept of ownership ... it is inherent in the nature of ownership that possession of the res should normally be with the owner, and it follows that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner (e.g. a right of retention or a contractual right).”

See also *Rhooode v De Kock and Another* 2013 (3) SA 123 (SCA), from which it appears that an application for eviction is inherently vindicatory. In *Wormald NO and Others v Kambule* 2006 (3) SA 562 (SCA) at para [11], the Court said:

“[11] An owner is in law entitled to possession of his or her property and to an ejectment order against a person who unlawfully occupies the property except if that right is limited by the Constitution, another statute, a contract or on some or other legal basis. Brisley v Drotsky 2002 (4) SA 1 (SCA) (2002) (12) BCLR 1229. In terms of s 26(3) of the Constitution, from which PIE partly derives (Cape Killarney Property Investments (Pty) Ltd v Mahamba and Others 2001 (4) SA 1222 (SCA) ([2001] 4 All SA 479) at 1229E (SA)), ‘no one may be evicted from their home without an order of court made after consideration of all the relevant circumstances’. PIE therefore requires a party seeking to evict another from land to prove not only that he or she owns such land and that the other party occupies it unlawfully, but also that he or she has complied with the procedural provisions and that on a consideration of all the relevant circumstances (and, according to the Brisley case, to qualify as relevant the circumstances must be legally relevant), an eviction order is ‘just and equitable’.”

[8] The applicants in this matter, have not given the first respondent any permission to occupy their property. Neither is there any arrangement entered into for the first respondent to occupy the property. In addition, as discussed below, the first respondent had not filed any opposing papers, showed no valid defence to the eviction, leading to the eviction order being granted by default. It was incumbent on the court, as happened here, to

determine a just and equitable date on which the unlawful occupier must vacate, the property, and a date on which the eviction order can be enforced, as provided for in secs 4(8) and 9 of the PIE Act. Subject to the procedural requirements being met, an owner is entitled to approach the court on the basis of ownership and the respondent's unlawful occupation. This will be so unless the occupier poses and discloses circumstances relevant to the eviction order, the owner, in principle, is entitled to an order for eviction. The issue of relevant circumstances is nearly, without fail, facts within the exclusive knowledge of the occupier, and it cannot be expected of an owner, like the applicants, to negate in advance facts not known to them. See in this regard, *Ndlovu v Ndlovu; Bekker and Bosch v Jika* 2003 (1) SA 113 (SCA) para [19]. In this matter, I was satisfied that the applicants had met all the procedural requirements, in particular sec 4(2) of the PIE Act, which entitled them to an eviction order, and that the first respondent had neither advanced a defence to the eviction order, nor placed any relevant circumstances for consideration before the court. It was for these reasons that I granted the eviction order on 16 April 2014, and ordered that the eviction order be carried out by 17 May 2014.

FINDING ON THE GROUNDS OF APPEAL

[9] I have considered carefully the grounds of appeal as contained in the application for leave to appeal. These grounds are plainly misplaced and unsustainable. The grounds were never raised in any answering papers. In any event, the first and the second respondents' attention were drawn to the

provisions of sec 26(1) of the Constitution as well the necessity to obtain legal assistance in para [35] of the founding papers. Further, in any event, the first respondent enjoyed legal representation until shortly before the hearing of the eviction application. For these reasons, I concluded that there are no reasonable prospects of success on appeal. The application for leave to appeal must fail.

[10] However, if I am incorrect in my above finding, I believe that the present application should also fail for another reason. That is that, the impugned order was granted in the unopposed motion court, and under circumstances where the first respondent was in default. At the hearing of the matter on 16 April 2014, the following facts were placed before the court: the notice of motion was served on the first and the second respondents during July 2013; the court order in terms of sec 4(2) of the PIE Act was served on the first and the second respondents on 14 March 2014; the matter was previously on the court roll on 31 October 2013 and again on 9 January 2014; on both occasions the first respondent, asked for, and was afforded the opportunity to file opposing papers; and this was never done until the order now on appeal was granted on 16 April 2014.

[11] The point is simply that the first respondent should rather have applied for the rescission of the judgment either in terms of rule 31(2)(b) or rule 42(1)(a) of the Uniform Rules of Court, or still under the common law. This did not happen. The instant appeal procedure is therefore incompetent, it is susceptible of alteration by the court of first instance. See in this regard,

Zweni v Minister of Law and Order 1993 (1) SA 523 (A) at 532H-J; and *S v Western Areas Ltd and Others* 2005 (5) SA 214 (SCA) at para [20]. Until varied or rescinded, the eviction order granted on 16 April 2014, remains extant. For this reason too, the present application was unsuited. In my view, it will nevertheless be in the interest of justice, avoidance of the abuse of court process, and based on the principle of utilising the court's inherent jurisdiction 'to protect and regulate' its own process, as envisaged in sec 173 of the Constitution, to refuse this unmerited application instantly. The applicants' prejudice remains unabated and irreparable in the interim. I must mention that the application for leave to appeal was previously enrolled for hearing on 14 October 2015. However, on the latter date, the matter was struck off the roll as there was no appearance for the appellant.

[12] At the invitation of the court previously, the parties also addressed me on the question as to whether or not the eviction order ought to be suspended pending the outcome of any further appeal that the first respondent may entertain hereafter. The question is governed by the recently introduced provisions of sec 18 of the Superior Courts Act 10 of 2013 (*"the Superior Courts Act"*), referred to immediately below.

[13] In regard to the discretion to order that an order shall not be suspended, pending the outcome of an appeal, sec 18(3) of the Superior Courts Act provides that "*a court may only order otherwise ..., if the party who applied to the court to order otherwise, in addition proves, on a balance of probabilities, that he or she will suffer irreparable harm if the court does not so*

order and that the other party will not suffer irreparable harm if the court so orders". In the present matter, and as set out above, the following are common cause: the property was registered in the names of the applicants as far back as 27 May 2013; they took out a loan for the purchase price through a mortgage bond; they have been, and are paying bond repayments ever since; they are also liable for rates and taxes and other charges levied in respect of the property; they are not enjoying the right to occupy the property; and the first respondent is occupying the property unlawfully and free of charge. The loss suffered by the applicants is increasing on a daily basis, and they may not or will not be compensated by the first respondent at the end of the probable further appeal proceedings. Indeed, counsel for the first respondent, in closing argument, conceded these common cause facts. The only argument advanced on behalf of the first respondent was that in the event of the eviction order being carried out, his right to housing in terms of sec 26(1) of the Constitution will be infringed. It was also argued that the first respondent's version on the merits of the eviction proceedings was not before the court as he omitted to file answering papers in regard thereto. It was conceded, however, that the first respondent was in fact in court when the eviction order was granted on 16 April 2014. This implied that the first respondent was aware of the order from inception.

[14] The above submissions of the first respondent are by far outweighed by the harm caused to the applicants for as long as they are denied occupation of the property. The record shows that at the previous hearing of the matter on the unopposed roll on 31 October 2013, the first respondent

was present and the court postponed the matter *sine die* in order for the first respondent to file answering papers. This was not done. Later, on 9 January 2014, the matter was on court roll. The first respondent was present. Once more, the matter was postponed *sine die* in order to allow the first respondent to file his answering affidavit. Once more, this was not done, up to the time of the granting of the order on 16 April 2014.

[15] In my view, all of the above constitute exceptional circumstances not to order the suspension of the eviction order as envisaged in sec 18(1) of the Superior Courts Act. (*Cf* for example, *Incubeta Holdings (Pty) Ltd v Ellis* 2014 (3) SA 189 (GJ) at 194J-195I.)

THE ORDER

[16] The following order is made:

1. The application for leave to appeal is dismissed with costs.
2. The eviction order remains in force and executable immediately.

D S S MOSHIDI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

INSTRUCTED BY	M J MBELE INC ATTORNEYS
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INSTRUCTED BY	K N B ATTORNEYS INC
DATE OF HEARING	4 NOVEMBER 2015
DATE OF JUDGMENT	9 NOVEMBER 2015