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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

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

Date: **12th NOVEMBER 2015** Signature: _____

CASE NO: 2013/24254

In the matter between:

THE OCCUPIERS OF ERVEN 87 & 88 BEREA

Applicant

And

DE WET, CHRISTIAAN FREDERICK N.O.

First Respondent

PARBHOO, ROYNATH N.O.

Second Respondent

JUDGMENT

ADAMS AJ:

[1]. This is an application to rescind and set aside an eviction order granted against the applicants by this court (Khumalo AJ, as she then was) on the 10th September 2013. The order for the eviction of the applicants was granted by agreement between the parties, which fact is now disputed by the applicants and is an issue central to this application.

[2]. The application was launched on the 7th November 2013.

[3]. The applicants are a group of individuals who presently unlawfully occupy a block of flats described as [E... ...]. And [8..... B....] Township, Registration Division I.R., Gauteng Province, known as *Kiribilly* and is situated at the corner of [S.....] and [F.....] Roads, [B.....], Johannesburg (*'the property'*). I will at times refer to these individuals as the '*occupiers*' of the property.

THE FACTS

[4]. The respondents are the joint liquidators of M L Rocchi Investments CC (in liquidation), the registered owner of the property since 1985. The property has since been sold to a Mr Calvin Maseko, who deposed to the answering affidavit on behalf of the respondents.

- [5]. On the 23rd August 2013, pursuant to a court order and in compliance with the provisions of the Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998 (*the PIE Act*), the respondents caused a notice in terms of section 4(2) of the PIE Act to be served on the applicants via the offices of the Sheriff of the Court. The said notice was served on the applicants as directed by the letter of the Order of this Court (Mayat J), dated the 21st August 2013.
- [6]. The sheriff had also served on the same day, that is the 23rd August 2013, the PIE Act section 4(2) notice on the City of Johannesburg as a third party.
- [7]. On the 10th September 2013, the date on which the main application for the eviction of the applicants had been set down for hearing, four of the representatives of the applicants attended court and negotiated a settlement of the matter ostensibly on behalf of the majority of the occupiers of the property. As I indicated above, the applicants are now disputing that the persons who attended court on the said date had a mandate to settle the matter on their behalf. I will return to this aspect of the matter later on in my judgment.
- [8]. After satisfying herself that those present at court on behalf of the applicants were in agreement with the terms of the draft order, Khumalo AJ made same an Order of the Court. The indications are that the Draft

Order was only made an Order of Court after a fair bit of negotiation between the legal representatives of the respondents and those representatives of the applicants. For example, the date on which the applicants were required to vacate the premises was changed from the 31st October 2013 to the 15th November 2013. Also, at the insistence of the representatives of the applicants, a prayer was included which provided that some of the applicants would have first option to enter into tenancy in respect of the property once refurbished. On the probabilities, these provisions could only have been on the insistence of the applicants or their representatives.

[9]. Subsequently, the applicants applied for Leave to Appeal the Judgment of this Court dated the 10th September 2013. This application was refused on the 18th February 2014. Thereafter, the applicants petitioned the Supreme Court of Appeal for Leave to Appeal, which application was dismissed on the 30th July 2014 on the grounds that the matter is not appealable.

[10]. In the Founding Affidavit, the applicants make much of the fact that, according to them, service of the relevant processes was wholly inadequate. They say that the eviction order was wrongly granted because there was no agreement or consent at all to have the draft order made an Order of Court. It is claimed that many of the occupiers had no idea that the eviction application was being heard.

[11]. In my view, the alleged defective service on the applicants of the Notice in terms of section 4(2) of the PIE Act and Notice of Motion is irrelevant. On their own version, service of these notices came to the attention of the applicants, who, by all accounts, understood the exigency of the processes so much so that they resolved to delegate four occupiers to attend court on their behalf on the 10th September 2013. They were furthermore enlightened by Mr Maseko at a meeting on the 31st August 2013 at the property. Therefore, the purpose of the notice in terms of section 4(2) of the PIE Act had been achieved and there cannot be any suggestion of prejudice on the part of the applicants as a result of the alleged defective service. In that regard, see: *Unlawful Occupiers, School Site v City of Johannesburg*, 2005 (4) SA 199 (SCA).

[12]. All the same, by the time this application for the rescission of the court order was launched during November 2013, most, if not all, of the occupiers of the property were very much aware of the eviction proceedings and they were in fact cognizant that an eviction order had been granted on the 10th September 2013.

[13]. In the answering affidavit Mr Maseko has this to say:

'It is extraordinary that in a building such as this, that not everybody knew about the eviction application. It defies belief that this is not something serious and spoken about between all the occupiers. The

only way that this version could have had any truthfulness is if the 24 people had committed to oath and presented a version to this court as to why they did not know about the application, which goes beyond a frivolous attack on the returns of service’.

[14]. I agree with these contentions. I find it hard to believe that there would not have been a full scale discussion amongst all of the occupiers of the pending eviction proceedings, especially if regard is had to the fact that the Sheriff had affixed at prominent spots around the building the notice of motion and the other documentation.

[15]. The respondents state that they served the application on the occupiers in terms of the Court Order on 21st August 2013. According to the Sheriff’s return, the application was served as follows:

“RETURN OF SERVICE – NOTICE IN TERMS OF SECTION 4(2) OF THE PIE ACT, 1998:

On this 23rd day of August 2013 at 18:02 I properly served this NOTICE IN TERMS OF THE PIE ACT, 1998, by affixing a copy thereof to the residence of the UNLAWFUL OCCUPIERS OF ERVEN 87 & 88 BERE, Respondent, at KIRIBILLY, CNR SOPER AND FIFE ROADS, BERE, JOHANNESBURG, which is kept locked and thus prevents alternative service. [Rule 4(1)(a)(v)].

Note: (1). By affixing a copy of the Notices and all further processes including an Order of this Honourable Court herein, to all entrances to the property; (2). By affixing a copy of the Notices and all further processes including any Order of this Honourable Court herein, to the door of each and every room, partition or structure within the property that appears to be occupied, alternatively to slide copies of the Notices including any Order of this Honourable Court under the door of the such room, partition or structure; and (3). By assigning a number to every room, partition or structure within the property that appears to be occupied; and (4). By attempting to establish the name or names of the occupier or occupiers of each and every room, partition or structure as identified in paragraph (3) above that appears to be occupied and who are prepared to identify themselves; and refused to identify themselves; (5). By authorising and directing to explain to any person present at the property on the occasion of service of these documents, the nature and import of the relief sought by the Applicant, in English, Sotho and Zulu”.

[16]. The main eviction application was then enrolled for hearing on the 10th September 2013. On the aforementioned date Khumalo AJ, after satisfying herself that the parties have settled the application, granted an order for the eviction of the applicants by agreement between the parties. More specifically, in terms of the Court Order, the occupiers of the property were directed to vacate the property on or before the 15th November 2013.

[17]. During September 2013, the applicants consulted their present attorneys of record, the Seri – SA Law Clinic, who have represented them in these and the other legal proceedings since then. The import of this detail relates to the fact that the applicants would, since during September 2013, have been made aware of their rights in relation to the eviction proceedings. They would no doubt have been advised on the provisions of the PIE Act and the related legislation. Importantly, they would have been advised of their constitutional right to emergency housing in the event of them being rendered homeless as a result of being evicted from the property. Importantly, not a single approach was made by the applicants and / or their legal representatives to the City of Johannesburg with a view to placing the Council on terms to provide them with alternative accommodation in the event of them being evicted. Instead, the approach of the applicants was to expand all of their efforts and energy in getting the eviction order set aside notwithstanding the fact they are, by all accounts, in unlawful occupation of the premises. This, I believe, is an aspect which goes to the *bona fides* of the application for rescission.

[18]. On the 7th November 2013, the present application was launched by the Seri – SA Law Clinic on behalf of the applicants. The application is based on the premise that the eviction order was wrongly granted in that there was no agreement or consent by the applicants to the said order. It is alleged in the Founding Affidavit that the applicants who were aware of the eviction application elected four occupiers to attend court on their behalf and that a Mr Ngubane, who is not a legal practitioner, would represent

them at Court. Mr Ngubane himself denies this claim and alleges that the four representatives were in fact at court to speak on behalf of the applicants and he was there merely as an observer to assist and facilitate if and when necessary.

[19]. The applicants furthermore state that the four occupiers who were sent to attend court were mandated to obtain a postponement of the matter and that they were not authorised to agree to an eviction.

[20]. In the end and after having heard from the parties before her, Khumalo AJ granted the eviction order by agreement between the parties.

[21]. In the present application for rescission, all of the occupiers of the building are before the court as applicants. As far back as the 29th July 2013, most of the applicants met with Mr Ngubane and the applicants handed to him a copy of the eviction application. He then undertook to look into the matter. Most of the applicants had, by implication, by then had sight of the application irrespective of whether or not there had been proper service on them. In other words, by the 29th July 2013, notice of service of the eviction application had come to the attention of the applicants.

THE APPLICATION FOR RESCISSION

[22]. The application for rescission is brought in terms of the provisions of Rule 42(1) of the Uniform Rules of Court and / or in terms of the Common Law.

[23]. The applicants rely on the common law as well as Uniform Rule 42(1) for their claim for rescission. It is trite that in terms of the common law, an applicant, in order to be successful in an application for rescission, is required to show good cause. Generally, an applicant will establish good cause by giving a reasonable explanation for his or her default and by showing that he or she has a *bona fide* defence to the plaintiff's claim which *prima facie* has some prospect of success. In terms of Rule 42(1)(a), the Court may rescind or vary an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby.

[24]. Ms Hlengiwe Gloria Mhlambo, one of the occupiers of the property, deposed to an affidavit in support of the rescission application in which she sets out her and the remaining applicants' personal circumstances and explained what transpired at court on the 10th September 2013. She is one of the occupiers who, in fact, attended court on the aforementioned date on which Khumalo AJ granted the eviction order.

[25]. She is a 40 year old vendor, who sells cigarettes and sweets for a living. She lives in room 63 at the property with her daughter and son. She has

been living at the property since 2003. She alleges that she and her children do not have alternative accommodation and would be rendered homeless without the provision of alternative accommodation.

[26]. According to Ms Mhlambo, approximately 184 people reside on the property, consisting of 47 women, 114 men and 23 children, most of whom have been living on the property for a considerable number of years. She described the occupiers as poor and vulnerable. Nowhere in her Founding Affidavit does she make mention that she or any of the other occupiers searched for alternative accommodation at any stage.

[27]. As regards the proceedings at court on the 10th September 2013, her version is that they, the four representatives of the occupiers, were not involved in any discussions with the legal representatives of the respondents. They were also blissfully unaware of what was happening and they did not even realise that an eviction order was granted against them. I find this hard to believe. This is in stark contrast to what is said by Mr Ngubane, who accompanied them to court on the day. He says in a confirmatory affidavit that there were discussions between them and the respondent's attorney and they were able, at some stage, to negotiate a later date on which they would have to vacate the premises.

[28]. It is apparent from the facts that the applicants, or at least the majority, had agreed to the Draft Order which was made an Order of Court. There

was no justus error and for this reason alone the application for rescission should fail.

[29]. The applicants relied on two grounds in support of their assertion that they have a *bona fide* defence. First, they contended that in terms of s 4(6) and 4(7) of the PIE Act, a court can only grant an eviction order once it is satisfied that it is just and equitable to do so. It was contended that the court ought to have been alive to the fact that the occupiers of the property were poor and faced the very real prospect of homelessness if evicted. Thus, so it was submitted, they were entitled to protection in terms of s 26(1) and (3) of the Constitution. Second, it was argued that where the grant of an order of eviction may result in the occupiers of the property being homeless, the municipality was a necessary party to the proceedings and the failure to join the municipality rendered the grant of the eviction order premature.

[30]. Section 26 of the Constitution, which entrenches the right to housing, provides that:

‘(1) Everyone has the right to have access to adequate housing.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

(3) 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.'

[31]. In *Government of the Republic of South Africa & others v Grootboom & others* 2000 (11) BCLR 1169 (CC), the Constitutional Court held that a housing programme could only be reasonable if it provided emergency shelter to people in desperate need who, for whatever reason, faced the prospect of homelessness. The right to be protected from arbitrary eviction, as contained in s 26(3) of the Constitution, is given effect to through various provisions of the PIE Act. One of the primary objectives of the PIE Act is to ensure that evictions take place in a manner consistent with the values of the Constitution. The PIE Act prescribes the requirements which must be satisfied before a court may grant an order of eviction. Of relevance to this application are ss 4(6) and 4(7) which provide that a court may only grant an eviction order if it is just and equitable to do so, after considering all the relevant circumstances.

[32]. These sections read:

'4(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.'*

[33]. In terms of s 4(6) and 4(7), a court is obliged to consider the rights and needs of the elderly, children, disabled persons and households headed by women. These are specifically listed as relevant factors to which a court must have regard. In terms of s 4(7), the court is also obliged to consider the availability of alternative land for the relocation of an occupier. Where information relating to these matters is not placed before the court, the court will not be in a position to consider these circumstances in determining whether the eviction was just and equitable.

[34]. Our courts have recognised that there is a duty on them, in eviction matters, to consider all relevant circumstances and that they are not in a

position to discharge this duty where information relating to, inter alia, the rights and needs of the elderly, children, disabled persons and households headed by women, has not been placed before them.

[35]. This constitutional approach was explained by Sachs J in *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC):

‘The obligation on the court is to “have regard to” the circumstances, that is, to give them due weight in making its judgment as to what is just and equitable. The court cannot fulfil its responsibilities in this respect if it does not have the requisite information at its disposal. It needs to be fully apprised of the circumstances before it can have regard to them. It follows that, although it is incumbent on the interested parties to make all relevant information available, technical questions relating to onus of proof should not play an unduly significant role in its enquiry . . . Both the language of the section and the purpose of the statute require the court to ensure that it is fully informed before undertaking the onerous and delicate task entrusted to it. In securing the necessary information, the court would therefore be entitled to go beyond the facts established in the papers before it. Indeed, when the evidence submitted by the parties leaves important questions of fact obscure, contested or uncertain, the court might be obliged to procure ways of establishing the true state of affairs, so as to enable it properly to “have regard” to relevant circumstances.’

[36]. The PIE Act imposed a new role on the courts in that they are required to hold the balance between illegal eviction and unlawful occupation and ensure that justice and equity prevail in relation to all concerned. Sachs J, in *Port Elizabeth Municipality v Various Occupiers*, 2005 (1) SA 217 (CC), described this new role of the court as '*complex, and constitutionally ordained*', and one which required a court '*to go beyond its normal functions, and to engage in active judicial management*'.

[37]. A number of courts have, in relation to the provisions of s 4 of PIE, recognised the duty of the court to act proactively, as well as its powers to investigate, call for further evidence or make special protective orders.

[38]. In terms of s 4(7), a court is obliged, in addition to the circumstances listed in s 4(6), namely, the rights and needs of the elderly, children, disabled persons and households headed by women, to give due weight to the availability of alternative land. There is nothing to suggest that in an enquiry in terms of s 4(6), a court is restricted to the circumstances listed in that section. The court must have regard to all relevant circumstances. The circumstances identified are peremptory but not exhaustive. The court may, in appropriate cases, have regard to the availability of alternative land. However, where the availability of alternative land is relevant, then it is obligatory for the court to have regard to it.

[39]. The difficulty, *in casu*, is the applicants were represented at court when the eviction order was granted. In these circumstances, they would have been fully entitled to canvass all the relevant circumstances and to bring same to the attention of the Court. I am of the view that, on this particular aspect of the matter, Khumalo AJ had properly discharged her statutory obligations. Therefore, this '*defence*' does not avail itself to the applicants.

[40]. In any event, I now have before me any and / or all the information which a court would possibly require in order to rule on whether it would be just and equitable to evict the applicants, including all of the personal details of the occupiers of property. I am of the view that even if Khumalo AJ was apprised of all of these circumstances, she would nevertheless have granted the eviction order, especially if regard is had to the fact that the applicants have no right to occupy the premises. These circumstances may have had an influence on her ruling relating to the timing of the eviction but not on the order to evict. In that regard, see: *City of Johannesburg v Changing Tides 74 (Pty) Ltd & Others*, 2012 (2) SA 294 (SCA), at par [25] where Wallis JA states as follows:

'Once the court decides that there is no defence to the claim for eviction and that it would be just and equitable to grant an eviction order, it is obliged to grant that order. Before doing so, however, it must consider what justice and equity demands in relation to the date of the implementation of that order and it must consider what conditions must be attached to that order.'

[41]. In the founding affidavit, the applicants take issue in the main with the fact that City of Johannesburg has not been joined as a party to the application for their eviction. As mentioned above, the Notice of Motion was served on the Johannesburg City Council by the respondents, who seemingly did not respond in any way whatsoever.

[42]. I have already alluded to the fact that since September 2013, the applicants have made no attempt to rope in the City of Johannesburg with a view to having their constitutional right to emergency housing enforced against the Council. In the *Changing Tides* matter, the SCA had directed the attorneys of the occupiers to prepare lists, etc with a view to the City of Johannesburg providing alternative accommodation following their eviction. This, in my view, is an indication that the applicants are not allowed to sit back and expect the respondents to take the necessary measures to get the Local Authority to intervene. The applicants themselves ought to have taken the initiative.

[43]. Also, in the matter of *Johannesburg Housing Corporation (Pty) Ltd v Unlawful Occupiers, Newtown Urban Village*, 2013 (1) SA 583 (GSJ), the court held that prerequisites for mediation were that the parties be *bona fide* and that a credible proposal be put forward. In that matter, so Willis J held, there was little evidence that the occupiers were *bona fide* nor had they put forward a credible proposal. In addition, the court doubted the capacity of the municipality to mediate the process. I agree with this approach.

[44]. In the premises, I am of the view that the '*defence*' that the City of Johannesburg should have been required to intervene in the proceedings is not sustainable.

[45]. I am accordingly of the view that, having regard to all the circumstance in this matter, including the personal circumstances of the occupiers and in particular the prospect that their eviction could lead to homelessness, they have not established a bona fide defence that carries some prospect of success.

[46]. A court has a wide discretion in evaluating '*good cause*' in order to ensure that justice is done.¹ For this reason, the courts have refrained from attempting to frame an exhaustive definition of what would constitute sufficient cause to justify the granting of an indulgence for any attempt to do so would hamper the exercise of the discretion.²

[47]. I am not persuaded that the occupiers have shown '*good cause*'. They attempted to create the impression that when their representatives attended court on the 10th of September 2013, they were completely ignored and they were blissfully unaware of what was happening in court. They also blame the court and Mr Ngubane for allowing an order to be granted against them by consent. This is denied by Mr Ngubane, who

¹ See *Wahl vs Prinswil Beleggings (Edms) Bpk* 1984 (1) SA (T).

² See *Cairns' Executors vs Gaarn* 1912 AD 181 and *Abraham vs City of Cape Town* 1995 (2) SA 319 (C) at 321 I – J.

rejects the implication that he colluded with plaintiff's legal representatives on the day of the hearing. For the reasons mentioned above, this ground, as a basis for setting aside the order granted by the court, falls away.

[48]. An examination of the grounds provided by the occupiers for the rescission of the judgment reveals that this application is not *bona fide*. The applicants have also failed to raise a *prima facie* defence to the claim by the Respondents.

[49]. I am not persuaded that the Applicant had demonstrated the existence of a *bona fide* defence on the substantive merits of the Respondents' claim. In *Chetty v Law Society, Transvaal*³, Miller J said the following about the two elementary requirements of common law, the test of sufficient cause:

"It is not sufficient if only one of these two requirements is met; for obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default. And ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain of the Rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits"

³ 1985 (2) SA 756 (A).

[50]. I am satisfied that the application for rescission of the order granted on 10th September 2013 should fail.

[51]. Accordingly, I intend dismissing the application to set aside and rescind the said order.

[52]. During argument before me, Mr Van der Merwe, Counsel for the Respondents, informed me that, in order to afford the applicants time and opportunity to make arrangements for alternative / emergency accommodation, the Respondents are amenable to allowing the applicants until January 2016 to vacate the property. I therefore intend varying the previous eviction order of Khumalo AJ to provide for this concession on behalf of the respondents.

ORDER

Accordingly, I make the following order:

1. The application for rescission is dismissed.
2. The applicants, together with all members of their families and any other persons who are in occupation of the property (the unlawful occupiers), are to vacate the property, known as [K.....], being [E.....] [8.....] and

[8....] Berea Township, Registration Division I.R., Gauteng Province, situated at the corner of [S.....] and [F.....] [R.....], [B.....], Johannesburg (*the property*), no later than the 31st January 2016.

3. In the event that the unlawful occupiers of the property do not vacate the property on or before 31st January 2016, the sheriff of the court or his lawfully appointed deputy is authorised and directed to evict the unlawful occupiers from the property.
4. The unlawful occupiers are interdicted and restrained from entering the property at any time after they have vacated the property or have been evicted therefrom by the sheriff of the court or his lawfully appointed deputy.
5. In the event that any of the unlawful occupiers contravene the order in para 4 above, the sheriff of the court or his lawfully appointed deputy, is authorised and directed to remove them from the property as soon as possible after their reoccupation thereof.
6. The applicants are jointly liable to pay the costs of this application.

L ADAMS

*Acting Judge of the High Court
Gauteng Local Division, Johannesburg*

HEARD ON: 3rd November 2015

JUDGMENT DATE: 12th November 2015

FOR THE PLAINTIFF: Adv. Wilson, with Adv. Hobden

INSTRUCTED BY: Seri – SA Law Clinic

FOR THE DEFENDANT: Adv. Van der Merwe

INSTRUCTED BY: Vermaak & Partners Incorporated