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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

DELETE WHICHEVER IS NOT APPLICABLE

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

Date: **4th MAY 2016** Signature: _____

CASE NO: 2012/36167

In the matter between:

THE ILLEGAL OCCUPIERS OF UNIT [1.....] IN THE SECTIONAL TITLE

SCHEME KNOWN [A.....] [P.....] [D.....]

Applicant

And

DE WET, CHRISTIAAN FREDERICK N.O.

First Respondent

KEEVY, KAREN N.O.

Second Respondent

NDEBELE, TIMOTHY ROZI N.O.

Third Respondent

JUDGMENT

ADAMS AJ:

[1]. This is an application to rescind and set aside an eviction order granted against the applicant by this court (Beasley AJ) on the 28th February 2013.

The order for the eviction of the applicant, who is in fact Ms Goodness Khonziwe Mchunu, was granted by default after compliance by the respondents of the provisions and procedural requirements of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (*the PIE Act*).

- [2]. In terms of the Order dated the 28th February 2013 the applicant was ordered to vacate the property, being Section Number [1.....] in the Scheme known as [S.....] [P.....] [D....], situated at [2....] [U....] Street, [P....] [G.....], [S....] (*the property*). Notwithstanding the Court Order, the applicant remains in occupation of the property some 3 years later.

- [3]. The application for rescission was launched during March 2015, and was set down for hearing by the respondents.

- [4]. The respondents are joint liquidators of Infogold Investments 10 (Pty) Limited (In Liquidation) (*Infogold*), the registered owner of the property.

- [5]. In her Founding Affidavit, the applicant bases her application for rescission primarily on the fact that she is unsure as to who the true owner of the property is. She expressed a wish to purchase the property and would like to make an offer to buy same. She has however not been able to ascertain who the correct party is whom she should address. She emphasises the fact that she has no other place to go and she has spent most of her life

living at the property. The property has been her place of residence since 2006

- [6]. At the hearing of the application for rescission before me on the 29th April 2016, the applicant was unrepresented. She applied for a postponement to enable her to obtain legal representation. Due to the lapse of time since the judgment was given by Beasley AJ, I was of the view that this matter had to be concluded and I refused the application for a postponement. I nevertheless gave the applicant the assurance that she would be afforded ample opportunity to place in full any and / or all information before the court which she thought relevant to my adjudication of her application for rescission. In the end, her submissions were made with the assistance of an official Court Interpreter.

THE APPLICATION FOR RESCISSION

- [7]. The application for rescission is presumably brought in terms of the provisions of Rule 42(1) of the Uniform Rules of Court and / or in terms of the Common Law.
- [8]. 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.

[9]. Generally, an applicant will establish good cause by giving a reasonable explanation for her default and by showing that she has a *bona fide* defence to the claim of the respondents 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.

[10]. I am of the view that in her Founding Affidavit the applicant did not satisfactorily explain her default nor did she demonstrate that she has a *bona fide* defence to the judgment granted by Beasley AJ. This is so despite the fact that the applicant was allowed to make submissions which were not supported by the averments in her Founding Affidavit. She was allowed extra leverage in order to ensure that she was not prejudiced by reason of the fact that she was not legally represented at the hearing of the application.

[11]. In the end, the fact remained that the respondents are the owners of the property, which is presently occupied unlawfully by the applicant and her 2 (two) children, the one being 22 years old and the other being 14 years old. The applicant also confirmed that she is presently employed at the Chris Hani Provincial Hospital at a salary of approximately R6,000.00 per month. She also reiterated that she is desirous to purchase the property to enable her and her family to continue inhabiting it. She confirmed that since 2006 she and her family have been living at the property free of

charge. She paid for water and electricity consumption on a monthly basis as there are prepaid meters installed at the premises.

[12]. Having regard to all the circumstances in this matter, including the personal circumstances of the applicant and in particular the prospect that their eviction could lead to homelessness, I am not persuaded that the applicant has established a *bona fide* defence that carries some prospect of success.

[13]. I am not persuaded that the applicant has demonstrated the existence of a *bona fide* defence on the substantive merits of the respondents' claim. In *Chetty v Law Society, Transvaal*¹, 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. Any 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"

¹ 1985 (2) SA 756 (A).

[14]. I am satisfied that the application for rescission of the order granted on 28th February 2013 should fail.

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

[16]. The only question remaining is whether the '*PIE Act Considerations*' affords the applicant a basis on which the order should be rescinded. In this matter I think not, and I say so for the simple reason that the applicant, who is in full time employment and lives at the property with her two sons, one of whom has the capacity to earn an income, clearly does not fall into the category of persons who can be described as the poorest of the poor. On her own version she has the means to be able to source accommodation elsewhere, either on a rental basis or by purchasing her own property. After all, she submitted during argument that she would dearly like to buy the property for her and her family.

ORDER

Accordingly, I make the following order:

1. The application for rescission is dismissed with costs.

L ADAMS

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

HEARD ON: 29th April 2016

JUDGMENT DATE: 4th May 2016

FOR THE APPLICANT: In Person

INSTRUCTED BY: In Person

FOR THE RESPONDENTS: Adv Swanepoel

INSTRUCTED BY: Mostert Incorporated