

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1)	REPORTABLE: No
(2)	OF INTEREST TO OTHER JUDGES: No
<u>15/5/2023</u>	
DATE	 SIGNATURE

CASE NO: 8797/2018

In the matter between:

NOMTHANDAZO MAKHUNZI

Applicant

and

RAYMOND HLAZO N.O.

First Respondent

SIZAKELE CHILIZA

Second Respondent

WILLIAM MAZIBUKO

Third Respondent

DANIEL MFANIMPELA MKHALIPHI

Fourth Respondent

Neutral Citation: *Nomthandazo Makhunzi v Raymond Hlazo N.O and 3 Others*
(Case No: 8797/2018) [2023] ZAGPJHC 479 (15 May 2023)

JUDGMENT

This judgment is deemed to be handed down upon uploading by the Registrar to the electronic court file.

Gilbert AJ:

1. On 15 November 2018, the court granted an order *inter alia* evicting the applicant from her home. The order was executed on 9 December 2019. Although the applicant was evicted that day, she soon re-occupied the property through the intervention of the community. The applicant has been in occupation of the property since.
2. The applicant now seeks of the court to rescind the order that had been granted on 15 November 2018 by way of these rescission proceedings launched on 25 April 2022. The applicant was not present in court on 15 November 2018 when the order was granted and so the applicant seeks to rescind the order in terms of Uniform Rule 42(1)(a) on the basis that the order had been erroneously sought or erroneously granted in her absence, alternatively under the common law on good cause shown.
3. The first, second and third respondents, as the successful applicants in the eviction proceedings, have opposed the rescission. A fourth respondent, being a subsequent purchaser of the property, has been cited in these proceedings and who abides the decision of the court. I shall refer to the first, second and third respondents as “the respondents”.
4. The respondents oppose the rescission *inter alia* on the basis that the applicant was in wilful default in not appearing in court on

15 November 2018 when the order was granted, and in any event the applicant elected not to participate in the proceedings on 15 November 2018 and therefore, on the authority of decisions such as the recent Constitutional Court decision of *Zuma v Secretary of the Judicial Commission of Enquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State and Others*¹ cannot rely upon Rule 42(1)(a). The respondents further contend that the applicant has not disclosed a *bona fide* defence which *prima facie* carries some prospects of success and so, when coupled with the absence of a reasonable explanation for her default in failing to appear in court on 15 November 2018, results in the applicant not having made out a case under common law for rescission of the order.²

5. Dealing first with the issue as to whether the applicant was in wilful default in failing to appear on 15 November 2018 and elected to absent herself, I during the course of the hearing invited each counsel to point out in the papers where there was any specific and unequivocal notice given to the applicant that she was to be in court on 15 November 2018. Bearing in mind that the purpose of compliance with section 4(2) of the Prevention of Illegal Eviction From and Unlawful Occupation Land Act, 1998 is to ensure in so far as reasonably possible that written and effective notice of

¹ [2021] ZACC 28, para 56.

² *Grant v Plumbers (Pty) Limited* 1949 (2) SA 470 (O) at 476 to 477, and as approved in numerous subsequent decisions including by the Supreme Court of Appeal in *Colyn v Tiger Food Industries Limited t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) at 9 E/F and the Constitutional Court in *Gundwana v Steko Development and Others* 2011 (3) SA 608 (CC) at 628 B, footnote 54.

the proceedings is given to a person before he or she is evicted from his or her home, this was a pertinent enquiry. Neither counsel could refer me to any such unequivocal written and effective notice in the court file.

6. The respondents' counsel submitted that the applicant would have known of the hearing date of 15 November 2018 because she had previously been informed of that date when she attended court on a previous occasion, on 8 August 2018. But it does not appear to me from the papers that it is at all clear that this in fact was so. The applicant denies that she was in court and even if she was in court, there does not appear to be any cogent evidence that the applicant was informed, or at the very least appreciated, that an eviction order may be granted on 15 November 2018, and so that she should attend court, and particularly place her personal circumstances before the court to enable the court to determine *inter alia* whether it would be just and equitable to grant an eviction order.³

7. The respondents' counsel submitted that the third respondent, who was an applicant in the eviction proceedings, personally served a notice of set down upon *inter alia* the applicant on 12 November 2018. An affidavit by the third respondent is in the court file. The difficulty is that it is not clear what notice of set down was so "served" on the applicant, particularly as to whether that notice of set down informed the applicant that she was to be in court on 15 November 2018. A further difficulty is that given the personal interest of the third respondent as an applicant in the main

³ See, for example, *Occupiers of Erven 87 and 88 Berea v De Wet N.O. and another* 2017 (5) SA 346 (CC), para 48.

application, it is problematic that he should be the person “*serving*” a notice as important as that which informs the applicant that she may be evicted, rather than, as is usually the case, the sheriff of the court. There is also no cogent evidence as to whether the prescribed and court-authorised section 4(2) notice had been served on the applicant as the returns of service that appear in the court file do not show personal service upon the applicant and where in any event the only section 4(2) notice to which I was directed does not contain any date as to when the applicant was required to be in court.

8. In the circumstances, I am unable to find that the applicant in fact knew she had to be in court on 15 November 2018 and so I am not in a position to find that she was in wilful default in not appearing in court that day, or that she deliberately elected to absent herself from court that day.
9. Insofar as a *bona fide* defence is concerned that has some prospects of success, there is no evidence that the court, with respect, engaged in the obligatory enquiry required in terms of section 4(7) of PIE to consider all the factors in order to decide whether it would be just and equitable to grant an eviction order,⁴ and, if so, the further obligatory enquiry for purposes of determining in terms of section 4(8) of PIE the date upon which the applicant was to vacate the property, and failing which the eviction order would be carried out. A court is required to act proactively

⁴ A recent reminder in this Division that a court is required to consider all the relevant circumstances and that the facts must demonstrate that it would be just and equitable to grant an eviction order before it can be granted is *Madulammoho Housing Corporation NPC v Nephawe and another* [2023] ZAGPJHC 7 (10 January 2023), para 10, per Wilson J.

to ensure that it is 'appraised of all relevant information to enable it to make a just and equitable decision'.⁵

10. I invited counsel, and particularly the respondents' counsel, to point me to evidence that would demonstrate otherwise.
11. Consequent upon a request for reasons, the court that granted the order on 15 November 2018 did deliver reasons for its making the order that day. Those reasons do not show that the necessary enquiry was carried out but rather that the court was prepared upon the reading of the applicant's papers and in the absence of an answering affidavit to grant the relief. No evidence was led as to what enquiry the court undertook on the day before granting the order. The reasons do not state that such an enquiry was undertaken, and if anything is implicit from a reading of the reasons, it is that the enquiry was not carried out.
12. It is however not necessary for the applicant to prove that the necessary enquiry was not carried out. For purposes of rescission under the common law, there is enough of an insufficiency of evidence that the necessary enquiry was carried out by the court on 15 November 2018, the absence of which enquiry which would constitute a *bona fide* defence that has some prospects of success.

⁵ *Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* [2010] 4 All SA 54 (SCA), para 15.

13. In any event, in my view, much is to be said for the applicant's case that the court had erroneously granted the order in the absence of the applicant as contemplated in terms of Rule 42(1)(a) in circumstances where (i) there is no evidence indicating that it had considered all relevant factors before granting the order as was required of it in terms of PIE; and (ii) it does not appear to have been aware of the respondents' failure to give adequate notice to the applicant that she was to appear in court that day.
14. Accordingly, whether the matter is approached from the basis of a rescission in terms of Uniform Rule 42(1)(a) or under the common law, in my view a case for rescission has made out.
15. The difficulty that presents itself for the applicant is the lengthy delay from when she learnt of the order, which was on 9 December 2019 when she was evicted, until she launched this application some two and a half years later in April 2022.
16. The applicant's explanation is terse. The applicant explains that she did not know what to do or what steps to take in reaction to the order and upon being evicted, and that the first attorney she approached did not give any real assistance. The applicant continues that it is only when she approached her present *pro bono* legal representatives, being the Seri Law Clinic, that she for the first time was made aware that she could seek rescission of the order and that she then acted expeditiously within a month in launching these proceedings.

17. The respondents counter on the basis that this is not an adequate explanation and that the reason that the applicant is now seeking a rescission was that the shoe of criminal proceedings was beginning to pinch. These criminal proceedings had been launched by the respondents upon the applicant's failure to abide the eviction order and by her instead simply returning to the property notwithstanding she had just been evicted on the strength of the court order.
18. I echo what was said by Binns-Ward J in the recent decision of *Vacation Import (Pty) Limited v Bumina and Others*; *Vacation Import (Pty) Limited v Ngaleka and Others* [2023] ZAWCHC 44 (3 March 2023) when having to deal with a condonation application in the context of eviction proceedings:

*"It was only because of the nature of the litigation in the eviction applications, which bears not only on the respondents' rights in terms of s 26 of the Bill of Rights but, as has been recognised by the Constitutional Court, also involves broader societal implications requiring the courts to engage actively in the issues in an interrogative manner quite different to the approach adopted in the ordinary course in adversarial litigation,⁶ that I in the end decided, not without hesitation, that the respondents should be given the opportunity to have their cases in the eviction matters heard."*⁷

⁶ See, for example, *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) especially paras 32 to 38.

⁷ Para 15.

19. There is also some merit to the respondents' counsel's submission that because the applicant was almost immediately restored to occupation of the property, notwithstanding the eviction, through the intervention of the community in what the applicant's counsel described as a "*imbizo*" of sorts that she was of the mindset that the issue of her eviction had been resolved, at least insofar as the order was concerned and until the criminal proceedings arose. Whilst the applicant's conduct in simply retaking possession of the property after an eviction order had been executed and served upon her cannot be countenanced, there does appear to be sufficient cogency to her belief as asserted by counsel to give some explanation for the delay.
20. The serious deficiencies in the manner in which the respondents went about obtaining the eviction order on 15 November 2018, and the strength of the applicant's case on the merits when it comes to the probable absence of the obligatory enquiry into all the relevant circumstances before granting the eviction order, outweighs the deficiencies in the applicant's explanation as to why she delayed for the time that she did before launching these proceedings. This is especially so given the context of the applicant asserting her constitutional rights in terms of section 26 of the Constitution.
21. The same reasoning informs my view that the costs of these rescission proceedings, albeit that at least to some extent the applicant is seeking an indulgence, should be costs in the main eviction proceedings.

22. As it is only the applicant as the second respondent in the main eviction application that seeks rescission of the order and not the first respondent in the main application (who in any event has not been cited in these rescission proceedings), the rescission is to be limited to the order in so far as the applicant is concerned.⁸

23. An order is granted:

23.1. Rescinding and setting aside the order granted by this court on 15 November 2018 under this case number as against the applicant.

23.2. Directing that the applicant deliver her answering affidavit in the main application under this case number within 20 (twenty) days of this order.

23.3. That the costs of the rescission application are to be costs in the main application under this case number.

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right, positioned above a solid horizontal line.

Gilbert AJ

**ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG**

⁸ As to the rescission of an order of eviction in relation to only some of several respondents, see *Sehube and Another v City of Johannesburg Metropolitan Municipality and Others* [2021] ZAGPJHC 535 (13 October 2021) paras 36 to 45.

Date of hearing: 11 May 2023

Date of judgment: 15 May 2023

Counsel for the Applicant: Mr L Moeli

Instructed by: Seri Law Clinic

Counsel for the First, Second
and Third Respondents:

Mr T Mosikili

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Attorneys