

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH

Case No.: 2645/2017

Date Heard: 15 February 2018

Date Delivered: 20 February 2018

In the matter between:

PRINCE CHIBUEZE UGHALA	1ST APPLICANT
VUYISA NIKA	2ND APPLICANT
SUSAN KARSHIPA	3RD APPLICANT
YOLLADENE JACOBS	4TH APPLICANT
DAVIDENE KILLAN	5TH APPLICANT
ZHONA MNGAZA	6TH APPLICANT
SINAZO TAYO	7TH APPLICANT
MELISSA GROOTS	8TH APPLICANT
ASANDA SIQONGANA	9TH APPLICANT
BONNY GOBENI	10TH APPLICANT
CHUKWANA EZE	11TH APPLICANT
SIMTHANDILE GOLA	12TH APPLICANT
SISANDA GOLIMPI	13TH APPLICANT
MIC KYLAN	14TH APPLICANT
NOMFUSI JILINGISI	15TH APPLICANT
PORTIA BLOUW	16TH APPLICANT
SIBONGILE MTYEKU	17TH APPLICANT
NOMACHIRE JILINGISI	18TH APPLICANT
LEBOHANG ZAYA	19TH APPLICANT

BUNTUZONKE NDLALENI	20TH APPLICANT
PHILLIP OLA	21ST APPLICANT
PINKY KANTI	22ND APPLICANT
FATIMA MOEHAPE	23RD APPLICANT
VUYISA NIKA	24TH APPLICANT
HAPPY KHUMALO	25TH APPLICANT
HAZEL NJENGELE	26TH APPLICANT
CINDY LOGAN	27TH APPLICANT
and	
LAWS STORES CC	1ST RESPONDENT
NELSON MANDELA BAY	
METROPOLITAN MUNICIPALITY	2ND RESPONDENT

JUDGMENT

EKSTEEN J:

[1] The applicants were previously unlawful occupiers of a building situated at 12 Western Road, Central, Port Elizabeth (the property). On 14 November 2017 an eviction order was issued in this court which required them to vacate the property within sixty days of service thereof. The eviction order was duly served on 28 November 2017. On 30 January 2018 the applicants launched an application to rescind the order. The applicants failed, however, to comply with the eviction order and before the hearing of the rescission application they were evicted on 9 February 2018 with the assistance of the South African Police Services in terms of the eviction order. On the same day the applicants launched the present application as a matter

of urgency in which they seek interim relief pending the finalisation of rescission of judgment application in the following terms:

“Suspending the execution of the Order dated 14 November 2017;
Directing the First Respondent forthwith to restore the Applicants to peaceful and undisturbed possession of their home situate at No. 12 Western Road, Central, Port Elizabeth, Eastern Cape; and
Interdicting and restraining the First Respondent from evicting the Applicants from the property.”

[2] The application for rescission was launched in the ordinary course. No request was made to the respondents’ attorneys to hold over the execution of the eviction order pending the hearing of the rescission application and no urgent relief was sought in respect of the stay of execution.

Background

[3] The background leading up to the application emerges from the papers filed in the eviction application, the application for rescission and the urgent application presently serving before me. The first respondent is the registered owner of the property purchased on an auction in 2007. It entered into a month-to-month verbal lease agreement with the first applicant in terms of which the first applicant would pay to the first respondent a monthly rental of R40 000. The first respondent remained liable for the rates, electricity and water of the property. The first applicant took occupation of the building and let various rooms in the property to tenants, being the 2nd to 27th applicants. The 2nd to 27th applicants therefore occupied the building through the first applicant. The rental agreement was honoured for a period of approximately nine years until May 2016 when a fire broke out in the property

which extensively damaged the left wing of the property. There is some dispute on the papers as to the extent of such damage, however, the dispute is not material to the resolution of the present application.

[4] The first respondent contends that the first applicant denied members of its maintenance team access to the building in order to effect repairs after the fire. The first applicant stopped making payment of the rentals during or about June 2016. Some discussion followed in respect to repairs to the building and the non-payment of rent which resulted in the first applicant recommencing rental payments in the amount of R13 000 in October 2016 and erratic payments amounting in total to R16 000 over the period November 2016 to February 2017. A final payment of R9 000 was made in March 2017 whereafter no further rentals were paid.

[5] The condition of the building after the fire contravened a number of municipal bylaws and National Legislation, notably the National Health Act. Notices followed from the municipality relating to the dilapidated state of the building and the health hazards presented by the condition of the property.

[6] On 31 March 2017 the first respondent caused a notice to vacate to be forwarded by its attorneys to the applicants. Numerous requests to vacate the building followed, but to no avail. In the circumstances the first respondent launched proceedings to evict the applicants in August 2017.

[7] A notice as envisaged in section 4(2) of the Prevention of Illegal Eviction and Unlawful Occupation of Land Act, 19 of 1998 (PIE) was duly approved by this court which prescribed the method of service to be followed. The notice of motion in the eviction application together with the notice in terms of section 4(2) of PIE was duly served by the Sheriff on the applicants in the prescribed manner.

[8] I pause to record that in the urgent application presently serving before me the 2nd to 27th applicants denied that they ever received notice of the intended eviction. This averment stands in stark contrast to the averments set out in the application for rescission. In the application for rescission the first applicant attested to the main affidavit on behalf of the remaining applicants, each of whom attested to a confirmatory affidavit. The first applicant records therein that the first respondent issued an eviction application in 2017 and that “a meeting with some of the tenants was held to discuss (the) way forward”. They, being all the applicants, thereafter approached their attorney and instructed him to negotiate a settlement on their behalf. They entered an appearance to oppose the application but recommended that the matter be settled. Their attorney, being the same attorney currently representing the applicants in both the rescission application and the present application entered an appearance to oppose on behalf of “the respondents” in the eviction application. In the eviction application the first applicant was cited as first respondent whilst the remaining occupiers, 2nd to 27th applicants, were cited as the second respondent. The Nelson Mandela Bay Metropolitan Municipality was cited as the third respondent. Realising the error in the notice of opposition which referred to all the respondents an amended notice of opposition was filed on 31 August 2017 recording that the “first and second respondents hereby give notice of their intention

to oppose the application". The applicants were accordingly at all material times aware of and represented in the eviction proceedings. In the circumstances Mr **Ndamase**, who appeared for the applicants in the present application acknowledged, fairly in my view, that he was unable to argue that the applicants had not received notice of the eviction proceedings.

[9] The eviction proceedings were initially enrolled for 5 September 2017. It is instructive at this juncture to record that the Nelson Mandela Bay Metropolitan Municipality was cited as a third respondent in the eviction proceedings "as an interested party by virtue of its constitutional obligations imposed on it in terms of section 26 of the Constitution". An order was issued that the Nelson Mandela Bay Metropolitan Municipality prepare a report providing the court with facts so as to assist the court in establishing whether or not the third respondent has a duty to provide temporary emergency accommodation to all persons being evicted who have no alternative accommodation and who would be rendered homeless. To this end the eviction proceedings were postponed from time to time to await a full report from the Nelson Mandela Bay Metropolitan Municipality. The report was duly filed on 9 November 2017 and served on the applicants' attorney of record on the same day. The applicants however, filed no opposing papers in the eviction application. On 14 November 2017 the eviction application was heard as an "uncontested opposed" matter. The applicants' attorney remained on record but did not appear on the date of hearing. On a consideration of all the facts placed before him and the report from the Nelson Mandela Bay Metropolitan Municipality the presiding judge was satisfied that it was just and equitable, as envisaged in section 4(7) of PIE to order the eviction of the applicants. An order was accordingly made and issued that the

applicants were to vacate the property within sixty days of service of the order. The order was duly served by the Sheriff on 28 November 2017. The presiding judge made no order against the Nelson Mandela Bay Metropolitan Municipality.

[10] The applicants showed no intention to comply with the order and accordingly the first respondent's attorney instructed the Sheriff on 23 January 2018 to proceed with the eviction, presumably upon the expiry of the sixty day period stipulated in the order. The rescission application, as recorded earlier herein, was launched on 30 January 2018 in the ordinary course. The rescission application remains pending.

Urgency

[11] The first respondent has in its papers before me challenged the urgency of the application. It is argued that the applicants have known for many months of their pending eviction. Reference is made to the notice to vacate which was delivered in April 2017, the service of the application and the section 4(2) notice to which I have referred earlier, the delivery to their attorneys of record of the report by the Nelson Mandela Bay Metropolitan Municipality and the service of the order. On this basis it was submitted that such urgency as there may be is self-created. In my view there is no merit in this challenge. The applicants were evicted on 9 February 2018 and on the same day launched their application to redress the situation. I am accordingly of the view that the matter is urgent and that the applicants were justified in enrolling the matter.

Suspension of the execution of the order dated 14 November 2017.

[12] Whilst there was initially some debate surrounding the courts inherent discretion to suspend the operation of an eviction order granted by it, it is now settled that the court does have such an inherent discretion. (See for example **EP Du Toit Transport (Pty) Ltd v Windhoek Municipality** 1976 (3) SA 818 (SWA); and **Belmont House (Pty) Ltd v Gore and Another NNO** 2011 (6) SA 173 (WCC) at 178B-C.) This power is confirmed by the provisions of Rule 45A of the Uniform Rules of Court. It has been held that Rule 45A bestows upon the court the power to exercise an equitable discretion to grant a stay of execution in appropriate circumstances. (See for example **Firm Mortgage Solutions (Pty) Ltd v Absa Bank Ltd and Another** 2014 (1) SA 168 (WCC).)

[13] A stay of execution serves to preserve the *status quo* for a predetermined period or pending some future event. What the applicants seek in the present matter, however, is not a stay of execution to preserve the *status quo*, but rather an order setting aside the execution which has already occurred so as to reinstate the *status quo ante*. I have had regard to numerous authorities where the court has suspended the operation of an eviction order. I am unable to find any decision, nor have I been referred to any decision, where such relief has been granted after the execution has already occurred so as to reinstate the *status quo ante* (compare **Voortrekker Pers Beperk v Rautenbach** 1947 (2) SA 47 (A); **Lovius and Shtein v Sussman** 1947 (2) SA 241 (O); **Potgieter and Another v Van der Merwe** 1949 (1) SA 361 (A); **Van Reenen v Kruger** 1949 (4) SA 27 (T); **Gois v Van Zyl** 2011 (1) SA 148 (LC) and **Firm supra**).

[14] In **Le Roux v Yskor Landgoed (Edms) Beperk en andere** 1984 (4) SA 252 (T) Ackerman J held that a court did not have such a wide discretion that it could order the setting aside (as opposed to the suspension) of execution of a judgment on the grounds of justice and fairness where the *causa* for the execution still existed. I am in respectful agreement with the reasoning of Ackerman J. In the present matter the relief sought is interim in nature pending the rescission of the eviction order. The eviction order, being the *causa* for the execution remains valid and binding until rescinded. In these circumstances I do not think that the court has a discretion, whether under Rule 45A or at common law to set aside the execution which has already occurred.

[15] Mr **Ndamase** recognised this difficulty. He argues, however, that in the event of the further relief being first granted and the applicants being reinstated in occupation an order suspending the further execution of the order thereafter would be competent. I turn therefore to consider the further relief.

Restoring the applicants to peaceful and undisturbed possession.

[16] The order sought herein is in essence a spoliation order. The Mandament van Spolie entitles a person who has been unlawfully deprived of his possession to be reinstated to his former position before all else, i.e before any question of title is considered. The difficulty which faces the applicants in the present matter is that their deprivation of possession occurred in consequence of a lawful process and an order of court. The dispossession was therefore not unlawful and the question of title has already been considered. For as long as the eviction order remains in force, as it does, it seems to me that the applicants' occupation of the property remains

unlawful. In these circumstances I do not consider that I have the discretion pending the hearing of the rescission application to reinstate the applicants to their former position in the face of a valid order of this court which remains in force.

[17] Mr **Ndamase** argues, however, that the applicants are entitled to an interim interdict reinstating them in occupation pending the hearing of the application for rescission on the ordinary principles of the law relating to interdicts. The argument proceeds, as I understand it, from the premise that an application for the rescission of the eviction order, being the *causa* for the execution, is pending. It is argued that the application attacks the underlying *causa* for the eviction and holds reasonable prospects of success in that the order was erroneously sought and erroneously granted in the absence of the applicants. I express no view on the prospects of success in the application for rescission which is not before me. The applicants contend, however, that a substantial injustice has already occurred in that the applicants have been evicted and are unable to afford alternative accommodation unassisted. For this reason the harm suffered by the applicants is likely to continue in the event that the execution order is not set aside and such harm would be irreparable.

[18] I acknowledge without reservation that the facts of the present matter necessarily evoke considerable sympathy for the applicants, as is the case with every unlawful occupier who is evicted under similar circumstances. Whether, an injustice has occurred depends upon the validity of the argument raised in respect of the rescission of the order. In the event that the eviction order was properly granted,

and I must assume for present purposes that it was, it cannot be said that an injustice is done.

[19] Mr **Ndamase** argues that the applicants have demonstrated a *prima facie* right to be reinstated in occupation by virtue thereof that the eviction order was erroneously sought and erroneously granted in their absence and that the applicants have filed an application for rescission. I have given careful consideration to the submissions made, however, I am unable to agree.

[20] In the present matter the event causing the alleged irreparable harm, being the eviction, has already occurred. An interdict can only be granted to prevent future conduct and not conduct which has already occurred. For this reason, the Constitutional Court held in **National Treasury and Others v Opposition to Urban Tolling Alliance and Others** [2012] JOL 29422 (CC) at para [50]:

“An interdict is meant to prevent future conduct and not decisions already made. Quite apart from the right to review and to set aside impugned decisions, the applicants should have demonstrated a *prima facie* right that is threatened by an impending or imminent irreparable harm. The right to review the impugned decisions did not require any preservation *pendente lite*.”

[21] I consider that these comments are equally apposite to the present application. For these reasons I consider that the applicants have failed to establish a *prima facie* right to the relief sought.

[22] In the result, the application is dismissed with costs.

J W EKSTEEN

JUDGE OF THE HIGH COURT

Appearances:

For Applicant: Adv Ndamase instructed by JCM Attorneys, Port
Elizabeth

For First Respondent: Adv Ah-Shene instructed by Karsan Inc c/o Goldberg &
De Villiers Inc, Port Elizabeth