

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, MTHATHA)**

CASE NO. 3979/2018

Heard on : 20 September 2018

Date delivered: 30 October 2018

In the matter between:

MZWEBANGO RALENI

Applicant

And

EASTERN CAPE DEVELOPMENT CORPORATION

Respondent

JUDGMENT

MAJIKI J:

[1] The applicant is an adult male who states that he has been residing at 14 Qolorha Close, Butterworth (the property). He approached this Court by way of urgency seeking an order declaring his eviction from the property to be wrongful, unlawful and unconstitutional; that the respondent be directed to allow him vacant occupation of the property; that the respondent or its agent or nominee be interdicted from interfering with his occupation of the property and other ancillary reliefs. The application is opposed by the respondent.

BACKGROUND

[2] It is common cause that the respondent is the owner of the property. The property was previously occupied by one Nomini Hlangwana

(Hlangwana) without the respondent's consent or authorisation. Around June 2013 the respondent issued summons against Hlangwana for her eviction from the property. The action was defended by Hlangwana. In her plea dated 03 June 2015 she denied that respondent was the owner and that she was in wrongful and unlawful occupation of the property. On 13 May an order in terms of section 4(2) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) was made in that action. Eventually, on 28 May 2018 the order including the following terms was obtained against Hlangwana, directing that "the defendant and all who claim title through him (sic), must vacate the property within thirty (30) calendar days of receipt of this order".

[3] On 17 August 2018 the sheriff of Butterworth district executed a warrant of ejectment which was issued pursuant to the order against Hlangwana. The warrant authorised the sheriff to remove from the premises the "defendant and all those in occupation" of the property. It is the eviction on that warrant that the applicant seeks to have declared wrongful. On 17 August he approached this Court for that purpose.

APPLICATION

[4] The applicant's attorney of record, Mr Makade placed before the duty judge a Certificate of Urgency in terms of rule 12(a) of the Joint Rules of Practice for High Courts of the Eastern Cape Province (the Joint Rules). A directive was issued by the duty Judge, Mlomzale AJ, on the same day. I need to say something about the said directive. The terms of the directive are framed as follows:

- "1. *After hearing Mr Makade Bonisile in Chambers and reading the content of the warrant of ejectment marked annexure A, the Court directs as follows:-*

2. *The applicant may issue and serve the papers upon the respondent on or before the 23rd of August 2018. The matter must be set down for hearing on the 28 August 2018.*
3. *A Rule Nisi is issued that the occupation of the premises situated at No 14 Qolorha Close extension 7 Butterworth be restored back to the applicant pending the hearing of the application on the 28 August 2018 or any other date as the judge directs”.*

[5] Rule 12(a) of the Joint Rules provides for the placing of certificate of urgency, before a duty judge, which sets out the reasons for urgency. Application papers or annexures are not to be presented upon the placing of the certificate, until a directive has been issued by the judge. Clearly, at this stage there is no application before court and it cannot be competent for a judge to grant any order sought in the application, let alone grant a *rule nisi*. This is even so because the rule of practice is that, it is not permissible to grant interim interdicts without notice to the respondent, unless there is a real danger that giving of notice would defeat the object of the interdict or it is wholly impracticable to give such notice.

[6] In this matter the judge was presented with annexures, which is not envisaged in rule 12(a) of the Joint Rules. A *rule nisi* directive/order was granted without notice to the other side. Such a directive was not regularly obtained. Mr Makade failed to give the assistance to the court as would be expected of an officer of this Court, such should be frowned upon.

[7] During the hearing the parties, correctly so, were of the same mind that there was no *rule nisi* issued in the matter. However, in the light of the directive, the respondent agreed not to interfere with the applicant's occupancy pending the finalisation of the matter.

APPLICANT'S CASE

[8] The applicant avers that his wife applied for and was allocated an apartment by Department of Public Works, East London, during January 2015. He lives in the property with his minor children, aged, 16, 10 and 6 years old. He does not state when they occupied the property. He says when the sheriff executed the warrant, he explained that he was not Hlangwana. The respondent did not follow due process of the law in having him evicted. The eviction took place without compliance with section 26(3) of the Constitution of Republic of South Africa, 1996 (the Constitution). The applicant's circumstances as contemplated in sections 4 and 6 of PIE were not considered. His situation and his family circumstances render the matter urgent, the balance of convenience favours him and he has no other alternate remedy.

[9] As regards the issue of the warrant being issued by the magistrate and not the clerk of the court, or any aspect, relating to the regularity or not of the warrant of ejectment, that is beyond the scope of the issues to be determined in this application. There is no application to challenge the said warrant or any part of the proceedings in the magistrate court.

[10] The applicant vehemently denies that he obtained the property through Hlangwana or obtained notice of the proceedings prior to the execution of the warrant of ejectment.

RESPONDENT'S CASE

[11] The respondent pleads *res litigiosa*. It avers that the respondent's action against Hlangwana was an action in *rem* and the action became *res litigiosa* upon commencement of the action. Alternatively, should the court find that the proceedings were an action in *personam*, the property became *res litigiosa* upon *litis contestatio* being reached in the action. Upon the property becoming *res litigiosa* Hlangwana could alienate the property, but the respondent's rights in the property remain protected.

[12] The applicant took occupation directly or indirectly from Hlangwana. He does not state how and when he occupied the property. The Department of Public Works neither gave occupation nor did it have the right to allocate the property to the applicant's wife. The respondent gave PIE notice to Hlangwana and the local municipality, duly obtained order against Hlangwana whom it knew to be in occupation of the property.

[13] Both parties concede that the matter is urgent. The applicant claims that he and his family had no place to stay and the respondent says the property is required for prospective tenant who is willing to pay rent. The respondent is not paying any rent. Further, the respondent is legally required to administer the property in the best interests of the state.

[14] The first issue to be determined in this application is whether the proceedings against Hlangwana were in *rem* or they are in *personam*. Further, whether compliance with PIE, order and ejection against Hlangwana could validly extend to the applicant in the circumstances of this case.

[15] During the hearing most of Mr Jozana's argument focused on the issue that the applicant is an unlawful occupier. Even if his occupation was through Hlangwana, he was not given notice, section 26(3) of the Constitution was not complied with, before he was evicted. Mr Hobbs, on the other hand, correctly submitted that this Court is not dealing with eviction proceedings or the status of the eviction order. Even if the applicant seeks to rely on *mandament van spolie*, his application falls short of the requisite allegation that he was in free and undisturbed possession. He submitted further that the eviction was in execution of a valid court order.

[16] With regard to whether the eviction proceedings are proceedings in *rem*, the respondent's submission, that the property became *res litigiosa* upon commencement of the action or if they are in *personam*, it became *res litigiosa* upon *litis contestatio*, then Hlangwana's disposition of the property would not affect the respondent's rights, would not be faulted. In *Blue-Cliff*

Investments (Pty) Ltd and Another v Griessel and Others 1971 (3) SA 93 (C) at 95-6 with regard to whether a sale of an undivided share in immovable property is a *res litigiosa* in a suit commenced for the partition of the property it was stated:

“With regard to the first point Sande in his Treatise upon Restraints sets out in Chap. IX, para. 1, the principle which underlies the rule against alienation, and he says that it is to protect the thing itself, for otherwise the judgment would be a mockery and the suitor who vindicated would be in a worse position, as the res litigiosa had been transferred to a man other than the one against whom the action was brought. In para. 3 he says that a thing becomes a res litigiosa at the time when there arises a judicial enquiry concerning the dominium, or the right of ownership of it. Therefore if there is no dispute about the dominium, but only about a servitude, or any other right over a thing, then the right which has been subjected to judicial decision becomes litigiosum, but the thing itself does not, and therefore it can be freely alienated.

In the present case what has been alienated is an undivided share in a piece of land. There is no dispute about the ownership of that. The only dispute is how the property itself is to be divided. What a plaintiff primarily claims in a partition suit is that his joint rights over the whole of the property shall be exchanged for exclusive rights over a defined portion of it. In other words, the plaintiff is claiming the surrender to him of the co-owners’ rights in respect of the portion awarded to him, in return for a surrender by him of his joint rights over the remainder of the property.

Where there has been an alienation pendente lite of an undefined share of immovable property there is, strictly speaking, no dispute about the ownership of the thing alienated, but inasmuch as the alienator is being called upon to surrender part of his joint rights in respect of the property it could, in a loose sense, be regarded as a dispute about the dominium of the thing which has been alienated”

In my view the eviction proceedings against Hlangwana at the commencement of the proceedings were not about ownership of the property and therefore not in *rem*. This view was also followed in *Opera House (Grand Parade) Restaurant (Pty) Ltd v Cape Town City Council* 1986 (2) 656 (C) at 661 C.

[17] The next issue is whether the property became *res litigiosa* upon *litis contestatio* being reached in the action against Hlangwana. In the action against Hlangwana, Hlangwana did put the respondent's ownership of the property into dispute in her plea. She denied that the respondent was the owner of the property and denied that she was in wrongful and unlawful occupation of the property.

[18] As was stated in *Blue-Cliff Investments* case (*supra*), an action in *rem* is one in which the ownership of the property is in issue. Even certain claims which are technically personal might be sufficiently akin to claims regarding disputed ownership as to make the property in question *res litigiosa*. Personal claims become *res litigiosa* at *litis contestatio*. Alienation of such a property is permitted, provided the rights of third persons are not affected. According to *Opera House (supra)*, clearly, the rights of the respondent are herein protected. If Hlangwana gave the property to the applicant, that could not be to the detriment of the respondent's rights.

[19] The next issue relates to non-compliance with section 26(3) and or PIE. The applicant states that in June 2014 his wife applied for, and in January 2015 was allocated a house by public works. In June 2015 Hlangwana pleaded to the respondent eviction, summons. When the respondent averred that " he was in wrongful and unlawful occupation of the plaintiff's property ... took occupation of the property without the plaintiff's consent to occupy ... and without any legally recognised right to occupy the property", Hlangwana pleaded, "the defendant denies that she is in wrongful and unlawful occupation of No. 14 Qolorha Close, ... as she denies plaintiff's ownership thereof."

[20] The respondent, on the other hand, submits that the matter ought to be decided in its version that, the applicant falls within the category of people “who occupied the property through” Hlangwana, and therefore is covered by the court order.

[21] The applicant’s version has many gaps, if the property was allocated to the applicant’s wife in January 2015 when did the applicant and his family move in? where was Hlangwana?, how was she claiming that she was not in unlawful occupation of the property six (6) months thereafter? According to the respondent the applicant is deliberately economical about furnishing this information in his application.

[22] At the time the applicant approached this Court he was in possession of annexure “MR2.” He instructed his attorneys to act on his eviction. He and his legal representatives, ought to have perused the processes leading to the issue of annexure “MR2”, the eviction proceedings. Even if they were not aware of that action prior to the applicant’s eviction, before coming to this Court, the prudent thing to do would have been to acquaint themselves with the proceedings leading to issue of annexure “MR2”. The applicant then had to explain where did the involvement of Hlangwana (as in the plea) end, or state when the applicant took occupation and whether Hlangwana or anyone was in occupation of the property at that time. Further, the applicant has not placed any facts that indicate that the Department of Public Works was entitled to allocate the property which belongs to the respondent and how the said allocation was done, orally or in writing, and has also not placed any evidence in that regard.

[23] I have to agree with the respondent that in order to resolve the dispute of whether the respondent followed due process of the law in evicting the applicant, that has to be decided on the version of the respondent. I accept that there is no other conclusion to be reached regarding his occupancy, he occupied the property through Hlangwana. In my view, he is included in the order of eviction of Hlangwana and those who occupied the property through her. PIE was complied with therein, the section 4 (2) notice was affixed at

the principal door of the property on 17 May 2016. If the applicant had wanted to place his circumstances before the court that granted the eviction, he could have sought an order re-opening those proceedings so that he could do so, explain his reasons why he did not timeously do so or why he failed to be present in court when the order was granted by default. In his version the property was allocated to his wife in June 2015 already, PIE notice was affixed

in the property eleven (11) months later. Furthermore, upon execution of warrant of execution, he could have still sought to reopen the proceedings at the magistrate's court and seek audience envisaged in PIE there, than rushing to this Court.

[24] I am mindful of the fact that Hlangwana claimed to be in lawful possession of the property in June 2015, in a plea filed by her attorneys of record (who happen to be the same attorneys for the applicant herein) and again on 14 March 2018 the same firm of attorneys filed a notice of acting, and that neither Hlangwana nor the said attorneys was in court on 28 May 2018 when the order was made. I am therefore unable to come to any other conclusion other than that, when Hlangwana and her mutual legal representatives with the applicant felt that they could no longer resist the eviction proceedings, Hlangwana brought the applicant into the picture with the hope that the applicant would not be covered by the order against Hlangwana.

[25] In the circumstances, I am unable to come to the assistance of the applicant. He failed to deal with the eviction proceedings while aware of them, he failed to furnish information that would have shed light on whether he is not acting to frustrate the respondent against its legal action against Hlangwana. In my view, he has an alternate remedy, to challenge the eviction proceedings or seek to have them set aside. That order is valid, until set aside and is executable against him in the circumstances of this case.

In the result,

The application is hereby dismissed with costs.

B Majiki

Judge of the High Court

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