

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION: MTHATHA)

NOT REPORTABLE

CASE NO. CA & R 50/2014

In the matter between:

LUNGELWA MDINGI

APPELLANT

AND

EASTERN CAPE DEVELOPMENT CORPORATION RESPONDENT

APPEAL JUDGMENT

KAHLA AJ:

1. The appeal emanates from a refusal by the Magistrate to rescind a judgment granted against the Appellant.
2. The main basis of the rescission application was the Respondents non-compliance with the provisions of section 4 of Prevention of Illegal Eviction and Unlawful Eviction and Unlawful Occupation of Land Act 19 of 1998 (hereinafter referred to as PIE), which reads as follows “notwithstanding anything to the contrary contained in any law or common law the hearing of proceedings for eviction of unlawful occupier should be preceded by a notice, 14 days before the hearing.
3. The Application was dismissed with costs.
4. The present appeal is to be decided on a twofold basis:-
 - (a) Should the Magistrate have considered that the technical non-compliance with the provisions of the Act was sufficient to warrant a rescission on the basis of a procedural defect despite the fact that the Appellant failed to disclose any defence on the merits, i.e. where the defence was a formal or legal defence.
 - (b) Whether or not a finding in favour of the Appellant with regard to the above would have any practical effect on the outcome of the case due to inter alia the subsequent events, the effluxion of time, i.e. whether or not this matter is for all intents and purposes purely academic.
5. The starting point is to accept:-
 - (a) The provisions of section 4 regarding notice prior to the hearing of a matter is pre-emptory.

- (b) The Respondent accordingly is obliged to comply with the provisions thereof.
- (c) It is common cause that the respondent failed to do so.
- (d) The Appellant accordingly correctly raised a statutory defence of non-compliance with section 4 of PIE.
- (e) I would accordingly assume in favour of the Appellant that the judgment was void ab origine by reason of non-compliance with section 4 of PIE due to the failure on the part of the Respondent to obtain an order in terms of section 4 or serve the notice.
- (f) However one has to have regard to the peculiar circumstances of this case in order to determine whether or not rescission ought to be granted and the matter allowed to follow the ordinary cause.

6. In this case it is common cause inter alia:

- a) The Appellant was not personally in occupation of the premises from around April 2002,
- b) That the Appellant was in arrears on her papers due to the fact that her husband, who was in factual occupation failed to pay the rentals over to the Respondent,
- c) That the Respondent obtained judgment against her,
- d) That no eviction of the actual occupants occurred as a result of the judgment,
- e) That in fact a new lease was entered into between the Respondent and the Appellant's husband;

- f) That the original lease had nonetheless expired by the effluxion of time,
 - g) That the lease entered into by the Respondent's husband was terminated due to his non-compliance with the terms thereof and judgement was obtained against him,
 - h) There was no challenge to the court order obtained against him and he in fact vacated the premises,
 - i) The appellant did not attempt to renew the original lease upon the termination thereof, in at best for her April 2005.
 - j) The Appellant after a period in excess of 8 years from the date of obtaining the judgment, and despite her failure to renew the lease or attempt to do so in the interim brought an application to rescind the judgment, on the procedural defect since she had no defence on the substantive claim.
7. The court accepts that there was non-compliance with the provisions of PIE and that the provisions are pre-emptory and there was an obligation on the part of the Respondent to comply with the provision of the Act prior to obtaining judgment.
8. The issue is whether or not this would constitute a bona fide defence in terms of section 49 (3) of the Magistrate's Court Act in that it constitutes a valid and bona fide defence as referred to in **Leo Manufacturing CC v Robor Industrial (Pty) Ltd t/a Robor Stewarts and Llyods**¹ .
9. The case of Leo Manufacturing (supra) where there was no service of the summons was found to be *void ab oringine* but despite service being a pre-emptory prerequisite for the obtaining

¹ 2007 (2) SA 1 (SCA)

of judgment the Appeal nonetheless failed due to the fact that section 49 (3) nonetheless required the Appellant to set out the basis of the defence non-compliance with the requirement for service was not regarded as sufficient. The technical defect was not found to constitute a defence in that case. The requirement of service of summons was also pre-emptory so non-compliance with what was technically a statutory defence was found to be insufficient to warrant rescission, because the grounds of the defence had not been set out in the application for rescission.

10. The Appellant herein merely stated that there was no notice or service of the notice upon her. She failed to state what factors she would have raised or what her defence would have been to enable the magistrate to exercise his discretion in refusing eviction. She was gainfully employed overseas and her husband was the head of the household that he occupied with her children. The respondent was not paid rental despite them having the means to do so. Her reasons set out in the rescission application are far too scant to constitute a valid bona fide defence.
11. The Appellant failed to demonstrate how this nullity or non-compliance adversely impacted upon her and her family by showing a bona fide defence and a valid one to stave off a claim for eviction by a court exercising its discretion in determining whether or not to grant eviction despite her failure to pay rentals. It would not be granted having inter alia to the following:
 - (a) This case however having regard to the facts present herein is peculiar and rescission is not justifiable having regard inter alia to:

- (i) the fact that practically no prejudice resulted from the judgment to the Appellant's family members who were in occupation of the premises as the Respondent gave her husband a lease to continue occupying the premises,
- (ii) that her husband was only evicted on the basis of another application upon his failure to pay rentals in terms of the second lease agreement and there was no allegations pertaining to non-compliance with this formalities prior to his eviction,
- (iii) There was further no renewal of the Appellant's initial lease agreement which expired through effluxion of time, despite her believing that she was still the lessee if we accept her version,
- (iv) The Application for rescission was brought 8 years after the original agreement elapsed,
- (v) The appellant had no defence on the merits and was factually in arrears, the outcome on the merits would not have changed,
- (vi) The Appellant has not demonstrated how an eviction order would adversely impact upon her or her family especially in circumstances where she was not even personally in occupation of the premises during the duration of the lease,
- (vii) There is in fact at present no lease agreement between the parties as the same expired through the effluxion of time.

(viii) Furthermore neither the Appellant nor her family members are presently in occupation of the premises.

12. A further factor that mitigates against granting an order in favour of the Appellant is that no practical effect will be served by referring the matter back to the court *a quo* having regard to the fact that:-

- a) The lease has expired;
- b) That neither the appellant nor her family are in occupation of the premises;
- c) Accordingly no purpose would be served by rescinding the judgment and referring the matter back to the court *a quo* in circumstances where practically no *lis* exists between the parties; and
- d) Mr Hobbs accordingly correctly argued that in terms of **Section 16 (2) (a) (i) of the Superior Court Act** the court is entitled to dismiss the appeal sought where it will have no practical effect or result.
 - i) Section 16(2)(a)(i) is akin to the now repealed section 21A of the Supreme Court Act 59/1959.
 - ii) Section 21A is premised upon the existence of an issue subsisting between the parties which require to be decided.
 - iii) The dispute between the parties in this matter has become academic (see **Western Cape Education**

Department & Another v George 1998(3) SA 77 (SCA) @ 84 E.

- iv) In **Radio Pretoria v Chairman, Independent Communications Authority of South Africa 2005(1) SA 47(SCA) @ 56 G – I**, the court held that a case is moot and, therefore, not justiciable if it no longer presents an existing or live controversy.
- v) The object of Sec 16(2)(A)(i) of the Superior Court Act and its predecessor, namely, sec 21A(1) of the Supreme Court Act 59/1959 was enacted mainly to relieve the courts of hearing issues which had since become academic, which are not live issues. Courts are concerned with settlement of concrete controversies and actual infringements of rights, not to pronounce upon abstract questions or merely to advise on differing contentions (see **Coin Security Group(Pty) Ltd v SA National Union for Security Officers & Others 2001(2) SALR p 872@ 875 AD**

- 13. This appeal accordingly further falls to be dismissed on the basis of section 16 (2) (a) (i) of the Superior Court Act in that the decision sought will have no practical effect or result for the reasons given.
- 14. For all the reasons set out above the Appeal is dismissed. The Respondent however should have been more vigilant and followed the proper procedures and guidelines laid down in PIE to prevent these kind of applications being made, in the first place.

15. As a mark of the court's disapproval for the shoddy manner in which this matter was initially handled and its failure to initially even oppose this Appeal in the exercise of the court's discretionary power, no order of costs is made in favour of the Respondent in the Appeal despite it being the successful party.

16. ORDER

- (i) The Appeal is dismissed; and
- (ii) No order as to costs.

KAHLA AJ

ACTING JUDGE OF THE HIGH COURT

I AGREE:

DAWOOD J

JUDGE OF THE HIGH COURT

DATE HEARD:

21 AUGUST 2015

JUDGMENT DELIVERED:

24 MAY 2016

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