

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)



Case number: 49326/2013

Date: 11 March 2015

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO	
(2) OF INTEREST TO OTHERS JUDGES: YES/NO	
(3) REVISED	
11/3/2015	<i>Chetori</i>
DATE	SIGNATURE

In the matter between:

NGR SULELO

APPLICANT

And

G KRUGER N.O.

RESPONDENT

JUDGMENT

PRETORIUS J.

- [1] The applicant is applying for the setting aside of an order granted against her on 23 September 2013 by this court. The order was granted against the applicant by default. The applicant had appeared in court in person with a friend who could understand English to assist her on 23 September 2013.
- [2] This court stood the application for the rescission of judgment down for two days to enable the applicant to obtain legal assistance, as her previous attorneys of record had withdrawn. On Wednesday, 25 February 2015, she had still not obtained a legal representative. The court requested counsel to appear *pro bono* on her behalf and Adv TP Kruger represented her.
- [3] Background:
- The applicant has occupied the property at Stand 644, Diepkloof Extension Phase 2 since at least 1983, when her father passed away. Her mother passed away in 2007. The property was owned by the joint estate of her father and mother, the late Mr and Mrs Sulelo.
- [4] The applicant's brother, Mr Drummond Sulelo, was appointed as executor on 24 January 1992, after his father had passed away. The applicant consented to move out of the property once it was transferred. Her complaint to the Master set out:

"I do not desire to leave my parents' home, but when this whole mess is resolved by you Master, I repeat, if push comes to shove 'God forbid' I will willingly vacate"

- [5] The property was sold to the A Dlamini Trust, IT3561/2011, who is currently the registered owner of the property. The Trust had purchased the property from the estate Late Dika Thompson Sulelo on 10 February 2012 for an amount of R690 000.00. The property was transferred to the trust on 21 November 2012.
- [6] Prior to selling the property the applicant's brother, Mr Sulelo, had discussed the fact that the property had to be sold with the applicant. The rates and taxes on the property were not paid and ultimately the applicant conceded that the property had to be sold.
- [7] Numerous potential buyers visited the property and the applicant co-operated and welcomed these prospective purchasers. She agreed that she would vacate the premises once the property had been sold.
- [8] Ultimately the property was sold on 10 February 2012. The applicant had received an amount of R93 000.00 after the trust had paid the purchase price. She received R50 000.00 on 4 March 2013 and R43 777.95 on 31 October 2013, which constituted her share of the purchase price.
- [9] The applicant had turned down two offers of alternative accommodation when the property was sold and she had to move. A

property, house number 14028, Section 24, Klerksdorp is available to her and her brother, Mr Samuel Sulelo offered her alternative accommodation.

[10] Court proceedings – 23 August 2013:

On 23 August 2013 the eviction application served in front of Jordaan J. An application was brought to evict the applicant from the property in terms of the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("PIE"). The applicant was present at court and requested a postponement so that she could obtain a lawyer from the Legal Aid Board to assist her. Counsel for the respondent (applicant in the application for eviction) informed the court that counsel had spoken to the applicant. A member of the public assisted the applicant, indicating to Jordaan J that the applicant requested a postponement to enable her to get assistance from the Legal Aid Board. She informed the court that she had approached the Legal Aid Board and was informed that it was too short notice for somebody from the Legal Aid Board to attend to the matter.

[11] Counsel for the respondent (applicant in the application for eviction) suggested to the court to grant the eviction order, but to grant the applicant a substantial period of time to find alternative accommodation. Hence the order that granted the applicant 45 days to leave the property.

[12] The applicant applied for leave to appeal Jordaan J's decision, but the application for leave to appeal was dismissed with costs. It is clear that the applicant had been at court when default judgment was granted. However, she was not granted an opportunity to state her intention to apply for legal aid and that she required a postponement.

[13] Section 4(5)d of the PIE Act provides:

“(5) The notice of proceedings contemplated in subsection (2) must—

(a) state that proceedings are being instituted in terms of subsection (1) for an order for the eviction of the unlawful occupier;

(b) indicate on what date and at what time the court will hear the proceedings;

(c) set out the grounds for the proposed eviction; and

(d) state that the unlawful occupier is entitled to appear before the court and defend the case and, where necessary, has the right to apply for legal aid.”

[14] Section 4(7) provides:

*“If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court **may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land sold in a sale in execution pursuant***

to a mortgage, whether land had been made available or can reasonably be made available by a municipality or other organ of state or another landowner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women.” (Court’s emphasis)

[15] In **Johannesburg Housing Corporation (Pty) Ltd v Unlawful Occupiers of the Newtown Urban Village 2013(1) SA 583 (GST)** Willis J referred to **Machele and Others v Mailula and Others 2010(2) SA 257 CC** in para 23 where Skweyiya J found:

“The application of PIE is not discretionary. Courts must consider PIE in eviction cases. PIE was enacted by Parliament to ensure fairness in and legitimacy of eviction proceedings and to set out factors to be taken into account by a court when considering the grant of an eviction order. Given that evictions naturally entail conflicting constitutional rights, these factors are of assistance to courts in reaching constitutionally appropriate decisions.”

[16] Section 26(3) of the Constitution reads as follows:

“3. No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No

legislation may permit arbitrary evictions.” (Court’s emphasis)

[17] In **M C Denneboom Service Station v Phayane 2015(1) SA 54** at **para 16**, Khampepe J held:

“The court was required to ensure that PIE’s requirements had been met before ordering his eviction.”

[18] There is thus a duty on the court to ensure that the *audi alterem partem* rule applies in these applications for evictions. The court had a duty to ensure that the respondent (the present applicant) knew her rights in this application and had to afford the respondent the opportunity to engage with the Legal Aid Board for assistance in opposing this application for eviction. This applies even more so in this instance where the applicant was present at court. She had made it plain to the court that she intended opposing the application once she had obtained Legal Aid. It is of vital importance that PIE requirements must be met before an eviction order can be granted. It is the court’s function to ascertain that the requirements have been met.

[19] I have considered all the arguments by both counsel and find that the applicant was not granted the opportunity to appear in court on 23 August 2013 and to apply for legal aid. The court relied on the hearsay argument of counsel when granting an order, but ameliorating the order by suspending it for three months.

[20] The court cannot find that the applicant was in wilful default as at all material times she endeavoured to bring her defence to the attention of the court.

[21] There is an attempt to set out a *bona fide* defence by the applicant by firstly submitting that Mr Drummond Sulelo had forged her signature on the letter of consent to sell the property. Furthermore it is submitted that Mr Sulelo had not yet been appointed as executor of his mother's estate when he sold the property. These allegations, if proved, may have an impact on the eviction application. The applicant should be granted an opportunity to obtain legal aid and to be heard.

[22] I therefore make the following order:

1. **The order granted on 23 August 2013 is rescinded and set aside;**
2. **The applicant is granted leave to oppose the application issued on 8 August 2013;**
3. **No order as to costs.**



Judge C Pretorius

Case number : 49326/2013

Application heard on : 25 February 2015

For the Applicant : Adv. TP Kruger

Instructed by : Pro Bono Instruction

For the Respondent : Adv. MP van der Merwe SC

Instructed by : Tim Du Toit & Co Inc

Date of Judgment : 11 March 2015