

IN THE HIGH COURT OF SOUTH AFRICA
(FREE STATE DIVISION, BLOEMFONTEIN)

Appeal no. A252/2014

In the matter between:

NTSEBO MAMSIE KHAUHELO

Appellant

and

RAMOTSOKOANE JERRY MOSUPA

First Respondent

MALUTI-A-PHOFUNG LOCAL

MUNICIPALITY

Second Respondent

CORAM:

JORDAAN J *et* S J REINDERS (AJ)

HEARD ON:

9 MARCH 2015

DELIVERED ON:

19 MARCH 2015

S J REINDERS (AJ)

- [1] The appellant (first respondent in the Court *a quo*) was evicted by the Magistrate Phuthaditjhaba on the 14th August 2014 at the behest of the first respondent (applicant in the Court *a quo*).

[2] In the Notice of Motion the second respondent was cited as “*illegal occupants*” and the Maluti-A-Phofung Municipality, was the third respondent.

[3] Not satisfied with the order made by the Magistrate, the appellant on appeal before us contends that the Magistrate should have dismissed the application for *inter alia*, the following reasons:

3.1 The Notice of Motion did not comply with Rule 55(1)(e)(iii) of the Magistrate’s Court rules in that, according to the said rule, an applicant should set forth a day in its Notice of Motion, not less than five (5) days after service of the application on the respondent which requires of the respondent to notify the applicant whether the application would be opposed and furthermore, a date should be stated not less than ten (10) days after the lapse of the five (5) day period when the application will be heard. The appellant points out that no such dates were set out in the Notice of Motion.

3.2 The respondent should have used Form “1A” of the Magistrate’s Court rule whilst there was no request for condonation for the use of the wrong form.

3.3 The appellant has minor children and cannot obtain alternative accommodation.

3.4 Although no specific agreement existed between the appellant and the respondent regarding the appellant's occupation of the premises, only one notice to "*terminate*" the said agreement were sent to the appellant more than two (2) years prior to the launching of the application.

3.5 It was not just and equitable to evict the appellant particularly since she has been occupying the premises for more than six (6) months and the fact that she was a woman heading the household.

3.6 That there were not proper compliance with the provisions of Act 19 of 1998.

[4] Subject to what is stated hereinlater I am not of the view that there are much merit in any of the grounds complained of save for the last-mentioned ground. Suffice to say that on the papers as it stood, I agree *prima facie* with the submissions made on behalf of the respondent that:

4.1 The ownership of the said property (on the papers) is beyond reproach.

4.2 The appellant was legally assisted in the application and I do not find anything on the papers indicating that the appellant did not have the full opportunity of placing a version before Court.

- 4.3 The appellant in conducting her defence has not been prejudiced at all.
- 4.4 Having taken all the factors into consideration, and where no valid defence has been raised, the Court must in terms of Section 4(8) of the act grant an eviction order and in terms of Section 4(8)(a) of the act, determine a just and equitable date on which the unlawful occupier or occupiers must vacate the premises.

City Of Johannesburg v Changing Tides 74 (Pty) Ltd
2012 (6) SA 294 (SCA) at 304.

- [5] It is common cause that the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (“PIE”) is applicable herein. Section 4 of PIE reads as follows:

“4. EVICTION OF UNLAWFUL OCCUPIERS:

- (1) Notwithstanding anything to the contrary contained in any law or the common law, the provisions of this section apply to proceedings by an owner or a person in charge of land for the eviction of an unlawful occupier.
- (2) That at least fourteen (14) days before the hearing of the proceedings contemplated in sub-section (1), the Court must serve written and effective notice of the proceedings on the unlawful occupier and the Municipality having jurisdiction.

(3) ...

(4) ...

(5) The notice of proceedings contemplated in sub-section (2) must –

(a) state that proceedings are being instituted in terms of sub-section (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 a right to apply for legal aid.”

[6] “It is clear from the authorities that even where the formalities required by statute are peremptory it is not every deviation therefrom that is fatal and the question is whether in spite of the defects, the object of the statutory provision has been achieved.

Unlawful Occupiers, School Site v City Of Johannesburg 2005
(4) SA 199 at 209 par. G – H.”

[7] In **Senekal v Winskor** 2010 (3) SA 327 (SCA) the distinction between the procedures for applications for evictions in the High Court and the Magistrate’s Court are described as follows:

“Unlike the procedure prescribed by Rule 6 of the Uniform rules, Rule 55(1) of the Magistrate’s Court rules does not create a procedure whereby an application in opposed matters has to be set down by way of a notice after all the papers have been filed as in the High Court. On the contrary, in terms of Rule 55(1), upon the issue of the application, such application must state the terms of the order sought and the date and time when the application will be heard. The result is that on being served with the application, respondent will be fully informed of the nature of the application, the order sought, and the date, time and Court where the application will be heard. Section 4(2) in itself does not require an additional notice. All it requires is that written and effective notice of the proceedings be served on the unlawful occupier and the Municipality fourteen (14) days before an order for eviction could potentially be granted.”

At 331 par. G – I.

[8] *In casu*, the Notice of Motion (titled “*Notice of Prevention of Illegal Eviction from and an (sic) Unlawful Occupation of Land Act 19 of 1998*”) was issued on the 18th September 2013. In the said notice, it was stated that the applicant would apply on the 15th October 2013 at 09H00 *inter alia*, for an order evicting the respondent. On the 15th October 2013, the Magistrate made an order which reads as follows:

“1. The Respondents are hereby given a written notice of these proceedings against her as stipulated in Section 4(5) read with Section 4(2) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, (hereinafter referred to as “the Act”).

2. The local Municipality Maluti-A-Phofung is hereby given a written notice of these proceedings against the Respondents as stipulated in Section 4(5) read with Section 4(2) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act no. 19 of 1998, (hereinafter referred to as “the Act”).
3. The Respondents must appear before the Honourable Court on the 12th/11/2013 at 09 am and electing from their constitutional right to conduct their own cases, alternatively to get their own attorney of their choice whom they will pay and if they cannot afford to pay the attorney, that they have the right to apply for legal aid.
4. That the Sheriff for the Phuthaditjhaba district be authorized to serve the said notice and annexures thereto, on the Respondents in the following manner:
 - 4.1 That the Sheriff for the Phuthaditjhaba district hand over, the copy of the notice and annexures thereto, to the Respondents immediately after having read the content thereof to them in Respondents’ presence, alternatively, serve same by means of affixing on the Respondents.
5. That manner of service aforesaid be deemed to be effective service of the notice as envisaged in Section 4(4) of the Act.
6. Service on the Respondents and local Municipality must be effected on or before the 31st October 2013.”

- [9] The above order bears a Court stamp dated the 15th October 2013. In the Magistrate's reasons for judgment he states that this order was granted on the 15th October 2013.
- [10] Although the order stated that same should be served before or on the 31st October 2013, it had been served according to the return of service on both the first respondent as well as the Municipality on the 1st of November 2013.
- [11] I am not of the view that there was compliance with the act and that the purpose of the said act has been achieved. Nowhere in the said notice, is the date stated whereon the proceedings would be heard as contemplated in Sections 4(2) and 4(5)(b). Although the order stated that the respondents must appear before the Court on the 12th November 2013, same was only to indicate whether they would make use of their right to conduct their own cases, alternatively to get an attorney and/or to apply for legal aid. Nowhere is a date of the hearing indicated. Accordingly, the Municipality would never have known when this application was to proceed. No effective notice was therefore given to them. This is apart from the fact that notice had not been given less than fourteen (14) days.
- [12] It does not suffice to say the Municipality in any event would not have appeared or filed a report. That kind of approach would result in no service and/or knowledge of such applications to the Municipality who play an important role in applications like this for example to report to Court on the availability of

accommodation or consequences of eviction – **Absa Bank Ltd v Murray And Another** 2004 (2) 15 CPD at 30 C – F.

Blue Moontlight Properties v Occupiers Of Saratoga Ave 2009 (1) SA 470 WLD at 480 G.

- [13] Where the Municipality is not the owner of the land in question it may in terms of Section 7(1) of PIE appoint a facilitator to attempt to mediate the dispute. The Municipality has a legal interest in applications for eviction in terms of PIE. In **Cashbuild (Sa) (Pty) Ltd v Scott and Others** 2007 (1) SA 332 TPD at 340 the following was stated:

“This is not a mandate it receives from an applicant – it is what parliament entrusts the Municipality with, viz to see to it that the Constitutional provisions are not rendered superfluous.”

- [14] In the circumstances I am not of the view that the provisions of the act has been complied with at all or that the object of the statutory provision to wit effective and proper notice to the Municipality had been achieved.
- [15] The Magistrate in the circumstances should not have granted the order. The Magistrate should have found that there was no proper compliance with the provisions of the act and could not in the absence thereof have granted an order of eviction.
- [16] In my view the Magistrate should merely have removed the application from the roll.

[17] Accordingly the appeal succeeds and I make the following orders:

17.1 The appeal succeeds with costs.

17.2 The order of the Court *a quo* is set aside and replaced with the following:

17.2.1 The application is removed from the roll.

17.2.2 Applicant to pay the costs.

S. J. REINDERS (AJ)

I agree.

A. F. JORDAAN, J

On behalf of the appellant: Adv J.S. Rautenbach
Instructed by:
McIntyre & van der Post
BLOEMFONTEIN

On behalf of the respondent: Adv E.M. Grewar
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