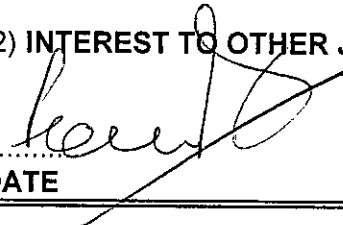


IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

(1) REPORTABLE: NO	
(2) INTEREST TO OTHER JUDGES: NO	
 DATE	18/2/13 SIGNATURE

18/2/2013

CASE No. 54595/2012

In the matter of:-

M C MULEA

Applicant
(First Defendant in proceedings *a quo*)

and

J F FOURIE N.O.

Respondent
(Plaintiff in proceedings *a quo*)

JUDGMENT : REASONS FOR ORDER GRANTED ON 15 FEBRUARY 2013

Van der Byl AJ:-

[1] On 15 February 2013 I dismissed, with costs, the application for leave to appeal and indicated that written reasons would follow. These are the reasons.

...

(I will, for the sake of convenience, refer to the parties as they were cited in the proceedings *a quo*)

[2] In terms of an order granted on 21 December 2012 I, in addition to the usual order of costs, ordered in summary judgment proceedings -

(a) **THAT** the First Defendant and all those occupying through her the property situate at 703 Rubenstein Drive, Moreleta Park, (*“the Property”*) be directed to vacate the Property not later than 31 December 2012 or such later date as the Plaintiff may in his sole discretion determine.

(b) **THAT**, in the event of the First Defendant and any of those persons occupying through her failing to vacate the property as directed in paragraph 1 of this order, she may be evicted by the Sheriff of this Court and, if necessary, with the assistance of members of the South African Police Service, provided that the Sheriff must at all times be present during such eviction.

[3] In a Notice of Application for Leave to Appeal served on the Plaintiff’s attorneys of record on 27 December 2012, the First Defendant now seeks leave to appeal against my judgment and order.

[4] As is apparent from my judgment -

(a) the Plaintiff addressed and delivered a letter to the occupants of the property on

.../...

27 September 2011 informing them that it is his duty to dispose of the property and gave them notice to vacate the property no later than 31 October 2011 and indicated that no monthly rental has been received from any one of them in respect of their occupation of the property;

- (b) that the Plaintiff, not having received any response from the occupants and on their obvious refusal to vacate the property, issued summons against the First Defendant on 19 September 2012 claiming an order for payment of R300 000 and the eviction of the First Defendant;
- (c) that, on the First Defendant having filed a notice of intention to defend, the Plaintiff filed an application for summary judgment on 22 October 2012 and enrolled the matter for hearing on 15 November 2012 seeking orders as claimed in the Particulars of Claim;
- (d) that, in an opposing affidavit filed by the First Defendant on 6 November 2012 she raised -
 - (i) a point *in limine* that the Plaintiff has failed to obtain an order in terms of section 4(2) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 1998 (Act 19 of 1998) ("*the Act*") and that the amount of R300 000 is not a claim for a liquidated amount;
 - (ii) a defence that she occupied the property since 15 March 2009 pursuant

.../...

to a lease agreement concluded with Ms Wakefield and that she on 31 August 2009 entered into another lease agreement with ABSA Bank after having been informed that Ms. Wakefield is no longer the owner of the property.

[5] I rejected for reasons apparent from my judgment both these defences.

[6] In the Notice the First Defendant now seeks leave to appeal up effect on the grounds thereof -

(a) **firstly**, that I erred in granting an eviction order when no proof was furnished that a notice in terms of section 4(2) of PIE was served on the Second Defendant in terms of Rule 4;

(b) **secondly**, that I erred in finding that the lease agreement entered between the First Defendant and the Plaintiff's predecessor was lawfully terminated and that I should have held that the lease agreement was not so terminated as the Plaintiff has not given notice in terms of clause 14.1.2 of that agreement;

(c) **thirdly**, that I misdirected myself in concluding that the provisions of section 4(7) of PIE have been complied with when it was not possible to consider whether land can reasonably be made available for the relocation of the First Defendant.

[7] In relation to the first of those grounds, it is, apart from the fact that such a notice

was delivered at the Second Defendant's offices and received by its "*Litigation Section*", it was in argument contended that it was not served by the Sheriff in terms of Rule 4. This is not an issue raised in the papers or in argument before me in the proceedings *a quo*. I am satisfied that the Second Defendant did receive proper notice of the section 4(2) application and the order granted under that section. I fail to see that another Court will interfere with my judgment and order merely on this ground.

[8] In relation to the second of those grounds, it is clearly provided in clause 3.2 of the lease agreement that after the termination of the agreement by effluxion of time on 30 September 2009, it would continue on a month to month basis terminable by any party with one month's notice "*provided that the lessee has faithfully carried out the terms and conditions and provided that the lessee was not at default at the time of the expiration of the lease*". The First Respondent's contention that the Plaintiff failed to give due notice of termination can, bearing in mind that the First Defendant admittedly failed to pay as she was required to do in terms of the agreement the agreed rental, for at least two reasons not be sustained. Firstly, the continuation of the agreement is, according to the proviso, dependent on her having complied with the agreement which she admittedly failed to do so that the agreement expired on 30 September 2009, Secondly, the provisions of clause 14 of the agreement cannot find any application as she was in breach of the agreement and in any event was indeed given notice of termination on 29 January 2010. There in my view in these circumstances no reasonable prospects that another Court may come to a different conclusion.

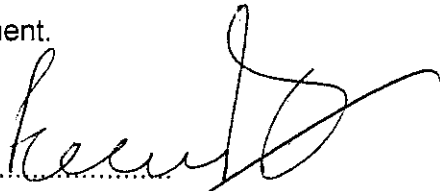
[9] In relation to the third of those grounds, the First Defendant elected, apart from

.../...

relying on the lease agreement, not to any circumstances envisaged in section 4(7) being circumstances which fall peculiarly within her own knowledge. She obviously did not do so because she did not regard herself as an "*unlawful occupier*". I was accordingly not provided with any information which would have enable me to consider the circumstances envisaged in that section. She in any event clearly appears not to be an indigent person. In my view there are also here no prospects of success on a appeal.

[10] I have no doubt that the First Defendant's application for leave to appeal has been launched merely in an attempt to delay, to the prejudice of the Plaintiff, her inevitable eviction from the Property.

[11] It is for these reasons that I made the order referred to in paragraph [1] of this judgment.


.....
P C VAN DER BYL
ACTING JUDGE OF THE HIGH COURT

ON BEHALF OF THE APPLICANT

MR B MOHLABA

MOHLABA & MOSHOANA INC
230 Malherbe Street
Capital Park
PRETORIA

Ref: Mr Mohlaba/ETB/CIV/M 0934/12
Tel : 012 326 2529

ON BEHALF OF THE RESPONDENT

ADV J J GREFF

On the instructions of

KEMP DE BEER & GOOSEN ATTORNEYS
317 Paul Kruger Street
Caipal Park

.../...

- Page 7 -

PRETORIA
Ref: W S Badenhorst
012 321 1105

DATE OF HEARING AND ORDER

15 February 2013

REASONS FURNISHED

18 February 2013