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2013-02-15

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**SOUTH GAUTENG HIGH COURT
JOHANNESBURG**

(1) REPORTABLE: **NO**/
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED.

Date: 28 March 2013.

SIGNATURE

10

CASE NO: 02312/2013

DATE: 2013-02-15

In the matter between

MTSHALI THOKOZANI

1st Appellant

THE OCCUPIERS OF 238

MAINS AND BEREA STREET

2-230 Applicants

and

TAYENGWA MASAWI

1ST Respondent

20 **TRENE RUMBINZAI MASWAI**

2ND Respondent

PHUMANGELAKHE MAKHAYA

3RD Respondent

CITY OF JOHANNESBURG METROPOLITAN

MUNICIPALITY

4th RESPONDENT

NATIONAL COMMISSONER OF

SOUTH AFRICAN POLICE

5th Respondent

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Date of judgement: 28 March 2013

Summary: Application to rescind order of eviction. Requirements of rescission not satisfied. Applicants failed to show bona fide defence.

EX TEMPORE J U D G M E N T

MOLAHLEHI AJ

- 10 [1] This extempore judgment was delivered on 15 February 2013. The record of the judgment was subsequently transcribed but took some time to finalise because the file went missing. The file has not been found and accordingly the extempore judgement was finalised without access to the file.
- [2] This is an application for the rescission of an eviction order granted by Kathree-Setiloane J, under case number 47208/11 on 28 March 2012. The applicants further seek the restoration to the home situated at 238 Main and Berea Street, Jeppe Town, Johannesburg. In the alternative the applicants seek an order requiring the City of
- 20 Johannesburg to provide to those applicants rendered homeless by the eviction alternative accommodation.
- [3] The applicants seek the rescission of the order on the basis that they were being deceived, they did not receive any notice of eviction of the proceedings and also that they were not aware of the eviction application. They in this regard contend that the return of

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service was served on a person referred to as "Ten Ten" who is unknown to them.

[4] In relation to the good cause and the *bona fide* defence the applicants in their founding affidavit contend that they satisfy the legal requirement for the granting of a rescission. The applicants contend in this regard that they did not receive the notice of the eviction application and were therefore denied the opportunity to place before the Court their personal circumstances which they would have used to demonstrate that they occupied the premises in good faith and that they made regular payment for the rental of the property in question.

[5] The applicants further contend that the court would not have granted the eviction order had it been aware of the personal circumstances of the applicants, more particularly as concerning the presence of minor children and woman-headed households. The circumstances of the applicants are set out in the founding affidavit including the period that they have stayed in the property in question.

[6] The applicant's counsel argued in his submissions that the applicants were entitled to have the order rescinded because of non-compliance with Prevention of Illegal Eviction Act which specifically requires that the court in considering eviction application should take into account all relevant circumstances to determine whether it was just and equitable to evict unlawful occupiers, and if so to determine when it would be just and

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equitable to require the applicants to vacate.

- [7] It was further argued on behalf of the applicants that the court was misled by the first and second respondent when they in their founding affidavits stated:

"The rights and needs of children, elderly and or disabled persons and or households headed by woman, will not be unduly affected by the eviction of the "occupiers" from the property pursuant to this application. I did not observe any elder, children or disabled persons staying in the property."

- [8] As concerning the relief the applicants in addition to the rescission of the order they seek an order restoring possession of their homes and personal property and in this respect tendered to pay rental for staying in the property.

- [9] It is trite that in considering whether or not to rescind a judgment or an order the Court has to be satisfied that the applicant has shown: (a) good cause by giving a reasonable explanation of his or her default, (b) that the application is *bona fide* and, (c) that he or she has *bona fide* defence to the claim which *prima facie* has prospects of success.

- [10] In my view this application turns on whether the applicants have shown that they have *bona fide* defence with prospects of success. The applicants testified in their papers that they paid rental to the third respondent and admit that they never paid the rent to the first and second respondents who are the owners of the property in

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question. It would appear that the third respondent had hijacked the building in question. The applicants also do not dispute that they never entered into any agreement with the first and second respondent regarding their stay in the property.

[11] The applicants do not dispute that they rebuffed and chased away the first and second respondents when they sought to brief them regarding the ownership of the property and about the need for them to vacate the building.

10 [12] The applicants have subsequently tendered to rent the rooms from the first and second respondents in the property in question. The first and second respondents have declined the offer. It is apparent from the reading of the applicant's papers and their argument as presented in Court that the main focus in seeking the rescission is on the procedural aspects relating to the granting of the eviction order.

[13] The applicants do not contend that they owned the property or that they have agreed with the first and second respondent to remain in the property. There was also no evidence that there was any agreement between the applicants and the first and second
20 respondent for them to remain as tenants in the property.

[14] In the *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 Pty Ltd*, and occupiers of Saratoga Avenue CCT 37/11 (2011) ZACC 33, the Constitutional Court in upholding the eviction had the following to say:

"...to the extent that it is the owner of the

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property and the occupation is unlawful Blue Moonlight is entitled to an eviction order. In the circumstances I am of the view that the applicants have to show that they have *bona fide* defence which has *prima facie* prospects of success."

10 [15] The applicants have in this regard, in my view, failed to satisfy the requirements for rescission in that they have failed to show that they had the right to remain in the property and that the first respondent was not entitled to evict them.

[16] I now turn to deal with the alternative relief sought by the applicants. This relates to the issue of whether the City of Johannesburg should provide alternative accommodation to the 30 applicants, who after eviction were rendered homeless resulting in them taking sanctuary under a bridge.

20 [17] After their eviction the applicants were provided temporary accommodation for 72 hours by a non-governmental organisation arranged by the Johannesburg Metropolitan City Council. The NGO that has provided the temporary accommodation requires that each of the applicants and members of their family, both who are employed and unemployed to make a daily contribution of R20,00 daily. It would appear that the amount of R20,00 is unaffordable even to people who have some income. It further seems unjust and unfair to expect people with no income to contribute.

[18] The City of Johannesburg does not dispute its constitutional duty

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to provide alternative accommodation to the applicants. It was, however, submitted on behalf of the Johannesburg Metropolitan City Council that there is no available spaces in its temporary accommodation which it has been providing for people faced with similar situations as the applicants.

[19] Accepting that the City Council has as a matter of principle the duty to provide alternative accommodation it seems to go without saying that in light of the decision not to grant the rescission and in light of there being no dispute that the applicants are consequently
10 homeless, the Johannesburg Metropolitan City Council should be directed to carry out its constitutional duty. In doing so a balance has of course to be struck between the interest of the applicants and others who may have been waiting for accommodation from the City Council.

[20] In the premises the following order is made:

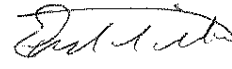
1. The applicant's rescission application is dismissed.
2. The applicants and the third respondent are to pay the costs of this application, jointly and severally the one paying the other to be absolved.
- 20 3. The City of Johannesburg Metropolitan City Council must provide the applicants whose names appears in ANNEXURE B to the amended notice of motion with temporary accommodation.
4. Should the current arrangement of accommodating the applicants at a Khaya House continue those of the

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applicants who have income as reflected in EXHIBIT X
may be required to pay R10 on a daily basis and this
will apply only to adults and not children.



E MOLAHEHI
ACTING JUDGE OF
THE SOUTH GAUTENG
JOHANNESBURG

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Appearances:

FOR THE APPLICANT:

FOR THE RESPONDENT:

]- do not have
the file - the
file has gone
missing.