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**IN THE HIGH COURT, OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NUMBER: 36091/2014

REPORTABLE: YES/NO
OF INTEREST TO OTHERS JUDGES: YES/NO
REVISED

.....
DATE SIGNATURE

In the matter between:

YENI, MICHEAL MBUYISELO

FIRST APPLICANT

YENI, NOMQIBELO PRICELLA

SECOND APPLICANT

And

DE KOCK, VINCENT FLEETWOOD N.O.

FIRST RESPONDENT

EKURHULENI METROPOLITAN MUNICIPALITY

SECOND RESPONDENT

SHERIFF, BRAKPAN

THIRD RESPONDENT

Date heard: 3 October 2014
Date order granted: 3 October 2014
Date reasons furnished: 20 October 2014

REASONS FOR JUDGMENT

MODIBA AJ:

- [1] This is an urgent application to restore to the applicants occupation of immovable property at 1..... H.... Street D....., B..... (The property). The applicants were evicted from the property on 30 September 2014 pursuant to an eviction order granted in the Brakpan Magistrates' Court on 19 August 2014.
- [2] The application came before me in urgent court on 3 October 2014. After reading the papers and hearing counsel, I granted the order that appears at the end of this judgment on the same day and deferred the reasons. The reasons are set out below.

THE PARTIES

- [3] The applicants were joint owners of the property by virtue of their marriage in community of property. The first respondent is the new owner of the property. The second respondent is cited due to its constitutional duty to provide access to housing in the Ekurhuleni Municipality area. The third respondent is the Sheriff of the Magistrates' Court for the area where the property is situated.

COMMON CAUSE FACTS

- [4] On 6 May 2011, the applicants were sequestered after they voluntarily surrendered their joint estate. The property was an asset in the surrendered estate. A trust of which the first respondent is a trustee purchased the property in good faith after the applicants voluntarily surrendered their estate. The property was transferred to the first respondent on 14 November 2013. The applicants remained in the property after it was transferred to the first respondent. Subsequently, the first respondent applied for an eviction order against the applicants. The eviction order was granted on 19 August 2014. The applicants appeared in court in person when the eviction order was

granted. Therefore the eviction order was not granted in default. In terms of the eviction order, the applicants were ordered to vacate the property on 29 September 2014, failing which the Sheriff would execute the order on 30 September 2014. They have not appealed against the eviction order.

- [5] On 29 September 2014, the applicants did not vacate the property. Instead, they filed an application for rescission of the eviction order. The basis for the rescission is fraud allegedly committed during the sequestration proceedings.
- [6] On 30 September 2014, fully aware that a rescission application had been launched, the second respondent executed the eviction order.

THE ISSUE TO BE DECIDED

- [7] There are two issues to be decided in this application. Firstly, whether launching the rescission application automatically suspends the execution of the eviction order in terms of section 78 of the Magistrates' Courts Act 32 of 1944. If not, whether the second respondent has the duty to apply for leave to execute the eviction order pending the outcome of the rescission application.

ANALYSIS

- [8] Section 78 of the Magistrates' Courts Act makes provision for the suspension of the execution of an order pending an appeal or rescission. It is clear from the wording of section 78 that the suspension is not automatic. It is granted on application. However, it is not clear from the wording of section 78 who should bring the application for the suspension of the order.
- [9] It is common cause that when the Sheriff executed the order on 30 September 2014, the order had not been suspended. Counsel for the applicants argued that the Sheriff had the duty to apply to the Magistrates' Court to execute the eviction order. He relied in this submission on an unreported judgment by my brother Lamont J in *Mnguni V Louw* [2013]

ZAGPJHC 253 (10 October 2013) that the duty to bring such an application lies with the person seeking execution.

- [10] In my view, Lamont J's reasoning in the Mnguni does not apply to this case because the facts are distinguishable. In the Mnguni case, the applicants' property had been sold in execution pursuant to a default judgment granted to secure a debt owed by the applicant. The applicants applied for the rescission of that order. Subsequent to the rescission order being heard but before it was finalised, the Magistrate granted an order for the eviction of the applicants for the property. They then applied for a review of the eviction order. In this case, the applicants have not applied for the rescission of the order that led to their property being sold. They have applied for the rescission of an eviction order, granted to a *bona fide* third purchaser.
- [11] Lamont J, restored possession of the property to the applicants on the basis that although the purchaser had taken transfer of the property when the eviction order was granted, he was in possession of a disputed right which could in due course have resulted in the order declaring the property especially executable being rescinded.
- [12] In this case, when the eviction order was granted, no rescission proceedings were pending for the order that led to the applicant's property being sold. The applicants have not set out facts to support the allegation that fraud perpetrated during sequestration proceedings would render an eviction order granted to a *bona fide* third party purchaser rescindable.
- [13] If the legislature intended to burden the person in whose favour an order was granted with the duty to seek leave to execute the order pending an appeal or a rescission application, it would have made provision for the order to be automatically suspended when an application for leave to appeal or a rescission application is filed. However, it refrained from doing so. In my view, the legislature recognised that automatically suspending an order may not always be in the interests of justice and would render section 78 open to abuse especially in cases where the appeal or rescission application lacks

merit and is brought purely to delay the execution of an order. The applicants have not set out grounds upon which they dispute the purchaser's title over the property.

[14] In May 2014, prior to granting the eviction order, the Magistrate gave the applicants a period of three months to find alternative accommodation. They have given no account of what progress they have made in that regard. The eviction order granted the applicants a further month to find alternative accommodation. After the eviction order was granted, the applicants also did not find alternative accommodation. They knew very well that if they do not vacate the property on 29 September 2014, the Sheriff would evict them the following day.

[15] They waited until the day they had to vacate the property before bringing the rescission application. They knew that the Sheriff was authorised by a court order to evict them the day after they launched the rescission application. I do not see why in the circumstances of this case the Sheriff should be burdened with the duty to seek leave to evict the applicants when he is already authorised by an order of Court to evict them. Given that the launching of a rescission application does not automatically suspend the authority granted to the Sheriff to evict the applicants, the duty to seek an order to stay the execution of the eviction order should lie with the person seeking to avoid the consequences of the order. Such a person seeks an indulgence from the court and should take steps to secure it.

[16] The applicants seek a spoliation order but have not met the requirements of such an order. The first respondent is a *bona fide* purchaser. His rights are protected by section 70 of the Magistrates' Courts Act. He evicted the applicants pursuant to an eviction order. The order had not been suspended when the applicants were evicted. Therefore the spoliation was not unlawful.

[17] In the premises, the application stands to be dismissed with costs.

ORDER

1. The application is dismissed.
2. The applicants shall pay the costs of this application.

MODIBA AJ

ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION,
JOHANNESBURG

Counsel for the Applicant: Advocate H Motsemme
Instructed by: ED van Schalkwyk Attorneys

Counsel for the Respondent: Advocate AP Bruwer
Instructed by: Sibel, Fourie & Nel Incorporated