

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

CASE NO: 2015/05289

(1)	<u>REPORTABLE: YES / NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>
.....
DATE	SIGNATURE

In the matter between:

GLADYS MDLALOSE

Applicant

And

MAGISTRATE NOMVUYO KAMBA

First Respondent

SHADES OF SUMMER INVESTMENTS 27 CC

Second Respondent

SHERIFF OR HIS DEPUTY

Third Respondent

J U D G M E N T

MASHILE, J:

[1] This review application is purportedly brought in terms of Section 24 of the Superior Courts Act No. 59 of 1959 that followed upon the First Respondent's dismissal of a postponement application on 10 December 2014.

[2] The factual background is that the Second Respondent is the owner of immovable property situate at 8 [T.....] Street, [M.....] [E.....], [G.....] (hereinafter “the property”) having purchased it at a sale in execution. Joaquim Carlos Teixeira Marques, the deponent to the answering affidavit, is the sole member of the Second Respondent.

[3] The property is occupied and the Second Respondent, having acquired it, instituted eviction proceedings against the unlawful occupiers. On 10 September 2014, the Second Respondent sought and subsequently obtained a directive in terms of Section 4(2) of the Prevention of Illegal Eviction Act No. 19 of 1998 (“PIE”).

[4] On 15 September 2014, the Applicant acted in accordance with the directive as granted by this court. The Eviction Application was to be heard on 1 October 2014 but on 30 September 2014 the Applicant contested it by filing her notice to oppose.

[5] On 1 October 2014 the hearing of the application was postponed to 15 October 2014 at the instance of the Applicant and her attorney. The main objective of the postponement was to allow the Applicant to consult with her attorney to prepare and deliver an answering affidavit.

[6] On 15 October 2014, the Applicant showed up in court and again entreated that the matter be postponed as she had lost her son and could as

such not consult with her attorney for purposes of preparing the answering affidavit.

[7] The court regarded her application and postponed the hearing to 12 November 2014. The Applicant was therefore granted a further one month indulgence to file her opposing affidavit. In the interim the Second Respondent attended to the service of a further Section 4(2) Notices in terms of PIE on 24 October 2014 to ensure that all occupants took note of their rights.

[8] On 12 November 2014, the Applicant appeared in court without filing an opposing affidavit. On that day, the other unlawful occupiers indicated that they would attend at Legal Aid. The application was postponed to 26 November 2014, making it the third postponement. This postponement was granted as the court wanted to give the other occupants an opportunity to apply for Legal Aid's assistance and also to allow the Applicant to file her opposing affidavit.

[9] On 26 November 2014 the Applicant attended at court without any legal representation. However, her attorney's secretary handed over on his behalf, a letter addressed to the court in which a medical report was enclosed. The letter recorded that the matter was postponed on the previous occasion at the instance of the Applicant to enable her to deliver her answering affidavit.

[10] In the second place, her attorney advised the court that he had not been in good health and could therefore not consult, prepare and deliver the answering affidavit as agreed on the last appearance. For those reasons, he asked the court that the matter be postponed *sine die* ostensibly to give him time to either draft it or arrange alternative means that his client be represented.

[11] The medical report was confirmation that the Applicant's attorney was diabetic. The report further stated that he had vitreous hemorrhage in his eyes. The condition was unending and was progressively deteriorating with time. The Applicant's attorney could nonetheless still see.

[12] The other occupants informed the court that Legal Aid declined their applications for representation on the ground that their defence lacked merit. They indicated to the court that they did not oppose the relief but nonetheless wanted to present their personal state of affairs to the court in terms of Section 4(7) of PIE. The court considered such circumstances, recorded them and excused them from attending the next hearing scheduled for 10 December 2014.

[13] Granting a postponement to 10 December 2015, which was for the fourth time, the court advised the Applicant that this would be the final postponement for her to deliver her answering affidavit. The court further cautioned that if her Attorney could not assist then she would be expected to instruct a different attorney alternatively, approach Legal Aid for assistance.

[14] The court further stressed and explained to the Applicant that the matter would proceed on the next date of hearing. The hearing would proceed regardless of whether she would have delivered her answering affidavit or whether she would be legally represented or not.

[15] The court's warning to the Applicant on 26 November 2014 notwithstanding, the Applicant's Attorney attended at court to advise that he could not prepare the answering affidavit as he was sick. He again requested that the matter be postponed *sine die* pending finalisation of his client's answering affidavit and his health improving.

[16] The Applicant's attorney presented the court with various doctors' notes all of which seemed to be prescription of medicine. The application to postpone the matter was vehemently opposed by the attorney of the Second Respondent on the basis that:

16.1 The Application was not *bona fide* as the Applicant had been legally represented since September 2014 and effectively had 4 months within which to consult, prepare and deliver the answering affidavit;

16.2 The Application was not made timeously and that the purported doctor's reports and notes did not in any manner suggest that the Applicant's Attorney is incapacitated to such an extent that

he could not reasonably attend to his duties;

16.3 The aim of the application was to delay the matter unnecessarily. Meanwhile, the Second Respondent was the only party suffering prejudice as it had not been receiving any rentals whatsoever. Furthermore, it had not been placed in possession of the property despite being responsible for the municipal accounts. In consequence the Second Respondent continued to suffer damages daily which were and are escalating out of control;

16.4 the unavailability of a legal representative is not a ground for a postponement.

[17] The court considered the matter and gave an order dismissing the application for postponement. In reaching that conclusion it held that the application for postponement was not *bona fide* and in any event the Applicant furnished no satisfactory reasons for it. The court held further that the attorney for the Applicant failed to provide proof that he was medically unfit to represent the Applicant. The application for the Applicant's eviction proceeded.

[18] The court indicated to the Applicant's attorney that he could still assist the Applicant by leading *viva voce* evidence in support of her defence. The attorney for the Applicant elected to withdraw from the case thus leaving the

Applicant to represent herself. The court then took it upon itself to lead the Applicant so that she could elaborate on her defence against the eviction application.

[19] From the *viva voce* evidence that the court elicited from the Applicant, it established that the Applicant had not been paying any rental since 2012. The Applicant failed to demonstrate that her entitlement to remain on the property stemmed from a lease agreement that she concluded with an estate agent. Her persistence that the Second Respondent was not the owner of the property was irrational especially after the production of convincing evidence by the Applicant to the contrary.

[20] As enjoined by the PIE, the court duly enquired about the personal circumstances of the Applicant and the latter duly obliged. The court thereafter gave an order granting the Applicant and the other unlawful occupiers three months from the date of the order within which to vacate the property.

[21] The Applicant now wants the decision of the First Respondent to be reviewed as she refused to postpone the matter. In doing so, the First Respondent deprived her of legal representation as her attorney withdrew as a result of ill-health, leaving her to battle it alone. That was grossly irregular as the Constitution prescribes that everyone is entitled to legal representation. She, being a lay person could not represent herself satisfactorily as an attorney would have done.

[22] The First Respondent did not oppose the application and was not in court during the hearing of this matter. The Second Respondent opposed the application and argued firstly, that a review is not open to a party who has been refused a postponement. It is an appeal that lies against a decision for the dismissal of a postponement. Secondly, the Applicant failed to establish the threshold criteria for a review application.

[23] Accordingly, there are two issues to be determined by this court and they are:

23.1 Whether this court should entertain an application to review the First Respondent's decision to refuse postponement; and

23.2 Whether it was grossly irregular for the First Respondent to allow the matter to proceed without legal representation for the Applicant.

[24] Grounds for review are set out in Section 24 of the Superior Court's Act, 59 of 1959 and they are:

24.1 Absence of jurisdiction on the part of the Court;

24.2 Interest in the course, bias, malice or the commission of an offence;

24.3 Gross irregularity in the proceedings;

24.4 The admission of inadmissible incompetent evidence or the rejection of admissible or competent evidence.

[25] In the cases of *Agasim-Perreira of Fulwood v Wertheim Becker Inc* [2006] 4 All SA 43 (E) and *Myburgh Transport v Botha t/a SA Truck Bodies* 1991 (3) SA 310 (NMS), the court dealt with matters concerning refusal to postpone. It should suffice to state that in *Myburgh*, the decision of the court below was reversed while in *Agasim-Perreira*, the decision of the court below was upheld. Of significance with these two matters is that they both concerned themselves with postponement and the decision of the court of the first instance was appealed and not reviewed.

[26] This confirms that unless a decision to refuse postponement falls within the grounds for review as outlined above, the normal manner of dealing with it is through appeal and not review. Thus, to the extent that the Applicant seeks to review the magistrate's decision to refuse postponement, this application is completely flawed. I do not believe that this court should devote time discussing this issue.

[27] I turn to consider the Applicant's claim that it was grossly irregular for the First Respondent to have allowed the matter to proceed without legal representation for the Applicant. It is objectively clear that the decision to

finally refuse postponement on the fifth occasion was not taken blithely. The court considered the number of previous postponements that were permitted, as well as the court's reasons.

[28] Under different set of circumstances, allowing a matter to proceed without legal representation for a party would be grossly irregular as it would constitute a violation of the Constitution. In the instant case, the First Respondent's refusal to postpone the matter must be weighed against the prejudice that the Second Respondent would have suffered had the postponement been granted.

[29] The Second Applicant is the legal owner of the property having acquired ownership a while back. It has since the acquisition of the property not enjoyed its ownership instead it has been burdened with payment of assessment rates, taxes, water, electricity and mortgage bond. While it is the only party paying for all these, the Applicant enjoys living on the property for free. This, the court should not countenance.

[30] Other than the foregoing, the Applicant was given sufficient time to deliver her answering affidavit even though the reasons proffered in support for the court to grant postponement, in my opinion, hovered around frivolity. This conclusion is inescapable as the Applicant knew that her attorney was diabetic. Why she did not instruct a different attorney to handle her case remains enigmatic. I do not think that the Second Respondent should be

denied the enjoyment of the property as a result of the inadequacies of the Applicant.

[31] The above is the background against which the First Respondent's decision to dismiss the application for postponement must be measured. It cannot be said that the decision of the First Respondent to refuse postponement was of so gross a nature that it was calculated to prejudice the Applicant. If anything, the converse is true particularly in view of the First Respondent's invitation to the Applicant's attorney that he could still assist her by leading *viva voce* evidence.

[32] Furthermore, when the Applicant's attorney withdrew, the First Respondent stepped-in to assist the Applicant. It was during this process that it became plain that the Applicant did not have a defence to the eviction application. For that reason, the First Respondent ordered her eviction giving her three months from the date of the order to vacate the property.

[33] I am unable to find any act on the part of the First Respondent that could be interpreted as gross irregularity in the context of Section 24 of the Superior Courts Act No. 59 of 1959. In the circumstances, the application for the review of the First Respondent's decision to refuse postponement must fail and I make the following order:

1. The application is dismissed with costs.

B MASHILE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Counsel for the Applicant: Adv. K.D Makakaba

Instructed by: Mngomezulu Attorneys

Counsel for the Respondent: Adv. J.C Viljoen

Instructed by: Stupel & Berman Inc.

Date of hearing: 23 November 2015

Date of delivery of Judgment: