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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

DELETE WHICHEVER IS NOT APPLICABLE

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

Date: **20th February 2018** Signature: _____

APPEAL CASE NO: A3072/2018

COURT A QUO CASE NO: 25972/2017

DATE: 20th February 2019

In the matter between:

BOYLES, CHARLES WINSTON

First Appellant

BOYLES, THERESA ANN

Second Appellant

- and -

TAWANA, TSHEPO JACOB

First Respondent

ZWANE, DUDUZILE CYNTHIA

Second Respondent

JUDGMENT

THLAPI J:**Introduction**

[1]. This is an appeal against an order granted on 26 March 2018 by the Magistrate sitting in Johannesburg, evicting the appellants from a residential property they previously owned, and ordering them to vacate the said property by 29 June 2018.

[2]. The notice of appeal was filed and served on the respondents on 18 April 2018. The appellant's attorneys, Mervyn Fehler Attorneys, served and filed an index and record of the proceedings before the magistrate, and the annexures, on 29 June 2018. On 4 October 2018 Mervyn Fehler formally withdrew as attorney of record for the appellants and gave a 'last known address' where they could be reached, which was the same address as the one from which they were evicted.

[3]. On 27 November 2018 the respondents wrote to the Deputy Judge President with a request that the Registrar be authorised to enrol the appeal for hearing and the following reasons were provided:

1. That the appeal was prosecuted on 29 June 2018 by the delivery of the appeal record together with an application for a date of hearing and this was followed by the delivery of a supplementary record on 5 July 2018. These papers were not accompanied by a practise note and heads of argument.
2. Contrary to the practice manual, the Registrar allocated a case number. The appellants' attorneys failed to deliver the practice note and heads of argument despite repeated requests to do so. Hoping to expedite the

matter the respondents' attorneys delivered their practice note and heads of argument on 25 September 2018 and this was followed by the withdrawal of the attorneys for the appellants.

[4]. The respondents' attorneys were notified by the office of the Deputy Judge President that the appeal would be heard on 29 January 2019 and a notice to that effect was communicated to the parties by the Registrar on 4 December 2018. The said notice was sent to the appellants' physical address. At the appeal hearing on 29 January 2019 the appellants were not in attendance and Mr Shull, for the respondents, informed us that he had also caused to be served on the appellants a notice of set down by Sheriff on 21 January 2019. He sent the returns of service back of the Sheriff for correction because they had erroneously stated that service was effected on the respondents instead of on the appellants. By the time of the appeal hearing the error had not been rectified. In the interests of justice, the matter stood down to the 31 January 2019. The deputy Sheriff, Mr Willem Benjamin van Dijk, filed an explanatory affidavit, confirming personal service on the appellants on 21 January 2019.

Background

[5]. On 28 June 2017 and at a public auction, the respondents purchased a residential property, namely Erf [...] Malvern, [...] Street, Malvern, Johannesburg, from Nedbank for an amount of R300 000. The property was put up for sale as a result of the appellants defaulting on their mortgage bond payments. The property was transferred into the names of the respondents on 23 August 2017. The appellants continued to reside on the said property after transfer without the consent of the respondents.

[6]. The eviction proceedings were commenced on 2 February 2018 by serving a Notice in terms of section 4(2) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ('the PIE Act') on the appellants and the local Municipality. The appellants opposed the application and the matter was heard on 26 March 2018.

[7]. The respondents contended that the appellants were in unlawful occupation and they had complied with the provisions of PIE and these were addressed under several headings. In particular, they had also served on the local municipality. They contended that it would be just and equitable to make an order for the eviction of the appellants who had persisted in their unlawful occupation thereby depriving them of the right to occupy the property, or to rent it out at a market related price or to generate income from the said property. The respondents were being severely prejudiced and had suffered financial loss due to the appellants utilizing all facilities including water and other municipal services payable by them.

Alternative Accommodation

[8]. In the opposing papers the first appellant averred that he was a 57 year old businessman and a diabetic. The property had been his primary residence since 2005. He continued to reside there with his wife and three children after transfer to the respondents. Their two adult children were above 30 years and both had disabilities and that he was a diabetic. His business was not doing well and his monthly earnings amounted to R4000. His wife was unemployed and she assisted in caring for their disabled children who both receive a disability grant amounting to R1600 per month.

[9]. The first appellant contended that eviction would render him homeless, deprive him and his family of their constitutional right to housing. Furthermore, the area where the residence is situated was important for his trade. He averred that the first applicant was a substantial property owner and he called upon him to produce the rates and taxes accounts from which the municipal valuation of the properties could be determined. He contended that one of the properties must be worth millions of rand.

Grounds of Appeal

[10]. The following are appellants grounds of appeal:

‘The magistrate had erred in that:

1. It is the winter months on the 2nd July 2018 onwards, when they are due to be evicted in terms of the court order.
2. The 1st Appellant and 2nd Appellant and their three children are likely to suffer severe prejudice to their health due to the likely cold weather should they be evicted from their home during such period, when they will all be homeless.
3. The learned magistrate should have ordered the eviction as at the end of September 2018;
 - 3.1 when the weather is likely to be warmer.
 - 3.2 The Appellants attorney at the hearing advised the court that the Appellants would be likely to find alternative accommodation only at the end of September 2018.’

Evaluation

[11]. It is common cause that the respondents launched the application in compliance with the provisions of PIE. Having considered arguments on behalf of the parties, the learned magistrate concluded that the appellants had failed to put up a defence and he granted the relief sought. The notice of appeal is not contesting the grant of the relief except that it is alleged, that the learned magistrate had only erred in that he had brought forward the date of eviction to the 29 June 2018, when it would have been just and equitable, given the personal circumstances of the appellants, to have extended their occupation beyond the cold winter months, to the end of September 2018. Mr Fehler had submitted before the court that as at that date the appellants would have found alternative accommodation.

[12]. It is my view that no purpose would be served by striking the appeal from the roll because it has become moot. The end of September 2018 has come and gone. Furthermore, the appellants have not followed through to finalize an appeal they had initiated even after their attorneys had withdrawn as attorneys of record by filing their heads of argument and by causing the matter to be set down for hearing.

[13]. For these reasons, the appeal stands to be dismissed.

Order

Accordingly, I make the following order:-

1. The appellants' appeal is dismissed with costs.

V V THLAPI

*Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg*

I agree,

L R ADAMS

*Acting Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg*

HEARD ON: 29th and 31st January 2019

JUDGMENT DATE: 20th February 2019

FOR THE APPELLANTS: No appearance

INSTRUCTED BY: No appearance

FOR THE RESPONDENTS: Mr B J Shull

INSTRUCTED BY: Stabin Gross & Shull Attorneys