IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO.
(2) OF INTEREST TO OTHER JUDGES: YES / NO.
(3) REVISED.
DATE **SIGNATURE**

CASE NUMBER: 13687/2012
DATE: 13/6/2014

In the matter between

ANNA MOENG NDUBANE **APPLICANT**

And

LANCE KIBEL **1ST RESPONDENT**

ABSA BANK **2ND RESPONDENT**

In re

LANCE KIBEL **APPLICANT**

And

NDUKO PHINEAS NDUBANE **1ST RESPONDENT**

ANNA MOENG NDUBANE **2ND RESPONDENT**

CITY OF TSHWANE METROPOLITAN MUNICIPALITY **3RD RESPONDENT**

JUDGMENT

LEPHOKO AJ

[1] The first responded purchased the property known as erf 4[…] S[…], Registration Division JR, Gauteng Province (the property) at a public auction conducted by the sheriff on 14 April 2011. It appears from the first respondent's title deed that the property had been attached pursuant to a judgment obtained by the second respondent, ABSA Bank (ABSA) as mortgagee after Mr. Nouko Phineas Ndubane and his wife Anna Moeng Ndubane who were mortgagors had defaulted on their bond repayments.

[2] On 19 June 2012 the first respondent as the new registered owner of the property issued proceedings in terms of section 4 of the Prevention of

Illegal Eviction from Unlawful Occupation of Land Act, Act 19 of 1998 seeking an order to evict the alleged unlawful occupiers of the property.

[3] The eviction application was unopposed and on 22 August 2012 Matojane J granted an order in terms of which the respondents in the eviction application and all those who occupied the property were ordered to vacate the property on or before the 11 October 2012 failing which they could be evicted by the sheriff on or after the 21 October 2012.

[4] The applicant in this application is the daughter of Mr. and Mrs. Ndubane and is in occupation of the property as one of the alleged unlawful occupiers. On 11 October 2011 the applicant brought an urgent application to have the eviction order granted by Matojane J on 22 August 2012 suspended pending an application for rescission of that order. The applicant also sought an order authorizing her to occupy the property in question. Baqwa J struck the application off the roll with costs for lack of urgency.

[5] The application for rescission of the eviction order was not proceed with and the application struck off the roll by Baqwa J remained dormant

until the first respondent in the present proceedings enrolled it for hearing on 5 May 2014. At the hearing of the matter the first respondent sought an odder dismissing the application with costs and that the applicant and her fellow respondents in the eviction matter be evicted from the property immediately.

[6] The only issue I have to decide is whether the eviction order should be suspended pending the rescission application and whether the applicant should remain in occupation of the property pending the final determination of the rescission application.

[7] The decision whether the eviction order should be rescinded vests in the court hearing the application for rescission. I will not attempt to usurp the function of that court. In determining whether the relief sought by the applicant should be granted the court must *inter alia* consider whether prospects exists that the court hearing the rescission application may rescind the eviction order. In so doing the court must evaluate the application against whether the applicant has made allegations that are ordinarily required to found an application for rescission of judgment.

[8] It is trite that in order to succeed with an application for rescission the applicant must show that she was not in willful default, that the application is *bona fide* and not made with the intention to delay the claim and that she has a *bona fide defence,* which *prima facie* has some prospects of success: Grant v Plumbers (Pty) Ltd 1949 (2) SA 470 (O) at 476 – 477, Morkel v ABSA Bank Bpk 1996 (1) SA 899 (C) at 903D – E, Standard Bank of SA Ltd v EL-Naddaf 1999 (4) SA 779 (W) at 784.

EXPLANATION OF DEFAULT

[9] This application is poorly drafted and there are instances where important dates and events are not correctly set out. The first respondent alleges that the eviction order was not granted in default as the applicant was in court when the order was granted. The application was first in court on 09 July 2012 when it was postponed to the 22 August 2012. The first respondent's counsel informed the court that the postponement was to allow the applicant to obtain legal representation.

[10] The applicant states that she was served with first respondent's application for eviction during 2011. The documents filed indicate that the eviction application was only issued in 2012 and was served on the

executor of her father's estate on 30 March 2012. Once the applicant became aware of the application she approached the Law Society of the Northern Provinces (the Law Society) for legal assistance to oppose the eviction application. She was referred to an attorney through the Law Society's *pro bono* scheme. She struggled to get an appointment to consult with the attorney due to the attorney's busy schedule which led to the matter eventually proceeding unopposed on 22 August 2012 when the eviction order was granted.

[11] The first respondent's counsel argued that the applicant was personally in court on 22 August 2012 when the order was granted. It was submitted that on 22 August 2012 the court engaged with the applicant before granting the eviction order and that the applicant had the opportunity to put her case before the court before it was dismissed.

[12] I have perused the transcript of the proceedings on 22 August 2012. The applicant, who is illiterate, was not legally represented on that day. I do not intend to deal with the procedure or merits of the eviction application as this court is a review court or a court of appeal. Suffice to say that the applicant did not appear to understand the nature of application

proceedings and the manner of presenting evidence in such proceedings. She did not file an answering affidavit or testify under oath at the hearing. She did not admit, deny or challenge any of the allegations made by the first respondent in his founding affidavit despite the fact that she was there to oppose the application. She did not know or understand that she had the right to do so in order to effectively oppose the application.

[13] In my view, mere physical presence in court as a concerned observer having a direct and substantial interest in the outcome of the proceedings can never amount to presence in court as envisaged in the rules of court. An uninformed engagement with the court does not translate to such presence or a fair hearing.

[14] It appears that the applicant took all reasonable and necessary steps to protect her interest in the property as soon as she became aware of the legal proceedings. She sought help from the Law Society and instructed attorneys to represent her before the date of the hearing. She also personally attended court each time the matter was in court notwithstanding her illiteracy. It appears that she was let down by her attorneys who seemingly failed to act in her best interest.

BONA FIDE APPLICATION

[15] The applicant alleges the facts that are set out in paragraph 16 below. In my view a possibility exists that the court hearing the application for rescission may find that based on those facts the applicant is not bringing the application solely for the purpose of delaying the first respondent's claim.

BONA FIDE DEFENCE

[16] The applicant states that she is illiterate, unable to read or write and does not understand how banks operate. She states that the property belonged to her late father and that the mortgage bond was insured by ABSA. She further states that on the death of her father she took the insurance policy documents to ABSA in order to have a claim processed for the insurance policy to pay off the bond. ABSA assured her that the insurance would settle the outstanding balance in full. She went to ABSA on several occasions to enquire about progress. Each time she visited ABSA she was told that she would be informed of progress.

[17] The applicant further states that her attorney approached ABSA and enquired about the insurance that was supposed to have paid off the balance on the bond. ABSA first told her attorney that the insurance had settled the outstanding balance in full. ABSA later informed her attorney that there was an outstanding amount of R23 000-00 but could not provide confirmation of the amount paid by the insurance policy. ABSA also failed to give reasons why it sold the property in execution before executing on movable property. These allegations are confirmed by the applicant's attorney of record at the time in a verifying affidavit. The attorney is an officer of the court and the court takes her confirmatory affidavit at face value and assumes that she would not deliberately mislead the court.

[18] The first respondent's counsel referred the court to the case of Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd1984 (3) SA 623 (A) and submitted that in the light of the applicant's failure to file a replying affidavit the application must be decided on the first respondent's answering affidavit and only the admitted facts in the applicant's founding affidavit.

[19] I am not persuaded that in the circumstances of the present case I should decide the application on the basis suggested by counsel even when it is clear that the applicant, who is illiterate, would most probably have filed a replying affidavit or led rebutting evidence at the hearing had she fully understood and appreciated the nature of the proceedings and the significance of filing a replying affidavit or adducing rebutting evidence at the hearing. In this kind of situation it would be in the interest of justice for the court to exercise its discretion and afford a party in the position of the applicant an opportunity to file a replying affidavit or to adduce oral evidence to rebut the allegations made in the answering affidavit. In my view, failure to do so may lead to unintended miscarriage of justice.

[20] The right to housing is a fundamental right protected by section 26 of the constitution of South Africa. The courts are also there to protect the rights of illiterate persons, the poor and vulnerable members of society. Courts should be loath to readily dismiss a defence based on a constitutionally protect right even though protracted litigation may lead to enormous prejudice to one of the parties involved in the litigation.

[21] In RGS Properties (Pty) Ltd v Ethekwini Municipality 2010 (6) SA 572 (KZD) at 575H-576C the court stated that judgment by default is inherently contrary to the provisions of section 34 of the Constitution and that in weighing up facts for rescission, the court must balance the need of an individual who is entitled to have his dispute resolved in a fair manner in a public hearing, against those facts which led to the default judgment being granted. The court observed that whilst there is a need for the existence of a bona fide defence the court is not seized with the duty to evaluate the merits of the defence. The fact that the court may be in doubt about the prospects of the defence to be advanced is not a good reason for refusing the application.

[23] The court was referred to the decision in Johannesburg Housing Corporation (Pty) Ltd v Unlawful Occupiers, Newtown Urban Village 2013 (1) SA 583 (GSJ) where it was stated that a property owner cannot be expected to provide free housing for the homeless on its property for an indefinite period. The court was also referred to the decisions in City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another 2012 (2) SA 104 (CC) and City of Johannesburg v Changing Tides 74 (Pty) Ltd and others 2012 (6) SA 294 (SCA) where it

was decided that property owners are entitled to rights in regard to properties of which they are the lawful owners, and which should be recognized by the court.

[24] I am in full agreement with the pronouncements in the foregoing cases but hold the view that these decisions are not authority for the proposition that the court must order the eviction of an alleged unlawful occupier pending the determination of the lawfulness of the registered owner's right to the disputed property. In those cases ownership was not in dispute, in this case it is. The fact that one is a registered owner of immovable property does not *per se* put his right of ownership beyond scrutiny by the courts as the acquisition may have been unlawfully acquired and subject to setting aside.

[25] This court is not sitting as a review court or a court of appeal and is not competent to set aside the order granted on 22 August 2012 even temporarily. I am however of the view that in the circumstances of this case it would be just and equitable to restrain the first respondent from evicting the occupiers of the property pending the determination of the application for rescission. I am of the view that the applicant has shown sufficient

cause why the court should come to her assistance. I have also taken into account that the application was brought on an urgent basis and that that may have limited the applicant's ability to deal with her grounds for rescission in sufficient detail as she intended to bring a separate application for rescission that would have enable her to set out a comprehensive and proper case for rescission.

[26] This matter was first heard on 06 May 2014. The applicant was again personally present in court. Counsel for the first respondent informed the court that she had discussed the matter with the applicant's attorney outside court in the presence of the applicant and an agreement had been reached that the applicant would not proceed with the application and would vacate the property. The applicant's attorney left before the matter was called and the applicant was again unrepresented. On enquiry by the court the applicant denied that she had agreed to any settlement of the matter. The matter was stood down to the 08 May 2014 so that the applicant's attorney could be present in court.

[27] On 08 May 2013 Ms. Mnisi appeared for the applicant. She informed the court that the matter had been settled and the applicant would vacate

the property and was not proceeding with the application. Upon questioning by the court Ms Mnisi informed the court that applicant had not instructed her to settle the matter but that she had taken it upon herself to settle based on her advice to the applicant. The offer of settlement was not considered by the court as it was against the applicant's instructions.

[28] Before the court adjourned on 08 May 2008 counsel for the first respondent informed the court that Ms. Mnisi does not have a right of appearance in the High Court. Ms Mnisi confirmed that she is not authorized to appear in the High Court and apologized for her unbecoming conduct. She was reprimanded by the court and warned not to appear in the High Court until she was properly authorized.

COSTS

[28] The first respondent argued that he is entitled to payment of his costs by the Legal Aid Board *de bonis propriis* due to the delay it had caused in finalizing the application. Cost *de bonis pripriis* are punitive costs against a party who acts or litigates in a representative capacity. Cost *de bonis pripriis* are not awarded lightly and are ordered when there is good reason

to do so such as negligence or unreasonable action, improper conduct or recklessness on the part of the representative.

[29] The present application was set-down by the first respondent and the rescission application still has to be finalized. The fact that the Legal Aid Board neglected to enroll the application is not sufficient justification for an award of punitive costs *de bonis propriis*. The first respondent could have easily mitigated his prejudice by enrolling the matter as soon as he became aware that the applicant was failing to do so. The delay in finalizing this matter can therefore not be solely attributed to the applicant or her legal representatives.

[30] As a general rule costs follow the cause. The applicant may still succeed in having the judgment rescinded which may eventually lead to a possible dismissal of the first respondent's claim or the dismissal of the applicant's defence. In my view, a cost order at this stage would be preemptive and premature. The applicant's legal representative was however responsible for the unnecessary postponement on 06 May 2014 and her action of abandoning her client and the hearing when the matter

was due to proceed cannot be countenanced. The Legal aid Board is therefore held responsible for the wasted costs on 06 May 2014.

In the circumstances the following order is made:

1. The first respondent is interdicted from evicting the applicant and any other occupier of the property known as erf 4[…] S[…] T[…], Registration Division JR, Gauteng Province (the Property) pending the final determination of the application for rescission referred to in paragraph 2 below.

2. The applicant may institute an application for rescission of the eviction order granted by Matojane J on 22 August 2012 within 15 days of the date of this order, failing which the order in paragraph 1 above will lapse.

3. The applicant and the other occupiers of the property are authorized to occupy the property pending the final determination of the application for rescission referred to in paragraph 2 above or the lapse of the order referred to in paragraph 1 above.

4. The Legal Aid Board is ordered to pay the wasted costs occasioned by the postponement on 06 May 2014.

5. The costs of the application shall be costs in the cause.

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A L C M LEPHOKO
(ACTING JUDGE OF THE HIGH COURT)

Heard on: 06 and 08 May 2014.

Judgment delivered on: 13 June 2014

For the Applicant: Adv.: E Niewoudt
Instructed by: Legal Aid Centre

For the Respondent: Adv.: L van der Westhuysen

Instructed by: Noa Kinstler