IN THE NORTH GAUTENG HIGH COURT, PRETORIA

[REPUBLIC OF SOUTH AFRICA]

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

29 / 01 / 2016
DATE

SIGNATURE

CASE NUMBER 30172/2015

29/1/16

In the matter between:

PIETER MARTHINUS GELDENHUYS	**APPLICANT**
And	
PRUDENCE SEGAGE	**1ST RESPONDENT**
THE OCCUPIERS	**2ND RESPONDENT**
CITY OF TSHWANE METROPOLITAN MUNICIPALITY	**3RD RESPONDENT**

JUDGMENT

MAVUNDLA. J,

[1] This is an opposed application to have the first and second respondent's application for leave to appeal served on the 6 October 2015, declared as an irregular proceeding and set aside in terms of rule 30(1)(A) with a costs order.

[2] On the 6 October 2015 the first and second respondents served their application for leave to appeal the eviction order which was granted on the 4 September 2015. The first and second respondents had filed their notice of intention to oppose the eviction application, however, did not file their opposing affidavits, which resulted in the eviction order being granted on the 4 September 2015.

[3] The applicant subsequently served a notice of irregular proceedings in terms of Rule 30 on the 2 November 2015, giving the first and second respondents notice to remove the cause of complaint on the grounds that:

3.1 The application for leave to appeal constitutes an irregular step within the meaning of Rule 30 as the first and second respondents ought to have brought an application for rescission of judgment.

3.2 The first and second respondents have not taken any step to remove the irregular proceeding nor have taken any further step as contemplated in terms of the Rules of this Court.

[4] In opposing the application in terms of rule 30(1) (A), it was contended on behalf of the respondents that the Court *a quo* erred in that when it granted the eviction order:

4.1 it did not give special consideration to the fact that the second respondent is, in fact, the 3 children of the first applicant. The latter is a woman, a widow and the household head;

4.2 it did not determine with certainty the specific date on which the respondents must be evicted, as required by section 4(8) of the PIE Act.

[5] It needs mentioning that in the relevant notice for leave to appeal the grounds raised are in essence the very grounds raised in the submission why the applicant's application should be dismissed.

[6] On behalf of the applicant it was submitted, *inter alia*, that, the application should succeed because the first and second respondents should have brought an application to rescind the judgment and order they seek leave to appeal against. Further, the first and second respondent, save to file a notice of intention to oppose, failed to file their opposing affidavits in the eviction application. It was further contended on behalf of the applicant that the respondents cannot therefore appeal the judgment in the circumstances mentioned herein above.

[7] The issue to be decided *in casu,* is whether the eviction granted against the respondents is final and appealable although granted in their absence. It is common cause that the respondents save for filing a notice of intention to oppose the eviction

application, failed to file their opposing affidavit. It is not as if the judgment was granted against them without them being aware of the application.

[8] In the matter of *Charlton v Parliament of RSA*[1] the Supreme Court of Appeal held that:

"[17] In term s20 (1) of the Supreme Court Act 59 of 1959, only 'judgments' and 'orders' (and not merely 'rulings') are appealable. In *Zweni v Minister of Law and Orders*[2], the test for what is meant by a 'judgment' or 'order' was expressed as follows:

"first, the decision must be final in effect and not susceptible of alteration by the Court of first instance; second, it must de definitive of the rights of the parties; and third it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings."

[8] In the Civil Procedure in the Superior Court by Harms[3], the learned author stated that:

"A judgment or order" is generally speaking, a decision with three attributes:

- It must be final in effect and not susceptible of alterations by the Court of first instance.
- It must be definitive of the rights of at least a substantial portion of the relief claimed and distinct relief.
- It must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings. This requires a proper identification of the 'main proceedings...

[1] 2012 (1) SA 472 (SCA) at 477E
[2] 1993 (1) SA 523 (A) at 532J-533A.
[3] C-9 [Issue 54]

A decision that does not have these attributes is a "ruling" is not appealable. A ruling, although couched in the form of an order, is usually a direction as to the manner in which the case should proceed."

[8] In the matter of *Pitelli v Everton Gardens Projects*[4]. the Supreme Court of Appeal held that:

"[27] An order is not final for the purposes of an appeal merely because it takes effect, unless it is set aside. It is final when the proceedings the court of first instance is complete and the court is not capable of revisiting the order. That leads one ineluctably to the conclusion that an order that is taken in the absence of a party is ordinarily not appealable.... It is not appealable because such an order is capable of being rescinded by the court that granted it, and it is thus not final in its effect."

[9] Section 16(1)(a)(i) of the Superior Courts Act 10 of 2013 provides as follows:

"...an appeal against any decision of a Division as a court of first instance lies upon leave having been granted-

(i) If the court consisted of a single judge, either to the Supreme Court of Appeal or to the full court of that Division on direction issued in terms of section 17(6).

[10] It is trite that in considering an application for leave to appeal, the court of first instance has to consider whether there are reasonable prospects of success in the appeal. This Court need not decide this issue. All this Court need to decide is whether the eviction order is appealable, although granted in the absence of the respondent.

[4] 2010 (5) SA 171 (SCA) at 176D.

[11] It is trite that a judgment granted in the absence of a party, can be set aside in terms of rule 31(2) (b), 42(1) or common law. Under rule 31(2)(b) the affected person on application must show good cause why the judgment must be rescinded. Good cause or sufficient cause entails that the affected person must first and foremost giving a satisfactory and reasonable explanation of his default. Secondly he must show that he has a *bona fide* defence to the claim and that he is *bona fide* in opposing the action and not merely delaying the action. In this regard vide Mutebwa v Mutebwa and Another[5]; Sanderson *Techntool (Pty) Ltd v Intermenua (Pty) Ltd*[6]; *Vilvanathan v Louw*[7]. Both requirements must coexist with each other and absent the other the application for rescission is doomed to fail; vide Harris v ABSA Bank Ltd t/a Volkskas[8].

[12] Under rule 42(1) "The court may, in addition, to any other powers it may have, *mero motu* or upon application of any party affected, rescind or vary:

(a) An order or judgment erroneously or erroneously granted in the absence of any party affected there by;

(b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, or a patent error or omission;

(c) an order or judgment granted as the result of a mistake common to the parties.

---

[5] 2001 SA 193 (Tk HC) at 197E- 198C.
[6] 1980 (4) SA 573 (W) at 575H-576A.
[7] 2010 (5) SA 17 (WCC) at 21G-23F.
[8] 2002[3] ALL SA 215 at 217

[13] *In casu* rule 42(1) is not available to the respondents the eviction application was not erroneously sought nor erroneously granted, neither is there any suggestion of any patent mistake common to the parties.The respondents simply did not file opposing papers. The applicant was, in my view, at large to approach the court for the eviction order.

[14] Under common law the Court has discretion to grant rescission of judgment where sufficient or good cause has been shown. By sufficient cause is meant the applicant must give an acceptable explanation of his default and this must coexists with evidence of reasonable prospects of success on the merits. If one of the essentials is lacking then the court will not come to his assistance; *Harris v ABSA Bank Ltd t/a Volkskas.*[9] I have already stated herein above that the absence of the respondents was not explained and therefore, the respondents could not resort to common law to bring an application for rescission.

[15] In the matter of *Arendse v Arendse and Others*[10] the Court held, *inter alia*, that a court considering eviction, need not consider who has the right to the property, but is obliged in terms of PIE to consider all relevant facts and decide whether it is just and equitable to grant eviction order. Towards that end the court must consider the rights and interest of the children, and whether there would be alternative accommodation. The Court must consider all the circumstances and whether it is just and equitable to order eviction. The Court must also pronounce a specific date on

[9] 2002[3] ALL SA 215 at 217.
[10] 2013 (3) SA 347 (WCC) vide pars [34]-[38].

which the eviction order must be carried out in the event the unlawful occupiers did not comply with the court order; vide City of Johannesburg v Changing Tides 74[11].

[16] *In casu,* the order provided that the respondents must be evicted from the property within twenty (20) calendar days from the date of service of the order upon the first and second respondents. In my view, the order as couched, is, with respect, vague and does not inform the respondents by which date must they be evicted. Where it can be shown that the Court failed to apply its mind as demanded by the PIE Act, in circumstance where the order is final, such order can only be set aside through the appeal process because then the court granting such order would have misdirected itself. The failure of the Court in complying with the prescripts of PIE Act, *in casu,* does not form a basis for the defence against to the merits of the eviction application. The defence to the eviction application must have been inherently available prior to the consideration of the application. *In casu,* the non-compliance with PIE Act is, in my view, an irregularity on the part of the Court *a quo* during the consideration of the eviction application, which renders the matter not capable of being corrected through rescission but only through an appeal process. Consequently I find that the eviction order of the Court *a quo* is appealable.

[17] In the result I find that the notice for application for leave to appeal filed by the respondents on the October 2015 is not an irregular step. I further find that the applicant's application in terms of Rule 30(1)(A) application to have the first and second respondent's application for leave to appeal declared an irregular proceedings must fail and be dismissed with costs.

[11] 74 2012 (6) SA 294 at 304D-305B, 311F-312D.

[18] In the premises it is hereby ordered that the application in terms of Rule 30(1) (A) is dismissed with costs on opposed party and party scale.

N.M. MAVUNDLA

JUDGE OF THE HIGH COURT

HEARD ON THE	: 14 /01 / 2016
DATE OF JUDGMENT	: 29 / 01 /2016
APPICANT`S ADV	: ADV J. JANSE VAN VUUREN
INSTRUCTED BY	: STEYN STEYN LE ROUX INCORPORATED
RESPONDENTS' ADV	: ADV. L. DU PREEZ
INSTRUCTED BY	: SDU PREEZS ATTORNEYS