

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

REPUBLIC OF SOUTH AFRICA



26/8/16

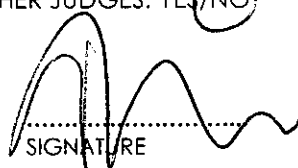
CASE NUMBER: 25888/2015

(1) REPORTABLE: YES ☒ NO

(2) OF INTEREST TO OTHER JUDGES: YES ☒ NO

(3) REVISED.

22/8/2016
DATE


SIGNATURE

In the matter between:

MUHAMMED REZA RAYMAN

First Applicant

ALL OTHER UNLAWFUL OCCUPIERS RESIDING

AT 11B COLIN AVENUE ELDORAIGNE, CENTURION

Second Applicant

THE CITY OF TSHWANE METROPOLITAN MUNICIPALITY

and

CLOETE MURRAY N.O.

First Respondent

WELCOME NORMAN JACOBS N.O.

Second Respondent

JUDGMENT IN APPLICATION FOR LEAVE TO APPEAL

BRENNER AJ

1. This is an application by the first and second applicants for leave to appeal against my judgment granted on 3 May 2016. On this date, I granted an order for the eviction of the first and second applicants, in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998 ("the PIE Act"). The City of Tshwane, the third respondent in the main application, did not oppose the original application.
2. For ease of reference, in this application for leave to appeal, the first applicant, Muhammed Reza Rayman, will be referred to as "Rayman". The second applicant includes all other occupiers who occupy the property in question with Rayman and will be referred to as "the occupiers". The first and second respondents will be referred to as "Murray" and "Jacobs" or collectively as "the trustees" where appropriate. A previous trustee, who was substituted by Murray, and who was originally a trustee, namely, Mathole Serofo Motshekga, will be referred to as "Motshekga".
3. In essence, the grounds of appeal pertain to purported procedural irregularities in the process in which the main application was prosecuted and adjudicated.
4. The first ground of appeal is that I erred in refusing a postponement of the application pending the outcome of a rescission application brought by Rayman and the occupiers to set aside part of an ex parte order granted by the Honourable Mr Justice Strijdom on 29 April 2015.
5. On 22 April 2016, four days before the hearing before me, Rayman and the occupiers served the rescission application, to set aside paragraph 4 of the ex parte order of 29 April 2015, which gave leave to the trustees in terms of section 18(3) of the Insolvency Act, to launch the eviction application.
6. I placed on record that I could regard this application as pro non scripto since it was not before me. Nevertheless, Counsel for Rayman and the occupiers addressed oral argument to me concerning the invalidity of paragraph 4 of the ex parte order, this because it had allegedly prevented the first and second applicants from challenging the trustees' authority to launch the application in

the first place. It was argued that they had suffered prejudice as a consequence. I was more than satisfied that Rayman and the occupiers had not proved any basis for prejudice but to the extent to which they may have suffered same, their avenues for recourse had not been exploited by the date of hearing of the main application. I was driven to the irresistible conclusion that the rescission application, launched four days before the hearing, was tantamount to yet another dilatory tactic and an abuse of the process of the Court.

7. It is noteworthy that the ex parte application had been served with the main application on Rayman and the occupiers on 16 April 2015, before the hearing thereof some thirteen days later. It was therefore open to Rayman and the occupiers to oppose the application prior to the hearing and to argue their issue with the provisions of section 18(3) of the Insolvency Act 24 of 1936 ("the Insolvency Act"). This they failed to do.
8. Even if the rescission application had been entertained, its prospects of success were remote, at best. Moreover, Rayman and the occupiers had been aware of the intention to apply for the ex parte order on or shortly after 16 April 2015, and of the grant of the ex parte order since May 2015, but had inexplicably failed to launch any rescission application until shortly before the hearing of the ejectment application almost one year after the fact.
9. It is further contended that I erred in finding that the requirements of section 18(3) of the Insolvency Act were fulfilled when the ex parte order was granted. The Court which granted this order was so satisfied. It is a well established precept of our law that Court orders are required to be complied with unless set aside.
10. Section 18(3) of the Insolvency Act was designed to accommodate recourse to litigation by provisional trustees where appropriate and prior to their final appointment. In casu, the provisional trustees bore the duty to take steps against Rayman and the occupiers as soon as practically possible regarding their vacation to facilitate the sale of the property. It was prudent to attempt to resolve the issues extracurially, which they tried to do, to no avail. It was only when it became apparent that Rayman did not intend to honour his promise to

pay interim rent that legal steps were instituted in April 2015. This was in the interests of the concursus creditorum.

11. It merits mention that, on 22 September 2015, the conduct of the provisional trustees was ratified in a meeting of creditors. It also merits mention that, ex abundante cautela, and even assuming the invalidity of paragraph 4 of the ex parte order, which was not conceded, I exercised my discretion to authorise the launch of the ex parte and main application, ex post facto.
12. The remaining ground for leave related to the substitution of one trustee for another when the final appointment of trustees was made in the insolvent estate of Rayman, this in terms of rule 15(2) of the Uniform Rules of Court. In argument before me, Counsel for Rayman and the occupiers was pertinently asked what functions were performed by the trustees vis a vis the estate of Rayman. To which he replied that the trustees took control of Rayman's estate, including all assets and liabilities, and that this occurred in their representative capacities. In the result, he had to concede that the applicant in the main application had always remained the same party, namely, the insolvent estate as represented by its trustees. I repeat what is stated at paragraphs 28 to 30 of my judgment.
13. Counsel for Rayman and the occupiers maintained that the notice attempted to substitute one legal party for another. This is a misconception of the facts. There was no attempt to substitute litigating parties. The litigating party has remained at all times the insolvent estate of Rayman. The identity of one of the trustees of the estate had changed. Murray was finally appointed as trustee instead of Motshekga, who was a provisional trustee. At all times material hereto, Motshekga and Jacobs represented the estate of Rayman, qua provisional trustee, and thereafter, on the final appointment of trustees, Murray and Jacobs represented the estate qua final trustees. Moreover, in terms of section 76(2) of the Insolvency Act, the Court may permit substitution in the given circumstances.
14. In terms of rule 15(4) of the Uniform Rules, and section 76(2) of the Insolvency Act, I confirmed the substitution of Murray for Motshekga as joint final trustee, with Welcome Jacobs, in the insolvent estate of Rayman.

15. In argument, Counsel for Rayman and the occupiers asked me to extend the deadline date for vacation if I found against them in this application. I have no jurisdiction to do so, as my role is *functus officio*. Nevertheless, as a consequence of the launch of the application for leave to appeal, Rayman and the occupiers have been afforded an effective period approximating four months within which to vacate the premises.

16. In the result, I am of the view that the first and second applicants do not enjoy a reasonable prospect of success on appeal, and that leave to appeal should accordingly be refused, with costs following the result. My grounds for granting the order on 3 May 2016 are more fully adumbrated in my written judgment handed down on the same date.

17. The following order is made:

a. the first and second applicants' application for leave to appeal against the judgment granted on 3 May 2016 is dismissed;

b. the first and second applicants are directed to pay the costs of the application jointly and severally.



BRENNER AJ

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

22 August 2016

Appearances

Counsel for the First and Second Applicants

: Advocate S Hussein-Yousuf

Instructed by

: Mothle Jooma and Sabdia Inc

Counsel for the First and Second Respondents

: Advocate J Hershensohn

Instructed by

: Attorneys Attorneys Rorich Wolmarans and Luderitz