

SOUTH AFRICA / JUDGMENT

Brodie and Others v Kgosamang and Others (2019/32683) [2019] ZAGPJHC 475 (30 October 2019) [2019] ZAGPJHC 475

COURT

South Gauteng High Court, Johannesburg

BEFORE

S Yacoob

CASE / FILE NUMBER

2019/32683

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NO: 2019/32683

In

the matter between:

BRODIE, MARIE
ANTOINETTE First
Applicant
THE UNLAWFUL OCCUPIERS
OF ERF 1161
GREYMONT TOWNSHIP, 16
2ND ROAD
GREYTOWN
GAUTENG Second
Applicant
and
KGOMASANG,
MOSIMANEOTSILE MICHAEL First
Respondent
BOKABA, ANDRIES BJALA
THAPEDI BHOLA Second
Respondent
THE CITY OF
JOHANNESBURG Third
Respondent

JUDGMENT

YACOOB J:

Introduction

1. On 11 October 2019 I gave an order in the urgent court in the following terms:
 - 1.1. it is declared that the applicants' eviction on 10 October 2019 was unlawful;
 - 1.2. the respondents are ordered to restore the applicants' occupation of ERF 1161 Greymont Township forthwith;
 - 1.3. the first and second respondents are further ordered to give at least 30 days' notice to the applicants before effecting an eviction, and
 - 1.4. the first and second respondents are further ordered to give at least 30 days' notice to the third respondent before effecting an eviction of the applicants.
2. At the time I indicated that I would provide reasons at a later date. These are those reasons.

Factual

Background

3. The first and second respondents ("the respondents") purchased the property at issue (probably at a sale in execution, as the founding affidavit states that it was sold at an auction after the first applicant defaulted on payments on her mortgage bond), obtaining transfer on 01 December 2017. They then discovered the applicants in occupation of the property and took steps to evict them in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998 ("PIE").
4. The application was not opposed by the applicants and was set down in the unopposed court on a date that does not appear from the papers, and the applicant appeared in person and requested the opportunity to oppose the application. She was apparently referred to the pro bono desk at the court.
5. The eviction application was then set down again in the unopposed court on 04 September 2018, as nothing had come of the applicant's approach to the pro bono desk. The applicant was again in court in person, and the judge declined to hear her. The judge granted the eviction application, setting the date on which the applicants in this matter must leave the property as 04 October 2018.

6. On 27 September 2018 the applicants served an application for rescission on the respondents, which was filed on 01 October 2018. An application for leave to appeal was then filed on 24 October 2018. An application for condonation is attached to the application annexed to the founding affidavit in the urgent application.
7. I was informed that reasons for the eviction order were given by Carrim AJ, who made the eviction order, in December 2018. Since then no steps have been taken to prosecute the appeal. Carrim AJ's reasons are not annexed to the papers.
8. The applicants were informed in January 2019 that the respondents considered the application for leave to appeal to be fatally defective, and brought an urgent application to stay the eviction in January 2019. There is a dispute about what happened to that urgent application, but no order was made and no further steps were taken to evict the applicants at that time.
9. The rescission application was heard on 28 August 2019, and judgment was handed down, dismissing the application, on 27 September
2019. On 30 September 2019 the respondents served the judgment dismissing the application for rescission on the applicants, and on 10 October 2019 the respondents evicted the applicants without further notice. The applicants immediately approached the court.
10. The judgment dismissing the rescission application did not make any order regarding the date of eviction, despite the fact that the eviction date determined by Carrim AJ had long passed. Nor did the respondents give the applicants notice of any date by which they were expected to leave the property, after the rescission judgment had been handed down.
11. It was contended on behalf of the applicants that, because they still had an application for leave to appeal pending, it was not competent for the respondents to have acted on the eviction order granted by Carrim AJ. The applicants also submitted that the eviction made them homeless, and that they were a family without an income headed by an elderly blind woman. It was submitted that an eviction that left them homeless was unlawful.
12. On behalf of the respondents it was contended that there was no application for leave to appeal because the condonation application had not yet been decided upon. They were therefore entitled to evict the applicants. The respondents were the owners of the property and had the right to take possession. The answering affidavit described the respondents' family but did not set out any basis for a conclusion that restoring possession to the applicants would leave them homeless.
13. In the answering affidavit, the respondents also alleged that the applicants' attorneys had attempted to intimidate them on the day on which the eviction occurred, by bringing a minibus with a number of men to the property to threaten them. This was denied in the replying affidavit. The respondents did not request that any order be made in this regard.

Issues

14. The questions which arise in this matter are:

14.1. whether the application for leave to appeal prevents the respondents from executing the eviction order, and

14.2. if not, whether there is any other reason why the respondents were not entitled to evict the applicants on 10 October 2019, without notice other than the service on 30 September 2019 of the judgment dismissing the eviction application.

The Application for Leave to Appeal

15. Although the applicants instituted an application for leave to appeal, together with an application for condonation, over a year ago, and received reasons more than ten months ago, they have taken no steps to prosecute that appeal.
16. The applicants' counsel suggested that they wished to pursue the rescission application first, and if that was unsuccessful, to prosecute the application for leave to appeal. This suggestion smacks of delaying tactics.
17. The respondents' counsel referred me to the judgment of Sutherland J in *Panayiotou v Shoprite Checkers (Pty) Ltd and Others*[1] as authority for the proposition that an application for leave to appeal that is served late does not suspend the judgment against

which appeal is sought, nor does an application for condonation, until and unless that application for condonation is granted.

18. The circumstances of this case demonstrate why that judgment is entirely correct. An applicant for leave to appeal and condonation then becomes able to delay the execution of a judgment for an inordinately long time, which can never be in the interests of justice.
19. Mr Makgalemele for the applicant suggested that this case is distinguishable from the *Panayiotou* judgment because the parties are different, and the issues are different. The applicants are seeking to prevent their own homelessness and are not represented by a private firm of attorneys. In my view these factors may be relevant to whether the application for condonation is granted. It may also be relevant to any application to suspend the operation of the court order pending the

determination

of the application for condonation. However, it is not relevant to whether there is an existing application for leave to appeal which suspends the operation of the court order. Even if I was to consider these factors relevant, they would be counterbalanced by the extremely long period of time for which the applicants have not prosecuted the application for leave to appeal.

20. Mr Makgalemele also submitted that the urgent court before which this matter served in January 2019 had found that it was not bound by the Panayiotou judgment, and suggested that I may come to the same conclusion. He was unable to make submissions as to the reasons why I may find that I am not bound. I cannot see any reason why I would not be bound, and in any event, in my view the interests of justice would not be served in this case by following Mr Makgalemele's submission, for the reasons already set out above.
21. I find, therefore that there is no merit in the leave to appeal point.

The Respondents' Entitlement to Evict the Applicants on 10 October 2019

22. The respondents contended that, having served the applicants with the outcome of the rescission application on 30 September 2019, they were then at liberty to evict the respondent in terms of the court order of 04 September 2018, which provided for eviction on 04 October 2018, without anything more.

23. PIE provides in its preamble that

WHEREAS no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property;

AND WHEREAS no one may be evicted from their home, or have their home demolished without an order of court made after considering all the relevant circumstances;

AND WHEREAS it is desirable that the law should regulate the eviction of unlawful occupiers from land in a fair manner, while recognising the right of land owners to apply to a court for an eviction order in appropriate circumstances;

AND WHEREAS special consideration should be given to the rights of the elderly, children, disabled persons and particularly households

headed by women, and that it should be recognised that the needs of those groups should be considered...

24. PIE provides in section 4(7)-(12) that

- (7) If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women.

- (8) If the court is satisfied that all the requirements of this section have been complied with and that no valid defence has been raised by the unlawful occupier, it must grant an order for the eviction of the unlawful occupier, and determine-
- a) a just and equitable date on which the unlawful occupier must vacate the land under the circumstances; and
 - b) the date on which an eviction order may be carried out if the unlawful occupier has not vacated the land on the date contemplated

in paragraph (a).

- (9) In determining a just and equitable date contemplated in subsection (8), the court must have regard to all relevant factors, including the period the unlawful occupier and his or her family have resided on the land in question.
- (10) The court which orders the eviction of any person in terms of this section may make an order for the demolition and removal of the buildings or structures that were occupied by such person on the land in question.
- (11) A court may, at the request of the sheriff, authorise any person to assist the sheriff to carry out an order for eviction, demolition or removal subject to conditions determined by the court: Provided that the sheriff must at all times be present during such eviction, demolition or removal.
- (12) Any order for the eviction of an unlawful occupier or for the demolition or removal of buildings or structures in terms of this section is subject to the conditions deemed reasonable by the court, and the court may, on good cause shown, vary any condition for an eviction order.
25. Although the respondents have the right to possess the property they have purchased as their new home, this does not give them the right to take possession thereof in an unfair and therefore unlawful manner. PIE makes it clear that, while unlawful deprivation of property is not permitted, eviction may only take place after all relevant circumstances have been considered, and in a fair manner.
26. The respondents have not set out any basis in their answering affidavit for a conclusion that reinstating the applicants on the property would result in the respondents being homeless.
27. It is clear that part of the fairness contemplated by PIE is that unlawful occupiers are given a period of time to vacate their homes that is just and equitable. Although it is not explicitly stated, this necessarily means that they must be given sufficient notice to do so.

28. It was submitted for the applicants that this also meant that they could not be evicted without alternative accommodation being made available, in accordance with the decision of the Constitutional Court in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another*.^[2] However, it is not clear to me that that is the case, since section 4(7) of PIE clearly excludes from the requirement for alternative accommodation occupiers of property sold in a sale of execution pursuant to a mortgage. It appears that this is such a property.

Taking into account the interim and urgent nature of the relief I have granted, it is not necessary for me to decide this question.

Should the applicants make any further approach to the court to further delay their eviction, that issue will be among those ventilated. In *Blue Moonlight* it does not appear that the property was purchased at a sale in execution pursuant to a mortgage, nor were the 81 occupiers the persons who had defaulted on the mortgage.

29. I emphasise that, as I have already stated, PIE requires that unlawful occupiers be evicted in a fair manner and on a date determined by a court to be just and equitable.
30. There are two issues that arise which are in the applicants' favour. The first is that the date determined by the court granting the eviction order as just and equitable had already passed. The second is that the applicants were not given notice of their eviction.
31. The fact that the just and equitable date of the eviction had already passed meant that it was necessary for a court to determine again what date would be just and equitable for the applicants to vacate the premises. It would have been appropriate for the court hearing the rescission application to do so. It is only logical that any court hearing an application for rescission, an application for leave to appeal, or an appeal, of an eviction order, where the dates have either already passed or are no longer reasonable due to the passing of time, must determine afresh what date would be just and equitable.
32. This approach is borne out by a number of cases in which courts hearing appeals determined new eviction dates.
33. In *Blue Moonlight* the High Court had granted an eviction order on 4 February 2010, with an eviction date of 31 March
2010. The matter went to the Supreme Court of Appeal which granted an order on 30 March 2011 with an order to vacate the property by 1 June
2011. The Constitutional Court then considered the matter, and ordered on 1 December 2011 that the occupiers were to vacate the property by 15 April 2012.

34. The Constitutional Court considered all relevant circumstances to determine whether eviction would be just and equitable and by what date. In that case the court ordered that the City must provide alternative accommodation to the occupiers two weeks before the date it had determined as the eviction date.
35. The Supreme Court of Appeal also accepted as a matter of fact that, having found that Blue Moonlight had complied with all the requirements of PIE and was entitled to an eviction order, it had to then determine the timing of the eviction – both to allow the City to make arrangements for temporary accommodation, and to allow the occupiers to prepare to move from their homes.[3]
36. In *Mayekiso and Another v Patel NO and Others*[4] the Full Court dealt with an appeal against an eviction order granted by a single judge in that division. The original eviction order had been granted on 23 September 2016, ordering the occupiers to move out by 31 December 2016. The Full Court, in dismissing the appeal, accepted as a matter of course that, since the “date fixed for eviction has come and gone” the court had to determine a new date that would be just and equitable.[5]
37. As far as notice is concerned, it is obvious, even if the court did not need to determine a new date for the eviction, that an unlawful occupier cannot be evicted with no notice whatsoever. Notice that the rescission application had been dismissed, where the dismissal did not determine new dates for eviction, does not constitute notice of eviction.
38. The applicants could not be expected to know by when they had to leave, and could not be expected to live in daily fear of eviction without being able to make proper arrangements to vacate their home.
39. I have already found that it was necessary for a new date to be determined. I also find it necessary to say that I consider the conduct of the respondents in simply evicting the applicants with no notice to be scandalous. It is obviously unlawful. At the very least, eviction in a fair manner requires proper notice of the date on which a person may expect to be evicted in terms of

PIE.

Appropriate relief

40. For the reasons set out above, I find that the appropriate relief in this matter is to declare that the eviction without notice was unlawful, and order that the applicants be reinstated on the property.
41. Considering that Carrim AJ’s judgment still stands, and that the application was brought on an extremely urgent basis, without sufficient information which would permit the court to consider whether a different period may be appropriate, I consider it appropriate that the applicants be afforded the same amount of time that Carrim AJ considered just and equitable in which to vacate the property.

42. Carrim AJ ordered that the applicants vacate the property within 30 days of her order – that is, she ordered on 04 September 2018 that the applicants vacate the property on 04 October 2018.
43. Rather than setting an exact date for the applicants to vacate the property I considered it appropriate to order that the respondents are to give the applicants 30 days' notice before evicting the applicants in terms of Carrim AJ's order. This was to give either party time to bring any proceedings to finalise the leave to appeal and/or condonation application if they so desired. It is also intended to give sufficient time to the City of Johannesburg, the third respondent, to respond to the applicants'

pending eviction.

Costs

44. The applicants are represented pro bono. The second respondent is unemployed, and the first respondent has in his household his wife, three children, mother, three brothers and two uncles. The second respondent is the first respondent's brother. Although the respondents have acted unlawfully, they have done so in ignorance and in pursuance of their rights.
45. Taking into account that the applicants have not incurred any legal costs, I consider it appropriate to make no order as to costs.

Conclusion

46. In the circumstances I made the order set out in paragraph one of this judgment.

_____.S. YACOOBJUDGE OF THE HIGH COURT

Appearances

Counsel for applicants: Mr Z Makgalemele

Instructed by: Seri Law Clinic

Attorney for first and second respondents: Ms T Mkhize

Instructed by: Steyn Steyn Le Roux Inc

Date of hearing:

11 October 2019

Date of judgment:

30 October 2019

[1] 2016

(3) SA 110 (GJ)

- [2] 2012
- (2) SA 104 (CC)
- [3] City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another 2011
- (4) SA 337 (SCA) at [74]
- [4] 2019
- (2) SA 522 (WCC)
- [5] At para [75]
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