

SOUTH AFRICA / JUDGMENT

Gajoo and Another v Kock and Others (2015/33530) [2016] ZAGPJHC 82 (4 May 2016) [2016] ZAGPJHC 82

COURT

South Gauteng High Court, Johannesburg

BEFORE

L Adams

CASE / FILE NUMBER

2015/33530

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NO: 2015/33530

DATE:

04 MAY 2016

In the matter

between:

GAJOO,
 DIRAN.....First
 Applicant
 BALKISSOON,
 RISHANA.....Second
 Applicant
 And
 KOCK,
 DANIEL.....First
 Respondent
 ALL UNLAWFUL
 OCCUPIERS OF PORTION [2....] OF
 ERF [6....],
 [N.....], SITUATE AT [2.....] [P.....],
 3rd ROAD,
 [N.....], [R.....] EXTENSION
 [4.....].....Second
 Respondent
 CITY OF
 JOHANNESBURG METROPOLITAN
 MUNICIPALITY.....Third
 Respondent

JUDGMENT

ADAMS AJ:

[1]. The applicants apply for the eviction of the first respondent and all other persons occupying the immovable property described as Portion [2.....] of Erf [6....], [N.....] Extension [4.....] Township, situate at [2....] [P.....], 3rd Road, [N.....] Extension [4.....], [R.....] ('The property').

[2]. The application was launched on the 22nd September 2015, and the applicants have complied in all respects with the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ('the PIE Act').

[3]. The property is at present occupied by the first respondent and his wife, Carol Lynn Watt. According to the first respondent they are the only occupiers of the property and they have been in occupation of the property since 1994.

The facts

[4]. The first and second applicants are the joint owners of the property, which was registered into their names on the 28th of July 2015 pursuant to the purchase of the property from White Rock Property Trading (Pty) Limited ('White Rock Property') on or about the 5th August 2014. The applicants are the registered owners of the property under Deed of Transfer number: [T.....].

[5]. White Rock Property had purchased the property at a Sale in Execution on the 8th August 2013 pursuant to Summary Judgment granted by this Court on the 9th of October 2012 against inter alia the first respondent in favour of Absa Bank Limited for payment of the sum of R905,810.79, together interest thereon and costs of suit. Simultaneously with the granting of the summary judgment against the first respondent, the Court had declared the property specially executable.

[6]. On or about the date of the Sale in Execution of the property the first respondent commenced proceedings in the Gauteng Division of the High Court for the sequestration of his estate. On the 8th of August 2013, being the date of the Sale in Execution by the Sheriff of the Court, Randburg Southwest, to White Rock Property, the first respondent caused a notice in terms of section 4(1) of the Insolvency Act to be published in the Government Gazette, giving notice that he will be applying for the surrender of his estate on the 5th September 2013. The Sheriff of the Court, Randburg Southwest, was advised of the foregoing, and the Sale in Execution was made subject to the suspensive condition that the first respondent does not pursue his application for the surrender of his estate.

[7]. The application was not pursued, which meant that a valid sale in execution came into existence, and White Rock Property acquired

ownership of the property in terms of the sale.

[8]. The sum total of the defence of the respondents on the merits of the application for their eviction is that the first applicant is 'currently preparing an application in terms of Rule 42 of the High Court Rules to rescind' the summary judgment granted against him as far back as the 9th October 2012, some three and a half years ago. The first respondent also seems to suggest, although he does not say so in as many words, that he intends applying to set aside the sale in execution on the basis that same 'constitutes an invalid transaction of sale'. Importantly, to date hereof and despite these threats to institute the various legal proceedings, the first respondent has not done so.

INTENDED APPLICATION FOR RESCISSION

[9]. The respondent has indicated in his answering affidavit that he intends launching an application for a rescission of the summary

judgment

obtained against him. To date hereof and approximately three and a half years later, the threatened application has not been instituted.

[10]. It is not altogether clear from his answering affidavit what the first respondent's bona fide defence to the summary judgment is, which would entitle him to a rescission of the judgment.

[11]. The requirements for obtaining rescission of a judgment are well-established: Firstly, the existence of a reasonable and acceptable explanation for the default in appearance (if applicable) and secondly that a bona fide defence, carrying some prospect of success, exists (see *Chetty v Law Society Transvaal*, 1985 (2) SA 756 (A); *Silber v Ozen Wholesalers (Pty) Ltd*, 1954 (2) SA 345 (A)).

[12]. I am of the view that the first respondent has not even begun to place before me evidence suggesting that he would be able to satisfy these requirements.

[13]. The main difficulty I have with the first respondent's intended rescission application is that he is a tad thin on the detail

relating to the basis on which he would be entitled to the rescission. Furthermore, there is no explanation by the respondent as

to why the application has to date, which is some three and a half years after judgment was granted, not been launched. I am therefore

of the view that it will be difficult, if possible at all for the respondent to demonstrate to a court that his application for

rescission is bona fide.

[14]. No reason has been proffered for the respondent's failure to launch the application for rescission as a counter – application to the present application before me.

[15]. I am therefore of the view that the first and second respondents do not have a defence to the merits of the application for their eviction.

the pie act considerations

[16]. That leaves me to consider whether, in the circumstances of this matter, it would be just and equitable to order the eviction of the first and second respondents from the property.

[17]. The PIE Act imposed a new role on the courts in that they are required to hold the balance between illegal eviction and unlawful occupation and ensure that justice and equity prevail in relation to all concerned. Sachs J, in *Port Elizabeth Municipality v Various Occupiers*, [2004] ZACC 7; 2005 (1) SA 217 (CC), described this new role of the court as 'complex, and constitutionally ordained', and one which required a court 'to go beyond its normal functions, and to engage in active judicial management'.

[18]. A number of courts have, in relation to the provisions of s 4 of PIE, recognised the duty of the court to act proactively, as well as its powers to investigate, call for further evidence or make special protective orders.

[19]. In terms of s 4(7), a court is obliged, in addition to the circumstances listed in s 4(6), namely, the rights and needs of the elderly,

children, disabled persons and households headed by women, to give due weight to the availability of alternative land. There is nothing to suggest that in an enquiry in terms of s 4(6), a court is restricted to the circumstances listed in that section. The court must have regard to all relevant circumstances. The circumstances identified are peremptory but not exhaustive. The court may, in appropriate cases, have regard to the availability of alternative land. However, where the availability of alternative land is relevant, then it is obligatory for the court to have regard to it.

[20]. An important consideration is whether suitable alternative accommodation is available to the first and second respondent. The relevant authority is *Blue Moonlight Properties 39 (Pty) Limited v Occupiers of Saratoga Avenue and Another*.^[1] However, the case before me does not identify the first and second respondents as persons who are within the class of persons who are referred to as the poorest of the poor or the fact that the respondents may face the prospect of being homeless. No such case was made out in this matter.

[21]. In *Blue Moonlight* the occupiers were identified and represented and had placed undisputed information before the court regarding their personal circumstances and demonstrated that, if evicted, they would be rendered homeless.^[2] *Blue Moonlight* further held that affected individuals, including children, elderly people, and people with disabilities or women headed households, for whom the need for housing is particularly great, homelessness would result in particularly disastrous consequences.^[3]

[22]. Griffiths J summarised the position as follows in *Mtshelakana*:^[4]

‘[9] As I understand these cases, the function of a court in performing its judicial oversight is to examine the papers before it and determine therefrom whether or not there is an apparent abuse of a fundamental right or the rights of the respondent or respondents. In practically every case which has come before me in this regard it is generally clear from the papers as to whether or not this is the case. On the extreme, there are the cases generally dealt with in the above-mentioned judgments involving extremely poor, landless people who are merely attempting to exercise the rights afforded them by the Constitution in claiming a small portion of land and erecting a modest shelter in order to protect themselves from the elements. On the other extreme, there are those cases where well-heeled tenants have remained in occupation of rented premises well beyond the rights accorded them in terms of the lease without paying rental therefor, despite being in a position to do so.

[10] It seems to me that in the former case, and depending on the circumstances thereof, the court may well decide (in the exercise of its judicial oversight) that the local municipality should be joined as a party to the proceedings on the basis that it may in those circumstances have a direct a substantial interest in the proceedings in that it is obliged to ensure adequate accommodation for such persons in dire need of adequate shelter.

[11] In the latter case, however, it does not appear to me that the municipality would have a direct and substantial interest in the matter in that the respondent concerned would clearly have the means to be able to source accommodation elsewhere, either on a rental basis or by purchasing his or her own property. Thus, in such a case, there would be no obligation on the court to ensure that the municipality is joined as a party.'

[23]. The first respondent in this case occupied the property since 1994. During 2012 Absa Bank obtained Summary Judgment against the first respondent and at the same time the property was declared specially executable. Subsequently, the first and second applicants became the registered owner of the property on the 28th of July 2015.

[24]. The first respondent, who is approximately 64 years old, and his wife are the only occupiers of the property. I am of the view that they do not fall into the category of persons who can be described as the poorest of the poor. If anything, they probably can safely be categorised as persons who clearly have the means to be able to source accommodation elsewhere, either on a rental basis or by purchasing their own property.

[25]. There are no facts which would justify a court to regard the first and second respondents as falling into the class of persons requiring for example intervention by the local authority.

[26]. As was said by Mokgoro J in *Jaftha v Schoeman; Van Rooyen v Stoltz*, [2004] ZACC 25; 2005 (2) SA 140 (CC) at par [42]:

'The interests of creditors must not be overlooked. There might be circumstances where, notwithstanding the relatively small amount of money owed, the creditor's advantage in execution outweighs the harm caused to the debtor. In such circumstances, it may be justifiable to execute. It is in this sense that a consideration of the legitimacy of a sale in execution must be seen as a balancing process'.

[27]. Also at par [43]:

'However, it is clear that there will be circumstances in which it will be unjustifiable to allow execution. The severe impact that the execution process can have on indigent debtors has already been described. There will be many instances where execution will be unjustifiable because the advantage that attaches to a creditor who seeks execution will be far outweighed by the immense prejudice and hardship caused to the debtor. Besides, the facts of this case also demonstrate the potential of the section 66(1)(a) process to be abused by unscrupulous people who take advantage of the lack of knowledge and information of debtors similarly situated to the appellants. Execution in these circumstances will also be unjustifiable'.

[28]. The property in question appears to be the primary residence of the first and second respondents. It was not purchased with the assistance of a Government Housing subsidy. The respondents also are clearly not of the same ilk from a means point of view as the debtors in the *Jaftha* matter. I do not have before me any indication that the eviction would infringe on the constitutional right of the respondents to have access to adequate housing.

[29]. The property in question is occupied by the respondent and his wife. There are no occupants who can be said to fall within the category of the vulnerable in our society. There is most certainly no information and evidence before me of such circumstances. I can therefore safely infer that this is a consideration which would not favour the respondents.

[30]. The relative financial strengths of the applicants and the respondent is a consideration which, at best for the respondents, is a neutral one. The applicants, two private individuals, who bought the property in question with a view to securing a place of abode and a roof over their heads, have since July 2015 been servicing a mortgage bond over the property which is in place to secure the purchase price of the property. Despite this, they have not had the benefit of their ownership of the property. They are being deprived of their constitutional right to have the beneficial use of their property.

[31]. On the available evidence, it cannot possibly be suggested that the applicants have instituted action with an ulterior motive. If

anything, I am of the view that the applicants have treated the first respondent fairly and reasonably, with due regard to his

constitutional rights.

[32]. These factors, in my view, mitigate against the respondents and in favour of the applicant.

[33]. In the circumstances of this matter, I am of the view that there are no circumstances that might be regarded as extraordinary which would persuade a court to decline an order for the eviction of the respondents. Accordingly, there is no reason why I should not order that the respondents be evicted from the property.

[34]. The only other issue which requires my consideration, and which is an aspect relevant to the enquiry relating to whether it is just and equitable to evict, is the time period which I ought to give to the respondents to vacate the premises. In that regard, Mr Cremen, who appeared on behalf of the applicants, submitted that, in the circumstances of this matter, the respondents should be afforded a period of 2 (two) months within which to vacate the property. I agree with this submission. I have had regard to the fact that the first notice to vacate was sent to the first respondent on or about the 31st of July 2015.

order

Accordingly, I make the following order:

1. The first and second respondents, together with all those occupying the property by virtue of their occupation thereof, including their family and / or employees, are evicted from the property, being Portion [2.....] of Erf [6...], [N.....] Extension [4.....] Township, Registration Division I.Q., Gauteng Province, situated at [2.....] [P.....], 3rd Road, [N.....], [R.....] ('the property').

2. The first and second respondents, together with all those occupying the property by virtue of their occupation thereof, including their family and / or employees, are to vacate the property, being Portion [2....] of Erf [6....], [N.....] Extension [4.....] Township, Registration Division I.Q., Gauteng Province, situated at [2....] [P.....], 3rd [R.....], [N.....], [R.....] ('the property'), by no later than the 30th June 2016.
3. In the event that the first and second respondents, together with all those occupying the property by virtue of their occupation thereof, including their family and / or employees, do not vacate the property on or before the 30th June 2016, the eviction order may be executed and the sheriff of the court or his lawfully appointed deputy is authorised and directed to evict the first and second respondents, together with all those occupying the property by virtue of their occupation thereof, including their family and / or employees, from the property.
4. The first and second respondents, together with all those occupying the property by virtue of their occupation thereof, including their family and / or employees are interdicted and restrained from entering the property at any time after they have vacated the property or have been evicted therefrom by the sheriff of the court or his lawfully appointed deputy.
5. In the event that any of the first and second respondents, together with all those occupying the property by virtue of their occupation thereof, including their family and / or employees, contravene the order in para 4 above, the sheriff of the court or his lawfully appointed deputy, is authorised and directed to remove them from the property as soon as possible after their reoccupation thereof.
6. The first and second respondents shall pay the first and second applicants' costs of this application.

L ADAMS

Acting Judge of the High Court

Gauteng Local Division, Johannesburg

HEARD ON: 29th April 2016

JUDGMENT DATE: 4th May 2016

FOR THE APPLICANT: Adv Cremen

INSTRUCTED BY: Bruno Simão Attorneys

FOR THE RESPONDENT: Adv Sithole

INSTRUCTED BY: Christo Schoeman Attorneys

[1]

[2008] ZAGPHC 275; 2009 (1) SA 470 (W).

[2] Para 39.

[3] Para 92.

[4] Premier, Eastern Cape v Mtshelakana 2011

(5) SA 640 (ECM) paras 9-11.

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Prepared on 13 October 2026 · Esheria