

SOUTH AFRICA / JUDGMENT

Harinoro and Another v LG Maroncowitz and Sons (Pty) Ptd and Another (2879/17) [2018] ZAGPPHC 308 (2 May 2018)

[2018] ZAGPPHC 308

COURT

North Gauteng High Court, Pretoria

BEFORE

N.M Mavundla

CASE / FILE NUMBER

2879/17

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IN THE NORTH GAUTENG

HIGH COURT, PRETORIA

[REPUBLIC OF SOUTH AFRICA]

(1)

NOT REPORTABLE

(2)

NOT OF INTEEST TO OTHER JUDGES

(3)

REVISED.

CASE

NUMBER: 2879 / 17

2/5/2018

HARINORO,

AIMEE

1ST

APPLICANT

ALL OCCUPIERS OF 238 CORNELIS

STREET

FAIRLAND, JOHANNESBURG (ALSO

KNOWN AS

ERF

Q92, FAIRLAND, JOHANNESBURG

2ND APPLICANT

And

LG

MARONCOWITZ AND SONS (PTY) PTD

1ST RESPONDENT

CITY

OF JOHANNESBURG MUNICIPALITY

2ND RESPONDENT

In

re: LG
MARONCOWITZ AND SONS (PTY) PTD
APPLICANT
ALL
OCCUPIERS OF 238 CORNELIS STREET
FAIRLAND,
JOHANNESBURG (ALSO KNOWN AS
ERF
Q92, FAIRLAND, JOHANNESBURG
1ST RESPONDENT
CITY
OF JOHANNESBURG MUNICIPALITY
2ND RESPONDENT

JUDGMENT

MAVUNDLA, J.

[1] The applicant applies in terms of rule 42(1) that:

1.1 the order granted on 10 March 2017 be rescinded and set aside;

1.2 the writ of ejectment, if any issued in consequence of the aforesaid order be declared to be of no force and effect, and be set aside;

1.3 the applicant be allowed and directed to file their opposing affidavit in the main application for eviction within ten (10) days from date of this order;

1.4 the first respondent and any other respondents opposing the grant of the application herein be ordered to pay the costs on attorney and client scale;

1.5 further and or any other relief.

BACKGROUND

FACTS

[2] It is not in dispute that:

2.1 the applicant on the 20 December 2008 concluded a purchase and sale agreement^[1] with "the previous owners" of the property in issue, namely Rafidimalalaso Adriananisoa Alien ; Adrianarisoa Mathieu Prosper ; Barny Fabrice Henri and Barny Miharivola Andriansarisoa;

2.2 the terms of the aforesaid agreement were that the purchase price for the relevant property was R2 500 000. 00 (two million R1 500 000. 00 (one million five hundred thousand r11d} was to be paid in advance to the "previous owners"

2.3 following the aforesaid agreement the applicant paid the amount of R1 500 000. 00 (one million five hundred thousand rand) in cash as deposit to the previous owners, and later paid gradual amounts;

2.4 it was agreed further that the applicant would upon payment of the deposit , proceed and continue to occupy the property whilst awaiting transfer of the same property in his name which occupation indeed he took.

[3] The eviction application was served at Harinoro's physical address on the 23

January 2017 (annexure LGM3 which is the return of service by the Sheriff.}. In terms of the rules Harinoro had to file his notice of intention to oppose the eviction application within 5 days, which is the 30 Jal'uuary 2017.

[4] According to Harinoro on 9 February 2017 he came to learn that the previous owners had sold the relevant property and transferred it to a third party in the form of the first respondent (L.G Marincowitz and Sons (Pty} Ltd).

[5] At the time of the service of the eviction process brought by Marincowitz and obtained by default, according to Harinorio he was in Madagascar, but instructed his attorneys to enter an appearance to oppose the application, which was filed on the 16 February 2017. He was to depose to an affidavit on his return to the country. But on his return he learnt that an eviction order had been grant ed.

[6] Harinoro as the applicant in casu contended in his papers that he was not in wilful default in filing his notice to oppose and his opposing affidavit. He contended further that, on the contrary the first respondent flouted the court rules in that :

5.1 it proceeded to prematurely place the matter on the unopposed roll in spite of the fact that the matter was now being opposed;

5.2 it failed to serve the notice of set down on his attorneys of record;

5.3. Irregularly served a notice of set down at the premises in issue in casu.

[7] Harinoro contended that it was not in in wilful default . It further contended that its purchase and sale agreement I was never cancelled and therefore the subsequent agreement concluded between L I Marincowitz and the previous owners is not valid, because the first agreement between Harinoro and the previous owner was not cancelled.

- [8] L I Marincowitz contended that it is the lawful owner of the property in issue and entitled to evict Harinoro and all occupiers thereof. It further contended that the issue of the agreement between the previous owners and the Harinoro is a matter between the last two mentioned and cannot adversely affect the rights of the L I Marincowitz.
- [9] LI Marincowitz further contended that the Harinoro is not certain when the last day of filing of the opposing affidavit was supposed to be, the 9 or the 10 March 2017. L I Marincowitz contended that the last day of filing of the answering affidavit had already lapsed when the eviction order was granted, as the answering affidavit ought to have been filed on the 7 March 2017. L I Marincowitz further contended that the days for filing of the notice to der end started running on the date of the receipt of the notice served on the Harinoro on the 23 January 2017.
- [10] The essential question to be decided is whether the eviction order obtained by the L I Marincowitz on the 10 March 2017 was erroneously sought and granted.
- [11] Marincowitz's application for eviction was served on the 23 January 2017 (annexure LGM3 which is the return of service by the Sheriff.).[2] The notice would have provided in terms of rule 6(S)(b) (iii) as follows : " set forth a day, not less than five days after

service thereof on the respondent, on or before which such respondent is required to notify the applicant, in writing, whether respondent intends to oppose such application, and must further state that if no such notification is given the application will be set down for hearing on /a stated day, not being less than 10 days after service on the said respondent of the si id no t ice" .

- [12] Harinoro, as the respondent in the main application, having been served with the eviction application on the 23 January 2017, had five days until 30 January 2017 to fi le his not ice of intent ion to oppose.

- [13] Harinoro by the 30 January 2017 had not filed his intention to oppose, presumably because he was not aware of the application since he was in Madagascar. Marincowitz could set the matter down for hearing on a stated date not less than 10 days from the service of the application. However the matter was set down for hearing on the 10 March 2017.

- [14] According to Harinoro it was on the 9 February 2017 that the application for eviction was brought to his attention. He then gave instructions to his attorneys to file a notice of intention to oppose, which was filed on the 16 February

2017. In terms of rule G(S)(d)(ii)

Harinoro had fifteen days until 1Jh e 9 March 2017 to file his opposing affidavit , which was not done.

- [15] Rule 6(5) (f) provides that where there is no answering affidavit filed, in casu by 9 March 2017, the applicant can within 5(five) days of the expiry of the period referred to in 6(S)(d)(ii) (in casu between 10 to 17 March 2017), apply in writing to the registrar for the allocation of a

date for hearing of the application. In casu the default judgment was granted on the 10 March 2017, which falls in the period during which the application for a trial date was supposed to be made in writing to the registrar . This would then mean that the date was applied for prematurely, as Harinoro contended .

- [16] According to Marincowitz, the dies started running from the 23 January 2017. Accepting for a moment that this submission is correct , applying all the calculations mentioned in the previous paragraph it means that Harinoro had until the 30 January 2017 to file his notice of intention to oppose .In the absence of a notice of intention to oppose, the matter could be placed on the roll for hearing by giving the registrar notice of set down before noon on the court day but one preceding the day upon which same is to be heard (rule 6(5)(b)(iii).
- [17] In casu the notice of set down was served on the 20 February 2017 (annexure "KS1"). This was after the notice of intention to oppose had already been filed on the 16 February 2017. Marincowitz could not simply ignore the notice of intention to oppose albeit the fact that it was done put of time. Besides, the service of the set down was done at the Harinoro, notwithstanding the fact that it should have been served on the chosen address of accepting pleadings, that is the address of the attorneys . The service of the notice of set down was therefore irregular.
- [18] Harinoro contends that he was not in wilful default, because when the proceedings were served he was in Madagascar, the pleading only came to his attention on 9 February 2017, the notice of s t down was not served on his attorneys and was therefore irregularly served. I am satisfied that upon becoming aware of the eviction application, he immediately and within reasonable time instructed his attorneys to file a notice of intention to oppose. The notice of set down was irregularly served not at the chosen address of the attorneys., I am satisfied that a reasonable explanation for the absence was proffered; vide *Thekwini Municipality v Ingonyama Trust*;[3] *Wolgroeirs Afslaer (Edms) Bpk v Municipaliteit van Kaapstad*. [4]
- [19] Harinoro's defence is that he purchased the immovable property in issue and his contract was never cancelled accordingly as the owner he is entitled to occupancy, alternatively, has a lien over the property. The defence proffered is in my view, a bona fide defence.
- [20] I am further of the view that the default judgment was erroneously sought and granted because, it was not brought to the attention of the presiding officer that the notice of set down was prematurely sought and irregularly served, as already pointed out herein above.
- [21] It is trite that costs follow the event. In the premises the opposing party, being L. G Maroncowitz bear the costs in this application . I am not satisfied that sufficient reasons were advanced for a punitive costs being granted. Accordingly the ordinary costs of the opposition would be granted.
- [22] In the premises, in the exercise of my discretion, it is ordered that:

1.1 the order granted on 10 March 2017 be rescinded and set aside;

1.2 the writ of ejectment, if any issued in consequence of the aforesaid order be and is declared to be of no force and effect, and is set aside;

1.3 the applicant be and is allowed and directed to file their opposing affidavit in the main application for eviction within ten (10) days from date of this order;

1.4 the first respondent is ordered to pay the costs hereof.

N.M MAVUNDLA

JUDGE OF THE HIGH COURT

DATE OF JUDGMENT

: 02 / 05 / 2018

PLAINTIFFS ADV

: ADV.

BRIEFED BY

: TOM FERREIRA FUCHS ROUX ATTORNEYS

DEFENDANTS ADV

: ADV

INSTRUCTED BY

: EKONYELA ATTORNEYS

[1] Annexure "AHA1".

[2] rule 6(5)(b) (iii)

[3] 2014 (3) SA 240 (CC) at 246 para [24].

[4] 1978 (1) SA 13 (A) 39-42D;

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