

SOUTH AFRICA / JUDGMENT

Kondile v Canary and Another (29896/2013) [2018] ZAGPPHC 412 (16 May 2018) [2018] ZAGPPHC 412

COURT

North Gauteng High Court, Pretoria

BEFORE

Nel

CASE / FILE NUMBER

29896/2013

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, PRETORIA)

(1)

NOT

REPORTABLE

(2)

NOT OF

INTEREST TO OTHER JUDGES

(3)

REVISED.

CASE

NO: 29896/2013

OPP

REF. NO:

16/5/2018

In

the matter between: NCEBA
 ELLIOT
 KONDILE
 Applicant
 and
 MALCOLM
 CANARY
 First
 Respondent
 CHERYL
 KOETAAN
 Second Respondent

JUDGMENT

NEL AJ

- [1] This is an application in terms of which the applicant seeks an order rescinding the " Order' made by the Rental Housing Tribunal on 18 December 2011.
- [2] The applicant also seeks an order condoning the launching of the rescission application outside of the time periods prescribed by the High Court Rules.
- [3] The applicant also seeks an order for condonation of the filing of the application outside of the time periods stipulated by the Magistrate Court Rules.
- [4] The applicant also seeks a costs order as against the first and second respondents on an attorney and client scale.
- [5] The application was set down for, and argued on, 7 May 2018.
- [6] On 11 May 2018 I made an order in the following terms:
 - [6.1] The application for the rescission of the ruling made by the Rental Housing Tribunal on 18 December 2011 is dismissed;
 - [6.2] The applicant is to pay the costs of the application.
- [7] I stated at the time of making the order that a judgment, incorporating the reasons for the order, will be delivered on 16 May 2018.

BACKGROUND

- [8] On 16 March 2010 the second respondent, in the capacity of lessee, and Nombomo Properties, in the capacity of lessor, concluded a written lease agreement in terms of which the second respondent would rent Unit 118 in Fiora Flats, situated at 614 Lievaart Street, in Proclamation Hill, from the Lessor.

- [9] It is not clear whether Nombomo Properties is a separate legal entity, or is simply a trading name utilised by the applicant. Despite

raising this aspect during the hearing of the application with applicant's attorney, no clarity was provided.

- [10] The lease agreement terminated during March 2011. The respondents alleged that the applicant unlawfully evicted the respondents from Unit 118, on 12 March 2011, under threat that "something would happen" if the respondents did not leave the premises. The applicant was silent on the manner in which the termination of the lease agreement arose, and the manner in which the respondents left Unit 118.
- [11] The respondents alleged that a deposit amount of R 7 600.00 was paid to the applicant on 15 March 2010. The applicant alleged that no deposit was paid by the respondents, and refers to a handwritten note on the written lease agreement.in support of such allegation.
- [12] The respondents also alleged that the applicant did not repay the pro rata portion of the rental for the balance of the month of March
2011. The applicant did not respond to such allegation.
- [13] The respondents referred their dispute with the applicant, relating to the non refunding of the deposit and the pro rata portion of the March 2011 rental, to the Gauteng Rental Housing Tribunal, which held a hearing on 1 December 2011, in the absence of the applicant. It is recorded in the ruling of the Gauteng Rental Housing Tribunal that the applicant was " duly subpoenaed to attend the hearing and failed to do so...".
- [14] The Gauteng Housing Tribunal ultimately ruled that the applicant is to pay the deposit amount of R 7 600.00, the pro rata rental portion for March 2011, and interest on such amounts to the respondents. A copy of the ruling, albeit incomplete was attached to the founding affidavit.
- [15] The applicant failed to pay such amounts in terms of the ruling made by the Gauteng Rental Housing Tribunal, and the Sheriff of the Magistrate's Court for the district of Pretoria attended on the applicant's premises on 28 February 2012 in order to give effect to a Warrant of Execution that was issued.
- [16] Pursuant to the attendance of the Sheriff of the Magistrate's Court for Pretoria, the applicant commenced with rescission proceedings.
- [17] The founding affidavit filed in support of the application for rescission of the ruling of the Gauteng Housing Tribunal is somewhat vague and rather sketchy, but it appears, from the founding affidavit as read with the affidavits filed by the respondents, that an application for the rescission of the ruling of the Gauteng Rental Housing Tribunal was initially launched out of the Magistrate's Court of Pretoria, but the Magistrate hearing the application ruled that the Magistrate's Court did not have the jurisdiction to rescind orders of the Rental Housing Tribunal.

- [18] It appears that the applicant then launched this application for rescission of the ruling of the Gauteng Rental Housing Tribunal in this Court, which was set down for hearing on 7 March 2014.
- [19] The respondents filed an answering affidavit on 5 December 2013, setting out that the rescission of the ruling of the Gauteng Rental Tribunal was not opposed, but that they did oppose the costs order sought. No replying affidavit was filed on behalf of the applicant.
- [20] It appears that the application came before His Lordship Mr Justice Rabie on 7 March 2014, and was postponed sine die on the basis that the applicant had failed to serve the rescission application on the Gauteng Rental Housing Tribunal, being an interested party in the application.
- [21] There is no indication that the application was ever served on the Gauteng Rental Housing Tribunal, but the application appears to have been set down again for hearing in this Court on 19 November 2014 when Her Ladyship Ms Justice Khumalo removed the matter from the roll.
- [22] On 12 November 2014 the respondents filed a supplementary affidavit, setting out that the application for rescission launched by the applicant was now being opposed, on the basis that the circumstances have changed. The basis for the opposition was the alleged delay on the part of the applicant in having the application finalised. It appears from the supplementary affidavit, and the further supplementary affidavit, that the respondents had no knowledge of the application being set down for hearing on 19 November 2014.
- [23] The respondents accordingly sought an order that the application should be dismissed, and that a punitive costs order be made against the applicant.
- [24] On 24 June 2015 the respondents filed a further supplementary affidavit, essentially responding ad seriatim to the allegations contained in the founding affidavit.
- [25] Despite the founding affidavit in the application being deposed to on 7 December 2012, and launched on 16 May 2013, and the three affidavits filed by the respondents, no supplementary affidavit setting out what had occurred since the launching of the application, or a replying affidavit was filed on behalf of the applicant. ·
- [26] The application was not pursued, and no further steps were taken from 24 June 2015, until November 2017, when the application was set down for hearing on 7 May 2018 by the respondents.
- [27] On 7 May 2018 applicant's attorney appeared at court, and handed up heads of argument on behalf of the applicant. No practice note and heads of argument had been filed on behalf of the applicant prior to 7 May 2018.

- [28] The heads of argument handed up on behalf of the applicant referred to the two previous occasions that the application had come before this Court, and recorded that "At the end of the day it became clear that the High Court does not have jurisdiction to set aside a judgment of the rental tribunal".
- [29] It was also submitted in the heads of argument of the applicant, that the respondents ought to have known, or should have been advised, that this Court does not have the jurisdiction to hear the application, and the conduct of the respondents in setting down the application has resulted in unnecessary costs being incurred. On such basis, the applicant submitted that the respondents should pay the costs of the opposed application. It was however also submitted in the heads of argument that both parties were responsible for the delay in the finalisation of the application and that each party should be ordered to pay its own costs, as both parties were equally to blame.
- [30] In dealing with the Rental Housing Act, No. 50 of 1999, as amended ("the Rental Housing Act"), it was submitted on behalf of the applicant that the Rental Housing Act was silent on the issue of rescissions, and that the respondents ought to approach the Magistrates Court to have the order suspending the execution of the Warrant of 28 February 2012 set aside.
- [31] During her address, the applicant's attorney advised that Her Ladyship Ms Justice Khumalo had held on 19 November 2014 that the High Court had no jurisdiction to hear the application, and that in the circumstances it was necessary for this Court to determine whether the Court had the necessary jurisdiction to rescind the ruling made by the Gauteng Rental Housing Tribunal.
- [32] In an attempt to clarify whether Her Ladyship Ms Justice Khumalo had already determined that the High Court did not have the necessary jurisdiction, as submitted and as alluded to in the heads of argument filed by applicant's attorney, I was ultimately advised that Her Ladyship Ms Justice Khumalo had merely removed the matter from the roll on 19 November 2014.
- [33] In the circumstances, the applicant's attorney, who had initially submitted that the High Court does not have the jurisdiction to deal with this application and suggested that each party should be ordered to pay its own costs, then submitted that the application sought by the applicant should be granted, on the basis that the applicant had a valid defence, and submitted that in the event of the court being unable to determine which party is telling the truth, the application should be referred to oral evidence.
- [34] Respondents' counsel did not make any submissions in respect of the jurisdictional aspect, and submitted that the application for rescission should be dismissed on the basis that the applicant had not established that the conduct of the respondents in seeking the ruling before the Gauteng Rental Housing Tribunal had been fraudulent or made with the intent to mislead.

[35] The heads of argument filed on behalf of the respondents set out that the applicant's version should be rejected, that there was no proper explanation for the delay or the wilful default of the applicant, and that the application should be dismissed with costs.

[36] In the respondents' heads of argument, there was a reference to the matters of *Young Ming Shan CC v Chagan NO and Others*, and *Mapheng and Others*, which I will deal with below.

THE RENTAL HOUSING ACT

[37] The Rental Housing Act·,

which came into effect from 1 August 2000, was promulgated to, inter alia, provide a mechanism to resolve disputes between lessors and lessees speedily and at a minimum cost.

[38] In terms of section 7 of the Rental Housing Act, Rental Housing Tribunals may be established to ensure that the objectives of the Rental Housing Act are achieved.

[39] In terms of section 13(1) of the Rental Housing Act, any tenant or landlord is entitled to lodge a complaint with a Rental Housing Tribunal concerning an unfair practise. In terms of Section 10(4) of the Rental Housing Act, a Tribunal meeting will be held in order to consider any complaint referred to the Tribunal in terms of Section 13, or any matter which the Tribunal may or must consider in terms of the Act.

[40] In terms of Section 13(13) of the Rental Housing Act, a ruling made by the Tribunal is deemed to be an order of a Magistrate's Court. There is no provision or procedure in the Rental Housing Act for the rescission or variation of a ruling made by a Rental Housing Tribunal.

[41] In terms of Section 17 of the Rental Housing Act, the proceedings of a Tribunal may be reviewed by the High Court within the area under which the Tribunal would fall.

THE RENTAL HOUSING AMENDMENT ACT

[42] On 5 November 2014 the Rental Housing Amendment Act, No. 35 of 2014 ("the Amendment Act") was assented to, but it has not yet come into force, as it has not been promulgated.

[43] In terms of the Amendment Act there is an intention to insert a new Section 13(12A) of the Rental Housing Act, in terms of which the Tribunal would be entitled to rescind or vary any of its rulings. Any application for rescission would have to be brought within 14 days of the Tribunal's ruling.

[44] There is also an intention to insert a new Section 17A, which makes provision for an appeal by any person who feels aggrieved by a Tribunal ruling, to the Member of the Executive Council.

[45] There is then also an intention to amend the current Section 17, so as to include the review by a High Court of an appeal held in terms of Section 17A.

THE JURISDICTION OF THE HIGH COURT

- [46] It is accordingly necessary to determine whether this Court has the necessary jurisdiction to rescind a ruling made by a Rental Housing Tribunal.
- [47] Rescissions of judgments or orders of the High Court are dealt with in terms of Rule 31(2)(b) of the Uniform Rules of Court, Rule 42 of the Uniform Rules of Court, or the common law.
- [48] In terms of Rule 31(2)(b) of the Uniform Rules of Court, it is stated that a defendant may within 20 days after knowledge of "such judgment" apply to court to set aside the default judgment. The reference to "such judgment" is clearly a reference to a default judgment granted either by the Registrar or a Judge of the particular division of the High Court.
- [49] In terms of Rule 42 of the Uniform Rules of Court an "order or judgment" of a court of law can be rescinded, on a number of grounds.
- [50] In terms of the common law a court may set aside its own judgment or order provided that certain requirements are met, including the requirement of sufficient cause.
- [51] In the matter of *Heyman v Yorkshire Insurance Company Ltd*[1] the Appellate Division, as it then was, found that reference to a "judgment" and an "order" is used to describe a decision of a court of law.
- [52] The High Court clearly has the jurisdiction to rescind its own orders or judgments, but no rule or act entitles the High Court to rescind orders or judgments (or rulings) of another forum.

THE INHERENT POWERS OF THE HIGH COURT TO RESCIND

- [53] It is therefore necessary to determine whether the inherent jurisdiction of the High Court would entitle it to rescind a ruling of the Rental Housing Tribunal.
- [54] It is a general principle that once a court has duly pronounced a final judgment or order, the court has no authority itself to vary or alter such judgment or order. The general principle is departed from when it is in the interests of justice to do so, and in departing from the general principle, the courts have invoked their inherent powers to regulate their own processes.
- [55] In the matter of *Naidoo v Cavendish Transport Company (pty) Ltd*[2], in which the question of whether or not the Durban and Coastal Local Division could grant a rescission of its own judgment was considered,

it was stated[3] as follows:

" An application of this nature is not covered by our Rules of Court, but it is clear I think, that this court has jurisdiction, founding on its inherent powers, to grant a rescission of its own judgment."

- [56] The Rules of Court have since the decision in *Naidoo v Cavendish Transport Company (pty) Ltd* been amended to make provision for the rescission of judgment.
- [57] It is however clear that the High Court has the jurisdiction to rescind an order or a judgment of a court of law. A ruling of a tribunal is not an order or a judgment.
- [58] The inherent jurisdiction of the High Court has now been enshrined in Section 173 of the Constitution, which provides that the High Court has the inherent power to protect and regulate its own process, and to develop the common law, taking into account the interests of justice.
- [59] The inherent powers and jurisdiction of the High Court are however limited, mainly by way of statutory limitations. The High Court also does not have jurisdiction in respect of certain matters that require specialised knowledge, and such matters are dealt with in special courts or tribunals.
- [60] The Rental Housing Act currently makes no provision for the rescission of a ruling of a Rental Housing Tribunal. The High Court's inherent jurisdiction is therefore clearly limited by the express provision that only reviews of the rulings of the Rental Housing Tribunal may be dealt with by the High Court. If the legislature had intended that rescissions of the rulings of the Rental Housing Tribunal should be dealt with by the High Court, it would have stipulated such intention. The intention to amend the Rental Housing Act by making provision for the Tribunal itself to rescind rulings of the Tribunal indicates that the legislature never intended the High Court to rescind such rulings.
- [61] In the matter of *Phillips & Others v National Director of Public Prosecutions*[4] it was stated[5] that the power that a court has to use its inherent power is a special and extraordinary power which should be exercised sparingly and only in clear cases.
- [62] It was also stated in the *Phillips* matter that it is doubtful that the inherent jurisdiction of a High Court, is such that would empower a Judge of the High Court to make orders which negate the unambiguous expression of the legislature.
- [63] In the circumstances it is clear that despite the inherent powers of a High Court, such powers can be limited by statute, and in circumstances where specific remedies are provided by the legislature.
- [64] In the matter of *Young Ming Shan CC, supra* ,[6] the High Court dealt with a review of a ruling of the Gauteng Rental Housing Tribunal. It was held that the function of the Rental Housing Tribunal are administrative, and that the Rental Housing Tribunal is not a court of law.[7] It was also stated that the proceedings of the Tribunal are not subject to appeal, but may be reviewed.[8] It was also reiterated that the Tribunal is not a court of law, and its acts are not judicial acts.[9]

- [65] As it was held that a ruling of a tribunal is an administrative act, it is clear that such rulings can only be reviewed by the High Court.
- [66] In the matter of Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd[10] it was confirmed that the proceedings of the Rental Housing Tribunal may be reviewed.[11]
- [67] In the absence of any other available remedy, the applicant ought to have launched a review of the ruling of the Gauteng Rental Housing Tribunal, insofar as the applicant sought relief in the High Court.
- [68] Instead, the applicant sought to rely on a procedure for which no provision is made in terms of the Uniform Rules of the High Court.
- [69] In the circumstances, the application for rescission in the High Court is an inappropriate and incorrect procedure, and falls to be dismissed.

COSTS

- [70] In determining an appropriate order as to costs, I took into account the fact that the application was set down by the respondents and not the applicant. It is however clear from the affidavits filed on behalf of the respondents that the setting down of the application was motivated by frustration on the part of the respondents in reaching finality in the matter.

[71]

The applicant, who initially launched the application, did not withdraw the application, despite the view of the applicant's attorney as expressed in her heads of argument, that the High Court did not have the jurisdiction to determine this application. Rather than withdrawing the application, the applicant submitted that the respondents should bring an application in the Magistrate's Court to set aside the judgment. I assume that the applicant meant that the respondents should bring an application to set aside the stay of the Warrant of Execution. The applicant however, persisted with the relief sought in the application.

- [72] In the circumstances, there is no reason why the usual order of the costs following the result should not be made, and on such basis I found it appropriate to order that the applicant must pay the costs of the application.

G NEL

[Acting Judge of the High Court,

Gauteng Division,

Pretoria]

Date of Hearing:

7 May 2018

Date of Judgment:

16 May 2018

APPEARANCES

For the Applicant:

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For the Respondents: Adv

Instructed by:

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[1] 1964 (1) SA 487 (A).

[2] 1956 (3) SA 244 (D & CLD).

[3] At 247FG.

[4] 2006 (1) SA SOS (CC).

[5] at paragraph [52

[6] 2015 (3) SA 227 (GJ)

[7] At paras [37) and (44).

[8] At para [44].

[9] At para [45].

[10] 2012 (3) SA 531 (CC).

[11] At para 39.

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