

SOUTH AFRICA / JUDGMENT

Manca v Sehemmo (M 201/2015) [2018] ZANWHC 70 (12 April 2018) [2018] ZANWHC 70

COURT

North West High Court, Mafikeng

BEFORE

R D Hendricks

CASE / FILE NUMBER

M 201/2015

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IN

THE NORTH WEST HIGH COURT, MAFIKENG

CASE

NO: M 201/2015B

In

the matter between:

PATRICIA
LERATO MANCA
Applicant
and
THAPELO
JOHANNES SEHEMO
Respondent
DATE
OF HEARING
:
05 APRIL 2018
DATE
OF JUDGMENT
:
12 APRIL 2018
COUNSEL
FOR THE APPLICANT
:
ADV. D. SWART
COUNSEL
FOR THE RESPONDENT
:
ADV. G. MAREE

JUDGMENT

HENDRICKS J

Introduction

- [1] This matter has a very long and protracted history which started on the 04th September 2012 when the applicant (Manca) launched an application in the Magistrate Court, Lichtenburg under case number 747/2017 for the eviction of the first respondent (Sehemo) and all persons occupying through him, from the property situated at 2445, Extention 3, Blydeville, in the district of Lichtenburg. The application was made in terms of the Prevention of Illegal Eviction Act 19 of 1998 ('the PIE Act).
- [2] From the transcribed record of the proceedings in the Magistrate Court on 24th February 2015, the following appears:

"COURT: Civil case 747/2012, in the Civil Court for the district of Lichtenburg held here in Lichtenburg. In the matter P L Mandla the applicant and T Sehemo first respondent and second respondent it is Distobotla Municipality.

It is an Application for Eviction Order. The Presiding Magistrate Mr Magane T J, for the Applicant it was Mr D Swart and for the Respondent Mr F K Nemaname.

Summary of the offence is that the applicant brought an ex parte application for eviction of the first respondent for a certain premises known as Erf 2445 Blydeville Extension 3, North West Province.

The applicant is the registered owner of the premises. A copy of the Deed of Transfer is attached.

In terms of the Deeds Registration Act 47 of 1997 ownership of land may only be conveyed by means of a Deed of Transfer from one person to another in terms of Section 16.

The application is opposed by the first respondent on the basis that he purchased the said property from the previous owner known as Mr M J Konqeka(?). Both parties claim ownership to the property in distant and submitted documents in their support to substantiate their claims.

FINDING

The court has found that there is a considerable dispute of facts in this matter which can only be resolved by viva voce evidence by parties.

The matter is referred for trial as it is not just equitable for the court to grant an eviction order. Costs to be costs in the cause."

- [3] The applicant (Manca) took the decision of the Magistrate to refer the matter for trial on review to the North West High Court, Mahikeng. The review court (per Gura J et Kgole J) granted an order in the following terms on 29th September 2016:

“IT IS ORDERED

1. The decision of the Magistrate to refer the matter to trial is reviewed and set aside;
 2. The first Respondent together with any person who occupy house No.2445 Extension 3, Bleydeville, Lichtenburg through him, are to vacate this property within forty (40) days from date hereof;
 3. If the first Respondent or any such person fails to vacate the house, the Sheriff of Lichtenburg to evict him and any other person occupying the property through him after the expiry of forty (40) days from date hereof;
 4. The first Respondent to pay costs of the review application before this Court and the costs of the eviction application in the Court a quo.”
- [4] Various other applications were made by the respondent against the applicant. It is not necessary to deal with all those applications in any detail in this judgment, save to state that, inter alia, an application for leave to appeal was filed with the Registrar of this Court on 04th May 2017 against the whole of the judgment and orders granted by Gura J et Kgoele J on 29th September 2016.
- [5] On the 11th July 2017, the applicant (Manca) issued and filed with the Registrar of this Court an application in terms of section 18 of the Superior Courts Act 10 of 2013 for an order in the following terms:
- “a) That the applicant is granted leave to execute the judgment of Gura J and Kgoele J dated 29 September 2016;*
- b) Costs of the application;
 - c) Further and / or alternative relief.”

This application served before this Court on 05th April 2018, when judgment was reserved.

- [6] A very brief and succinct synopsis of the history of the matter is that Mr. M.J Gongxeka (Gongxeka) was initially the owner of the aforementioned property. There is attached to the papers an offer to purchase which constituted a deed of sale entered into between Gongxeka and the respondent (Sehemo) dated 03 December 2009. Subsequently, Gongxeka sold the same property to the applicant (Manca). The property was subsequently registered in the name of the applicant (Manca) on 13th September 2011. It is on the basis of ownership that the applicant (Manca) initially approached the Magistrate Court for an order of eviction. The order of Gura J et Kgoele J sitting as court of review, has the effect that the eviction of the respondent (Sehemo) was granted. The applicant now applies for execution of this order in terms of section 18 of the Superior Court Act 10 of 2013.
- [7] Section 18 of the Superior Court Act 10 of 2013 provides:

“Suspension of decision pending appeal

18.

- (1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.
 - (2) Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.
 - (3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.
 - (4) If a court orders otherwise, as contemplated in subsection (1)—
 - (i) the court must immediately record its reasons for doing so;
 - (ii) the aggrieved party has an automatic right of appeal to the next highest court;
 - (iii) the court hearing such an appeal must deal with it as a matter of extreme urgency; and
 - (iv) such order will be automatically suspended, pending the outcome of such appeal.
 - (5) For the purposes of subsections (1) and (2), a decision becomes the subject of an application for leave to appeal or of an appeal, as soon as an application for leave to appeal or a notice of appeal is lodged with the registrar in terms of the rules.”
- [8] The Supreme Court of appeal (“SCA”) in the matter of *The University of the Free State v Afriforum and Another* 1 All SA 79 (SCA) / [2016] ZASCA 165 (17 November 2016) had its first opportunity to deal with the requirements of exceptional circumstances in the context of section 18 of the Superior Court Act. It stated the following:
- “[8] This is the first appeal under s 18(4)(ii) of the Act that has reached this court. Section 18 of the Act has, however, been considered by divisions of the high court. In this regard reference can be made to Incubeta Holdings (Pty) Ltd & another v Ellis & another 2014 (3) SA 189 (GJ); Liviero Wilge Joint Venture & another v Eskom Holdings Soc Ltd [2014] ZAGPJHC 150 and The Minister of Social Development Western Cape & others v Justice Alliance of South Africa & another [2016] ZAWCHC 34. Although these judgments differ in certain respects as to the application of the requirements of s 18 of the Act, they are closely reasoned and of much assistance in the interpretation of this novel provision.*
- [9] In embarking upon an analysis of the requirements of s 18, it is firstly necessary to consider whether, and, if so, to what extent, the legislature has interfered with the common law principles articulated in *South Cape Corporation*, and the now-repealed Uniform rule 49(11). What is immediately discernible upon perusing ss 18(1) and (3), is that the legislature has

proceeded from the well-established premise of the common law that the granting of relief of this nature constitutes an extraordinary deviation from the norm that, pending an appeal, a judgment and its attendant orders are suspended. Section 18(1) thus states that an order implementing a judgment pending appeal shall only be granted ‘under exceptional circumstances’. The exceptionality of an order to this effect is underscored by s 18(4), which provides that a court granting the order must immediately record its reasons; that the aggrieved party has an automatic right of appeal; that the appeal must be dealt with as a matter of extreme urgency and that pending the outcome of the appeal the order is automatically suspended.

[10] It is further apparent that the requirements introduced by ss 18(1) and (3) are more onerous than those of the common law. Apart from the requirement of ‘exceptional circumstances’ in s 18(1), s 18(3) requires the applicant ‘in addition’ to prove on a balance of probabilities that he or she ‘will’ suffer irreparable harm if the order is not made, and that the other party ‘will not’ suffer irreparable harm if the order is made. The application of rule 49(11) required a weighing-up of the potentiality of irreparable harm or prejudice being sustained by the respective parties and where there was a potentiality of harm or prejudice to both of the parties, a weighing-up of the balance of hardship or convenience, as the case may be, was required. Section 18(3), however, has introduced a higher threshold, namely proof on a balance of probabilities that the applicant will suffer irreparable harm if the order is not granted and conversely that the respondent

will not, if the order is granted.

[13] Whether or not ‘exceptional circumstances’ for the purposes of s 18(1) are present, must necessarily depend on the peculiar facts of each case. In *Incubeta Holdings* at para 22 Sutherland J put it as follows:

‘Necessarily, in my view, exceptionality must be fact-specific. The circumstances which are or may be “exceptional” must be derived from the actual predicaments in which the given litigants find themselves.’

I agree. Furthermore, I think, in evaluating the circumstances relied upon by an applicant, a court should bear in mind that what is sought is an extraordinary deviation from the norm, which, in turn, requires the existence of truly exceptional circumstances to justify the deviation.”

[9] The court to which an application for leave to execute is made has a wide general discretion to grant or refuse leave and, if leave be granted, to determine the conditions upon which the right to execute shall be exercised. In *Ntlemeza v Helen Suzman Foundation and Another* 2017 (5) SA 402 (SCA) the following is stated:

“[23] As can be seen, s 18(4)(ii) has made orders to execute appealable, fundamentally altering the general position that such being purely interlocutory orders, they were not appealable. Moreover, it granted to a party against whom such an order was made, an automatic right of appeal. In addition s 18(3) requires an applicant for an execution order to prove on a balance of probabilities that he or she ‘will’ suffer irreparable harm if the order is not granted and that the other party ‘will not’ suffer such harm.”

- [10] The applicant contend that there are no prospects of success on appeal because of extinctive prescription. Any claim that the respondent might have had to claim ownership has become prescribed. The respondent allegedly concluded a written agreement of sale with Gongxeka during 2009. His right to demand transfer in terms of the alleged written agreement of sale has been extinguished by extinctive prescription during 2012, so it was contended on behalf of the applicant.
- [11] It was furthermore submitted that the applicant was registered as the owner of the said property during September 2011. The respondent gained knowledge of the applicant's ownership during September 2012 when he received a letter of demand to vacate the property, alternatively when the eviction application was served during 2012. Any claim that the respondent might have had against the applicant based on the doctrine of knowledge or double sale should have been enforced by the respondent before the end of 2015. No such proceedings has been launched by the respondent. Therefore, any claim that the respondent might have had against the applicant has been extinguished through extinctive prescription at the end of 2015.
- [12] This agreement lose sight of the fact that the property was registered in the name of the applicant on 13th September 2011. The applicant approached the Magistrate Court for an order of eviction on 04th September 2012. There was there a is between the parties before the expiry of the three (3) year period, as contemplated in the Prescription Act 68 of 1969. The Magistrate made a ruling to refer the dispute with regard to ownership for trial on 24th February 2015. The judgment of the court of review was granted in 29th September 2016. An application for leave to appeal the judgment of the court in review and to lead further evidence on appeal is still pending. It can therefore not be argued that any claim that the respondent might have had against the applicant or Mr. Gongxeka had become prescribed due to the effluxion of time. The matter is still not finally resolved.
- [13] It was furthermore contended on behalf of the applicant that if the respondent is successful on appeal, the judgment and order of GURA J and KGOELE J will be set aside and the matter will be referred back to the Magistrate's Court to hear oral evidence as to the dispute of ownership. If the respondent is successful and convinces the Magistrates Court that the application for eviction should be dismissed, it will not take the matter any further seeing as though the applicant would still remain the registered owner of the property. The respondent is not seeking an order that ownership in the property should be transferred from the applicant to him. The respondent cannot in any event claim transfer seeing as though he is barred by extinctive prescription. An absurd result will follow in that the

applicant will remain the registered owner without the ability to occupy the property and the respondent will be entitled to remain in occupation of the property in perpetuity without paying any rent or consideration.

- [14] This does not debar the respondent to bring an application to be declared the lawful owner of the property. In any event, if successful with regard to the disputed ownership, the court will grant an order in favour of the respondent with regard to ownership of the property. This should best be left for the trial court to determine if the matter is referred back to the Magistrate Court or to the Court of Appeal in the event leave to appeal and leave to lead further evidence on appeal is granted by the court of review.
- [15] It was contended on behalf of the applicant that because she is the registered owner of the property, she is entitled to occupation thereof which she is currently deprived of by the respondent. The respondent has no right to the property whatsoever and is merely delaying the inevitable. It is inevitable that the respondent will be ordered to vacate the premises, so it was contended by the applicant. The woeful and non-existent chances of prospects to succeed with his appeal warrants an order in terms of section 18 of the Superior Court Act against the respondent, so it was submitted by the applicant. I do not agree.
- [16] The applicant did not establish exceptional circumstances that will enable this Court to grant an order for execution of the court order granted on 29th September by Gura J. and Kgoele J. The application for leave to appeal and to lead further evidence on appeal is still pending.

During oral submissions by counsel this Court was informed (and it is common cause) that an application for a trial date for the

application for leave to appeal has been made. Due to logistical problems encountered, the trial date could not be determined. The respondent is desirous to prosecute his appeal. In actual fact, the respondent brought various other applications in order to try and exercise his right to justice in terms of the law. I need not say much about those applications because it is strictly speaking not relevant to the present application. Suffice to say that attempts were made by the respondent, acting on advice of his legal representatives, to exercise whatever right he may have or perceive to have according to the advice he received, in terms of the law.

- [17] In my view, the applicant failed to prove, on a balance of probabilities, exceptional circumstances warranting the relief sought. The applicant failed to prove that she will suffer irreparable harm if the order is not granted and that the respondent will not suffer irreparable harm if the order is made. The respondent is in occupation of the property which is a residential house and in which his family is currently residing. The respondent in the Magistrate Court provided evidence that a written agreement was entered into with Mr. Gongxeka in 2009. This was before the applicant concluded the sale agreement with Mr. Gongxeka, and prior to the property being registered in the name of the applicant. This amounts to double sale of the property. There was in my view also good reason why the Magistrate referred the matter to trial because of the disputed ownership. To grant an order

for execution of the court order would in my view amount to the proverbial shutting of the doors of court for the respondent.

[18] In the absence of proof of the existence of exceptional circumstances as contemplated in section 18 of the Superior Court Act, the application should be dismissed. There is also no plausible reason why costs should not follow the result and be awarded in favour of the successful litigant, namely the respondent. The application should therefore be dismissed with costs.

Order

[19] Consequently, the following order is made:

1. The application in terms of section 18 of the Superior Court Act 10 of 2013 for the execution of the order by Gura J and Kgoele J on 29th September 2016 is dismissed.
2. The applicant is ordered to pay the costs of this application.

R D HENDRICKS

JUDGE OF THE HIGH COURT,

NORTH WEST DIVISION, MAHIKENG

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