

SOUTH AFRICA / JUDGMENT

Masilo v Somandass and Another (57928/14) [2015] ZAGPPHC 290 (7 April 2015)

[2015] ZAGPPHC 290

COURT

North Gauteng High Court, Pretoria

BEFORE

E M Kubushi

CASE / FILE NUMBER

57928/14

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REPUBLIC
OF SOUTH AFRICA
IN THE HIGH COURT
OF SOUTH AFRICA
(GAUTENG
DIVISION, PRETORIA)
CASE
NO: 57928/14

DATE:

7 APRIL 2015
NOT
REPORTABLE
NOT
OF INTEREST TO OTHER JUDGES
In the matter

between:

CECILIA
MOSIAMIE MANG
MASILO.....APPLICANT
and
RAJENDRA
SOMANDASS.....1st
RESPONDENT
SHERRIFF
OF THE HIGH COURT
TSWANE SOUTH
EAST.....2nd
RESPONDENT

JUDGMENT

KUBUSHI, J

- [1] The applicant has approached this court on an urgent basis for an order to suspend an eviction order granted against her in favour of the first respondent, for a period of 14 days. The applicant resides with her family in the property in which she is to be evicted (the property). It is her primary residence. The order sought by the applicant is to give her an opportunity to file two applications for the rescission of the eviction order in this instance, and a judgment obtained by ABSA Bank (ABSA) against her, foreclosing on a mortgage loan and mortgage bond (the ABSA judgment). The said Mortgage loan and bond are a cause from which the first respondent derived his alleged rights to evict the applicant from the property.
- [2] The applicant was the original owner of the property. She had entered into an agreement of loan with ABSA and registered a mortgage bond over the property in favour of ABSA. When she could no longer service the mortgage bond, ABSA under case number 67181/2011, issued summons against her for the recovery of the amount due and owing. Pursuant to the summons, the applicant signed a confession to judgment in terms of uniform rule 31 (1), wherein she undertook to pay off the arrears on the aforementioned loan.
- [3] In terms of the confession to judgment, the applicant agreed that ABSA's attorneys may apply for judgment against her without further notice in the event of her failing to comply with the repayment arrangement. The applicant also confessed to:

"1. ...

2. ...

3. An Order declaring the mortgaged property executable for the said sums. The Defendant's attention is however drawn to section 26 (1) of the Constitution of the Republic of South Africa, which affords to everyone the right to have access to adequate housing. Should the Defendant claim that the Order for execution will infringe that right, it is incumbent on the Defendant to place information

supporting that claim before the Court.

4. An order in terms whereof the Registrar is directed to issue a Warrant of Execution against Immovable Property mentioned in prayer

(1) above, in terms of Rule 46 of the Uniform Rules of Court.

5. ..."

- [4] The applicant failed to comply with the terms of the confession to judgment and without any further notice to her, ABSA obtained judgment against the applicant for the whole amount due and owing; and, on the strength of the judgment proceeded to obtain an order authorising the issuance of a writ of execution in respect of the property.
- [5] The first respondent bought the property on auction and as of now the property is registered in his name. The first respondent applied in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998 (PIE), and was granted an order to evict the applicant from the property. It is this order which prompted the applicant to approach the court for the relief she seeks.
- [6] The first respondent is opposing the application and attaching the application on both urgency and the merits.
- [7] On urgency, the first respondent's contention is that the urgency is self-created since as early as 11 February 2015 the applicant knew of the eviction order and should have applied for rescission then. According to the first respondent's counsel, the applicant had 19 clear court days within which she could have approached the court for relief.
- [8] The applicant, on the other hand, states that she could not have approached the court earlier because from the time she became aware that judgment had been granted against her in the ABSA case, she consulted with various legal representatives but got no assistance. At one time she even filed an application to rescind the judgment but was advised to withdraw the application due to the confession to judgment. Eventually she consulted with her current legal representative who was prepared to research the legal position and to assist her. By the time the current legal representative was able to assist her, the respondent had already obtained an eviction order against her. I am, thus, prepared to accept the applicant's explanation as reasonable and to treat this matter as one of urgency.
- [9] I am, however, not convinced that the applicant has made out a case for the relief she seeks on the merits.
- [10] In determining whether or not to grant the applicant the relief she seeks, I first have to determine whether there are prospects of success in the intended rescission applications.
- [11] The judgment granted against the applicant is in terms of uniform rule 31 (1) (c). Uniform rule 31 (1) states that -
- (a) Save in actions for relief in terms of the Divorce Act, 1979 (Act 70 of 1979), or nullity of marriage, a defendant may at any time confess in whole or in part the claim contained in the summons.
- (b) Such confession shall be signed by the defendant personally and his signature shall either be witnessed by an attorney acting for him or her, not being the attorney acting for the plaintiff, or be verified by affidavit.

- (c) Such confession shall then be furnished to the plaintiff, whereupon the plaintiff may apply in writing through the registrar to a judge for judgment according to such confession.
- [12] The applicant's ground for wanting to rescind the ABSA judgment and the eviction order against her is that the confession to judgment infringes upon her Constitutional right to access to adequate housing in terms of s 26 and her right to property in terms of s 25 of the Constitution.
- [13] The applicant contends that the fact that ABSA included a clause in the confession to judgment for her to agree that no further notice is necessary to her, and entitled ABSA to obtain judgment in her absence which also includes the authorisation of the issue of the warrant of attachment, was an error. Such error in the agreement of confession to judgment, according to the applicant, constitutes a iustus error and renders the confession to judgment defective. As a result of the iustus error she is entitled to avoid the agreement (confession to judgment) and resile therefrom since her consent was improperly obtained, so it was argued. In arguing this point, the applicant's counsel relied on the judgment in MEC for Economic Affairs, Environment and Tourism v Kruisenga and Another 2008 (6) SA 264 (CK). According to counsel, that judgment, provides the necessary legal remedy to attack the confession to judgment.
- [14] I, however, do not agree with the argument by the applicant's counsel. I made it clear during the hearing of this application that there should be separation of issues between the judgment and the order authorising the issue of a warrant of execution. Once such separation is made, it becomes evident that the judgment was lawfully granted and in that respect there would be no prospects that it will be rescinded. On the face of the confession to judgment and the evidence presented before me, there is no indication that there was an error committed when the confession was entered into.
- [15] Firstly, it is trite that property cannot be made the subject of an order of attachment in pursuance of a writ of execution, unless judgment has been taken against a defendant. Before an immovable property can be sold in execution, there are two processes which a plaintiff has to follow after the service of the summons on the defendant. The first process is for the plaintiff to obtain judgment against the defendant and the second would be to obtain an order authorising the issuance of a warrant of execution.
- [16] When applying for judgment, ABSA was not obligated to inform the applicant of its intention to do so. It was also not incumbent upon the applicant, at that stage of the proceedings, to place information before the court supporting the claim that her s 26

(1) Constitutional rights will be infringed. Uniform rule 31 (1) does not provide for that. Over and above that, it is common cause that the applicant signed a confession to judgment wherein she consented to judgment being obtained against her without any further notice to her. In the circumstances ABSA was entitled to obtain judgment against the applicant without any further notice to the applicant. The judgment, as such, has been lawfully granted.

[17] The Kruisenga-judgment, on which the applicant seeks to rely, does not assist the applicant at all. Unlike in that case, the judgment, in this instance, was lawfully obtained.

[18] Secondly, it has been held that a defendant against whom default judgment has been granted in terms of uniform rule 31 (1), does not have the right to apply for the rescission of such judgment, where after default judgment has been granted, he or she realises that he or she has a defence.¹ The applicant, in this instance, having confessed to judgment cannot, therefore, apply for the rescission of the judgment granted against her on the strength of the confession.

[19] From the reading of the confession it appears that the applicant should, before the court could authorise the writ of execution

against the property, have been afforded an opportunity to place information supporting a claim that such an order would infringe her right to adequate housing. It is common cause that she was not afforded such an opportunity. This, however, cannot assist the

applicant to have the judgment rescinded. As it is, the property has already been sold in execution and is registered in the name of the respondent. The law as it stands is that immovable property validly sold in execution at judicial sales cannot, as a general rule, after transfer be vindicated from a bona fide purchaser.²

[20] The result is that the eviction order can also not be rescinded since it has also been validly obtained.

[21] The main gripe of the applicant, as I understand it, is the failure to be provided an opportunity to present the information in support of her claim that the writ of execution would infringe her rights to adequate housing and the right to property; and for the court to decide whether it was just and equitable to evict the applicant from the property. As I have already indicated, this information would not necessarily absolve her from her obligation to ABSA. It is so that where there are no other proportionate means to obtain payment of the judgment debt, execution may not be avoided.

[22] In terms of PIE, the court has discretion to decide whether it is just and equitable that an unlawful occupier be evicted from the property. Note should, however, be taken that the effect of PIE is not to expropriate private property. What PIE does is to delay or suspend the exercise of a landowner's full proprietary rights until a determination has been made whether it is just and equitable to evict the unlawful occupier and under what conditions.³

[23] The circumstances the applicant wanted to present to the court are that -

- (a) The applicant occupies the premises with 4 (four) daughters: two of them are minors; one is 18 years old and disabled; the eldest is 22 years old and attending University - studying from home;
- (b) The property is their primary residence;
- (c) The applicant is a single mother and the daughters depend on her.

[24] Against this background sight should not be lost that the evidence shows that the applicant has been living in the property for over two years without paying anything towards its upkeep. The evidence is that she refused to sign a lease agreement with the respondent and that the respondent is paying municipality charges for the property.

[25] My view is that it is just and equitable under the circumstances that the respondent be given possession of the property but the applicant must be given a reasonable time within which to vacate the house. In the light of the applicant having previously been given 30 days within which to vacate the property; and the fact that she has children one being disabled, in my opinion, it is just that the applicant be given a further 45 days from the date of this court to vacate the property

[26] In the premises I make the following order:

1. The application is dismissed with costs.
2. The applicant is ordered to vacate the property 266 Johan Rissik Street, Waterkloof, Pretoria with property description Erf 305 Water kloof Ridge Township, JR Gauteng, within forty-five (45) days from the date of this order.

E. M. KUBUSHI

JUDGE OF THE HIGH COURT

APPEARANCES

HEARD ON THE: 31 MARCH 2015

DATE OF JUDGMENT: 07 APRIL 2015

APPLICANT'S COUNSEL: ADV. L. VAN EEDEN

APPLICANT'S ATTORNEY: DU PREEZ ATTORNEYS

RESPONDENT'S COUNSEL: ADV. QS VAN DER HEEVER

RESPONDENT'S ATTORNEY: LIESL VAN RENSBURG ATTORNEYS

¹See *Morkel v ABSA Bank Bpk en 'n Ander* 1996 (1) SA 899 (C) at 904H - 905B/C

²See *Knox NO v Mofoheng and Others* 2013

(4) SA 46 (CSJ) para [16].

3See City of Johannesburg Metropolitan Municipality u Blue Moonlight Properties 39 (Pty) Ltd 2012 (2) SA 104 (CC) at 118E - H

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