

SOUTH AFRICA / JUDGMENT

Mphoka v Kekana (HCA14/2016) [2017] ZALMPPHC 26 (30 August 2017) [2017] ZALMPPHC 26

COURT

Limpopo High Court, Polokwane

BEFORE

E M Makgoba, M V Semenya

CASE / FILE NUMBER

HCA14/2016

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

CASE NO: HCA 14/2016

Reportable

Of interest to other judges

Revised.

30/8/2017

NKGASHA JERMINA MPHOKA APPELLANT

and

RAMOKONE GLADYS KEKANA RESPONDENT

JUDGMENT

MAKGOBA JP

- [1] This is an appeal against the judgment and order of the Magistrate's Court for the district of Mokerong held at Mahwelereng in terms of which an eviction order was granted against the Appellant in terms of the provisions of section 4 of Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("the PIE Act")
- [2] The Respondent issued an application for eviction of the Appellant and any person occupying through the Appellant from the property

known as Erf 2610 Mahwelereng - B, Mogalakwena District, Limpopo Province.

[3] The Appellant unsuccessfully opposed the application and on the 16 March 2016 the Court a quo granted an order that the Appellant be evicted from the property by 16 May

2016. The Appellant served and filed a Notice of Appeal against the aforesaid order on 1 April 2016, i.e within the prescribed period in terms of the Magistrate's Court Rules.

[4] The Appellant relied on the following main grounds of appeal:

4.1 That the Court a quo erred in finding that it was not necessary to join the Local Authority (Mogalakwena Municipality in this instant) as a party to the proceedings and

4.2 That the Court a quo erred in finding that it is just and equitable to grant an eviction order.

[5] The Appellant failed to prosecute the appeal according to the Uniform Rules of Court and subsequently the appeal lapsed in terms of Rule 51(9) of the Magistrate's Court Rules and Rule 50(1) of the Uniform Rules of Court. The Appellant has filed an application for condonation, which is opposed by the Respondent.

Condonation

[6] It is common cause that the Appellant noted the appeal within the prescribed period, only that he failed to prosecute the appeal within the prescribed 60 (sixty) days period, hence the appeal lapsed.

[7] As reasons for late prosecution of the appeal the Appellant states that her attorney of record duly requested the transcribed record of proceedings in the Court a quo but in response the Clerk of Court furnished the attorney with a wrong transcription of a certain criminal matter. The attorney of record entered into correspondence and I or communications with the Clerk of Court and the transcribers over several months, the first correct record of proceedings concerning

this matter was incomplete. Further communications with the Clerk of Court and the transcribers ensued until the correct and complete

record was received by the attorney on 18 November 2016. Thereafter the attorney of record was able to process the appeal.

[8] Rule 27(1) of the Uniform Rules of Court provides as follows :

"Extension of Time and Removal of Bar and Condonation

(1) In the absence of agreement between the parties, the Court may upon application on notice and on good cause shown, make an order extending or abridging any time prescribed by these rules or by an order of Court or fixed by an order extending or abridging any time for doing any act or taking any step in connection with any proceedings of any nature whatsoever upon such terms as to it seems meet. "

[9] The explanation or reasons proffered by the Appellant for her failure to prosecute the appeal within the prescribed period shows that the delay was not intended. Where the delay was unintended the Court ought to condone the infringement of the time-frames

- Pitje v Shibambo and Others 2016 (4) BCLR 460 (CC). Although the delay in the present case is inordinate, this factor is not and cannot be individually decisive.

[10] In *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532 C - F the Court in dealing with the issue whether or not sufficient cause had been shown for condonation for non-compliance with the Court rules, stated the following:

"In deciding whether sufficient cause has been shown, the basic principle is that the Court has discretion, to be exercised judicially upon consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation thereof, the prospect of success, and the importance of the case. Ordinarily these factors are interrelated, they are not individually decisive"

[11] Good cause looks at all those factors which bear on the fairness of granting the relief as between the parties and as affecting the proper administration of justice. In any given factual complex it may be that only some of many of such possible factors become relevant.

See *Madinda v Minister of Safety and Security* [2008] ZASCA 34; 2008

(4) SA 312 (SCA) at para 10.

[12] In *Turnbull-Jackson v Hibiscus Coast Municipality* 2014 (11) BCLR 1310 (CC) it was held that the test for determining whether condonation should be granted or refused is the interest of justice. Factors that the Court weighs in that enquiry include: the length of the delay; the explanation for, or cause of the delay; the prospects of success for the party seeking condonation; the importance of the-issue that the matter raises; the prejudice to the other party or parties; and the effect of the delay on the administration of justice .

[13] In casu I am satisfied that the Appellant has set forth briefly and succinctly such essential information as may enable this Court to assess the Appellant's prospects of success in her application for condonation . On the facts of this case it cannot be said that the non-observance of the Court Rules has been flagrant and gross.

[14] There are prospects of success on appeal in this matter. Furthermore the case is of great importance to the Appellant. The appeal raises critical constitutional issues of the right to housing as enshrined in section 26 of the Constitution of the Republic of South Africa, 1996.

[15] The application for condonation for the late prosecution of the appeal is accordingly granted.

Non

- Joinder of the Municipality

[16] It was argued on behalf of the Appellant that the joinder of the Municipality in eviction applications is a mandatory requirement.

[17] Section 4(2) of the PIE Act states as follows:

"(2) At least 14 days before the hearing of the proceedings contemplated in subsection (1), the Court must serve written and effective notice of the proceedings on the unlawful occupier and the municipality having jurisdiction"

[18] The need for joinder would only arise where the Municipality has a direct interest in the proceedings by reason of its duty to report to the Court or to appoint a mediator. See *Drakenstein Municipality v Hendricks and Others* 2010 (3) SA 248 (WCC); *Occupiers of Erf 101,102,104 and 112 Shorts Retreat, Pietermaritzburg v Daisy Dear Investments (Pty) Ltd and Others*

[2009] 4 ALL SA 410 (SCA).

[19] In the light of the authorities referred to above, I am of the view that in the present case it was not necessary for the Respondent to join the Municipality as a party. The service of the Notice in terms of section 4(2) of the PIE Act on the Municipality suffices.

Whether the Eviction was Just and Equitable

[20] The Appellant has been in occupation of the property in issue, that is Erf 2610 Mahwelereng Zone B, Limpopo Province ("the

Property") since 1993. At the time of taking occupation of the property she did not have a Deed of Grant in respect of the property issued to her and so did most of the occupiers of other sites in that neighborhood. She stayed with her sister, one Florah Baloyi. The other occupants are her life partner, Vincent Rashokeng who has a visual disability and her six children. The Appellant's life partner is elderly and a recipient of social grant.

[21] Some years ago Florah Baloyi got married and vacated the property leaving the Appellant behind with her disabled life partner and the children. Unbeknown to the Appellant and while she was away from home due to employment in Gauteng, Florah Baloyi applied and had a Deed of Grant in respect of the property issued in her name. (Florah Baloyi's name). During September 2010 Flora Baloyi sold the property to the Respondent and ownership thereof was transferred to the Respondent on 16 September 2011. Consequently the Respondent is the owner of the property pursuant to the Deed of Grant endorsed in her name.

[22] The Appellant became aware that the property had been sold and that ownership had been transferred to the Respondent when Florah Baloyi brought an unsuccessful Court application to evict her from the property.

[23] The Appellant and her family are still in occupation of the property and have erected a house and a shack as a form of their housing. They have no alternative housing. The Respondent has never been in occupation of the property and has her own separate place where she is presently staying.

[24] The issue before us in this appeal is whether or not the Court a quo erred in granting the eviction order in the circumstances of this case.

[25] Section 4(7) of the PIE Act provides that:

"If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a Court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering, except where the land is sold in a sale in execution pursuant to a mortgage, whether land has been made available by the Municipality or other organ of state or another owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled person and household headed by women"

In the present case the property or household is headed by a woman (being the Appellant) who is living with an elderly disabled life partner and children. The family has been staying on the property for more than twenty years.

[26] The onus to establish that it is just and equitable to grant an eviction order remains on the Applicant throughout, and in order to satisfy this onus the Applicant must deal with the application with all the aspects that need to be considered before the Court can come to the conclusion that an order ought to be granted. This means that the Court needs to be informed as best as the Applicant can, of the needs of the elderly person, any disabled person, any children or household headed by woman that will be affected by the eviction and how their interests should be taken care of.

[27] In casu the Respondent relied more on the fact that the Respondent is the lawful owner of the property and that the Appellant did not get the Respondent's permission to stay on the property. The Court a quo seems to have accepted the argument of the Respondent as such and failed to enquire as to whether it would be just and equitable to grant the eviction order regard being had to the needs of the category of persons mentioned in section 4(7) of the PIE Act. The Court a quo erred in this regard.

[28] Section 26(3) of the Constitution provides that:

"No one may be evicted from their home, or have their home demolished, without an order of Court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions"

The duty that rests on the Court under section 26(3) of the Constitution and section 4 of PIE Act goes beyond the consideration of the lawfulness of the occupation. It is a consideration of justice and equity in which the Court is required to and expected to take an active role. The application of the PIE Act is not discriminatory - *Machele and Others v Mailula and Others* 2010 (2) SA 257 (CC)

[29] In *FHP Management (Pty) Ltd v Theron NO and Another* 2004 (3) SA 392 (C) AT 393 C - E Van Heerden J stated:

"In terms of s4(7) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) read with s 26(3) of the Constitution of the Republic of South Africa Act 108 of 1996, it is not necessary for an Applicant, in proceedings to evict an unlawful occupier from such Applicant's property, to place more before the Court by way of evidence than that such Applicant is the owner of the property in question and that the Respondent is in unlawful occupation thereof. It is then up to the occupier to disclose to the Court "relevant circumstances" to show why the owner should not be granted an order for the eviction of the occupier. Unless the occupier opposes and discloses circumstances relevant to the eviction order, the owner, in principle, will be entitled to an order for eviction

In casu the Appellant, as the occupier did disclose all the relevant circumstances for consideration by the Court a quo.

[30] The interests of the landowner and the unlawful occupier should be balanced and taken into consideration. In *PE Municipality v Peoples Dialogue on Land & Shelter* 2000 (2) SA 1074 (SECLD) at 1081 F - G, Horn AJ (as he then was) said:

"The use of the term just and equitable relates to both interests, that is what is just and equitable not only to the persons who had occupied the land illegally, but to the landowner as well. The term also implies that a Court, when having to decide a matter of this nature, would be obliged to break away from a purely legalistic approach and have regard to extraneous factors such as morality, fairness, social values and implications and any other circumstances which would necessitate bringing out an equitably principled judgment. "

[31] The balance that has to be struck is one between the proprietary rights of the owner and the basic human rights of the occupier. The PIE Act creates a legal mechanism whereby the human rights of unlawful occupiers are afforded some protection in the context of the exercise by property owners of their proprietary rights. See *ABSA Bank v Murray and Another* 2004 (2) SA 15 (C) at 24 F - H.

[32] The application of the PIE Act in eviction matters is not discretionary but rather mandatory, with the Courts expected to consider whether it is just and equitable in the circumstances to order an eviction. The Constitutional Court in its recent decision in *Occupiers of Erven 87 & 88 Berea v De Wet NO and Another* [2017] ZACC 18 (8 June 2017) reaffirmed that judicial officers have to play an active role in adjudicating eviction matters.

- [33] A judicial officer in eviction proceedings is not a passive arbiter existing only to rubber-stamp the application for the eviction order. Rather the judicial officer must apply his or her independent judicial mind to the proceedings and take a proactive role to establish the relevant facts, protect human rights of those being evicted - especially if they are to be rendered homeless - and apply the delicate balance between the oft-competing housing and property rights during such eviction proceedings.
- [34] In my view the Magistrate in the Court a quo has failed to ensure that the constitutional principles set out in section 26(3) of the Constitution and elaborated on in the PIE Act were complied with. This is so because in the Court a quo the eviction order had been granted by the Magistrate without giving due regard to a number of factors set out in section 4(7) of the PIE Act, such as the rights of children, women, the elderly, the disabled and the vulnerable .
- [35] All these factors determine whether an eviction order should be granted. These factors are crucial considerations which the Court should have regard to as they will assist the judicial officer in determining whether it is just and equitable in the circumstances to grant an eviction order.
- [36] The Court a quo erred in that it failed to determine whether it was just and equitable to grant the eviction order. In the result the appeal succeeds and the following order is made:
1. The appeal is upheld with costs.
 2. The order of the Court a quo is set aside and replaced with the following order:
"The application is dismissed with costs"

E M MAKGOBA

JUDGE PRESIDENT OF THE

HIGH COURT, LIMPOPO

DIVISION, POLOKWANE

I agree

M V SEMENYA

JUDGE OF THE HIGH COURT,

LIMPOPO DIVISION,

POLOKWANE

APPEARANCES

Heard on : 18 August 2017

Judgment

Delivered : 31 August 2017

For Appellant : Mr M E Phooko

Instructed by : Moloko Phooko Attorneys

c/o Makhafole (Director) Inc

Polokwane

For Respondents : Ms H Nienaber

Instructed by : Borman Snyman & Barnard

c/o Niland & Pretorius Attorneys

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