

SOUTH AFRICA / JUDGMENT

Mutsweni v Loop en Staan Beleggings CC and Another (791/18) [2019] ZAMPMHC 8 (23 October 2019) [2019] ZAMPMHC 8

COURT

Middelburg High Court, Mpumalanga

BEFORE

M T Mankge

CASE / FILE NUMBER

791/18

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA

DIVISION

(MIDDLEBURG

LOCAL SEAT)

CASE NUMBER: 791/18

23/10/2019

In

the matter between:

NCANE KOOS

MUTSWENI APPLICANT

And

LOOP EN STAAN BELEGGINGS

CC FIRST

RESPONDENT

EMAKHAZENI LOCAL

MUNICIPALITY SECOND

RESPONDENT

JUDGMENT

MANKGE, AJ

INTRODUCTION:

[1] This is an opposed application for rescission of judgment. The applicant seeks to rescind this court's judgement granted on 30 July

2018. The application specifically seeks to rescind an order of eviction from the immovable property known as remaining extent of portion 17 of the Uitvlugt 380, Registration Division J.S, Mpumalanga ("The property").

[2] The court further ordered the applicant to demolish the two corrugated iron structures and the currently partially built brick

and mortar structure on the property and to remove all building material from the immovable property.

[3] In the court order the applicant is further interdicted from entering the property and building or continuing with the building of any structure on the property without the permission of the land owner after they have been evicted or have vacated the property.

[4] The applicant seeks to rescind the judgment on the basis that the eviction order was sought and erroneously granted under incorrect

legislation, to wit the Prevention of Illegal Eviction Act. The applicant contends in this respect that he is a labour tenant as

defined in the Land Reform (Labour Tenants) Act No 3 of 1996 (the "LTA") and that he therefore ought to have been dealt with in terms of LTA. He contends further that even if he does not qualify as a labour tenant, he would still qualify as an associate as defined in LTA. The applicant contends further that should he not qualify in terms of LTA, he should have alternatively been dealt with as an occupier in terms of the Extension of Security of Tenure Act 62

of 1997 ("ESTA"), in terms of which he submits the 1st respondent was not entitled to evict him without at least fulfilling the relevant provisions of ESTA.

[5] The 1st respondent opposes the application on the basis that the applicant is relying on his opinion that he is labour tenant, and that this opinion remains inadmissible as evidence. The 1st respondent also opposes the application on the basis that the applicant already vacated the property in 2013 and that this constituted a waiver and termination of the Labour tenant agreement if there was ever was one.

[6] Regarding the argument based on the ESTA, the 1st respondent contends that in order to succeed the applicant had to have a right to reside on the land as on 4 February 1997 or thereafter and that he further had to have either consent or another right in law to reside

there, excluding any right as a labour tenant. The 1st respondent therefore contends that as the applicant had neither such right nor consent from the 1st respondent, he consequently had no right to erect structures and commence living on the property without meaningful engagement or consent of the 1st respondent to return to the property. The 1st respondent's contention is therefore that the applicant does not qualify as an occupier as provided for by ESTA.

THE LAW

[7] The applicant's application for rescission of this judgment granted by my sister Mphahlele Jon 30 July 2018, is based on Rule 42(1)(a) of the Uniform Rules of Court which provides as follows :

"The court may, in addition to any powers it may have mero motu or upon the application of any party affected, rescind or vary:

(a) an order or Judgment erroneously sought or erroneously granted in the absence of any party affected thereby." It is indeed common cause that this judgment was granted in the absence of the applicant.

[8] I note that the applicant did not address the reasons of his absence in court on 30 July 2018. This is despite clear proof that the defendant or applicant?? was served in terms of Rule 4(1)(ii) with the notice in terms of section (4)(2) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act No 19 of 1998 ("the PIE Act") and that he was further served with the order that he now seeks to rescind which was served on his wife in terms of Rule 4(1)(ii).

[9] The applicant however applied for condonation of the late filing of the rescission application from the bar, and that was upon hearing the respondent insisting on their absence of condonation application, the explanation offered by the counsel for the applicant is in my view reasonable and acceptable. The respondent did not raise or establish any prejudice which may be caused by the applicant's late filing of the condonation application. In the premise his application for condonation is hereby granted.

[10] The law governing applications for rescission under Uniform rule 42(1)(a) is trite. The applicant must show that the default

judgment

or order had been erroneously sought or erroneously granted. If the default judgment was erroneously sought or granted, a court should, without more, grant the order for rescission *Bakoven Ltd v G J Howes (Pty) Ltd* 1992 (2) SA 466 (E) at 471G.

[11] Generally, a judgment is erroneously granted if there existed at the time of its granting a fact which the court was unaware of and which would have precluded the granting of the judgment and which, if the court was aware thereof, would have induced it not to grant the

judgment Erasmus: Superior Court Practice 2 edition (Revision Service 1, 2015) Vo/ 2 at D1-567. Southwood J in Naidoo v Mat/a/a NO 2012 (1) SA 143 (GNP) pointed out that in general terms a judgment is erroneously granted if there existed at the time of its issue a fact of which the judge was unaware, which would have precluded the granting of the judgment and which would have induced the judge, if aware of it, not to grant the judgment Nyingwa v Moo/man NO 1993(2) SA 508 (TK) at 510 D-G.

[12] The only requirement for the rescission of a default judgment under this sub- rule is that the judgment must have been 'erroneously sought or erroneously granted. Ferris and Another v First Rand Bank Ltd 2014 (3) SA 39 (CC) at para [13].

[13] Rule 42(1) requires the following:

13.1 the judgment must have been erroneously sought and granted;

13.2 in the absence of the applicant;

13.3 who is affected by the granting thereof. This means that the party must have substantial interest in the granting thereof. (Mutembwa v Mutembwa 2001 (2) SA 193 (TKHC) at 201 (A-H).

[14] Once it is established that an order or judgment was erroneously granted in the absence of any party affected thereby, the court should, without any further enquiry, rescind the order on the application of such party affected thereby. (Tshabalala and Another v Peer 1979 (4) SA 27 (T) at para [30] and Mutembwa v Mutembwa supra)

[15] It is, in my view further clear from the reading of the above that I need not to question the reason for the party's default as long as the "erroneous" part has been identified and established by the affected party who has an interest in the matter. It is therefore clear from the above that I ought to proceed to grant the rescission if satisfied that the judgment was granted erroneously.

[16] I therefore have to consider and make a determination as to whether or not the judgment granted by Mphahlele J on 30 July 2018 was granted erroneously. In my view the judgment was granted as a result of an error especially when the following are taken into account:

16.1 The 1st respondent knew at the time of initiating the application for eviction that the applicant and his family were residing at the farm on 4 February 1997;

16.2 The 1st respondent in its application for eviction expressly and positively stated that " when the applicant took occupation of the property in 2008, the late father of the 1st respondent, known to me as Mr. Korporaal Mutsweni, was employed by me as a general farm worker on the property". Based on this statement the 1st respondent knowing that the applicant was a son to Korporaal Mutsweni and he was staying with him in the farm ought to have instituted the eviction application in terms of ESTA instead of PIE even if according to him the LTA was not applicable (Emphasis underlined);

16.3 Had the court been made aware, prior to the granting of the order for eviction that the applicant's father had been a resident and a farm worker on the property who leaved with is family for many years in the property, the eviction order would not have been granted as the court would have been appraised of the full circumstances and the background behind the said eviction, the court would have immediately found that ESTA or LTA instead PIE, is the applicable legislation.

- [17] I am alive to the fact that if this fact was not brought to the attention of both courts, it could not have been apparent from the respondent's papers for eviction application. The information or facts ought to have been brought to the attention of both courts where an order for eviction was being sought.
- [18] The counsel for the respondent conceded that this fact was not brought to the attention of the court ostensibly because there was no need to do so as the applicant at the time in any event fell under purview of PIE as a simple illegal occupier who had waived his rights in terms of LTA.
- [19] The 1st respondent view about the applicant waiving his right, and its decision not disclose to the court that the eviction is brought on PIE because of this particular view, is an error on its own, as in my view that was not the respondent's decision to make without involving the court to whom it sought relief, In my considered view even the knowledge of this waiver on the part of the applicant needs to be evaluated fully by a relevant court; E.G. whether with applicant was aware that leaving the farm amounted to the waiver of his right, I find that there is no justice in just ignoring all those facts in dealing with this eviction application.
- [20] Though the order granted by Thobane AJ (as he then was) is not an issue before me, the truth is one cannot consider the current order without revisiting notice 4(2) order. I find myself constrained to comment about this order for completeness sake.
- [21] I am of the view that it was not only wrong but also misleading for the respondent not to reveal the glaring facts suggesting possible relevance and application of both ESTA and LTA the applications before Thobane AJ on 16 April 2018 as well as Mphahlele J on 30 July 2018. I am of the firm view that the respondent, having been aware of these facts, had the duty of placing same before court in the application.
- [22] Other than the fact that both the ESTA and LTA make provision for their own special requirements which ought to be satisfied before a final eviction order can be granted what also stands out is the fact that both enactments also seeks to address the injustices of the past and this in my view is one issue that cannot be ignored by this court even at this stage of the proceedings.
- [23] This court notes that both pieces of legislation intends to give effect to the State's constitutional obligations for land tenure that is legally secure for farm dwellers and farmworkers.

- [24] While ESTA specifically addresses the tenure rights of farm dwellers residing on land owned by others, the LTA specifically addresses the injustices of the past by giving labour tenants security of tenure or ownership of the portion of land that they use to live on, grow crops and keep livestock. ESTA sets out the rights and duties of landowners and farm occupiers, and the procedure that needs to be followed in order to lawfully evict a person from the farm.
- [25] Ignoring the glaring features of both legislations will in my view seriously undermines the rights of farm occupiers and labour tenants. It threatens the constitutional right of access to land. Whether the applicant will succeed in establishing these features when given an opportunity to defend his eviction is an issue which in my view deserves a hearing in a proper forum.
- [26] I therefore find that it was imperative for both courts which granted these orders, (Section (4) (2) PIE application, and the current order), to have been duly appraised of the full circumstances of this matter in order to deal properly with the application for eviction. Although I note that in initial application for eviction mention of these facts is made in the 1st respondent's affidavit, my view is however that more disclosure should have been made by the 1st respondent of the full circumstances and facts surrounding that eviction. It is clear from the 1st respondent's own concession this was not done as the respondent held a different view on the applicant as an occupier when it sought these two orders.

CONCLUSION

- [27] I am in the circumstances satisfied that the applicant has made out a proper case that the order dated 30 July 2018 was granted erroneously within the purview of Rule 42(1)(a).

- [28] I have no doubt that if the court order dated 30 July 2018 is not rescinded based on the objections raised by the 1st respondent,

this eviction would be a classic example of an eviction that elevated form over substance, which in my view can never be just, especially when the said eviction has the potential of threatening the rights that are entrenched in the Constitution.

- [29] I am equally satisfied that the judgment was erroneously sought as the court was not appraised of the facts which in my view were material as articulated above. Accordingly I need not to enquire any further but to proceed and grant the rescission of judgment.

- [30] Accordingly the following orders are made:

30.1 The court order granted on 30 July 2018 is hereby rescinded;

30.2 The applicant is granted leave to deliver its answering affidavit to the application for eviction within 10 days of this order;

30.3 The respondents are ordered to pay costs of the application.

M. T Mankge, AJ

Acting Judge of the High Court

DATE OF HEARING: 08 October 2019

DATE OF JUDGMENT: 23 October 2019

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