

SOUTH AFRICA / JUDGMENT

Seema v Phukubye and Others (2024/025816) [2024] ZAGPJHC 362 (22 March 2024) [2024] ZAGPJHC 362

COURT

South Gauteng High Court, Johannesburg

BEFORE

Crutchfield

CASE / FILE NUMBER

2024/025816

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IN

THE HIGH COURT OF SOUTH AFRICA,
GAUTENG

DIVISION, JOHANNESBURG

CASE

NO: 2024-025816

1.

REPORTABLE: NO

2.

OF INTEREST TO OTHER JUDGES: NO

3.

REVISED.

22

March 2024

In

the matter between: MACHOENE
 LINAH SEEMA
 Applicant
 And
 OUPA
 PHINEAS PHUKUBYE
 First
 Respondent
 THE
 CITY OF MOGALE LOCAL MUNICIPALITY
 Second
 Respondent
 THE
 SHERIFF OF THE HIGH COURT
 Third
 Respondent

JUDGMENT

CRUTCHFIELD J:

- [1] The applicant, Seema Linah Machoene, brought spoliation proceedings in the urgent court before me on 8 March 2024.
- [2] The first respondent, Oupa Phineas Phukubye, opposed the proceedings whilst the second respondent, the City of Mogale Local Municipality, and the third respondent, the Sheriff of the High Court, did not oppose the proceedings.
- [3] The applicant claimed relief in terms of Part A of the application, ordering the third respondent, the Sheriff of the High Court, to:
- 3.1 Restore possession of the immovable property described as Erf 7[...], R[...] V[...], L[...] Street, K[...] (“the property”) to the applicant;
- 3.2 Ensure that the applicant gained access and restoration to the property by removing any “different locks” placed in the premises pursuant to the eviction of the applicant from the property; and
- 3.3 Various costs orders, some of which contradicted others.
- [4] I interpose to mention at this stage that the applicant did not define what she intended by the term “different locks” utilised in the notice of motion.
- [5] The applicant, in terms of Part B of the application, claimed rescission of the order of Twala J dated 19 October 2023 under case number 2023/074916, which ordered the eviction of the applicant and all those occupying the property through and under the applicant.

- [6] The notice of motion provided for Part A of the application to be heard on 7 March 2024 at 17h00.
- [7] The applicant afforded the respondents, the first respondent in particular, particularly short and unreasonable time in which to furnish notice of its intention to oppose the application if any, and if so, its answering papers. The first respondent and any respondent opposing Part A of the application was required to comply with unreasonably truncated time periods such that it was well nigh untenable for them to do so.
- [8] In essence, the first respondent was the registered owner of the property from which the applicant and all those occupying the property through and under the applicant, were evicted pursuant to the order of Twala J dated 19 October 2023 under case number 2023-074916 (“the order”).
- [9] The applicant alleged that she had no knowledge of the eviction application brought by the first respondent under case number 2023-074916 and that she did not receive service of the application in terms of Section 4(1) of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act, 19 of 1998 (“PIE”). Nor did the applicant allegedly receive service of the notice in terms of section 4(2) of PIE (“the s4(2) Notice”), giving occupiers written and effective statutory notice of the date of the hearing of the application in terms of s4(1) of PIE or service of the order. The applicant alleged that if she had been aware of the proceedings under case number 2023-074916, she would have opposed them as she had opposed previous eviction proceedings issued by the first respondent under case number 2023-027918, on 25 May 2023.
- [10] The first respondent withdrew the proceedings under case number 2023-027918 due to confusion over the description of the property and physical address of the property.
- [11] The property, described as Erf 7[...], R[...] V[...], L[...] Street, K[...], has a physical address or geographical location of “House 7[...]”. Notwithstanding differences in the numbers, the reference is to one and the same immovable property, owned by the first respondent and from which the applicant and all those occupying through and under the applicant were evicted pursuant to the order.
- [12] The first respondent alleged that the applicant and other occupiers of the property occupied unlawfully. The first respondent effected service via the Sheriff of a written notice to vacate the property dated 29 May 2023. The Sheriff served the notice to vacate on 28 June 2023 at the property upon the alleged unlawful occupiers personally after the original document was displayed and the nature and contents thereof explained to her. This is evident from the Sheriff’s return of service uploaded on CaseLines at CaseLines page 009-173.
- [13] The Sheriff’s return of service (CaseLines 001-65), reflected service of the application in terms of s4(1) of PIE at the property upon “Mrs Seema Occupier”. The Sheriff noted the “appearance date” of the application in terms of s4(1) of PIE as 17 October 2023. In effect, service of the s4(1) application was upon the applicant personally on 25 August 2023.

- [14] The first respondent referred to the Sheriff's return of service in respect of the s4(2) Notice (CaseLines 009-255), which reflected service of the s4(2) Notice on 2 October 2023, by affixing to the principal door of the property in circumstances where the occupier refused to accept the process, which was affixed in the presence of a female occupier who refused to state her name, the nature and content of the process was explained to the occupier at the given address of the property. The Sheriff noted on the return that Erf 7[...] R[...] V[...], the relevant property in this matter, is also known as 7[...] R[...] V[...]. As aforementioned, the two descriptions referred to one and the same property.
- [15] The applicant argued that service of process by affixing is reserved for service of process on a corporate or such entity and is not appropriate for service on an individual. However, the reference and reliance by the Sheriff on service by affixing in circumstances such as these, where the occupant refused to disclose her identity and refused to accept service of the process, as transpired in this matter, is sufficient. Given that the occupier refused to furnish her name and refused to accept the process, there was no other means available to the Sheriff to serve the process. The Sheriff noted on the return of service that the nature of the process was explained to the occupant and the process was affixed to the principal door in the presence of the occupier, meaning that the occupier had full knowledge of the service of the process. In these circumstances, I consider the service of the
- s4(2) Notice on the applicant, albeit by affixing, to be good and effective service. The first respondent was not required to serve the s4(2) Notice upon the applicant personally in terms of the authorising court order.
- [16] The applicant alleged, in the face of the Sheriff's returns of service, that she had no knowledge of the application in terms of s4(1) of PIE and that service did not occur on her or her sister, the only two adult females residing in the property. The applicant and her sister were not present allegedly at the property at the time of service by the Sheriff and the applicant contended that I should decline to accept the Sheriff's returns of service.
- [17] The applicant alleged that she was occupied in the course of her employment on 25 August 2023, was not present at the property and did not accept service of the application in terms of s4 of PIE as stated on the Sheriff's return of service.
- [18] The applicant alleged that she would provide an affidavit from her employer that would support her version that she was engaged at work at the time that the Sheriff allegedly served the s4(1) application upon the applicant personally on 25 August 2023.
- [19] The affidavit of the applicant's employer, Ms Mangope Mokgadi Maria, uploaded at CaseLines 001-66, confirmed that Ms Mangope Mokgadi Maria requested the applicant to teach her learners during the June 2023 school holidays. The applicant invited me to find that the teaching duties referred to in the employer's affidavit extended to August 2023, notwithstanding the employer's specific statement that the teaching duties were during the course of the June 2023 school holidays. The applicant did not provide any factual basis for me to find that the June 2023 school holidays, as they were referred to in the employer's

affidavit, extended 25 August 2023.

- [20] Section 43 of the Superior Courts Act, 10 of 2013, provides that the contents of the return of the Sheriff or Deputy Sheriff constitute prima facie evidence of the truth thereof. In those circumstances, the applicant was obliged to show the clearest and most satisfactory evidence that the return of service of the Sheriff was impeachable. See in this regard *Van Vuuren v Jansen*[1].
- [21] The applicant failed to demonstrate clear and satisfactory evidence that the Sheriff's return of service was impeachable.
- [22] In the face of the returns of service in respect of the s4(1) application and the s4(2) Notice as well as the circumstances of the applicant's reliance on the affidavit of the employer, which clearly did not support the applicant's version, the applicant's allegations that she did not receive service of the s4(1) application and the s4(2) Notice, lack credibility. I am entitled to accept, as I do, that the applicant's version is untrue. See in this regard *Mhlongo Mandla v City of Ekurhuleni Municipality*[2] in which Wepener J relied on *Cameron JA in Fakie No v CCII Systems (Pty) Ltd* [2006] ZASCA 52; 2006
- (4) SA 326 (SCA) at [55] where Cameron JA stated:
- "Motion proceedings are quicker and cheaper than trial proceedings and in the interest of justice; court have been at pains not to permit unvirtuous respondents to shelter behind patently implausible affidavit versions or bald denials ... This means that an uncreditworthy denial, or a palpably implausible version, can be rejected out of hand, without recourse to oral evidence."*
- [23] Similarly, there is no reason why this statement of Cameron JA should not apply to the matter before me.
- [24] The Sheriff's returns of service reflected proof of service of the s4(1) application on the applicant personally and the s4(2) Notice as well as the notice to vacate in terms of the Rules. There is no reason for me not to accept the Sheriff's returns of service.
- [25] Insofar as the applicant alleged that she and all those occupying the property through and under her were evicted unlawfully, the eviction took place pursuant to the order. The order was not erroneously sought by the first respondent as the s4(1) application and the s4(2) Notice as well as the notice to vacate were served on the applicant in terms of the Rules and PIE. Thus, there was no unlawful
- interference in the applicant's possession of the property by reason of the eviction pursuant to the order.
- [26] Furthermore, the order stands until set aside. It follows that the applicant's eviction from the property was not unlawful and the applicant failed to fulfil one of the two requirements of the mandament van spolie.

- [27] In the circumstances, the applicant failed to prove at least one of the two obligatory requirements of a mandement van spolie, the consequence of which is that this application must fail on the substantive merits of the application.
- [28] In addition, however, in the light of the order of Twala J dated 19 October 2023, that ordered the applicant to vacate the property with effect from 15 December 2023, the applicant's continued occupation of the property as at 6 March 2024, was unlawful.
- [29] In the circumstances, the applicant cannot be found to have been in peaceful possession of the property as at 6 March 2024, when the first respondent executed the order by way of the applicant's eviction.
- [30] In addition, however, the first respondent has sold the property and transfer is currently pending. The prospective owners of the property, in the interim, are in the process of taking up occupation of the property. In the circumstances, their rights stand to be prejudiced by any grant of the relief claimed by the applicant and the prospective purchasers and future owners ought to have been joined in the proceedings prior to the application being moved before me. Notwithstanding the point being raised by the first respondent in its answering papers, the applicant elected to proceed with the application before me.
- [31] In the circumstances, this application must fail and I intend to grant an order accordingly.
- [32] The first respondent sought an order for punitive costs of the application. The first respondent is entitled to such an order. The applicant could not succeed in the spoliation application against the third respondent based on the facts referred to above. I intend to grant such an order for attorney and client costs against the applicant.
- [33] In respect of the urgency of this application, the applicant alleged that her neighbours took her and her children in pursuant to the eviction on 6 March 2024. In those circumstances, there was no immediate threat to life or limb and this matter should have been set down for hearing on the following Tuesday at 10h00 as required by the Practice Manual in this Division.
- [34] There was no factual basis for the respondents, particularly the first respondent, to be given the unreasonably truncated time periods afforded to them to deliver opposing papers to the application. Insufficient consideration was paid by the applicant's

attorneys and counsel to the relief appropriate to the facts of the matter and the legal remedy appropriate thereto.

[35] By virtue of the above, I grant the following order:

1. The application is dismissed with costs against the applicant on the scale as between attorney and client.

I hand down the judgment.

CRUTCHFIELD J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION

JOHANNESBURG

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the judgment is deemed to be 22 March 2024.

COUNSEL FOR THE APPLICANT:

INSTRUCTED BY:

COUNSEL FOR THE FIRST RESPONDENT:

DATE OF THE HEARING: 8 March 2024

DATE OF JUDGMENT: 22 March 2024

[1] Van Vuuren v Jansen 1977

(3) SA 1062 (T).

[2] Mhlongo Mandla v City of Ekurhuleni Municipality 107138/2002 dated 17 July 2023, unreported decision of this Division.

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Prepared on 11 October 2026 · Esheria