REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2015/24833

In the matter between:

ZACHARIA DINGINDAWO KUNENE Applicant

And

PHUTHI WASHINGTON MAUPYE Respondent

J U D G M E N T

MAKUME, J:

[1] On the 20th August 2015 the Applicant launched this application in accordance with the provisions of Rule 6(12)(a) of the Uniform Rules of Court in which application the present applicant seeks the following order:

> "*That the eviction order granted against the Applicant on the 18th August 2015 in the above Honourable Court under Case Number 2015/24833 to vacate premises known as Erf[……] Extension […..] also known as Number [8…..] [C……..] Street, [E…..] Park, [T……], Gauteng be rescinded and/or set aside forthwith.*

[2] This application is but one of the numerous legal wrangles concerning ownership and occupation of the property stated above and for a better understanding as to where the parties are I think it is necessary to set out a brief narrative of certain facts and circumstances giving rise to this litigation as they emerge from the papers.

REGISTRATION OF THE PROPERTY

[3] It is common knowledge that during or about March 2014 the Registrar of Deeds transferred ownership of Erf [2…..], [E….] Park, Extension [……] Township, (the property) into the name of Phuthi Washington Maupye and his wife Makhomo Elizabeth Maupye the first and second respondents in this application.

THE KEMPTONPARK MAGISTRATE'S COURT ORDER

[4] It is further common cause that on the 6th July 2015 under Case Number 10209/2014 the Magistrate's Court at Kempton Park made the following order in favour of the Applicant against the Respondent:

"*It is ordered that the Second and Third Respondents are ordered to restore possession and occupation of the immovable property known as Erf [2…..], [E…..] Park, Extension […….] Township Gauteng to the Applicant on or before 12h00 on 8 July 2015.*"

[5] On the same day the Respondent's attorneys addressed a letter to the Applicant's attorneys advising them that they have instructions to note an appeal against the judgment of the Magistrate.

[6] On the 4th August 2014 the Respondent noted appeal against the order of the Magistrate to the High Court.

THE SATCHWELL J ORDER OF THE 10TH JULY 2015

[7] On the 10th July 2014 the Respondent launched an urgent application in this Court under Case Number 2015/24833 paragraph 2 of that order reads as follows:

"*2. Pending final determination of an appeal which must be noted within 10 days of the date of receiving the reasons from the learned Magistrate V Da Silva, at the Kempton Park Magistrate Court for the Order handed down on the 06th July 2015 in case number 10209/14.*

2.1 The eviction of the tenants at the aforesaid address, property [2…….], house no, [8…….] [C……] Street, [E…….] Park, [T…..], namely (Third to Sixth Applicants Ndoda Khumalo, Jonas Mabaso, Lawrence Niyamba and Ishmail Shilowa is declared unlawful).

2.2 The aforesaid order of the learned Magistrate at the Kempton Park Magistrate Court is invalid and unenforceable against the aforementioned Third to Sixth Applicants in the application.

> *2.3 The First and Second Respondents are forthwith and immediately to restore the aforementioned Third to Sixth Applicants Ndoda Khumalo, Jonas Mabaso, Lawrence Niyamba, and Ishmail Shilowa into their lawful occupation as tenants of the aforesaid property [2…….], house no. [8…..] [C…….] Street, [E……] Park, [T…..].*"

THE ORDER BY VALLY J DATED 18 AUGUST 2015

[8] On the 18th August 2015 the First Respondent in this matter was granted an order in the urgent court by his Lordship Vally which reads as follows:

> "*1. The First and Third Respondents are to vacate property 2207 house number [8……..] [C…….] Street, [E……] Park, [T…….] on or before Sunday 23 August 2015.*
>
> *2. If the First and Third Respondents fail to vacate the property on Sunday 23 August 2015 the Second Respondent is directed to forthwith eject the First and Third Respondents from property [2……] house number [8……] [C…..] Street, [E…..] Park, [T…..].*
>
> *3. The Second Respondent is hereby ordered to hand over possession of the property [2…..] house number [8…..] [C…….] Street, [E……] Park, [T……] to the Applicant.*"

THE PRESENT APPLICATION

[9] As I have indicated at the start of this judgment the Applicant seeks an order rescinding and setting aside the judgment by Vally. This application was launched on the 20th August 2015 as an urgent application and set down for hearing on the 25th August 2015.

[10] Applications for rescission of judgments and orders are governed procedurally in terms of Rule 42(1) of the Uniform Rules of Court which Rule reads as follows:

> "*42(1) The Court may in addition to any other 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.*
>
> *(b) An order or judgment in which there is ambiguity or a patent error or omission, but only to the extent of such ambiguity, error or omission.*
>
> *(c) An order or judgment granted as a result of a mistake common to the parties.*"

[11] It was held in the matter of *Kotze v Kotze* 1953 (2) SA 184 (C) that:

> "*It is the plain and unqualified obligation of every person against or in respect of whom an order is made by a Court of competent jurisdiction to obey it, unless and until that order is discharged.*"

[12] The Applicant tells the court in this application at paragraph 6 that the order of eviction granted on the 18th August 2015 was by default in that the Honourable Court did not have the reasons of the applicant. What the Applicant seems to say is that although he was present in court he was not afforded an opportunity to say what his defence was. This cannot be correct it appears from listening to argument by counsel that the Applicant was afforded

an opportunity to state his case and thereafter a ruling was made. Whether a judgment is erroneous or not it remains valid until it is set aside.

[13] Any person who cannot bring an application for setting aside a judgment under either Rule 31 of Rule 42 may nevertheless be entitled to have the judgment set aside at common law in a proper case. The court in *Hard Road (Pty) Ltd v Oribi Motors (Pty) Ltd* 1977 (2) SA 576 (W) held that such right is limited.

[14] Rule 42(1) does not specifically require '*good cause*' or '*sufficient cause*' (as in certain earlier rules) to be shown before a judgment can be rescinded or varied. Paragraph (a) of this rule requires however that the judgment must have been erroneously sought or erroneously granted.

[15] Although the Applicant does say in paragraph 6.7 of his affidavit that the order granted on the 18th August 2015 was erroneously sought and granted he forgets that that can only apply if such judgment was granted in the absence of the Applicant. The present matter is that the Applicant was present in court in person when judgment was granted.

[16] The Applicant seems to rely on the argument that the Respondent had no *locus standi* to bring the application. This argument cannot be correct for in that application the Respondent described himself as a lawful owner of the property. Nowhere does the Applicant challenge the Respondent's ownership of the property.

[17] In *Bakoven Ltd v G J Howes (Pty) Ltd* 1992 (2) SA 466 (E) at 471F Erasmus J held that a judgment may be set aside in terms of Rule 42(1)(a) on the ground that it was erroneously granted only if the court has made a mistake in a matter of law appearing on the proceedings of a court of record and in deciding whether judgment was erroneously granted the court is confined to the record of the proceedings.

[18] In paragraph 6.11 of his founding affidavit the Applicant in furtherance of his "*erroneously sought or granted theory*" says that the Respondent should have brought an application in the Magistrate's Court to suspend the operation of that judgment pending the outcome of his appeal. This argument has no merit for it is trite law that once an appeal is noted against a judgment that brings about the automatic staying of execution of that judgment and if a party in whose favour the judgment was granted whishes to execute it is that party who must approach court for the indulgence to execute on the judgment notwithstanding the appeal.

[19] Having said this I refrain from pursuing this matter any further the point *in limine* argued by the Respondent is sufficient reason for my decision to refuse the application.

[20] I accordingly order as follows:

(a) The application is dismissed.

(b) The Applicant is ordered to pay the Applicant's taxed costs on a party and party scale.

DATED at JOHANNESBURG on this 8th day of SEPTEMBER 2015

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M A MAKUME
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

DATE OF HEARING	26 AUGUST 2015
DATE OF JUDGMENT	8TH SEPTEMBER 2015
FOR APPLICANT	ADV S Mziako
INSTRUCTED BY	NCHUPETSANG ATTORNEYS 62 Marchall Street Johannesburg Tel: 011 492 3544 Ref: Mr. Nchupetsang
FOR RESPONDENT	ADV F MAGANO
INSTRUCTED BY	MALISEHA ATTORNEYS c/o Hadebe Attorneys 132 Market Street 212 Mansion House Building Johannesburg Tel: (011) 333-7662