REPUBLIC OF SOUTH AFRICA

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

CASE NO: 14237/2015

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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DATE SIGNATURE

In the matter between:

MAHLOMOLA KOOS SEBOGOLI First Applicant
(First Respondent in the main proceedings)

MMAMOSA FAITH SEBOGOLI Second Applicant
(Second Respondent in the main proceedings)

And

DOMINICA NOMFANO MDIYA First Respondent
(Applicant in the main proceedings)

DUDUZILE JERMINA MOTHA Second Respondent
(Eleventh Respondent in main proceedings)

EKURHULENI METROPLITAN MUNICIPALITY Third Respondent

REGISTRAR OF DEEDS, JOHANNESBURG Fourth Respondent

CORNELIA MARIA CLOETE N.O. Fifth Respondent

HARRY KAPLAN N.O. Sixth Respondent

ANNA PAULA DE OLIVIERA N.O. Seventh Respondent

SOPHIE MMAPULA N.O. Eighth Respondent

SHERIFF FOR THE DISTRICT OF BOKSBURG Ninth Respondent

ABSA BANK LIMITED Tenth Respondent

STANDARD BANK OF SOUTH AFRICA LIMITED Eleventh Respondent
(Twelfth Respondent in the main proceedings)

RONNIE THABO MBELE Twelfth Respondent

J U D G M E N T

MAKUME, J:

[1] In this application which was brought by way of urgency in terms of Rule 6(12) the First and Second Applicants seek in the main two orders against the Second and the Twelfth Respondents they are:

(a) That Mr Ronnie Thabo Mbele be joined as the Twelfth Respondent;

(b) That the Applicants be restored to occupation of certain house situate at [1…….] [T……] Crescent, [V……] Extension 23 (the property).

[2] I shall refer to the First and Second Applicants as the Applicants and to the Second and Twelfth Respondents as the Respondents.

[3] It is common knowledge that the Applicants are presently contesting the loss of their title to the property through a Scheme known as the Brusson Scheme. They rely in the main on a number of decisions in the High Court which have pronounced on the validity of that Scheme. I will say no more about that Scheme as this is not what is before me.

[4] It is common cause that the Respondents purchased the property from the First Respondent Mdiya. The property at that time was advertised on the website of Property 24 a well-known internet property sales forum.

[5] During or about June 2015 and shortly after transfer had taken place in favour of the Respondents a meeting was held by both parties at which meeting the Applicants undertook to vacate the property by a certain date namely the 10th July 2015. The document that confirms such meeting is attached to the papers and bears the stamp of the South African Police Vosloorus. The Applicants claim that they signed the document under duress.

[6] This application has its origin on the events of the weekend of the 1st and 2nd August 2015. The Applicants seek an order restoring them to occupation of the property and the eviction of the Respondents on the basis that they were wrongfully and unlawfully spoliated. This matter is not about determining who the rightful owner of the property is.

[7] The issue before me is accordingly whether the Applicants were spoliated or not during the weekend of the 1st and 2nd August 2015.

[8] It is common cause that the Applicants brought an urgent application in this Court which application was set down for hearing on the 6th August 2015 and then was postponed to the 12th August 2015. On the said day the parties appeared before Mudau AJ in the Urgent Court and the application was struck off the roll due to lack of urgency.

[9] The Second and Twelfth Respondents in answering affidavit say that firstly the application is not urgent as it had been dismissed due to lack of urgency on the 12th August 2015; secondly that the Applicants were never evicted as they voluntarily left the property on the 2nd August 2015 after they had asked for one more night stay on Saturday the 1st August 2015.

URGENCY

[10] It is trite law that an applicant must set forth explicitly the circumstances which evidence the application urgent. See the matter of *East Rock Trading 7 (Pty) Ltd v Eagle Valley Granite (Pty) Ltd and Others* [2012] JOL 28244 (GSJ) at paras [5] and [6]. The Applicants' application was struck off the roll for lack of urgency on the 12th August 2015. The Applicants I am told has simply reinstated the application without saying in this present application why is it now urgent and why it should now be dealt with as an urgent application.

[11] A ruling by a court that an application lacks urgency and falls to be struck off is not appealable all it means is that the Applicant must proceed to set the matter down on the normal roll. The Applicant has not set out the facts and circumstances upon which he relies to render the application urgent. The fact that he and his family are living in less favourable conditions whilst regrettable does not make this application urgent as a court has already ruled in that regard. This Court cannot sit as a court of appeal on a ruling on urgency it is simply unprocedural.

[12] This application lacks urgency and should have been struck off from the roll however in order to bring finality to the recurring urgent applications I allowed the parties to argue the merits of the case.

[13] At the centre of the dispute in this matter is a document that the Applicant signed on the 10th July 2015 at the police station in Vosloorus in which document he the Applicant agreed to vacate the property on the 10th July 2015. This agreement was concluded on the 28th June 2015 and was duly witnesses. The Applicant now seeks to renege from that agreement by alleging that he signed the document under duress.

[14] In paragraph 11 of his answering affidavit the Respondent says that a few days after the 10th July 2015 he had a meeting with the Applicant and after they had been to the police station again and had consultations there the Applicant told him that he was fed up and would advise his lawyers to stop all

legal proceedings as he had come to realise that he was wasting everyone's time. He the Applicant conceded that the property now belongs to the Respondent.

[15] On the 1st August 2015 the parties agreed that the Applicants could occupy the house for that night only and then vacate the following morning being the 2nd August 2015.

[16] The crucial averment in the Respondent's answering affidavit is paragraph 16 which reads as follows:

> "*16. On the 02nd August 2015 and at approximately 18h30, we drove to the subject property which had by then been left unlocked and vacated with the Applicants having removed all their belongings. We went to arrange for our truck load of furniture and occupied the subject property.*"

[17] The Applicant does not deal with this statement at all in his reply instead he decided to refer to the Brusson Scheme and how he was defrauded. He did not in his reply deal with the central issue of spoliation.

[18] The evidence before me which is uncontested demonstrates that on the 2nd August 2015 the Applicants vacated the property in accordance with the oral agreement concluded on the 1st August 2015. When the Respondents took occupation the Applicants had already relinquished possession and therefore they could not have been spoliated.

[19] If the Applicants had no intention to vacate on the basis that they had been made to sign a document under duress in which they had agreed to vacate then the question is why did he not report this irregularity to the police; secondly why did his attorneys not take steps to prevent the Respondent from relying on that document.

[20] It is trite law as it was said by Cameron JA in the matter of *Street Pole Ads Durban (Pty) Ltd v Ethekweni Municipality* 2008 (5) SA 200 (SCA) that the claim for spoliatory relief arises solely from an unprocedural deprivation of possession. A person spoliated need show no more than mere possession and possible dispossession.

[21] This is not what happened in the present matter. When the Respondent arrived on the property at 18h30 on the 2nd August 2015 the property was empty and he took occupation.

[22] At para [15] of the *Street Pole* matter (*supra*) Cameron JA says the following:

> "*[15] An offending respondent in a spoliation application is generally not allowed to contest the spoliated applicant's title to the property. That is because good title is irrelevant. There is a qualification however if the applicant goes further and claims a substantive right to possession whether based on title of ownership or on contract. In that case the respondent may answer such additional claims of right and may demonstrate if he can that applicant does not have the right to possess which it claims. This is because such an applicant in effect forces an investigation of the issues relevant to the further relief he claims. Once he does this the respondent's defence in regard thereto has to be considered.*"

[23] In the founding affidavit from paras 7 to 9 the Applicant sets out how he was defrauded through the Brusson Scheme and at paragraph 9 he concludes with the following words:

> "*I therefore submit that we have a valid claim to the property which we are seeking to enforce.*"

[24] The Applicant's claim is not only based on possession but he also claims ownership hence the Respondents have demonstrated that they are now the owners of the property having acquired same at a sale in execution. The sale in execution still stands and has not been nullified or set aside.

[25] In conclusion it is my view that the parties concluded an agreement regulating when the Applicant would vacate the property. The Applicant has failed to taint that agreement with any form of irregularity or fraud so as to negate consensus. In the matter of *SAR&H v National Bank of South Africa Ltd* 1924 AD 704 the question was whether a party who had accepted a letter as a correct record of an oral contract could after a considerable lapse of time challenge the correctness of the letter. At page 715 Wessels JA held that in the circumstances it was too late to challenge the correctness of the letter and continued as follows:

> "*The law does not concern itself with the working of the minds of parties to a contract but with the external manifestation of their minds. Even therefore it from a philosophical standpoint the minds of the parties do not meet yet if they their acts their minds seem to have met*

the law will where fraud is not alleged look to their acts and assume that their minds did meet and that they contracted in accordance with what the parties purport to accept as a record of their agreements. This is the only practical way in which courts of law can determine the terms of a contract."

[26] The Applicant has failed to prove possession of the property at the relevant time and reliance on the Brusson Scheme decisions cannot be of assistance in the face of a valid agreement. I accordingly order as follows:

(i) The application is dismissed.

(ii) The Applicants are ordered to pay the costs of the Respondents on a party and party scale.

DATED at JOHANNESBURG 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

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DATE OF HEARING	27th AUGUST 2015
DATE OF JUDGMENT	8th SEPTEMBER 2015