20/10/17

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO.: 73637/2016

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

20.10.2017 _____
DATE SIGNATURE

In the matter between:

LLOYD REECE STEVENS-KING	**APPLICANT**
and	
BASIL ABDUL-HAAK HOORZUK	**1ST RESPONDENT**
SHARON SARAH SUSANNA HOORZUK	**2ND RESPONDENT**
THE OCCUPANTS PORTION 14 OF ERF 4935 EERSTERUST, PRETORIA	**3RD RESPONDENT**
THE CITY OF TSHWANE METROPOLITAN MUNICIPALITY	**4TH RESPONDENT**

Heard: 16 October 2017
Delivered: 20 October 2017

JUDGEMENT

VAN DER SCHYFF AJ:

Relief requested by the parties

[1] The Applicant has instituted legal proceedings in terms of s 4 of the Prevention of Illegal Eviction from Unlawful Occupation of Land Act 19 of 1998, hereinafter "PIE", for an order of eviction against the occupants of Portion 14 of Erf 4935, situated in the township

of Eersterust, Registration division JR Gauteng Province (also known as 442 Atlantis Avenue, Eersterust, Pretoria), hereinafter "the property".

[2] The Applicant filed a notice of motion at this court for an order that:

(a) the First, Second and Third Respondents, together with all those presently occupying the property, be ordered to vacate the property as contemplated in s 4(1) of PIE, within 14 days from the order;

(b) the Sheriff or his deputy of the district in which the property is situated be authorised to give effect to the order in the event of the failure of the First, Second and Third Respondents and those holding occupation under them, vacating the property within 30 days of the date of the order;

(c) the said Sheriff or his deputy be authorised to elicit the assistance of the South African Police in order to give effect to the order, if such assistance is required by the said Sheriff or his deputy;

(d) the Respondents be ordered to pay the costs of this application; and

(e) such further and/or alternative relief as may be just and equitable be granted to the Applicant.

[3] Counsel acting on behalf of the Respondents requested the court to consider postponing the eviction application 'pending the finalisation of the Respondents' rescission application'. Respondents' counsel also argued to the dismissal of the eviction application.

The case to be decided

[4] On 7 October 2016 the Applicant brought an ex parte application and obtained an order to the effect that:

(a) a notice in terms of s 4(2) of PIE be served on the First, Second and Third Respondents in accordance with Rule 4 of the Uniform Rules of Court, and

(b) that the Applicant is authorised to serve the notice of motion in the main application under case number 73637/2016 simultaneously with the s 4(2) notice.

[5] Service of the said s 4(2) notice was effected on 25 October 2016 on the First, Second and Third Respondents. The notice of motion for the eviction application was also served on the First, Second and Third Respondents on 25 October 2016, and on the Fourth Respondent on 9 November 2016. On 6 December 2016 the First and Second Respondents gave notice of their intention to oppose the eviction application. They

appointed Forbay Attorneys as their attorneys of record. On the designated court date of 7 December 2016 the matter stood down for the filing of the First and Second Respondents' answering affidavit. On 8 December 2016 the First and Second Respondents filed their answering affidavit with annexures. The matter was subsequently postponed *sine die* on 9 December 2016. On 23 February 2017 the Applicant filed its replying affidavit. On 11 April 2017 the Applicant served its practise note and heads of argument on the Respondents. The matter was set down for hearing during the week of 16 October 2017 and the notice of set down was served on First and Second Respondents' attorneys of record on 11 May 2017. No practise note was filed by the Respondents' counsel but on 16 October 2017 counsel for Respondents requested leave to hand up Respondents' heads of argument from the bar.

[6] The Applicant's case is simple and straightforward. The Applicant states in his founding affidavit that he is the lawful owner of the property that forms the subject matter of this application. Applicant was the successful bidder at an auction held on 19 April 2016 and purchased the property. He attaches proof that the property is registered in his name at the office of the Registrar of Deeds, Pretoria. Applicant states that First, Second and Third Respondents are in unlawful occupation of the property, and have been in such unlawful occupation for more than six months. He further states that he is not aware of any facts pertaining to the rights and needs of any elderly, children, disabled persons and households headed by women that might affect the court's decision. He finally states that neither he, nor the Fourth Respondent, is obliged to provide alternative accommodation to the Respondents.

[7] The First Respondent acts as spokesperson for himself, Second and Third Respondents and attaches Second Respondent's confirmatory affidavit to his founding affidavit. In the discussion that follows First, Second and Third Respondents will be referred to as "Respondents".

[8] The Respondents oppose the eviction application. They start off by drawing the court's attention to the decision in *Gundwana v Steko Development and Others* 2011 (3) SA 608 (CC), where the Constitutional Court declared Rule 45 unconstitutional. They contend that their matter 'falls squarely within the envisioned results' of, amongst others, the *Gundwana*-case.

[9] The Respondents state that a written credit agreement was concluded between First and Second Respondents and Standard Bank in 2006. The loan was secured by a mortgage bond registered over the property. During 2007 the Respondents fell in arrears with payments and Standard Bank instituted action. First Respondent states that he negotiated with the bank in order to ensure that this agreement is not cancelled and to ensure payment of the arrears towards the bank. He further states in paragraph 5.4 that he is 'unsure what had transpired', as his attorneys informed him that an arrangement with the bank was in place and he was obliged to keep on paying the mortgage bond. (It is unfortunate that the First Respondent does not identify this attorney nor does he attach a confirmatory affidavit from him/her.) In paragraph 5.5 of his answering affidavit, First Respondent then states that he is unsure as to when the judgment was obtained but that he could gather from 'the documents' and the best of his recollection that judgment was granted by default and the property declared specially executable by the Registrar of this Court in terms of the 'old Rule 45'. (Unfortunately the First Respondent does not attach 'the documents' that he refers to in this regard to his answering affidavit.) In paragraph 5.6 he says that his attorney of record attempted to obtain copies of the court file under which the judgment was granted but that the documents could not be traced. (Once again it is unfortunate for the First Respondent that no confirmatory affidavit substantiating this claim is attached to his answering affidavit.) In paragraph 5.8 he states, in contradiction with the claim in paragraph 5.4, that an agreement was entered into with Standard Bank that he would continue with the loan payments and keep paying the bond. He states that Standard Bank is in possession of the records in respect of this agreement.

[10] First Respondent states that he kept up payments in terms of this agreement until 2015 when he fell in arrears again. He was informed by Standard Bank that they were going to sell the property at a sale in auction. He once again arranged with Standard Bank to make payment of the arrears and requested them to provide him with a restructured payment plan or to extend the terms of the loan agreement. In paragraph 6.2 of his answering affidavit he states: 'I was informed by unknown employees of Standard Bank of South Africa Limited that in fact they has extended the term from 20 to 30 years.' He claims that he made a payment of R18 000 and was informed that Standard Bank was no longer proceeding with the sale in execution. (Unfortunately no corroboration of these statements is provided by confirmatory affidavits, relevant documents or by joining Standard Bank as a party to these proceedings.)

[11] Thereafter First Respondent once again fell in arrears. This time Standard Bank refused further indulgence. Respondents were informed by letter that the property would be sold in auction during April 2016. Respondents claim that they did not receive any writ of attachment or any document that the property was going to be sold in execution. First Respondent was informed by Standard Bank that they were entitled to sell the property, as they obtained judgment in 2007.

[12] First Respondent was then referred to a company by the name of 'Rescue my Roof' to assist him to stop the sale in execution from proceeding. He was assisted by one 'Wayne Anderson', but when he realised that the auction date was fast approaching he informed said 'Wayne' that he does not need their help any further. In paragraph 7.4 of his answering First Respondent states that his attorneys of record obtained the content of the court file and realised that 'someone' had instituted a rescission application without a founding affidavit on his behalf. This statement is relevant for more than one reason. It is imperative to note that contrary to the claim made in paragraph 5.6 that his attorney attempted to no avail to obtain copies of the court file, and the 'challenge' directed at the Applicant in this application to 'supply the Honourable Court with a copy of the judgment obtained against myself and my wife as far back as 2007' in paragraph 5.7, it is now stated that the content of the court file was obtained. (The content of this court file is not attached to the present papers and the court cannot ascertain for a fact that the judgment was indeed granted by default and by the Registrar of this Court.) It is, moreover, possible to identify the 'someone' who instituted the application for rescission since not only the attorneys for the applicant, but also the reference of the specific person dealing with the matter, is clearly indicated on the application attached as annexure 'BH1'. First Respondent contends in paragraph 7.5 that his attorney informed him that 'this was a fraudulent act on behalf of "Rescue my Roof" and that they acted without my instructions'. (It is a very peculiar choice of words for First Respondent to use – stating that his attorney informed him that "Rescue my Roof" acted without his instructions. In addition, no confirmatory affidavit by his attorney is attached.) In any event, First Respondent was informed that this application for rescission of judgment was 'struck out' due to non-compliance with the Uniform Rules of Court. In paragraph 7.6 of his answering affidavit, First Respondent then claims that the Respondents have **now** (in December 2016) instituted a rescission application in order to 'challenge the judgment and as such the causa of the writ of attachment'. First Respondent claims that if Respondents are

successful with this rescission application, he will 'remain the true owner of the property and as such I am not in unlawful occupation of the property'.

[13] At this point it is imperative to note that the First Respondent's answering affidavit was commissioned under oath on 8 December 2016. The rescission application that he refers to is attached to the answering affidavit as annexure 'BH3' and dated 6 December 2016. It was filed at court on 7 December 2016. There is, however, no indication at all that this rescission application has since been served on the Applicant or Standard Bank. In fact, during oral argument counsel for the Applicant stated that the application for rescission of judgment has to date not been served. Counsel for the Respondents conceded to this. Although the founding affidavit attached to this 'rescission application' is attached to the Respondents' answering affidavit, the court is not going to consider the content thereof in determining whether the Applicant has made out a proper case for the relief claimed in this application. Save to remark that there are conflicting and contradicting statements in the First Respondent's answering affidavit and the founding affidavit attached to the filed, but unserved, application for rescission of default judgment, the fact that the latter application has not been served since its inception in December 2016, renders the consideration thereof redundant. It effectively annihilates the Respondents' request for postponement.

[14] In this regard it is necessary to revert to the decision of the Constitutional Court in *Gundwana v Steko Development* 2011 (3) SA 608 pertaining to the constitutionality of the sale of homes in execution after judgment on money debt. Although the First Respondent could not unequivocally state in paragraph 5.5 of his answering affidavit that the judgment given against him that lead to the sale of his house in execution was a default judgment given by a Registrar of the court, the court will give him the benefit of the doubt (for now) and revisit aspects of that judgment since First Respondent, and his counsel, placed heavy emphasis thereon in both the answering affidavit and during oral argument.

[15] First Respondent is correct in his view that the Constitutional Court held in the *Gundwana* case that execution may only follow upon judgment in a court of law and that judicial oversight is required where execution is sought against the homes of indigent debtors after judgement on a money debt. The High Court rules and practice that allowed registrars to grant orders declaring such property specially executable were therefore declared unconstitutional. It is also correct that the Constitutional Court placed no limit on

the retrospectivity on its order. However, the Constitutional Court held that individual persons affected by the ruling need to approach the courts to have the sales and transfers set aside if granted by default (para 57). It was specifically stated at 628 A-C:

'In order to turn the clock back in these cases, aggrieved debtors will first have to apply for the original default judgment to be set aside. In other words, the mere constitutional invalidity of the rule under which the property was declared executable, is not sufficient to undo everything that follows. In order to do so the debtors will have to explain the reason for not bringing a rescission application earlier, and they will have to set out a defence to the claim for judgment against them.'

At 628 C-E Froneman J continued:

'. . . it follows that a just and equitable remedy, following upon the declaration of unconstitutionality, should seek to ensure that only deserving past cases benefit from the declaration. I consider that this balance may best be achieved by acquiring that aggrieved debtors, who seek to set aside past default judgments and execution orders granted against them by the registrar, must also show, in addition to the normal requirements for rescission that a court, with full knowledge of all the relevant facts existing at the time of granting default judgment, would nevertheless have refused leave to execute against specially hypothecated property that is the debtor's home.'

[16] There is no application for rescission of the judgment debt granted against the First and Second Respondents in the matter between *Standard Bank of South Africa Limited and Basil Abdul-Haak Ringo Hoorzuk and Sharon Sarah Susanna Hoorzuk* under case number 11673/2007 that precedes this application for eviction. In fact, there is currently no application for rescission of the judgment debt that lead to the predicament that the Respondents find themselves in. On the principle stated in *Gundwana v Steko Development* it cannot be said that the First Respondent succeeded in, or actually attempted to, 'turning the clock back'. In the recent decision in *Erstwhile Tenants of Williston Court and Others v Lewray Investments (Pty) Ltd and Another* 2016 (6) SA 466 (GJ) the court went so far as to hold that the operation of an eviction order is not automatically suspended by a pending rescission application. The cumulative effect of the two cases provides substantial authority for a decision not to postpone the eviction application. Since there is no rescission application pending the court need not decide on the *bona fides* of any possible defence that that Respondents may proffer, or the Applicant's response thereto.

[On the Respondents' version, the 'fraudulent' rescission application under case number 11673/2007 was 'struck out'. It was also conceded that the rescission application attached to the First Respondent's answering affidavit and instituted in December 2016 under case number 11673/2007, was not served. It is safe to conclude that the Respondents failed to prove that they did indeed attempt to have the judgement obtained by Standard Bank set aside. Their failure to join Standard Bank as a co-respondent in opposing this application is fatal. The Respondents' argument is based on an alleged misunderstanding between them and Standard Bank. The Respondents have had ample time to institute a rescission application against the default judgement obtained by Standard Bank. Since no proper application for rescission had been pursued from 2007 until 2016, it can be accepted that Respondents have chosen to abandon that remedy. Their defence as set out above is, therefore, without merit.]

[17] The court now needs to decide whether the Applicant in the application for eviction has made out a proper case to obtain the requested relief.

[18] After considering Applicant's founding affidavit and Respondents' answering affidavit, and applying the well-known *Plascon Evans* rule, the court finds that the Applicant is the rightful owner of the property concerned. The Respondents, who have properly been identified, are in unlawful occupation of the property. Proper notice was been given to the Respondents and the City of Tshwane Metropolitan Municipality. Although the Respondents have been in occupation for longer than six months, the property was sold in a sale of execution pursuant to a mortgage. The court still needs to consider all relevant circumstances to determine whether it will be just and equitable to evict the Respondents (See *Occupiers of erven 87 & 88 Berea v Christiaan Frederick De Wet N.O.* [2017] ZACC 18).

[19] It is evident from the affidavits filed in support of and opposition to this application that there are no elderly persons, children, or disabled persons that will be affected by this application. The 'children' mentioned by the First Applicant were respectively 27, 26 and 17 years old on 5 December 2016. In addition, the household is not headed by a woman. The First Respondent does not claim that the Respondents will be homeless and out on the street if the eviction is granted. Neither does he indicate that the Respondents need emergency assistance to relocate elsewhere. He states in paragraph 19 of the answering affidavit that 'any eviction would cause such an

unwarranted situation as I would be obliged to find alternative accommodation and storage for my belongings. . . This would cause severe financial distress and emotional shock to my family.'

[20] The court does not deny the negative emotional (and financial) impact that an eviction will have on the evictees. It is always unfortunate when the dreams that accompanied the purchase of immovable property are shattered by economic hardship that leads to the loss of one's home. However, the Respondents' interests are not the only interests that should be considered by the court. There is the public interest in a sound economic system in the country – a system where money is made available to prospective buyers of property to enable them to acquire property. Lenders, however, need real security to protect their interests. This is the reason why the Constitutional Court stated in *Jaftha v Schoeman and Others; Van Rooyen v Stolz and Others* 2005 (2) SA 140 (CC) para 58 'if the judgment debtor willingly put his or her house up in some or other security for the debt, a sale in execution should ordinarily be permitted where there has not been an abuse of court process'. The Respondents did not succeed in convincing the court of any abuse of court process.

[21] The Applicant's interests must also be considered. The Applicant bought this property in April 2016. He has not had the opportunity to occupy it but had to carry the financial responsibilities associated with acquiring immovable property. The Applicant has not yet been afforded the opportunity to reap the fruits of his investment. Although ownership carries with it certain inherent social responsibilities, and 'should be limited for the benefit of society at large' (See Pienaar GJ 'Registration of Informal Land-Use Rights in South Africa - Giving Teeth to (Toothless?) Paper Tigers?' 2000:3 *TSAR* 442-468) it is not one of those responsibilities to provide free housing to previous owners.

I THEREFORE MAKE THE FOLLOWING ORDER:

1. The First, Second and Third Respondent, together with all those presently occupying the property are ordered to vacate the property as contemplated in section 4(1) of PIE, within 30 (thirty) days from the order;
2. The Sheriff or his deputy of the district in which the property is situated is authorised to give effect to this order in the event of the failure of the First, Second and Third Respondents and those holding occupation under them, vacating the property within 45 (forty five) days for the date of the order;

3. The said Sheriff or his deputy is authorised to elicit the assistance of the South African Police in order to give effect to this order, if such assistance is required by the said sheriff or his deputy;
4. The Respondents are ordered to pay the costs of this application.

E VAN DER SCHYFF
Acting Judge of the High Court
Gauteng Division, Pretoria