IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

17/3/2017

CASE NO: 40478/2016

Not reportable

Not of interest to other judges

17 March 2017

In the matter between:

SHABBIR EBRAHIM N.O **1ST APPLICANT**

(Identity number: […]

IMRAN EBRAHIM N.O **2ND APPLICANT**

(Identity number: […]

SHEREEN AHMED EBRAHIM N.O **3RD APPLICANT**

(Identity number: […]

And

ABDULHAMI D EBRAHIM MOHAMED **1ST RESPONDENT**

KHATIJA DAWOOD MAHOMED **2ND RESPONDENT**

THE OCCUPIERS **3RD RESPONDENT**

CITY OF TSHWANE METROPOLITAN MUNICIPALITY **4TH RESPONDENT**

JUDGMENT

MOKOENA A.J

INTRODUCTION

1. This is an application in terms of Section 4 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Ac t 19 of 1998 ("the PIE Act") . In this application, the Applicants seeks an order for the eviction of the Respondents from 1he premises described as ERF[…], GAUTENG, also known as […] Avenue CLAUDllS GAUTENG ("the property") . The matter came before me as an opposed motion.

2. The Applicants are the trustees of Shabbir Ebrahim Family Trust ("the Trust") which acquired the property at an auction on 11 February 201 6. They purchased the property at a sale in execution of a default judgment granted against the Respondents by this Court on 13 of April 201 5 in favour of ABSA bank. The property was subsequently transferred into the names of the trust on 31 March 201 6.

3. The Respondents oppose the application on the basis that they have launched an application for the rescission of the default judgment. The application was instituted during March 2016.

4. They contend that the pending rescission of judgment application has the effect of staying these proceedings or, that these proceedings must be stayed pending the finalisation of their rescission of judgment application.

5. During argument, Mr. Snyman for the Respondents confirmed that the Applicants Notice in terms of Section 4(2) was duly served on the Respondents. However Mr Snyman made a submission that this application was not in compliance with the provisions of Section 4 of the PIE Act in that when 1he eviction application was *"postponed"* (own emphasis) on 19 August 201 6 to an unspecified date, the Applicants were required to obtain authorisation to serve another Section 4(2) Notice which they never did.

6. This defence was raised for the first time during argument. It was raised neither in the opposing papers of the Respondents nor in the Heads of Argument. What is only said in the Opposing Affidavit is simply that the Applicants:- " *(have) not complied with the procedure* as *laid down by the Court and in any event it is premature" .* In the Heads of Argument, Mr. Snyman dealt with this defence of non-compliance with the PIE;\ct as follows *" it is denied that the applicants complied with the prescripts of the practice manual in respect of the set-down and notice in terms of the provisions of the Prevention of Illegal Evictions of Occupiers of Land Act, Act of 1998 ("PIE") .* No substantive facts were placed before this Court both in the Opposing Affidavit and the Heads of Argument to support such contentions.

7. I then directed that both Mr. Snyman and Ms Pretorius for the A pplicants that they may file their Supplementary Heads of Argument and that Mr. Snyman must deal in detail with the defence of non- compliance with Section 4(2) PIE Act in the Supplementary Heads of Argument. Both Counsel submitted their Supplementary Heads of Argument. Mr Snyman on 21 February 2017 and Ms Pretorius on 23 of February 2017.

8. On the papers before me and the Heads of Arguments together with the Supplementary Heads of Argument, two issues arise for determination. Firstly whether the pending rescission of the default judgment application stays these proceedings and secondly, whether the Applicants were required to obtain authorisation of this Court to serve another Section 4(2) Notice and whether the Notice had to be served at least ·1 4 days prior to the date of the hearing of the eviction application.

Does the pending rescission of judgement application suspend these proceedings

9. Mr. Snyman made a submission that in terms of the repealed Rule 49 (11) of the Uniform Rules of Court, a pending recession of judgment application suspend the execution of on Order of Court. In his submissions he relied on the matters of *Khoza* AO v *Body Corporate of Ella Court (unreported)* Case No. 22463 /2007 and *Antonette Lobuschagne* v *ABSA Bank Ltd* Case *No. 12349 /20 12 .*

10. Those two decisions ore distinguishable in that they were decided on the basis of the repealed Rule 49 (11) , whereas in *casu* a determination of that question has to be made with reference to Section 18 of the Superior Courts Act. The Section reads as follows:-

> *" 18(1) Subject to subsections (2) and (3),* and *unless the Court under exceptional circumstances orders otherwise, the operation and execution of* a *decision which is the subject of an application for leave to appeal* or *of an appeal, is suspended pending the decision of the application* or *appeal" .*

11. In her submissions Mr Pretorius referred me to the matter of *Erstwhile Tenants of Williston Court and Another v Lewray Investments (Pty) Ltd and Another 20 16(6) SA* 466 *(GJ) ,* in particular paras 18 to 20 of the judgment where Meyer J said the following:-

> *[18] " the provisions of Section I8 of the Superior Courts Act must be interpreted in accordance with the established principles of interpretation (See Natal Joint Municipal Pension Fund v Endumeni Municipality 20 1 2 (4) SA 593 (SCA) par 18; Bothrno-Batho Transport (Edms) Bpk v Bothma & Seun Transport (Edms) Bpk 20 1 4 (2) SA 494 (SCA) par J 2). Contextually read, I am of the view that had it been the intention of the legislature for the operation and execution of a decision which is the subject of an application for rescission also to be automatically suspended, then such decision would have been expressly included in Section 18(1] . The legislature would have expressed its intention to include such decision in clear and unambiguous language"*
>
> *[19] "the contrary interpretation would result in the absurdity that the filing of any unmeritorious application for rescission could f oil the operation and execution of a decision which is the subject of such application ...But a person against whom the decision which is the subject of an application for rescission was given can always approach a court under Rule 45A to suspend its execution pending the finalisation of an application for rescission. I see no reason in principle or in logic why an applicant for rescission should be placed in a better position that an applicant for leave to appeal or an appellant as for as the operation and execution of court orders is concerned. The glaring absurdities that could result in hardship*

to the part y in whose favour a decision that forms the subject of an application for rescission was given could never have been contemplated by the Legislature" .

[20] The Superior Courts Act commenced on 23 August 20 13. Its section 18 only provides for the automatic suspension of the operation and execution of a decision pending an application for leave to appeal. No other provision of the Superior Courts Act provides for the automatic suspension of the operation and execution of a decision which is the subject of an application to rescind, correct, review or vary an order of court. There is also no thing which indicates an intention on the part of the legislature to broaden the automatic suspension of the operation and execution of decisions beyond those included in section 18. A court can always be approached under rule 45A to suspend the operation and execution of orders not included in section 18. Bu t their operation and execution are not automatically suspended" .

12. Rule 45A of the Uniform Rules provides as follows:-

"The Court may suspend the execution of any order for such period as it may deem fit" .

13. At B 1-330 Erasmus, Superior Court Practice, the author says the following:-

"As a general rule the Court will grant a stay of execution where real and substantial justice requires such a stay or, put it otherwise, where injustice will otherwise be done" .

14. I agree with the submissions made by Ms Pretorius that reading the provisions of Section 18(1) of the Superior Court Act together with Rule 45A of the Uniform Rules, there is no basis in law for the automatic suspension of the operation and execution of a Court Order which is the subject of an application for rescission. To say a mere filing of a rescission of judgment application automatically suspends the execution or operation of the order or decision of this Court will indeed be absurd and will render the provisions of Rule 45A of the Uniform Rules nugatory.

15. It follows therefore that the Respondents ' pending rescission of a default judgement application does not suspend or stay these proceedings in the absence of an order granted in terms of Rule 45A of the Uniform Rules.

Were the Applicants required to obtain authorisation from this Court to serve "another" Section 4 (2) Notice and to serve it 4 prior to the hearing of this application

16. The Applicants were authorised by this Court on 07 July 201 6, to serve both the Section 4(2) Notice together with the eviction application on the Respondents. The contents of the Notice fully complied with the requirements set out in Section 4(5) of PIE Ac t by stating:-

20.1. That the eviction proceedings against the Respondents are instituted by the Applicants:

20.2. The Court where the eviction application will be heard;

20.3. The date and time of the hearing of the application;

20.4. The grounds relied upon by the Applicants in bringing the eviction application; and

20.5. The Respondents are entitled to appear in Court with their legal representatives or to approach the Legal Aid Board for legal assistance.

17. The Respondents were each personally served with both the eviction application and the Section 4(2) Notice on 21 July 2016.

18. When the Applicants obtained authorisation from this Court *(on* 07 *July 20 16)* to serve both the Section 4(2) Notice together with the eviction application, they had not yet served the eviction application on the Respondents. As indicated above, these were served on 21 July 2016. No further processes in the eviction proceedings were served after 21 July 2016.

19. The Section 4(2) Notice together with the eviction application served on the Respondents specifically stated that in the event that the Respondents failed to file their Notice to oppose the application, the eviction application will be heard on 19 August 201 6. This means that when the Applicants obtained authorisation f or service of the Section

4(2) Notice and the eviction application, they had already secured a date for 19 August 2016 on an unopposed motion roll.

20. On 25 July 201 6, the Respondents reacted to the Section 4(2) Notice and filed their notice to oppose the eviction application. They subsequently filed their Opposing Affidavit on 1 7 of August 201 6. As a result of the eviction application having become opposed, the Applicants removed their eviction application from an unopposed motion roll of 1 9 of August 201 6 and placed it on the opposed motion roll of 13 February 201 7 in compliance with the Practicing Directives of this Division. A notice of Set-down was served on the Respondents attorneys on 22 November 201 6.

21. Nothing was said during argument that the Applicants were required to have served the eviction application first and thereafter to obtain authorisation from this Court to serve both the eviction application and the Section 4(2) Notice.

22. Mr Snyman's submission was that when the Applicants application was *"postponed"* on 19 of August 201 6 to an unspecified date, the Applicants were required to obtain another authorisation from this Court to serve again a Section 4(2) Notice. In his submissions he referred me to Chapter 15: 10 of the Practice Manual of this Court and to the matter of Cape Killarney Property Investments (Pty) Ltd v Mahamba and Others 2001 (4) All SA 479(A).

23. Before I deal with the provisions of Chapter 1 5: 10 of the Practice Manual and the referred case law, I must mention that Ms Pretorius handed a Court Order indicating that on 19 August 201 6 the eviction application was *"removed"* from an unopposed motion roll and not *"postponed"* as submitted by Mr Snyman.

24. Reverting to the Chapter in the Practice Manual and the referred case law, Chapter l5:10 of the Practice Manual states the following:-

"The application for eviction must be a separate application. The procedure to be adopted (except in urgent applications) is as follows:-

1.1 The notice of motion must follow Form 2 (a);

1.2 The notice of motion must allow not Jess than five days from date of service of the application f or delivery of a notice of intention to oppose; and

1.3 The notice of motion must give a date when the application will be heard in the absence of a notice of intention to oppose.

After the eviction application has been served and no Notice of Intention to Oppose has been delivered, or if a Notice of Intention to oppose has been delivered at a stage when a date for the hearing of the application has been determined, the Applicant may bring an ex parte Interlocutory Application authorising a Section 4 (2) Notice and for directions on service.

When determining a date f or the hearing of an eviction application, sufficient time must be allowed for bringing the ex parte application, for serving the section 4(2) notice and for the 14 day notice period to expire.

If the eviction application is postponed in open Court on a day of which Notice in terms of Section 4(2) was duly given, and if the postponement is to a specific date, it will not be necessary to serve another Section 4(2) notice in respect of the latter date. The local, provincial or national authorities that may be affected by an eviction order must be clearly identified".

25. Chapter 15: l0 of the Practice Manual must be interpreted by reference to the purpose of Section 4(2) Notice. In the matter of *Unlawful Occupiers of the School Site* v *City* of *Johannesburg 2005 (2) All SA 108 (SCA) p 1 16 at* para *23* Brand JA describe the purpose of the Section 4(2) Notice as follows:-

> *"The purpose of Section 4(2) is to afford the respondents in an application under PIE an additional opportunity, apart from the opportunity they have already had under the rules* of *Court, to put all the circumstances they* allege *to be relevant before the court [" see* Cape *Killarney Property Investments at 1229E-F]* ".

26. In the Cape Killarney matter Supra, Brand A JA at p483 (paras 12-13) said the following:-

> *"Section 4(3) requires that a notice of motion as prescribed by Rule 6 be served on the alleged unlawful occupier in the manner prescribed by Rule 4 of the rules of Court. It is clear to me that this Notice (" the notice of motion"] in terms of rules*

of Court is required "in addition" (own emphasis) to the Section 4(2) notice. Any other construction will render the requirements of Section 4 (3) meaningless.
The fact that the Section 4(2) Notice is intended as *an additional notice (own emphasis]* of *the forthcoming eviction proceedings under the Act is also borne out by Section 4(4)* ".

27. Mr Snyman quite correctly submitted that what Brand AJA said in the Cape Killarney matter is that *"apart* from *the service* of *the eviction application prescribed by the rules of Court, an additional notice be* served *upon the Respondent at least Fourteen(14) days before the date upon which the application is to be heard" .*

28. I however, disagree with him when he said the Learned Judge was referring to service of another section 4(2) Notice when he said an additional notice had to be served with the forthcoming eviction proceedings. Brand AJA was referring to a Section 4(2) Notice as an addition notice to the notice of motion prescribed by Rule 6 of the Uniform Rules, and not another Section 4(2) Notice.

29. Service of a Section 4(2) Notice is a peremptory requirement of a PIE Act, and it was intended to inform the Respondents about the forthcoming eviction proceedings; the bases of the eviction application and also inviting the Respondents to raise any defence they might have to the eviction application. They reacted by filing their Notice to Oppose and their Opposing Affidavit. Furthermore their Counsel appeared in Court on the 131h February 201 7, to present their defence. Under those circumstances, the Section 4(2) notice had achieved its purpose of informing the Respondents of the basis upon which the eviction order is sought.

30. Mr Snyman has not referred me to any authority or rule that requires the Applicants to serve another Section 4(2) Notice in the event their eviction application is removed from an unopposed motion roll, after it has become opposed, and placed on an oppose motion roll in terms of the practice directives of this division.

31. I therefore see no reason why the Applicants are required to serve another Section 4 (2) if the initial notice served on the Respondents on 21 July 201 6 had achieved its legislative purpose of informing the Respondents of the forthcoming eviction application

and the basis for that the application. They were also served with a Notice of Set-down informing them of the date and time of the hearing of the eviction application, more than 14 days as prescribed by the PIE Act.

Court's discretion in granting an order of eviction

32. This Court is enjoined by the provisions of PIE Act to grant an order for eviction if it is *just* and *equitable* to do so.

33. I have considered the fact that the Respondents did not place any facts before this Court that there are any children, the elderly, or disabled persons who are in occupation of the property. It is also not their defence that they have no alternative accommodation.

34. During argument I asked Mr Snyman as to who is paying for the property tax on the property, and his answer was that the trust as the owners is required by law to pay that property tax despite the trust and or the beneficiaries to the trust not enjoying the use and the fruits of the property. I further asked him as to who is paying for the services that the Respondents are consuming. He was evasive in this regard. He was not helpful to this Court. His response was that the Respondents are not provided with municipal statements of account. I found that answer not satisfactory in that the Respondents as the consumers of municipal services they have a duty in terms of Section 5 (2) (b) of the Municipal Systems Act 32 of 2000 to pay promptly f or those services. That duty carries with it an obligation on the Respondents to enquire either from the municipality or from the Applicants the amount owing for the services they have consumed.

35. I further raised it with him that when the trust bought the property, it paid the arrear rates and taxes to the amount of R28 513.85 which amount is made up of the municipal services consumed by the Respondents. That was not disputed.

36. Based on these facts, I am of the view that the continuous occupation of the property by the Respondents is seriously prejudicing the trust financially and it may not recover those expenses from the Respondents, given their financial position as indicated in their Opposing Affidavit.

CONCLUSION

37. For these reasons, the Applicants have satisfied all the requirements of Section 4 of PIE and that no valid defence has been raised by the Respondents.

38. In the premises I grant the following order:-

(1) The application for eviction succeeds.

(2) That the First, Second and Third Respondents and all those who occupy the premises better known as **ERF 1344 CLAUDIUS EXT 1, GAUTENG, ALSO KNOWN AS 282 2N° AVENUE, CLAUDIUS, GAUTENG** by virtue of the First, Second and Third Respondents ' occupancy thereof, including the First, Second and Third Respondents ' servants and employees, if any, be and are hereby evicted from that property; within (20) twenty days from the date of service of this order.

(3) In the event of the First, Second and Third Respondents and all those who occupy the property under and by virtue of the First, Second and Third Respondents ' occupancy thereof, including the servants and employees, if any, fail and/or refuse to vacate the property within the period as stated in 2, that the Sheriff of the above Honourable Court and/or its deputy be and is hereby authorised to forthwith enter upon that property and to evict the First, Second and Third Respondents and all those who occupy the property under and by virtue of their occupancy thereof.

(4) Costs of this application to be paid by the First and Second Respondents jointly and severally the one paying the other to be absolved.

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