

REPUBLIC OF SOUTH AFRICA



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

CASE NUMBER: A3014/2019

DELETE WHICHEVER IS NOT APPLICABLE

1. REPORTABLE:

YES/NO

2. OF INTEREST TO OTHER JUDGES:

YES/NO

3. REVISED

17/09/2019

DATE

SIGNATURE

In the matter between:

MOHLALA CHABANE ALTON

First Appellant

ALL OTHER OCCUPIERS

Second Appellant

and

MASHALE HILDA NTHABISENG

First Respondent

EMFULENI LOCAL MUNICIPALITY

Second Respondent

JUDGMENT

DIPPENAAR J:

[1] This is an appeal against an eviction order granted by the magistrate's court, Emfuleni on 13 August 2018. The application papers cited one Chabane Alton Mohlala as first respondent. The second respondent was cited as "*All other occupiers of Erf 157, Zone 10, Extension 2, Sebokeng*", hereinafter referred to as "the property". The third respondent, who did not participate in the proceedings was the Emfuleni Local Municipality.

[2] The first and second respondents, the appellants in the present proceedings, had unsuccessfully opposed the eviction application. On 13 August 2018, an eviction order was granted against the first to third respondents, directing, inter alia, that: "*The respondents must vacate the said property with all their possessions by 15 October 2018, failing which a warrant of ejectment could be executed on 22 October 2018*".

[3] On 19 October 2018, the appellants launched a condonation application for the late filing of the appeal. A notice of appeal was delivered on the same date. There are no documents on record which indicate that the appeal has been opposed. No heads of argument were delivered by the respondents, nor were they represented at the hearing. The notice of set down was served on the respondents' attorney on 24 March 2019.

[4] The condonation application was launched in the name of the first and second appellants. It included an affidavit by one of the daughters of the first respondent, Ms Magwajana Mohlala, who occupies the property with her sisters and is thus one of the "occupiers of the property", cited as the second respondent. In this affidavit, Ms Mohlala states that the first appellant had passed away on 16 August 2017, prior to the granting of the eviction order. The eviction order was served on the second respondents on 1 October 2018. No attempt was made by Ms Mohlala to join the proceedings as a party.

[5] The grounds of appeal relied on by the appellants are that the magistrate erred in granting the eviction order:

- a. without reasons and findings as prescribed in The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("the PIE Act");
- b. without taking into account that the first respondent (the first appellant) passed away on 5 August 2018¹;
- c. in the face of a pending application for leave to appeal proceedings in the High court in this division under case no 15/40395;
- d. and that if the magistrate had waited for the application for leave to appeal to have been finalised, she would have realised that the property had been unlawfully and improperly sold to the first respondent and the first respondent had never collected the selling price from the transferring attorneys.

[6] The papers are procedurally deficient in various respects. The appellants further failed to launch the proceedings within the requisite time period as prescribed and have sought condonation. In the course of considering whether condonation should be granted, we have also considered the merits of the appeal and whether the appeal has any prospect of success.

[7] In the appellants' heads of argument, their main argument was that the learned magistrate granted an eviction order and not a judgment, thus rendering the eviction order unlawful.

[8] It was however conceded during argument, correctly in our view, that the learned magistrate had indeed provided reasons for the order granted and had considered the relevant issues under the PIE Act in her ex tempore judgment delivered at the time of

¹ A different date to that stated in the affidavit supporting the condonation application.

granting of the order on 13 August 2018. This disposes of the first ground of appeal, which lacks merit.

[9] In argument, the appeal rested on two primary contentions: first; that as the magistrate was not informed of the death of the first respondent, an order should not have been granted and that the occupiers of the property should have been joined to the proceedings. Second; that the order should not have been granted whilst the application for leave to appeal was pending.

[10] In our view, the first contention lacks merit.

[11] The eviction order clearly refers to the occupiers of the property as “the second respondent”, who were at all times parties to the magistrates’ court proceedings and were legally represented therein by the same representatives who represented the first appellant. The proceedings were opposed by them. From the appellants’ papers, it appears that the occupiers are the daughters of the first appellant. They did not identify themselves or elect to be personally joined to the proceedings as parties and no steps were taken by them to do so. In these appeal proceedings, the occupiers accepted that they had *locus standi* to launch the appeal proceedings as second appellant.

[12] It cannot be said that the eviction order was improperly granted against the second respondent in the circumstances and the appellants’ contention that the eviction order was granted against the first appellant only is factually incorrect.

[13] It was further incumbent on the appellants to take the necessary steps to substitute the first appellant with the executor of his estate after his passing. No steps were ever taken in that regard. It further remains unclear when the first appellant passed away, considering the contradictions in the appellants’ papers and absent any death certificate evidencing the date of his death. No explanation has been tendered why the learned

magistrate was not informed of the death of the first appellant prior to granting the eviction order.

[14] For purposes of this appeal, the first appellant is not properly before this court and cannot prosecute the appeal.

[15] We turn to consider the second contention pertaining to the application for leave to appeal. The papers are confusing on this issue and the factual position remains unclear. From the replying papers in the proceedings before the magistrate it appears that the first appellant's high court application under case no 10677/2015 was dismissed on 18 March 2016.

[16] From the transcript attached to the record of the proceedings on 9 July 2018 it appears that when the eviction application was argued, the first respondent contended that the application for leave to appeal was dismissed on 28 April 2016. The appellants contended otherwise, alleging that the application for leave to appeal was only launched together with a condonation application on 28 August 2017, which at the date of argument, had not yet been finalised. A postponement was accordingly sought. Such a postponement was granted and the application was postponed to 13 August 2018. On this date the eviction order was granted, in the presence of the appellants' legal representatives. The record makes no mention of the application for leave to appeal.

[17] We are not persuaded that the appellants have made out a case that the eviction order falls to be set aside on this basis or that there was any misdirection on the part of the magistrate in granting the order.

[18] It cannot in our view be said that there was any material misdirection of fact or law on the part of the magistrate in granting the eviction order. From her judgment it is clear what she considered the relevant facts as required under the PIE Act in determining the application.

[19] In as much as the appellants have not illustrated any prospects of success on appeal, condonation could have been refused. In any event, even if condonation were to be granted, the appeal is doomed to failure on its merits.

[20] From the papers, it does not appear that any active steps were taken by the first respondent to oppose the present proceedings. In the circumstances, it would not be appropriate to grant an adverse costs order against the appellants.

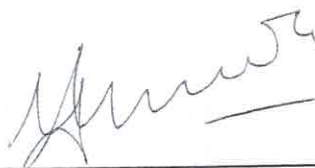
[21] We grant the following order:

The appeal is dismissed.



**F DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG**

I AGREE



**U BHOOLA
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG**

APPEARANCES

DATE OF HEARING	: 20 AUGUST 2019
DATE OF JUDGMENT	: 17 SEPTEMBER 2019
APPELANT'S ATTORNEYS	: HLATSWAYO MHAYISE INC. : MR HLATSWAYO
FIRST RESPONDENT'S ATTORNEYS	: NETSHIVERA ATTORNEYS