



IN THE LAND CLAIMS COURT OF SOUTH AFRICA
RANDBURG

CASE NO: LCC169/2016

Before: Poswa - Lerotholi, AJ and Ncube, AJ

Heard on:

Delivered on: ~~July~~ 2017

August

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE YES / NO	
(2) OF INTEREST TO OTHER JUDGES YES / NO	
(3) REVISED YES / NO	
03/08/2017	
DATE	SIGNATURE

In the matter between

PAULINAH MOLELEKI

First Appellant

JOSEPH MOLELEKI

Second Appellant

JOHANNAH MOLELEKI

Third Appellant

ANGELINAH MOLELEKI

Fourth Appellant

And

FAR WEST DOLOMITIC WATER

ASSOCIATION

First Respondent

MERAFONG MUNICIPALITY

Second Respondent

Judgment

POSWA-LEROTHOLI AJ

Introduction

- [1] This is an appeal against the dismissal of an application for the rescission of judgment and orders granted in the Magistrate's Court, Merafong on 22 July 2015 for the eviction ("the eviction order") of the Applicants from the First Respondent's property known as Portion 72, 73, 115 Farm Wonderfontein, Carletonville, Gauteng ("the property").

Parties

- [2] The First Appellant is the widow of Mr Moleleki ("the deceased"). The deceased was employed by Mr Modibedi who leased the property from the First Respondent. The First Appellant is 69 years of age. The Second, Third and Fourth Appellants are the children of Mrs Moleleki. The First Respondent is Far West Dolomitic Water Association and the owner of the property on which the deceased was resident and working. The Second Respondent is Municipality in whose are of jurisdiction the property is situated.

The Grounds of Appeal

- [3] The Appellants basically rely on three grounds for the dismissal of the decision

of the court *a quo*:

- 3.1 They were not informed of their constitutional right to legal representation. Although the Appellants had informed the Magistrate that they could not afford legal representation, they were not informed of their right to access legal aid. The Appellants contend that the court's duty to explain the right to legal representation went beyond a cursory statement particularly in light of an application lodged under the wrong legislation.
- 3.2 There was no inquiry into whether the Appellants wished to conduct their own defence, they were presented with a *fait accompli* by the Magistrate which was to explain how they came to reside on the property, provide their personal circumstances and state the time line of their eviction from the farm. The Appellants did not consent to judgment.
- 3.3 The application should have been dealt with under Extension of Security of Tenure Act, 62 of 1997 ("ESTA") and not Prevention of the Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998 ("PIE"). as the Appellants are occupiers within the meaning of the ESTA.

Factual Background

- [4] The deceased, his wife children and nine minor grandchildren were resident on the property. He was employed by Modibedi and working on the property. He died in June 2003. The First Respondent purchased the property from the previous owner. The property was later leased out to one Mr Modibedi. Mr Modibedi defaulted on the payment of rent. He was subsequently evicted from

the property. Appellants continued residing on the property without interference.

[5] On the 12 June 2015, the First Respondent commenced proceedings in the Court a quo for the eviction of the Appellants from the property. The eviction proceedings were brought in terms of in terms of PIE. The Appellants, who were unrepresented, did not file papers in opposition of the application. Despite this Appellants attended court on the date set for the hearing of the application. The eviction order was granted with the consent of the Appellants.

[6] Except for the manuscript recordal of the proceedings of the 22 July 2015 by the Magistrate, there is no transcript of proceedings. It is alleged that the electronic recording apparatus malfunctioned on the day. According to the Magistrate's manuscript:

6.1 Each of the Appellants elected to conduct their own defence.

6.2 The Appellants stated that they do not oppose the eviction, but needed a time frame for eviction. The First Respondent objected to the Appellant's plea for an extension of time arguing that none of the Appellants fall within the category of the vulnerable persons sought to be protected and to whom considerations of extensions of time were extended. Moreover, the First Respondent argued, the Appellants had been aware of the proceedings for over two months but instead of vacating the property, they had chosen to stay on.

6.3 Each of the Appellants then presented their personal circumstances.

- [7] The version of the Appellants differs from that recorded in the manuscript of the of the Magistrate. They contend that the eviction order was granted on 22 July 2015 the first and final day on which the matter was heard. The Appellants were unrepresented on the day in question, no pleadings had been filed on their behalf. The Appellants were not advised of their right to *pro bono* legal representation they were simply informed that the eviction order would be granted, and they were permitted to make representations regarding the timeline for their eviction. In the final analysis, the Appellants agreed to the eviction.

Legal Representation

- [8] The main objection by the Appellants is that their right to legal representation were not fully explained to them. The Appellants contend that the availability of *pro bono* legal presentation, how to access such representation, and the possibility of postponing the matter in order to obtain legal representation was not explained to them. In the rescission judgment, the Magistrate merely acknowledges that the Appellants were unrepresented and notes the following with regard to legal representation-

"On the 22 July 2015, the application was brought before court and the Applicant was represented by Marianne Pretorius Attorney and all five Respondents appeared in person. The Magistrate then informed them of their legal right to presentation of which they indicated that they understood and they elected to conduct their own defenses. All 5 Respondents indicated they were not contesting the application they just wanted to argue the time frame of eviction."

- [9] The manuscripted notes, do not contain any mention of an explanation to the to the Appellants about their right to legal representation.
- [10] In the rescission judgment, the Magistrate reasoned that the explanation given to the Appellants during the eviction proceedings was adequate and complied with the constitutional requirements. The Magistrate seems to have misunderstood or underestimated the burden on the judicial officer when faced with an unrepresented litigant. The duty of a judicial officer to inform an unrepresented litigant of his rights is settled in our law. A string of decided authorities has held that to merely inform the Appellants of their right to legal representation falls woefully short of the constitutional imperative to protect the rights of the unrepresented respondent. The burden is heavier in matters concerning the protection of rights in sections 25(6) and 34 of the Constitution.
- [11] This duty includes the right to legal representation that is expressly stated and provided for in the conduct of criminal trials. In *Nkuzi Development Association v Government of the Republic of South Africa* 2002 (2) SA 733 (LCC) (“*Nkuzi*”) the court cited with approval the dictum of Goldstone J in *S v Radebe; S v Mbonani* 1988 (1) SA 191 (T) at 196F-J, that the duty on judicial officers to inform accused of their legal rights included the duty-

“...not only to be told of the right but he (the litigant) should be encouraged to exercise it. He should be given a reasonable time with in which to do so. He should also be informed in appropriate cases that he is entitled to apply to Legal Aid Board for assistance. A failure on the part of the judicial officer to do this, having regard to the circumstances of a

particular case, may result in an unfair trial in which there may well be a complete failure of justice."

- [12] Concluding that this line of reasoning must be extended to civil cases, the Court in *Nkuzi* stated-¹

"Once it is found that there is a right to legal representation at State expense in certain civil cases, I can conceive of no logical reason why a judicial officer should not inform the person appearing before him/her of that right, and how to exercise it. There is no logical basis for distinguishing between criminal and civil cases. The issues in civil matters are equally complex and the goals and procedures difficult to understand. Failure by a judicial officer to inform these litigants of their rights, how to exercise them and where to obtain assistance may result in a miscarriage of justice."

- [13] The rationale for the necessity of legal representation in eviction matters is based on the dire consequences of an eviction and the group of persons vulnerable to unfair evictions. Section 25(6) of the Constitution seeks to protect the rights of persons whose security of tenure of land is insecure as a result of past racially discriminatory laws or practices. The Labour Tenants Act and ESTA give effect to this constitutional imperative.

- [14] The plight of this vulnerable group in seeking to enforce their constitutionally guaranteed rights was aptly stated in *Nkuzi* –

¹ *Nkuzi* pages 736- 737 at para [11]

"...However, a very large number of the people for whose benefit the Labour Tenants Act and ESTA were enacted, do not enjoy that entitlement when their rights are infringed or threatened with infringement. This is so because they are overwhelmingly poor and vulnerable people with little or no formal education. When their tenure security is threatened, or infringed, they do not understand the documents initiating action or the processes to follow in order to defend their rights. On the other hand, they cannot afford the fees for a lawyer to represent them because of their poverty. As a result, they are quite often unable to defend or enforce their rights and their entitlement under the Constitution, the Labour Tenants Act and ESTA."

[15] The Appellants fall within this vulnerable group. It is therefore imperative that their rights are protected. The right to a fair trial enshrined in the Constitution is apposite. The Magistrate clearly misconstrued his duty to the unrepresented litigants.

[16] In *FHP Management (Pty) Ltd v Theron NO and another*.² Van Heerden J stated that the principle that in the absence of legal representation, the respondents will suffer "substantial injustice", set out in *Nkuzi Development Association*, applied with equal force in PIE matters-

"Although the Nkuzi case specifically concerned persons having a right of security of tenure in terms of the Extension of Security of Tenure Act 62 of 1997 and the Land Reform (Labour Tenants) Act 3 of 1996, similar reasoning to that followed in that case would also, in my view, apply to the "right" to legal aid at State expense of an unlawful occupier

² 2004 (3) SA 392 (C) at 402 B-C; See, in this regard, *Nkuzi Development Association v Government of the Republic of South Africa and another* 2002 (2) SA 733 (LCC) at para [12], read together with paras [3] – [6]. (Also reported at [2001] 4 All SA 460 (LCC) – Ed)

in terms of PIE, who is faced with eviction proceedings (see Kusa Kusa CC v Mbele 2003 (2) BCLR (LCC) at paras [4] et seq)."

Non- compliance with language rights

[17] It is not apparent from the manuscript, what language the proceedings were conducted in, whether there was an interpreter present; whether the respondents had waived their right for the provision of an interpreter. All in all, there is no mention of an interpreter on the record.

[18] Section 34 of the Constitution guarantees everyone the right to have any dispute resolved in a fair public hearing before a court of law, or where appropriate another partial or independent tribunal. A fair hearing would include the right to have the proceedings conducted in a language the litigants understands.

[19] In terms of section 35(3)(k) of the Constitution, the right to a fair trial includes the right –

"... to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language."

[20] In *S v Ngubane* 1995 1 BCLR 121 (T) at 122H, the court explained, the manner in which the interpretation should be conducted in order to give effect to the constitutional imperative.

"This provision is to be construed as meaning that the interpretation

should take place simultaneously with the testimony being given by the witnesses; it also presupposes and provides that the interpretation will be in a language which the accused fully understands and not into a language which he understands partially as was the case in the court a quo."

[21] In *Cape Killarney Property Investments (Pty) Ltd v Mahamba & Others* 2002 (2) SA 67 (C) a notice in terms of section 4(2) of PIE was successfully challenged on the basis that it was ineffective as it had not been explained in the language the respondents understood.

[22] The reasons for ensuring that the proceedings are conducted in a language the litigant understands cannot be overemphasised. In a scholarly article entitled *Receiving Justice in Your Own Language-The Need for Effective Court Interpreting in Our Multilingual Society* initially delivered by JM Hlophe, Judge President, Cape High Court at the University of Cape Town on 17 September 2003 and later published in the *Advocate* in April 2004.

"The court environment is intimidating and the language issue complicates matters. ...Every effort must be made to make the courts a less daunting place. Our courts must be more user-friendly in order to make justice accessible to the poor and vulnerable members of our communities."

[23] The failure by the Magistrate to note whether the language rights of the respondents were observed during the eviction proceedings is fatal to the eviction order as it calls into question whether a fair trial was conducted. It also raises the issue as to whether the Appellants understood the eviction order they apparently

consented to.

The absence of informed consent

[24] One of the reasons the Magistrate dismissed the application for rescission of judgment is that the Appellants had consented to the eviction order and that therefore could not, *post facto* seek the revocation thereof.

[25] The most recent case before the Constitutional Court, in which the duty of the court in eviction proceedings was considered is *Occupiers of Erven 87 & 88 Berea v De Wet NO and Another* (CCT108/16) [2017] ZACC 18 (8 June 2017) ("*Occupiers of Erven 87 & 88 Berea*"). Two issues arose similar to this matter, namely, whether a consent order absolved the court from its obligation to consider all relevant circumstances before ordering an eviction and whether an eviction order may be rescinded at the instance of occupiers who had purportedly consented thereto.

[26] Moloto AJ stated that in order for consent to be valid and legally binding, the person giving consent should do so "...*freely and voluntarily with the full knowledge of the rights being waived. It must be an informed consent.*"³ A consent order entails a waiver of rights.

[27] In determining whether there was informed consent it is imperative to examine the information available to the Appellants about the rights being waived, at the time consent was granted. There is no evidence that the proceedings were conducted in a language the Appellants understood, that the court considered all

³ *Occupiers of Erven 87 & 88 Berea* at para [32]

the relevant circumstances prior to eviction; no report by the local authority on availability of alternative accommodation; whether the eviction order was just and equitable. There is no evidence that any of these considerations were brought to the attention of the Appellants.

[28] In the circumstances, I am of the view that there was no informed consent and the absence of informed consent vitiates the consent order.⁴

[29] Section 26(1) of the Constitution provides that no one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions. Both ESTA and PIE give effect to this provision. Both statutes contain provisos that prohibit eviction unless it is “just and equitable” to do so and “having regard to all the relevant circumstances”.

[30] The fact that the Appellants did not oppose the eviction and merely sought to be given sufficient time to find alternative accommodation did not absolve the court from its duties. The legislation enjoins the court to form the opinion or satisfy itself that an order for eviction is just and equitable. In order to do so, the court must have regard to all the relevant circumstances.⁵

[31] The court failed to appreciate the extent of its obligations, it failed to make a determination on a crucial aspect of the enquiry, as a result, it failed to ask

⁴ *Occupiers of Erven 87 & 88 Berea at para [33]*

⁵ *Occupiers of Erven 87 & 88 Berea at para [54]*

whether the correct legislation had been invoked in the eviction proceedings but merely deferred to the party that was dominis litis. The Court failed to play its statutory prescribed role.

- [32] There was no informed consent on the part of the Appellants and therefore no legally binding agreement between the parties. The Magistrate failed to perform her constitutional and statutory duties to satisfy itself that the eviction would, nevertheless, be just and equitable after considering all the relevant circumstances.

PIE or ESTA

- [33] A major difference between PIE and ESTA is that-

33.1 PIE is concerned with the rights of unlawful occupiers, that is persons who had no consent tacit or otherwise from the owner or person in charge of the property to reside on the property;

33.2 ESTA on the other hand, is concerned with persons who are lawful occupiers with consent, on rural land at some stage or other had a right to reside on the land of another, derived from a legal right. And earning less than the prescribed minimum amount.

- [34] The First Respondent maintains that-

34.1 Although the property was previously a farm it is currently surrounded by a township and therefore no longer in a rural area as contemplated in ESTA. Consequently, the eviction is in terms of PIE.

34.2 The Appellants are unlawful occupiers on the farm due to the fact that their right to occupy the farm was terminated upon the death of the Mr Moleleki whereupon they became unlawful occupiers within the meaning of PIE;

34.3 The Appellants had no consent to reside on the property.

[35] With regard to the alleged rezoning; the First Respondent disputed that the property was in rural land, but in an urban setting as it was surrounded by a township. The First Respondent failed to support this contention with an official document to that effect.

[36] There is no evidence that the Magistrate considered the circumstances of residents on the property, he merely went along with the manner in which the First Respondent had framed the eviction application. The facts as presented by the Appellants clearly demonstrated that the eviction should have been dealt with in terms of ESTA and not PIE. The property in question is a farm, on rural land; the right of residence initially arose from employment; the Appellants had resided on the property for over 3 years thereby gaining independent rights to occupation. The Appellants were not in a position to advance this argument as they were unrepresented and not aware of the legal requirements. They merely consented to eviction without understanding what they were consenting to.

The requirements for rescission Rule 49 of Magistrates Court Rules

[37] Section 36 of the Magistrates Court Act No. 32 of 1944 makes provision for the rescission of judgment it provides:

- "(1) The court may, upon application by any person affected thereby, or, in cases falling under paragraph (c), *suo motu*—
- (a) *rescind or vary any judgment granted by it in the absence of the person against whom that judgment was granted;*
 - (b) *rescind or vary any judgment granted by it which was void ab origine or was obtained by fraud or by mistake common to the parties;*
 - (c) *correct patent errors in any judgment in respect of which no appeal is pending;*
 - (d) *rescind or vary any judgment in respect of which no appeal lies.*
- (2) *If a plaintiff in whose favour a default judgment has been granted has agreed in writing that the judgment be rescinded or varied, a court must rescind or vary such judgment on application by any person affected by it.*

[38] The consequences of an eviction order are dire as the respondent is placed in an invidious position of losing his right to shelter. The more intrusive the consequences of an order on the rights of a litigant, the more circumspect the judicial officer should be in ensuring that protecting the rights of an unrepresented litigant enshrined in section 25(6) of the Constitution which reads thus:

"A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress."

[39] The question has to be whether the grounds for rescission have been met in terms of the Magistrates Court Rule 49.

[40] The Appellants contend that the eviction order amounted to a default judgment by reason of the fact that it was void *ab origine*. They contend that in order to be successful in an application for default judgment, the applicant must prove an absence of wilfulness; a reasonable explanation for the default; prove applicant's bona fides; and a bona fide defence to the main application.

[41] The Appellants argue that the Magistrate erred in dealing with the merits of the eviction rather than the rescission application only. The irregularities pointed out above, constitute the absence of wilfulness as well as a reasonable explanation for the default. In the circumstances, the court is satisfied that the eviction order is void *ab origine* as pleaded by the Appellants.

Bona Fide Defence in ESTA

[42] The question that remains is whether the Appellants have a *bona fide* defence in ESTA. The court has already made a finding that the Appellants are occupiers within the meaning of ESTA and were accordingly entitled to the protections extended to occupiers in terms of ESTA.

[43] The Appellants explain that their right of residence is derived from the deceased husband of the First Respondent and father and grandfather to the rest of the appellants. He worked on the farm, employed by one Mr Modibedi whom they believed owned the property and earning R150 per month plus payment in kind of one bag of mealies as well as the informal dwelling on the property. This state

of affairs remained the same until Mr Modibedi left the property. Therefore, the right of residence of the Appellants arose from the deceased.

[44] Section 3(4) provides for tacit consent:

"For the purposes of civil proceedings, in terms of this Act a person who has continuously and openly resided on land for a period of one year shall be presumed to have consents unless the contrary is proved."

[45] Section 3(5) of ESTA is a deeming provision which provides even greater protection to persons who have resided on property for longer than three years, it reads-

"For purposes of civil proceedings in terms of this Act, a person who has continuously and openly resided on the land for a period of three years shall be deemed to have done so with the knowledge of the owner or person in charge."

[46] It is important to note that these provisions do not take into account the circumstances in which the right of residence arose but merely concern themselves with the length of time the person has resided on the property. The deceased passed away in July 2003. The Appellants continued to reside there after the death of Mr Moleleki without any interference.

[47] The Appellants derive their right of residence from consent as contemplated in section 3 of ESTA. Consequently, the termination of their right to occupy the farm shall be in accordance with section 8 of ESTA. The considerations relevant to

the termination of the right of residence cannot be determined by this Court, as this court does not have all the relevant factual information. However, at this juncture, it is sufficient to determine a *prima facie bona fide* defence. The First Appellant in particular, has resided on the property for more than 10 years, she is over 69 years old and there has been no allegation of a breach of duties as contemplated in section 10(1)(a), (b) or (c) by the First Respondent, which means her right to residence may not be terminated as she is entitled to protection in terms of section 8(4) of ESTA. With regards to the other Appellants, their continued residence may or may not be affected by the First Respondents right to family life, their state of health and all the considerations listed in section 8.

[48] With regard to the status of the Appellants' right of residence, the Magistrate cited with approval authorities in which it was held that persons whose right of residence emanated from their relationship with the labourer could only enforce their right against the labourer, not the owner of the property as the right to reside on the land was not a real right in the land. The right to reside on the property terminated according to the Magistrate, with the demise of the deceased and they become unlawful occupiers. However, I have already found that subsequent to the Appellants continued residence on the property for over 3 years, the deeming provision of section 3(4) was triggered, the Appellants resided on the property by consent. They became occupiers in their own right.

Order

[49] In the circumstances, I issue the following order:

1. The appeal is upheld with costs;

2. The order of the Magistrate dismissing the application for a rescission, is set aside and substituted with the following order:

- a. The application for a rescission is granted.
- b. The eviction order granted against the appellant on 22 July 2015 is rescinded.
- c. The Appellants are granted leave to defend the eviction application.
- d. The matter is remitted to the Magistrate to deal with the eviction application in terms of ESTA as pointed in this judgment.


S POSWA-LEROTHOLI

Acting Judge of the Land Claims Court

PP 
T M NCUBE

Acting Judge of the Land Claims Court