IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case number: 2022-000833
Date of hearing: 9 September 2022
Date delivered: 20 September 2022

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED

20/09/2022
DATE SIGNATURE

In the application between:

MAVUSO, SANDILE	First Applicant
ALL OCCUPANTS OF THE PROPERTY SITUATED AT UNIT NUMBER 1 GUSTIL, ON 181 BERTHA STREET, TURFONTEIN, JOHANNESBURG	Second Applicant

and

BOLLEURS, RICHARD GREGORY	First Respondent
BOLLEURS, RICHARD GREGORY N.O.	Second Respondent
CITY OF JOHANNESBURG METRO. MUNICIPALITY	Third Respondent

JUDGMENT

SWANEPOEL AJ:

[1] This matter came before me on an urgent basis. On 13 June 2022 Malindi J granted an eviction order against applicants, in respect of a property owned by respondents, and which had been occupied by applicants for a number of years. Applicants have launched a rescission application against the eviction order on the basis that it was allegedly erroneously sought and erroneously granted. Subsequent to the launching of the rescission application respondents executed the order, and evicted the applicants. They are now destitute and living on the streets. The exact nature of the relief sought in this application is important to understand, as it is dispositive of the case. Applicants pray as follows:

> "2. That the first and second respondents' conduct, of executing the eviction order on the face of a pending rescission application, is hereby declared unlawful.
>
> 3. That the possession, occupation, use, enjoyment and control of the immovable property described as Erf 550 Turfontein Township, Registration Division I.R. Province of Gauteng situated at number 181 Bertha Street, Unit 1

Gustill House, Turfontein, is hereby, with immediate effect, restored back to the applicants, pending the finalization of the pending rescission application. "

[2] It is also important to understand what this application is not about. It is not an application to stay the eviction order, as applicant's counsel expressly conceded at the hearing of the matter. Applicant's counsel argued the matter on the basis that the filing of the rescission application automatically suspended the execution of the order by virtue of the provisions of rule 49 (1 1) of the Uniform Rules. Applicant therefore argues that the execution of the order, in the face of the rescission application, was unlawful, and that applicant and his family should be allowed to return to the premises. In its heads of argument applicant says the following:

"The Honourable Court will, with respect, be referred to the provisions of rule 49 (11) of the Rules of Court, which rule provides as follows: -

"where an appeal has been noted or an application for leave to appeal or to rescind, correct, review or vary an order of court has been made, the operation and execution of the order in question shall be suspended pending the decision of such appeal or application, unless the court which [gave] such order, on the application of a party, otherwise directs. "

[3] Applicant relies on the judgment of Khoza and Others v Body Corporate Ella Court [1] to substantiate its argument that the order was automatically stayed. In Khoza Notshe AJ considered the judgment in United Reflective Converters v Levine[2] in which the court had held that rule 49 (11) was of no force and effect insofar as it related to rescission applications. Notshe AJ held that United Reflective had been incorrectly decided, and he declined to follow the judgment. The Court also made the following obiter dictum:

> "Even if the aforesaid rule were to be held to be a substantive rule I would still been obliged (sic) to consider whether the common law substantive rule as it stands should not have been developed and extended to avoid irreparable prejudice to an applicant for a rescission of judgment"

[4] In Erstwhile Tenants of Williston Court and Another v Lewray Investments (Pty) Ltd (Pty) Ltd and Another[3] Meyer J raised his doubts as to the correctness of Khoza. Nevertheless, Khoza was decided on an interpretation of rule 49 (11), and did not hold that the common law should be developed to provide for an automatic stay where there is a rescission application. It is therefore distinguishable from this matter.

[5] The problem that applicants face is simple: rule 49 (11) was repealed by Government Notice R 317 on 17 April 2015. That being said,

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[1] [2008] ZAGPHC
[2] 1988 (4) SA 460 (W)
[3] 2016 (6) SA 466 (GJ)

the entire edifice of the application crumbles. I have expressly not been asked to stay the order. I have also not been asked to consider whether the common law should be developed in such a manner that it allows for the

automatic stay of an order where there is a rescission application pending. The case that respondents were asked to meet was simply that the eviction order was already suspended by virtue of rule 49 (1 1), which is obviously not the case.

[6] Applicants have argued that Malindi J granted the eviction order in error as he did not have sufficient information to determine whether the eviction would be just and equitable as is required by section 4 (7) of the PIE Act.[1] That may be so, but that unfortunately does not assist their case before me. I cannot find for the applicants given the relief sought, and on the basis that the application was brought before me,

[7] That, however, is not the end of the matter. Section 26 (1) of the Constitution enshrines the right to access to adequate housing:

> "26 (1) Everyone has the right to have access to adequate housing.
> "

[8] Section 26 (2) provides that the state must take reasonable legislative and other measures, within its available resources, to achieve the realization of the abovementioned right.

[9] Section 28 (1) of the Constitution relates to the rights of children, which includes the right to shelter, and to be protected from maltreatment, neglect, abuse or degradation. Section 28 (2) lays down the principle that a child's best interests are paramount in every matter concerning the child.

[10] In this case at least one of the applicant's children (there are two major children who are studying) is a minor, being 12 years old and in Grade 6. The entire family is now living on the streets. t cannot, as upper guardian of minor children, close my eyes to the devastating effect the

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1 The Prevention of Illegal Eviction from, and Unlawful Occupation of Land Act, 1998

eviction has had on the family, but no doubt especially on the minor child.

[11] In Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC) the Constitutional Court considered the obligation of the State, including that of local authorities, to provide access to housing to a desperately poor community, and shelter to children in terms of section 28. The Court said:

> "But section 26 is not the only provision relevant to a decision as to whether state action at any particular level of government is reasonable and consistent with the Constitution. The proposition that rights are interrelated and are all equally important is not merely a theoretical postulate. The concept has immense human and practical significance in a society founded on human dignity, equality and freedom. It is fundamental to an evaluation of the reasonableness of state action that account be taken of the inherent dignity of human beings. The Constitution will be worth infinitely less than its paper if the reasonableness of state action concerned with housing is determined without regard to the fundamental constitutional value of human dignity. Section 26, read in the context of the Bill of Rights as a whole, must mean that the respondents have a right to reasonable action by the state in all circumstances and with particular regard to human dignity. In short, I emphasise that human beings are required to be treated as human beings. This is the backdrop against which

the conduct of the respondents towards the appellants must be seen. "5

[121 And further.

"Neither section 26 nor section 28 entitles the respondents to claim shelter or housing immediately upon demand. The High Court order ought therefore not to have been made. However, section 26 does oblige the state to devise and implement a coherent, coordinated programme designed to meet its section 26 obligations.

The programme that has been adopted and was in force in the Cape Metro at the time that this application was brought, fell short of the obligations imposed upon the state by section 26(2) in that it failed to provide for any form ofreliefto those desperately in need of access to housing. '6

[13] Having found that there is no right, in terms of section 26 and 28 of the Constitution to demand immediate shelter, the Court nevertheless made the following order:

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[5] At para 83

[6] At para 93

"(a) Section 26(2) of the Constitution requires the state to devise and implement within its available resources a comprehensive and coordinated programme progressively to realise the right of access to adequate housing.

(b) The programme must include reasonable measures such as, but not necessarily limited to, those contemplated in the Accelerated Managed Land Settlement Programme, to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations. "

[14] The eviction application was served on the City of Johannesburg on 18 January 2022. The application was heard, and the eviction order was granted, on 13 June 2022. Unfortunately, the City chose not to participate in the matter, and there was no evidence before the court hearing the eviction application as to alternative accommodation that may have been available to the applicant and his family.

[151 Grootboom held that applicant may not be entitled to emergency shelter, but that the State must set plans in motion to assist such persons. I believe that it is thus important, especially given the fact that one of the persons left homeless by the eviction is a child, that the City should state what plans it has in place for such emergency situations, and whether it can render assistance to the applicant and his family.

[16] Consequently, I ma eth foll •ng order:

16.1] The s all furnish a report to the Court by 23 September 2022 on the availability of emergency accommodation wherein applicant and his family may be accommodated.

[16.2] The application is postponed to 26 September 2022 for finalization.

[16.3] Applicant shall serve this judgment at the office of the Chief Law Officer of the City of Johannesburg by 16hOO on 20 September 2022.

SWANEPOEL AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION OF THE HIGH COURT, JOHANNESBURG

NJ Belcher Attorneys

Adv. T Mkhize

SSLR Inc.

9 September 2022

20 September 2022