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

Case number: 2023-091850

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

....
SIGNATURE DATE

In the matter between:

JEMINA NAKELI **1ST APPLICANT**
UNLAWFUL OCCUPIERS OF ERF 85 JN HOFMEYER TOWNSHIP, REGISTRATION DIVISION I.R, PROVICE OF GAUTENG **2ND APPLICANT**

And

MONAMA ENOS SELLO **1ST RESPONDENT**
CITY OF JOHANNESBURG **2ND RESPONDENT**

Delivered: This judgment was prepared and authored by the Judge whose name is reflected herein and is handed down electronically and by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for handing down is deemed to be 22 September 2023.

JUDGMENT

PHAHLAMOHLAKA AJ

INTRODUCTION

[1] The applicants launched an urgent spoliation application seeking an order that their eviction be declared unlawful, and that they be restored back into the first applicant's property, pending the determination of Part B of their application.

[2] I made an order that the matter be heard on urgent basis and consequently the parties argued the matter on the merits.

BACKGROUND FACTS

[3] On the *6th of September 2023* the Sheriff of the court executed a court order, granted by Senyatsi J sitting in this division. The court order authorised the Sheriff or his deputy to do all things necessary to evict the applicants from the first respondent's property if the applicants failed to vacate the property on or before *31 December 2022*.

[4] In 2019 the applicants were served by registered owner with the notice to vacate the property. The applicants aver that at the time, although in possession of notice to vacate, none of them could vacate because they simply had nowhere to vacate to.

[5] The first respondent approached the court and sought an eviction order which was grated by Senyatsi J on *12 October 2022*. The following order was made by Senyatsi J:

> " 1*. the first respondent, or any person occupying the property through the first respondent, is evicted from the property ERF 85 JAN HOFMEYER TOWNSHIP, REGISTRATION DIVISION I.R., PROVINCE OF GAUTENG("the property")*
>
> *2. the first respondent or anyone occupying the property through them is ordered to vacate the property on or before 31 December 2022.*
>
> *3. in the event the first respondent, or anyone occupying the property through the first respondent, fails to vacate the property within the aforesaid period, the Sheriff or his deputy is authorised to do all things necessary to give effect to orders 1 and 2 above."*

[6] The applicants admitted in their founding affidavit that they failed to vacate the property by the *31st of Deceber 2022* as ordered by the court per Senyatsi J.

APPLICABLE LAW

[7] Spoliation is the wrongful deprivation of another person's right. In order for the applicant to succeed the applicant must prove the enjoyment of free and undisturbed possession. In spoliation applications the lawfulness of the possession of the applicant for the spoliation order is irrelevant. Therefore, spoliation remedy protects peaceful and undisturbed possession against unlawful evictions.

[8] In ***Ngqukumba v Minister of Safety and Security***[1]**,** the Constitutional Court held as follows:

> *"21. Self-help is so repugnant to our constitutional values that where it has been resorted to in despoiling someone, it must be urged before any inquiry into the lawfulness of the possession of the preson despoiled."*

APPLICANT'S SUBMISSIONS

[9] Counsel for the applicants commenced his address by submitting that the applicants seek an order declaring the eviction order granted by this court unlawfully. Counsel further submitted that the applicants sought an order staying the eviction of the applicants pending Part B of the applicant's application. The 'eviction order granted by this court' is the order granted by Senayatsi J.

[10] On paragraph 16 and 18 of the founding affidavit the applicants make the following averments:

> "*16. This is a spoliation application pending the determination of Part B wherein we ask for orders that our eviction be declared unlawful, that we be restored back into the property.*
>
> *18. We are further advised that to succeed in spoliation proceedings and be granted any of the prayers we pray for , we will have to show that we were in peaceful and undisturbed occupation of the property and that our occupation has been disturbed unlawfully."*

[11] Counsel for the applicants referred me to *section 26(3) of the Constitution*[2] which provides that no one may be evicted from their home or have their home demolished, without an order of court made after considering all relevant circumstances.

[1] 2014 (5) SA 112 (CC)
[2] Act 108 ot 2006

[12] The applicants' case is therefore that of spoliation as pleaded in the founding affidavit. Counsel for the applicants argued that the order by Senyatsi J did not have a date on which the Sheriff was supposed to evict the applicants and therefore the order did not comply with *section 4(8) of the Prevention of Illegal Eviction from Unlawful Occupation of Land Act(PIE Act)*[3]

FIRST RESPONDENT'S SUBMISSIONS

[13] Counsel for the first respondent argued that Senyatsi J granted an order evicting the applicants from the first respondent's property. The order of Senyatsi J provided that in the event the applicants failed to vacate the property by the prescribed date, the Sheriff is authorised to do everything in their power to evict the applicants.

[14] It was submitted on behalf of the first respondent that the only duty the first respondent owed to the applicant was not to evict them without a proper court order. The founding affidavit was deposed to by the first applicant who avers that she was employed but she does not disclose any other information. She does not say what her earnings are.

[15] The first respondent further contented impossibility of performance as a point *in limine*. It was argued that the structures were demolished after the applcants were lawfully evicted by the Sherrif. The second point in limine raised by the first respondent was that of a non-joinder, contending that the Sheiff could have been joined in the proceedings. Consel for the first respondent, however, did not raise these points *in limine*, but rather proceeded to raise those points in his main agument.

[16] In his answering affidavit the first respondent avers that[4] " *the applicants on their own version received notices from 2019. They received the eviction application ,but due to 'lack of funds' could n't instruct a lawyer. The applicants' attorneys of record approached my attorneys of record in December 2022 intimating rescission application. They have been aware of the eviction from as far back as the notices and the December period. I was present at the eviction and the Sheriff had all the documentation necessary and further presented same to the applicants. Multitutes of notices and service was done which the applicants merely ignored, seemingly to see how far it would go."*

[3] Act 19 of 1998
[4] Paragraph 33 of the first respondent's answering affidavit

[17] In respect of the second respondent, the first respondent made the following averments[5]:

> *" The second respondent has at all times been aware of the situation at the property, dating back to 2021 when I had a meeting with Heads of Department."*

SECOND RESPONDENT'S SUBMISSIONS

[18] The second respondent correctly made submissions only in relation to alternative accommodation. Counsel for the second respondent raised a technical issue in the notice of motion where mention is made of the 'third respondent.' The relevant prayer in the notice of motion reads as follows:

> "4. *Alternative to prayers 2 and 3, compelling the Third Respondent to immediately provide Emergency Alternative Accomodation to the first Applicants from its housing stock or from housing stocks in private ownership"*

[19] Counsel for the second respondent argued that the second respondent accepts its obligation to provide alternative accommodation in cases of need, but there is a qualification criteria. Counsel argued that the applicants provided very little information of themselves in the founding affidavit. For example, the deponent of the founding affidavit only says she is employed but she does not disclose what her earnigs are.

[20] The second respondent further contended that it would be able to provide alternative accommodation in six weeks and only after investigations shall have been conducted regarding the status of the those who qualify.

ANALYSIS

[21] The applicants approached the court on an urgent basis with a spoliation application. In order to succeed the applicants must prove that they were in peaceful and undisturbed possession and that they were unlawfully deprived of that possession.

[22] In my view although the applicants content that they were in peaceful and undisturbed possession, they were not unlawfully evicted because the Sheriff was executing a court order.

[23] The Constitutional Court in ***Ngqukumba***[6] further held that; "*The essence of the madament van spolie is the restoration before all else of unlawfully deprived possession*

[5] Paragraph 36 of the first respondent's answering affidavit
[6] Supra-paragraph 10

to the possessor. It finds expression in the maxim spoliatus ante omnia restituendus est *(the despoiled person must be restored to possession before all). The spoliation order is meant to prevent the taking of possession otherwise than in accordance with the law. Its underlying philosophy is that no one should resort to self-help to obtain or regain possession. The main purpose of the mandament van spolie is to preserve public order by restraining persons from taking the law into their own hands and by inducing them to follow due process."*

[24] *In casu,* the first respondent followed due process and did not resort to sef-help to evict the applicants. The first respondent obtained a court order and still gave the applicants indulgence after obtaining the court order. The court order is clear and unambiguous in that it provided that if the applicants failed to vacate the property by the date provided for in the court order, the Sheriff is given authority to do everything in their power to give effect to the order.

[25] Counsel for the applicants conceded that the Sheriff was executing a court order and because the Sheriff is the Sheriff of the court, he does not have auothority to question whether the order is fair or not. It would be illogical to expect the Sheriff or the first respondent to go back to court and inquire whether the court order should be executed even though the order of the court is very clear.

[26] The constitution protects all citizes, including the first respondent who did everything by the book to rid the applicants out of his propery. It is clear that the applicants were not prepared to vacate the first respondent's property even though they were served with a court order. After they were served with the eviction order the applicants approached the attorneys who telephoned the first respondent's attorneys of record intimating that they were going to rescind Judge Senyatsi's order. This never happened.

[27] To show that the applicants are playing a game, they only filed an application for leave to appeal the order of Senyatsi J after serving the current application. The application is hopelessly out of time although the applicants have a right to apply for condonation for late filing.

[28] The applicants did not dispute the second respondent's contention that the notice of motion is defective, nor did the applicants counter the contention that they, applicants, shared very little information regarding the personal circumstance of those who were evicted. In fact, the applicants blamed the second respondent for not taking a proactive step. In my view the applicants have failed to make out a case for the relief sought against the second respondent too.

CONCLUSION

[29] I am of the view that the applicants have failed to make out a case for the relief sought in the notice of motion. The applicants failed to show that they were unlawfully evicted by the Sheriff. The applicants should have appealed or rescinded the eviction order if they were aggrieved by it.

[30] I agree with counsel for the second respondent that the applicants provided little information regarding their personal circumstances. The first applicant only avers that she is employed but she does not disclose her earnings. It is not unreasonable for the second respondent to do investigations into the personal circumstances of those who seek alternative accommodation, and it is incumbent upon the applicants to provide the relevant information.

[31] The applicants have not made out a proper and convincing case for the relief sought in the notice of motion and therefore their application stands to fail.

COSTS

[32] On the issue of costs the first respondent is asking for punitive costs order on the basis that the application is just an abuse of the court process. On the other hand counsel for the applicants submitted that the applicants are indigent and if I find against them I should not make a costs order against them. It is trite that the award of costs is within the discretion of the court. In my view costs must follow the results. The second respondent has not argued costs and therefore it is only appropriate not to make any costs orded in respect of the second respondent.

ORDER

[33] In the circumstances I make the following order:

(a) The matter is heard on an urgent basis in terms of Rule 6(12) of the Uniform Rules of Court.

(b) The applicants are ordered to pay the first respondent’s costs.

KGANKI PHAHLAMOHLAKA

ACTING JUDGE OF THE HIGH COURT

JUDGMENT RESERVED ON: 15 SEPTEMBER 2023

DELIVERED ON: 22 SEPTEMBER 2023

COUNSEL FOR APPLICANTS: MR T NKOSI

INSTRUCTED BY: SERI LAW CLINIC

COUNSEL FOR 1ST RESPONDENT: ADV NS NXUMALO

INSTRUCTED BY: MATOJANE MALUNGANA INC.

COUNSEL FOR 2ND RESPONDENT: ADV MUTENGA

INSTRUCTED BY: KOIKANYANG INC.