

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2018/43335

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

[6 December 2022]

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SIGNATURE

In the matter between:

NTHABISILE TSHABALALA	First Applicant
ADMIRE NKULUBE	Second Applicant
PHUMZILE LIZZIE NKOSI	Third Applicant
MARIE BALOYI	Fourth Applicant
MATEU SITEO	Fifth Applicant
JOIYE JOSE FUMO	Sixth Applicant
CINDY MOTSEPA	Seventh Applicant
KGADI VIRGINIA MBEDZI	Eighth Applicant
THAMSANGA NGULUBE	Ninth Applicant
and	
AZTOGGRAPH	Respondent

JUDGMENT

MUDAU, J:

[1] The Applicants instituted this urgent application, in terms of which the applicants are seeking a *mandament van spolie* relief, following what they contend to be an unlawful eviction stemming from an eviction order in terms of section 4(8) of the Prevention of Illegal Eviction and Unlawful Occupation of Land Act, ("PIE").¹ The court order is the subject of an application for condonation for the late filing of the application for leave to appeal. The Respondent opposes the application.

[2] After hearing the application on 17 November 2022, I reserved judgment, but ordered in relevant parts as follows:

"3: Pending the determination of the reserved judgment ... the City of Johannesburg is ordered to provide the applicants with temporary emergency accommodation, provided that they qualify for same. 4. The Gauteng Department of Social Development is ordered to work in collaboration with the City of Johannesburg in investigating the personal circumstances of the applicants in order to determine who it may accommodate and to provide social welfare assistance. [And para 6], The City of Johannesburg and the Gauteng Department of Social Development respectively, are to file reports stating reasons within seven (7) days of service hereof if they are unable to continue complying with para 3 and 4 of the Court Order."

There were no such reports filed.

[3] The facts are not complex. On 20 August 2021, this Court as indicated (per Bezuidenhout AJ), granted an eviction order against the applicants. In terms of the court order, the applicants were to vacate, within 30 calendar days, Luna Heights, 48 Op de Bergen Street, Corner Market, Fairview, Johannesburg, more specifically known as Erven 245, 246, 247 and 248, Fairview Township, Registration Division IR, Gauteng ("the Property").

[4] On 27 September 2022, which is a period over 1 year from the date of the court order, the applicants filed an application for leave to appeal, together with a condonation application. Subsequently, on 15 November 2022, the respondent

¹ Act 19 of 1998.

executed the court order against the applicants. Consequently, the applicants were duly evicted from the property.

- [5] The applicants contend that the court order relied on had been suspended by filing of an application for leave to appeal in terms of the rules 49(1)(b) and 27 of the Uniform Rules. The relevant subrule, 49 (1)(b), reads as follows:

“When leave to appeal is required and it has not been requested at the time of the judgment or order, application for such leave shall be made and the grounds therefor shall be furnished within fifteen days after the date of the order appealed against: Provided that when the reasons or the full reasons for the court's order are given on a later date than the date of the order, such application may be made within fifteen days after such later date: Provided further that the court may, upon good cause shown, extend the aforementioned periods of fifteen days”.

Subrule 49 (1)(b) is peremptory. Subrule 27(3) provides that, “[t]he court may, on good cause shown, condone any non-compliance with these rules”.

- [6] Based on the principles espoused in the judgments of *Panayiotou v Shoprite Checkers (Pty) Ltd and Others*² and *Myeni v Organisation Undoing Tax Abuse and Another*,³ in cases dealing with petitions to the Supreme Court of Appeal (“the SCA”), the respondent contends that the court order remains effective and is operative up until the applicants’ condonation application is dealt with by the Court.

- [7] Section 18 of the Superior Courts Act 10 of 2013 deals with the conditions necessary for a judgment of the High Court to be suspended pending an application for leave to appeal:

“(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.

² 2016 (3) SA 110 (GJ).

³ [2021] ZAGPPHC 56.

- (2) Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.
- (3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.
- (4) If a court orders otherwise, as contemplated in subsection (1)-
 - (i) the court must immediately record its reasons for doing so;
 - (ii) the aggrieved party has an automatic right of appeal to the next highest court;
 - (iii) the court hearing such an appeal must deal with it as a matter of extreme urgency; and
 - (iv) such order will be automatically suspended, pending the outcome of such appeal.
- (5) For the purposes of subsections (1) and (2), a decision becomes the subject of an application for leave to appeal or of an appeal, as soon as an application for leave to appeal or a notice of appeal is lodged with the registrar in terms of the rules.”

[8] In *Panayiotou*, this court per Sutherland J (as he then was) was emphatic in finding that, “the inherent logic of the position is unassailable. It can be tested by asking what were to happen if many months or years were to pass before an application for condonation is lodged. It is untenable that upon the service of a condonation application the judgment would then be suspended”.

[9] The applicants contend that, Rule 6(8) of the SCA Rules deals with a failure to comply and it says that such failure would result in the application lapsing, which deeming provision is absent in Rule 49(1)(b) of the Uniform Rules. The applicants contend that the cases referred to above and relied upon by the respondent are clearly distinguishable in substance and context. The applicants contend that the drafters of Rule 49(1)(b) of the High Court did not prescribe the lapsing of an appeal for failure to file an application for leave to appeal in the High Court and that they chose not to have such regime in Rule 49(1)(b).

[10] In my view, the application must fail because the very premise upon which it is founded is misconceived. Rule 49(1)(b), as indicated, is prescriptive and the text emphasises that the application for leave to appeal shall be made and the grounds therefore shall be furnished within fifteen days after the date of the order appealed against and that the court may, upon good cause shown, extend the aforementioned period of fifteen days. This is, as contemplated in Rule 27(3), relied upon by the applicants. [My emphasis].

[11] The criticism levelled against Rule 49(1)(b) and the alleged *lacuna* is without any basis. I have not been referred to any other case law in that regard. With the application for leave to appeal having lapsed, accordingly, all that is pending before the Court at present is an application for condonation as well as the application for leave to appeal, whose fate remains uncertain.

[12] This application is misconceived because the applicants had an option, in time, to invoke Rule 45A of the Uniform Rules, which provides: “[t]he court may, on application, suspend the operation and execution of any order for such period as it may deem fit: Provided that in the case of appeal, such suspension is in compliance with section 18 of the Act”. This they failed to do. It is common cause that the history of the eviction dispute has been ongoing for at least five years.

[13] The pending application for condonation has no impact on the court order. The respondent is entitled to exercise its rights in terms of the court order. The applicants were evicted pursuant to an order as contemplated in section 26(3) of the Constitution. To be ordered that they should allow the applicants to resume occupation of the property and wait until a condonation application is disposed of, which may be many months from now, is simply not equitable and inherently unjust. Accordingly, the application falls to be dismissed. There is no reason why the question of costs should not follow the result.

Order

[14] The application is dismissed with costs.

APPEARANCES

For the Applicant: Adv L Moela
Instructed by: Sithi and Thabela Attorneys

For the Respondents: Adv. V Qithi
Instructed by: VMW Attorneys

Date of Hearing: 17 November 2022
Date of Judgment: 6 December 2022