REPUBLIC OF SOUTH AFRICA

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

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

27 May 2022 .....
DATE
SIGNATURE

CASE NO: 2021/36326

In the matter between:

TSHEPO TAWANA Applicant/Appellant

and

TUPA 2012(PTY) LTD Defendant

JUDGMENT

MIA, J

[1] This is an appeal against the judgment and order handed down on 5 August 2021 in the urgent court. I shall refer to the parties as they appeared in the application. The applicant appeals on the grounds that the court misdirected itself in finding that the applicant had not made out a case for spoliation. The respondent opposed the application.

[2] In the application for leave to appeal the applicant raised ten main grounds of appeal and then raised a further approximately fifty

grounds of appeal in which it is averred that the court erred on the facts and in law. The applicant had applied for a spoliation order in the High Court as well as certain relief against the attorney dealing with an eviction application in terms of the Prevention of Illegal Eviction from Unlawful Occupation of Land Act, 19 of 1998 (PIE). The application in terms of PIE was proceeding in the Magistrates' Court. The court dismissed the spoliation application as well as the application for contempt against the attorney and a person known only as Mary.

[3] Counsel for the applicant submitted that spoliation was a robust application and the requirements were that the applicant be in peaceful undisturbed possession. He averred further that the applicant was deprived unlawfully of possession. In his view the court erred in that it did not distinguish between the PIE application and the spoliation application. He submitted further that whilst the applicant, his wife and the children were not at the property, the applicant did not relinquish possession of the premises. In this regard he relied on the decision of the court in *Denmar Trading BK and others v Corporation Retail S.E. (Pty) Ltd* [2008] 1 All SA 47 (C). The headnote in the *Denmar* matter reads as follows:

> "In terms of a franchise agreement, the respondent was permitted to operate a string of convenience stores. The franchise agreement allowed the respondent to sub-franchise the stores.
>
> One such sub-franchise agreement was entered into with the second applicant, who nominated the first applicant as the contracting party in her stead. The agreement provided for the first applicant's lease of the shop as a going concern for an initial 2-year period.
>
> Before the expiry of that period, the respondent cancelled the agreement on the grounds that the applicants had failed to maintain the standards, quality, cleanliness stock levels and to make timeous payments as per the agreement. Pursuant to the notice of cancellation being served, the respondent took control of the applicant's shop.
>
> The applicants sought the urgent restoration of possession to them of their business, alleging that they had been in peaceful and undisturbed possession thereof when the respondent unlawfully deprived them of such possession. That version was countered by

> the respondent's contention that the applicants voluntarily surrendered possession of the premises to it, and were accordingly not unlawfully deprived of possession thereof.

[4] Counsel submitted that whilst the application in the present matwasr as not urgent in the sense that someone was dying, it semi-urgent such that it could come to court on the following day after giving notice to the respondent. He argued further that the present matter was similar to the *Denmar* case, in that the applicant was locked out on 21 July 2022 and it was a spoliation matter where the applicant was unlawfully deprived of the possession of the premises. Counsel reiterated that the applicant's case was that he was in occupation of the premises and had not vacated the premises as contended by the respondent. He noted that the applicant's children were residing with their grandmother. A fact that emanated from the bar which was not evident from the papers was that the applicant's wife was also residing with the children at their grandmother's home. This did not appear in the founding affidavit.

[5] In relation to the application, he submitted that the respondents were obliged to follow the letter of the law literally as well as figuratively. The letter that the applicant received from the respondent's attorney did not take the matter any further in his view and required no further response than the applicant had furnished. He submitted that the applicant had to seek legal advice and made a distinction between the PIE application which was pending in the Magistrates' Court and the spoliation application. This explained why the applicant did not indicate in his reply to the respondent's attorney's correspondence that he was indeed still residing in the premises when requested to move the remaining items in the apartment.

[6] He submitted further there was no indication when the section 4(2)

notice was served in relation to the PIE proceedings in the Magistrates' Court. He did not address the sheriff's return of service as he did not have it in his brief. Once he had sight of it he submitted that the initial non-service was not an indication that the premises were vacant. Counsel submitted that the building was not usually locked as the door's locking mechanism is defective. In support of his contention that the applicant was occupying the premises counsel pointed out that there were goods were in the premises. Moreover, he submitted this court had a particular duty to forge new tools as indicated in the matter of *Fose v Minister of Safety and Security* [1998] JOL 1364 CC at [69] where the Court stated that

"….Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to "forge new tools" and shape innovative remedies, if needs be, to achieve this goal."

[7] He submitted furthermore, that the matter in the Magistrate's Court had a long history which dated back to March 2022 after which the matter died a natural death only to be revived. In any event, the matter was not pursued in the Magistrates' Court subsequent to the spoliation application. He indicated that the contempt of court proceedings would be pursued against Mr Berman and Mary in the Magistrates Court as that was the appropriate forum to do so. He did not confirm that this was an intention to abandon this ground in the leave to appeal, rather he indicated that the applicant would stand by the grounds of appeal in this court and was intent on proceeding in the Magistrates' Court on a contempt of court application. He was of the view that the contempt of court against the parties mentioned in the application was best pursued in the Magistrates' Court but pointed out that he stood by all the points raised in the applicant's application for leave to appeal and the heads of argument.

[8] Counsel for the respondent submitted that the applicant was not correct if he indicated he was not proceeding with the aspect of contempt of court on appeal but was nonetheless requesting leave to appeal in respect of the leg. There was no reference to contempt in the application for leave to appeal and neither was there a case made out in the founding affidavit of the applicant in the urgent application. There were no facts that supported a finding of contempt as submitted. This appeared to be only an issue that the applicant was obsessed with throughout the proceedings without having alluded to any facts in support thereof.

[9] Counsel for the respondent submitted furthermore, that the *Denmar* case was only persuasive and was distinguishable. Although it related to spoliation the facts were distinguishable in that the facts of that matter related to a franchise where the franchisee and the franchisor were in dispute about the onsite control of the business. In the present matter, the facts differed in that the Sheriff's return of service in the eviction matter indicated that the premises were vacated. The return of service was never challenged by the applicant. He also submitted that the Sheriff was never joined in the spoliation proceedings. There was never an explanation regarding the applicant's wife's whereabouts at the time of service given the Sheriff served the notice after hours. Whilst the children were at their grandmother's home, the applicant did not indicate in the founding affidavit why his spouse was not at the premises at a time when one would expect her to be home from work.

[10] He argued that the test on appeal in terms of section 17(1)(a)(i) of the Superior Courts Act codified the common law and amplified the test. It did so by elevating the proper and long-established test in an application for leave to appeal by inserting the word "would" when considering the prospects of success in the appeal. He referred to the decision in *Acting National Director of Public Prosecutions and Others v Democratic Alliance In Re: Democratic Alliance v Acting National*

Director of Public Prosecutions and Others (19577/09) [2016] ZAGPPHC 489 (24 June 2016) where the Court found at paragraph [25]:

"The Superior Courts Act has raised the bar for granting leave to appeal in *Mont Chevaux Trust (IT 2012/28) v Tina Goosen* and 18 others, Bertelsman J held as follows:

'*It is clear that the threshold for granting leave to appeal against the judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, see Van Heerden v Cronwright & Others 1985 (2) SA 342 (T) at 343H. The use of the word "would" in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against*' "

[11] In relation to the present matter, he contended that not only is the test amplified but that in applying the test the court must consider whether there is a sound rational basis for coming to its conclusion. In this regard he referred to the decision of the Supreme Court of Appeal in *Four Wheel Drive Accessory Distributors CC v Rattan NO* 2019(3) SA 451 at 436F where the Court found:

"There is a further principle that the court a quo seems to have overlooked — leave to appeal should be granted only when there is 'a sound, rational basis for the conclusion that there are prospects of success on appeal'.

[12] He submitted that the result of this court's order was the subject of the appeal not only the reasons and criticisms of the judgment. In applying the test to the present matter he argued that the applicant did not meet the elevated test required in s 17(1)(a)(i). Moreover, he continued the applicant's grounds of appeal did not demonstrate that the appeal would have a reasonable prospect of success and that

there was no rational basis for the conclusion that there were prospects of success on appeal on the facts.

[13] Having regard to the submissions of both counsel, I am grateful to both counsel for the heads of argument and the submissions which inform my reasons.

[14] Counsel for the applicant focussed on the main grounds regarding the spoliation and stood by the notice and heads of argument in the matter. In view of the applicant standing by all issues raised, I will address the tenth main ground before addressing the remainder of the issues raised by the applicant. The applicant averred that the court erred in correcting its own judgment and suggested that the court approbated and reprobated its earlier judgment after it was *functus officio.* The general rule is that a judgment once given is final. The court is *functus officio* and the judgment cannot be supplemented or amended. The court does however have the inherent competence to correct clerical errors in its judgments and orders. The court may also amend or supplement a pronounced judgment provided the sense or substance is not thereby affected.[1] There was no indication how the court had changed the judgment as suggested in the appeal. This point does not appear to have merit in light of what appears above.

[15] On the remaining issues, counsel indicated from the bar, on the day the leave to appeal was argued, for the first time that the applicant's wife was residing with the children at their grandmother on the day the Sheriff served the notice. There was no response to the question during the urgent proceedings. The founding affidavit was silent on this issue. I accept the applicant sought advice regarding the PIE application in the Magistrates' Court and the spoliation application in

[1] *S v Wells* 1990 (1) SA 816 (A); *Mostert NO v Old Mutual Life Assurance Co (SA) Ltd* [2002] 2 All SA 101 (A), 2002 (1) SA 82 (SCA); *University of Witwatersrand Law Clinic v Minister of Home Affairs and Others* [2007] ZACC 8, 2008 (1) SA 447 (CC).

the High Court. On the question of urgency, the courts have been clear regarding which matters belong in the urgent court. This view has been illuminated by Notshe AJ said in *East Rock Trading 7* (*Pty*) *Ltd and another v Eagle Valley Granite* (*Pty*) *Ltd and others* (11/33767) [2011] ZAGPJHC 196 (23 September 2011) in paragraphs 6 and 7 [reported at [2012] JOL 28244 (GSJ) - Ed] as follows:

"[6] The import thereof is that the procedure set out in rule 6(12) is not there for taking. An applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the Applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course. The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in an application in due course. The rules allow the court to come to the assistance of a litigant because if the latter were to wait for the normal course laid down by the rules it will not obtain substantial redress.

[7] It is important to note that the rules require absence of substantial redress. This is not equivalent to the irreparable harm that is required before the granting of an interim relief. It is something less. He may still obtain redress in an application in due course but it may not be substantial. Whether an applicant will not be able obtain substantial redress in an application in due course will be determined by the facts of each case. An applicant must make out his case in that regard."

[16] This view was echoed by Wepener J in " *In Re: Several matters on the urgent roll* 18 September [2012] 4 All SA 570 GSJ. The applicant did not indicate either in the urgent application nor in the appeal that

the applicant would not be afforded substantial redress in due course. The PIE application was pending in the Magistrates Court there was no indication that he was denied access to what was remaining of his belongings in the property. The reference to property on the applicant's version was to a few named items such as a particular file that related to a dispute between the parties and some of the children's educational items which appeared to be left behind rather than referring to a list of items suggesting occupation of the premises such as furnishing, clothing, and items necessary for daily living.

[17] The applicant did not make out a case on urgency or indicate that he was in peaceful undisturbed possession to enable the court to grant an order for spoliation. The test that the applicant had to meet was the higher test that there was a sound rational basis for coming to the conclusion that another court would reach a different conclusion. Where the applicant did not provide evidence that he was in possession in light of the Sheriff's return. The applicant did not dispute his vacating the premises either in correspondence to the attorney. On the contempt issue, there was no evidence in the founding affidavit and there is even less clarity now. The applicant appears to be pursuing the matter in a different forum and is not abandoning the point in the leave to appeal application despite not having made out a case. There appears to be no rational basis for coming to this conclusion.

[18] Counsel for the applicant conceded that the first time the issue was raised the application was brought to this court initially on an *ex parte* basis and struck off the roll correctly. The suggestion by the applicant avers that perjury was used to usurp the power of both courts, the Magistrates' Court as well as the High Court and that the court should have found in his favour is not based on any evidence placed before this court and thus does appear to be rational.

[19] I am not persuaded that another court is likely to come to a different conclusion on the issues raised by the applicant in the application for leave to appeal. I am therefore of the view that there are no reasonable prospects that another court would come to different conclusions, be they on aspects of fact or law, to the ones reached by this court. The appeal does not, in my view, have a reasonable prospect of success. Leave to appeal is therefore be refused.

[20] In the circumstances, I make the following order:

ORDER

1. The applicant's application for leave to appeal is dismissed with costs

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S C MIA
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances:

On behalf of the Applicant/Appellant	: Adv. ETL Matshaba
Instructed by	: Tawana Attorneys
On behalf of the Respondent	: Adv L Peter
Instructed by	: Vermaak Marshall Attorneys
Date of hearing	: 19 May 2022
Date of judgment	: 27 May 2022