

REPUBLIC OF SOUTH AFRICA



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

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

3/10/2022
DATE

SIGNATURE

CASE NUMBER: 45483/18

In the matter between:

ALL OCCUPIERS OF 1 WILLOW PLACE, KELVIN, SANDTON

Appellant

and

K2016498847 SA (PTY) LTD

Respondent

JUDGMENT

DOSIO J:

INTRODUCTION

[1] This is an application for leave to appeal in respect to my judgment dated 18 July 2022.

[2] The appellant was the second respondent in the eviction application and the respondent was the applicant.

[3] On 12 September 2022, my secretary sent an email to all parties informing them that the

matter was set down for hearing on 16 September 2022 at 9h00 in Court 4D. This correspondence was sent to the email address josjoey1@gmail.com. On 12 September 2022, the notice of set down was uploaded by the appeals clerk, Ms Catharina Thomas, however, the notice of set down reflected the e-mail address joyjoey@gmail.com. The matter stood down until

10h15. Various calls were made to the Ms Smith, representing the appellant, on 16 September 2022, by my secretary, as well as the respondent's counsel, to no avail. There was no appearance

for the appellant on 16 September 2022. In order not to prejudice the appellant, the matter was removed from the roll and I requested that a new notice of set down be sent to the appellant for 28 September 2022, and that the notice of set down reflect the correct e-mail address, namely, josjoey1@gmail.com.

[4] On 28 September at 10h00, the appellant was once again absent. Various calls were made by my secretary and the respondent's counsel to the cell number of Ms Smith, to no avail. The respondent handed up proof of service of the notice of set down on the appellant for the date

28 September 2022. Service was effected on 19 September 2022, by the sheriff on the appellant.

The notice of set down was accepted by Magauta Charity Njovu ('Ms Njovu'), who was the first respondent in the eviction application.

[5] The matter was called at 10h00 on 28 September 2022. The only party present was the respondent's counsel. There was no appearance for the appellant. The leave to appeal proceeded in the absence of the appellant.

[6] It is important to note that the first respondent in the eviction application, namely, Ms Njovu, who was absent on both 3 and 4 May 2022 and against whom judgment was granted, is not cited as an appellant in these proceedings.

[7] In considering whether to grant leave to appeal, section 17 of the Superior Courts Act 10

of 2019 ('Superior Courts Act') states that:

'(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that-

(a) (i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;

(b) The decision sought on appeal does not fall within the ambit of section 16 (2) (a); and

(c) Where the decision sought to be appealed does not dispose of all the issues in the case,

the appeal would lead to a just and prompt resolution of the real issues between the parties.' [my emphasis]

[8] Uniform Rule 49(1)(b) was not complied with, as the leave to appeal was not filed within

15 days of the order being granted. Due to the appellant's failure to seek condonation, the appeal

should be dismissed on this ground alone. However, in order not to prolong this matter any further, the leave to appeal was considered in the appellant's absence.

[10] The first issue raised by the appellant at paragraph 1.3 is that it was unable to obtain the transcripts. This matter was finalised on 18 July 2022 and there is no logical explanation afforded by the appellant why to date the transcripts for 3 May and 4 May 2022 have not been obtained.

[11] The second issue raised by the appellant at paragraph 1.4 is that there is a glaring discrepancy between the purported eviction order and the purported judgment, in that the eviction order is granted by the Hon. Judge Mabesele and the judgment is delivered by the Hon. Judge Dosio. The judgment dated 18 July 2022 was delivered by myself and the typed judgment, which has been uploaded to CaseLines correctly reflects this.

[12] The appellant has raised 20 grounds for leave to appeal.

[13] The first ground for leave to appeal is that:

'His Lordship erred by granting an order for the eviction of the appellants from the property whilst not considering the fact that the first respondent in the eviction application (being MAGAUTA CHARITY NJOVU and the only respondent in the eviction application cited by name) has an existing registered mortgage bond over the property, (being a liquidated document that to date remains unpaid and has not been cancelled) that still encumbers the property as stated in para 8.3 of first Respondents AA & para 8.4 of the second Respondents answering affidavit and therefore who was legally in possession of the said property in terms clause 4 of the Mortgage Bond. Given that in terms of sections 57 of Deeds Registries Act, 1937, the Respondent was substituted as the *debtor* upon registration of transfer.'

[14] As regards this first ground, after the application for a postponement was denied on 3 May 2022, Ms Smith (who represented the appellant) left the Court without the Court's permission. Accordingly, the matter proceeded in her absence. As a result, no submissions were made in respect to a mortgage bond. The property has been transferred into the name of the respondent and the title deed reflects the respondent's details. As a consequence, the respondent holds full title over the property.

[15] Although there is a pending application by Ms Njovu to set aside the alleged fraudulent sequestration order, it still has not been done. This Court dealt with the *Oudekraal*¹ principle in its judgment, which states that an invalid administrative action may not simply be ignored, but may be valid and effectual and may continue to have legal consequence until set aside by proper process. The legal consequence is that the respondent is still the owner of the property and the appellant is unlawfully occupying the property.

[16] The appellant relies on s57(3) of the Deeds Registries Act 47 of 1937 ('Act 47 of 1937'), however, Ms Smith removed herself from the proceedings on 3 May 2022 and this aspect was not addressed.

[17] Section 57 of Act 47 of 1937 deals with the substitution of a debtor in respect of a bond. It states that:

'(1) If the owner (in this section referred to as the transferor) of land which is hypothecated under a registered mortgage bond other than a mortgaged bond to secure the obligations of a surety (not being a person referred to in paragraph (b) of subsection (1) of section fifty-six) transfers to another person the whole of the land hypothecated thereunder, and has not reserved any real right in such land, the registrar may, notwithstanding the provisions of subsection (1) of the said section, register the transfer and substitute the transferee for the transferor as debtor in respect of the bond: Provided that there is produced to him, in duplicate, the written consent in the prescribed form of the holder of the bond and

¹ Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2004 (6) SA 222 (SCA)

the transferee to the substitution of the transferee for the transferor as the debtor in respect of the bond for the amount of the debt disclosed therein or for a lesser amount.

[Sub-s. (1) amended by s. 27 (a) of Act 43 of 1957 and by s. 24 (a) and (b) of Act 43 of 1962.]

(2) In registering the transfer in terms of subsection (1) the registrar shall-

- (a) endorse upon the deed of transfer that the land has been transferred subject to the bond;
- (b) endorse upon the bond that the transferee has been substituted for the transferor as debtor; and
- (c) make such consequential entries in the registry records as he may deem necessary.

[Sub-s. (2) amended by s. 24 (c) of Act 43 of 1962 and by s. 7 of Act 92 of 1978 and substituted by s. 16 (a) of Act 27 of 1982.]

(3) As from the date of the transfer deed the transferor shall be absolved from any obligation secured by the bond and the transferee shall be substituted for him as the debtor in respect of such bond and shall be bound by the terms thereof in the same manner as if he had himself passed the bond and had renounced therein the benefit of all relevant exceptions and, if the bond is a bond to secure future debts, the immovable property thereby mortgaged will secure any further or future advances which are made by the mortgagee of the bond to the transferee.'

[18] Section 57(3) cannot be read in isolation, as s57(1) and (2) of Act 47 of 1937 set out the requirements under which a transferee can be substituted for a debtor. These requirements were not met in the matter *in casu*.

[19] The second ground for leave to appeal is that:

'His Lordship erred and in light of the preceding paragraph 1, for not finding that the Respondents eviction application is/was akin to a *debtor* evicting a *secured creditor* for the purpose of circumventing the payment of the debt and/or a mechanism advertently employed to fraudulently dispose the property to a third innocent party and thereafter absconding with the proceeds of the sale.'

As regards the second ground, this Court has dealt with the fact that the alleged fraudulent sequestration order and transfer of the property has to date not been set aside, accordingly, there is no order of Court stating that the sequestration or transfer were fraudulent.

There is no basis in law under which a secured creditor cannot be evicted due to the fact that they hold a debt over the debtor.

[20] The third ground for leave to appeal is that:

'His Lordship erred in failing to take into account the issue of the fraudulent Court order that purportedly granted Hon. Majavu AJ and that was prepared and uploaded by the Respondent's representative namely Attorney "*Ms Tanya Stanley* and that triggered the Respondent's abusive process that lead to all the purported premature hearings and alleged Judgments/Orders. The aforesated fraudulent Court order formed the genesis of the problematic, premature and irregular set downs by the Respondent in an

attempt to circumvent the proper, procedural and fair hearings of the main eviction application before this Honourable Court; and for which a variation and/or rescission application had been launched.'

The respondent's counsel argued that he was in court on that day and the application was heard on Microsoft Teams. The main eviction application was set down for hearing but it was not ripe for hearing as heads of argument had not been filed. In addition, Ms Smith who appeared on behalf of the appellant stated they were not ready to proceed with the matter as Hope Nhlanhla was ill. Acting Judge Majavu accordingly removed the matter. The point raised by the appellant has no merit, as no other court would find that a mere removal of the matter would affect the outcome of the main eviction hearing.

[21] The fourth ground of leave to appeal is that:

'His Lordship erred in failing to take into account that a further rescission application dated 14 April 2022 had been launched by the Appellants/Applicants that remains pending an extant, as a result of all the further premature, abusive irregular and unprocedural set downs by the Respondent.'

This aspect was dealt with extensively in my judgment. There is little prospect that another Court will come to a different conclusion.

[22] The fifth ground of leave of leave to appeal is that:

'His Lordship erred in failing to take into account that the Respondent's alleged counsel (*Mr. Tyron Lautre*) had not proved that he was a duly admitted Advocate as his capacity to represent had been raised and objected to and an application made to that effect and that the application had not been finalized as a rescission application remained pending.'

This aspect has been dealt with by Willis AJ on 10 August 2021. The appellant persists with this meritless accusation that Mr Lautre is not a duly admitted advocate. No Court will reach a different decision, especially since Advocate Lautre has provided proof on multiple occasions that he is a dully appointed advocate.

[23] The sixth ground for leave to appeal is that:

'His Lordship erred in failing to consider and give due emphasis to the Appellants pending applications in terms of Rule 6(5)(g), Rule 35(13), Rule 42&Rule30 dated 05 March 2021 that remains pending extant and that had not been adjudicated at the time of the hearing and were not adjudicated at the hearing.'

This was dealt with in the Court's judgment and also by Willis AJ. These applications were not considered as they were not brought on notice of motion. The appellant cannot hide behind the fact that they are unrepresented as every other interlocutory application has been brought in the correct format, so they are well versed as to how an application should be done. Even if the Court were to have considered them, it would not take the matter any further as they were further delaying tactics. All the documents requested in the Rule 35(13) application, according to the respondent's counsel, were provided.

[24] The seventh ground for leave to appeal is that:

'His Lordship erred in not making a final decision in the absence of all the Appellants and by refusing to postpone the matter and grant an opportunity to one of the Appellants to submit the merits of the Notice in terms Rule 30 and 30A dated 28th April 2022, and/or make an application thereof, that complained of the premature, abusive and irregular set down, having been delivered to the Respondent and the submissions therein having been presented during the hearing alerting the Hon. Court as to the premature set down and the reasons of prematurity and why the matter could not fairly proceed for a final hearing on the day.'

The appellants were given every opportunity to present their case. The postponement of a matter set down for hearing on a particular date cannot be claimed as a right. A postponement will not be granted unless the Court is satisfied that it is in the interests of justice to do so. The reason for the refusal was provided to Ms Smith, before she abruptly left the Court and it was reiterated in my judgment. After the postponement was denied, judgment was not granted by default, the defences were considered extensively. Due to Court time the matter commenced on 3 May 2022 and continued on 4 May 2022. On 4 May 2022, Ms Smith was once again absent. There is no reason afforded by the appellant why another Court would interfere with this Court's discretion to refuse a postponement.

[25] There is a pattern exhibited by the appellant to set applications down and once it reaches the door of the Court, they either disappear or don't appear at all, which is evident once again from the failure of the appellant to appear in Court on the day this leave to appeal was heard.

There is no prospect that another Court, having heard the grounds for the postponement, would find that the application for postponement was unfairly denied. In considering the merits of the application for eviction, there is no basis in law why the eviction should be refused.

[26] The eighth ground for leave to appeal is that:

'His Lordship erred in his examination of Rule 49 (11) and Section 18 of the Superior Courts Act and Common law quoted due to the fact they are all with reference to an order that has already been granted and is being rescinded and the effects thereof. *In casu* the issue before the Hon. Judge was whether or not to proceed with the main eviction application *ex-facie* the pending rescission application that could affect and possibly dismiss the main eviction application. It was remiss for the Hon. Judge to proceed with the main matter regardless of and in disregard of the pending rescission applications.'

This Court questioned the appellant why they had taken no steps to set aside the sequestration order since 2021, whereupon the only reason given by Ms Smith was that heads of argument needed to still be drafted and that this exercise is technical in nature. Having considered all the technical points taken by the appellant, which were complex in nature, in comparison, the drafting of heads of argument, in respect to the rescission of the sequestration order would have been far easier and more useful to the appellant. As stated *supra*, to date this still has not been done. As a result, the respondent is the lawful owner and is entitled to the eviction order. There is also no Court order stating that the eviction application should be stayed pending the eviction being granted. All these aspects have been dealt with in the judgment and there is little prospect that another Court would reach a different conclusion.

[27] The ninth ground for leave to appeal is that:

'His Lordship continues in paragraphs 40-47 of the Judgment on the same trajectory wherein he adjudicates on the effect of a rescission on a Court order that is granted, whereas at the time of hearing he had not granted the eviction Court order. The rescission application against the Court order of the Hon. Willis AJ (stated in paragraph 2 above and that was not before him for hearing) affected the hearing of the main matter which he was ceased with, in that he would be making a final decision in circumstances whereby a different Court might arrive at a different decision regarding the issues and merits in the pending rescission application and thus rendering the premature hearing of the eviction application, a nullity.'

This Court did consider what the effect of the rescission would be. The interlocutory applications heard by Willis AJ were not of a final nature. There is little chance that another Court would come to a different decision as regards the interlocutory applications and the judgment of Willis AJ, where he dismissed the interlocutory applications. None of the interlocutory applications had merit as they were brought in terms of the incorrect rules and the requested documents, according to the respondent's counsel had already been provided. There is nothing set out by the appellant why a different Court would come to a different conclusion, they merely state that a different Court would arrive at a different conclusion. The appellants are

in effect seeking a second, third and fourth bite at the cherry by constantly attempting to revive abusive interlocutory applications which have been dismissed.

[28] The tenth ground for leave to appeal is that:

‘His Lordship erred in paragraph 35(2) of Judgment in that he accepts pre-emptive submissions from the bar by the Respondent’s Counsel (which are copy pasted word for word in the purported Judgment) concerning the implications or effect of a rescission on Court order that is granted prior to the Hon.Judge granting the order for eviction and/or without been presented with or having an opportunity to dissect the merits with finality.’

The submissions heard from the bar were legal submissions which an advocate is entitled to make and which a Court may take cognisance of.

[29] The eleventh ground for leave to appeal is that:

‘His Lordship erred in failing to give due emphasis to the key legal principle “*ille qui dicit probat* “ and that the *onus probandi* rested on the Respondent as the Applicant in the application, in that he failed to consider and attach the necessary weight to the Appellants notices to produce, because had he done so, he would have realised that the submissions by the Respondent’s alleged Counsel (*Mr. Tyron Lautre*) from the bar were largely false and that the Respondent could not prove any of the allegations, documents and the events, given the fact that to date they remained unanswered.’

The notice to produce was filed after the judgment was granted and after the respondent had filed its heads. It was therefore after the fact.

[30] The twelfth ground for leave to appeal is that:

‘His Lordship erred in proceeding to hear the eviction application in circumstances a pending application for rescission under case number 3146/2017 of this Hon. Court launched as result of fraudulently obtained sequestration order that gave rise to the alleged registered ownership of the immovable property and wherein in the application *inter alia* a stay of the eviction proceedings is sought pending finalisation of that application.’

This Court dealt with this issue in the judgment. No Court has ever pronounced on the setting aside of the sequestration order or transfer of the property. The appellants have had years to set this aside, but to date have failed to do this.

[31] The thirteenth ground for leave to appeal is that:

'His Lordship erred in paragraph 13-33 of Judgment by unnecessarily attaching a lot of weight and relying on the same alleged findings and decisions for which rescissions are being sought against and whose determinations to date remain pending and that were not before him for adjudication and for which in paras 14, 15, 21,24 etc he claimed the matters had already adjudicated upon by other Judges.'

Other Judges have indeed decided on these matters as there are Court orders to this effect and this Court can take note of them. This Court fails to see how another Court would reach a different conclusion. There is an extensive judgment written by Willis AJ dealing with the appellant's conduct in these proceedings. The chances of a different Court coming to a different conclusion are negligible.

[32] The fourteenth ground for leave to appeal is that:

'His Lordship erred in paragraphs 9 and 60 of Judgment in finding that the Applicant is losing money as a result of repairs to the property and outstanding rates and incurred loss of income in the absence of any evidence having been tendered in the Respondent's papers but such only premised on the false testimonies at the bar by the Respondent's alleged Counsel (*Mr. Tyron Lautre*) in paragraph 24 of his short supplementary heads of arguments.'

This is incorrect as evidence for the loss of income is set out at paragraph 34 of the founding affidavit. This in itself is also not a ground for the appellants to avoid being evicted. Even if another Court were to find, which it wouldn't, that there is prejudice being suffered by the respondent because they are losing income, that is not a ground for the appellants to escape an order for eviction. There are accordingly no grounds for prospects of success on this ground.

[33] The fifteenth ground for leave to appeal is that:

'His Lordship erred in paragraph 10 of his Judgment in finding that the Respondents have instituted a damages claim against the Applicants when in fact there is none and/or none exists.'

The respondent's counsel is adamant that Ms Njovu has issued summons against the respondent in the Gauteng Division, Pretoria under case number 10996/2022. Irrespective of this, this aspect does not take the matter any further and it is not a ground for leave to appeal against the order of eviction granted by this Court.

[34] The sixteenth ground for leave to appeal is that:

'His Lordship erred in paragraphs 60 & 68 of the Judgment in finding that a purported application by the Johannesburg Municipality that was launched by the Respondent and ostensibly by the Johannesburg

Municipality for which the Municipality has not prosecuted for many years, if the Hon. Judge had applied the same logic of long delay of prosecuting matters as he had applied in paragraph 10 & 66 of the Judgment is to be regarded. Notably the alleged application has not been prosecuted by the Municipality since the First Respondent (in the main eviction application) challenged the authority of the Municipality's alleged representative in the purported application in the year 2019'

This is a completely different matter and does not take the eviction matter anywhere. The municipality has taken action against the respondents for unpaid rates and taxes and this does not affect the order of eviction granted by this Court.

[35] The seventeenth ground for leave to appeal is that:

'His Lordship erred in paragraph 16 of his Judgment in finding that there was an application filed by the First Respondent (in the main eviction application) under case number **30412/2019** for the rescission and setting aside of the order placing the deceased estate under sequestration, when in fact the referred case number is under **Gauteng Division Pretoria** wherein the First Respondent only seeks documentation in possession of her previous attorney (being "Amina Bibi Rajah a.k.a Amina Bibi Rahman") , who at the time doubled as the Respondent's attorney'

The reference to the wrong case number is merely a typographical error and does not take this matter anywhere. This is not a ground for appeal and it does not affect the merits of the matter in anyway.

[36] The eighteenth ground for leave to appeal is that:

'His Lordship erred in paragraph 61 of his Judgment in finding that the Respondent saw that the property was for sale and purchased it. The Respondent contradicts itself in the papers as to whom it purchased the property from and the Hon. Judge would have picked that upon a fair and unbiased examination of submissions made by the Appellants as regards the genesis of the orchestrated fraud that led to the Respondent's registered ownership of the property.'

Whether the respondent was introduced by an agent or saw the property for sale, is of no import, because at the end of the day the property was transferred to the respondent who accordingly is the registered owner and entitled to an eviction. The circumstances surrounding why that came to be are completely irrelevant. These are facts that should have been brought by the appellant in the application to set aside the sequestration order and the transfer of the property, which to date it has failed to do.

[37] The nineteenth ground for leave to appeal is that:

'His Lordship erred in paragraph 62 of his Judgment wherein he willingly and blindly flows with the Respondent's submissions (even when they are out rightly false) regarding the relationship between the 1st Respondent in the main eviction application (being Magauta Charity Njovu) and one of the 2nd Respondent (being Hope Nhlanhla). An unbiased analysis of submissions by the 1st & 2nd Respondents would have erased the need for unfounded assumptions given that Mr. Hope Nhlanhla in para 8.2 of 2nd Respondent's answering affidavit clearly refers to the 1st Respondent as his mother however in par 9.2 of the 1st Respondent of her answering affidavit she refers to the executor of the deceased estate as her "step son".

This Court has dealt with this aspect in the judgment. The appellant's submissions were considered by this Court and they were afforded the opportunity to appear before this Court. Whether or not Mr Nhlanhla is the son or step son of Ms Njovu, it does not matter, as all the occupiers are in unlawful occupation of the property and the respondent is entitled to evict them. Even if another Court had to find there was a relationship between Ms Njovu and Mr Nhlanhla, it does not take the matter any further.

[38] The twentieth ground for leave to appeal is that:

'His Lordship erred in paragraph 34(3) of his Judgment in finding that the telephone number was gotten from an unknown Registrar of this Hon. Court in circumstances no such Registrar had testified to that effect however he. The Appellants/Applicants clearly demonstrated their concerns in their notices and letters which the Hon Judge clearly ignored. The inference to be drawn is that his Lordship proceeded to make a finding for the purposes of affording the Respondent or its representatives a plausible explanation as to how the telephone number had been gotten and was overzealously and hell-bent on protecting the Respondent or its alleged legal representatives at all costs and/or he was openly biased, unjust and unfair towards the Appellants and was unjustifiably in favour of the Respondent and/or the Judgment was prepared by the Respondent or its alleged representatives.'

This aspect was dealt with in the judgment of Willis AJ as well as in the judgment of this Court. The respondent's counsel once again stated that Willis AJ asked the appellant to whom the number belonged, which prompted Ms Smith to leave the proceedings without providing an answer. This does not take the matter anywhere. It does not affect the merits of the matter and cannot be raised as a ground of appeal.

[39] In the matter of *The Mont Chevaux Trust v Tina Goosen & 18 Others*², the Court held that the threshold for granting leave to appeal against a judgment of the High Court has been raised. The former test, whether to grant leave to appeal should be granted, was a reasonable

² *The Mont Chevaux Trust v Tina Goosen & 18 Others* 2014 JDR 2325 (LCC) at para [6]

prospect that another Court might come to a different decision. The current usage of the word 'would' in s17(1)(a) of the Superior Courts Act implies that there must be a measure of certainty that another Court will differ from the Court whose judgment is sought to be appealed against.

[40] In the matter of *S v Smith*³, the Supreme Court of Appeal stated that:

'What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must in other words, be sound, rational basis for the conclusion that there are prospects of success on appeal.'⁴

[41] Having considered the twenty grounds for leave to appeal raised by the appellant, this Court finds that none of the grounds raised are convincing that there is a prospect of success on appeal. The appellants are in unlawful occupation and have managed to delay their eviction for years.

[42] In the premises the following order is made

1. Leave to appeal is dismissed with costs.

D DOSIO
JUDGE OF THE HIGH COURT

This judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 03 October 2022

Date of hearing:	28 September 2022
Date of Judgment:	03 October 2022

Appearances:

On behalf of the appellant:	Absent
On behalf of the respondent:	Adv. T. Lautre
Instructed by:	Sithatu and Stanley Attorneys

³ *S v Smith* 2012 (1) SACRT 567 (SCA) 570

⁴ *Ibid* para [7]