

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

Case Number: 35743/23A

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
_____	_____
DATE	SIGNATURE

In the matter between:

ANTS LIQUOR STORE

First Applicant

ANTHEA RABIE

Second Applicant

and

NHLANHLUA EUGENE MTHETHWA

Respondent

JUDGMENT

C BESTER AJ:**Introduction**

[1] On Friday 18 August 2023, the applicants approached this Court on an urgent basis to stay the execution of the order of Magistrate Mthembu handed down

on 30 March 2023 in the Magistrates Court for the District of Johannesburg Central under case number 19948/2021.

- [2] The first applicant conducts business as a liquor store and the second applicant says that she depends on the business as her only source of income.
- [3] The learned magistrate ordered that the applicants vacate the premises situated at no. 160. Bellavista Road, Turf Club, Johannesburg within fourteen days, failing which the Sheriff was authorised to take the necessary steps to execute the order.
- [4] The application arises from the fact that on 18 August 2023, the Sheriff notified the attorneys of the applicants of his intention to immediately commence with the execution of the order of the Magistrates Court of 30 March 2023.

The Issue

- [5] The central issue concerns the first applicants' entitlement to a stay of execution in circumstances where they have failed to prosecute their appeal brought against the judgment and order of the learned magistrate following the delivery of a notice of appeal on 19 April 2023.
- [6] The notice is styled as a notice in terms of Rule 49 but since appeals from the Magistrates Court are brought in terms of Rule 50 of the Uniform Rules of Court, I will treat the notice as one delivered in terms of Rule 50 for purposes of this application.¹
- [7] While the papers were admittedly prepared under some pressure, and did not represent a modicum of clarity, I deem it necessary to first consider the status of the appeal since for so long as a valid appeal remains pending, the successful party in the Magistrates Court is not entitled to enjoy the fruits that come with the execution of a judgment granted in its favour, unless it takes steps in terms of section 78 of the Magistrates Court Act 32 of 1944 for the

¹ An appeal must be *noted* within the time period provided in Rule 51 of the Magistrates Court Rules but is prosecuted in the High Court within the time period and in the manner set out in Rule 50 of the Uniform Rules of Court. See Erasmus **Superior Court Practice** RS 21, 2023, D1-687.

judgment to be carried into execution. It is common cause on the papers that the respondent has not invoked section 78.

- [8] Although the respondent argued that the application was one of self-created urgency, I intend to immediately proceed to deal with the merits of the application since it is evident that the application is stillborn at a substantive level. To strike the matter for lack of urgency in these circumstances will only result in the return of the application to this Court on a later date, occasioning a waste of scarce judicial resources that can be avoided by disposing of the application once and for all on its merits.

Discussion & Analysis

- [9] At common law the general rule is that the execution of a judgment is automatically suspended pending the noting of an appeal with the consequence that until the finalisation of the appeal, the judgment cannot be carried into effect.² The reason is to prevent irreparable damage to a losing party pending the outcome of the appeal if the judgment is put into motion under a warrant or by execution of the judgment.³

- [10] After the noting of an appeal, a party is obliged to prosecute its appeal to finality within the time periods prescribed in Rule 50(1) of the Uniform Rules of Court which provides as follows:

“An appeal to the Court against the decision of a Magistrate in a civil matter shall be prosecuted within 60 days after the noting of such appeal, and unless so prosecuted it shall be deemed to have lapsed.”

- [11] Prosecuting the appeal means making a written application to the Registrar on notice to all parties for a date for the hearing of the appeal in terms of Rule 50(4).⁴ The sixty-day time-period referred to in Rule 50(1) was extended to 14 weeks in terms of Rule 6(1) of the Rules Regulating the Conduct of Proceedings in the Gauteng Division of the High (“*the Gauteng Rules*”).⁵

² **Sabena Belgian World Airlines v Ver Elst** 1981 (1) SA 1235 (W) at 1236H; **Rentecor (Pty) Ltd v Rheeder and Berman NNO** 1988 (4) SA 469 (T) at 503E–504C; **Schoeman v Nedbank Ltd** 1989 (4) SA 812 (W) at 815D-816C.

³ **Reid v Godart** 1938 AD 511 at 513; **Kalahari Salt Works (Pty) Ltd v Bonne Fortune Beleggings Bpk** 1973 (4) SA 471 (NC) at 477A.

⁴ **Hall v Van Tonder** 1980 (1) SA 908 (C) at 910.

⁵ Rule 6(1) of the Gauteng Rules.

- [12] Where the appeal is not prosecuted within the time-period prescribed, Rule 50(1) provides that the appeal shall be deemed to have lapsed. This is also the position in terms of Rule 50(9) of the Magistrates Court Rules which enjoins a party noting an appeal to prosecute the appeal within such time as may be prescribed by rule of the court of appeal and, failing which, the appeal shall be deemed to have lapsed, unless the court of appeal sees fit to make an order to the contrary.
- [13] Where an appeal has lapsed, there is no legal impediment to the implementation of the judgment and successful party is entitled to execute the judgment in its favour.
- [14] This is so because there can be no continued suspension of an order in the absence of a valid appeal and not even the subsequent delivery of condonation application will suspend a judgment in respect of an appeal that has already lapsed.⁶
- [15] In the present instance, the applicants noted an appeal on 19 April 2023 but have taken no further steps to prosecute the appeal because of the costs of the Magistrates Court proceedings which they say rendered them unable to take the next step in the litigation.
- [16] The appeal therefore lapsed on 3 August 2023 by the latest as a result of the failure of the applicants to make written application to the Registrar for a date for the hearing of the appeal in terms of Rule 50(4).
- [17] The second applicant explains this on the basis that she had instructed their attorneys not to take any further steps aimed at advancing the appeal until she could raise the funds to do so.
- [18] There is no attempt made in the founding affidavit to explain what steps the applicants have undertaken, if any, to raise the funds to prosecute the appeal in the intervening months since the noting of the appeal.

⁶ See **Panayiotou v Shoprite Checkers (Pty) Ltd and Other** 2016 (3) SA 110 (GJ) per Sutherland J (as he then was) at 115A-B.

- [19] In the absence of a more fulsome explanation, the Court is left with the distinct impression that the applicants have simply adopted a supine attitude to the matter and now approach this Court well after the appeal has already lapsed.
- [20] In light of the fact that the appeal has lapsed, the applicants can therefore not rely on a pending appeal to avoid the execution of the order and were obliged to make out a case on the basis for a stay of execution in terms of the general principles that inform applications of this nature.
- [21] Relief of this kind is not simply there for the asking, lest the effective functioning of the administration of justice be frustrated by aggrieved litigants relying on spurious, if not opportunistic grounds that bring an orderly execution process to a grinding halt so as to delay the inevitable finality that must come with all litigation.
- [22] I can do no better than quote from the judgment of De Villiers AJ in **BP Southern Africa (Pty) Ltd v Mega Burst Oils and Fuels (Pty) Ltd and Another; BP Southern Africa (Pty) Ltd v ZA Petroleum and Another** 2022 (1) SA 162 (GJ) at paragraph 25 where it was held as follows:
- “A litigant with an enforceable judgment is entitled to payment, and only in rare cases would be delayed in that process. In my view there may be exceptional cases where a court would still exercise a discretion to prevent an injustice in staying execution.”
- [23] As I show below, the applicants have failed to satisfy the Court that they are entitled to a stay of the learned magistrate’s order.
- [24] Without embarking on an extensive discourse of the law, the legal position today is that a Court will grant a stay of execution where real and substantial justice is required, or an injustice will otherwise be occasioned.⁷
- [25] The Court considers the factors that inform the granting of interim interdicts, with due regard to the fact that an applicant is not asserting a *prima facie* right but is seeking to avoid an injustice. The Court must be satisfied that:

⁷ See **Gois t/a Shakespeare's Pub v Van Zyl and Others** 2011 (1) SA 148 (LC) at para 37; **Road Accident Fund v Legal Practice Council** 2021 (6) SA 230 (GP) (a decision of the full court) at paragraphs 30 to 33.

- a. the applicant has a well-grounded apprehension that the execution is taking place at the instance of the respondent; and
- b. irreparable harm will result if execution is not stayed, and the applicant ultimately succeeds in establishing a clear right.⁸

[26] It follows that irreparable harm will invariably result if there is a possibility that the underlying *causa* may ultimately be removed or where the underlying *causa* is the subject matter of an ongoing dispute between the parties.⁹ Although the Court is not ordinarily concerned with the merits of the underlying dispute, this Court in **BP Southern Africa** found that the Court in the exercise of its judicial discretion may examine the prospects of success when faced with an application for a stay of execution.¹⁰

[27] The reasoning in **BP Southern Africa** strikes me as sound.

[28] Assuming for a moment the applicants in these proceedings can revive their appeal through a properly motivated condonation application delivered in due course, permitting an enquiry into the merits of the appeal at this stage with the available evidence at hand is useful if not necessary. The greater their prospects of success on appeal, the more likely it is that a considerable injustice will be done if the applicants are evicted from the premises that the first applicant trades from. Conversely and if those prospects on appeal are no more than negligible, the risk of an injustice will be less likely.

[29] Although the second applicant says that the business of the first applicant is her only source of income, the papers do not suggest that the business of the first applicant cannot find suitable alternative premises from which it can trade. I accept that the execution of the order may be disruptive for the applicants, but I am unable to find that the injustice occasioned to the applicants in the event that the order is put into operation will lead to a substantial injustice.

⁸ Ibid.

⁹ **Gois t/a Shakespeare's Pub** *supra* at paragraphs 37 to 38.

¹⁰ At paragraphs 25 and 26.

- [30] Giving effect to an order of the Magistrates Court in the absence of any compelling grounds to suggest that the learned magistrate erred in evicting the applicants from the premises or that hint at the fact that the underlying *causa* may be expunged must not be confused with an injustice of the kind that should tilt the balance in favour of an applicant in the exercise of the Court's discretion.
- [31] In my view there is nothing before the Court to suggest that the merits of any appeal that may be revived in due course favour the applicants.
- [32] Two reasons inform this conclusion.
- [33] Firstly, the applicants made no attempt of any kind to deal with the merits in their founding affidavit and as counsel for the applicants properly conceded in argument, this was not touched on which he attributed to the haste with which the application was brought.
- [34] Secondly, the applicants chose not to file a replying affidavit in response to the allegations of the respondent in answer to the effect that no rental has been paid since the commencement of the first applicant's occupation of the premises three years ago while the lease agreement in existence between the parties has long since expired. The respondent's version must therefore be accepted.
- [35] The absence of any prospects on appeal in my view means that the applicants cannot show the existence of a real and substantial injustice that would justify the exercise of my discretion in their favour.
- [36] Not only do the merits of any appeal appear to be hopeless but there is no indication that a further thirty days that the applicants seek to raise funds will make any difference, at least not in the absence of cogent evidential material placed before me to show why there is a reasonably strong prospect that funds will be forthcoming in the next thirty days to somehow allow them to take the necessary steps aimed at reviving the lapsed appeal.
- [37] There are no reasons to depart from the ordinary rule that the successful party should be awarded the costs of the application.

[38] I accordingly make an order in the following terms:

[1] The application is dismissed.

[2] The applicants are ordered to pay the respondent's costs jointly and severally the one paying the other to be absolved.

**C BESTER AJ
JUDGE OF THE HIGH COURT
JOHANNESBURG**

Heard: 18 August 2023

Delivered: 6 September 2023

For the Applicant:

LP Nkosi

Instructed by SE Dube Attorneys

For the Respondent:

LP Motau

Instructed by Mosimanegape
Attorneys