IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 23662/2018

DATE: 16-08-2023

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO.
(3) REVISED.
DATE 21 September 2023
SIGNATURE

In the matter between

N KODISANG TRUST Plaintiff

and

RICHARD SOLOMON MOHOMANE & 6 THERS Defendant

J U D G M E N T

YACOOB, J: The applicant seeks reconsideration of an order granted on 21 July 2023 in terms of Ruly 6(12)(c), on the basis that the order on 21 July was granted in his absence. However, it is common cause that the applicant was represented in those proceedings. There is a dispute about the reason his counsel was not present at the time when the order was granted.

The applicant states in the founding affidavit that

neither the attorney nor the client was present in court and therefore Mr Mkhize, the applicant's counsel, could not execute the instruction. This makes no sense. Mr Mkhize on the applicant's own papers had an oral instruction and there was no reason why he could not remain in court.

The respondent's version is that Mr Mkhize excused himself. Mr Mkhize in court from the bar said that he was excused by Wanless, AJ, who told him that he could not appear without a written instruction.

That these being application proceedings I must go on the respondent's version. Nevertheless, I give Mr Mkhize the benefit of the doubt on the reason why he left the court may be appropriate since the transcript can be obtained and the respondent can then take appropriate steps. This despite the fact that Mr Mkhize's very appearance in this court amounted to a misrepresentation, since he appeared in silk robes, and on being questioned, claimed, falsely, that he had obtained silk in 2021. He also told the court he was paying an amount in fees to the Legal Practice Council that bears no relation to the actual fees that are levied by the Council. Nevertheless, in order not do an injustice to M Mkhize's client, I determined that I should at least consider the issues raised.

The applicant also claims in his finding affidavit that he did not file an answering affidavit as ordered by Judge

Wanless because he could not properly instruct his attorney because he was not present in Johannesburg. It is not clear whether “he” refers to the attorney or the applicant. This is not a valid reason for failure to comply, as arrangements could have been made and condonation sought.

The respondents’ attorneys were in e-mail contact and there is no evidence that the applicant’s attorney made any attempt to deal with the issue.

I am not satisfied that the order was taken by default or in the absence of the applicant. However, in order to avoid any patent injustice, I have considered the merits of the application to ensure that there is nothing that requires judicial attention.

The applicant seeks to reconsider an order that was granted which stayed an eviction order granted in 2020 against a Mr Pooe. The applicant claims he is the owner of the property and was wrongly done out of his property.

The order granted on 21 July stays the eviction order pending a recission application which was lodged by the respondents in 2022. The applicant also in argument raised Rule 15 saying that the respondents were not parties to the original application and therefore they needed to obtain an order joining them before they could be heard.

I disagree. They are clearly affected persons and were entitled to approach the Court. A person cannot be

evicted by an order evicting a different person.

The question of ownership is not for this Court to determine. There is a clear dispute of fact on the say so of the parties, adn the title deed shows that the applicant is not at the moment the registered owner. The fact that the applicant seeks an investigation into the issue of how he is no longer the owner confirms that he is not at this time the registered owner. The basis on which he seeks the reconsideration, that he is the owner and is exercising his ownership rights, is therefore not established.

The applicant also submits that because the eviction application was served on the second respondent before it was granted because he was already resident on the property, that somehow changes things. That is not the case. The eviction application was not against the second respondent nor was the eviction order against the second respondent. The second respondent could not be expected to oppose or respond to court proceedings that had nothing to do with him.

This again conflicts with the submission that the second respondent or the respondents are not party to the proceedings and therefore because they have not sought to be joined do not have *locus standi*. One cannot on one hand argue that one can evict an occupant with this order and on the other hand that the same occupant does not

have *locus standi* to stay the order.

The applicant also states that the order was already executed and that the Court made a mistake in granting the order staying the eviction. There is no evidence of that on the papers and in any event the order that was granted was a spoliation order. Even if the correct person was being evicted, they would have, if they had grounds, been entitled to seek a spoliation order on an extremely urgent basis.

The applicant makes an allegation with no evidence at all presented about the nature of the trust which is the first respondent. That allegation is not supported by any evidence and there is no need to take any notice of it.

In any event the second respondent who was the second applicant in the application to stay the eviction still has *locus standi* as he is a person who was sought to be evicted.

There is absolutely nothing in the rather convoluted founding affidavit that changes the factual state of affairs which is that eviction order was granted against a Mr Pooe.

The second respondent is the person against whom the order was sought to be executed and an eviction application must be brought against him if he is to be evicted. The applicant did not bring an application against him. The applicant brought and obtained an order evicting Mr Pooe and that is irrelevant to whether the second

respondent is entitled to remain on the property. The order did not allow the eviction of the second respondent.

Therefore, even if the applicant was not represented or present at the time the order was granted, he has not made out a case for reconsideration.

Mr Mkhize submits that costs should be reserved if I find against his client. I see no reason for that because this application does not at all make out the case for the relief sought.

Ms Delport for the respondents asks for cost *de bonis propriis*. That was not sought in the answering affidavit and the applicants' legal representatives have not had an opportunity to substantively respond to such a request.

It is true that the Court has the discretion to grant such an order where misconduct is patent however in my view there is some doubt about what exactly happened, and I do not have access to the recording of what happened in court on the previous occasion, so I am not in a position to make an order *de bonis propriis.* Taking into account that there was no such request in the answering affidavit, I will not grant that request.

For these reasons, the application is dismissed with costs on an attorney and client scale.

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YACOOB, J

JUDGE OF THE HIGH COURT

DATE:21 September 2023

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