

REPUBLIC OF SOUTH AFRICA



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

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED: YES/ NO
DATE: 06 October 2023 JUDGE: T THUPAATLASE AJ

CASE NO. 2022/20584

In the matter between:

Cesley Olivier	First Applicant/ First Plaintiff
Marius Nicolas Olivier	Second Applicant/ Second Plaintiff
And	
Stanley Blessing Manzini	First Respondent/ First Defendant
Noluthando Beauty Manzini	Second Respondent/Second Defendant
Gary Ross Attorney Inc.	Third Respondent/ Third Defendant
The City Ekurhuleni	
Municipality	Fourth Respondent/ Fourth Defendant

Judgment

Introduction

[1] This matter has a long history with some twists and turns resulting in two judgments already delivered by two judges of this division. The first judgment by Wanless AJ was delivered after the matter was dealt with as a special motion. This was after the applicants had served application praying for specific performance and other ancillary relief and in turn the respondents had brought a counter application seeking cancellation of the sale agreement between the parties. This will be a third judgment involving the same parties.

[2] The first judgment by Wanless AJ resulted in the matter being referred for trial in terms of the discretionary powers set out in Rule 6 (5) (g). In terms of the subrule the court may refer the matter for trial. The court also gave appropriate directions in particular that the affidavits already filed shall stand as pleadings in an action. The court further deferred the issue of costs for the determination by the trial court. The practical effect of the judgment is that applicants have retained occupation of the property which is a subject matter of the sale agreement.

[3] During September 2023 the applicants brought a fresh application. This was an urgent application. The matter was set down for hearing on the 03 October 2023. The application was one of urgency as envisaged by Rule 6(12). In terms of the notice of motion the applicants were seeking relief in the following terms:

1. Dispensing with forms and service provided in the Rules of this court and that the matter to proceed as one of urgency in terms of Uniform Rule 6(12) and condoning any non-compliance with the Rules of court by the Applicants.
2. Pending the final outcome of the action proceedings, the First and Second Respondents are interdicted and restrained from:
 - 2.1. attending at or entering Portion 4 of Erf 439 Eastleigh Township situated at 69 High Road Eastleigh, Gauteng;

2.2. contacting the Applicants, members of the Applicants' immediate family resident at the property or the Applicants' employers either directly or indirectly, in person telephonically, in writing or any electronic means;

2.3. intimidating, threatening, or harassing the Applicants, members of the Applicants' immediate family at the property and the Applicants' employers in any manner whatsoever;

2.4. engaging the services of any third parties to commit any of the prohibited action herein above.

3. Directing the Fourth Respondent to allow the Applicants to open a tenant account in the name of the First Applicant, for utilities against payment of any necessary prescribed deposits or statutory fees within seven (7) days from granting this order.

4. That the First and Second Respondents shall pay the costs of this application.

[4] As indicated above the application was set down for hearing urgent on 03 October 2023. However, before this could happen new developments occurred. On the 23 September 2023 after the Respondents were served with the urgent application they went and forcibly entered the property. Their actions prompted the Applicants through their legal representative to approach the court for an urgent relief.

[5] The Applicants informed the court that the Respondents had forcibly entered the property during the morning of that day and had remained in the property until at the very time that the submissions were being made in court. The Applicants sought an urgent court order to have the Respondents and their family members removed from the property and further to interdict them from returning to the property.

[6] The matter served before Kuny J who after considering the matter granted the order sought by the applicants. The court concluded that the Applicants were in peaceful and undisturbed possession of the property and that they had not given up their right to occupy the property. The court further found that the conduct of the Respondents amounted to spoliation. Rule nisi was issued returnable on 03 October

2023, requiring the Respondents to show cause why a final order should not be issued.

[7] It is clear from the reading of the judgment of Kuny J and the order he granted that most of the relief which the Applicants sought in the notice of motion setting for hearing on 03 October 2023. The only difference being that the relief was granted as an interim relief and thus affording the Respondent opportunity to appear and show cause why it should not be made final.

[8] The rationale for issuing the interim order was clearly in recognition of the *audi alterem partem* rule. The court was obviously cognisant of the introductory remarks by Sutherland DJP in *Mazetti Management Services (Pty) Ltd and Another v Amabhungane Centre for Investigative Journalism NPC and Others (2023-050131) [2023] ZAGPJHC 771 (3 July 2023)* para [1] 'in our law, there is a fundamental norm that no decision adverse to a person ought to be made without giving that person an opportunity to be heard. In a court of law, this norm is scrupulously observed. However, in the real world, prudence dictates that sometimes pragmatism must be applied and in exceptional circumstances that sacred right of *audi alterem partem* may be relaxed, but when it is appropriate to do so, such a decision is hedged with safeguards. The principle which governs whether to grant an order against a person without their prior knowledge is straightforward: only when the giving of notice that a particular order is sought would defeat the legitimate object of the order'.

[9] I must hasten to add, that the only relief that was not dealt with by that court was the relief relating to the Fourth Respondent. It is clear that in the context of the relief of spoliation Kuny J was not called upon to decide the issue. The court also mulcted the Respondents with a punitive costs order in respect 23 September 2023 hearing.

Proceedings on 03 October 2023

[10] On the 03 October 2023 parties appeared before me, and the first point raised by the Applicants' counsel was that the court should not consider the answering affidavit as it was delivered outside the timelines which were given in the notice of motion especially that the application for condonation was scanty on the reasons why there were no compliance.

[11] The counsel for the Respondents countered the submission by pointing out that the truncated timelines which were set out by the Applicants were too tight. The

court ruled that the answering affidavit should be admitted and matter to proceed. I was not persuaded that there was an inordinate delay in filing an answering affidavit. See *National Adoption Coalition of South Africa v Head of Department of Social Development for KwaZulu-Natal* 2020 (4) SA 284 (KZD) at paragraph [77].

[12] The Applicant contended that relief in respect of prayer 3 be granted allowing the Applicants to approach the Fourth Respondent (Ekurhuleni Municipality) to open an account for utilities.

[13] The Respondents argued that urgency had not been established and, on that basis, alone the matter should be struck off the court roll. On the merits the Respondents were of the view that the requirements of interdict were not satisfied as the Applicants had an alternative remedy. It was submitted that the Applicant should have approached the magistrates' court for a protection order in terms of the Harassment Act.

Urgency

[14] As indicated the Respondents have argued that there is no urgency that was established by the Applicants, consequently the matter should be struck off the roll. It is trite that 'the applicant must in his founding affidavit set out explicitly the circumstances on which he relies to render the matter urgent and the reason why he claims that he cannot be afforded substantial relief at a hearing in due course'. See *Luna Meubel Vervaardigers (Edms) Bpk v Makin (t/a Makin's Furniture Manufacturers)* 1977 (4) SA 135 (W),

[15] At 137F the court further stated that: 'mere lip service to the requirements of Rule 6 (12) (b) will not do and an applicant must make out a case in the founding affidavit to justify the particular extent of the departure from the norm, which is involved in the time and day for which the matter be set down. The court also sounded alarmed about the 'undoubted abuse of the rule.'

[16] The other point raised by the Respondent was that if there was any urgency then it was self-created. The law does not countenance self-created urgency. It is well established that an applicant cannot create its own urgency by simply waiting until the normal rules can no longer be applied.

[17] As I pointed to both counsels during argument my view regarding urgency was that Kuny J dealt with urgency during the hearing of 23 September 2023. It was on that basis that he was able to grant the order. He explicitly stated as much at paragraph 25 of the judgment that 'the conduct of the respondents was extremely flagrant. The applicants had no choice, other than to set down their urgent application, due to be heard on 3 October 2023, on the urgent roll of 23 September 2023'. That was also the motivation by the learned judge to grant a punitive costs order. The persistence by the Respondents with this argument i find it be misplaced.

[18] It is curious that the Respondents aver that learned judge Kuny J could not have dealt with the issue of urgency when as shown by the quoted passage that he made such finding, and it is that finding that led to him granting the type of costs order he made.

Merits

[19] The genesis of the dispute between the parties is largely common cause. The relationship between the parties started in 2021 through the sale agreement of the property of the Respondents to the Applicants. The property has date not yet transferred to the Applicants. It is this point of dispute between the parties as to the reason why the transfer of the property has not taken place the parities initially approached court. The dispute is set to be resolved during an impending trial action which have ordered by the learned Wanless AJ.

[20] The issue should therefore not detain us. The issue before court is whether a rule nisi issued on 23 September 2023 should be made a final order. The Respondents contends that they did not commit any of the acts alleged by the Applicants.

[21] I am satisfied that the facts as alleged by the Applicants and those alleged and admitted by the facts indicate clearly that rule nisi be confirmed. The argument that the interdict was not meritorious as the events have passed cannot be sustained. It is true that, an interdict is an appropriate form of relief to prevent future harm, not afford redress for past harm.

[22] On the other hand I am not satisfied that the Applicants have established the basis upon which prayer 3 of the notice of motion should be granted especially taking into account the pending trial action between the parties.

Costs

[23] The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. See: *Myers v Abramson*, 1951(3) SA 438 (C) at 455. I can think of no reason this court should deviate from this general rule

Order

- a. It is ordered that the rule nisi granted on 23 September 2023 is hereby confirmed.
- b. Prayer 3 of the notice of motion is hereby dismissed.
- c. Costs awarded to the Applicants.

Thupaatlase AJ

Acting Judge of the High Court

Heard on 03 October 2023

Judgment on 06 October 2023

For the Applicants:

Adv. L Franck

Instructed by Cherry-Singh Inc.

For the Respondents:

Adv. K Kabinde

Instructed by Sithi Thabela Attorneys