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

CASE NO: A3065/2020

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

13 February 2023
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In the matter between:

MNGUNI, SELLO OF ERF 21481, TSAKANE BRAKPAN	Appellant
and	
NGWENYA SHADRACK SHATI	First Respondent
EKURHULENI METROPOLITAN MUNICIPALITY	Second Respondent

JUDGMENT

CRUTCHFIELD J:

[1] This appeal came before us on Thursday, 18 August 2022. The appellant, Mnguni Sello of Erf 21481, Tsakane, Brakpan and the second respondent, the unlawful

occupiers of erf 21481 Tsakane Extension 11, did not appear at the hearing. Nor did the third respondent, the Ekurhuleni Metropolitan Municipality. The first respondent, Ngwenya Shadrack Shati, appeared in person.

[2] The appellant's failure to appear at the hearing resulted from the appellant's delivery of a notice of removal of the appeal from the roll of 18 August 2022, on 16 August 2022.

[3] The appellant did not provide a reason for the notice of removal of the matter from the roll. My secretary attempted to contact the appellant's representatives on the morning of the appeal to inform them that we required an appearance on behalf of the appellant at the hearing. An appearance accordance with the attorneys' obligations to this Court and the administration of justice in the light of the late delivery of the notice of removal.

[4] The history of this matter is of some importance. The appeal arose from an order of the civil court for the District of Ekurhuleni South East held at Tsakane, case number 175/17, handed down by the learned magistrate on 11 September 2020.[1]

[5] The first respondent launched the proceedings in the court *a quo* during September 2017. The *ex parte* application in terms of s 4(2) of PIE was dated 14 September 2017 and set down for hearing on 22 May 2018. Various postponements followed thereafter in order for the appellant to locate alternate accommodation, produce documents (including bank statements) and for the appellant's witnesses to appear and lead evidence. The court *a quo* finalised the proceedings before it on 11 September 2020[2] or thereabouts, approximately three years after the proceedings commenced.

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1 Caselines 001-31.
2 The judgment is dated 11 September 2020.

[6] The court *a quo* ordered the eviction of the appellant and the second respondents from erf 21481 Tsakane, Brakpan, ('the property'), by not later than 31 October 2020, that they not return to the property thereafter and in the event that they did not vacate the property by 31 October 2020, that the sheriff together with the South African Police Service, if necessary, carry out the eviction on or after 30 November 2020 by removing the occupants from the property ('the eviction order').

[7] The lower court ordered the appellant and the second respondents to pay the costs of the application including the costs of the application in terms of s 4(2) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998 ('PIE').

[8] On 30 March 2021, the appellant applied for the assignment of a date for the hearing of the appeal in this Court in terms of rule 50(4)(a) of the uniform rules of court ('the rules'). On 28 October 2020, the appellant delivered an application for condonation of the late filing of the notice of appeal.[3] The appellant uploaded heads of argument on caselines on 30 April 2021.

[9] The registrar set the appeal down for hearing, on the first occasion, on 24 August 2021. The appellant uploaded a notice of removal of the proceedings from the roll on 24 August 2021, the day of the appeal.

[10] Thereafter, the registrar allocated 18 August 2022 as the date of the appeal. The appellant uploaded a notice of removal of the appeal from the roll on caselines, on 16 August 2022. The first respondent informed us at the hearing that the appellant's legal representatives failed to inform him (and presumably his attorneys of record), prior to the hearing on 18 August 2022, that they intended to remove the matter from the roll.

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[3] Caselines 002-12.

[11] The first respondent told us that he utilised the proceeds of his pension to purchase the property. Due to the appellant's occupation of it, the first respondent had not had access to it in the interim. The first respondent was 69 years of age. This was consistent with the record that reflected his age of 67 years during the proceedings before the court *a quo*.

[12] The appellant was 38 years of age at the time of the proceedings before the court *a quo* and described himself as being "abled bodied." The first respondent was approximately 30 years older, a pensioner, reduced to living in makeshift accommodation, (referred to as a "shack" by the first respondent before us), whilst the appellant made use of the first respondent's property.

[13] Whilst the first respondent's attorneys remained of record, the first respondent told us that he was indebted to them in an amount of approximately R70 000.00. Thus, he appeared in person. The record reflected the first respondent's indebtedness to the third respondent in the amount of approximately R30 000.00 during 2020, consequent on the appellant's occupation of the property.

[14] Paragraph 5 of chapter 7 of the practice manual of the Gauteng Local Division provides that once a date has been allocated for the hearing of any civil appeal, the parties may not agree to postpone the appeal without the leave of the Deputy Judge President or the judges to whom the appeal has been allocated for hearing. The appellant failed wholly to comply with paragraph 5 of chapter 7 of the practice manual on two occasions, without explanation on either occasion.

[15] The public interest in the efficient running and management of the appeal roll allocations requires that litigants comply with the relevant provisions of the practice manual. The unauthorised removal of the matter from the roll by the appellant's legal

representatives served to deprive other litigants of an opportunity to have dates allocated for the hearing of their appeals. Furthermore, the conduct of the appellant's legal representatives wasted precious and sparse judicial resources in that four judges read and prepared the record in this matter, only to be confronted by the removal of the matter from the roll.

[16] The first respondent, an elderly gentleman of almost seventy (70) years of age and living in an informal structure as a result of the appellant's occupation of the property, waited in excess of two years for the finalisation of this appeal before us, only to find that the appellant's legal representatives had uploaded a second notice of removal of the matter from the roll.

[17] The conduct of the appellant's legal representatives violated the efficient and proper administration of the justice system, was contemptuous of this Court as well as the first respondent and should not be tolerated.

[18] It would be unjust and unfair to the first respondent and to other litigants to permit the appellant to remove this matter from the roll and re-enrol it for a third time. This is particularly so in the light of the first respondent's personal circumstances.

[19] In the circumstances, it is not in the interests of justice to permit the appellant to remove the matter from the roll for a second time and an appropriate order will follow hereunder.

[20] The appellant referred in the notice of appeal and heads of argument to a report of the third respondent, allegedly placed before the court *a quo* and referred to[4] in the appellant's heads of argument. The appellant, however, did not include the third

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[4] Caselines 001-25 para 1.1.2.

respondent's report in the record or place the report before this Court. Notably, the transcripts of the court proceedings placed before us did not refer to the third respondent's report. Moreover, whilst the appellant's heads of argument referred to various aspects of the third respondent's report, those heads of argument did not include any caselines page references to the report.

[21] In addition, the copy of the court a quo's judgment in the record was incomplete.[5]

[22] The appellant was *dominis litis* in this appeal. The hearing before us on 18 August 2022 was the second date allocated for a hearing of this matter. Notwithstanding that the final notice of set down was uploaded on caselines on 20 May 2022, the appeal record was significantly incomplete and incoherent. Various documents were missing from the record placed before this Court, including a complete copy of the judgment of the court *a quo*, the third respondent's report, the first respondent's replying affidavit[6] and the heads of argument filed on behalf of the parties in the court *a quo* dated 6 September 2019.[7] Furthermore, not a single reference to the caselines record was made in the appellant's heads of argument.

[23] Volume 2 of the record commenced with the index in respect of volume 1. The appellant failed to upload an index relevant to volume 2, thus forcing us to trawl through the documents uploaded under volume 2 without the assistance of an index.

[24] The transcript of the proceedings before the court *a quo* reflected the proceedings on 12 August 2020 and 4 February 2020 only, notwithstanding that the matter was dealt with both prior and subsequent to those dates, including on 11 September 2020.

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5 Page 32 of the judgment was missing.
6 Caselines 001-37.
7 Caselines 004-60; 004-62 line 18.

[25] Neither the transcripts of the proceedings on 12 August 2020 nor 4 February 2020 referred to the third respondent's report.

[26] The 77 pages of transcript reflecting the proceedings on 12 August 2020 were uploaded nine (9) times on caselines.[8]

[27] The transcript of the proceedings on 4 February 2020 reflected issues that arose from and related to a disagreement between the appellant and his legal advisor not relevant to the substantive aspects of this matter.

[28] The appellant's legal representatives failed to provide an explanation for their failure to comply with their duty to place a complete and accurate record before this Court. This was despite this being the second date allocated to the appeal of this matter by two judges of this Division. Thus, four judges have had to peruse the incomplete and incoherent record and do their best to deal with it.

[29] Adding to the irregular state of the record were the two notices of removal of the matter from the roll in respect of both dates allocated to this appeal.

[30] It is wholly unacceptable for the appellant and his legal representatives to subvert the proper administration of justice and the operation of this Court's processes and proceedings by delivering notices of removal from the roll and doing so once the Judges allocated to deal with the matter have already prepared it in advance of the hearing date. Moreover, the appellant's insistence on remaining in the property in the face of the order of the court *a quo* whilst failing to his municipal consumption, is being aided and abetted by his legal representatives' unacceptable conduct in removing the matter from the roll contrary to the practice manual of this Division.

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[8] Caselines 004-1; 004-78; 004-155; 004-232; 004-379; 004-386; 004-463; 004-540; 004-617.

[31] Rule 41(1)(a) provides that a party instituting proceedings may at any time before the matter has been set down and thereafter by consent of the parties or leave of the court withdraw such proceedings, in any of which events he shall deliver a notice of withdrawal and may embody in such notice a consent to pay costs and that Taxing Master shall taxed such costs on the request of the other party.

[32] Van der Schyff J in *Dey Street Properties (Pty) Ltd v Salentias Travel and Hospitality CC t/a Van Hobs Dry Cleaners,*[9] held that the implication was that a party cannot unilaterally postpone a matter where the opposing party's consent cannot be obtained. It is the discretion of the court seized with an application for postponement that prevails. Similar logic as applies to Rule 41(3) applies to the removal of a matter from the roll after it's enrolled for hearing. An applicant, *dominis litis*, is bound to the date determined by it in the notice of motion, for the matter to be heard.

[33] The same logic applies in respect of the appellant's unilateral removal of the matter from the roll without the consent of the first respondent and without the consent of the Deputy Judge President or this Court.

[34] It is the duty of the appellant's attorney to ensure that a complete and coherent record of the appeal is placed before an appeal court. The attorney is obliged to peruse and consider the record in order to ensure that it complies with the rules and the practice manual of this Division.[10] There can be no doubt that the appellant's legal representatives failed in their duty to this Court, to the respondents and to the appellant, in respect of the appeal record herein and the prosecution of this appeal.

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9 *Dey Street Properties (Pty) Ltd v Salentias Travel and Hospitality CC t/a Van Hobs Dry Cleaners* Case No 25461/21 dated 15 July 2021 Gauteng Division, Pretoria at [5]

10 *Rennie NO v Gordon* 1988 (1) SA 1 (A) at 20D; *Hing v Road Accident Fund* 2014 (3) SA 350 (WCC) at 382D – 383A.

[35] In the circumstances, it would be unjust and unfair to the first respondent as well as a violation of the proper administration of the justice system and this Court, to permit the removal of the matter from the roll and thereby allow the appellant an opportunity to place this matter on the roll for hearing for a third time, in circumstances where four judges already have read and prepared these papers, and, to expect the first respondent to wait even longer than he has done to date, for finalisation of the matter.

[36] The appellant's conduct of this appeal ought not to be countenanced by this Court. The removal of the matter from the roll on the day of the hearing on 24 August 2021 and subsequently on 16 August 2022, violated and continues to violate the first respondent's right to finality of this litigation together with the first respondent's constitutional rights abovementioned and the proper administration of the justice system.

[37] The lower court's judgment was dated and signed by the learned magistrate on 11 September 2020. Some two years elapsed since and the appellant failed to prosecute this appeal to finality in a coherent manner.

[38] In the circumstances, it is appropriate that this matter be struck off the roll and this judgment not be removed from caselines.

[39] In the light of the facts set out herein, this is a matter that justifies this Court demonstrating its displeasure by ordering that the appellant pay the costs of the appeal on a punitive scale as between attorney and client.

[40] Accordingly, I grant the following order:

1. The appellant is not permitted to remove this appeal from the roll of 18 August 2022.

2. The appeal is struck off the roll.

3. This judgment may not be removed from caselines.

4. The appellant is ordered to pay the costs of the appeal on an attorney and client scale.

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CRUTCHFIELD J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG

I agree.

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DLAMINI J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 13 February 2023.

ATTORNEYS FOR THE APPELLANT: Mdabe Hlongwa Attorneys
Legal Advisory and Information Centre

ATTORNEYS FOR THE FIRST RESPONDENT:	Gishen-Gilchrist Inc
DATE OF THE HEARING:	18 August 2022
DATE OF JUDGMENT:	13 February 2023