

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2022-62072

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

In the matter of:

JGK ENGINEERING (PTY) LTD

Applicant

And

QUARRY MASTER CC

First Respondent

ANDRIES STEFANUS DU TOIT

Second Respondent

CECILIA MARIA MAGDALENA DU TOIT

Third Respondent

JUDGMENT

BESTER AJ

Introduction

- [1] The applicant, a manufacturer of mining equipment, seeks the urgent stay of two warrants for its ejectment from adjoining properties, which together constitute the commercial premises situated at 33 Greer Street, Vulcania, Brakpan, from which it operates.
- [2] The first respondent owns one of the properties, and the second and third respondents, a married couple, own the other. They also own and control the first respondent. The respondents seek the ejectment of the applicant from the premises in a counterapplication, on the basis that the warrants had already been lawfully executed, whereafter the applicant unlawfully returned to the premises.

The facts

- [3] The facts are not contentious. The applicant took occupation of the premises at the end of March 2021. On 28 May 2021 the respondents respectively sold the two properties to the applicant in terms of two separate contracts. In terms thereof, the applicant paid substantial non-refundable deposits, and had to pay off the balance of the purchase prices at R20 000,00 per month each. Since November 2021, the applicant has not made the monthly payments.

- [4] On 1 April 2022 the respondents had formal breach notices served on the applicant, and when the notices were not complied with, the respondents cancelled the agreements on 11 May 2022. In the same month they issued two summonses out of the Magistrates' Court for the district of Brakpan, each for both a monetary claim and a claim for ejection. The applicant delivered notices of intention to defend both actions but failed to deliver its pleas, despite the delivery of notices of bar. The applicant purported to deliver notices to remove cause of complaint in both actions but did not seek to uplift the bars.
- [5] In these circumstances, default judgment was granted in favour of the respondents, on 18 October 2022 and 11 November 2022 respectively, and warrants of execution against movable property and warrants of ejection were issued pursuant thereto.
- [6] On 7 December 2022 the Sheriff evicted the applicant from the premises under these warrants, attached the movables, locked the premises and handed the keys to the respondents.
- [7] On 12 December 2022 the applicant launched applications for the rescission of the default judgments, and the next day it brought applications to stay execution pending the outcome of the applications for rescission, in terms of

section 78 of the Magistrates Court Act, 32 of 1944. These applications were brought *ex parte* and were granted on the same day.

[8] Although the two orders stipulate that they were rules *nisi*, neither contained a return date. The respondents anticipated the notional return date on 19 December 2022, when the interim orders were discharged.

[9] On 27 December 2022 the applicant delivered notices of appeal against the discharge of the interim rules, and on 29 December 2022, this application was launched.

[10] The applications for rescission are enrolled for hearing on 24 January 2023, although the respondents still have to deliver their answering affidavits.

Analysis

The warrants have already been executed

[11] The eviction warrants were executed on 7 December 2022. The applicant states as much in its papers. The Sheriff had completed the eviction when he handed the keys to the premises to the respondents.¹ After 7 December 2022 there was thus no longer any possibility of a stay of execution, as it had already taken place.²

¹ *O'Sullivan v Mantel an Another* 1981 (1) SA 664 (W) at 669 B – C.

² *O'Sullivan supra*; *Makhubedu and Another v Ebrahim* 1947 (3) SA 155(T). See especially the comments of Blackwell J in the dissenting judgment in *Makhubedu* at p 163.

[12] This position is not affected by the fact that the applicant is currently again in occupation of the premises. It now occupies the premises, not because the warrants have not yet been executed, but because the applicant had retaken possession of the premises through self-help. I will return to this issue below.

[13] For this reason alone, the application must fail. However, I briefly consider two further grounds upon which the application in my view also would have failed.

The issue has already been decided

[14] This application is a second, separate attempt to stay the warrants after the same application had failed in the Magistrates' Court. The applicant moved for the same relief, on the same cause, in respect of the same subject matter and between the same parties. The issue is thus *res judicata*.³ As mentioned above, the dismissal of the applications in the Magistrate's Court is the subject matter of pending appeals. Assuming, without deciding, that the order is appealable, the matter is *lis pendens*.⁴

³ See for instance *National Sorghum Breweries Limited (t/a Vivo African Breweries) v International Liquor Distributors (Pty) Ltd* 2001 (2) SA 232 (SCA) in [2]; *Aon v Van den Heever* 2018 (6) SA 38 in [22].

⁴ See also the statements by Lord Hoffman in *Arthur JS Hall & CO (a firm) v Simons*; *Barratt v Ansell & Others (t/a Woolf Seddon (a firm))*; *Harris v Scholfield Roberts & Hill (a firm) and Another* [2000] 3 All ER 673 (HL) at 701 c - e, cited in *CSARS v Hawker Aviation Services Partnership & Others* 2005 (5) SA 283 (T) in [46]. The matter was overturned on appeal in *CSARS v Hawker Air Services (Pty) Ltd* 2006 (4) SA 292 (SCA), but the statements of the principles were not criticised – see para 24 of the SCA Judgment.

[15] Mr Van Nieuwenhuizen, on behalf of the applicant, sought to overcome this hurdle on the basis that interim relief may be revisited if there are new facts requiring it. The applicant argues that the new information allowing for the proverbial second bite at the cherry is the dichotomous outcome in the Magistrates' Court applications, where the warrants of execution against the moveable property was stayed, but the warrants for eviction not.

[16] The 'new information' is not a reason to revisit the issue, even if this option was available to the applicant, which I am not convinced of. It does not speak to the facts underpinning the outcome of the previous attempt but to the previous outcome itself.

[17] The Magistrate, in discharging the interim order for the stay of the warrants of ejectment, concluded:

"The warrant of ejectment has already been executed by the Sheriff on the 7th December 2022. This court has no jurisdiction to overturn that ejectment. This fact was not disclosed in the Applicant's founding affidavit. The court can stay/suspend the warrant of execution against the movables which were attached by the Sheriff, nothing more. What the Applicant is asking for is an order for specific performance which this court cannot grant."

[18] The Magistrate, quite correctly in my view, appreciated that once the warrant had been executed, there was no execution to stay, as already dealt with above. The warrants against movable property were not yet fully

executed, because there had only been an attachment. There is thus no disjunct in the treatment of the two types of warrants that justifies a 'reconsideration'.

[19] In any event, the applicant has already raised this issue for determination on appeal. In its notices of appeal it contends that one of the Magistrate's errors was the conclusion that:-

"2. The Court can stay the attachment of movables that has already been attached by the Sheriff but cannot stay the ejectment that has already taken place."

[20] This then brings us back full circle to *lis pendens*.

It will not be just to grant a stay

[21] This Court may stay the execution of a warrant when real and substantial justice requires it, or put differently, where injustice would otherwise result.⁵ The Court exercises its discretion when considering whether to stay the execution of a warrant.⁶

[22] The applicant did not disclose to the Magistrate that it had in fact already been evicted from the premises. In the founding affidavits in support of the

⁵ *Gois t/a Shakespeare's Pub v Van Zyl* 2011 (1) SA 148 (LC) in [32]; *Road Accident Fund v Strydom* 2001 (1) SA 292 (C) at 304 G.

⁶ *Reynders v Rand Bank Bpk* 1978 (2) SA 630 (T) at 639 F.

ex parte applications, which are similar in content, Mr Kaushal, a director of the applicant, stated that –

“23. The Sheriff served me with the warrant of ejectment and a warrant of execution against moveable property on 7 DECEMBER 2022, I have been unable to operate my business in part and/or at all since then.

...

27. In light that my business has been severely interrupted and that **our ejectment and execution is imminent**, and I have no alternative but to approach this court on an urgent basis.”

(emphasis added)

[23] The applicant thus expressly presented to the Court that it had not yet been evicted – a position that is untenable on the facts.

[24] The withholding or suppression of material facts in an *ex parte* application by itself entitles a Court to set aside an order, even if the nondisclosure was not wilful or *mala fide*.⁷ The Court exercises its discretion in such circumstances and will have regard to factors such as⁸ (i) the extent of the nondisclosure; (ii) whether the Court might have been influenced by proper disclosure; (iii) the reasons for the nondisclosure and (iv) the consequences of setting the provisional order aside.

⁷ *National Director of Prosecutions v Basson* [2002] 2 All SA 225 (SCA) in [21].

⁸ *Phillips and Others v National Director of Public Prosecutions* 2003 (6) SA 447 (SCA) in [29]; *Recycling and Economic Development Initiative of South African NPC v Minister of Environmental Affairs* 2019 (2) 251 (SCA) in [52].

[25] It is clear that the applicant misled the Magistrate. It knew that it had been evicted, yet it presented the opposite to the Magistrate. As can be seen from the Magistrate's judgment on the return day, that omission was material to the granting of the *ex parte* orders. If the fact of the eviction had been disclosed, the orders would not have been made. The applicant thereafter forced its way back onto the premises. To my mind, this reveals a wilful abuse of the process of court to obtain an ostensible basis for its return to the property.

[26] Justice requires that the applicant should not be rewarded for its improper conduct. This is so even though there is the potential that the judgments underlying the warrants may be upset in the rescission applications. A court cannot countenance conduct whereby a party obtains an order through misrepresentation and then, on the back of that order, asserts non-existent rights through self-help to obtain possession of property.

[27] In the result the application must fail.

The counterapplication

[28] The respondents brought a counterapplication for the ejectment of the applicant from the premises. As already shown, the applicant had been evicted from the premises, and thereafter, without the imprimatur of a court

order or the owners' consent, forcefully regained possession (by changing the locks to the property).

[29] A party cannot unilaterally undo the consequences of execution and then, on the pretence that execution had not yet taken place but is imminent, seek to prevent a further eviction. The Court will not allow its process to be abused in this manner.

[30] The statement that the applicant regained entry onto the premises "due to the interim order", is obviously wrong. The applicant obtained an interim order staying execution of the warrants of ejection, not that it may re-enter the premises. It could not have obtained such an order, because the case that it presented to the Magistrate, on oath, was that it had not yet been evicted from the premises.

[31] The applicant had no entitlement to dispossess the respondents of their property in this fashion, and its possession of the property is unlawful.

[32] Although the respondents framed their application along the lines of an interdict, their case, as set out in their papers, is in reality vindicatory in nature. It is common cause that they are the owners of the properties, and that the applicant does not have their permission to occupy the premises. As has been shown above, there is no superior right which the applicant may lay

claim to for its possession of the premises. In the result, the respondents are entitled to vindicate their property.⁹

[33] In the result the respondents are entitled to an order for ejection.

Conclusion

[34] In my view there is no reason why the costs should not follow the result.

[35] In the result I make the following order:

- (1) The application for a stay of eviction under case numbers 1002/2022 and 1003/2022 in the Magistrates' Court for the District of Brakpan is dismissed.
- (2) The Sheriff of this Court is authorised and directed to evict the applicant from the properties known as Erven 64 and 65 Maryvlei Township Extension 12, situated at 33 Greer Street, Vulcania, Brakpan as well as all persons claiming occupations through or under the applicant.
- (3) The applicant shall pay the respondents' costs in respect of both the application and the counterapplication.

⁹ *Goudini Chrome (Pty) Ltd v NCC Contracts (Pty) Ltd* 1993 (1) SA 77 (A); *Chetty v Naidoo* 1974 (3) SA 13 (A).

A Bester
Acting Judge of the High Court of South Africa
Gauteng Division, Johannesburg

Heard: 10 January 2023
Judgment: 16 January 2023

Counsel for the Applicant: Advocates HP Van Nieuwenhuizen
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