



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

Not reportable
Case Number: 2023-038568

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

24 November 2023

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SIGNATURE

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DATE

In the matter between:

SIYAKHULISA TRADING ENTERPRISE (PTY) LTD

Applicant

and

GLENCORE OPERATIONS SOUTH AFRICA (PTY) LTD

First Respondent

JABULA PLANT HIRE (PTY) LTD

Second Respondent

JUDGMENT

FORD , AJ.

Introduction

[1] This is an application for leave to appeal, against my judgment dated 2 October 2023.

[2] In the aforementioned judgment, I struck the applicant's urgent application from the roll, for lack of urgency.

The application for leave to appeal

[3] The applicant's principal contentions against my judgment are the following:

3.1 That I erred and/or misdirected myself by over emphasising the provisions of rule 6(12) and threshold thereof and that I ignored the facts and the law pertaining to spoliation applications. Further that I failed to consider or take into account the decision of the SCA in *Eskom Holdings SOC v Masinda*¹ and that I ought to have found that I was bound by the findings in that decision, where the court stated:

[8] The mandament van spolie (spoliation) is a remedy of ancient origin, based upon the fundamental principle that persons should not be permitted to take the law into their own hands to seize property in the possession of others without their consent. Spoliation provides a remedy in such a situation by requiring the status quo preceding the dispossession to be restored by returning the property 'as a preliminary to any enquiry or investigation into the merits of the dispute' as to which of the parties is entitled to possession. Thus, a court hearing a spoliation application does not require proof of a claimant's existing right to property, as opposed to their possession of it, in order to grant relief. But what needs to be stressed is that the mandament provides for interim relief pending a final determination of the parties' rights, and only to that extent is it final. The contrary comment of the full court in *Eskom v Nikelo* is clearly wrong. A spoliation order is thus no more than a precursor to an action over the merits of the dispute.

3.2 That I failed to appreciate the true question before the court, namely whether the first and/or the second respondent had unlawfully dispossessed the applicant of the Tweefontein site and whether there was need to restore the status *quo* pending the final determination of any rights. Further that the provisions of Rule 6(12) of the Uniform Rules, while giving a general guideline on how urgent applications must be dealt with, does not detract from the fact that the circumstances of some cases render the matter inherently urgent. And

¹ 2019 (5) SA 386 (SCA) at para 8. (See also *Ngqokumba v Minister of Safety and Security and Others* 2014 (7) BCLR 788 (CC) para 10).

that as a matter of legal principle, I was obliged to take into consideration the findings of the SCA in *Masinda*. The applicant contends that I placed a higher threshold on the applicant than what the law envisages when dealing with spoliation matters. That spoliation applications are inherently urgent and that the applicant took all reasonable steps to ensure restoration of its possessory rights to the site once it became clear that the respondents intended to unlawfully dispossess it of the Tweefontein site.

3.3 That the first respondent in its answering affidavit conceded that spoliation claims are inherently urgent in that the court must restore the peace when one person has taken the law into their own hands. Further that the first respondent confirmed that it had dispossessed the applicant of the Tweefontein site on 14 April 2023, but that I ignored these concessions, and that the applicant was entitled to restoration of its possession of the site pending the finalisation of any arbitration proceedings that may be brought by the applicant.

3.4 That my finding, regarding self-created urgency was wrong as it did not take into account that the applicant's agreement was purportedly terminated on 31 March 2023. To this end it is submitted, that the last written correspondence between the parties in attempting to resolve the dispute was on 14 April 2023 and that the applicant instituted the proceedings thereafter (on 24 or 25 April 2023), whereafter the matter was scheduled for hearing on 8 May 2023. The applicant thus contends, there was no delay in bringing the application, as it was attempting to resolve the dispute. The applicant submits further that, it was only after it became aware of the fact that the respondent was making attempts to poach its employees and dispossess it of the site, that it approached the court on an urgent basis for relief.

[4] The respondents oppose the application for leave to appeal on grounds that my judgment is unassailable on the law and the facts.

Analysis

[5] Section 17(1) of the Superior Courts Act, 2013 provides that:

“Leave to appeal may only be given where the judge or judges concerned are of the opinion that—

- (a) (i) the appeal would have a reasonable prospect of success; or
- (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
- (b) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and
- (c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.”

[6] The judgment which I handed down, did not touch on the merits of the spoliation application at all. In fact, this is what I stated in the judgment:

It bears noting that, the striking of a matter from the urgent roll, for want of urgency, does not by any means suggest, that I have formed an opinion on the merits. It simply means that the application, is not regarded as urgent, and has to be enrolled for hearing in the ordinary course².

[7] I am persuaded that the striking of a matter from the roll, for lack of urgency, is not appealable. It is not a final order, nor is it final in effect. As correctly pointed out by counsel for the respondents.

[8] In *Zweni v Minister of Law and Order*³ our Appellate Division (as it was then) made it incandescently clear that, to constitute a judgment or order and be appealable, a decision must have three attributes: First, it must be final in effect and not susceptible of alteration by the court of first instance. Second, it must be definitive of the rights of the parties. Third, it must have the effect of

² Paragraph 8 of judgment

³ 1993 (1) SA 523 (A) at 532I-533A

disposing of at least a substantial portion of the relief claimed in the main proceedings.

- [9] In *TWK Agriculture Holdings (Pty) Ltd v Hoogveld Boerderybeleggings (Pty) Ltd and Others*⁴, the SCA confirmed that the aforementioned test, and not the interests-of-justice test employed by the Constitutional Court, applies to appeals to the SCA.
- [10] In *Mannatt and Another v De Kock and Others*⁵ the Western Cape High Court held that an order striking a matter from the roll for lack of urgency is not appealable under the *Zweni* test. It held that the order was of “a purely procedural character” and did not have “any of the three attributes of a ‘judgment or order’ identified in *Zweni*”.
- [11] The judgment and order handed down by me is also not definitive of the rights of the parties and does not dispose of any of the substantive relief claimed by the applicant.
- [12] The matter is therefore not appealable.
- [13] Section 17(1)(c) of the Superior Courts Act provides that, where the impugned decision does not dispose of all the issues, it can be appealed only if it would lead to a just and prompt resolution of the real issues between the parties. The striking-off order does not dispose of the issues in this matter. These can still be tried on the ordinary roll or in arbitration.
- [14] In fact, when I pointed out to counsel for the applicant, that had the matter simply been enrolled in the normal course, it may have been heard by now, she conceded this much.

⁴ 2023 (5) SA 163 (SCA) at para 30

⁵ [2020] ZAWCHC 54 at para 9

[15] The contention that the matter was inherently urgent does not, as I've explained in the judgment, render it urgent for purposes of Rule 6(12).

[16] I do not believe that the applicant has any prospects of success in an appeal, and I hereby accordingly refuse leave to appeal.

[17] In the result, I make the following order:

Order

1. The application for leave to appeal is refused.
2. The applicant is ordered to pay the first and second respondent's costs on the ordinary scale (party-and-party).

B. FORD

Acting Judge of the High Court
Gauteng Division of the High Court,
Johannesburg

Delivered: This judgment was prepared and authored by the Judge whose name is reflected on 24 November 2023 and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 24 November 2023

Appearances:

For the applicant: Adv. N. Dandadzi
Instructed by: Nhubunga Attorneys

For the first respondent: Adv. P. Smith
Instructed by: Werksmans Attorneys

For the second respondent: Adv. B.D. Hitchings
Instructed by: Seneka Simmonds Inc