

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

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

Date: **18th Apri 2023** Signature:

CASE NO: 01355/2023

DATE: 18TH APRIL 2023

In the matter between:

DLAMINI, MUSA ELPHAS

Applicant

and

NCUBE, SIBUSISO GERALD

First Respondent

STEYN CITY MANAGEMENT

Second Respondent

NTULI, MR

Third Respondent

Neutral Citation: *Dlamini v Ncube and Others (01355/2023)* [2023] ZAGPJHC
379 (18 April 2023)

Coram: Adams J

Heard: 15 and 17 April 2023.

Delivered: 18 April 2023 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 10:00 on 18 April 2023.

Summary: Application – for the implementation of an order pending an appeal – the requirements for the granting of an order in terms of s 18 of the Superior Courts Act 10 of 2013 considered – applicant bears the onus to prove the existence of ‘exceptional circumstances’ and should discharge the onus imposed by s 18(3) to show irreparable harm – application granted.

ORDER

- (1) In terms of section 18(1), read with section 18(3), of the Superior Courts Act, Act 10 of 2013, it is ordered that the operation and execution of the Judgment and Order of this Court (per Nel AJ), under case number 01355/2023, dated the 14th of April 2023, shall not be suspended pending a decision on the first respondent’s application for leave to appeal and, in the event of leave to appeal being granted, the outcome of such appeal.
 - (2) There shall be no order as to costs relative to this application.
-

JUDGMENT [APPLICATION ITO SECTION 18 (1) AND (3) OF THE SCA]

Adams J:

[1]. On the 14th of April 2023 judgment was granted in favour of the applicant against the first and the second respondents in terms of which the said respondents were ordered *inter alia* to restore the applicant’s occupation of residential premises in a Sectional Title Development in Midrand (‘the premises’). On the same day, being 14 April 2023, the first respondent applied for leave to appeal the said judgment, with the second respondent indicating that it would be abiding the Court’s judgment and the order and it accordingly granted the applicant access to the estate.

[2]. In this application, the applicant applies for an order directing that the operation and execution of the judgment and the order of the 14th of April 2023 shall not be suspended pending the first respondent’s application for leave to

appeal. The application is premised on the facts mentioned in the original application for the Spoliation order, notably that the applicant urgently needs to be afforded free and undisturbed possession of the premises as he and his son, who lives with him at the premises, are stranded and they have nowhere else to go. In fact, so it is alleged by the applicant, he is at present living under a bridge close to the estate.

[3]. The applicant, Mr Dlamini, alleges that on a daily basis he suffers damages as a direct result of the conduct displayed by the spoliating first respondent in that he has unlawfully deprived him (the applicant) and his minor son of their possession of the premises by unlawfully evicting them, without a Court Order authorizing him to do so. This, so the case on behalf of the applicant goes, the first respondent did on Wednesday, 5 April 2023, at approximately 20:00, by removing applicant's name from the security gate access system and by changing the door locks to the unit he had been occupying up to that stage, together with his son.

[4]. In this application, the applicant, as regards exceptional circumstances, refers to the fact that they have no alternative accommodation and that he and his son have since been living under a bridge. He also stated in his founding affidavit that he is a chronic patient who has a serious chronic condition. The applicant also alludes to the fact that his son, who is presently doing his second year, had examinations on Monday, the 17th April 2023, and that he was denied access to his books and study material, which, in turn, would have an adverse effect on his studies and subsequently mental health.

[5]. Conversely, so the applicant contends, there is no irreparable harm to be suffered by the first respondent, who had taken the law into his own hands and unlawfully had him evicted from the leased premises. In that regard, the applicant highlighted the fact that he has been occupying the leased premises for an uninterrupted period of two years and four months without rental as the lease agreement with the first respondent provided that the rental would only become due and payable when he received the proceeds of a civil claim against a third party. The applicant also contends that there is no harm that will be

suffered by the first respondent in the event of him being reinstated in the said premises.

[6]. The first respondent opposes the application. He contends that there is no pressing need for the implementation of the order, pending the hearing of the application for leave to appeal. Moreover, so the first respondent contends, there is no irreparable harm to be suffered by the applicant if the Court order of 14 April 2023 is suspended pending the hearing of the application for leave to appeal. In particular, so the contention continues, an offer to pay for applicant's alternative accommodation has been made by the first respondent, which in effect negates any possible irreparable harm the applicant would suffer as a result of the suspension of the order of Nel AJ. Conversely, so it was submitted on behalf of the first respondent, he has and still suffers irreparable harm in that his property is being occupied by the applicant rent-free, as he has been doing since February 2021. In sum, the contention by the first respondent is that the applicant has not only failed to demonstrate that he would suffer irreparable harm in the event of the court order being suspended in terms of s 18(1) of the Superior Courts Act¹, but also that it has not been proven that he (the first respondent) would not suffer irreparable harm.

[7]. Section 18 of the Superior Courts Act provides as follows: -

- '(1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.
- (2)
- (3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.
- (4) If a court orders otherwise, as contemplated in subsection (1)—
- (i) the court must immediately record its reasons for doing so;
 - (ii) the aggrieved party has an automatic right of appeal to the next highest court;
 - (iii) the court hearing such an appeal must deal with it as a matter of extreme urgency;
- and

¹ The Superior Courts Act, Act 10 of 2013;

(iv) such order will be automatically suspended, pending the outcome of such appeal.'

[8]. Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a judicial discretion. Its existence or otherwise is a matter of fact which the Court must decide accordingly.

[9]. It has been found in the main Judgment by Nel AJ that the first respondent has acted unlawfully and in disregard of the law and the rule of law. The *status quo ante*, which should be restored, lest lawlessness be condoned, is that the applicant was in lawful occupation of the premises and was residing there with his son – that was until the first respondent took the law into his own hands through self-help and unceremoniously evicted the applicant. It is so, however, that the first respondent is taking that order on appeal as he is of the view this Court erred in finding that the applicant was in free and undisturbed occupation of the premises when he was evicted. The fact remains, however, that the first respondent, by all accounts, made himself guilty of self-help, which conduct cannot and should not be countenanced.

[10]. The foregoing, in my view, would in the normal course of event constitute exceptional circumstances. The point is that a party who, through unlawful means, finds himself in unlawful occupation of a property, can hardly be heard to complain that the position is to be retained pending the appeal. Should the order not be put in operation with immediate effect, it would result in a situation arising where the first respondent – having unlawfully spoliated the applicant's erstwhile peaceful and undisturbed possession and occupation of the premises – would benefit from his unlawful conduct.

[11]. The first respondent, however, submits that when considering the question of exceptional circumstances, regard should be had to the fact that the applicant has been in occupation of the premises for a period in excess of two years without having paid one cent towards the rental of thereof. Moreover, the property has now been re-let to the third respondent, who is ready to take occupation of the premises immediately. This then means that he (first respondent) will suffer irreparable harm in that he would be liable for damages to the said third party.

[12]. I find myself in agreement with the submissions on behalf of the applicant. Unpalatable as it may sound, I am persuaded that the applicant has demonstrated that exceptional circumstances exist which entitles him to an order that the operation of the previous court order shall not be suspended.

[13]. Moreover, if not reinstated into the property, it will result in the applicant suffering irreparable damages. And this is so, despite the fact, as stated by the first respondent, that he is already owed about R800 000 in rental by the applicant, with very little prospect of him receiving that sum soon or ever. This, in my view, does not translate into irreparable financial harm to be suffered by the first respondent in the event of the court order not being suspended pending the appeal.

[14]. I am therefore satisfied that on a balance of probabilities the applicant will suffer irreparable harm if the relief sought in this application is not granted. On the other hand, and even if regard is had to applicant's rent-free occupation of the property for a period in excess of two years, it can be said that the first respondent will not suffer irreparable harm.

[15]. Having regard to the facts in this matter, I am satisfied that the applicant has demonstrated exceptional circumstances entitling him to an order implementing the previous order pending leave to appeal and the appeal. In addition, the applicant has, in my judgment, shown, on a balance of probabilities, that the respondents will not suffer irreparable harm.

[16]. As regards costs, subsequent to the hearing of the matter on the first day on Saturday, 15 April 2023, and after the matter was stood down by me to Monday, 17 April 2023, the applicant himself took the law into his own hands and, by way of self-help, re-entered the premises. This conduct is deplorable and completely disregards the principle as per s 18(1) of the Superior Courts Act. The point is that the applicant does not have clean hands in this matter, which is a good enough reason for me not to award him the costs of this application.

[17]. The application must therefore succeed.

Order

[18]. In the circumstances the following order is made:

- (1) In terms of section 18(1), read with section 18(3), of the Superior Courts Act, Act 10 of 2013, it is ordered that the operation and execution of the Judgment and Order of this Court (per Nel AJ), under case number 01355/2023, dated the 14th of April 2023, shall not be suspended pending a decision on the first respondent's application for leave to appeal and, in the event of leave to appeal being granted, the outcome of such appeal.
- (2) There shall be no order as to costs relative to this application.

L R ADAMS

*Judge of the High Court
Gauteng Division, Johannesburg*

HEARD ON: 14th, 15th and 17th April 2023 – in a ‘virtual hearing’ during a series of videoconferences on the *Microsoft Teams* digital platform and in physical court.

JUDGMENT DATE: 18th April 2023 – judgment handed down electronically

FOR THE APPLICANT: Mr S M Shabangu

INSTRUCTED BY: SMS Attorneys, Witbank

FOR THE FIRST RESPONDENT: Adv J Potter

INSTRUCTED BY: Werksmans Attorneys, Sandton

FOR THE SECOND RESPONDENT: Adv J Potter

INSTRUCTED BY: Werksmans Attorneys, Sandton