REPUBLIC OF SOUTH AFRICA

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

Case Number: 058334/2022

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

02 MAY 2023

DATE SIGNATURE

In the matter between:

THAMI NDLALA HOLDINGS (PTY) LTD First Applicant

THAMSANQA LUCAS NDLALA Second Applicant

and

URBAN MOUNTAIN Respondent

Neutral Citation: *Thami Ndlala Holdings (pty) LTD and Another v Urban Mountain* (Case No. 2022/058334) [2023] ZAGPJHC 413 (2 May 2023)

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

YACOOB J:

1. The applicants for leave to appeal were the respondents in the urgent application, which they seek to appeal.

2. The applicants applied at the hearing of the application for leave for a postponement to obtain the transcript of the urgent hearing, to submit that transcript as evidence because part of the reasons I gave for the order was that the order was granted by consent, and to adduce evidence in the application for leave to appeal of events after the hearing. That application was dismissed for reasons given *ex tempore*.

3. In summary, the reasons were that the transcript is irrelevant, because the application for leave can be determined on the basis that there was no consent to the order, and because by seeking to adduce evidence of events after the hearing the applicants were seeking to make out a new case. In any event if there were issues with what happened after the order was granted the appropriate forum would have been another court, approached either urgently or otherwise, to remedy any unlawful actions that were being taken.

4. I was unable to deliver a decision in the leave to appeal *ex tempore* because the Caselines platform was intermittently offline and I was unable to contemporaneously refer to those portions of the papers to which the parties referred me in argument.

5. During the arguing of the application, there was a suggestion that the fact that the order states that it was by agreement is another ground for appeal and that is why the transcript is necessary. There is no merit in that suggestion. The order being by agreement is does not change the substance of the order, or the effect of it. It is not part of the appealable terms of the order, and does not change the outcome of the matter.

6. In the initial notice of application for leave, the applicants sought leave on the basis that the court did not "appreciate" the evidence before it; that a different order was granted than that sought; that the court impermissibly found a different cause of action for the (then) respondent; and that the court impermissibly interfered in a lease agreement. The applicants also submitted that it was in the interests of justice to grant leave despite the order "appearing" to be an interim order.

7. In the supplementary grounds, the applicants contended that the court had impermissibly granted an eviction order while postponing the eviction application; that the order is now moot; that the court was wrong in finding there was restoration work which needed to be done, and that the court did not provide an end date for the order, meaning that the respondent could abuse it.

8. I am satisfied that the evidence before me on the day of the urgent hearing does not support a conclusion that there were people making their home at the property, and therefore that the order granted does not amount to an unlawful eviction order. The respondent stated in its founding affidavit that occasionally builders employed by the applicants would stay on the property for a temporary period while doing work and then would move on. The applicants did not respond to this allegation and it must be taken to be admitted. The applicants deal in their answering affidavit with the workers having stayed there on a particular night, but nowhere is there an allegation that their presence had any element of permanence or that they made their homes there. This was something that the applicants ought to have made a positive allegation about if it was the case. Certainly without any such allegation there is not enough from which a court can draw the inference that there are people making their home on the property. Nor is it appropriate for a court to draw inferences in application proceedings save in very restricted circumstances.

9. I am satisfied also that the order is not final in effect. Although no date was fixed in the order for the restoration of the property, the provision that the property be restored when the work was done coupled with the requirement that the respondent report monthly on progress of the work done is sufficient in my view to protect the applicants' interests. If there was any indication that the

respondent was dragging its heels, or delaying in bad faith, the applicants are entitled to approach a court for assistance.

10. As far as the mootness argument is concerned, the applicants on the one hand contends that the restoration has been completed and on the other that it was not necessary. If, as suggested in argument, the “completion” referred to by the applicants is the work they claimed to have done, of which photographs were submitted at the hearing, it was clear that the fencing depicted in the photographs would not have the effect of preventing the kind of damage that was feared. If it is that work has since been done, then the appropriate remedy is to approach a court for restoration to the property in terms of paragraph 1.4 of the order.

11. The respondent submitted that if the order is moot that precludes leave to appeal because the Superior Courts Act 10 of 2013 states in section 16(2)(a)(i) that an appeal may be dismissed simply on the ground that the decision would have no practical effect, and section 17(1)(b) precludes the granting of leave in such circumstances.

12. Although the supplementary grounds for appeal contend that the order is now moot, it is clear that the applicant relies on its contention that no restoration work was necessary at the time, and therefore that the order was always moot. I do not think that that is the sort of mootness that is meant by section 16(2)(a)(i).

13. There is no basis to the allegations that the court “created” a cause of action. The reason the respondent approached this court on an urgent basis is well set out in its affidavit and is the cause of action on which the relief was based. Relief may be fashioned by a court in accordance with a cause of action set out and supported in affidavits. This is what this court did.

14. I am satisfied that there is no merit in any of the grounds on which leave is sought. I am not satisfied that another court would come to a different conclusion.

15. The respondent in asking for the application for leave to be dismissed with costs asked that the Court include the costs of the abortive hearing last week, when the matter could not proceed primarily because there were problems hearing counsel for the applicants on the virtual connection. I agree that the costs of the application should include the costs of that abortive hearing, whichever party bears them. Although it was the duty of counsel for the applicant, once the brief was accepted, to ensure he was in a place from which he could address the place audibly and with a good connection, I think that it would require some element of gross negligence for these kinds of logistical matters for a negative costs order to result.

16. The application for leave to appeal is dismissed with costs, including the costs of 20 April 2023

_____

S YACOOB

JUDGE OF THE HIGH COURT

JOHANNESBURG

Date of Hearing:	20 and 25 April 2023
Date of Judgment:	02 May 2023

For the Applicant:	AW Pullinger instructed by Fairbridges Wertheim Becker
For the Respondents:	CM Shongwe instructed by Enhle Ngwane Attorneys Inc