REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2023-068488

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

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B.C. WANLESS **31 July 2023**

In the matter between:

NDYEBO TREASURE JONGWANA
Applicant

and

RIAZ AMOD VAJETH First Respondent

SIBUSISIWE JOY VAJETH Second Respondent

SHERIFF, SANDTON NORTH Third Respondent

This judgment was handed down electronically by circulation to the parties' and/or the parties' representatives by email and by being uploaded to Case Lines. The date and time for hand-down is deemed to be 10h00 on 31 July 2023

REASONS

WANLESS AJ

Introduction

[1] On Tuesday the 18th of July 2023 this Court made an order that the application was struck off the urgent roll due to a lack of urgency. The issue of costs was reserved.

[2] Having made the said order the Applicant (a practising attorney of this Court who appeared in person) requested (from the Bar) that the Court provide reasons therefor. The Applicant was directed to provide this Court with such a request in writing. The following day (Wednesday the 19th of July 2023) the Applicant addressed an email to the Court's clerk (Mr C Mabunda) requesting the said reasons. In the premises, this Court provides brief reasons for the order made on the 18th of July 2023, as set out hereunder.

History

[3] On the 28th of April 2023 this Court, under case number 19616/2022, made an order where, *inter alia*, the Applicant was evicted from the property situated at 34B Rietfontein Road, Edenburg, Rivonia, Sandton *("the premises"*). The premises are owned by the First and Second Respondents. Subsequent thereto the Applicant sought leave to appeal against that order of Makume J which application was dismissed on the 26th of June 2023. In light thereof the Registrar of this Court issued a writ of execution on the 3rd of July 2023 and the Sheriff of this Court (the Third Respondent) evicted the Applicant from the premises on the 12th of July 2023.

[4] After normal court hours on 12 July 2023 the Applicant brought an urgent application before Mudau J on an *ex parte* basis. In that application the Applicant sought the following urgent relief:

> 1. *Dispensing with the forms and service provided for in the Uniform Rules of Court and condoning non-compliance with the Uniform Rules of Court relating to service and time-periods in terms of Uniform Rule 6(12);*
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> 2. *Directing that the First and Second Respondent to forthwith make over and restore the Applicant's peaceful and undisturbed full possession and occupation of the property described in the lease agreement as Unit 2 situate at 34B Rietfontein Road, Edenburg, Sandton, Johannesburg, 2128 (the premises).*
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> a) *The Order above operates as a rule nisi in terms of which the Respondent are called to show cause on the 18th July 2023 why the order should not be confirmed and made a final order of the above Honourable Court.*

3. *Directing that the Sheriff Sandton South forthwith make over and restore the Applicant's furniture, items and other goods which were removed from the premises back to the Applicant.*

4. *That the First and Second Respondent be and are hereby interdicted and from unlawfully interfering with the Applicant's possession, occupation, use and control of the premises pending the confirmation of the rule nisi and the outcome of the application for leave to appeal to be lodged with the Supreme Court of Appeal*

5. *That the Applicant files a full affidavit in supplementation of the short affidavit and viva voce evidence setting out the facts and circumstances in support of the application for restoration of peaceful and undisturbed full possession of the premises by the 14th July 2023.*

6. *Service of the Court Order to be effected by the Applicant by email on the Respondents' attorneys of record at: heinrich@bmattorneys.co.za; memory@bmattorneys.co.za*

7. *That costs be determined upon return for the confirmation of the rule nisi issued.*

8. *Further, alternative and/ or just and equitable relief.*

[5] Mudau J ordered that the application papers be served upon the Respondents; there be an exchange of further affidavits on the 13th of July 2023 and once the application papers were complete the matter would be argued on the urgent roll before the learned Judge on the 14th of July 2023. The Respondents filed Answering Affidavits. However, the Applicant failed to file a Replying Affidavit but nevertheless elected to proceed with the application. This is clear from the reasons provided by Mudau J on the 19th of July 2023 *("the Mudau judgment").*[1] On that basis the application was argued before Mudau J on the 14th of July 2023.

[6] On Friday the 14th of July 2023, after hearing argument, Mudau J made an order whereby he struck the application off the roll for want of urgency with costs on the attorney and client scale. This Court is under the impression that when the learned Judge made the said order the Applicant requested him to provide reasons therefor. Whenever that request was forthcoming it is, quite remarkably, a matter of record in this matter that Mudau J provided written reasons for his order on Wednesday the 19th of July 2023. Of course, when the matter came before this Court on Tuesday the 18th of July 2023, whilst this Court was aware that the matter had been before Mudau J only a matter of one court day before (on Friday the 14th of July 2023) and that the Applicant had requested reasons from Mudau J (because the Applicant, during the

[1] *At paragraphs [3] and [4].*

course of argument, advised this Court thereof and, ironically, appeared somewhat bemused by the fact that he had, at that stage, not yet received those reasons) this Court had obviously not yet had sight of those reasons which were delivered the next day (Wednesday the 19th of July 2023).

[7] Between the application being struck from the urgent roll on Friday the 14th of July and once again being placed on the urgent roll on Tuesday the 18th of July 2023 the only addition to the application papers was that the Applicant had now filed a Replying Affidavit. The relief sought by the Applicant, once again on an urgent basis, was precisely the same. In this regard the Applicant had made no changes whatsoever to his Notice of Motion (as set out above). In an email dated Monday 17 July 2023 to one K Matha *("Matha"*), who is the clerk of Dlamini J (the Senior Judge for Urgent Court during the week 17 July 2023 to 21 July 2023) the Applicant advises Matha that the matter was struck off the roll on Friday the 14th of July 2023 due to the application papers being incomplete. Matha is further advised by the Applicant that the application papers are now complete and requests that the matter be enrolled on the urgent roll of this Court. As set out above and as amplified hereunder, this was not the reason why the matter was struck from the urgent roll on Friday the 14th of July 2023 by Mudau J.

The merits and the respective submissions of the parties

[8] At the outset, it was submitted by Adv Campbell (who once again appeared for the Respondents) that the actions of the Applicant, by once again enrolling the matter on the urgent roll of this Court shortly after the Court had made a decision in respect thereof, amounted to nothing less than an abuse of process. The Applicant submitted that by filing his Replying Affidavit he had set out new grounds of urgency which this Court should consider thereby allowing the matter to be heard as a matter of urgency and ultimately granting to the Applicant the relief sought.

[9] Arising from the aforegoing, this Court invited the Applicant to make reference to those averments in his reply which substantiated the submissions made by him. This was in order that this Court (apart from the trite general principle in motion proceedings that an applicant should make out his or her case in the founding papers and is not entitled to raise new matter in reply) could consider same insofar as these averments could assist the Applicant in establishing why this Court should entertain the application as one of urgency. The Applicant was unable to do so. Moreover, as the Applicant's (somewhat lengthy) argument evolved, it became abundantly clear to this Court that the Applicant was merely repeating the same argument as that essentially relied upon in the Applicant's Founding Affidavit. It must follow therefrom that this would have been essentially the same argument that the Applicant would have placed before Mudau J on Friday the 14th of July 2023.

[10] This argument, in broad summary, relied upon the fact that spoliation, by its very nature, gives rise to an urgent remedy and, in this particular instance, had rendered the Applicant homeless. It also relied upon the fact that the Applicant had advised the Respondents' attorneys that he intended to petition the Supreme Court of Appeal *("the SCA")* for leave to appeal to the SCA in terms of subsection 17(2)(b) of the Superior Courts Act, 10 of 2013 *("the Act")*. Further, the Applicant submitted that it was common cause, on the application papers before this Court, that before he was evicted from the premises he was practising as an attorney therefrom and that since his eviction he had been unable to continue with his practice since, *inter alia*, he had lost possession of his client's files.

Does spoliation always give rise to an urgent remedy?

[11] Of course, the Applicant's argument that spoliation must give rise to an urgent remedy cannot succeed or assist the Applicant on the issue of urgency in the present matter since there has been no spoliation. The Respondents have evicted the Applicant pursuant to an existing court order and in terms of a writ of execution lawfully issued in terms thereof. However, even accepting, for the sake of argument, that the eviction of the Applicant from the premises was somehow unlawful the Applicant has failed to establish any grounds of urgency. To the contrary, it is common cause, on the application papers before this Court that, *inter alia*, having occupied the premises for a considerable period of time without paying any rental and having exhausted all legal remedies to date the Applicant has nevertheless neglected and/or refused to vacate the Respondent's property (the premises). It must also be accepted that the Applicant must have reasonably anticipated that following thereon (particularly since he is a practising attorney) the Respondents would be entitled and would have no other remedy than to have him lawfully evicted from the premises. Under those circumstances and having regard to, *inter alia,* the chronology of events in this matter, there was ample time for the Applicant to have made timeous arrangements for suitable accommodation (both for living and work purposes). Not only are these aspects not dealt with at all by the Applicant in either the founding or replying affidavits but the Applicant has failed to make any averments whatsoever to the effect that he is unable to afford alternative accommodation. The result of the aforegoing is that if there is indeed any urgency in this matter (which there is not) it must be held that same has been self-created by the Applicant. Indeed, despite filing a Replying Affidavit the Applicant fails to deal at all with the averments in the Respondents' Answering Affidavit pertaining to the Applicant's ability to obtain and afford suitable alternative accommodation pursuant to his eviction from the premises. As if this was not bad enough for the Applicant's case there is a clear contradiction between the averments as set out in paragraphs 29 and 30 of his Replying Affidavit. On the one hand he complains about having to incur out of pocket expenses in respect of temporary and suitable accommodation whilst also averring that he has become homeless as a result of the alleged unlawful actions of the Respondents.

[12] To briefly answer the question posed in the heading above the answer thereto must, as a general principle, be in the negative. Each case must be decided on its own merits. In matters of eviction (such as in this case) it is often difficult to separate a finding on urgency from, at the very least, a *prima facie* finding on the merits. This leads to the second basis upon which the Applicant's argument was founded, as set out hereunder.

The Applicant's reliance upon the fact that he has advised the Respondents' attorneys that he intends to petition the SCA for leave to appeal in terms of subsection 17(2)(b) of the Act which the Applicant submits suspends the operation of the judgment of the High Court

[13] The interpretation the Applicant wishes to place upon this subsection of the Act has been thoroughly dealt with in the Mudau judgment when the learned Judge set out his reasons for the order made on Friday the 14th of July 2023. In order not to burden these reasons unnecessarily, reference is simply made thereto. Furthermore, this Court is in full agreement with those reasons as set out by Mudau J in the Mudau judgment as to why the Applicant's interpretation cannot be correct.

[14] In the Applicant's Replying Affidavit the Applicant made reference to two decisions (which this Court also raised with him during the course of his argument on the 18th of July 2023) upon which he relied in support of his aforesaid interpretation. The first matter relied upon is that of *Panayiotou v Shoprite Checkers (Pty) Ltd and Others*[2] Far from supporting the Applicant's interpretation this decision only reinforces the clear meaning of the relevant subsections and intention of the Act (and the finding in the Mudau judgment) that mere intent to institute an application for leave to appeal (reflected in an email) is clearly insufficient. An actual application (described by Mudau J as a court process) is required. Whilst the court in *Panayiotou* was not dealing directly with this point but with an application for condonation and when a petition has the effect of suspending the judgment against which leave is sought, it is clear therefrom. An application for leave to appeal must be served within the prescribed time. Until it is lodged the judgment is not suspended and it is not suspended merely by the service of an application for condonation but only by the granting thereof.

[15] The Applicant also relied upon the decision in the matter of *Helen Suzman Foundation v Minister of Police*.[3] This matter deals with the test to be applied in respect of an application to put into operation a judgment which is the subject of an application for leave to appeal in terms of subsection 18(1) of the Act. It is not authority, in any manner whatsoever, for the point that the Applicant wishes to make.

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[2] *2016 (3) SA 110 (GJ).*
[3] *2017 JDR 0794 (GP).*

The Applicant's submission that it was common cause on the application papers before this Court that before he was evicted from the premises he was practising as an attorney therefrom and that since his eviction he has been unable to continue with his practice since, *inter alia*, he has lost possession of his client's files.

[16] When this submission was made by the Applicant during the course of argument, Counsel for the Respondents immediately objected on the basis that same was not common cause. This was then conceded by the Applicant who thereafter submitted that this Court should draw that inference from the application papers before it. Not only is this Court of the opinion that this is not the only reasonable inference that may be drawn from the application papers before this Court (that the Applicant practised from the premises and that he has lost possession of the files of his clients as a direct result of being evicted from the premises) but this Court once again repeats the reasons already provided and as set out above.[4]

Costs

[17] The Respondents sought an order that the application be dismissed with costs on the scale of attorney and client. In support thereof, Counsel for the Respondents submitted to this Court that on all previous occasions when the Respondents had succeeded against the Applicant the Court had granted costs on a punitive scale. In addition thereto, Counsel also submitted that the agreement in terms of which the Applicant had rented the premises from the Respondents provided for costs on an attorney and client scale.

[18] It was pointed out by this Court to Counsel for the Respondents that this Court was rather restricted by the fact that it had little or no knowledge of the previous proceedings. Further, the application papers had been received by the Court via email (with no hard copies provided). In addition thereto, as also dealt with earlier, the reasons of Mudau J were yet to be provided which could also possibly have enlightened this Court as to the issue of the scale of costs. Taking all of the aforesaid factors into consideration, Counsel for the Respondent elected to have the Court reserve the issue of costs rather than make a hasty decision in relation thereto which may have resulted in this Court, in the exercise of its general discretion in relation thereto and in light of the lack of information before it, together with the fact that there were other urgent matters to be dealt with on the urgent roll, granting an award for costs on the party and party scale only. In this manner (by reserving the issue of costs) the parties (with particular reference to the Respondents wishing to seek a punitive order as to costs) could properly ventilate same at a later stage should they so desire. In the premises, the issue of costs was reserved.

Conclusion

[4] *Paragraph [11] ibid*.

[19] The aforegoing are the reasons for the order made by this Court dealing with the matter on the urgent roll on Tuesday the 18th of July 2023.

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B.C. WANLESS
Acting Judge of the High Court
Gauteng Division, Johannesburg

Heard:	18 July 2023
Judgment (*Ex Tempore*):	18 July 2023
Written Reasons	31 July 2023

Appearances

For Applicant:	[In Person]
For First and Second Respondent:	Adv AG Campbell
Instructed by:	Bennett McNaughton Attorneys