IN THE HIGH COURT OF SOUTH AFRICA, NORTHERN CAPE DIVISION, KIMBERLEY

JUDGMENT

Not Reportable

Case No: 2231/2018

In the matter between:

ORANJE WATERSPORT CC **APPELLANT**

And

DAWID KRUIPER MUNICIPALITY **RESPONDENT**

Neutral citation: *Oranje Watersport CC v Dawid Kruiper Municipality* (Case no 2231/2018) (10 February 2023)

Coram: PHATSHOANE DJP, MAMOSEBO J and SIEBERHAGEN AJ

Heard: 07 November 2022

Delivered: 10 February 2023

Judgment

Phatshoane DJP

[1] Essentially, this appeal turns on the question whether the Court of first instance (Lever J) had a discretion to afford an erstwhile tenant a reasonable time within which to vacate a commercial property following the expiry of the lease agreement. The appeal is with leave of that court.

[2] The respondent, Dawid Kruiper Municipality (the municipality), took a point that the appeal has lapsed. The appellant, Oranje Watersport CC, sought leave that it be reinstated. The saga has had a somewhat tortuous passage. To facilitate understanding of the issues arising on appeal, a resumé of certain relevant facts is necessary.

[3] The appellant leased a property known as erf 15747, Olivier Park, Upington (the property), from the municipality and its predecessor in title for a period of approximately 18 years in terms of several lease agreements most of which were for a fixed period of five years. The latest lease commenced on 26 July 2013 and ran its course on 30 June 2018. It conducted a business of a resort on the property and a river barge styled 'Sakkie sê Arkie' which became known internationally and nationally for conducting cruises on the Orange River from the pier at the property. It also effected some improvements to the property for this purpose. The lease provided that on its termination the municipality would acquire ownership of the improvements and would not compensate the appellant for this. When the lease came to an end on 30 June 2018 the municipality did not renew it. Instead, it disposed of the property by means of a public tender. The appellant submitted a tender but was informed that its bid was unsuccessful. The property was awarded to Upington Hotel (Pty) Ltd.

[4] Aggrieved by the turn of events, the appellant filed a review application which came before the Full Bench of this Division. It was unsuccessful but subsequently successfully petitioned the Supreme Court of Appeal (SCA) which, on 30 June 2020, granted leave to appeal; upheld the appeal; set aside the order of the Full Bench and substituted it with the following:

> '(a) The resolution of the first respondent [the municipality] to sell the property known as Erf 15747, Olivier Park, Upington, Northern Cape Province, measuring 9 023 square metres, is reviewed and set aside.
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> (b) The award of the tender adjudication committee dated 8 April 2016 in respect of tender TN054/2015 is reviewed and set aside.

(c) Any contract entered into as a result of the decisions of the tender adjudication committee of the first respondent to award the tender to the second respondent is declared invalid and of no force and effect.

(d) The first respondent is ordered to pay the costs of the application.'

[5] Prior to the above decision of the SCA, on 10 September 2018, the municipality had applied to the court of first instance for the appellant's eviction from the property on the basis that the lease had expired and thus the appellant was in unlawful occupation of the premises. The appellant resisted the eviction application and traversed wide field of points *in limine* which included the lack of jurisdiction of the court of first instance to determine the eviction application. None of these, the court of first instance found, had merit. The jurisdictional point had been premised principally on clause 30 of the lease agreement which provided that any dispute which may arise out of the agreement, excluding the payment of rental, service fees, tax and any payment in respect of which the lessor would be liable in terms of the agreement, would be resolved through negotiation between the parties and if unresolved within 14 days the dispute would be decided by an independent arbitrator. On this point Lever J held that:

'Once respondent [the appellant] conceded that the lease had run its course by the effluxion of time there was no longer any possibility that respondent could raise any issue that arose from the agreement which could be the subject of an arbitration as contemplated in clause 30 of the said lease agreement. Accordingly, this point in limine has no substance and stands to be dismissed.'

[6] It was argued before Lever J that he had a discretion to postpone the eviction and could order the appellant to pay rental while the appeal, on the review of the tender referred to above, was being processed in the SCA. The court of first instance reasoned that the property in issue was not a residential property and it was not open to it to make an agreement for the parties. Thus, on 20 September 2019, Lever J ordered the appellant's immediate eviction from the property.

[7] The appellant sought leave to appeal the eviction order. It raised multifarious grounds but ultimately persisted in two of the grounds, namely: that the court of first instance did not have jurisdiction to entertain the application for eviction in light of clause 30 of the lease, which pertained to the arbitration, referred to earlier. The second ground, which is key to the present appeal, concerned the question whether the court of first instance had a discretion to postpone the operation of the eviction order and whether it had in fact properly exercised that discretion. On this score, the appellant argued in paras 4-6 of the grounds of appeal that the court of first instance erred in finding that it did not have any discretion to set a specific date for eviction as the property was commercial and not residential. It was contended that it had an inherent discretion, when the order of eviction is to be given effect to, in order to do justice between the parties. The appellant cited various decisions[1] in terms of which it argued that our courts have given evictees time within which to vacate the property and had in some instances stayed the ejectment order.

[8] On 14 February 2020, the court of first instance refused leave in respect of the first ground of appeal but found that it had not properly exercise its discretion to postpone the date in respect of which the eviction order was to take effect. Whether sufficient basis existed to stay the execution of the ejectment order, the court of first instance held, was a matter to be determined by this Court. It therefore granted leave to appeal to the Full Court on the second ground confined to paras 4-6 of the Notice of Appeal.

[9] The appellant was not satisfied with the partial leave that had been so granted. On 19 August 2020, when the appellant filed its Notice of Appeal to the Full Court, it simultaneously petitioned the Supreme Court of Appeal on the remaining ground which concerned the jurisdiction of the court of first instance to have determined the eviction application. On 22 January 2021 the SCA granted condonation for the late filing of the petition but refused leave. In terms

[1] *Voortrekker Pers Bpk v Rautenbach* 1947 (2) SA 47 (A) at 50; *Lovius and Shtein v Sussman* 1947 (2) SA 241 (O); *Van Reenen v Kruger* 1949 (4) SA 27 (W)*; Graaff-Reinet Municipality v Mkwane* 1950 (3) SA 883 (E); *Woudstra v Jekison* 1968 (1) SA 453 (T).

of s 17(2)(f) of the Superior Courts Act 10 of 2013 (Superior Courts Act), the appellant applied to the President of the SCA for the reconsideration of the decision to refuse leave. That application was dismissed on 03 May 2021.

[10] An appeal has to be prosecuted within a reasonable time. As already said, Lever J granted leave to appeal to this Court on 14 February 2020. Within 20 days following this, the appellant was supposed to have filed its Notice of Appeal in terms of Rule 49(2) of the Uniform Rules of this Court. It did not. The appellant sprang into action on 16 July 2020, when the municipality brought it to its attention that the appeal had lapsed and urged the appellant to vacate the property by 17 July 2020.

[11] Before us, in its application for condonation and reinstatement of the appeal, the appellant explained that an e-mail dated 17 February 2020, from its correspondent attorneys, informing its attorneys of the judgment and order by Lever J granting partial leave, did not reach its attorney's e-mail account. This was confirmed by Mr Van Dyk of Dot Cloud (Pty) Ltd, a company which hosts its attorneys' e-mail server. The appellant also says that during that period, when the email was dispatched to it, its attorney had been on leave. The judgment granting leave was brought to its attention on 16 July 2020. As already alluded to, on 19 August 2020, some five months following the granting of leave by Lever J, the appellant filed its Notice of Appeal and sought condonation and reinstatement of the appeal.

[12] Rule 49(6) of the Uniform Rules of this Court provides:

'(6)*(a)* Within sixty days after delivery of a notice of appeal, an appellant shall make written application to the registrar of the division where the appeal is to be heard for a date for the hearing of such appeal and shall at the same time furnish him with his full residential address and the name and address of every other party to the appeal and if the appellant fails to do so a respondent may within ten days after the expiry of the said period of sixty days, as in the case of the appellant, apply for the set down of the appeal or cross-appeal which he may have noted. If no such application is made by

either party, the appeal and cross-appeal shall be deemed to have lapsed: Provided that a respondent shall have the right to apply for an order for his wasted costs.'

[13] Apart from its failure to file its Notice of Appeal timeously, the appellant did not apply to the registrar of this Court for a date of hearing of the appeal and neither did the municipality request the set down of the appeal after the expiry of the 60 days as set out in Rule 49(6). As a consequence of this, the appeal lapsed by operation of the law.

[14] On 09 February 2021, six months following the filing of the Notice of Appeal, the municipality directed an e-mail to the registrar's office, in an endeavour to advance the appeal process, enquiring on the availability of dates for the hearing of the appeal. The appellant in its replying e-mail of the same date, directed to the municipality and the registrar, was of the view that the prosecution of this appeal had been suspended until the SCA had, in terms of s 17(2)(f) of the Superior Courts Act, reconsidered its decision to refuse leave. The Registrar's attitude was that it fell outside the scope of her work to advise the parties on the further conduct of the proceedings. She urged them to follow the rules of court and practice directives.

[15] On 30 March 2021, the municipality launched an application for its wasted costs in terms of Rule 49(6)*(a).* It contended that in accordance with Rule 49(6) *(a)* the appellant was supposed to have applied to the registrar for the date of the hearing of the appeal within 60- days pursuant to the filing of the Notice of Appeal and to furnish the registrar with the particulars of other parties to the appeal as set out in the rule.

[16] In countervailing, the appellant contended that the appeal before us was suspended pending the final determination of its application for leave to appeal in the SCA. It premised its argument, as it were, primarily on s 18(1) of the Superior Courts Act which provides:

'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.'

[17] The appellant argued that the 60-days period within which the appeal ought to have been prosecuted should be calculated from 03 May 2021, the date of dismissal of the application for reconsideration of the decision to refuse leave by the SCA. This meant, it argued, that the 60-days period within which to apply for the hearing of this appeal would have been on 27 July 2021. It contended that as soon as its reconsideration application in the SCA failed, it did not delay in prosecuting the appeal. On 02 July 2021, it filed the record of the appeal. It further contended that the Rule 49(6)*(a)* application by the municipality, for the wasted costs, in the circumstances of this case, was premature as it was delivered before the SCA had pronounced on the reconsideration application.

[18] Reliance by the appellant on s 18 of the Superior Courts Act as support for its argument that the appeal pending in this Court was suspended following its launching of the application for leave to the SCA against the remainder of the order of the court of first instance refusing leave, is misplaced. Properly construed, the decision of the court of first instance granting leave to the Full Court does not fall within the category of "a decision which is the subject of an application for leave to appeal or of an appeal" as contemplated in s 18(1). The interpretation of the statutory provision in a manner suggested by the appellant may lead to some absurdity. The suspension of an order granting leave in order to obtain further leave in the same court or another court is not provided for in the Superior Courts Act or in the uniform Rules.

[19] However, the fact that there had been a separate application for leave pending before the SCA which draws its origin from the judgment of the court of first instance somewhat vindicates the appellant's contention because the application for leave before the SCA dealt with the question of jurisdiction of the court of first instance to have considered the eviction application. Had the appellant been successful in that appeal the jurisdiction of this Court would have similarly been ousted. It was only pragmatic, as I see it, that the

application for leave before the SCA be disposed of first prior to the appeal before us on the merits of the eviction, in particular, the discretion or lack thereof on the part of the court of first instance to afford the appellant the opportunity to vacate the property.

[20] The following remarks by Madlanga J in *Eke v Parsons*[2] are instructive*:*

> '[39]…Without doubt, rules governing the court process cannot be disregarded. They serve an undeniably important purpose. That, however, does not mean that courts should be detained by the rules to a point where they are hamstrung in the performance of the core function of dispensing justice. Put differently, rules should not be observed for their own sake. Where the interests of justice so dictate, courts may depart from a strict observance of the rules. That, even where one of the litigants is insistent that there be adherence to the rules. Not surprisingly, courts have often said '(i)t is trite that the rules exist for the courts, and not the courts for the rules'.'

[21] From the aforegoing exposition, the prosecution of the appeal was plainly imperilled by circumstances beyond the appellant's control. It follows that the appeal must be reinstated. Even though the appellant, by means of the application for condonation and reinstatement of the appeal, was seeking an indulgence from this Court, it ought not to bear the costs occasioned thereby. This is so because the prosecution of the appeal had been stymied in a manner already described. In my view, each party must bear its own costs.

[22] Rule 49(6)(a) serves a very useful purpose of securing efficient and expeditious disposal of appeal processes. The frustration experienced by the municipality, as a result of many years of unending litigation, as foreshadowed in the Rule 49(6)(a) application, is understandable. Nonetheless, regard being had to the above analysis, its Rule 49(6)(a) application for wasted costs was a bit precipitous and must fail. However, I remain unpersuaded that the municipality should bear the costs of that application, let alone one on the punitive scale as the appellant sought to argue including the wasted costs occasioned by the postponement of that application on 22 October 2021. In *Mukaddam v Pioneer*

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[2] 2016 (3) SA 37 (CC) para 39.

Foods (Pty) Ltd[3] the Constitutional Court acknowledged that sometimes circumstances do arise, which are not provided for in the rules, and in that case the proper course is to approach the court itself for guidance. The appellant did not act conscientiously by seeking guidance from this Court or filing an application seeking this Court's direction on the further conduct of the appeal proceedings so soon when it dawned upon it that compliance with the time-frames set out in Rule 49(6)*(a)* was nigh impossible. It only reacted some 6 months later, when the municipality, out of exasperation, commenced requesting dates for the disposal of the appeal from the registrar. I am driven to the conclusion that the appellant ought to be deprived of its costs in the Rule 49(6)(a) application including the wasted costs occasioned by the postponement of that application on 22 October 2021.

[23] The appeal itself turns on a narrow issue whether a court has the authority in an eviction which concerns a commercial property to stay or suspend the operation of the ejectment order pending the occurrence of a specific future event or to fix a specific date in future upon which the order is to take effect. The court of first instance, as already said, found that it did not have such a discretion. *Voortrekker Pers Beperk v Rautenbach*[4] did not concern the exercise of a discretion, however, the Appellate Division gave an evictee one month period within which to vacate the property. In *AJP Properties CC v Sello*[5] Spilg J found, on good authority, that:

> '[21] There is accordingly a history of case law spanning close on a century which has, irrespective of its pedigree, become solidified and which has accepted that courts can exercise a discretion which, it appears, is not derived from its inherent jurisdiction but from a common-law power to stay or suspend the execution of an ejectment order…'

[24] In terms of Rule 45A the court may, on application, suspend the operation and execution of any order for such period as it may deem fit: Provided that in the

[3] 2013 (5) SA 89 (CC) para 32.

[4] 1947 (2) SA 47 (A).

[5] 2018 (1) SA 535 (GJ).

case of an appeal, such suspension is in compliance with section 18 of the Superior Courts Act. The court has, apart from the provisions of this rule, a common-law inherent discretion to order a stay of execution and to suspend the operation of an ejectment order granted by it. It is a discretion which must be exercised judicially but which is not otherwise limited.[6] The Court's inherent power to stay the execution of the ejectment order is buttressed by s 173 of the Constitution[7] which endows the High Courts the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.

[25] The appellant argued that it sought that the date, in respect of which the eviction was to take effect, be fixed to a date after the hearing of its appeal to review the decision of the municipality referred to in para 4 above. Otherwise put, it sought before Level J that it be allowed to remain on the property 'for the interim period pending the finalisation of the appeal proceedings'. The municipality contended that the discretionary period which the court of first instance might have granted to the appellant, prior to the execution of the eviction order, had far been exceeded by the period it took to prosecute the appeal and thus the determination of the appeal is moot. In any event, so it argued, the appellant had ample time through which it benefitted from its unlawful occupation of the property, therefore, the period of extension of the execution of the ejectment order had been sufficient up until the date of the hearing of this appeal. Consequently, it further argued, the ejectment order must immediately take effect.

[26] Execution is subject to the supervision of the court which has inherent jurisdiction to stay its operation if the interests of justice so require.[8] To the extent that the court of first instance ordered the immediate eviction of the appellant from the property, on the basis that it was a commercial property and

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[6] See commentary under Rule 45A and authorities cited therein, Erasmus, Superior Courts Practice, Jutastat e-publications, RS 18, 2022, D1-603.

[7] The Constitution of the Republic of South Africa,1996.

[8]*Chief Lesapo v North West Agricultural Bank* 2000 (1) SA 409 (CC) para 13.

therefore it had no discretion to consider the period in respect of which the ejectment order was to take effect, it erred. Regard being had to the period of 18 years in which the appellant occupied the property, to my mind, the court of first instance ought to have given it a reasonable period within which to vacate the property.

[27] When the appeal before the SCA, concerning the review, was finalised on 30 June 2020, the appellant had been in unlawful occupation of the property for a period of almost 8 months calculated from the date of Lever J's order. At present more than two years and 7 months has lapsed since the review appeal was determined by the SCA. The discretion which the appellant contended the court of first instance ought to have exercised has long been overtaken by the events. However, the appellant's argument took a further dimension. The period within which the appellant ought to be allowed to remain on the property, as set out in its heads of argument, further hinges on this:

> '7.11 What is furthermore clear from the aforegoing is the fact that the respondent [the municipality] still intends to sell the property and to enable [it] to do so it has to again follow the due and correct tender process. Despite indicating in the letter from its attorneys of record in July 2020 that it is to make a decision in that respect by 30 July 2020, the municipality refuses to do so until the appellant vacates the property, as the municipality submitted that prospective bidders as to the new tender process cannot view the property whilst the appellant is in occupation thereof, which ironically was the same position that the municipality found itself in at the time the municipality launched the tender process which was set aside by the SCA, in that the appellant was at that time also and remains so, in occupation of the property, which occupation was not at that time [of any] hindrance to the municipality.
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> 7.12 That leaves a stalemate situation.
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> 7.13 The appellant tendered to pay rent while in occupation and the main reason for the occupation of the property by the appellant is simple.

> 714 It is common cause that if the property is vacated by the appellant [it would] be vandalised and become unusable during and in the time that the municipality presumably decide to embark upon the new tender process, so as to sell the property.
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> 7.15 The appellant's simple contention is that it intends to buy or at least submit a bid to buy the property. If the appellant is to be successful in its bid to again buy the property, after having vacated the property, it would have lost all the capital investment in the property, should [it] be unable to protect same during the sale process. It is this simple problem appellant wishes to overcome by temporary occupation thereof until the [municipality] completed the process...
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> 7.16 …(T)he court has a discretion to order that the appellant only vacate the property once the municipality has made a decision in respect of the property and it is to be transferred to any other entity or person [other] than the appellant...'

[28] It is not the appellant's case that the eviction order was improper. On the contrary, it argued, "it cannot be disputed that the order for eviction should stand..." What the appellant is urging this Court to do, in the preceding paragraphs, is at odds with the basic principles of property law. It is also remarkable that it seeks, as part of the order, that the eviction only takes effect upon the municipality having decided upon the award of a bid. That cannot be. The municipality is the registered owner of the property and has the right to possess, use, enjoy, and deal with the property freely, within the confines of law, since the termination of the lease on 30 June 2018.

[29] It would be unconscionable and legally untenable for the appellant to hold the property in perpetuity in circumstances where the lease had run its course. Put differently, it cannot continue to have 'a permanent anchorage for its barge during the time that barge is not in operation' as alluded to in its founding papers. The anchorage is dependent on the duration of the lease. A court must protect a legal right when it is not barred from doing so.[9]

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[9] *Betta Eiendomme (Pty) Ltd v Ekple-epoh* 2000 (4) SA 468(W) para 10.2

[30] In a further attempt to secure continuous use and enjoyment of the property the appellant contended:

> '7.18 Should the court however be of the view that, on the facts before it the parties should file further affidavits to deal with the proper exercise of such discretion, then the court has the right to refer that aspect back to the court and that the parties file further affidavits should they wish. This court has the authority in terms of section 19 of the superior Courts Act of 2013.'

[31] I am of the view that there is sufficient evidence before us to determine the appeal. The appellant has had more than a fair opportunity to secure alternative accommodation. Litigation has to end at some point. However, all things considered, to my mind, it would be just and equitable to afford the appellant a further period within which to vacate the property, regard being had to a period of 4 and half years, since the termination of the lease, that the appellant had been in occupation whilst ligating against the municipality. To this end, I am of the view that a further period of two months, from the date of the order of this Court, within which to vacate the property would be adequate.

[32] That leaves the question of costs in this Court, which present no difficulty and must follow the result. With regard to the costs in the court of first instance, the municipality has had substantial success in the eviction application. Thus, there would be no basis to interfere with the court of first instance's order on that aspect. In the result, I make the following order.

Order:

1. The application for condonation and reinstatement of the appeal is granted;

2. The application for wasted costs in terms of Rule 49(6)(a) is dismissed;

3. The appeal is upheld with costs including costs of the application for leave to appeal;

4. The order of the court of first instance is set aside and in its place is substituted the following:

‘1. Oranje Watersport CC, the respondent, and or any person occupying erf 15747, Olivier Park, Upington, through or on behalf of the respondent is hereby evicted from the said property;

2. The order of eviction referred to in para 1 of this order is to take effect within two months (60 calendar days) from date of this order;

3. The respondent is to pay the costs of the application on party and party scale.’

Phatshoane DJP

Mamosebo J and Sieberhagen AJ concur in the Judgment and order of Phatshoane DJP.

APPEARANCES:

For the appellant:	Adv M Snyman SC
	Instructed by Engelsman Magabane Inc, Kimberley.
For the respondent:	Adv JS Rautenbach

Instructed by Haarhoffs Inc, Kimberley.