



| | |
|------------------------------------|----------|
| Reportable: | YES / NO |
| Circulate to Judges: | YES / NO |
| Circulate to Magistrates: | YES / NO |
| Circulate to Regional Magistrates: | YES / NO |

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

Case No: **1252/2023**
Heard: **25/08/2023**
Delivered: **29/09/2023**

In the matter between:

OCHRE SHIMMER TRADE AND INVEST 78 (PTY) LTD Applicant

and

**CHIEF REGISTRAR, NORTHERN CAPE
HIGH COURT** First Respondent

THE OFFICE OF THE CHIEF JUSTICE Second Respondent

**THE SHERIFF, KATHU, NORTHERN CAPE
HIGH COURT** Third Respondent

ASSMANG (PTY) LTD Fourth Respondent

LESLEY PAPANKI MOTSAMAI Fifth Respondent

In re:

ASSMANG (PTY) LTD Applicant

and

OCHRE TRADE AND INVEST 78 (PTY) LTD First Respondent

**THE PROVINCIAL COMMISSIONER OF THE
SOUTH AFRICAN POLICE SERVICE: THE
NORTHERN CAPE** Second Respondent

**REGIONAL MANAGER: DEPARTMENT OF
MINERAL RESOURCES AND ENERGY:
NORTHERN CAPE REGION**

Third Respondent

TRANSNET SOC LIMITED

Fourth Respondent

LESLEY PAPANKI MOTSAMAI

Fifth Respondent

JUDGMENT

Mamosebo J

[1] In its unsigned amended Notice of Motion dated 22 August 2023 Ochre Shimmer is seeking the following relief:

- 1.1 That the application is heard as one of urgency, condoning, in so far as needs be, the applicant's non-compliance with the Uniform Rules of Court relating to forms, service and time periods and disposing of this application at such time and place, in such manner and according to such procedure as the Court may deem fit in terms of Rule 6(12).
- 1.2 It is declared that the Chief Registrar unlawfully usurped the function of the judiciary by issuing a writ of ejectment when the underlying *causa* is the subject of an application for leave to appeal.
- 1.3 It is declared that the Chief Registrar's conduct in the issuing of the writ of ejectment is invalid and unlawful.
- 1.4 That the execution of the writ of ejectment is stayed pending the determination of the application for leave to appeal.

- 1.5 The sheriff be ordered to restore the *status quo* which prevailed before his execution of the unlawful and invalid writ of ejectment.
- 1.6 Costs be for the Chief Registrar as well as any party opposing this application.
- 1.7 Further and/or final relief.

The parties

[2] The applicant is Ochre Shimmer Trade and Invest 78 (Pty) Ltd, a limited liability company incorporated in terms of the laws of South Africa with its principal place of business at 1028 Mosiane Street, Molapo, Soweto, Gauteng Province. The first respondent is the Chief Registrar of the High Court of the Northern Cape Division. The second respondent is the Office of the Chief Justice of the Republic of South Africa (OCJ). The third respondent is the sheriff of the Court, Kathu Region. The fourth respondent is Assmang (Pty) Ltd, an entity registered in terms of the laws of South Africa. The Chief Registrar and the OCJ did not oppose the application and have filed a Notice to Abide the decision of the Court. Only the fourth respondent, Assmang, opposed the relief sought by Ochre Shimmer.

A brief background

[3] The facts are mainly common cause. On 07 July 2023 Assmang (Pty) Ltd (Assmang) launched a spoliation application against Ochre Shimmer Trade and Invest 78 (Pty) Ltd (Ochre Shimmer). The application was heard by Stanton J who on 14 July 2023 granted the order in favour of Assmang thereby ordering Ochre Shimmer to restore possession of the farm known as the Remaining Extent of the Farm Doornfontein No 446 situated in the district of Postmasburg, free and unencumbered of infrastructure (including, but not limited to fencing and structures) and equipment, vehicles,

sub-contractors, agents and employees, within 3 days of date of this order. Ochre Shimmer, and anyone occupying the property through it were ordered to vacate the property and to remove from the property all infrastructure (including, but not limited to fencing and structures) and equipment and vehicles, within 3 days from date of this order. Ochre Shimmer was further ordered to pay the costs of the application including costs consequent upon the employment of two counsel.

- [4] Ochre Shimmer remained in occupation after Stanton J's orders and started its mining operations despite the orders. On 19 July 2023 Ochre Shimmer filed an application for leave to appeal simultaneously with a request for reasons from Stanton J. The reasons for the orders in the spoliation application were furnished on 02 August 2023 and in the contempt of court application on 17 August 2023. The contempt of court application pending before this Court has been postponed to 29 September 2023.
- [5] On 11 August 2023 Assmang served a writ of ejectment, annexed to the papers as "OS3", on Ochre Shimmer authorising the sheriff to eject Ochre Shimmer from Doornfontein. Essentially, the main relief sought by Ochre Shimmer is an order suspending the execution of the writ of ejectment dated 11 August 2023.

Urgency

- [6] Ochre Shimmer, as argued by Mr Nkhahle, claims that the urgency arose out of the purported unlawfulness and gross misconduct by the Chief Registrar in the irregular issuing of the writ of ejectment as the basis for launching this application. Mr Bruinders SC, for Assmang, argued that Ochre Shimmer was forewarned to rather bring the application to suspend the operation and execution of the spoliation order in terms of s 18(2) of the Superior Courts Act, 10 of 2013, shortly after 20 July 2023, but opted otherwise. It is only after the order was executed on 17 August 2023 that Ochre

Shimmer brought the urgent application to suspend the writ. The relief sought by Ochre Shimmer, so the argument went, is available in the ordinary course in terms of s 18(2). Counsel urged that the matter be struck from the roll as self-created or for lack of urgency.

- [7] The test for urgent applications has become settled in law. Rule 6(12)(b) stipulates:

“In every affidavit or petition filed in support of any application under paragraph (a) of this subrule, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course.”

This rule is clearly adumbrated in *Mogalakwena Local Municipality v Provincial Executive Council, Limpopo and Others [2014] 4 All SA 67 (GP)*. I nevertheless continued to hear the parties on the merits without pronouncing on urgency. By doing so it must not be construed that the matter was urgent. I had all the facts before me and the case was fully ventilated. I could perceive of no prejudice to either party to hear the merits whereas a postponement would needlessly cause a delay, settle another Judge with the application and duplicate costs.

- [8] Before I deal with the issue for determination, it is appropriate to consider the points *in limine* raised by Assmang in its answering affidavit as it was submitted by Mr Bruinders in oral argument that they were not abandoned. Ochre Shimmer neither filed a replying affidavit nor did its counsel, Mr Nkhahle, make any submissions pertaining to all the points raised in *limine* by Assmang save, after taking an instruction from its attorney, to submit that Ochre Shimmer will be at the mercy of the court in as far as these points are concerned.

The relief is incompetent

[9] Assmang maintains that Ochre Shimmer is seeking to stay the execution of the writ of ejectment that has already been executed but Ochre Shimmer, its employees and its equipment have already been evicted from the Doornfontein Farm. Therefore, an order to this effect will be incompetent as the horse has already bolted. It would be a *brutum fulmen*.

[10] The relief Ochre Shimmer should have availed itself of is contemplated in s 18(2) of the Superior Courts Act which stipulates:

“18 Suspension of decision pending appeal

- (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) Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.*
- (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*
 - (iv) such order will be automatically suspended, pending the outcome of such appeal.*

- (5) *For the purposes of subsections (1) and (2), a decision becomes the subject of an application for leave to appeal or of an appeal, as soon as an application for leave to appeal or a notice of appeal is lodged with the registrar in terms of the rules."*

[11] Ochre Shimmer should have brought an application for this Court to suspend the operation and execution of the spoliation order granted by Stanton J but has either omitted, elected or failed to do so. Absent such application its argument cannot be correct that the Chief Registrar usurped the function of the judiciary by issuing the writ because it was within the purview of her duties and responsibilities to do so. I agree with the submission by Mr Bruinders that there is a *causa* for the writ, namely, Stanton J's spoliation order and the Chief Registrar only sought to enforce that order which was extant.

[12] It is evident from the sheriff's Return of Service marked "AA1", attached to the papers, that the sheriff served a copy of Stanton J's order on Mr Morris Morole, CEO/Manager, at Ochre Shimmer in person which he accepted. The sheriff recorded on the return: Execution of Writ of Ejectment at p106 of the papers:

"It is hereby certified:

That on 18 August 2023 at 22:03 at Farm Doornfontein, Postmasburg, being the respondent's business address, the applicant was placed in possession of the premises after ejecting the respondent and their assets from the premises known as Farm Doornfontein, Postmasburg. Kindly note that the assets of the respondents were stored at the truck depot of the applicant which is situated at the main gate of the other portion of the farm."

An inventory of the assets is shown on the return under sheriff's reference 2023/01/01728.01.

This is conclusive that the order was effected. It therefore follows that the relief sought under this head is incompetent and stands to be dismissed.

Non-compliance with rules/practice directive

- [13] Evident from Ochre Shimmer's application is that the timelines are absurd. A party cannot, as Ochre Shimmer did, serve its application on Friday 18 August 2023 at 17:37 and set the matter down for hearing at 10:00 on Friday 18 August 2023. The respondents are requested, on those same papers to file their notice of intention to oppose by 21 August 2023, three days after the application would have been heard. Assmang was, nevertheless, asked to file its answering affidavit on 22 August 2023, that is four days after the application would have been heard on 18 August 2023.
- [14] The attack by Assmang relates to the procedural aspects as outlined in Rule 6 of the Uniform Rules of Court and the Practice Directives. The timelines as specified are not only indeed non-compliant but also conflicting. It is only after the answering affidavit was filed and these points taken that Ochre Shimmer belatedly served and filed the certificate of urgency and its notice in terms of Rule 41A. Ochre Shimmer ought to have set down the application by 12:00 on the Wednesday preceding the Friday when the argument was to be heard.
- [15] The rules are meant for the Court and not the Court for the rules. Schreiner JA in *Trans-African Insurance Co Ltd v Maluleka* 1956 (2) SA 273 (A) at 278F – G remarked:

“No doubt parties and their legal advisers should not be encouraged to become slack in the observance of the Rules, which are an important element in the machinery for the administration of justice. But on the other hand technical objections to less than perfect procedural steps should not be permitted, in the absence

of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits.”

Ochre Shimmer is no exception to these rules and ought to have observed them to enable compliance by its opponent.

Non-compliance with Regulation 4 of Act 16 of 1963

[16] There are patent defects in the founding affidavit resulting in a failure to comply with Regulation 4 of the Justices of the Peace and Commissioner of Oaths Act, 16 of 1963. It stipulates in peremptory terms that the commissioner shall not only sign the declaration but also print his or her full names and business address below the signature. The commissioner shall further state his/her designation and the area for which he holds the appointment if it is held *ex officio*. The “his/her” has not been deleted where applicable to confirm that the deponent was male or female. Ochre Shimmer’s founding affidavit does not comply with these stipulations. This aspect was dealt with in *Absa Bank v Botha NO 2013 (5) SA 563 (GNP)*. Such a statement may be construed as containing allegations that are not deposed to under oath by the deponent. The affidavit is the cornerstone upon which the application on notice of motion was founded. Although this aspect alone may not have the application dismissed it is, however, a factor that contributes towards an adverse finding when considered cumulatively with the other issues.

Misjoinder

[17] Assmang took issue with the joinder of the Chief Registrar and the Chief Justice contending that they do not have a legal and substantial interest in the application to set aside the writ of execution for ejectment. Assmang maintains that it is the duty of the Registrar to issue writs relying on the judgment as *causa* for the writ. If there is no *causa* the courts are entitled to set aside such writs. Further, the Chief Justice of the country has no interest in a writ of ejectment issued out of the Kimberley High Court

because a Judge seized with the application to set aside such a writ will adjudicate on such a matter. Assmang contended that proper notices should be issued exonerating both parties from being cited. The horse has bolted on this aspect because argument has already been heard. Both parties intimated, in any event, to abide the decision of the Court.

- [18] Ochre Shimmer applied on urgency for the writ of ejectment issued by the Chief Registrar to be stayed pending its application for leave to appeal. It maintains that by doing so the Chief Registrar usurped the function of the Court. The main contention by Assmang to the contrary is that there is a *causa* for the writ based on Stanton J's judgment dated 14 July 2023.
- [19] Rule 45A of the Uniform Rules of Court stipulates that the court may, **on application**, suspend the execution of any order for such period as it may deem fit: Provided that in the case of an appeal, such suspension is in compliance with section 18 of the Act. This rule confers a discretion on a court to suspend the operation and execution of any order for a period it deems fit. Innes CJ in *Rood v Wallach* 1904 TS 257 at 259 stated that the suspension must aim at obviating real or substantial injustice. In *Rood* the special circumstances were that the party was seeking the suspension of the execution of a money judgment for loss of profits. In *casu* the issue involves a spoliation order. I do not deem it fit, in the exercise of my discretion, to suspend the execution of such an order in terms of Rule 45A.
- [20] Prior to the coming into operation of the Superior Courts Act, the common law prevailed. In terms of the common law rule of practice execution of a judgment was automatically suspended upon the noting of an appeal. The effect was that the judgment could not be carried out or no effect could be given thereto except with the leave of the Court that granted that judgment. See *South*

Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977 (3) SA 534 (A) at 544H – 545A.

- [21] A spoliation order, as endorsed by the Appellate Court in *Nino Bonino v De Lange* 1906 TS 120 has this illuminating fundamental principle that no man is allowed to take the law into his own hands; no one is permitted to dispossess another forcibly or wrongfully and against his consent of the possession of property, whether movable or immovable. If he does so, the Court will summarily restore the *status quo ante*, and will do that as a preliminary to any inquiry or investigation into the merits of the dispute.
- [22] The judgment by Stanton J is not final in effect because it granted to Assmang spoliation relief. Reliance by Ochre Shimmer on the unreported judgment in the South Gauteng Division of the High Court in *Metchem Steelpoort CC v Eskom Holdings SOC Ltd*, Case No 22375/2019 at para 26 does not support its argument as the paragraph is clear that spoliation relief is by definition only temporary or interim or interlocutory. Cameron JA, then, in *Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality and Others* 2007 (6) SA 511 (SCA) said the object of the *mandament* is interim restoration of physical control and enjoyment of specified property. This then leads to the conclusion that the order granted by Stanton J is a preliminary and provisional order.
- [23] Can the contention by Ochre Shimmer be correct that because it has filed an application for leave to appeal the order by Stanton J that that step ought to suspend the execution of the order? Can it also be correct that at the expiry of the 3-day period when Ochre Shimmer had not vacated the property and the Chief Registrar consequently issued a writ of ejectment the conduct of the Chief Registrar was unlawful as she was usurping the functions of the Court?

In conclusion

[24] On whether the Chief Registrar acted unlawfully in issuing the writ of ejectment and thereby, as alleged by Ochre Shimmer, usurped the functions of the judiciary. My finding is that the Superior Courts Act finds application and not the common law. The judgment and orders by Stanton J in the spoliation application are not automatically suspended because the spoliation order was interim relief. Notwithstanding that Ochre Shimmer has brought an application for leave to appeal the spoliation order, that application did not suspend the operation/execution of the spoliation order. It was incumbent upon Ochre Shimmer to apply to court for the suspension of the spoliation order. Absent such application and upon expiry of the fixed three days the Chief Registrar was well within the performance of her duties to issue such a writ and is exonerated. It therefore follows that the application by Ochre Shimmer stands to be dismissed with costs.

Costs

[25] On the question of costs, Ochre Shimmer sought an order for costs maintaining that it has made out its case for the relief sought in the amended Notice of Motion. Assmang, invoking *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) at paras 217 to 227, is seeking a punitive costs order based on the following grounds:

- 25.1 The urgent application by Ochre Shimmer is an abuse of Rule 45A of the Uniform Rules of Court which has resulted in unnecessary litigation expenses;
- 25.2 Ochre Shimmer should have resorted to the remedy under s 18(2) of the Superior Courts Act for the suspension of the operation and execution of the spoliation order; and

25.3 Ochre Shimmer's conduct in attacking the Chief Registrar for carrying out her mandated responsibilities is objectionable and reprehensible.

[26] It would be unfair to award the usual costs order on a scale as between party and party because the successful party would be left out of pocket in respect of needless expenses incurred in the litigation. The costs awarded on a party and party scale will not be sufficient to cover all the expenses. A punitive cost order is justified in this instance because Ochre Shimmer had other suitable remedies to explore but elected not to despite being forewarned.

[27] In the result, the following order is made:

The urgent application by Ochre Shimmer is dismissed with costs on attorney and client scale, which costs shall include the costs consequent upon the employment of two counsel.

M.C. MAMOSEBO
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION

For the Applicant:
Instructed by:

Adv. R.J. Nkhahle
Vakalisa Inc Attorneys
c/o Duncan & Rothman Inc.

For the 4th Respondent:
Instructed by:

Adv T.J. Bruinders SC (with him Adv M. Smith)
Cliffe Dekker Hofmeyr Inc.
c/o Van de Wall Inc.

For 1st and 2nd Respondent: Office of the State Attorney

For the 3rd & 5th Respondents: No opposition/ No appearance