Reportable:	**NO**
Circulate to Judges:	**NO**
Circulate to Magistrates:	**NO**
Circulate to Regional Magistrates:	**NO**

IN THE HIGH COURT OF SOUTH AFRICA

NORTHWEST DIVISION, MAHIKENG

CASE NO: 1200/2011

In the matter between:-

GODFREY KINNI RANGAKA Applicant

and

SARAH KENALEMANG MODIMOKWANE N.O 1st Respondent

SARAH KENALEMANG MODIMOKWANE 2nd Respondent

TSHEPISO DAVID RAMPHELE 3rd Respondent

(TRADING AS RAMPHELE ATTORNEYS)

SHERIFF OF THE MAGISTRATES' COURT

RUSTENBURG 4th Respondent

CORAM: MFENYANA J

Delivered: This judgment was handed down electronically by circulation to the parties' representatives *via* email. The date and time for hand-down is deemed to be 10h00 on **29 February 2024**.

ORDER

(1) The first to fourth respondents are interdicted and restrained from proceeding with, and from carrying out the ejectment of the applicant and all persons occupying the property described as Erf 2827, Tlhabane, Unit 1, Registration Division JQ, under him, pending the rescission, variation or setting aside of the order dated 17 September 2020.

(2) The writ of execution issued as a sequel to the order of 10 May 2016 or any re-issue thereof is stayed pending the rescission, variation or setting aside of the order dated 17 September 2020.

(3) The first to third respondents are interdicted and restrained from harassing, threatening or intimidating the

applicant or any person occupying the property described as Erf 2827, Tlhabane, Unit 1, Registration Division JQ, under the applicant, in any manner with the view to evict them from the property.

(4) The costs of the application shall be borne by the first to third respondents on a scale as between attorney and client, jointly and severally, the one paying the other to be absolved.

JUDGMENT

MFENYANA J

INTRODUCTION

[1] The applicant in these proceedings seeks various orders *inter alia* interdicting the respondents from ejecting the applicant from a property described as Erf 2827 Tlhabane, Unit 1, Registration Division JQ (the property), and any person occupying the property through him.

[2] The applicant also seeks a stay of a writ of ejectment re-issued by the Registrar of this Court on 22 November 2023, as well as an order interdicting the first to third respondents from harassing, intimidating and threatening the applicant or any person occupying the property through him. The re-issued writ makes no reference to when the writ was originally issued, save to state that an order was granted on 17 August 2015.

[3] Finally, the applicant seeks a costs order against the first to third respondents, jointly and severally, and only in the event of opposition in respect of the fourth respondent.

[4] Although the respondents have opposed the application, they did not file an answering affidavit in that the document before court, is neither signed nor commissioned. As such, this Court will not attach any value to it.

[5] A concession was made by Mr Makhambeni, counsel for the respondents, that the matter may be disposed of, on the founding papers alone. For that reason, this Court must consider whether the applicant has made out a proper case in the founding affidavit for the relief it seeks. Should this Court find that the applicant has not

made out a case, it should dismiss the application on that basis alone. In the event that this Court finds that the applicant has made out a proper case for the relief sought, it should grant an order in favour of the applicant.

[6] The law is very clear in this regard. A respondent who elects not to file an answering affidavit does so at its own peril. That respondent is at liberty to argue on the papers as filed by the applicant.

LITIGATION HISTORY

[7] The dispute between the parties has a long history dating back to 2011 when the first respondent (as plaintiff in those proceedings), instituted proceedings for the ejectment of the applicant from the property. The relationship between the parties can be traced back to an earlier dispute pertaining to the property, between the applicant and the second respondent's deceased husband. The first respondent is thus the executrix in the deceased estate and is cited in these proceedings in her capacity as such, as well as in her personal capacity.

[8] On 10 May 2016, this Court granted an order ("2016 order") in favour of the first respondent, ordering the ejectment of the applicant from the property. The order having been granted in the absence of the applicant, the applicant on 18 March 2019 brought an application seeking to stay the ejectment. The matter was heard on 17 September 2020. An order ("2020 order") was granted in favour of the applicant, staying the order of 10 May 2016, and effectively, the ejectment of the applicant.

[9] In terms of the 2020 order, the applicant was also awarded costs. The applicant sought to recover the said costs and served a notice of taxation on the third respondent on 26 March 2021. Having not been opposed by the first respondent, the applicant proceeded to tax the bill on 13 August 2021. In a letter addressed to the third respondent, the applicant, on 17 August 2021 demanded payment of the taxed amount of R81 616.89 within seven days.

[10] On 31 August 2021, the third respondent, in response to the applicant's letter of 17 August 2021, informed the applicant's attorneys that the respondents never received the 'judgment' to which the taxation pertained, indicating that they would be in contact with the registrar in order "to understand 'clearly' the right of

retention you succeded in claiming" (*sic*). This 'judgment' would later turn out to be a sore point between the parties, as the respondents maintain that they never received same. The applicant's contention in this regard is that the court granted an *ex tempore* judgment, in the presence of the respondents' counsel, and as such the applicant accepted that the respondents' counsel would have conveyed the thrust of the order to the third respondent.

[11] Having received no payment, and no further correspondence from the respondents, the applicant caused a writ of execution to be issued on 6 December 2021 in respect of the taxed bill of costs. After various failed attempts to execute against the first respondent's movable property on 27 May 2022 and 28 July 2023 as the first respondent had moved the assets which were under attachment, it is the plaintiff's contention that the Sheriff managed on the latter occasion to remove one of the motor vehicles under attachment. The sale in execution could however not proceed as the remainder of the assets had been moved.

[12] On 25 July 2023, the third respondent addressed a letter to the applicant's attorneys of record, recording that the applicant had failed to produce the "judgment" since 2021 despite numerous

requests, which allegation is denied by the applicant. The first respondent subsequently filed an application seeking to interdict the sale in execution. The applicant opposed this application and filed a counter- application. Both applications are still pending before this Court.

[13] According to the applicant, on 16 October 2023, the third respondent addressed a letter to the Registrar of this Court requesting the transcriber's certificate for the *ex tempore* judgment and seeking an explanation for the sudden appearance of the court order, after a period of three years. The third respondent further requested that an *ad hoc* Sheriff be appointed. The fourth respondent was appointed in response to that request.

[14] On 11 December 2023 the fourth respondent attended at the applicant's place of employment armed with a re- issued writ of ejectment and advised that he had received instructions from the third respondent to carry out the eviction. Despite being advised that the said writ could not be executed as the operation of the underlying order had been stayed, the third respondent persisted, as he stated that he had been informed by the third respondent that the September 2020 order was fraudulent. The ejectment was thus

to take place on 15 December 2023 and later postponed to 19 December 2023 by virtue of 15 December 2023 having been declared a public holiday and following discussions with the public order police. All attempts to reason with the third respondent on 13 December 2023, not to proceed with the ejectment came to naught. It is on that basis that the present application was issued on 14 December 2023.

THE PRESENT APPLICATION

[15] In this application, the applicant seeks an order:

(a) interdicting the respondents from carrying out the ejectment of the applicant and all persons occupying the property through the applicant, from the property.

(b) setting aside the re- issued writ of ejectment dated 22 November 2023.

(c) interdicting the first to third respondents from harassing, threatening or intimidating the applicant or any person occupying the property through the applicant.

[16] The applicant contends that it is entitled to the relief sought as the 2016 order was successfully stayed by the order of 17 September 2020. He further contends that the third respondent, being the

attorney of record for the first and second respondent, accompanied by individuals to whom the applicant refers as “bouncers”, on 13 October 2023, attempted to eject the applicant, ostensibly in execution of the May 2016 order, and despite being advised by Adv. Raikane (who also attended at the property at the instance of the applicant), that his conduct was unlawful. It was only upon further engagement by the applicant’s attorneys of record that as an officer of the court, the third respondent was misleading everyone and that his conduct was unlawful in light of the September 2020 order, that the third respondent relented.

[17] This conduct by the third respondent, the applicant contends, justifies the citation of the third respondent as a party to the proceedings, as well as a cost order against him together with the first and second respondents.

[18] As to urgency, the applicant contends that the ejectment was imminent, having received confirmation from the fourth respondent that it would be carried out on 19 December 2023. He submitted that he had attempted to prevent the institution of these proceedings, by reasoning out with the third respondent. He contended that he would not be afforded substantial redress in the ordinary course, as

his retention right and lien over the property would have lapsed due the threatened loss of possession and control of the property. To my mind, the issue revolves around the 2020 order and whether the respondents are entitled to evict the applicant form the property.

URGENCY

[19] The determination of urgency must follow Rule 6(12) of the Uniform Rules of Court, and Practice Directive 5 of this Division. In Rule 6(12)(a) it is provided that the court may dispense with the requirements of the Rules pertaining to forms and service and dispose of a matter as it deems fit.

[20] Rule 6(12)(b) requires an applicant to fully demonstrate why the matter is urgent and why they will not be afforded substantial redress if the matter is heard in due course and the harm the applicant will suffer if the matter is not heard.

[21] A respondent faced with an urgent application is obliged to provisionally accept the rules set by the applicant in the notice of

motion, to avoid the risk of judgment being taken against it in default, and when the matter is heard, make its objections thereto, if any.[1]

[22] In *Nelson Mandela Metropolitan Municipality & Others v Greyvenouw CC and Others*[2] Plasket AJ (as he then was) observed:

> *"[37] It is trite that applicants in urgent applications must give proper consideration to the degree of urgency and tailor the notice of motion to that degree of urgency. It is also true that when Courts are enjoined by Rule 6(12) to deal with urgent applications in accordance with procedures that follow the Rules as far as possible, this involves the exercise of a judicial discretion by a Court 'concerning which deviations it will tolerate in a specific case".*[3]

[23] The papers in this application were issued on 14 December 2023. As the applicant avers, the ejectment was said to be scheduled for 19 December 2023. The hearing of this matter was set for 18 December 2023. On that day, an order was granted following agreement between the parties to postpone the hearing of the

[1] *Caledon Street Restaurants CC v D'Aviera* [1998] JOL 1832 (SE). *In re: Several Matters on the Urgent Roll* [2012] 4 All SA 570 (GSJ) [15].
[2] 2004 (2) SA 81 (SE).
[3] Paragraph 37.

matter to 20 December 2023, as Mr Makhambeni, who had been briefed to appear for the respondents, was unavailable.

[24] On resumption of the matter on 20 December 2023, Mr Makhambeni informed the Court that the respondents, having filed no answering affidavit, would only rely on points of law. These relate to the urgency of the matter, the admission of hearsay evidence, what constitutes an ex tempore judgment. Save for the issue of urgency, none of these issues warrant any particular attention by this Court. This is so because the admission of hearsay evidence is not the basis for the present application, nor was it persisted with by the applicant. The nature of the order granted by the court on 17 September 2020 does not in any way negate the effect of that order.

[25] Rule 6(5)(d)(iii) is instructive in this regard. It provides that a respondent who wishes to raise a question of law should deliver a notice of its intention to do so within 15 days. There is no obligation on a respondent to file either an answering affidavit or a notice in terms of Rule 6(5)(d)(iii). The only obligation imposed on a respondent, should he wish to file such documents is that he must

do so within the 15 day period.[4] No such notice was filed by the respondents in the present case.

[26] There was also a suggestion by the respondents that the matter be postponed to the ordinary motion court roll, to be heard sometime in October 2024, to enable the respondents to file a chronology of events, an answering affidavit, and a notice to abide in respect of the third respondent. This, he submitted, was in view of an undertaking by the respondents not to proceed with the ejectment. However, no such undertaking had been received by the applicant. This point was also not pursued by the respondents with any degree of enthusiasm. I rejected this suggestion and proceeded to hear the matter.

[27] It became apparent from the reading of the founding affidavit, and the submissions made by Mr Masike on behalf of the applicant, that the applicant had satisfied the requirements for urgency, including the degree of urgency with which the application had been brought. Having considered the matter to warrant the urgent attention of this

[4] *Anthony Johnson Contractors Pty Ltd v D'Oliviera and Others* 1999 (4) SA 728 (C).

Court, I directed that the status quo should be maintained, and reserved judgment.

MERITS

[28] As to the merits, the applicant's case is unassailable. The 2016 order was stayed. That order, despite the respondents' denial of its existence, forms part of the record of this Court. In the correspondence annexed to the founding affidavit, the third respondent approbates and reprobates in this regard, stating on the one hand that no 'judgment' was granted, while on the other, stating that the court still has to provide reasons for the order. That argument is devoid of any substance. A litigant who intends lodging an appeal against the decision of a court is entitled to invoke the provisions of Rule 49(1)(b). The proviso thereto enjoins a party to do so within a stipulated timeframe of fifteen days. No such reasons had been requested by the respondents. The effect of this is that the parties are bound by that order until it is set aside.

[29] In *Moodley v Kenmont School and Others*[5] the Constitutional Court (CC) reiterated the values enshrined in section 165(5) of the Constitution that, "[a]n order or decision issued by a court binds all persons to whom and organs of state to which it applies". 'This is of singular importance under our constitutional dispensation which is founded on, amongst others, the rule of law. The judicial authority of the Republic vests in the courts. Thus courts are final arbiters on all legal disputes, including constitutional disputes. If their orders were to be obeyed at will, that would not only be "a recipe for a constitutional crisis of great magnitude", "[i]t [would] strike at the very foundations of the rule of law" and of our constitutional democracy.'[6]

[30] More relevant to the facts of the present case, the CC went further to observe that:

> "[38]…it is a court that declares an order previously granted and against which there is no appeal a nullity. In terms of section 165(5) persons and organs of state just must obey court orders whatever

[5](CCT281/18) [2019] ZACC 37; 2020 (1) SA 410 (CC); 2020 (1) BCLR 74 (CC) (9 October 2019).

[6] Ibid. Paragraph 36.

their view of them might be, subject, of course, to their exercise of the right of appeal."[7]

[31] With regard to the applicant's contentions to have the 're-issued writ' set aside, it follows automatically that once an order is stayed, the writ pertaining that order is of no moment, and falls to be stayed or set aside.

[32] The founding affidavit is silent in this regard, and in my view, falls short of making out a case for this relief. This relief is in my view ancillary to the relief in respect of the ejectment and nothing much turns on it.

[33] As far as allegations of harassment and threats are concerned, the evidence before this Court is that the third respondent, on 13 October 2023 attended at the property with 'bouncers', where he continued to threaten and harass the tenants currently occupying the property, in an attempt to evict them. This has not been challenged by the respondents.

[7] Paragraph 38: also see in this regard: *City of Johannesburg v Changing Tides 74 (Pty) Ltd* [2012] ZASCA 116; 2012 (6) SA 294 (SCA); *The Master of the High Court NGP v Motala N.O.* [2011] ZASCA 238; 2012 (3) SA 325 (SCA).

CONCLUSION

[34] In the absence of a pronouncement by a court on the impugned order, it is not open to the respondents to merely deal with the order on the basis of what they consider to be lawful. The respondents are bound by the order of 17 September 2020.

COSTS

[35] The applicant contends that the conduct of the respondents amounts to contempt of court, as they continue to disregard the order, having done nothing to challenge it. The applicant further decries the fact that the third respondent, being an officer of the court, has a legal, moral and ethical obligation to uphold the rule of law, but has disregarded the court order and actively undermined it. On these bases the applicant seeks a punitive costs order against the first to third respondents.

[36] Attorney and client costs are not awarded lightly. There must be cogent reasons why a court decides to award attorney and client costs. Such reasons are not exhaustive and may range *inter alia*

from a party's failure to file papers, an attempt to trifle with the court, and an abuse of the process of court.

[37] In this case the respondents elected not to place any version before court despite the gloomy picture painted by the applicant with regard to their conduct. In my view, such conduct warrants a punitive costs order as prayed for by the applicant.

ORDER

[38] In the result, I make the following order:

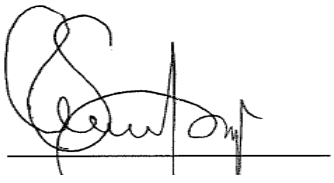
(1) The first to fourth respondents are interdicted and restrained from proceeding with, and from carrying out the ejectment of the applicant and all persons occupying the property described as Erf 2827, Tlhabane, Unit 1, Registration Division JQ, under him, pending the rescission, variation or setting aside of the order dated 17 September 2020.

(2) The writ of execution issued as a sequel to the order of 10 May 2016 or any re-issue thereof is stayed pending the

rescission, variation or setting aside of the order dated 17 September 2020.

(3) The first to third respondents are interdicted and restrained from harassing, threatening or intimidating the applicant or any person occupying the property described as Erf 2827, Tlhabane, Unit 1, Registration Division JQ, under the applicant, in any manner with the view to evict them from the property.

(4) The costs of the application shall be borne by the first to third respondents on a scale as between attorney and client, jointly and severally, the one paying the other to be absolved.



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JUDGE OF THE HIGH COURT OF SOUTH AFRICA

NORTHWEST DIVISION, MAHIKENG

APPEARANCES:

For the applicant	:	Adv T Masike
Instructed by	:	Van Velden - Duffey Inc
Email	:	wesley@vvd.co.za
	:	patsyt@vvd.co.za
c/o	:	Van Rooyen Tlhapi & Wessels Inc
Email	:	litigation@vtwinc.co.za

For the 1st to 3rd respondents:		Adv P.W Makhambeni
Instructed by	:	Ramphele Attorneys
Email	:	tdhmaserole@gmail.com
	:	info@rampheleattorneys.co.za
c/o	:	Nkomo Attorneys
Email	:	reception.nkomoattorneys@gmail.com

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