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REPUBLIC OF SOUTH AFRICA



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

CASE NUMBER: 39913/2016

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHERS JUDGES: NO
(3)	REVISED
May 2017	
DATE	SIGNATURE

In the matter between:

IMPRESS SERVICES

Applicant

AND

BUSO FREDDY

1ST Respondent

RADEBE FREDDY

2ND Respondent

RADEBE NOMBUSO

3RD Respondent

MZINYATHI MDUDUZI

4TH Respondent

XORILE QUEEN

5TH Respondent

MPANGE ZITHULELE

6TH Respondent

MPANGE SIBONGISENI

7TH Respondent

NHLAPO MARIA

8TH Respondent

JUDGMENT

MOLAHLEHI J

Introduction

- [1] On 29 March 2017, this court granted the applicant leave to implement the order which was made on 6 December 2016 despite the leave to appeal by respondent. The reasons for the outcome of the application in terms of s 18 of the Superior Courts Act,¹ (SCRT) are set out in this judgment.
- [2] The application was made following leave to appeal which the respondent had instituted against the order of Wright J which was made on 6 December 2016. The order evicted the respondents from the property known as ERF [...], Selection Park, Springs, Gauteng also known as No [...] N. Road, Selection Park, Springs, Gauteng (the property).
- [3] The grounds for leave to appeal are not relevant for the purpose of this judgment.
- [4] After hearing the matter, this court granted leave to operationalize the order made by Wright J pending the outcome of leave to appeal. The terms of the order are set out at the end of this judgment.

The background facts

¹ Act number 10 of 2013

- [5] The brief background to this matter is, as stated above that on 6 December 2016 Wright J made the order directing the eviction of the respondents from the property of the applicant.
- [6] On 13 December 2016, the respondents instituted proceedings to have that order rescinded. That application was dismissed by Wepener J on 13 December 2016.
- [7] On 11 January 2017, the respondents filed leave to appeal against the order of Wepener J which is still pending.

The legal principles

- [8] An application of this nature was before 2013 governed by Rule 49 of the Uniform Rules of the High Court (the Rules). In terms of that Rule the court had the discretion in determining whether an order could be implemented despite a pending leave to appeal or appeal. The position is now governed by s 18 of the SCRT, which reads as follows:

“18. Suspension of decision pending appeal.—

- (i) 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.”

- [9] The test to apply when considering whether to grant leave to operationalize an order pending leave to appeal is set out in ***Incubeta Holdings and Another v Ellis John Roland and Another***,² by Sutherland J in the following terms:

“1. The test is twofold; the requirements are:

1.1. First , whether or not ‘exceptional circumstances ‘exist, and

1.2. Second, proof on a balance of probabilities by the applicant of-

1.2.1. The presence of irreparable harm to the applicant/victor, who wants to put into operation and execute the order, and,

1.2.2. The absence of irreparable harm to the respondent/loser, who seeks leave to appeal.”

- [10] Valli J applied the test in ***Mokgatla and Others v South African Municipal Workers Union and Others***,³ where members of the union had successfully challenged their suspension by the union. Thereafter the union initiated appeal process. It was for that reason that the applicants applied to have the judgment implemented. They contended that they would suffer prejudice and irreparable harm if they were to wait for the completion of the appeal process. In applying the above test, the learned Judge said:

² 2014 (3) SA 189 (GJ)

³ Unreported judgment under case number 21815/14.

- “12. In conclusion, the first respondent does not, in my view, suffer irreparable harm should the order be made operational. Whatever harm it suffers, or is in danger of suffering, can be remedied, or prevented.
13. On a more general note, I hold that if a victorious party suffers irreparable harm because of a pending appeal, as has happened in this case with applicants 6 and 7, then the very foundation of our social contract, the rule of law, will be seriously compromised. It bears the risk of people losing faith in the law and in the courts. Such a consequence is not to be treated lightly.”

[11] In explaining the concept “exceptional circumstances,” referred to in s 18 of the SCRT the learned Judge relied on what was said in ***M v Ais Memos***,⁴ where the court said:

“17 What constitutes “exceptional circumstances has been addressed by Thring J in ***M v Ais Mamas*** 2002 (6) SA 150 (C), where a summation of the meaning of the phrase is given as follows at 156I – 157C:

“What does emerge from an examination of the authorities, however, seems to be the following:

⁴ 2002 (6) SA 150 (C).

- “1. What is ordinarily contemplated by the words
'exceptional circumstances' is something out of
the ordinary and of an unusual nature; something
which is excepted in the sense that the general
rule does not apply to it; something uncommon,
rare or different; 'besonder', 'seldsaam',
'uitsonderlik', or 'in hoë mate ongewoon'.
2. To be exceptional the circumstances concerned
must arise out of, or be incidental to, the particular
case.
3. Whether or not exceptional circumstances exist is
not a decision which depends upon the exercise of
a judicial discretion: their existence or otherwise is
a matter of fact which the Court must decide
accordingly.
4. Depending on the context in which it is used, the
word 'exceptional' has two shades of meaning: the
primary meaning is unusual or different; the
secondary meaning is markedly unusual or
especially different.
5. Where, in a statute, it is directed that a fixed rule
shall be departed from only under exceptional

circumstances, effect will, generally speaking, best be given to the intention of the Legislature by applying a strict rather than a liberal meaning to the phrase, and by carefully examining any circumstances relied on as allegedly being exceptional.”

- 18 Significantly, although it is accepted in that Judgment that what is cognisable as ‘exceptional circumstances’ may be indefinable and difficult to articulate, the conclusion that such circumstances exist in a given case, is not a product of a discretion, but a finding of fact.”

Analysis/ Evaluation

- [12] In the present matter, it would appear Mr Buso (Buso) is the leader and spokesperson for the respondents. He did not attend the court on the day of the hearing. Mr Mzinyathi and Ms Maria Ntlapo addressed the court about their role in the matter. They both stated that they did not know why they were in court because they are tenants who have paid their entire monthly rental to Buso.
- [13] The respondents instituted the leave to appeal the order of Wepener J during December 2016. It is apparent from the papers before this court that the respondents have not taken any further step since then to progress the matter to the next level. In other words, they have not done anything to bring the matter to finality.

- [14] On 19 December 2016, the transcription company iAfrica send an email to the respondents quoting them the costs of transcribing the judgment. There is no indication as to what the respondents have done in that regard. There is also no indication as to what the respondents intend doing to bring the matter to finality. There can be no doubt that this is prejudicial to the applicant which is now faced with the uncertainty and is constrained in arranging its affairs concerning the property.
- [15] Although they contend that they would be rendered homeless if the eviction was to be implemented, the respondents did not place before this court the facts that would support that proposition. They have in this regard failed to take the court in their confidence and placed before it facts that would indicate how the eviction would render them homeless. In the case of Buso and Mpange the applicants have provided the address which suggests that that is their family home. They have not provided any evidence as to why they would not be able to return to their home if evicted.
- [16] In response to the allegation that they still have homes to go back to, if evicted despite the pending the leave to appeal, the respondents have contended that that is irrelevant.
- [17] The information regarding the previous homes of the respondents is, in my view, relevant and important to the determination of whether they would be prejudiced if leave to implement the order was granted despite the pending leave to appeal.

- [18] The other consideration that weighed in favour of granting leave to implement the order is that Buso and Mpange are involved in another eviction matter that is pending before this court. In those proceedings they claim to be occupiers of the farm in question.
- [19] It is also important to note that the respondents have indicated that they are willing to vacate the property in question provided that the municipality provides them with alternative temporary accommodation. The question that then arises is whether the respondents have made out a case to show that they qualify for such a right. They have, in my view, not made out such a case; instead, the facts before this court indicate to the contrary that they can afford alternative accommodation on their own as they are not indigent.
- [20] In the other eviction matter, which was pending at the time of the hearing of this one, Buso and Mpange stated that they are owners of certain luxury assets such as laptops, desktops, scanners, microwave, photocopiers, fridges and digital cameras.
- [21] The other point to note is that the respondents on their own version say that they cannot afford to pay. In the meantime, they continue consuming water and electricity in the property without paying for those services. The water is also running on the property, either because of a broken tap or pipe. The applicant has apparently not reported the same to the municipality or done anything to address the problem. The applicant is thus running a water and electricity bill that is escalating daily. In this context there can be no doubt that the applicants are

suffering irreparable harm. They will not be in position to claim damages against the respondent.

[22] In these circumstances I find that the applicant will suffer prejudice and irreparable harm if the order of Wright J was not made operational pending the outcome of the appeal process. Having regard to the lapse of time since the filing of the leave to appeal, the *bona fides* of the respondent in instituting that process is questionable.

[23] In light of the above, I am of the view that the applicant has made out a case for exceptional circumstances as envisaged in s 18 of the SCRT.

[24] It was for the above reasons that the following order was made:

- “1. The application is heard urgently and that the Court dispenses with the forms and rules relating to service and non-compliance with the rules are condoned in terms of the provisions of Rule 6(12).
2. The Order issue by Honourable Justice Wright on 6 December 2016 is to be set into motion and that the Sheriff of the Honourable Court is to evict the Respondents from the premises known as ERF [...], Selection Park, Springs, Gauteng and also known as No [...] N. Road, Selection Park, Springs, Gauteng, if the Respondents do not voluntarily vacate the property within 48 hours of this order being granted.
3. The Respondents are to pay the costs of this application which costs are taxable and payable immediately.”

E Molahlehi

Judge of the High Court:

Johannesburg.

APPEARANCES:

For the applicant: Martini Patlansky Attorneys

For the respondent: In person

Heard on: 29 March 2017

Delivered on: 29 March 2017