

IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

CASE NO: 25095/2009

In the matter between;

15/1/2010

SM PITJE

First Applicant

N PITJE

Second Applicant

and



GT VAN DER MERWE

First Respondent

AJP ELS

Second Respondent

SHERIFF PRETORIA EAST

Third Respondent

JUDGMENT

- 1 This is an urgent application to vary an interlocutory order made by Webster J on 4 December 2009.
- 2 The first applicant's case was argued with considerable ability by the first respondent himself. The second applicant was represented by

counsel, as were the first and second respondents. The third respondent abides the decision of the court.

- 3 The essence of the applicants' case is that the legal system has failed them in that on at least two occasions judges of this court have made orders against them pursuant to proceedings that were, on the applicants' version, grossly irregular.
- 4 In order to enable the judge who is required to deal with this matter in due course to understand the course of events about which the applicants complain, I shall set out briefly how the litigation developed. As the various interlocutory applications all bear the same case number, ie 25095/2009, I shall have to identify them by reference to the judges who heard them. What I say below is not a completely comprehensive history; I refer only to those applications and the occasions they were called in court to which I was referred in argument as being of significance to the case which the applicants wish to make and which the respondents seek to rebut.
- 5 On 30 October 2009, Potterill AJ granted an order ("the eviction order") for the eviction of the present applicants upon the motion of the present first and second respondents.

- 6 On 20 November 2009, the applicants gave notice of an application for leave to appeal against the eviction order.
- 7 On 25 November 2009, the respondents gave notice of an application ("the rule 49(11) application") for an order that the eviction order be not suspended pending any appeal proceedings. The notice of motion in the rule 49(11) application stated that the relief under the rule 49(11) application would be sought "simultaneously with the hearing of the application for leave to appeal".
- 8 The applicants say that the application for leave to appeal was enrolled for hearing on 2 December 2009 pursuant to an email received from Potterill J's registrar on 1 December 2009 and that in a telephone conversation with Potterill J, the first applicant informed the learned judge that the applicants would not be proceeding with the application for leave to appeal on 2 December 2009.
- 9 What transpired at the hearing on 2 December 2009 is at present controversial. Suffice it to say that the application for leave to appeal did not proceed on that date but Potterill J heard and granted the Rule 49(11) application. It appears that the application for leave to appeal was postponed sine die on 3 December 2009 and has not since been re-enrolled.

- 10 On 3 December 2009, the applicants launched an application ("the suspension application") for orders to:
 - 10.1 suspend the execution orders made by Potterill J on 2 December 2009 pending the finalisation of a rescission application directed at rescinding the rule 49(11) relief granted by Potterill J on 2 December 2009; and
 - 10.2 interdict the respondents from enforcing the rule 49(11) order granted by Potterill J on 2 December 2009.
- 11 It is common cause that the applicants were not represented at the hearing before Potterill J on 2 December 2009.
- 12 One of the applicants' contentions is that because the rule 49(11) application was not set down for a specific date but rather to be heard simultaneously with the application for leave to appeal and because the application for leave to appeal was not heard, Potterill J had no jurisdiction (in the sense of *regsbevoegdheid*) to hear the rule 49(11) application on 2 December 2009. Further contentions are that the first applicant only came into court to confirm that the application for leave to appeal was indeed not proceeding and found that argument on the rule 49(11) application was in progress, that the second applicant was

not in court at all on 2 December 2009. All these contentions are hotly disputed by the respondents.

13 On 3 December 2009, the applicants launched an urgent application ("the rescission application") to rescind the rule 49(11) order, strike the application for rule 49(11) relief from the roll and suspend the operation of the eviction order. The applicants have set the rescission application down for hearing on 1 February 2010.

14 On 4 December 2009, the suspension application came before Webster J. Once again, what occurred during that hearing is controversial but it is common cause that Webster J dismissed the suspension application.

15 On 5 December 2009, the applicants launched an application ("the variation application") to vary the order made by Webster J on 4 December 2009 in which Webster J dismissed the suspension application by replacing the order made by Webster J with one which would:

15.1 suspend the execution order made by Potterill J on 2 December 2009 pursuant to the rule 49(11) application;

- 15.2 interdict the respondents from enforcing the execution order made by Potterill J pursuant on 2 December 2009 pursuant to the rule 49(11) application;
- 15.3 direct the respondents to return to the applicant the premises from which they were evicted.
- 16 The variation application came before Sapire AJ on 24 December 2009. Sapire AJ declined to enroll the matter and, according to the note on the court file, directed that the matter be removed from the roll due to lack of urgency. The note reads further: "The Notice of Motion is defective".
- 17 On 1 January 2010, the variation application came before Makgoka J. Makgoka J directed that the matter be removed from his roll.
- 18 On 12 January 2010, the variation application, with what is described as a "notice of motion as amended" came before me. The question of urgency was fully argued. The merits could not be fully argued because there was insufficient clarity about what occurred before Potterill J, Webster J, Makgoka J and Sapire AJ.

19 As I have stated above, the variation application cannot be heard until the relevant transcripts have been obtained. The transcripts in question relate to the proceedings before:

19.1 Potterill J on 2 December 2009;

19.2 Webster J on 4 December 2009;

19.3 Sapire AJ on 24 December 2009; and

19.4 Makgoka J on 1 January 2010.

20 The parties were agreed that I was not precluded by the ruling of Sapire AJ that the matter was not urgent from forming my own view and exercising my own discretion in regard to urgency.

21 I must decide the issue of urgency on the assumption that there is substance in the version presented by the applicants. On this basis, I find the application to be urgent: on the strength of one of the impugned orders, on 3 December 2009 a previous order for eviction was ruled under rule 49(11) to be effective immediately despite a pending application for leave to appeal and the applicants were evicted from certain residential premises. If the applicants are

ultimately successful, it may well be that they will be entitled to be restored to their possession which they lost by reason of the order of court. I do not think that it can be said that in those circumstances the applicants will receive adequate redress at a hearing in due course, such as to deny them an urgent hearing, because they will have an action for damages.

22 It is further of the utmost importance that in principle, where the conduct of the officers of this court is called into question, a court rule on the allegations as soon as possible. In that way, the integrity of the court is best served. Such allegations should not be allowed to linger. It should never be able to be said that judges will protect their colleagues rather than uphold the law.

23 It must not be understood from what I have just said that I have come to a conclusion on the allegations made by the applicants. On the contrary, I have not. Indeed, I do not think that a court should pronounce on these allegations on the papers as they now stand. This is because the applicants have relied on impression and recollection in their attempts to establish the allegations. They have not, as counsel for the respondents correctly submitted they should have, presented transcripts of the proceedings about which they complain.

- 24 There is in principle no reason why what actually was said in this court should be controversial. All the proceedings under attack by the applicants were recorded electronically. Transcripts are the best way of determining what was said.
- 25 It may be (I express no opinion in this regard) that a court of equal jurisdiction will have the power to revisit the orders made by Potterill J and Webster J respectively on the principles set out in *Bell v Bell* 1908 TS 887. Whether such a court would find it appropriate to exercise such a power, if it exists, is another question - one on which I express no opinion.
- 26 I accordingly do not intend to close the door on the applicants because they did not produce the best evidence available. I shall give them an opportunity to do so. It should be clear from what I have said that the application should not be set down again until the transcripts have been obtained and the parties have had an opportunity to deal with them in further affidavits. The same applies to the rescission application which the applicants have set down for hearing on 1 February 2010. This will be reflected in the order I intend to make. It would seem to be convenient if the rescission application could be heard together with the variation application as the two applications

cover much common ground. I make no finding on this question either.

27 I make the following order:

27.1 The present application ("the variation application") is declared to be urgent for the purposes of rule 6(12), enrolled and postponed sine die.

27.2 The applicants must deliver copies of transcripts, certified as correct, of the proceedings between the parties or any of them before:

27.2.1 Potterill J on 2 December 2009;

27.2.2 Webster J on 4 December 2009;

27.2.3 Sapire AJ on 24 December 2009; and

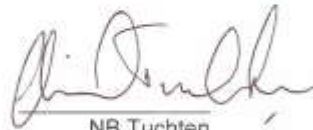
27.2.4 Makgoka J on 1 January 2010.

27.3 The parties may deliver further affidavits dealing with matters arising from the transcripts, the applicants within one week of

the delivery of the transcripts and the respondents within two weeks of the delivery of the transcripts.

27.4 Neither the variation application nor the rescission application may be re-enrolled for hearing before the transcripts have been delivered and either the further affidavits have been delivered or the time provided in this order for the delivery of such affidavits has expired.

27.5 The costs incurred before me are reserved for later determination.



NB Tuchten
Acting judge of
the High Court
15 January 2010