

10/6/2010
NOT REPORTABLE



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

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ☒ NO

(2) OF INTEREST TO OTHER JUDGES: ☒ NO

(3) REVISED: ☐

10 June 2010
DATE

[Signature]
SIGNATURE

CASE NO: 25095/2009

In the matter between:

S.M. PITJE

First Applicant

N. PITJE

Second Applicant

and

G.T. VAN DER MERWE

First Respondent

A.P.J. ELS

Second Respondent

SHERIFF PRETORIA-EAST

Third Respondent

J U D G M E N T

MAKGOKA, J:

[1] This judgment has taken inordinately long to deliver. A combination of factors, some beyond my control, has led to this state of affairs. I record my sincere apology to all the parties for any resultant inconvenience and hardship.

[2] In this application, the first and second applicants (the applicants) seek, on an urgent basis, variation of an order granted by Webster J on 4 December 2009 to the following effect, as stated in the amended notice of motion:

"2. That the judgment and order made by the Honourable Mr Justice Webster on the 4th December 2009 be varied to read as follows:

2.1 *That it is hereby declared that the execution order granted by Acting Justice Potterill on the 2nd December 2009 is suspended, pending the finalization of the rescission application launched by the Applicants on the 3rd December 2009;*

2.2 *That the Respondents are hereby interdicted and restrained from executing on the order made Acting Justice Potterill on the 2nd December 2009 in any manner whatsoever, pending the finalization of the rescission application launched by the Applicant on the 3rd December 2009;*

2.3 *That Respondents are hereby directed to immediately return the premises situated at 22 Verbenia Street, Lynnwood Ridge, Pretoria, Gauteng Province to the Applicants."*

2.4 That the Respondent are hereby directed to pay the costs of the application, jointly and severally, the one paying the other to be absolved on the attorney and client scale.

[3] The relief sought by the applicants is opposed by the first and second respondents (the respondents). The third respondent has not filed any papers.

[4] The applicants are husband and wife. On 12 January 2004 Standard Bank of South Africa Ltd foreclosed the applicants' mortgaged property situated at 22 Verbenia Street, Lynwood Ridge, Pretoria (the property) and obtained judgment against the first applicant. The first and second respondents purchased the said property at a subsequent sale in execution. The property was registered in the names of the respondents on 7 March 2008. On 30 October 2009 Potterill J (as she then was) granted the respondents an order evicting the applicants from the property.

POINTS IN LIMINE

[5] The respondents have raised two points *in limine*. The first relates to the competence of the first applicant to institute these proceedings. The second concerns urgency. With regard to the first point, it is indeed so that the first applicant has been declared a vexatious litigant by this court. This status was raised as a point *in limine*, to the effect that he had not received permission of this court to institute the present proceedings.

[6] It appears that the first applicant was granted permission on 19 November 2009 by Shongwe DJP (as he then was). The said order read as follows:

- "1 That the first applicant is hereby permitted to apply for leave to appeal the judgment and order made by the Honourable Acting Justice Potterill on 30th October 2009 in the above matter.
2. That the first applicant is hereby permitted to apply for the reinstatement of his counter-application which was struck from the roll by the Honourable Acting Justice Potterill on the 29th October 2009 in the above matter.
3. That the costs of this application be costs in the cause."

[7] In my view, a proper construction of the effect of the said order is that the first applicant retains the permission to engage in the application until finality on the substantive issue between the parties, namely the eviction of the applicants from the property. Inherent in that, in my view, is the competence of the first applicant to institute interlocutory proceedings ancillary thereto, of which this is but one. I therefore find that there is no merit in this argument.

[8] I now turn to the issue of urgency. In this regard, I can do no more than agree with Tuchten AJ (as he then was) when the matter came before him on 12 January 2010. At par 21 of his judgment, the learned Judge stated the following:

"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."

[9] I completely and respectfully align myself with these sentiments and hold accordingly, that this matter is still urgent.

FACTUAL BACKGROUND AFTER THE EVICTION ORDER

[10] On 6 November 2009 the applicants requested Potterill J to furnish written reasons for, among others, her order made on 30 October 2009.

[11] On 20 November 2009 the applicants filed an application for leave to appeal the order of Potterill J of 30 October 2009.

[12] On 25 November 2009 the respondents filed an application in terms of rule 49 (11) of the Uniform Rules of Court, (the uniform rules) to be heard simultaneously with the application for leave to appeal, for an order that pending any appeal proceedings, the order evicting the applicants, not be suspended.

[13] On 1 December 2009, the office of Potterill J informed the applicants' attorneys via e-mail, that both the application for leave to appeal, as well as the

respondents' rule 49 (11) application would be heard the following morning, 2 December 2009 at 9H30.

[14] It appears that during the late afternoon of 1 December 2009 there was communication between the first applicant and Potterill J about the applications to be heard on 2 December 2009, in particular whether they would proceed or not. The first applicant's understanding appears to have been that the two applications would be removed from the roll on 2 December 2009.

[15] On 2 December 2009 counsel for the respondents appeared before Potterill J. From the transcribed record of proceedings, Potterill J expressed a view that there was short notice to the applicants. Counsel agreed, but only with reference to the application for leave to appeal. Counsel, while agreeing that the application for leave to appeal should be postponed *sine die*, however persisted that the respondents' rule 49 (11) application be proceeded with, which indeed proceeded.

[16] During the course of counsel's address to Potterill J on the merits of the respondents' rule 49 (11) application, the first applicant walked into court. Potterill J enquired from the first applicant as to whether he was ready to argue the matter. The first applicant explained the purpose of his presence in court as being to ensure that what had been conveyed to him by Potterill J the previous day, namely that the two applications were to be removed from the roll, indeed occurred. Potterill J then informed the first applicant that only the application for

leave to appeal was to be postponed. The first applicant was then invited to address the court on the merits of the respondent's rule 49 (11) application.

[17] The first applicant conveyed to Potterill J that he was not ready to make submissions, firstly, because an opposing affidavit had not been prepared on behalf of the applicants and secondly that he needed counsel to oppose the application. At the end of the day, Potterill J granted an order in the following terms:

1. That the application for leave to appeal removed from the roll. (sic)
2. That the application in terms of Rule 49 (11) granted. (sic)
3. That it be directed that the order of this Court dated 30 October 2009 will not be suspended pending:
 - 3.1 an application for leave to appeal to his Court and/or;
 - 3.2 an application for leave to appeal to the Supreme Court of appeal;
and/or;
 - 3.3 an application for leave to appeal to the Constitutional Court;
 - 3.4 any possible appeal, flowing from the proceedings referred to in
prayer (sic) 3.1 to 3.4 above;

4. That the respondents, jointly and severally, is (sic) to pay the costs of this application.

[18] 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, which application was set down for 1 February 2010.

[19] On the same day, 3 December 2009, the applicants launched another application, also on an urgent basis, seeking the suspension of the effect of Potterill's J order made on 2 December 2009, pending finalization of a rescission application (the suspension application).

[20] The suspension application came before Webster J on 4 December 2009, who dismissed the application. Both parties were represented by senior counsel. The applicants in their papers allege that Webster J was misled to believe that the first applicant was present in court and argued the merits of the rule 49 (11) application on 2 December 2009 before Potterill J. Perhaps this was strongly stated. What counsel for the respondent conveyed to the court in this regard is recorded as follows (transcribed record, p 272, lines 8-18).

"M'Lord, may I just bring this to Your Lordship's attention. M'Lord, the respondents in this application, that is Gert Thomas van der Merwe and Andries Deetlef Jacobus Els - Mr. Van der Merwe is an attorney, an admitted attorney of this Court from the (sic) Limpopo, Van der Merwe and Associates. The 2nd respondent, he is sitting here behind me, is an

esteemed member of this Bar. He is an advocate of the Pretoria Bar. They confirm, both and both of them are prepared, if necessary M'Lord, to come and testify under oath now that Mr Pitje was not only present on 2 December but in fact argued, made submissions in this matter and they are here to come and confirm that, both of them under oath and that is one of the reasons..."

[21] Unfortunately Webster J's judgment is not part of the transcribed record. What appears to have swayed the learned judge to dismiss the suspension application though, was the assertion by counsel for the respondents that the first applicant was not only present, but argued the rule 49 (11). On p 270 the learned judge enquired from the applicant's counsel whether the order sought to be rescinded, viz the rule 49 (11) order, was granted by default. After counsel had conveyed to the court the circumstances leading to the hearing on 2 December 2009, the following exchange appears on p 271, lines 3-9:

"Court: So they did not go to court the next day.

Mr. Geach: They did not, as I understand they did not appear to argue the application for leave to appeal although I am told, I was not there, but I am told that Mr. Pitje was present, but he did not appear to argue his leave for appeal...

Court: So it was not by default? If Mr. Pitje was present then it was not by default.

Mr. Geach: M'Lord, I can take it no further but so say in paragraph 5 affidavit before Your Lordship such order was effectively granted in our absence. As I understand it M'Lord, and my instructions are Mr. Pitje did not appear and argued the case at all.

Court: But perhaps you say he did not argue but if he was present then most certainly he was not in default."

[22] After the dismissal by Webster J of the suspension application, on 5 December 2009 the applicants launched the present application, which came before Sapire AJ on 24 December 2009. Sapire AJ removed the matter from the roll due to lack of urgency. On 1 January 2010, the variation application, with the amended notice of motion, came before me in the urgent court. I was not satisfied that the respondents had been notified of the enrolment of the matter. I then removed the matter from the roll. On 12 January 2010, the variation application came before Tuchten AJ (as he then was). Tuchten J could not hear argument fully on the merits because there was insufficient clarity about what had occurred before Potterill J, Webster J, Sapire AJ and myself. He then ordered the applicants to deliver copies of transcripts of the proceedings between the parties before the Judges mentioned above. This has now been done and the matter came before me in the urgent court on 24 March 2010.

DISCUSSION

[23] It appears to me, from the transcribed proceedings before Webster J, that what was not considered, by both counsel and the court, was the position of the second applicant. Even if one accepts that the first applicant was present before Potterill J, and argued the rule 49 (11) application, he could have done so only on his own behalf, and not for the second applicant. The first applicant is not a legal representative. To the extent this is the case, the rule 49 (11) application was considered and granted in the absence of the second applicant.

[24] I have no reason reject the first applicant's assertion that there was agreement not to proceed with the application for leave to appeal on 2 December 2009 because of short notice. If that be the case, that consideration should, in my view, have been made with regard to the rule 49 (11) application, perhaps even more so given wording of the rule 49 (11) application, that the application would be made "simultaneously" with the application for leave to appeal.

THE LAW

[25] Having found that the rule 49 (11) application was heard in the absence of the second applicant, I turn now to consider whether the order of Webster J, can be varied as contended for on behalf of the applicants. To answer the said question, I must determine whether the said order is purely interlocutory, that is, one not having the effect of a final order. The general principle is that such an order may be varied or set aside by the Judge who made it or by any other Judge sitting in the same court and exercising the same jurisdiction. See *Bell v Bell* 1908 TS 887 at 891-893; *Duncan NO v Minister of Law and Order* 1985 (4) SA 1 (T) at 3 B-D.

[26] The general test as to whether an order is a simple interlocutory one or not, was stated in *Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd* 1948 (1) SA 839 (A) at 870, as follows:

"A preparatory or procedural order is a simple interlocutory order and therefore not appealable unless it is such as to 'dispose of any issue or portion of the issue in the main action or suit' or, which amounts I think to the same thing unless it irreparable anticipates or precludes some of the relief which would or might be given at the hearing"

[27] In *African Wanderers Football Club (Pty) Ltd v Wanderers Football Club* 1977 (2) SA 38 (A) at 48F, the following passage from Herbstein and Van Winsen, *The Civil Practice of the Superior Courts of South Africa* 2nd ed at 631, was quoted with approval:

“The principle to be applied in determining whether a preparatory or procedural order is purely interlocutory is laid down in the case of *Pretoria Garrison Institutes v Danish Varsity Products (Pty) Ltd*, namely an order is purely interlocutory unless it is such as to ‘dispose of any issue or any portion of the issue in the main action or suit’, or unless it ‘irreparably anticipates or precludes some of the relief which would or might have been given at the hearing’. Earlier judgments which laid down a further test, namely whether the order causes irreparable prejudice, are overruled by the majority judgement in the *Pretoria Garrison Institutes* case, in so far as they purport to take into account prejudice-such as the loss and inconvenience caused by an interim interdict which does not directly affect the issue of the suit.

See also *Bell v Bell* 1908 TS 887 at 891-893; *Bashford v Bashford* 1957 (1) SA 21 (N) at 24 A-C; *Sayprint Textiles (Pty) Ltd v Girdlestone* 1984 (2) SA 572 (ZSC) at 574 G-H; *S v Leepile* 1986 (2) SA 346 (W) at 349 A-E.

ANALYSIS

[28] It seems to me that the suspension application which served before Webster J did not have an effect on the final judgment in the main eviction application. It could not dispose of any substantive issues. Even if the variation

order was granted, it would similarly not have any effect on the final judgment in the eviction application. I therefore find that the suspension application before Webster J, was indeed a simple interlocutory application.

[29] Next I consider whether, in the present case, a proper case has been made for this court to exercise its power to vary its own interlocutory order. In considering the circumstances in which a court will be inclined to allow variation of an interlocutory order granted by it, the following was stated in *Bell v Bell* (*supra*) at 89:

"The general question of the limits within which the exercise of that jurisdiction should be confined is by no means an easy one. Courts will not likely vary their orders even though they may be of a merely interlocutory character. And the case in which such orders will be altered in the absence of facts, cannot be numerous."

[30] To answer this question, viz whether the applicants have established good cause for the variation of the order of Webster J, it is necessary to consider the events leading to the order made by Potterill J on 2 December 2009. Those events were triggered by the applicants' notice of application for leave to appeal.

[31] The next step was the setting down of the application for leave to appeal, simultaneously setting down the respondent's rule 49 (11) application. This was a matter which would have to be attended to by the Registrar, in consultation of course, with the Judge concerned. In terms of rule 49 (1) (d) of the uniform rules, it is provided that:

"the application mentioned in para (b) above (for leave to appeal) shall be set down on a date arranged by the Registrar who shall give written notice thereof to the parties.

[32] It should be accepted that the envisaged "written notice" shall allow sufficient period of time between the date of notice and the actual date of hearing. In this case, the notice of set down from the Judge's office was given on less than 24 hours notice, which can hardly be described as sufficient. Potterill J seemed to accept this during the debate with the respondents' counsel on 2 December 2009. If it was short service for the application for leave to appeal, it should have been so in respect of the respondents' rule 49 (11) application. Perhaps even more so in respect of the latter.

[33] I am satisfied, on a conspectus of all the facts in this application, that the order of Potterill J, which I have already found was made in the absence of the second applicant would, in my view, lead to an injustice were such an order be put in effect under such circumstances, where there is an application to rescind such an order.

DOES THE APPLICATION FOR RESCISSION SUSPENDS THE OPERATION OF THE ORDER?

[34] Which brings me to the question whether the application to rescind Potterill J's order of 2 December 2009, automatically suspends its operation. For over two decades, the leading authority on this subject has been *United Reflective Converters (Pty) Ltd v Levine* 1988 (4) SA 460 (W). In that judgment, Roux J held that there was no substantive rule of law that an application to

rescind or vary an order or judgment automatically suspends its operation and that words "or to rescind, correct or vary" as they appear in rule 49 (11) (a) were of no force or effect.

[35] Two decades later, in *PE Khoza and 17 Others v The Body Corporate, Ella Court* (Witwatersrand Local Division case number 22463/2007 (yet unreported)), Notshe AJ came to a different conclusion, holding among others, at par 24 that:

"... there would have been irreparable prejudice if the order was not suspended and later on the application for rescission succeeded. That is the same rational which was given for the existence of the rule suspending an order on noting of an appeal."

[36] I prefer the underlying reasoning and basis of Notshe AJ's judgment. To the extent two litigants who challenge orders or judgments of the same court, albeit via different routes, are treated differently and clearly unequally, I am unable to find agreement with Roux J. We now live in an era of constitutionalism, with its guarantee of equality before the courts.

CONCLUSION

[37] Having regard to all the factors in this application, I am of the view that the relief sought by the applicants be granted. I have come to this conclusion mainly on the basis that Potterill J's judgment was granted in the absence of the second applicant. From a practical point of view, the order I am about to make affects invariably the first applicant. They are husband and wife. Prayers 2.2 of the of

applicants' notice of motion has been overtaken by events insofar as the applicants have been evicted. All that can be done, from a practical point of view, is to order the respondents to restore the undisturbed possession of the property to the applicants, pending the determination of the rescission application. In other words, the *status quo* before the eviction should be restored.

[38] With regard to costs, I am of the view that these should be costs in the application for rescission.

[39] I therefore grant the following order:

1. The order made by Webster J on the 4 December 2009 is hereby varied to read as follows:

"1. The execution order granted by Potterill J on 2 December 2009 is suspended, pending the determination of the rescission application launched by the first and second applicants on 3 December 2009;

2. The first, second and third respondents are ordered to forthwith restore the immovable property situated at 22 Verbenia Street, Lynwood Ridge, to the first and second applicants;

3. The costs are to be costs in the rescission application."

2. The costs hereof are to be costs in the rescission application.



T M MAKGOKA
JUDGE OF THE HIGH COURT

DATE HEARD	24 MARCH 2010
JUDGMENT DELIVERED	10 JUNE 2010
FOR THE FIRST AND SECOND APPLICANTS	ADV L S DE KLERK SC
INSTRUCTED BY	<i>VICTOR MABE INC, PRETORIA</i>
FOR THE FIRST AND SECOND RESPONDENTS	ADV NF DE JAGER
INSTRUCTED BY	<i>VAN DER MERWE & ASSOCIATES, PRETORIA</i>