

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

APPEAL CASE NUMBER: A468/07

HIGH COURT CASE NUMBER: 32767/07

In the matter between:

29/7/2010

HOWARD G BUFFET N.O

First Appellant

N DE BRUYN N.O

Second Appellant

S DURANT N.O

Third Appellant

R JAMES N.O

Fourth Appellant

G MILLS N.O

Fifth Appellant

and

DELETE WHICHEVER IS NOT APPLICABLE

1) REPORTABLE: YES/ *Yes*

2) OF INTEREST TO OTHER JUDGES: *Yes*/NO

3) REVISED

28/7/2010

DATE

SIGNATURE

C M DEGENAAR

First Respondent

J ANSELL

Second Respondent

C M DEGENAAR (SNR)

Third Respondent

M R DEGENAAR

Fourth Respondent

JUDGMENT

LOUW J

Introduction

- [1] References in this judgment to the "main application" refer to the spoliation application which is the subject of the appeal heard simultaneously herewith. The facts of the main application will not unnecessarily be repeated herein.

- [2] The main application was granted by the court *a quo* on 6 August 2007. The appellants filed a notice of application for leave to appeal. Subsequent to the appellants lodging their notice of intention to make application for leave to appeal, the respondents brought an application in terms of rule 49(11) to declare the order in the main application to be executable pending the termination of the appeal. This application was granted by Preller J on 17 August 2007. On the same date he also refused leave to appeal.
- [3] This appeal is with the leave of the Supreme Court of Appeal.
- [4] It is so that normally a rule 49(11) execution order is not appealable. The following was stated in *Minister of Health and Others v Treatment Action Campaign and Others (No 1)* 2002 (5) SA 703 (CC)
- "In terms of both the common law and the Supreme Court Act 59 of 1959, an order granting leave to execute pending an appeal is considered to be purely interlocutory and not appealable. There are important reasons of policy why this is so. In particular, the effect of granting leave to appeal against an order of interim execution will defeat the very purpose of that order. The ordinary rule is that the noting of an appeal suspends the implementation of an order made by a court. An interim order of execution is therefore special relief granted by a Court when it considers that the ordinary rule would render injustice in a particular case. Were the interim order to be the subject of an appeal, that, in turn, would suspend the order."* (at para 5)
- [5] The Constitutional Court further held that:
- "Having granted leave to execute, permitting an aggrieved litigant to appeal that execution order pending the final appeal would generally result not only in the piecemeal determination of the appeal, but would 'stultify the very order ... made' "* (at para 10)

"All these considerations make it plain that it will generally not be in the interests of justice for a litigant to be granted leave to appeal against an interim order of execution." (at par 12, my emphasis)

(See further *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 551G-552H and *Machele and Others v Mailula and Others* 2010 (2) SA 257 (CC) at paras 22-24).

- [6] This case however does not fall in the general category referred to above. The notice of appeal is not only directed at the exercise of the discretion in granting the rule 49(11) relief but also states in paragraph 1.1 and 1.2 that leave to appeal is sought against:

"1.1 Preller J's refusal to postpone the application to afford the appellants a reasonable opportunity to file answering affidavits;

1.2 Preller J's dismissal of the appellants' point in limine relating to the non-joinder of certain third parties;"

- [7] I shall firstly deal with these two grounds.

Opportunity to answer

- [8] Ground 1.1 has to be seen in the light of the fact that the application was served on the appellants' Pretoria correspondent at 11h20 on 15 August 2007. Preller J ruled that the application was to be heard simultaneously with the application for leave to appeal in the main application i.e. on 17 August 2007. A notice of set down was only served on the appellants at 09h11 on 16 August 2007. This left the appellants with only twenty four hours notice of the date and time for the hearing of the application.

- [9] An affidavit by the appellants' Johannesburg attorney, Ms van der Linde, was delivered under protest. In that answering affidavit she explicitly stated that the appellants had insufficient time to prepare an answer. The respondents had waited nine days since judgment was handed down in the main application and eight days since the appellants' notice of application for leave to appeal was served, before they launched the rule 49(11) application, which was then set down with a mere twenty four hours' notice.
- [10] She stated that there was no time to answer the founding affidavit *ad seriatim* and further raised the complaint that the proper administration of justice was compromised.
- [11] Senior counsel who appeared at the hearing protested that the matter was not ripe for hearing because of the short notice received and that the appellants needed the opportunity to properly consider the answer and needed to consult with other witnesses and, if necessary, obtain affidavits from those potential deponents.
- [12] The transcript of the argument presented to the court *a quo* reflects counsel's submission that the application was not brought as a matter of urgency and that the papers had to be drafted the day before the hearing between 18h00 and midnight. The argument for a postponement concluded with the following request by appellants' counsel: "*We want an opportunity properly to amplify our opposing affidavits and to deal with this matter on a proper basis.*" This request was not granted. The court proceeded to hear argument and granted the application.
- [13] It is so, as argued by respondents' counsel, that a rule 49(11) application is an interlocutory application which may be brought on notice supported by such affidavits as the case may require and set down at a time assigned by

the registrar or as directed by the Judge, in terms of rule 6(11). (See *Airy v Cross-Boarder Road Transport Agency* 2001 (1) SA 737 (T) at 741F-H.)

- [14] This however does not mean that the respondents in such an application should not be granted a sufficient opportunity to answer. It is trite that at common law and in terms of the tenets of natural justice, the application of the *audi alteram partem* rule (described in *Pretoria Portland Cement Co Ltd v Competition Commission* 2003 (2) SA 385 (SCA) at [47] as “one of the most fundamental principles of our law”) is a *sine qua non* of fair proceedings. (see *Masetlha v President of the RSA* 2008 (1) SA 566 (CC) at [75])
- [15] The refusal of the requested postponement, despite the explicit protestations in the answering affidavit and in argument, was not procedurally justified. It resulted in a miscarriage of justice. As will appear from my consideration of the point of non-joinder hereunder, the refusal of the postponement resulted in a finding prejudicial to the appellants.
- [16] The denial of the appellants’ application for a postponement was unjustified. This appeal therefore has to succeed.

Non-joinder

- [17] Where a party has a direct and substantial interest in any order which a court may make in proceedings, or where an order cannot be sustained or carried into effect without prejudicing that party, such party is a necessary party and should be joined in proceedings (see *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A)).
- [18] To give judgment in the application and to take away certain rights

from the parties that have not been cited, without these parties being afforded an opportunity of being heard, would be contrary to natural justice. (see *South African Railways and Harbours v Chairman, Bophutatswana Central Road Transportation Board and Another*; *South African Transport Services v Chairman, Bophutatswana Central Road Transportation Board and Another* 1982 (3) SA 24 (B))”

- [19] In considering the appellants' point of non-joinder it has to be borne in mind that the alleged spoliation occurred on 13 June 2007 and that the papers in the main application were served more than a month later i.e. 19 July 2007. In the interim new occupiers, employees of the Trust, took occupation of both the houses that were previously occupied by the respondents.

- [20] In the answering affidavit it is stated that the new occupiers of the houses are *bona fide*, and had no knowledge of any of the respondents' claims to occupation at the time that they moved in.

- [21] The court *a quo* rejected these allegations.

- [22] Although, apparently as a result of recording problems, no typed copy of the judgment was available, junior counsel for the appellants made, according to Ms van der Linde, comprehensive notes of the judgment. These notes are attached to her answering affidavit and read in part as follows:

“Mr Vorster [respondents' counsel] argued that those tenants were not there when the answering affidavits were drafted or the matter argued - if that was so then this would have been raised as a defence. There is some merit in that, and I think I can safely assume that the new tenants moved in after the affidavit was drafted.

Mr Vorster looked at this from another angle, as when the appeal court looks at this there will be no mention of the new tenants in the papers, and the presence of the new tenants will not be a factor.

The order that I gave was one for restoration - if there is a problem then it is a problem for the respondents."

The correctness of these notes has not been disputed.

- [23] The court *a quo* could not "safely assume" that the new tenants moved in after the answering affidavit in the main application was drafted.

- [24] This finding does, as in the case of the main application, not heed the *Plascon-Evans* principle. The allegations in paragraphs 19 and 20 above stand uncontradicted, especially as no replying affidavit was filed herein. This evidence can not be rejected on the speculation that, had the allegations been true, they would have been mentioned in the answering affidavit in the main application. There was no specific reason for the appellants to do so. The appellants raised other defences which are good.

- [25] The plea of non-joinder is therefore good and, on this basis, too, the appeal has to succeed.

- [26] The passage from the judgment quoted above starkly illustrates the prejudice caused to the appellants by not giving them the opportunity to obtain affidavits from the occupants on the reserve. Had they sworn to affidavits, the point of non-joinder would probably have fallen away as being merely technical, but then it would have been abundantly clear to the court whether Ms van der Linde's affidavit correctly reflected the position or not. If correct, the position of the new occupants would have been material to the court's decision. As it turned out, without this issue having been properly

canvassed on the papers due to the short notice, the court *a quo* rejected the allegations in respect of the new occupants thereby potentially causing prejudice to innocent third parties not before the court.

Rule 49(11) merits

[27] The court *a quo* approached this application on the basis that there was a reasonable prospect of success on appeal.

[28] The decision turned on the balance of hardship or convenience to the respective parties were execution pending appeal to be granted or on the other hand, be refused. Crucial to the court's decision was the consideration that the respondents had been evicted from their homes. This is no doubt a very important factor in favour of the respondents.

[29] On the other hand the following factors had to be weighed in favour of the appellants:

- (i) The respondents' right to occupy the houses was part and parcel of their employment by the Trust.
- (ii) Two days after their alleged unlawful eviction they signed the compromise agreement in terms of which they agreed to leave the employ of the Trust and to vacate the houses on the reserve. They received compensation equal to three times their nett monthly salaries. In stating the relevance of this factor I keep in mind that the enforceability of the compromise agreements is attacked in the main application on the basis of duress.
- (iii) However, the foregoing factor has to be seen in the light of the fact that fifteen days after the alleged spoliation the respondents approached the provincial offices of the CCMA (the Council for Conciliation Mediation and Arbitration existing

in terms of the Labour Relations Act, 1995) in Polokwane. They did not seek reinstatement. In answer to the question in the standard LRA form as to the outcome they required, they stated "compensation required for 12 months."

- (iv) The main application was served on 19 July 2007.
- (v) In the interim the new occupants had taken occupation of the houses.
- (vi) The appellants raised the concern that, were the respondents to be allowed to occupy the houses pending the disciplinary inquiry against them, their presence might interfere with the inquiry, especially as witnesses against them stayed on the reserve. This was a relevant consideration.
- (vii) The respondents state in their founding affidavit herein that their living conditions were "*at best uncomfortable and at worst unbearable*". Referring to the founding affidavit in the main application, the facts are that the first and second respondents were living with the second respondent's parents whilst the third and fourth respondents were staying with the first respondent's sister. On the basis of these allegations it can only be accepted that their living conditions were uncomfortable, and on the other hand it has to be borne in mind that they had the three months' pay to obtain other accommodation.

[30] In exercising a judicial discretion on the aforementioned facts the court should have found that the rule 49(11) application had to be refused. The position would have been substantially different had the respondents brought the spoliation application immediately and not approached the CCMA for the relief that they did.

Summary

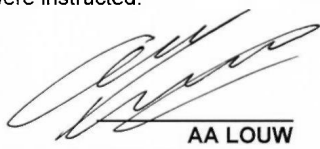
[31] I therefore find that the appeal has to succeed on three grounds. The first two are the failure to allow the appellants their procedural rights to answer properly and the non-joinder of interested parties. On both these aspects the result had to be that the application could not have proceeded on the date and the time that it did. Thirdly, the application had to be refused on the merits.

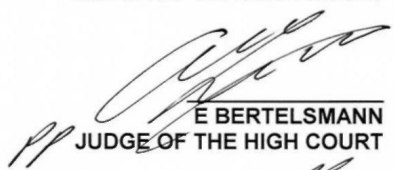
[32] I therefore make the following order:

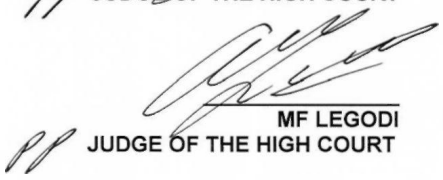
1. The appeal succeeds with costs. These costs include the costs of the application for leave to appeal in the court *a quo* as well as the costs of the application for leave to appeal to the Supreme Court of Appeal.
2. The order of the court *a quo* is set aside and is substituted by the following: "The application is dismissed with costs including the costs of two counsel".
3. All costs are to include the costs of two counsel, in all instances in which two counsel were instructed.

I agree

I agree


AA LOUW
JUDGE OF THE HIGH COURT


E BERELSMANN
JUDGE OF THE HIGH COURT


MF LEGODI
JUDGE OF THE HIGH COURT

ADV FOR APPELLANTS: CE WATT-PRNGLE SC

MF WELZ

ATTORNEYS FOR APPELLANTS: VAN DER LINDE ATTORNEYS

ADV FOR RESPONDENTS: A VORSTER

I OSCHMAN

ATTORNEYS FOF RESPONDENTS: VAN DEN BOGERT GÖLDNER INC.