

REPUBLIC OF SOUTH AFRICA



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

CASE NO: A3082/2022

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED YES

26/2/2024
DATE

In the matter between

DIANE ELENOR JONES

(in her capacity as the executrix of the deceased estate of
CEDRIC JONES)

Appellant

and

SHAWN KEVIN SUTHERLAND

Respondent

J U D G M E N T

WANLESS, J (Crutchfield, J concurring)

Introduction

[1] This is an Appeal to this Court against an order made in the

Meyerton Magistrates' Court. Regrettably, the nature of the order and the identity of the Magistrate who granted the order appealed against are far from clear from the papers placed before this Court. To add to the confusion, even the identity of the Appellant was not clear from the Record of Appeal (*"the record"*) provided to this Court. All of the foregoing will (hopefully) become more apparent as this judgment unfolds.

- [2] In addition to these difficulties the party appearing before this Court as the Appellant, namely, one Diane Elenor Jones, an adult female, had been unable, despite her best efforts, to procure Legal Aid and had been unable to afford legal representation throughout the majority of the proceedings leading up to (and including) this Appeal. Arising therefrom, the preparation of the record and the appearances before this Court on Appeal have all been carried out by her, in person.
- [3] The Respondent did not file Heads of Arguments prior to the Appeal on the 8th of February 2024 and, prior thereto, the Respondent's attorneys of record withdrew by way of notice dated the 25th January 2024. When the Appeal was called before this Court on the 8th February 2024 there was no appearance on behalf of the Respondent.

Background

- [4] The record in this matter consists of approximately 650 pages, most of which is irrelevant for the purposes of this Appeal. Sadly, what it does reflect is a bitterly waged war, mostly litigious but, unfortunately, also at times even of a physical nature, between two families, namely the “*Jones*” family and the “*Sutherland*” family, over a fairly considerable period of time.
- [5] The relevant portion of that history can be viewed by, *inter alia*, taking cognisance of those documents which do play a part in this matter and which form part of the record.
- [6] The saga begins with the entering into of an oral lease agreement (“*the agreement*”) between one Cedric Morgan Jones, adult male (“*Cedric*”) and one Shawn Kevin Sutherland (“*Shawn*”) on or about the 1st of July 2013. In terms of the agreement it appears that Cedric leased, *inter alia*, the main house on Portion 40, Witkoppies for a rental of R6 000.00 per month, from Shawn. A dispute arose between the parties as to whether Cedric had breached the agreement by failing to pay rent.
- [7] On or about the 14th of March 2014, Shawn issued a Combined Summons in the Magistrates' Court for the District

of Vereeniging (held at Meyerton) under case number 706/12, in terms of which he claimed from Cedric payment of the total sum of R30 000.00 in respect of arrear rental, together with interest and costs. On or about the 14th of August 2014, Cedric entered an appearance to defend the said action.

- [8] Following thereon, Shawn instituted an application for Summary Judgment which was opposed by Cedric. On the 16th of May 2014 the attorneys for Shawn and Cedric, namely a Miss Erasmus and a Mr Smith respectively, met with Magistrate Gelderblom at the Meyerton Magistrates' Court. On that day it appears that the learned Magistrate made the following order, namely;

"Application for Summary Judgment removed from the Court Roll. The costs of the application will be costs in the cause."

- [9] This having been a Summary Judgment application under the "old" rule (prior to the amendments of the applicable rule) it was obviously now incumbent upon the Defendant in the action (*Cedric*) to plead to the Particulars of Claim. On the 25th of July 2014, Shawn's Attorneys served a Notice of Bar upon Cedric's Attorneys of Record. Thereafter, on or about the 5th of August 2014, those attorneys withdrew as Cedric's Attorneys of Record.

[10] The Plaintiff (*Shawn*) then made an application for Default Judgment by way of notice dated 5 August 2014 and this judgment was granted on 30 October 2014 by the learned Magistrate Gelderblom ("*the Gelderblom order*"). No application for rescission of the Gelderblom order was ever made in the court *a quo* by Cedric. The order appealed against in this Court is *not* the Gelderblom order but is a judgment and order of the learned Magistrate Khota ("*the Khota order*") handed down in the court *a quo* some four years later on the 27th of September 2018. The Khota order does *not* form part of the record in the Appeal before this Court.

Merits

[11] On the previous occasion when this matter had come before this Court, it had been removed from the roll on the basis that, *inter alia*:

11.1 the record was incomplete;

11.2 there was no index to the record;

11.3 there was no proof of service on either the Respondent

or the Respondent's attorneys;

11.4 the affidavit of service referred to by the "Appellant" had not been uploaded onto Caselines; and

11.5 there had been no compliance with rule 15 of the Uniform Rules of Court.

In this regard, Cedric had passed away and whilst one Diane Elenor Jones ("*Diane*") had been appointed as the executrix of his deceased estate (and proof thereof had been placed in the record), she had not been formally substituted as the Appellant in this Appeal in terms of the rules of this Court.

[12] When the matter was called before this Court on the 8th of February 2024, Diane once again appeared as the Appellant. This Court immediately engaged with her and it became apparent that due to, *inter alia*, her age; financial circumstances and the fact that the matter had (according to her) already been removed or struck off the roll on two previous occasions, should, insofar as possible, be brought to its finality. Certainly, this was the wish she expressed and was the attitude adopted towards the manner in which this Court dealt with the matter, in the interests of justice, as is

clearly evident from that set out hereunder.

- [13] Taking the foregoing into account this Court proceeded to hear the Appeal despite the fact that the record was incomplete in that it did not contain a copy of the Khota order. The reason therefor is that the failure to include a copy of the Khota order in the record was ultimately not fatal to the decision reached by this Court. As to the failure of Diane to provide an index to the record, whilst this was a considerable inconvenience to this Court, this was, in the interests of justice, condoned. Regarding service on the Respondent or the Respondent's attorney, it appeared from the record that attempts had been made to serve the Notice of Set Down at the Respondent's last known address in KwaZulu-Natal without success. This address was the same as the address contained in the Notice of Withdrawal filed by Shawn's attorneys, as set out earlier in this judgment. It also appears that attempts to serve upon these attorneys may have been refused. In any event, at the end of the day, those attorneys have withdrawn from these proceedings. More importantly, in light of the decision reached by this Court the failure of Shawn to oppose this Appeal has not prejudiced him in any manner whatsoever and the issue of service is no longer a real one. This also applies to the question of the affidavit of service being uploaded onto Caselines.

- [14] As to the failure of Diane to comply with the provisions of rule 15 and institute a formal application whereby she was substituted as the Appellant in this Appeal, this Court, in the exercise of its discretion, elected to condone her failure to do so and substitute her as the Appellant on the basis that she is the lawfully appointed executrix of Cedric's deceased estate.
- [15] It should be clear from the foregoing that the fundamental difficulty with this Appeal is that it purports to seek to set aside the Khota order but has set out no grounds as to why (or how) this Court, sitting as a court of appeal, should (or could) do so. The relief sought conflates and/or confuses the setting aside of the Khota order with the rescission of the Gelderblom order. Ironically, this is in fact clear from the heading of various documents in the record which bear the heading or make reference to "*rescission*".
- [16] In this regard, as set out earlier in this judgment, the Khota order is not included in the record. To add insult to injury, Diane did not bring any application papers to court on 8 February 2024. However, she did confirm to this Court that the Khota order was in respect of an attachment order in relation to the default judgment granted in terms of the

Gelderblom order. In the premises, the only conclusions of fact and law this Court can make from the foregoing are the following, namely:

- [a] the Khota order arises from the Gelderblom order;
- [b] the Khota order exists until the Gelderblom order is rescinded or set aside;
- [c] in any event no grounds were advanced upon which this Court should or could set aside the Khota order; and
- [d] this Court, sitting as a court of appeal, cannot rescind or set aside the Gelderblom order. A rescission application should have been instituted in the court *a quo* if that was the intention of Cedric at that time. If it had been done and the court *a quo* had refused to rescind the default judgment (on whatever grounds) then the Appellant could have instituted an Appeal to this Court.

Conclusion

[17] In the premises, this Appeal cannot succeed and must be

dismissed. With regard to costs, as set out above, the Respondent (*Shawn*) did not file any Heads of Argument and was not represented at the hearing of the Appeal, his Attorneys of Record having withdrawn. Insofar as can be ascertained from the record, Shawn has accordingly either incurred no costs, or very little costs, in relation to this Appeal.

- [18] It is trite that costs fall within the general discretion of the court. Moreover, it is also trite that unless unusual circumstances exist, costs normally follow the result. In this particular case, this Court is of the opinion that such circumstances do exist. Not only is there a lengthy and unfortunate history of great acrimony between the Jones and Sutherland families (as referenced earlier in this judgment) but Diane has had to run this matter without the assistance of any legal representation whatsoever, despite her financial circumstances and her age. Taking all of the foregoing factors into consideration, it is the opinion of this Court that it would be just and equitable if each party paid their own costs in this Appeal.

Order

[19] The Court makes the following order:

1. The Appeal is dismissed.
2. The Appellant (Diane Elenor Jones N.O. in her capacity as the executrix of the deceased estate of Cedric Morgan Jones) and the Respondent (Shawn Kevin Sutherland) are to pay their own costs.



B. C. WANLESS
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION
JOHANNESBURG

I agree,



A. CRUTCHFIELD
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION
JOHANNESBURG

Date of Hearing: 8 February 2024

Date of Judgment: 26 February 2024