IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO.
(3) REVISED.

DATE 29 March 2023

CASE NO: 00052/2023

DATE: 2023-03-17

In the matter between

JEROME BADENHORST AND OTHERS Applicant

and

CITY OF EKURHULENI AND OTHERS Respondent

JUDGMENT *EX TEMPORE*

LEAVE TO APPEAL

WILSON J: The first respondent, the City of Ekurhuleni Metropolitan Municipality ("the City"), seeks leave to appeal against paragraphs 1 and 2 of my order dated 3 March 2023. In paragraph 1 of that order, I declared that the execution of the eviction order of Molahlehi J in the absence of the sheriff was unlawful. The eviction order was granted under case number 10264/2020 and dated 9 June 2021.

In paragraph 2 of my order, I directed the City,

South African Police Services and the Ekurhuleni Metropolitan Police Department to restore those persons evicted on 28 February 2023 to peaceful and undisturbed possession of the properties from which they were evicted.

Briefly, the sole factual basis on which I made that order was that the sheriff was not present when the order was executed on 28 February 2023. That fact is common cause.

It is equally common cause that both the Superior Courts Act 10 of 2013 and the Prevention of Illegal Eviction from an Unlawful Occupation of Land Act 19 of 1998 require the presence of the sheriff when an eviction order is to be executed.

In addition, Justice Molahlehi's order itself requires the sheriff to be present during the eviction. Paragraph 3 of the eviction order refers to the execution of the order by the City of Ekurhuleni Police Services and/or the South African Police Services and/or the sheriff of this court or the sheriff's lawful deputy. Paragraph 4 of the order states that if the applicants seek to reoccupy the properties, after their eviction "by the sheriff and/or his/her authorised deputy" (my emphasis) in terms of paragraph 3, then the sheriff may evict them again.

It accordingly seemed to me when I gave the order that the law as it stands in the Superior Courts Act and the

Prevention of Illegal Eviction from an Unlawful Occupation of Land Act and Justice Molahlehi's order were all in harmony. Each required the presence of the sheriff when the eviction order was executed on 28 February.

The sheriff was not present. It follows that the eviction took place outside the circumstances authorised by the Court order, interpreted in light of the applicable law. For that reason, the eviction was no more than a spoliation. I accordingly made the orders now appealed against.

Mr Sithole, who appears for the City, started his submissions by referring to a letter that was written by the applicants' attorney and that was annexed to the applicants' replying affidavit in the main application. The letter is directed to the sheriff of Nigel. It is dated 1 March 2023. The relevant part of the letter tells the sheriff that I had enquired specifically if the office of the sheriff of Nigel was in any way involved in the eviction.

In writing this letter, Mr Billings, the applicant's attorney, was mistaken. I had made no such enquiry. The first point at which I attended to the question of whether or not the sheriff was present at the eviction was when the absence of the sheriff was raised before me in argument on 3 March 2023. That was also the first time I became aware that the sheriff's presence or absence was relevant to anything I had to decide.

Be that as it may, I do not see the relevance of whether or not that enquiry was made. Mr. Sithole complained that my alleged enquiry on 1 March 2023 amounted to my raising, *mero motu*, a point that was not at that stage at issue between the parties. He also complained that his client was unaware of my supposed enquiry. But, even if I had made the enquiry, and even if it had been made without the City's knowledge, that would have made no difference to the correctness of the order I ultimately gave. Either the sheriff was present or he was not. It is accepted by all parties that the sheriff was not present.

I accordingly struggled to understand what the purpose Mr Sithole's reliance on Mr Billings' letter was and I have to say I still do not understand what the purpose of it was.

There was perhaps the suggestion that if I had made such enquiry, and if the enquiry had only been made to one of the parties, then that was unfair. If that was the suggestion, then I can understand why the City might have felt aggrieved. If I had made such an enquiry only to one of the parties and not to the other, it would have been inappropriate and, on the face of things, procedurally unfair. The unfairness would not have affected the merits of my judgment, but it would still have been a matter of legitimate concern to the City, and I would have understood why Mr.

Sithole would want to raise it with me.

Be that as it may, no such enquiry was made and the submissions made by Mr Sithole relating to Mr Billings' letter seem to me to be wholly irrelevant to the issue of whether the City's application for leave to appeal bears prospects of success.

What is perhaps more relevant to that issue is Mr Sithole's complaints on behalf of the City of Ekurhuleni that I decided the case and made my order on the basis of a new fact raised by the applicants in their replying affidavit.

That is true. But there is no absolute rule against a court deciding a matter on new facts or even a new case made out in reply. The question is whether there is prejudice to any of the parties and that question boils down to an analysis of the facts alleged.

In this case, there was a single relevant new fact alleged. That fact was the absence of the sheriff from the execution of the eviction order. That fact was not in dispute. Mr Sithole accepted during argument that the City did not apply to strike out the new fact raised in reply and that the City did not seek leave to file an affidavit dealing with it.

I do not think the City can be criticised for not doing either of those things, given that the new fact was common cause. But the fact that the City did not seek to strike out or respond to the new fact raised in reply underscores that

there can be no unfairness to the City from my relying on the fact, merely because it was raised for the first time in the applicants' replying affidavit.

Having quoted the authority in *First National Bank v Mostert* 2018 (4) SA 443 (SCA) a decision of Justice van der Merwe in the Supreme Court Appeal which deals with the admissibility of new facts raised in reply; having considered that authority very carefully; and having applied it, I decided that the new fact should be admitted and that an order in the terms appealed against should be made.

Mr Sithole has not persuaded me that I was mistaken in this, or that a court of appeal might consider that I was mistaken in drawing any of the conclusions I did or in making either of the orders the City appeals against.

There was a further issue raised about the fact that my order was made at the same time as my judgment on the balance of the applicants' Part A application was reserved. I do not understand why my decision to deal with the narrow point of the absence of the sheriff on an urgent basis and then to reserve my judgment in relation to the other issues raised in Part A of the applicants' application has any bearing on the prospects of success in an appeal against the order now at issue. Mr Sithole was unable to persuade me that has any such bearing.

The final distinguishable feature of Mr Sithole's

argument was the proposition that I had not interpreted Justice Molahlehi's eviction order in light of the applicable law, but that I had in fact varied it or set parts of it aside.

I dealt fully with that argument in my reasons for judgment on the main application. Briefly, my approach to that argument was that I interpreted Justice Molahlehi's order consistently with the law. I have to say it did not take much interpretation. Justice Molahehi himself is very clear about the fact that the sheriff must be present when the eviction order is executed. There is no other reasonable interpretation of paragraphs 3 and 4 of his eviction order when read together.

That, I hope, adequately addresses the arguments that Mr Sithole has put before me. I find none of them persuasive. I am not convinced that there is any prospect that a court of appeal will be persuaded by them either. There is no other compelling reason to grant leave to appeal. Accordingly, the application for leave to appeal is dismissed with costs.

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SDJ WILSON
JUDGE OF THE HIGH COURT