



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case No.: 2356/2021

In the matter between:

MARIA MAGRIETHA CATHARINA VICTOR
Applicant

First

VAUGHN VICTOR
Applicant

Second

And

WONDERHOEK FARMS (PTY) LIMITED

First Respondent

THE SHERIFF, WEPENER

Second Respondent

CORAM: MATHEBULA, J

HEARD ON: 04 FEBRUARY 2022

DELIVERED ON: The judgment was handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII on 07 February 2022. The date and time for hand-down is deemed to be 07 February 2022 at 14H15.

- [1] The applicants launched an urgent application contending that there is an appeal before this court and pending its finalisation the order of the learned Magistrate E.M. Sebe of Wepener should not be executed. The respondents oppose the matter contending that there is no appeal process before any court. Therefore, the aforementioned order was properly put in operation and executed. The matter first served before me on 31 January 2022 and I made an order allowing both parties to file supplementary papers. It apposite to mention that the papers were served on the respondents few hours before the applicants approached me in chambers. None of the parties took issue with the fact whether the matter is urgent or not. I am of the view that it was a prudent thing to do because this matter is by its very nature urgent.
- [2] The facts are fairly straightforward and are as follows. On 12 March 2021, the learned Magistrate E.M. Sebe granted an eviction order in favour of the first respondent. Aggrieved with the order, the applicants filed a notice of appeal to bring the matter before this court. It seems that despite the appeal process pending, the first respondent was hellbent on executing the order. This caused the applicants to bring an urgent application to prevent the first respondent from carrying out the eviction order. The order granted by Van Zyl J reads as follows: -

- “1. Condonation is granted in terms of prayer 1 of the Notice of Motion.
2. Pending the finalization of the applicant’s appeal of the court order granted on 12 March 2021 in the

Magistrate's Court for the district of Wepener, under case number 12/2020, the respondents is interdicted from enforcing the eviction against the applicants.

3. Costs of the application to be costs in the appeal.”

- [3] On 3 November 2021 Mhlambi J (with De Kock AJ concurring) dismissed the appeal with costs. The effect of this meant that the order of the learned Magistrate E.M. Sebe was confirmed rendering the applicants liable to be evicted from the contested property to *wit* Farm Aanvang, Wepener.
- [4] On 15 December 2021, the applicants served and filed the application for leave to appeal with the Registrar of this Court. What followed was an exchange of letters between the attorneys of the parties and they could not resolve the impasse. On 31 January 2022 the second respondent armed with a warrant of ejectment issued by the Clerk of the Court, Wepener and assisted by a number of independent contractors executed the order of the learned Magistrate.
- [5] The case for the applicants is thinly based on the provisions of Uniform Rule 30. The main contention on behalf of the applicants is that they have filed the application for leave to appeal. Therefore, in the event that by taking such a step they contravened the Uniform Rules of Court, that action constituted an irregular step. The first respondent was duty bound to invoke the provisions of the aforementioned rule. It was not open to the first respondent to disregard such filing because the respondent

cannot unilaterally decide on the legal consequence of the filed document. The applicant further contended that the first respondent wrongly implemented the order of the full court by inserting its own date to effect the eviction. Turning to the order by Van Zyl J, the point raised is that the court can enforce its own order to grant the relief. Lastly, it was argued that the first and second respondents did not act in terms of the order. The main thread of this argument is that independent contractors were involved instead of the South African Police Service (SAPS). Based on these grounds, counsel urged me to grant the application with a punitive costs order against the respondents.

- [6] Counsel for the first respondent sketched out the laws governing the appeal process before our courts. He submitted that the lodging of the appeal relied upon by the applicant is not in accordance with the law. The gist of his argument is that the appeal brought outside the Uniform Rules of Court has no effect because it is a nullity. He pointed out that the applicants were obliged to seek leave from the Supreme Court of Appeal and they failed to do that. Further they have not only failed to file their papers, they are now out of time. Therefore, until condonation is granted by that court, there is no appeal pending. Turning to the order of Van Zyl J counsel argued it was applicable only if there is an appeal pending and in this case there was none. Therefore, it is of no force and effect.
- [7] The submissions of counsel for the second respondent substantially mirror those made on behalf of the first respondent. He emphasised that the procedure followed in this matter was not

an irregular step but a nullity. He urged me that if this argument sustains, it must be treated as if it never occurred. Counsel argued that the second respondent was duty bound to give effect to the order. The second respondent was acting in terms of a valid warrant of ejectment and he was acting lawfully.

- [8] Both counsel argued that the application should be dismissed with a punitive costs order against the applicants. They referred to the manner the application was brought to court which was tantamount to sneaking a favourable court order. As a result of the conduct of the respondents, the respondents were placed under undue pressure to comply with unreasonable timeframes.
- [9] It is common cause that when the matter served before Mhlambi J and De Kock AJ, they were sitting as a court of appeal. An appeal against their decision lies to the Supreme Court of Appeal upon special leave having been granted by the last mentioned court.¹ The applicants have not complied with this provision.
- [10] The argument of the applicants on the law is fallacious and bereft of any merit. When the learned Judges handed down their judgment and order, that was the end of the business of this court with this matter. This court could only entertain it if the parties approached it for a reconsideration of the order. The High Court does not, in the circumstances prevailing in this matter, have the

¹ Section 16(1)(b) of the Superior Courts Act 10 of 2013 reads as follows: -

“Subject to section 15(1), the Constitution and any other law – an appeal against any decision of a Division on appeal to it, lies to the Supreme Court of Appeal upon special leave having been granted by the Supreme Court of Appeal”.

authority to grant an application for special leave to the Supreme Court of Appeal.²

- [11] There is a veiled concession on the part of the applicants that they misapplied the law on the issue of filing the application for leave to appeal. When this issue was raised by the first respondent, the applicants filed with the Registrar of the Supreme Court of Appeal an application on the notice of motion seeking condonation for the late application for leave to appeal and special leave to appeal. This is indicative of the fact that the applicants have failed to comply with the provisions of section 16(1)(b) of Act 10 of 2013. In my view, this put paid to the gallant effort of the applicants to prevent the execution of the warrant of ejectment.
- [12] The argument that the first respondent should have invoked the provisions of Uniform Rule 30 does not make sense at all. I have already stated that the business of this court with this matter ended when the learned Judges delivered their judgment and order. The Uniform Rules of Court can only be applied on a matter that is pending before the court. The first respondent was correct to ignore the purported application for leave to appeal because it was fatally flawed and defective. It seems to me that the applicants expect the first respondent to revive a nullity.
- [13] This brings me to the order of Van Zyl J which stipulates that the order of the learned Magistrate is suspended pending the finalisation of the appeal. The order presupposes that it will

² Potgieter v S (2015) ZASCA 15 at para 3.

automatically lapse once the appeal has reached such stage of finalisation. There can be no talk that this appeal has not reached such a stage. Any reliance on this order is misplaced.

[14] On the changed circumstances, the applicants argued that now that the application has been filed with the Registrar of the Supreme Court of Appeal, there is an appeal pending bringing the suspension of the order within the purview of section 18 of Act 10 of 2013.³ On the facts of this matter, the applicants still have to scale the hurdle of condonation. The primary question whether the application for condonation has the same effect of suspending the operation and execution of the decision of the court.

[15] In **Panayiotou v Shoprite Checkers (Pty) Ltd and Others** Sutherland J (as he then was) wrote the following: -

“The inherent logic of the position is unassailable. It can be tested by asking what were to happen if many months or years were to pass before an application for condonation is lodged. It is untenable that upon the service of a condonation application the judgment would then be suspended. Accordingly, the application fails for want of even a prima facie right that the judgment of Legodi J be suspended.”⁴

I agree.

³ Section 18(1) of Act 10 of 2013 reads as follows: -

“Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal”.

⁴ 2016 (3) SA 110 (GJ) at para 15.

[16] The parties are *ad idem* that the losing party must pay the costs on the scale between attorney and client. I agree with them. The application brought by the applicants was brought against the background of what is an elementary mistake of the law. Even an attempt to rectify the same was another comedy of errors in that a wrong form to the Supreme Court of Appeal was used. It does not end there, the applicants brought the application with unreasonable timeframes. They have been in the know for some time that the first respondent was going to execute the decision at least on 31 January 2022. However, they sat back and did nothing to prevent it.

[17] This conduct compelled the first respondent to file supplementary papers which could have been avoided had they exhibited a measure of fairness to the other side. The papers put before me are unnecessarily bulky and repetitive. The application focussed on a narrow issue which is the centre of the dispute between the parties *ie* whether the order of the learned Magistrate E.M. Sebe is suspended or not. On these grounds, I hold a view that a costs order on an attorney and client scale is appropriate.

[18] In the result I make the following order: -

18.1. The applicants' non-compliance with the Uniform Rules of Court is condoned and this application is heard on an urgent basis in terms of Uniform Rule 6(12).

18.2. The application is dismissed and the applicants are ordered, jointly and severally, the one paying the other to be absolved, to pay the costs on attorney and client scale.

M.A. MATHEBULA, J

On behalf of the applicant: Adv. F.G. Janse Van Rensburg

Instructed by: Willers Attorneys
Bloemfontein

On behalf of the first respondent: Adv. J.W. Kloek

Instructed by: Michael Du Plessis Attorneys
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On behalf of the second respondent: Adv. M.C. Louw

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