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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 90835/2016

Reportable: NO

Of interest to other judges: NO

Revised: YES

Date:

Signature

In the matter between:

ALLAN FRANCIS OSBORNE

Applicant

and

ETTIENE ERASMUS

1st Respondent

**ALL OCCUPIERS OF NUMBER 8[...] A[...] DRIVE
FOURWAYS, JOHANNESBURG, GAUTENG (Also
Known as ERF 1[...], Fourways Township, Registration
Division I.Q. Province of Gauteng**

2nd Respondent

**CITY OF JOHANNESBURG METROPOLITAN
MUNICIPALITY**

3rd Respondent

JUDGMENT

PRINSLOO AJ

General

[1] The parties indicated that on their papers they referred to the parties as cited in the main application and that reference to the Applicant, meant Mr Osborne and the Respondent, Mr Erasmus.

[2] To avoid confusion and for purposes of this judgment, Mr Erasmus is referred to herein as the appellant and Mr Osborne as the Respondent.

[3] It is common cause that this application for leave to appeal is only brought on behalf of the appellant as first respondent in the main application and that there is no application on behalf of the second respondents, being the other occupiers at the premises and that the eviction order granted against such occupiers on the 17th of March 2020 stands.

Non-Compliance with the Rules of Court, Practice Directives and absence of an Application for Condonation

[4] Rule 49(1)(b) is prescriptive that an application for leave to appeal shall be made within 15 {fifteen} days after the date of the order appealed against.

[5] This court's directives in Chapter 11 of it's Practice Manual, sets out concisely the process to be followed, namely that a written letter be submitted to the Registrar in charge of civil appeals, applying for a date of hearing.

[6] Despite the Notice of Application for Leave to Appeal being dated the 20th of March 2020 and being served electronically on the Respondent on the 25th of March 2020, there is no proof that the appellant has complied with the court rule by making the application to court within the 15-day period. Mr Scholtz, for the appellant after asking for an indulgence to contact his attorney who was not at court, made a submission that his attorney advised him that the notice was filed at court. He however could supply no written proof. In the absence thereof, the submission could not be accepted.

[7] The most compelling reason for this is that the first indication of the appeal with the registrar is that the Notice of Application was first uploaded on Case-Lines on the 10th of December 2020. It was quite disturbing to hear that it was in fact the respondent who has been pro-active in having brought this application before court and not the appellant. This was conceded by Mr . Scholtz.

[8] This gives credence to the respondent's argument, that the appellant only served the application for leave as a delaying tactic, to achieve the suspension of the eviction order against him.

[9] The rules of court and this Division's practice directives have not been complied with and there is no condonation application before the court. On this basis alone, this application falls to be dismissed.

The Grounds for Leave

[10] I placed on record, that it was the court's view that the appellant had from day one used tactical and technical points to frustrate the respondent. To prevent any further opportunity for complaint by the appellant, and despite the finding that the application fails due to the appellant's non-compliance with the Rules of Court, I in any event afforded Mr Scholtz an opportunity to address the court on the grounds for leave to appeal.

[11] At the outset there was an attempt to raise additional grounds that were not contained within the notice of application for leave to appeal.

[12] The first point raised was that the court had erred in not considering the time periods stipulated in sections 4(6) and 4(7) of the PIE Act and had not considered the period of unlawful occupation. Mr Scholtz was asked where this was raised as a ground of appeal and he referred to ground number 4. With respect Ground 4 relates to an alleged misdirection of circumstantial evidence.

[13] There was then an attempt to raise argument on behalf of the appellant by referring to two further unreported judgments, which also did not form part of the appellant's concise heads of argument.

[14] The Notice of application for leave to appeal, with respect, fell short of what is reasonably required. It is trite that the grounds of appeal must be clearly and succinctly set out in clear and unambiguous terms so as to enable the court and the respondent to be fully informed of the case the appellant seeks to make out and which the respondent is to meet in opposing the application for leave to appeal.

[15] Not one of the seven grounds, in clear and unambiguous terms, sets out a basis in law or the factual basis on which the court erred. For example, on the first ground the appellant simply states that the court erred in finding that the respondent, Mr Osborne, had discharged the onus. There are no grounds stated on why the court had erred.

[16] The second ground states that the court erred in finding that the PIE act had been complied with. The notice does not state which provisions were not complied with.

[17] The third ground alleges that the court misguided itself by applying common law. No reference is made to which aspect of common law or how the court misguided itself.

[18] The fourth ground alleges a misdirection on circumstantial evidence. The - alleged circumstantial evidence or facts are not stated.

[19] The remaining three grounds are the same. Bald statements without substance.

[20] Mr Scholtz was then asked to confine his arguments to the notice and heads of argument for the appellant.

[21] This led to the crux of the matter, which is the appellant's continued denial that he was in occupation of the property and his failure to produce a shred of evidence to prove that he was residing elsewhere and to substantiate the argument in the heads of argument that there was a *bona fide* dispute of fact.

[22] Mr Scholtz heavily relied on the judgment of *The National Director of Public Prosecutions v Zuma, Mbeki & Another*¹, but it is in that very judgment wherein lies the crux of this matter, where Harms JA states that: "It may be different if the respondent's version consists of bald or uncreditworthy denials raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers."

[33] That is the appellant's difficulty. He chose, either tactically not to provide the court with the substantiated particulars of where he truly was residing, or dishonestly attempted to mislead the court, and that he was in fact residing at the premises. It was pointed out again to Mr Scholtz, what was stated in paragraph 32 of the judgment that the matter of *Ndlovu*² requires an occupier to disclose circumstances relevant to the eviction, if he opposes such an order, failing which an applicant is entitled to such an eviction order. .

[34] That is why, in my view, there is no reasonable prospect of the appellant succeeding with an appeal. A different court will be faced with the same position: an occupier (the appellant) who makes the single bald denial that he is not in occupation of a premises and refuses to disclose circumstances, which he could easily do, which could assist that court in making a finding.

[35] I am of the humble view therefore, that a different court would not reach a different conclusion and that there are no other compelling reasons why the appeal should be heard, or grounds in terms of the Act³ on which leave should be granted for the appellant to prosecute his appeal.

¹ 2009 (2) All SA 243 (SCA)

² *Ndlovu v Ngobo; Bekker and Another v Jika* 2002 All SA 384 SCA.

³ Superior Courts Act 10 of 2013, Section 17.

Costs

[36] The appellant failed to comply with the rules of this court, he failed to comply with the directives of this Division. He never sought condonation. He failed to deliver an adequate notice setting out grounds with the particularity and clarity required to enable this court and the respondent to reasonably understand and meet the appellant's arguments. Worst of all though is that the Appellant never brought this application for leave to appeal to fruition, but the respondent was forced to do so.

[37] This is again worthy of a punitive sanction.

Order:

[38] Consequently, I make the following order:

The application for leave to appeal is refused and the appellant is ordered to pay the respondents costs on a scale as between attorney and own client.

AC PRINSLOO

Acting Judge of the High Court

APPEARANCES:

Applicant:	Advocate Prinsloo Innes R Steenkamp Attorneys
Respondent:	Advocate Scholtz Taute, Bouwer and Cilliers Inc.

Date heard: 11 March 2021

Judgement delivered on: 12 March 2021