



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, DURBAN**

CASE NO: 13185/2016D

In the matter between:

**VISHAL GOPAUL
SHELENA GOPAUL**

**FIRST APPLICANT
SECOND APPLICANT**

and

**AROOGMUGAN LUTCHMAN
GLADYS LUTCHMAN
ETHEKWINI MUNICIPALITY**

**FIRST RESPONDENT
SECOND RESPONDENT
THIRD RESPONDENT**

ORDERS

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1. The first and second respondents are granted condonation for the late noting of the application for leave to appeal;
 2. The application for leave to appeal is dismissed with costs;
 3. The applicant's application in terms of section 18 of the Superior Courts Act 10 of 2013 is adjourned *sine die*. Leave is granted to the applicants to file a supplementary affidavit should the application need to be re-enrolled;
 4. It is recorded that the order of Lopes J of 8 February 2018 has lapsed.
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JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

Henriques J

Introduction

[1] This is an application for leave to appeal by the first and second respondents, to the full court of this division, alternatively to the Supreme Court of Appeal, against the entire judgment and orders which I delivered on 30 November 2017¹. The application for leave to appeal is opposed by the applicants.

[2] The judgment and orders I issued related to the first and second respondent's application to stay the eviction proceedings pending an application for the rescission of judgment being lodged.² I dismissed the application to stay the eviction proceedings and granted the order for eviction.

[3] Given the number of interlocutory applications, for the sake of convenience, I will refer to the parties in this application as they were cited in the eviction application, the Gopauls, being the applicants in the eviction application and the Lutchmans, the respondents in the eviction application. The third respondent did not oppose the proceedings nor file any report.

Grounds of appeal

[4] The grounds of appeal as set out in the application for leave to appeal are the following:

1. The Court erred in not granting the Respondents the opportunity to file an application for the rescission of a judgment handed down by the Provincial Division of the High Court, Pietermaritzburg, which judgment was granted in default against the Respondents.
2. The Respondents obtained a provincial (sic) order against one Lancis Chetty, who unlawfully and fraudulently sold the Applicant's property to the first and second Applicants.
3. Because of the fact that the Respondents' Attorneys neglected to follow through with the matter in obtaining final judgment against one Lancis Chetty who unlawfully and fraudulently sold the Respondents' property to the First and Second applicants, such provincial (sic) judgment was dismissed in default of the Respondents' Attorneys not

¹ The applicants' attorney of record arranged for a transcript of the judgment to be provided before the hearing of the application for leave to appeal. I was advised from the bar that a copy was also provided to the first and second respondents' attorneys of record.

² This appears to be an obvious error as the application was instituted in the Durban High Court.

attending to the matter.

4. The Court erred in not granting the Respondents a stay in the eviction proceedings pending the finalisation of the matter between the Respondents and one other Lancis Chetty who is the person that unlawfully and fraudulently sold applicants' property to the First and Second Applicants. See Respondents [application] to stay as **Annexure A**.
5. The Court ought to have taken the Respondents Chapter Two of the Constitution of South Africa civil, political and socio-economic rights into consideration.
6. The Court erred in not taking into consideration and enforcing the Respondents' rights in terms of section 24 of the Constitution.
7. The Court ought to have held that the Respondents may not be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property especially when there are strong allegations of fraud in such deprivation claim.
8. The Court erred in its finding that the mere production of a Deed of Transfer is absolute proof of ownership without the Court taking all reasonable measures to investigate further the allegations of unlawful and fraudulent deprivation of property.
9. The Court erred in dismissing the application to stay the eviction proceedings.
10. The Court ought to have upheld the Respondents' application as the Respondents engaged the services of new attorneys and Counsel in this matter as the Respondents' previous attorneys were negligent and or refused to have given this matter due attention'.³

[5] The Lutchmans submit that another court might come to a different conclusion in the above matter.

[6] The application for leave to appeal is opposed by the Gopauls, the registered owners of the immovable property who obtained an order for the eviction of the Lutchmans on 30 November 2017, after the application to stay was dismissed with costs.

[7] It needs mentioning that the orders and *ex temporae* judgment were delivered on 30 November 2017 in the presence of the Lutchmans and their legal

³ I have gone into some detail with the grounds of appeal and the reasons therefore will become evident during the course of the judgment.

representatives who listened to the judgment and orders that were granted. They were thus aware from 30 November 2017, that they were required to vacate the immovable property by 1 February 2018.

[8] The application for leave to appeal, although dated 31 January 2018, does not appear to have been served on the Gopauls' attorney and was filed with the registrar on 2 February 2018, the day after the Lutchmans were required to vacate the immovable property. There is no explanation as to why the application for leave to appeal was brought so late and why there is no prayer for condonation.

[9] At the hearing of the application for leave to appeal, I raised this with Mr *Naidoo*, who appeared for the Gopauls. Copies of correspondence that was placed in the court file indicated that the Gopauls' attorney had repeatedly brought to the attention of the Lutchmans' attorneys, Balram attorneys, that condonation was an issue that needed to be dealt with. Despite this having been pertinently brought to the Lutchmans' attention via correspondence, no application for condonation was filed.

[10] Although the Superior Courts Act, 10 of 2013 does not appear to deal with this aspect, the Uniform Rules do. Uniform rule 49(1)(b) provides for the application for leave to appeal to be brought within 15 days of the date of the order and full reasons for the court's decision, but that the court may, on good cause shown, extend the period of fifteen days. Consequently, although there is no explanation for the delay in bringing the application for leave to appeal and no order for condonation was sought, Mr *Naidoo* submitted that the court ought to grant condonation which would not be opposed by the Gopauls. I believe this to be a pragmatic approach and to the extent necessary, the Lutchmans are granted condonation for the late filing of the application for leave to appeal.

[11] Given the history of the matter and what transpired at the hearing of the application, it is prudent to deal with the enrolment of the application for leave to appeal. From what is contained hereinafter, it becomes self-evident that the Lutchmans have, throughout the course of litigation between the various parties,

done their level best to delay the proceedings, often waiting until the eleventh hour to take steps to advance their case and have on no less than two occasions laid the blame at their legal representatives doorstep.

The date for the hearing of the application for leave to appeal

[12] On receipt of the application for leave to appeal, the general office of the registrar made attempts to locate the court file pursuant to my request. This proved challenging in light of the fact that the Lutchmans' attorneys of record did not disclose that the matter was enrolled for the hearing of an urgent application on 8 February 2018. The court file was accordingly not in place. Subsequently, the court file was located, and attempts were made to enrol the application for leave to appeal for hearing.

[13] This too proved challenging, in light of the fact that the Lutchmans' attorneys of record did not, in the application papers filed, nominate a local address for service. In consequence thereof, attempts were made to obtain the email address and telephone numbers of the Lutchmans' attorneys, Balram attorneys. This also proved challenging. In consequence thereof, the Gopauls' attorneys of record were contacted and requested to liaise with the Lutchman's attorneys local correspondent in the application to stay the eviction in an attempt to obtain dates for the hearing of the application for leave to appeal.

[14] Several attempts were made to arrange a mutually convenient date for the hearing of the application for leave to appeal and to contact Balram attorneys but this was to no avail. In consequence thereof, the matter was enrolled for hearing on 17 May 2018. On 8 May 2018, the Gopauls' attorneys were notified of the date for hearing and on 9 May 2018, a letter was dispatched to Balram attorneys, care of R & S attorneys, informing them of the date assigned for the hearing of the application for leave to appeal.

[15] Accompanying such letter was the notice of set down together with a copy of the court's transcribed judgment which had been arranged by the Gopaul's legal representatives. In addition, as a matter of caution, a notice of set down was also

served personally via sheriff on the Lutchmans.

[16] I must reiterate that the matter was enrolled in this fashion in light of the fact that the Lutchmans' attorneys took no steps to enrol the application for leave to appeal nor to arrange a transcript of the court's *ex tempore* judgment. Attempts to liaise with their correspondent attorneys, R & S Attorneys, to obtain a date also proved fruitless.

[17] On 11 May 2018, a letter was despatched from the offices of Balram Attorneys on their letterhead to the Gopauls' attorney, Nivesh Hiralall, which contained all their contact numbers as well as an email address. This letter indicated that neither the Lutchmans' advocate nor their attorney were available on 17 May 2018 to deal with the application for leave to appeal. The letter recorded the following:

'. . . Please can you provide us with a date two months in advance so that we can all mutually diarise the matter and attend to it accordingly.'

[18] In consequence thereof, on 15 May 2018, the Gopauls' attorneys of record indicated that the date was allocated by the presiding judge in accordance with the practice in this division. The attorneys were requested to contact Ms Snijders, the registrar temporary allocated to assist me. In consequence thereof, and so as to accommodate the Lutchmans' attorney and counsel, the matter was removed from the roll for 17 May 2018 and an email was despatched by Ms Snijders to both parties' legal representatives on 15 May 2018 indicating that the application for leave to appeal must be enrolled during term time within the next session and that the legal representatives ought to liaise with each other and propose dates for the hearing of the application for leave to appeal.

[19] The legal representatives were also provided with the email address of Ms Pieterse who would be temporarily assigned to me during the next session. I am advised by Ms Snijders that the Lutchman's attended at court in person on 17 May 2018 after receipt of the notice of set down. On 16 May 2018, the Lutchmans' attorneys of record responded indicating that they were available to attend to the matter in the July recess and provided four dates. This was despite the email of 15

May 2018 advising them that the application for leave to appeal must be set down during term time in the next session.

[20] On 17 May 2018, in response to Balram attorneys' email of 16 May 2018, Ms Snijders advised that Mr Balram ought to correspond with the registrar assigned to me, Ms Pieterse, and not directly to myself and secondly that he was to copy the Gopauls' attorneys in future emails, and further that the matter must be set down during term time which is from 21 May to 29 June 2018, and not during the July recess.

[21] As a consequence of Balram attorneys' failing to provide dates in term time being 21 May to 29 June 2018, despite Ms Snijders' advice in the emails of 16 and 17 May 2018, the matter was then enrolled for hearing at 11h30 on 28 June 2018 at the Pietermaritzburg High Court. The date of 28 June 2018 was a reserve day on which the matter could be better accommodated. On 14 June 2018, Ms Pieterse emailed Balram attorneys to once again advise that July was recess and that the matter was set down for hearing at 11h30 on 28 June 2018. On 16 June 2018, in response to such email, Mr Balram responded and advised that he was not available on 28 June 2018 but was available on 29 June 2018.

[22] On 20 June 2018, a letter was forwarded to Ms Pieterse (although it was addressed to one Hayley Greeff). The letter indicated that both Balram attorneys and counsel were not available on 28 June 2018 and were only available on 29 June 2018. In addition, dates were requested for July, August and September 2018.

[23] On 21 June 2018, Ms Pieterse again advised the parties' legal representatives via email that the matter will proceed on 28 June 2018. In response thereto, on the same day, Balram Attorneys informed Ms Pieterse via email that the Lutchmans had instructed him to approach the Judge President and in the event of him not doing so, the Lutchmans had indicated they would do so themselves, and bring to the attention of the Judge President that they were not available on 28 June 2018.

[24] In consequence thereof on 22 June 2018 an email was directed to Ms Jagannath, the registrar of the Judge President. The letter did not however record the attempts made to enrol the matter and the correspondence exchanged with the registrars. All it did was record that I had directed the matter would proceed on 28 June 2018 despite their non-availability. It also recorded or requested dates after the July recess.

[25] On 22 June 2018, Ms Jagannath informed the parties that she would bring the matter to the Judge President's attention on Monday 25 June 2018. On the same day, pursuant to a request, I informed the Judge President's registrar of the history of litigation in the matter and set out the attempts to enrol the matter for hearing. I was of the view that the Lutchmans were intent on delaying the hearing of the application for leave to appeal as had been the practice throughout the litigation.

[26] I recorded that the Lutchmans' legal representatives, Balram Attorneys, were uncooperative when it came to enrolling the matter during term time. I followed the practise in this division and enrolled the matter for hearing on a date on which it could be accommodated in the reserve dates given. The roster for the session had been finalised and work already assigned for the session. I may add that this day was the second day of the reserve days and would have had minimal impact to already assigned duties and was the most suitable date to accommodate this matter. This was despite the fact that I was engaged in a criminal session from Monday, 25 June 2018 up to and including Friday, 29 June 2018.

[27] I am advised that on 25 June 2018, the Judge President responded to Balram attorneys and indicated that he was not inclined to interfere with the matter and that the application for leave to appeal would proceed on the date allocated, being 28 June 2018.

[28] On 26 June 2018 at 15h09, an email was despatched from Balram attorneys to the Judge President's secretary as well as Ms Pieterse and copied to the Judge President. It once again recorded that the attorney and counsel were not available to attend to the matter on 28 June but rather would be available on 29 June. It also

recorded that I was no longer available on 29 June 2018 despite having initially informing the Lutchmans' legal representatives in early May 2018, before the commencement of the session in Pietermaritzburg, that I was available on that date. What this failed to take into account is that the roster is amended during the course of a session and further work allocated.

[29] On the morning of 28 June 2018, Ms Lutchman appeared at the hearing of the application for leave to appeal in person, also representing her husband. Aroogmugan Lutchman. She indicated that her legal representatives informed her that the matter had been set down and enrolled for hearing on 29 June 2018. She was unable to provide me with a notice of set down in confirmation thereof. I enquired from her how she became aware of the date of 28 June 2018 if this was what her attorneys informed her.

[30] She indicated that at 04h00 on the morning of 28 June 2018 she received a telephone call from her legal representative advising her that her matter was enrolled for hearing and that she ought to make her way to court and ensure that she was in attendance. She was advised to bring it to the court's attention that her legal representatives had informed her that matter had been enrolled for 29 June 2018 and that they were not available to attend to the matter on 28 June 2018.

[31] I took Mrs Lutchman through the correspondence exchanged with her attorneys of record in relation to enrolling the matter for hearing. She confirmed that she also received the notice of set down for the date of hearing being 28 June 2018 but did not do anything about same. She confirmed that she had had a telephonic discussion with her attorneys of record and advised them of receipt of the notice of set down but they indicated to her that they had enrolled the matter for hearing on 29 June 2018.

[32] Given the correspondence exchanged with the Judge President at the apparent instruction of the Lutchmans I advised Mrs Lutchman of the contents of such correspondence specifically that her attorneys were advised by the office of the Judge President that the matter would proceed. Ms Lutchman denied having

instructed her attorneys to make such approach to the Judge President.

[33] I stood the matter down to enable Mrs Lutchman to make telephonic enquiries with her attorneys of record. After doing so she advised the court that they informed her that the matter was enrolled for hearing on 29 June 2018 and they would not be in attendance on 28 June 2018. She further informed the court she would await her attorneys.

[34] Mr. *Naidoo* on behalf of the Gopauls placed on record the attempts made to enrol the matter for hearing since March 2018. In addition, Mr *Naidoo* indicated that the matter was enrolled for 17 May 2018 when the Lutchmans' legal representatives refused to co-operate and provide a date for hearing the application for leave to appeal which was convenient to them. They were accommodated and requested on no less than two occasions to provide dates for the hearing of the application for leave to appeal which would be convenient to them during the term. They failed to do so.

[35] In addition, the Gopauls had incurred costs and legal fees, specifically sheriff's fees which they incurred to enrol the matter on no less than two occasions. This involved notices of set down being served personally on the Lutchmans in light of the fact that the attorneys of record were not co-operating and did not initially provide a local address for the service of papers. Mr. *Naidoo* indicated that the matter had been properly enrolled and ought to proceed. In addition thereto the Gopaul's had incurred the costs of obtaining a transcript of the *ex tempore* judgment which should have been obtained by Balram attorneys and this was also made available to Balram Attorneys.

[36] I may also add that the Gopauls' attorneys of record had taken added precautions and served via the sheriff the notice of set down together with a covering letter informing the Lutchmans of the practice in this division and recording that the application for leave to appeal had to be heard before the end of the court session and not in the July court recess, and advising them that the matter had been enrolled for hearing on 28 June 2018 at 11h30 in Pietermaritzburg. They were in addition

requested to instruct an alternative counsel in the event of their counsel not being available.

[37] The notice of set down together with a covering letter was served personally by the sheriff on Mrs Lutchman and Mr Lutchman on 20 June 2018. Ms Lutchman confirmed receipt thereof.

[38] Taking all of this into consideration, I informed Mrs Lutchman that the matter would proceed and once again enquired from her as to what she wanted to do and she indicated that she would remain in attendance and would await her attorneys. The matter then proceeded in the absence of Mrs Lutchman's legal representatives who were in default of appearance despite adequate notification.

The judgment in the application to stay the eviction and the eviction application

[39] The *ex tempore* judgment and the reasons for refusing the application to stay the eviction application are a matter of record and I do not propose to deal with them in any detail. Essentially, the application to stay was refused in light of the fact that the court was of the view that the Lutchmans were not *bona fide* in bringing the application to stay the eviction and had not satisfactorily explained the delay in doing so, and were also were not *bona fide* in dealing with the reasons why they failed to bring the application for the rescission of the default judgment which had been granted at an early stage.

[40] The record and the contents of the court files reveal that the Lutchmans were aware as at 15 November 2017 that their erstwhile attorney of record, Sue Pillay, had withdrawn and were also aware that the matter was enrolled for hearing on 30 November 2017. There was no explanation provided as to why from 15 November 2017 until 23 November 2017 they delayed in instructing their new attorney, Ms Moodley. Ms Moodley withdrew as a consequence of the Lutchmans not placing her in funds to proceed to oppose the eviction application.

[41] Yet the Lutchmans instructed Balram attorneys and Mr *Pietersen* at the

eleventh hour and raised funds to secure their attendance at court on 28 November 2017. They also instructed them to bring the application to stay the eviction proceedings pending the application to rescind the default judgment which had been granted many years previously. It is instructive to note that Balram Attorneys and their counsel are from Cape Town.

[42] The eviction application was dealt with immediately after the application to stay the eviction was dismissed with costs. Mr *Pietersen* and Mr Balram were in attendance and Mr *Pietersen* was given the opportunity to make submissions in relation to the merits of the eviction application. He did so duly instructed and these were considered before I granted an eviction order and determined the dates for the Lutchmans to vacate the property. The Lutchmans were thus represented both at the hearing of the eviction application as well as the application to stay the eviction.

[43] In addition, the transcript of the proceedings indicate that Mr *Pietersen* was constrained by what was contained in the papers and, in light of the lack of information and given the hurried manner in which the papers were drafted, he was also given the opportunity to obtain further instructions in relation to the queries which I raised considering that the Lutchmans were present in court. Mr *Pietersen*, on a number of occasions recorded that he could not make further submissions and was constrained by what was in the papers and could not assist the court.

[44] In the eviction application, he placed the personal circumstances of the Lutchmans on record and given the time of year, requested that the Lutchmans be given an opportunity of six months to find alternative accommodation.

The test in an application for leave to appeal

[45] Applications for leave to appeal are governed by ss 16 and 17 of the Superior Courts Act 10 of 2013. Section 17(1) reads as follows:

‘Leave to appeal may only be given where the judge or judges concerned are of the opinion that—

- (a) (i) the appeal would have a reasonable prospect of success; or
- (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;

- (b) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and
- (c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.’

[46] The Lutchmans submit in their application that there are reasonable prospects of success within the meaning of s 17(1)(a)(i) of the Superior Courts Act. The phrase ‘reasonable prospects of success’ has been held to mean there is a reasonable possibility that another court might come to a different decision.⁴

[47] However, with the enactment of s 17 of the Superior Courts Act, the test has obtained statutory force. The test to be applied is to use the word ‘would’ in deciding whether to grant leave to appeal – in other words, ‘would’ another court come to a different decision. In the unreported decision of *The Mont Chevaux Trust (IT 2012/28) v Tina Goosen & 18 others*⁵, the Land Claims Court held, albeit obiter, that the wording of the subsection raised the bar for the test that now has to be applied to an application for leave to appeal. In *Notshokovu v S*⁶ it was held that an appellant faces a ‘higher and stringent threshold’ in terms of the Superior Courts Act.

[48] In *Acting National Director of Public Prosecutions & others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions & others*⁷, Ledwaba DJP writing for the full court considered the test as envisaged in s 17 of the Superior Courts Act. At para 25 of the judgment he dealt with the test set out in para 6 of *The Mont Chevaux Trust* above where Bertelsmann J held the following:

‘It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, see *Van Heerden v Cronwright & others* 1985 (2) SA 342 (T) at 343H. The use of the word “would” in the new statute indicates a measure of certainty that another court will differ from the court

⁴ *Van Heerden v Cronwright & others* 1985 (2) SA 342 (T) at 343H.

⁵ *The Mont Chevaux Trust (IT 2012/28) v Tina Goosen & 18 others* LCC 14R/2014 dated 3 November 2014

⁶ *Notshokovu v S* (157/15) [2016] ZASCA 112 (7 September 2016) para 2

⁷ *Acting National Director of Public Prosecutions & others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions & others* (19577/09) [2016] ZAGPPHC 489 (24 June 2016)

whose judgment is sought to be appealed against.’

[49] Thus, in relation to the provisions of s 17 of the Superior Courts Act, the test in respect of an application for leave to appeal is not whether another court ‘may’ come to a different decision but the test is ‘would’ another court come to a different decision. I have to determine whether another court **would** come to a different decision.

[50] The application to stay the eviction of the Lutchmans required this court to consider the merits of any rescission application and the steps taken to pursue such application. To this end it is necessary for the court to deal with this in some detail as this was considered in dismissing the application to stay the execution.

[51] In doing so, I had regard to the application papers under case no. 9815/2015. The facts relevant to that application are as follows. On 22 October 2007 Nedbank Limited obtained judgment against the Lutchmans in respect of a mortgage bond and as a consequence arranged a sale in execution of the immovable property for 7 December 2007.

[52] On 27 November 2007 a purchase and sale agreement was signed between the Lutchmans and one Lancis Chetty.⁸ Pursuant to the conclusion of the purchase and sale agreement, Lancis Chetty obtained a mortgage bond from FirstRand Bank and attorneys Omprakash Ramlakhan attended to the transfer of the immovable property.

[53] The bond was registered and the immovable property was transferred and registered in the name of Lancis Chetty on 2 June 2008. Pursuant to the registration of the bond and deed of transfer, the Lutchmans signed the power of attorney at Durban on 27 January 2008. In addition, the Lutchmans had given Ramlakhan instructions simultaneously with the registration of the transfer into the name of Lancis Chetty to pay various creditors of theirs. These included the bond with Nedbank which was cancelled and the sum of approximately R72 000 which was

⁸ The Lutchmans dispute the signature on the purchase and sale agreement.

paid to one Bisnuth pursuant to an acknowledgment of debt signed between him and the Lutchmans in respect of monies loaned and advanced.

[54] Following registration of the transfer, monies were also paid to Nedbank Limited in respect of an investment account and Gavin Gow Attorneys as well as Strauss Daly Attorneys in order to release the attachment and cancel the interdict in respect of the immovable property.⁹

[55] On 23 November 2011, FirstRand Bank instituted proceedings against Lancis Chetty in the Pietermaritzburg High Court. This was as a consequence of Chetty being in arrears with the monthly bond instalments. The return of service in respect of the summons and particulars of claim was served at the *domicilium* address which is the address of the immovable property and was served on Aroogmugan Lutchman personally.

[56] Prior to default judgment being granted, Mrs Lutchman attended at court and sought leave to intervene in those proceedings. She indicated, whilst in attendance at court that both she and her husband had never sold the immovable property to Lancis Chetty and that the purchase and sale agreement was a fraud. They challenged the validity of the signatures to the purchase and sale agreement and the subsequent registration of the bond and transfer of the immovable property into the name of Lancis Chetty.

[57] Prior to default judgment being obtained, the court ordered an investigation to be done by the attorneys acting for the bank who subsequently confirmed that the purchase and sale agreement was signed by the Lutchmans, together with the power of attorney to register the transfer. In consequence thereof the matter was adjourned at the request of Mrs Lutchman and she was granted leave to intervene in the application. She failed to proceed with the application to intervene despite the order of court, and as a consequence thereof, default judgment was granted.

⁹ This is evident having regard to the affidavits filed in case no. 9815/2015 in the matter between the Lutchmans, Lances Chetty, Omprakash Ramlakhan, Firstrand Bank Ltd, Sheriff, Inanda Area 1 and the Registrar of Deeds.

[58] Pursuant to the default judgment, FirstRand Bank then instituted proceedings to declare the immovable property specially executable. Once again the application papers were served on the Lutchmans and Mrs Lutchman attended at court and sought leave to intervene. This was on 15 April 2015. She was directed to bring the application to intervene by 18 May 2015.

[59] Presumably, as a consequence of her failing to do so, default judgment was granted and a warrant of execution was issued. The sale in execution of the immovable property was then to proceed.

[60] The Lutchmans then instituted an urgent application under case no. 9815/2015 in the Durban High Court. They obtained an urgent order on 18 September 2015, returnable on 9 October 2015. In terms of the interim order, the registration of the transfer to the Gopauls was interdicted and the Lutchmans were directed to institute an application to set aside the sale agreement and declare the transfer null and void.

[61] The matter was adjourned on a number of occasions and in opposition FirstRand Bank set out the history of the litigation between the parties and dealt with the allegations of the fraudulent purchase and sale agreement and transfer.

[62] The Lutchmans did not file a replying affidavit in respect of the allegations contained in the answering affidavit and the matter was then enrolled on the opposed roll. This was at the instance of FirstRand Bank and as a consequence of the Lutchmans failing to comply with the court orders when the matter was adjourned on a number of occasions.

[63] By this stage, the immovable property had already been sold at a sale in execution to the Gopauls on 11 September 2015. Given the urgent interim order obtained under case no. 9815/2015, the Gopauls did not proceed to have the property registered in their name, awaiting the outcome of the urgent application and the action to be instituted under 9815/2015.

[64] On the date assigned for the hearing of the opposed motion, the Lutchmans failed to appear and their attorneys of record did not attend at court or file heads of argument. In consequence thereof, on 9 September 2016, the interim order granted on 18 September 2015 was discharged by Gyanda J and the application was dismissed.

[65] No steps were taken to deal with the purchase and sale agreement or bring the rescission application despite the Lutchmans being represented. On 27 October 2016, the immovable property was registered in the name of the Gopauls. They gave notice to the Lutchmans, via the sheriff, to vacate the immovable property and such notice was served on 31 October 2016. There was no response to the notice to vacate and needless to say the Lutchmans remained in occupation of the immovable property.

[66] The application to evict the Lutchmans was issued on 20 September 2016. The notice of motion and affidavit were served by the sheriff on 21 December 2016. On 13 February 2017, Mrs Lutchman wrote a letter to the registrar's office regarding the fraudulent sale and requesting her attorney Mr Ngcongo to withdraw. On 16 March 2017, attorney Sue Moodley placed herself on record for the Lutchmans. An answering affidavit was filed on 18 March 2017 opposing the granting of the eviction order. The Lutchmans indicated that their attorney, Mr Ngcongo, did not follow their instructions and that instructions had been given to Sue Moodley to rescind the order.

[67] No steps were taken to rescind the order and on 10 November 2017, the heads of argument in the eviction application were served on Sue Moodley & Associates. In addition, the notice of set down was also served personally on the Lutchmans. The Lutchmans indicated that on 23 November 2017, they saw Sue Moodley and that was when she advised that they needed to place her in funds. They failed to do so and in consequence thereof, they knew at that stage she had withdrawn as attorney of record.

[68] In addition, they knew that the eviction application was enrolled on the

opposed motion for hearing for 30 November 2017. On 28 November 2017, the Lutchmans instructed their present attorney, Balram Attorneys.

[69] The Lutchmans have throughout all the proceedings blamed their various attorneys of record for the fact that the rescission application was not instituted. However, there is a certain point at which litigants cannot hide behind nor blame their attorneys.

[70] Given the history of the litigation, the Lutchmans, apart from not explaining why the application to stay was timeously instituted, in addition did not provide any explanation for their failure to bring the rescission application; consequently any rescission application is doomed to fail and has no prospects of success. I have serious reservations that the Lutchmans would be able to obtain condonation in any rescission application. There is no reasonable explanation for the inordinate delay.

[71] As a consequence, when taking all of the above into consideration, I am of the view that the application for leave to appeal has no prospects of success and another court would not reach a different conclusion.

[72] It should be briefly mentioned that on 8 February 2018 the Lutchmans were granted an order by Lopes J allowing them to return to and occupy the disputed premises, and provisionally suspending the execution of the eviction order pending the application for leave to appeal and subsequent appeal in the eviction proceedings. This order by Lopes J will accordingly lapse upon my finding that leave to appeal is dismissed. I now turn to the application in terms of s 18(2) and (3) of the Superior Courts Act instituted by the Gopauls.

Section 18(2) and 18(3) application

[73] The Gopauls issued an application in terms of s 18(2) and (3) of the Superior Courts Act on 19 June 2018 which was enrolled for hearing on 28 June 2018.

[74] Such application made provision for the order of eviction on 30 November 2017 to be executed pending any appeal to the full court, alternatively a petition to

the Supreme Court of Appeal. This application was served on the Lutchmans' correspondent attorneys on 19 June 2018. Abridged time limits were contained in the notice of motion for the filing of a notice to oppose as well as answering affidavits. No notice to oppose or answering affidavits were filed by the Lutchmans, nor was any notice to oppose served and filed by the Lutchmans' attorneys, Balram Attorneys or their correspondent attorneys.

[75] At the hearing of the application, Mr *Naidoo* acknowledged that this application was conditional on the court granting leave to appeal. In the event of the court not granting leave to appeal then the application ought to simply be adjourned *sine die* and the Gopauls granted leave to re-enrol it and file a supplementary affidavit in the event of there being a change in circumstances.

[76] Given the orders and the conclusion to which I come, it is not necessary for me to deal with the merits of this application and the most appropriate order is that which is contained in the orders hereinafter.

[77] In the premises, the following orders will issue:

1. The first and second respondents are granted condonation for the late noting of the application for leave to appeal;
2. The application for leave to appeal is dismissed with costs;
3. The applicant's application in terms of s 18 of the Superior Courts Act 10 of 2013 is adjourned *sine die*. Leave is granted to the applicants to file a supplementary affidavit in the event of the matter needing to be re-enrolled;
4. It is recorded that the Order of Lopes J of 8 February 2018 has lapsed.

Henriques J

Date of argument : 28 June 2018

Date of judgment : 17 May 2019

Appearances

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