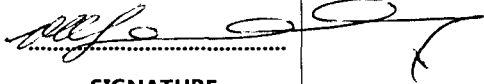




IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA DIVISION,)

CASE NO:228/2016

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES /NO.	
(2) OF INTEREST TO OTHER JUDGES: YES /NO.	
(3) REVISED.	
28/07/17	
DATE	SIGNATURE

ANDRE CARL ERASMUS

APPLICANT

Versus

ANTHONY GRAHAM ALCOCK

FIRST RESPONDENT

SUSAN KAREN ALCOCK

SECOND RESPONDENT

SHERIFF OF THE HIGH COURT, PRETORIA EAST THIRD RESPONDENT

REVIEW JUDGMENT

Reasons

LEGODI J



[1] On Wednesday 15 February 2017 after having heard an oral argument presented by the parties in an urgent motion roll, I granted an order as follows:

- "1. *The application is struck off from the roll due to lack of urgency which is self-created.*
- 2. *The applicant to pay the costs of the application.*
- 3. *Reasons for the order to follow in due course"*

[2] I now give reasons for the order so made. The order which was granted by De Vos J on 19 August 2016 under case number 36480\14 together with an order of 7 October 2016 granted by Jordaan J became the subject of a dispute before me, which dispute was prompted by an urgent application instituted by the applicant on 8 February 2017 in terms of which a relief is sought to vary the order of 19 August 2016.

[3] Of relevance, the relief sought in these proceedings is couched as follows:

- "2. *That the order granted by his Lordship Mr Justice De Vos on 19 August 2016 be varied to read as follows:*

'Pending the finalization of the application for condonation and the application for leave to appeal under case number 36480\2014 and the finalization of the appeal under case number A982\2013, the third Respondent is interdicted from effecting any steps in the eviction of the Applicant and all persons holding under him from the premises situated at Portion 457 of Portion 57 of the Farm Zwavelpoort.'

[4] The underlining is my emphasis. The order of 19 August 2016 reads as follows:

- "1. *Pending the finalisation of the application for condonation and the application for leave to appeal under this case number, the 3rd Respondent is interdicted from effecting any steps in the eviction of the applicant and all persons holding under him from the premises situated at portion 457 of 57 of the farm Zwavelpoort (the property)".*



[5] 'Under this case number' relates to case number 36480\2014 which is about a petition to the Supreme Court of Appeal against an eviction order granted against the applicant by Canca AJ on 29 June 2016. On the other hand, the matter under case number A982\2013 relates to a pending application for condonation and an appeal to the full court of this Division regarding the dismissal of an application for rescission of a default judgment which was granted in favour of Absa Bank against the applicant on 5 November 2007.

[6] On 20 January 2017 Shongwe JA and Govern AJA with regard to the petition for leave appeal against the eviction order under case number 36480\14, ruled as follows:

- "1. Condonation as applied for is granted. The applicant for condonation is to pay the costs of the application.*
- 2. The application for leave to appeal is dismissed with costs on the grounds that there are no reasonable prospects of success in an appeal and there are no other compelling reasons why an appeal should be heard."*

[7] On 8 February 2017 the applicant, as indicated in paragraph 2 above, instituted the present proceedings against the current registered owners (the respondents) of the property namely, Portion 457 of portion 57 of the farm Zwawelpoort in respect of which an eviction order was obtained against the applicant.

[8] In essence the order in paragraph [3] above is an addition to the order quoted in paragraph [4] above. Pending finalization of the appeal under case number A 982/201 where the Sheriff is to be interdicted from taking any steps in the eviction of the applicant is intended to put the execution of the eviction order on ice.

[9] The present application was brought on an urgent basis having issued the papers on Wednesday 8 February 2017. The first enquiry being the only issue which was argued before me was whether this matter deserves to be heard on an urgent basis. Or put differently, whether urgency is self-created. Having heard argument an order was made as in paragraph [1] above.

[10] Brief background to the issue of urgency is necessary: The applicant was previously the registered owner of the immovable property described in paragraph 7 of this judgment against which a mortgage bond was registered in favour of Absa Bank. On 5 November



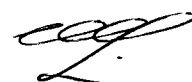
2007 and after having failed to service the bond, Absa bank obtained a default judgment against the applicant in the amount of R2 622 923.86. On 29 November 2007 the default judgment was brought to the attention of the applicant. On 20 November 2008, that is, a year after the applicant became aware of the judgment, he filed an application for the rescission of the default judgment granted on 5 November 2007.

[11] On 25 November 2008 the applicant launched an urgent application seeking to stop the sale in execution of the property, which application was struck off the roll due to lack of urgency. On 25 May 2011 Absa Bank bought the property at a sale in execution. On 16 November 2011, that is, three years after the application to stop the sale in execution was struck off, the applicant sought to set aside the sale in execution and the default judgment. On 16 January 2012 he filed his notice of amendment to the initial notice of motion to set aside the sale in execution and the default judgment which amendment was then effected on 8 February 2012. On 18 December 2012 his application for rescission of judgment was dismissed by De Klerk AJ. However, on 12 November 2013 the Supreme Court of Appeal granted leave to appeal against the dismissal of the application for rescission of judgment and such leave to the full court of this division which appeal is still pending as indicated in paragraph [5] above.

[12] The appeal aforesaid lapsed on 10 March 2014, the applicant having neglected to prosecute the appeal timeously after leave to appeal was granted by the SCA on 12 November 2013. On 15 April 2014 the applicant applied for hearing of the appeal without filing an application for condonation as he was required to do due the lapsing of the appeal. On 9 September 2014 the appeal against the dismissal of the application for rescission of judgment was struck off the roll for having failed to apply for condonation. On 25 April 2016 that is, about two years after the appeal was struck off the roll, the applicant delivered an application for condonation which as I said, is still pending.

[13] The present application seems to have been prompted by the dismissal by the SCA on the 20 January 2017 of the petition to appeal against the eviction order. In his founding affidavit, the applicant articulates urgency as follows:

“24. *The reasons as to why I aver that this application is urgent are as follows:*



24.1 *The first and second Respondents have indicated that they have instructed the Third respondent to evict the Applicant from the property and the instructions to the Third Respondent are that the said eviction has to be effected on 10 February 2017.*

24.2 *Notwithstanding requests that the eviction be held over pending the finalisation of the appeal under case number A982\2013, the First and Second respondents have instructed the Third Respondent that the eviction should occur.*

24.3 *I annex hereto as annexure "F" a letter from the First Second respondents' attorneys from which it inter alia appears from paragraph 13.3.3.1 thereof, that the First and Second Respondents agreed to stay the eviction until Friday 10 February 2017 and thereafter intend to proceed with the eviction.*

24.4 *I replied to the letter and counter proposed alternative time period to allow the application to be adjudicated. I refer to Annexure "G" hereto.*

24.5 *On the 6th of February 2017 the First and Second respondent attorney replied and advised that he was instructing the Third Respondent to execute the eviction order. I attached hereto as Annexure "H" hereto.*

24.6 *There cannot be any doubt that the First and Second Respondents intend to proceed with their instructions to the Third Respondent to effect the eviction.*

24.7 *I therefore aver that this application is urgent."*

[14] These averments for urgency must be seen in context. The order referred to in paragraph [4] of this judgment having been granted on 19 August 2016, the applicant on 4 September 2016 launched an urgent application under case number 36480\14 on which a renewed relief was sought as follows:



“2. Pending the finalization of an application to the Supreme Court of Appeal for leave to appeal in this matter, and pending the finalization of the Appeal under case number A982\2013, that the Third Respondent be interdicted from effecting any steps in the eviction of the Applicant and all persons holding under him, from the premises situated at Portion 457 of Portion 57 of the Farm Swavelpoort, Gauteng Province.”

[15] On 3 October 2016 and before the hearing of the application aforesaid, the applicant's sent an email to the respondents' attorneys in which it was indicated that the applicant contacted the Sheriff who conveyed to the applicant that the respondents attorneys were finalizing the eviction order and that the applicant should expect to be effected on Monday 3 October 2016. The applicant's attorneys then concluded in the email as follows:

“We refer to the Court Order granted on 19 August 2016 and would like to inform you that it was ordered pending the finalisation of the application for condonation and the application for leave to appeal, the 3rd Respondent is interdicted from effecting any steps in the eviction of the Applicant and all persons holding under him from the premises situated at Portion 457 of Portion 57 of the Farm Zwavelopoort (“the property”).

[16] On the same date that is, 3 October 2016 the attorneys for the respondents wrote inter alia as follows:

“We can't therefore say what your instructions were to your counsel but we would not have agreed to suspend the eviction order pending the appeal against ABSA as we were not satisfied that your client had been pursuing the appeal against ABSA and we are of the opinion that the matter is intentionally delayed.
The court order of 19 August 2016 is clearly setting out the terms of our agreement and we will oppose any application to suspend the eviction order any further”.

[17] The underlining is my emphasis. On 7 October 2016 the application which was launched on 4 September 2016 and referred to in paragraph [14] above came before Jordaan J who then made an order as follows:



36480\2014 handed down by Canca AJ ("the judgment") within fifteen days of obtaining the reasons of Canca AJ for his dismissal of the Applicant's application for leave to appeal the judgment. These reasons were provided to the parties on 6 October 2016.

2. It is further recorded that the 1st and 2nd Respondents have undertaken not to evict the Applicant or anyone holding under him from the premise situated at Portion 457 of Portion 57 of the Farm Swavelpoort, Gauteng Province ("the premises") until such time as the aforesaid petition has been finalized.

3. Notwithstanding this undertaking, the Respondents will be entitled to proceed with the eviction of the Applicant and anyone holding under him from the premises in the following circumstances:

3.1 If the aforesaid lapses for any reason.

3.2 If the Applicant fails to petition the Supreme Court of Appeal within the fifteen day period specified above in 1 above:

3.3 If the Respondents would be entitled to evict the Applicant and/or anyone holding under him in terms of the order of De Vos AJ in case number 36480/2014 ("the De Vos Order"), subject to clauses 4 and 5 below;

4. Notwithstanding the content of Paragraph 3 above, neither party shall be deprived on any rights that they may have in law.

5. Nothing in this order will impact on the De Vos order, which will remain of full force and effect. The parties' rights to seek a suspension, variation or rescission of the De Vos order remain unaltered by this order.

6. The time periods for the filling of further affidavits in this matter are stayed until either of the following has occurred, at which point the normal periods set out in the rules for delivery of further affidavit will commence running:

6.1 The fifteen day period set out in 1 above for the launching of the Applicants' petition lapses without the Applicant launching his petition.

6.2 The applicant's petition lapses for any reason.



6.3 *The Applicant's petition is finalized.*

7. *Once the time periods have commenced running, the parties may file Answering and Replying papers respectively, and any other further affidavits as agreed by the parties or allowed by this Court, to allow the matter to be considered and specifically the question of costs.*

8. *The costs of this application, including the Sheriff's costs incurred as a result of the cancellation of the eviction that was taking place when this application was launched, are reserved."*

[18] The respondents in the answering affidavit deposed to by their attorney amongst others, attack urgency as follows:

"6. *Whilst I admit that is the intention of the respondents to evict the Applicant at the earliest possible convenience, I note that the applicant's founding papers deliberately withhold certain facts from this Honourable Court, presumably in an attempt to bamboozle the Court into thinking that the matter is urgent.*

7. *This applicant is not urgent for several reasons.*

8. *Firstly, the Applicant has been aware of the order of De Vos AJ (and all its terms) since 19 August 2016 when the order was made by agreement between the parties yet has elected to do nothing about the alleged need to amend the order for over five months. He now claims that he should be afforded access to the urgent court to seek a variation of the order that the Respondents should be prejudiced by only being afforded just over a day within which to deal with the averments leveled against them when they would normally be afforded fifteen court days, plus the time within which to oppose an application in the ordinary course.*

9. *The question of the possible amendment of the order is not a new one. On 3 October 2016 the Applicant's attorney dispatched an email to me in which he noted as follows:*

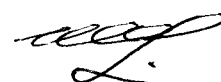


"My instructions to Counsel at the date of hearing of the urgent application that the stay of the eviction is subject to the finalization of both applications and not merely the eviction as such."

[19] Counsel for the applicant was at pains in substantiating the basis for urgency. He heavily sought to rely on the order of 7 October 2016 quoted in paragraph [17] above contending that paragraph [6] thereof read with the relief sought as quoted in paragraph [14] of this judgment speak to the appeal against the dismissal of the application for rescission of judgment.

[20] To come to the conclusion as counsel for the applicant suggested, one would have to ignore first, the events after the granting of the order by De Vos J on 19 August 2016. Long before the dismissal on 20 January 2017 by the SCA of the petition to appeal against the eviction order, the applicant knew that the respondents rejected the notion that the appeal against the dismissal of the rescission of default judgment was the subject of the order of 19 August 2016 and or 7 October 2016. The communications referred to respectively in paragraphs [15] and [16] of this judgment made it clear or should have made it clear to the applicant that the pending appeal against dismissal of the application for rescission of judgment did not suspend any of the respondents' rights to issue and execute a writ of ejectment.

[21] In fact, paragraph 5 of the order of 7 October 2016 quoted in paragraph [17] above makes it clear how each party needed to approach the order of 19 August 2016 quoted in paragraph [14] above. One, the order of 7 October 2016 did not impact on the order of 19 August 2016. Two, the order of 19 August 2016 was to remain of full force and effect. Lastly, the parties' rights to seek a suspension, variation or rescission of De Vos J's order remained unaltered. In other words, as from 7 October 2016 the applicant was at liberty to approach the court and ensure that the default judgment is not acted upon by issuing another ejectment order. Put differently, the applicant knew as early as 19 August 2016 or at least on 7 October 2016 that the respondents would be entitled to proceed with the ejectment, should the petition against the eviction order be unsuccessful. The applicant did not have to wait for the outcome of his petition to the SCA regarding the eviction order before he seeks suspension or variation as he now seeks to do pending his condonation application in the appeal against dismissal of the application for rescission.



[22] The attempt to find a case for interdict against the Sheriff from effecting any steps in the eviction of the applicant and all persons holding under him from the premises situated at Portion 457 of Portion 57 of the Farm Zwavelpoort, Gauteng Province based on paragraph 6 of the order of 7 October 2016 quoted in paragraph [17] above, has no basis. Paragraph 6 deals with the stay of filing of any affidavit pending finalization of the eviction appeal or petition thereof to the SCA. The applicant did not approach this court on the basis that he wants to file 'further affidavit in this matter' referring to the petition to appeal against the eviction order as contemplated in paragraph 6 of the order of 7 October 2016.

[23] That being so, considering also paragraph 5 of the order quoted in paragraph [17] above, the applicant delayed in bringing or pursuing the application he has now launched on 7 February 2017. Put differently, urgency is self-created. These are the reasons for the order made on 15 February 2017 quoted in paragraph [1] of this judgment.


M F LEGODI
JUDGE OF THE HIGH COURT