

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

Case No: 5219/2010

In the matter between

A Ramcheret

Applicant

and

Ethekwini Municipality

First Respondent

Sheriff of the High Court – Durban North

Second Respondent

JUDGMENT

12 August 2011

Steyn, J

[1] This is an application for leave to appeal against the whole of my judgment delivered on 1 June 2010.

Condonation

[2] In my view it was necessary for the applicant to explain why the application for leave was not lodged timeously with the office of the registrar of this Court. A substantial application was lodged on 22

July 2011 for condonation. I am not entirely convinced that Ms Naidoo's affidavit explains all the problems surrounding the delay in adhering to the rules. I will, however, give the applicant, as a lay person, the benefit of the doubt and grant condonation for hearing the application. Such condonation, however, does not relate to the fact that the papers were not in order on 30th June 2011. The condonation does not relate, given the specific circumstances, to the prospects of success on appeal.

Merits of application

[3] Mr Pillay SC, for the applicant, submitted that the applicant succeeded in the burden of proof in applying for an interim interdict and that the balance of convenience favoured her at the time of the application. In addition, he argued that she had shown that she had a *prima facie* right even if "open to some doubt". Accordingly, so it was argued, the probabilities of success favour the applicant and leave should be granted.

[4] Mr Bedderson, acting on behalf of the first respondent, opposed the application. He argued that applicant's application before this court was premised on the existence of a valid agreement of lease between the parties and never that the first respondent waived its

right to evict the applicant.

- [5] It is trite in applications like the present that the founding affidavit serves as the pleadings and evidence and neither the founding affidavit nor the supplementary papers averred that the municipality waived its right to evict through the order obtained on 24 April 2009.

When the application was heard, Ms Gates, representing the applicant, merely raised the fact that a municipality could waive strict compliance. She relied on the case of *Steenkamp v Perry Urban Areas Health Committee* 1946 (TPD) 424 at 429. It was never the case of applicant that the municipality waived its right, consequently the plaintiff in my view failed to establish that any waiver occurred.

When asked to address the court on the relevance of the authority quoted Ms Gates concluded: "M'Lady I would submit it is but just one point that a statute which is intended to protect a local authority . . . [indistinct] for the benefit of the public, that it can be waived. M'Lady, just that."

- [6] At the time when the application was heard the Court was asked to

adjudicate on the question whether or not a verbal agreement was entered into between the parties such being concluded after the order as per annexure “A” was granted and whether or not the new verbal agreement of lease and the subsequent settling of the indebtedness to first respondent, would have disentitled the first respondent to use the order for the purpose of ejecting the applicant. (See page 6 of the transcribed record). Applicant’s claim for the relief sought i.e., the interim interdict, was premised on the existence of a valid lease agreement between the parties.

[7] I have anxiously considered the submissions made by Mr Pillay especially that KG9 proves convincingly that the municipality waived its rights. No case for such waiver was, however, made out on either the papers or in argument when the matter was heard. In light of the aforesaid the argument of ‘waiver’ is unsustainable.

[8] Having considered the submissions I am not persuaded that another Court could reasonably come to a different conclusion, based on the papers. As the judgment shows the applicant failed to show *prima facie* any entitlement to the relief sought.

[9] The application for leave to appeal is hereby dismissed with costs, such costs to include the wasted costs occasioned by the

adjournment of the application on 30 June 2011.

Steyn, J

Date of Hearing of Application

for leave to appeal:

27 July 2011

Date of Judgment:

12 August 2011

Counsel for the Applicant:

Adv L Pillay S C

Instructed by:

PR Maharaj & Company

Counsel for the first Respondent:

Adv B Bedderson

Instructed by:

Linda Mazibuko & Associates