

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, BHISHO)**

Reportable / Not Reportable

CASE NO. CA 1/2023

In the matter between:

DOUGLAS XOLISA SKITI

Appellant

and

NONKULULEKO ADELAIDE SKITI

First respondent

ZUKISWA GOBINGCA

Second respondent

DEEDS OFFICE, KING WILLIAM'S TOWN

Third respondent

BUFFALO CITY METROPOLITAN MUNICIPALITY

Fourth respondent

JUDGMENT

LAING J

[1] This is an appeal against the whole of the judgment and order handed down on 8 August 2022 in the Magistrates' Court for the district of Mdantsane.

Background

[2] The second respondent (hereafter referred to as Ms Gobingca) previously brought an application against the appellant (hereafter referred to as Mr Skiti) in the Magistrates' Court for his eviction from erf 7[...], NU 3, Mdantsane.¹ In her founding affidavit, Ms Gobingca alleged that she purchased the property on 5 July 2021 from Mr Skiti's sister, cited as the first respondent in these proceedings. The transfer was registered in the deeds registry on 6 August 2021. Notwithstanding, Mr Skiti remained in occupation.

[3] In his answering affidavit, Mr Skiti averred that the property belonged to his late father; it was his family home. His late brother resided permanently on the property until his passing, whereupon Mr Skiti took occupation after he lost his employment. He currently resides on the property with his two children, one of whom being disabled. Similarly, the first respondent moved back to the property. Mr Skiti asserted that the first respondent subsequently purported to sell the property as if it had been her own; he intended to institute proceedings in the High Court to set aside the sale.

[4] At about the same time that Ms Gobingca instituted eviction proceedings, Mr Skiti launched an application against the first respondent, Ms Gobingca, the deeds registry, and the municipality for an order to stay the eviction proceedings, pending a suitable High Court application.² Mr Skiti explained that there was previously no title deed for the property; this was the case for much of the land in Mdantsane. The municipality previously addressed tax invoices to Mr Skiti's late father and subsequently to him, but this changed after the first respondent allegedly misrepresented herself as the owner of the property and thereafter 'acquired' a title deed. She was later appointed as executrix of their late father's estate. Mr Skiti pointed out that the first respondent required the written consent of the heirs before she could sell the property, as stipulated by section 47 of the Administration of Estates Act 66 of 1965. This never occurred.

¹ The application was brought under case number 990/2021.

² Mr Skiti appears to have brought the application under the same case number, i.e. 990/2021; there is no indication that the additional respondents were ever properly joined.

[5] Ms Gobingca, in her replying affidavit in the eviction proceedings, emphasized that the first respondent lawfully sold the property to her; she was the *bona fide* owner thereof. She had not, moreover, received any notice of an application to set aside the sale, as Mr Skiti threatened.

In the court *a quo*

[6] It is evident from the record that, at the hearing of the matter, the court *a quo* dealt only with Mr Skiti's application to stay the eviction proceedings. This was unopposed.

[7] The magistrate, in her judgment of 8 August 2022, observed that Ms Gobingca previously notified Mr Skiti about the commencement of eviction proceedings. The latter, however, failed to do anything about the matter and never approached the High Court. The magistrate went on to hold that, considering the parties' competing interests and the absence of any application to set aside the sale of the property, the relief sought by Mr Skiti could not be granted. There was no provision in the rules of the Magistrates' Court that permitted the court to stay the eviction proceedings indefinitely. The magistrate dismissed Mr Skiti's application with costs.

Grounds of appeal

[8] Mr Skiti listed several grounds as the basis for his appeal. He contends, chiefly, that the court *a quo* should have found that sections 47 and 48 of the Magistrates' Court Act 32 of 1944 permitted a stay of the main proceedings for a reasonable period to allow a party to institute a counterclaim such as the application to stay the eviction proceedings.

[9] The above constitutes the issue that lies at the heart of the matter. It is necessary, at this stage, to investigate the underlying principles.

Legal framework

[10] The Magistrates' Court lacks jurisdiction to deal with an application to set aside the sale of immovable property, such as that which Mr Skiti intended to launch. The High Court is the appropriate forum.

[11] Whether the Magistrates' Court had jurisdiction to stay the eviction proceedings must be determined by investigating the relevant provisions of the Magistrates' Court Act 32 of 1944. In that regard, counsel for Mr Skiti referred to section 47, which provides for a situation where a counterclaim exceeds the jurisdiction of the court. It states as follows:

'47 Counterclaim exceeding jurisdiction

(1) When in answer to a claim within the jurisdiction the defendant sets up a counterclaim exceeding the jurisdiction, the claim shall not on that account be dismissed; but the court may, if satisfied that the defendant has prima facie a reasonable prospect on his counterclaim of obtaining a judgment in excess of its jurisdiction, stay the action for a reasonable period in order to enable him to institute an action in a competent court. The plaintiff in the magistrate's court may (notwithstanding his action therein) counterclaim in such competent court and in that event all questions as to the costs incurred in the magistrate's court shall be decided by that competent court.

(2) If the period for which such action has been stayed has expired and the defendant has failed to issue and serve a summons in a competent court in relation to the matters and the subject of such counterclaim the magistrate's court shall on application either—

(a) stay the action for a further reasonable period; or

(b) dismiss the counterclaim (whether the defendant does or does not reduce such counterclaim to an amount within the jurisdiction of the court).

(3) If the defendant has failed to institute action within such further period or if the action instituted by the defendant be stayed, dismissed, withdrawn, or abandoned, or if the competent court has granted absolution from the instance thereon, the magistrate's court shall, upon application, dismiss the counterclaim and shall proceed to determine the claim.'

[12] The above provisions will be discussed further, below. Counsel for Mr Skiti also referred to section 48, which lists the various judgments that a magistrate may grant, depending on the circumstances.

[13] Although not mentioned in argument, the provisions of rule 20 in the Magistrates' Court are also relevant. The text reads:

'20 Claims in reconvention

(1) ...

(2) ...

(3) ...

(4) ...

(5) A defendant delivering a claim in reconvention may by notice delivered therewith or within 5 days thereafter apply to the court to pronounce that the claim in reconvention exceeds its jurisdiction and to stay the action under section 47 of the Act.

(6) Where a court finds that the claim in reconvention exceeds its jurisdiction, the defendant may forthwith or by notice delivered within 5 days after such finding apply for stay of the action.

(7) If no application for stay is made or, having been made, has been dismissed, the court shall on the application of the plaintiff or otherwise of its own motion dismiss a claim in reconvention pronounced to exceed its jurisdiction, unless the defendant shall forthwith abandon under section 38 of the Act sufficient of such claim to bring it within the jurisdiction of the court...'

[14] The above provisions constitute the basic framework within which the matter must be decided.

Discussion

[15] There are several aspects to the matter, to be addressed in accordance with the sub-headings that follow.

Section 47(1) of the Magistrates' Court Act 32 of 1944

[16] As a starting point, it is necessary to determine whether Mr Skiti met the requirements of section 47(1) to obtain an order to stay the eviction proceedings. The question that arises is whether he indeed set up a counterclaim.

[17] The meaning of the relevant portion of section 47(1) came under scrutiny in *Esterhuizen v Holmes*,³ where the court held, per Naser J, that 'sets up a counterclaim' means 'files a claim in reconvention'.⁴ The learned judge went on to state that:

'I know of no provision in the Magistrates' Courts Act whereby a magistrate would be empowered to stay an action instituted by a plaintiff against a defendant in the magistrate's court merely because the defendant had, either previously to or after

³ 1947 (2) SA 789 (T).

⁴ At 793-5.

issue of summons by the plaintiff in the magistrate's court, issued a summons in the Supreme Court against the plaintiff.'⁵

[18] Furthermore, the court held, in a separate judgment per Clayden J, that:

‘...a plea alleging facts which would justify a claim in reconvention being made, or alleging facts which were the facts used to found a claim in reconvention or a counterclaim in some other Court, would not, in terms of this construction, amount to setting up a counterclaim within the meaning of sec. 47(1)...’⁶

[19] The above decision is relatively dated. It has, nevertheless, survived the passage of time and has been cited with approval in more recent case law.

[20] In *Forrest Crest Properties CC v Matthee and others*,⁷ Murugasen J acknowledged the principles enunciated in *Esterhuizen* and observed that section 47(1) confers a discretion on a court faced with an application to stay proceedings. She stated that:

‘...the court **may** only order the stay **if satisfied** that the defendant has *prima facie* a reasonable prospect of obtaining judgment in excess of its jurisdiction on his counterclaim (my emphasis). It is therefore incumbent upon the court to consider the defendant's counterclaim, in order to exercise its discretion judicially. The fact that the defendant has already instituted an action for a claim in excess of the jurisdiction of the Magistrates' Court does not preclude its filing of a counterclaim to the plaintiff's action.’⁸

[21] The learned judge went on to hold that:

⁵ At 797.

⁶ Per Clayden J, at 799.

⁷ (AR 194/11) [2012] ZAKZPHC 80 (30 July 2012).

⁸ At paragraph [42].

‘...the only basis upon which an action can be stayed in terms of section 47 is if a counterclaim has been filed. In my view, the rationale for this decision clearly lies in the aforementioned obligation imposed on the magistrate in the exercise of his discretion by the provisions of section 47(1).’⁹

[22] Furthermore:

‘...a claim in reconvention must be filed, whether before or after the institution of the claim in another competent court, before a stay may be ordered, as a defendant is not precluded from filing a counterclaim and applying for a stay of prosecution although he has already instituted an action in the High Court.’¹⁰

[23] The decision in *Esterhuizen* was cited with approval, too, in *Afrikaanse Christelike Vroue Vereniging van Robertson and another v Folscher and another*.¹¹ Counsel for Mr Skriti relied thereon in argument, but the case is distinguishable from the present matter since the relevant issue on appeal was whether a magistrate was permitted to stay eviction proceedings for an indeterminate period, pending the outcome of an action in the High Court. The court, per Cloete J, found that sections 47 and 48 of the Magistrates’ Court Act 32 of 1944 did not empower the magistrate to do so.

[24] From the case law, it can be said that the courts have interpreted the relevant provisions of section 47(1) to mean that: (a) the defendant is required to file a counterclaim or claim in reconvention before a magistrate can exercise his or her discretion; (b) the fact that the defendant has already instituted proceedings in the High Court does not prevent him or her from filing such counterclaim or claim in reconvention; (c) a plea that merely alleges the facts upon which such counterclaim or claim in reconvention would be warranted or upon which it would be based in another court does not suffice; (d) the magistrate may stay proceedings if he or she is satisfied that the counterclaim or claim in reconvention indicates a reasonable chance of success

⁹ At paragraph [44].

¹⁰ At paragraph [48].

¹¹ (23256/17) [2018] ZAWCHC 138 (29 October 2018).

but in an amount or concerning subject matter that exceeds the jurisdiction of the Magistrate's Court; (e) the proceedings cannot be stayed for an indeterminate period but only for as long as is reasonable to allow the defendant to institute proceedings in a court having jurisdiction with regard to the counterclaim or claim in reconvention already filed; and (f) a magistrate has no authority to stay the plaintiff's action simply because the defendant has already instituted separate proceedings in the High Court.

[25] To the above principles I respectfully add my view that there seems to be no reason why the provisions of section 47(1) should not apply equally to action and motion proceedings. The purpose of the provisions was clearly to address a situation where a counterclaim or claim in reconvention exceeded the jurisdiction of the Magistrate's Court. It would serve no purpose for the magistrate to refuse to stay the proceedings and to grant judgment in favour of the claimant, notwithstanding the other party's having a counterclaim or claim in reconvention that indicated a reasonable prospect of success in another court with jurisdiction. This is especially so in relation to action proceedings for monetary claims, but the principle could, foreseeably, also apply to other causes of action brought in terms of motion proceedings.¹²

Whether the appellant met the requirements of section 47(1)

[26] The difficulty that confronts Mr Skiti in the present matter is that there is nothing to demonstrate that he ever set up a counterclaim or filed a claim in reconvention, as required by the principles established in *Esterhuizen* and affirmed in the cases already mentioned. Such a step was necessary to trigger the magistrate's exercise of her discretion to stay the proceedings.

[27] To Ms Gobingca's eviction application, Mr Skiti merely filed an answering affidavit; the substance of it read as follows:

¹² See, too, the discussion in DE van Loggerenberg, *Jones & Buckle: Civil Practice of the Magistrates' Courts in South Africa* (Jutastat e-publications, RS 10, 2016, Act), at p314.

‘...I should emphasize to the above honourable court that the property in question is a family house that belonged to my late father. My sister, Nonkululeko Skiti, in very curious and unexplained circumstances, sold the property to the applicant as her own.

...I have taken this up with the Deeds Offices. I have also initiated investigations into the estate of my late father through the offices of the Master of the High Court. As at the date of this affidavit, my efforts have been in vain.

...Accordingly I have been advised to bring a high court review application reviewing and setting aside the sale of the house entered into by the applicant and my sister.

...I thus pray the above honourable court to stay the above proceedings pending the finalization of the high court application I intend to bring to set aside the sale of the property at erf 7[...] NU 3 Mdantsane as null and void *ab initio*.¹³

[28] From the above, Mr Skiti was clearly perplexed by the first respondent’s conduct. He subsequently approached both the deeds registry and the Master of the High Court but failed to indicate the details of his interaction with the relevant officials or the nature of any information that he might have received; it is improbable that his enquiries would not have prompted further investigation if there had indeed been something untoward about the sale of the property. The deed of transfer must be regarded as *prima facie* proof of legal title by Ms Gobingca to the land in question.¹⁴ There is, moreover, nothing whatsoever to indicate the basis upon which Mr Skiti intended to apply for the setting aside of the sale.

¹³ Sic.

¹⁴ A copy of the deed of transfer was attached to Ms Gobingca’s founding affidavit.

[29] The answering affidavit, on its own, was insufficient to have triggered the magistrate's exercise of her discretion. No counterclaim or claim in reconvention (here, in the form of a counterapplication to set aside the sale) was ever filed.

[30] To the extent that it could be argued that Mr Skiti's application to stay the eviction proceedings served as a counterclaim or claim in reconvention, the affidavit filed in support thereof was no more than that. Mr Skiti alleged that the first respondent misrepresented herself and 'acquired a title deed which allowed her to sell the property as her own'. He provided no substantiation for the allegation. He averred, again, that he intended to institute High Court proceedings, in terms of which:

'the third respondent [i.e. the deeds registry] will be required to supply me and/or my attorneys with all documentation in relation to the property in question, including how the first respondent [i.e. Ms Skriti] got the property registered in her name etc.'¹⁵

[31] Mr Skiti went on to surmise that the first respondent 'curiously appointed herself as the executor' but provided no basis for his suspicion. He also asserted that section 47 of the Administration of Estates Act 66 of 1965 stipulated that an executor was required to sell property in the manner and subject to the conditions which the heirs approved in writing. In that regard, alleged Mr Skiti, his late father died intestate, and he was an heir; he had, however, never approved the sale of the property.

[32] The factual underpinnings of the various allegations made by Mr Skiti are far from clear. Even if the affidavit could be construed widely as a counterclaim or claim in reconvention, then it relied on too much speculation and uncertainty for him to contend that it demonstrated, *prima facie*, a reasonable prospect of success in relation to the High Court proceedings which he intended to institute. On a reasonable interpretation, the affidavit filed in support of Mr Skiti's application to stay the eviction proceedings amounted to a set of factual allegations (unsubstantiated) upon which a

¹⁵ Sic.

counterapplication would possibly have been justified or upon which it could possibly have been based, no more than that. It cannot be said to have met the requirements of section 47(1).¹⁶

Rule 20(5) procedure

[33] Essentially, Mr Skiti failed to file a counterapplication for the setting aside of the sale of the property. He also failed to comply with the procedure set out in rule 20(5); this would have entailed an application to the Magistrate's Court to pronounce that the counterapplication exceeded its jurisdiction and to stay the eviction proceedings in accordance with the provisions of section 47(1). Importantly, the rule 20(5) procedure depended on Mr Skiti's first having filed such a counterapplication. This was simply never done.

Reasoning of the court *a quo*

[34] The magistrate, in her judgment, referred to *Randell v Cape Law Society*,¹⁷ but this cannot be said to have been a proper basis for her decision. The case in question dealt with the question of whether a court ought to stay civil proceedings against a litigant when there were criminal proceedings pending in relation to the same issues. Smith J held that a court has a discretion to do so, but each case had to be decided in light of the particular circumstances and competing interests.¹⁸ The present matter involves entirely different facts.

[35] Reference was also made to *Nedbank Ltd v Jones and others*,¹⁹ where Gamble J reiterated the principle that a Magistrate's Court was a creature of statute and exercised no inherent jurisdiction; it could only issue orders regarding which it was expressly

¹⁶ A further difficulty facing Mr Skiti is that there is no indication that his application was ever properly served on either the first respondent or the deeds registry. There is, moreover, no indication that he ever properly applied for their joinder to the proceedings.

¹⁷ 2012 (3) SA 207 (ECG).

¹⁸ At paragraph [25].

¹⁹ 2017 (2) SA 473 (WCC).

authorized.²⁰ The principle in question is trite and well-established. The magistrate, in the present matter, used the reference in support of her decision that she could not order the stay of proceedings for an indeterminate period. The provisions of section 48 of the Magistrates' Court Act 32 of 1944 constituted a *numerus clausus*, as it was termed, which did not permit the order sought by Mr Skiti.

[36] The provisions of section 48 list the competent judgments available to a magistrate. It is clear, however, that the provisions pertain to the decision to be made at the conclusion of proceedings, i.e. at the end of a trial or after an application has been argued to completion.²¹ That is not the situation here. The provisions of section 47(1) undoubtedly allow a magistrate the discretion to stay proceedings if there is a proper basis upon which to do so, as already discussed.

Costs

[37] The court *a quo* dismissed, with costs, Mr Skiti's application to stay the eviction proceedings. Counsel referred to *Hotz and others v University of Cape Town*,²² where the Constitutional Court recognised the discretion available to a court of first instance to determine costs; a court of appeal cannot interfere with the exercise of such discretion without good reason to do so.²³ Nevertheless, contended counsel, the Supreme Court of Appeal confirmed, in *Naylor and another v Jansen*,²⁴ that a court of appeal may interfere with a costs order in exceptional circumstances; that was the situation in the present matter, counsel argued, where Ms Gobingca and the remaining respondents had not opposed Mr Skiti's application.

[38] The decision in *Naylor*, however, was more nuanced than suggested. Cloete JA held as follows:²⁵

²⁰ At paragraph [16].

²¹ See the discussion in DE van Loggerenberg, n 12 *supra* (RS 26, 2022, Act), at pp 322-3.

²² 2018 (1) SA 369 (CC).

²³ At paragraph [28].

²⁴ 2007 (1) SA 16 (SCA).

²⁵ At paragraph [14].

‘...an appeal court will interfere with the exercise of such a discretion only where it is shown that:

“...the lower court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles.”²⁶

[39] In the present matter, I am of the respectful view that the magistrate applied the wrong principles but reached the right decision. There is little scope to interfere. The order for Mr Skiti to pay costs, however, does not seem to have been warranted. To that effect, he did not seek costs when he brought the application. Ms Gobingca never opposed the matter, notwithstanding her attorney’s ambivalence in that regard at the hearing.²⁷ If she had indeed filed a notice of opposition and answering papers and if her attorney had clearly approached the matter on an opposed basis then there would have been a reason for the costs order. But that was not the case. The magistrate misdirected herself in that regard, giving rise to the exceptional circumstances that justify interference with her order.

[40] The appeal, too, was unopposed. Despite Mr Skiti’s failure to have persuaded the court of its merits, there is no basis for ordering him pay Ms Gobingca’s costs, if any, in relation thereto. He ought simply to bear his own costs and take advice on such further options as may be available to him.

Order

[41] In the circumstances, I would make the following order:

²⁶ *National Coalition for Gay and Lesbian Equality and others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC), at paragraph [11].

²⁷ From the record, the attorney concedes that his client, Ms Gobingca, never formally opposed Mr Skiti’s application to stay the eviction proceedings. That seems to have been the basis, too, upon which Mr Skiti’s attorney, as well as the court *a quo*, approached the matter at the hearing.

- (a) the appeal is dismissed; and
- (b) the appellant is directed to pay his own costs.

JGA LAING
JUDGE OF THE HIGH COURT

I agree.

S DUNYWA
ACTING JUDGE OF THE HIGH COURT

APPEARANCE

For the appellant:	Mr Nohaji
Instructed by:	Cinga Nohaji Inc. 36 Chamberlain Road Berea EAST LONDON Ref: CN/dxs/045/sp
For the respondents:	No appearance
Date of hearing:	28 March 2024.
Date of delivery of judgment:	09 July 2024.