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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: 22862/2023

In the matter between:

GARY NIGEL HARDISTY

First Applicant

JENNIFER JANINE HARDISTY

Second Applicant

And

THEMBINKOSI RUDOLF JIYANA

First Respondent

NOMVO JIYANA

Second Respondent

JUDGMENT - 29 August 2024

LEKHULENI J

Introduction

[1] This is an interlocutory application in terms of Rule 47(3) of the Uniform Rules, in which the applicants seek an order that the respondents be ordered to furnish them

security for costs in the sum of R250 000. The first and second applicants' application is premised on an order granted in this Court on 09 March 2023 under case number 15479/2021, in which Henney J declared the first and second respondents vexatious litigants in terms of section 2(1)(b) of the Vexatious Proceedings Act 3 of 1958 (*the Vexatious Proceedings Act*). The order declaring the respondents vexatious litigants followed multifarious applications brought by the respondents against the same applicants in various courts, inclusive of the Western Cape High Court under case numbers: WCHC 5171/2016, 1214/2016; 15952/2016; and 15479/2021; the Supreme Court of Appeal under Case No. 498/2023 as well as the Constitutional Court under Case No. CCT223/2023. The first and second respondents were unsuccessful in all the above cases and the various courts granted cost orders against them.

[2] Notwithstanding that the respondents were declared vexatious litigants, on 14 December 2023, the respondents brought an urgent application in this Court under the above case number (Case No: 22862/2023). They sought an order interdicting the applicants from taking occupation of an immovable property situated at No. 1[...] E[...] Close, E[...] Road, Parklands after they were evicted from the said property by the Sheriff. The respondents also sought an order directing the Sheriff to grant them access to the property and provide them with the necessary keys. The applicants opposed the respondents' application. After hearing the matter, the court dismissed the respondents' urgent application with costs.

[3] On 6th February 2024, the two respondents, without leave from this Court as required by the Vexatious Proceedings Act, once again filed an application for leave to appeal the court's order dismissing their interdict application. The applicants opposed the application. In addition, given that the first and second respondents have been declared vexatious litigants, the applicants brought an application in terms of Rule 47(3) of the Uniform Rules seeking an order directing the two respondents to furnish the applicants with security for costs.

[4] In addition, the applicants sought an order that any further proceedings by the respondents be stayed pending the provision of security within such time as may be determined by this Court or the Registrar. Should such security for costs not be provided within such time as this Court may determine, the applicants sought an order that the application for leave to appeal this court's order and any further proceedings by the respondents be dismissed with costs on an attorney and client scale.

The Applicants' Case

[5] The respondents bought a property situated at 1[...] E[...] Close, Milnerton, through a loan from Absa Bank. They failed to pay the bond instalment, and the bank repossessed the property and had it sold in execution. The applicants bought the property, which was subsequently registered in their names on 10 June 2016. After multifarious applications and appeals impugning the judgment giving rise to the sale in execution, the respondents were finally ejected from the said property by the Sheriff of Cape Town on 12 December 2023 pursuant to an order of eviction of this Court handed down on 25 October 2016 and a writ of ejectment issued by the Registrar of this Court on 06 December 2023. According to the applicants, the respondents have no right, title or interest in the property from the date of registration of transfer. The applicants asserted that the respondents had been in unlawful occupation of the said property since 10 June 2016.

[6] The applicants further asserted that the respondents launched a series of applications in respect of the said property, citing the same parties and dealing with the same subject matter to the High Court, Supreme Court of Appeal and the Constitutional Court between June 2017 and June 2021 but failed. The applicants further stated that the respondent's stratagem of issuing numerous hopeless applications on the same question of law involving the same parties in respect of the property in question resulted in Henney J declaring both respondents vexatious litigants under the Vexatious Proceedings Act on 09 March 2023.

[7] The applicants averred that despite the order of Henney J, the respondents launched an urgent application before this Court based on the same cause of action under the above case number, which resulted in this Court dismissing the application and ordering the respondents to pay the costs of that application including the costs of Counsel.

[8] Notwithstanding, the respondents have again launched an application for leave to appeal the judgment of this Court issued on 6 February 2024. Given that the respondents have been declared vexatious litigants, the applicants asserted that they are entitled to an order directing the respondents to furnish them security for costs and failing provision of such security as determined by this Court or the Registrar, the application of the respondents for leave to appeal should be dismissed with costs on an attorney and client scale.

The Respondents' Case

[9] The respondents opposed the applicants' application and implored the court to dismiss the applicants' Rule 47(3) application. The respondents denied that the applicants are lawfully registered owners of the house in question because the default judgment granted on 24 June 2008 in favour of Absa Bank was fraudulently obtained, and the sale in execution on 5 April 2016 is also contested as a nullity. The respondents believe that the disputed judgment and sale in execution led to the first and second applicants purchasing their property under circumstances where the sale took place while there was pending litigation by the respondents challenging the validity of the judgment that led to the sale.

[10] The respondents further asserted that the pending litigation, particularly the appeal against the refusal to stay the sale in execution, suspended the operation of the default judgment. According to the respondents, the pending Constitutional Court rescission of judgment application under case number 223/2023 attacked and contested both the sale in execution and the registration of the said property in the first and

second applicants' names. In the respondents' views, the Sheriff of Cape Town colluded with Absa Bank and misled this Court when it was stated in the Return of Non-service that the respondents had left the property in question due to eviction.

[11] The respondents stated that they were never evicted from the property in question. The respondents opined that their ejectment from the property was unlawful as it was predicated on an illegal writ of ejectment issued by the Registrar, in circumstances where there was a pending leave to appeal the eviction order, which as of 06 December 2023, had since been postponed *sine die* by agreement between the parties on 17 June 2017. The respondent stated further that they have since enrolled the leave to appeal application in respect of their eviction and are waiting for the office of Justice Sher to give them a date to argue the matter.

[12] Based on these facts, the respondents contended that the writ of ejectment stands to be declared a nullity, and their ejectment from the impugned house was consequently unlawful. The respondents do not deny that they have been declared vexatious litigants. However, they contend that the order of Henney J is being challenged before the Constitutional Court. They pleaded with this Court to dismiss the applicant's application with costs.

The Applicable Legal Principles

[13] As previously stated, the applicants seek an order against the respondents for security for costs in terms of Rule 47(3). The relevant parts of Rule 47 of the Uniform Rules of Court provide as follows:

“(1) A party entitled and desiring to demand security for costs from another shall, as soon as practicable after the commencement of proceedings, deliver a notice setting forth the grounds upon which such security is claimed, and the amount demanded.

(2) If the amount of security only is contested the registrar shall determine the amount to be given and his decision shall be final.

(3) If the party from whom security is demanded contests his liability to give security or if he fails or refuses to furnish security in the amount demanded or the amount fixed by the registrar within ten days of the demand or the registrar's decision, the other party may apply to court on notice for an order that such security be given and that the proceedings be stayed until such order is complied with...."

[14] Rule 47 applies to all cases where security is sought in the High Court. It does not explicitly set out the grounds upon which one party is entitled to demand security for costs from the other; it deals only with purely procedural aspects of the matter and not with substantive law. (See *DF Scott (EP) (Pty) Ltd v Golden Valley Supermarket* 2002 (6) SA 297 (SCA) at 301G; *Boost Sport Africa (Pty) Ltd V South African Breweries (Pty) Ltd* 2015 (5) SA 38 (SCA) at para 5). A court has a discretion whether to order security to be lodged in any given case. Such a discretion must be exercised after considering all relevant facts as well as considerations of equity and fairness to both parties. *Blastrite (Pty) Ltd v Genpaco Ltd* 2016 (2) SA 622 (WCC) at paragraph 10.

[15] In the case of vexatious litigation, the court has an inherent jurisdiction to stop or prevent a vexatious action as being an abuse of the process of the court. A court ought not to allow a person to be harassed by vexatious litigants. (*Western Assurance Co v Caldwell's Trustee* 1918 AD 262 at 275). An abuse of the process of the court connotes that the process of the Court must be used *bona fide* and properly and must not be abused. Similarly, an applicant without a *bona fide* claim intending to use litigation to cause his opponent prejudice abuses the court's process. (*Beinash and Another v Ernst & Young and Others* 1999 (2) SA 116 (CC) par 13). The Court will prevent the improper use of its machinery and will, in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation. (see

Brummer v Gorfil Brothers Investment (Pty) Ltd and Others 1999 (3) SA 989 (SCA) at 412H.

[16] What constitutes an abuse of the Court's process is a matter that needs to be determined with reference to the circumstances of each case. Although not subject to an all-encompassing definition, it is generally accepted that it is an abuse of process to employ the procedures permitted by the Rules of the Court to facilitate the pursuit of a purpose extraneous to that objective. (*Brummer v Gorfil Brothers Investment (Pty) Ltd and Others* 1999 (3) SA 989 (SCA) at 412H). In determining whether the proceedings amount to an abuse of the court process, the court should consider all factors relevant to the circumstances of the case. (*Fitchet v Fitchet* 1987 (1) SA 450 (E) at 454F. That consideration may require reference to the facts of the main application.

[17] However, it is well established that the court should not undertake a detailed investigation of the merits of the case at this juncture of the proceedings. (see *Boost Sport Africa (Pty) Ltd v South African Breweries* 1961 (1) SA 589 (O) at 593E). The court must carry out a balancing exercise. The court must strike a balance between the prejudice that the parties will suffer if the furnishing of security is granted or refused. In the present matter, the court must weigh the injustice to the respondents if prevented from pursuing their claim by an order for security against the injustice to the applicants if no security is ordered.

[18] Furthermore, in the present matter, the court must also factor in and consider the prejudice that the applicants will suffer if the respondents' application for leave to appeal is dismissed and the applicants find themselves unable to recover from the respondents the costs that they have incurred in defence of the application. (See *Shepstone & Wylie v Geyser NO* 1998 (3) SA 1036 (SCA) at 1046B.

Applying the law to the facts and Analysis

[19] It is common cause in the present matter that the respondents have been declared vexatious litigants by this Court. It is also common cause that when the respondents launched the main application in which they sought an order interdicting the applicants from taking occupation of the impugned property, they did so without seeking leave from this Court as envisaged in section 2(b) of the Vexatious Proceedings Act. The respondents sought leave to institute proceedings long after they had instituted proceedings. It is also not in dispute that the court order declaring them vexatious litigants remains extant.

[20] It is crucial to emphasise that court orders must be respected and followed without exception. Section 165(5) of the Constitution provides that an order or decision issued by a court binds all persons to whom and organs of state to which it applies. An order of a court of law stands until a court of competent jurisdiction sets it aside. Until that is done, the court order must be obeyed, even if it may be wrong. (See *Whitthead and Another v Trustees of the Insolvent Estate of Dennis Charles Rieckert and Others* [2020] ZASCA 124 at para 18). A flagrant disregard of court orders seriously violates the Court's integrity and honour and must be frowned upon with the utmost vigour.

[21] The respondents have instituted multifarious applications. Those applications were based on the same cause of action in the various courts. The respondents were unsuccessful in all their applications. The respondents now intend to impeach the eviction order, and the subsequent writ of ejectment issued by the Registrar as they aver that the default judgment granted by agreement against them was unlawful and that this Court was not competent to endorse it when one considers the provisions of section 129(3)(a) and (b) of the National Credit Act 34 of 2005 (*the NCA*). The respondents have already ventilated this argument on numerous occasions. This defence (in terms of section 129 of the NCA) raised by the respondents withstood judicial scrutiny by three judges of this Court as well as the Supreme Court of Appeal. Notably, the Supreme Court of Appeal and the Constitutional Court, on several occasions, found that this argument does not have any reasonable prospects of success.

[22] All the applications that the respondents lodged in the various courts dealt with this aspect that the default judgment granted against them was unlawful. This argument was dismissed in several court applications. In the circumstances, there is a need in my view to restrict the respondents' access to courts. Restricting the respondents' access to court is indispensable to protect and secure the right of access for those with meritorious disputes. It is also crucial to protect the applicants from abuse. The respondents must be ordered to provide security for costs.

[23] The respondents' deliberate and flagrant disregard of this Court's order declaring them vexatious litigants under the Vexatious Proceedings Act threatens the effective functioning of this Court. This court is under a constitutional duty to ensure compliance with its orders, protect bona fide litigants, court process and the administration of justice against vexatious proceedings. (see *Beinash and Another v Ernst & Young and Others* 1999 (2) SA 116 (CC) para 5). Ordering the respondents to furnish security for costs to proceed with their application provides an avenue for this Court to protect the interest of the applicants, the public and the public interest and the functioning of the courts.

[24] Moreover, this Court is under a constitutional duty to restrict vexatious litigants' access to the court to protect and secure the rights of access for those with meritorious disputes. (See *Fakie NO V CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) para 6. That factor weighs heavily in favour of this Court granting an order directing the respondents to furnish the applicants with security for costs before continuing with the main application.

[25] Finally, the respondents opposed the applicants' application and did not set out information concerning their financial position to provide security. The facts relating to the respondents' financial position are peculiarly within their own knowledge and in the circumstances call for an explanation. Yet, the respondents failed to provide this Court with any information concerning their financial position and ability to satisfy a security-for-cost order that may be granted against them in the main application.

[26] In my view, the failure of the respondents to explain their financial position must weigh against them. (See *Tucker Land and Development Corporation (Pty) Ltd v Soja (Pty) Ltd* 1980 (1) SA 691 (W) at 698A). From the totality of the evidence, I am of the opinion that it is justified that this matter continues under the safeguard of security for costs.

[27] I am also of the opinion that the respondents' conduct in persisting with their ill-founded litigation without leave from court, notwithstanding that they have been declared vexatious litigants, reflects reprehensible stubbornness, which equals vexatiousness. The respondents persist unabated and without consequences. As previously stated, the respondents were aware that they required leave from this Court before issuing the main application on 13 December 2023. Notwithstanding, the respondents proceeded to institute the main application without obtaining such leave. Ordering security for costs is a measure that will ensure that this practice is not accepted in this Court. In this way, the Court will vindicate its duty to protect the applicants and the administration of justice.

[28] Consequently, given all these considerations, I am of the view that the respondents must be ordered to provide security for costs in the main application.

Order

[29] In the result, the following order is granted:

29.1 The first and the second respondents are jointly and severally directed to furnish security for the applicants' costs in the main application.

29.2 The amount, form, and manner of security to be provided by the respondents shall be determined by the registrar of this Court on application by the applicants to that office.

29.3 Should the respondents fail to provide security for costs as determined by the Registrar within 15 days of the Registrar's determination, the main application, including the application for leave to appeal, shall be stayed forthwith. The applicants are entitled to apply in the same papers, amplified as necessary, for the dismissal of the respondents' main application, including the leave to appeal and any further proceedings.

29.4 The first and the second respondents are jointly and severally directed to pay the costs of this application on party and party scale.

LEKHULENI JD
JUDGE OF THE HIGH COURT

APPEARANCES

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