



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

**REPORTABLE
CASE NO: 17555/2024**

In the matter between:

JUDE ONUCHUKWU UMEGBOLU

First Applicant

ZIKONA BUYEYE

Second Applicant

And

DUNNO PROPRIETARY LIMITED

First Respondent

RAWSON PROPERTIES

Second

Respondent

(RAWSON AUCTION WESTERN CAPE)

REGISTRAR OF DEEDS CAPE TOWN

Third Respondent

(WESTERN CAPE DIVISION)

Coram: Parker, AJ

Matter heard on: 12 September 2024

Judgment reserved on: 15 October 2024

JUDGMENT

PARKER, AJ:

Introduction

[1] On 16 August 2024 an order was granted in the urgent court wherein I dismissed the urgent application with no order as to the costs. Only first respondent opposed the application.

[2] This was followed by an application for leave to appeal delivered by the applicants. The grounds of appeal, *inter alia* are:

- 2.1 That the Honourable Court allowed a certain Mr. Michael Jambwa who is neither a legal practitioner nor is entitled to by law, to appear at the hearing on 16 August 2024 and make submissions on behalf of first respondent. The Honourable Court accepted, admitted and/or considered a certain (undelivered, unfiled and/or not properly served and filed) documents together with oral submissions by Mr. Jambwa from the bar to the prejudice of the applicants.
- 2.2 The Honourable Court did not with respect, afford applicants, the opportunity to have insights into and/or properly respond to said documents and/or submissions of Mr. Jambwa, despite applicants' requests to so do.
- 2.3 The Honourable Court in making a determination of the applicants application, did not fully consider all the relevant facts and evidence presented by and/or on behalf of the applicants.

2.4 The Honourable Court did not give reasons for dismissing the applicants' application.

[3] The Applicants persisted with the leave to appeal despite the court's indication via the Registrar to the applicants that reasons are to be sought formally.

[4] Needless to say, the leave to appeal was heard on 12 September 2024 and the respondent was in person who elected not to appoint a legal representative. Furthermore an agreed timeline for the filing of heads of argument were directed for delivery on the 1, 8 and 15 October 2024 respectively.

The appeal

[5] The test for leave to appeal is well known.

[6] In terms of section 17(1)(a)(i), remains a determination of whether there are reasonable prospects of success. The Supreme Court of Appeal¹ held at paragraph [10] that:

“The test of reasonable prospects of success postulates a dispassionate decision based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In other words, the appellants in this matter need to convince this Court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist.”

¹ See the unreported judgment in *Ramakatsa and Others v African National Congress and Another* (724/2019) [2021] ZASCA 31 (31 March 2021).

[7] Section 17(1)(a)(ii) elevates the *onus* in the weight in which leave to appeal may be granted when “*there is some other compelling reason why the appeal should be heard*”.

[8] There is no exhaustive list of what constitutes a compelling reason; each case must be decided on its own facts.² Cachalia JA observed in *Caratco*³ that:

“A compelling reason includes an important question of law or a discreet issue of public importance that will have an effect of future disputes. But here too, the merits remain vitally important and are often decisive. [The applicant] must satisfy this court that it has met this threshold.”

Legal Authority

[9] The challenge to the legal authority of the first respondent was not dealt with in the founding affidavit at all, neither was it raised in argument when the urgent application was heard. The applicants now on appeal raises the issue that first respondent being a “*company is a separate legal entity, must be represented by someone who has a right of audience like an advocate or attorney except on an exceptional circumstance which are rare*”. In this regard the applicants had ample opportunity when it learnt that first respondent was opposing the matter and at the hearing to raise the challenge and or deliver the application in terms of Rule 7 of the Uniform Rules of Court to challenge the legal authority of the respondent. The argument therefore cannot be sustained.

Lack of reasons

[10] At the appeal the applicants argued that a fundamental importance in our judicial system is the furnishing of reasons for the decision made. The averments made in

² See *Transnat Durban (Pty) Ltd v Ethekekwini Municipality* (D4178/2020) [2021] ZAKZDHC 3 (8 February 2021).

³ See dictum in *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* 2020 (5) SA 35 (SCA).

argument that the “*lack of reasons for the decision regrettably does not favour the applicant*” are grounds for appeal. The applicants points to a judgment that an “*appeal court may have the difficulty of presiding over a judgment without reasons*”.⁴ Whilst I agree with the last sentence, I need to make it clear what transpired in this matter, which unfolds below.

[11] Whilst the applicants’ attempts to show that the court shut down the applicants constitutional rights, this is far from the truth. Applicants failed to seek reasons formally and therefore its argument that “*a violation of the constitutional right of access to courts, if reasons are to be withheld by a judicial officer,*” is frowned upon, given the Registrar’s communication to the attorney for the applicants. Applicants elected not to request reasons in terms of rule 49(1)(c), an avenue which was available to them.

[12] The criticism of the failure to give reasons for the decision when the order was granted, is misplaced. When one is on urgent duty, given the nature of the matters brought in the urgent court one does not always have the opportunity to deliver written judgments. This does not mean that I did not apply my mind when arriving at the decision.

Procedural issue

[13] Secondly applicants contends that they have been denied the opportunity to have insight or respond to the first respondent’s answering affidavit and uses this as a compelling reason for the appeal.

[14] At the hearing of the application, applicants elected to proceed with the matter despite respondent only filing its answering papers on the day of the hearing. Applicants brought this matter on urgency. The answering affidavit was delivered to the court on the day of the hearing. Applicants however were served with the opposing affidavit the day before (although incomplete as certain of the annexures were not

⁴ *S v Van Der Berg and Another* 2009 (1) SACR 661.

attached) the hearing. I then stood the matter down for applicants' counsel to take instructions whether they intended to proceed with the hearing of the application given that the attorney for applicants were not at court. Fifteen or so minutes later applicants elected to proceed.⁵

[15] As such the applicant cannot now raise that the court denied applicant its right to request a postponement of the matter. Both parties wanted to proceed and have the matter heard. Applicants' reliance on the *Isibaya Home Body Corporate Case*⁶ does not assist them.

Urgency

⁵ The extract of the transcript of the record reads “ *RT: Okay. Mr Jambwa, you must not go away at all. Please just hang around. I'm going to give Adv Mtunzi and the instructing attorney to consider what their position is, because you've only brought this to me now, literally 15 minutes ago.*

MR JAMBWA: Okay.

COURT: Thank you. Court adjourned, then.

MS MTUNZI: As the Court pleases.

COURT: When you are ready, just let us know, please.

MS MTUNZI: Will do so, M'Lady.

COURT: I am available for you.

COURT ADJOURNS[10:07]

COURT RESUMES[10:23]

MS MTUNZI: M'Lady, my instructions are, I consulted with my instructing attorney and my instructions are, for the application to be heard today and then the Court then if the Court then finds in our favour or grants the interim interdict then set down the return date and in the return date stipulate when or order or direct when the filing of the ...[intervenes]

COURT: Of the further timetable.

MS MTUNZI: ... further timetable.

COURT: Okay. so basically, you are asking for the interim relief today?

MS MTUNZI: Interim relief today.

COURT: Then, ja, if I grant the interim relief, and I'm satisfied with your submissions, then we will come back on another day, so that the □ to afford you an opportunity to reply.

MS MTUNZI: Correct, M'Lady.

COURT: If I find.

MS MTUNZI: If you do. We then came up with dates as well.

COURT: Okay, no that is fine. I just want to be sure that Mr Jambwa understands us. Okay. Mr Jambwa, I'm not sure if you followed what the counsel had said. Would you like me to explain it to you? Yes, okay. So the applicant has come here on an urgent basis. Seeking certain relief. One, either to stop the auction; two, if the sale continues, for that the money that's going to be □ because you are selling the property, am I right?

MR JAMBWA: Yes.”

⁶ *Isibaya House Body Corporate SS279/2007 and Another v City of Johannesburg Metropolitan Municipality* (29079/2017) [2021] ZAGPJHC 846 (11 June 2021) paragraph [23].

[16] The parties are embroiled in litigation in another forum arising from the applicants' occupancy on the property of first respondent. The application is to interdict the auction, sale and transfer of the immovable property, and or proceeds of the sale be interdicted from paying out such proceeds, interdicting the third respondent from transferring the property to any person or entity pending the outcome of the action and directing the insertion of an "*interdict*" against the title deed of the property, preserving the proceeds in a designated trust account pending the outcome of the applicants damages claim.

[17] The requirements for an urgent interim interdict are trite. The first question to be answered is whether the applicant has satisfied the requirement of *prima facie*, even if it were open to some doubt. The applicant would also have to show –

17.1 that it had no alternative remedy,

17.2 that it had a reasonable apprehension of irreparable harm if the interdict were not granted,

17.3 and that the balance of convenience favours the granting of the interim relief.

[18] The requirement to show a favourable balance of convenience would fall away if the applicant were able to show a clear right to the final relief, and the stronger the *prima facie* right the less important the influence of the balance of convenience.

[19] An important obstacle presented to applicants' case to justify the relief sought is that there is no evidence presented to show that the first respondent is planning to remove his assets from this court's jurisdiction with the intention to defeat the applicant's claim in the other forum. The applicants failed to plead such grounds in its

founding affidavit. Such an intention is a prerequisite for an anti-dissipatory interdict. In *Poolman v Cordier and others*, Erasmus AJ said:⁷

“[17] A Mareva injunction is a species of an interim interdict compelling a respondent/defendant to refrain from dealing freely with his assets to which the applicant can lay no claim. The purpose thereof is to prevent the intended defendant, who can be shown to have assets and who is about to defeat the plaintiff's claim or defeat the plaintiff's claim or dissipating assets, from doing so. To be successful, the applicant must show that the respondent is wasting or secreting assets with the intention of defeating the claims of creditors.”

[20] In the present matter the evidence is that the applicants occupied the home since 2013 under a lease agreement until first respondent purchased the property. On 30 September 2022 the second respondent delivered a notice to the applicants to vacate the property on or before 10 October 2022.

[21] On 20 October 2022 applicants were successful with its spoliation remedy against first respondent, following a housebreaking and removal of applicants' property.

[22] The order granted against first respondent was to restore the movable assets. This remains an issue between the parties, which is the subject of the damages claim. Applicants learnt of an auction of the immovable property on 11 July 2024, wherein Applicants were invited in an email correspondence dated 18 July 2024 to consider the purchase of the immovable property however there appeared to be some uncertainty regarding the auction.

[23] Save for stating that the first respondent is a peregrinus from Zimbabwe, the applicants argues that the property is its only security and allegedly its only asset in

⁷ *Poolman v Cordier and others* [2017] ZANCHC 49 para 17. See *Knox D'Arcy Ltd and others v Jamieson and others* [1996] 3 All SA 669 (A); 1996 (4) SA 348 (A), *Bassani Mining (Pty) Ltd v Sebosat (Pty) and Others* 2021 JDR 2276 (SCA) paras 12 to 19, and the judgment by Moshwana J in *Commissioner for the South African Revenue Services v Moloto and Others* 2022 JDR 3201 (GP) paras [8] to [18].

respect of its damages claim. Applicants contends that first and second respondents are acting with *mala fides* as to conduct an auction to frustrate the applicants claim. The first respondent submissions are that the applicants are abusing the court process and remain in unlawful occupation which is compounded by applicants failure to pay the rental, levies and rates.

[24] However Applicants failed to provide sufficient evidence that first respondent was secreting away assets to avoid paying its debts. Neither was there any evidence to show it would be impossible to execute the judgment of the damages claim, if successful. There was no evidence that it would be expensive or that exceptional circumstances that merit an anti dissipatory interdict.⁸

[25] I conclude that the applicants has not made out a *prima facie* right, it has not proven that the harm is imminent and therefore in my view found there to be no reasonable apprehension of irreparable harm and the application stands to be dismissed. The applicants have other remedies which they have pursued and are currently embroiled in, (the damages claim) and which is yet to be determined. There are no reasons to justify applicants coming to court, with nothing to support its case for urgency. The balance of convenience does not favour applicants. For all the above reasons I made the order as reflected in paragraph 1.

Costs

[26] In considering legal costs, I did not grant costs when the application was dismissed. However, under these circumstances, first respondent has been put through efforts in having to oppose the leave to appeal and for these reasons costs of the appeal should follow the result.

Order

⁸ *Evoke Reality (Pty) Ltd v Jacobus and Others* 2023 JDR 3221 (GJ) at para [36].

[27] In the circumstances the following order is made:

27.1 The application for leave to appeal is dismissed.

27.2 The applicants are to pay the first respondent's legal costs.

R K PARKER
ACTING JUDGE OF THE HIGH COURT

Appearances

Counsel for Applicants : Mr. P Sharuh

Instructing Attorney : Paul Sharuh Attorneys

Counsel for First Respondent : Mr. M Jambwa – Director in person

Instructing Attorney :