CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 14/10
[2010] ZACC 23

In the matter between:

KABELO BETLANE Applicant

and

SHELLY COURT CC Respondent

Heard on : 24 August 2010

Decided on : 24 November 2010

JUDGMENT

MOGOENG J:

Introduction

[1] Several orders were made by the South Gauteng High Court, Johannesburg[1] (High Court), which effectively restrained the applicant from petitioning the President of the Supreme Court of Appeal for leave to appeal[2] against the eviction and costs orders made

[1] *Betlane v Shelly Court CC*, South Gauteng High Court, Johannesburg, Case No 2007/13744A, 15 June 2009, 27 January 2009 and 6 October 2009, unreported.

[2] Section 20(4) of the Supreme Court Act 59 of 1959 (Act) provides:

> "No appeal shall lie against a judgment or order of the court of a provincial or local division in any civil proceedings or against any judgment or order of that court given on appeal to it except—
>
> . . . .

by the High Court against him.[3] These restraining orders would cease to apply only if the applicant paid the costs or furnished security for them.

[2] The applicant approached this Court primarily on the ground that those orders constituted an infringement of his right of access to court.[4]

[3] About three weeks before the date of hearing this application the respondent, for whose benefit the restraining orders were made, abandoned them. The question then arises whether there is a live constitutional issue remaining and, if so, whether it is in the interests of justice for this Court to pronounce on it.

Parties

[4] The applicant is Mr Kabelo Betlane, a lay litigant and former tenant of premises belonging to Shelly Court CC, which is the respondent in this matter. The applicant and the respondent are collectively referred to as "the parties".

(b) in any other case, with the leave of the court against whose judgment or order the appeal is to be made or, where such leave has been refused, with the leave of the appellate division."

Section 21(3)(a) of the Act provides that "[a]n application to the appellate division under subsection (2) shall be submitted by petition addressed to the Chief Justice."

[3] *Shelly Court CC v Betlane*, South Gauteng High Court, Johannesburg, Case No 2007/13744A, 17 October 2007, unreported.

[4] Section 34 of the Constitution provides:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

Factual background

[5] The parties entered into an oral lease agreement in terms of which the applicant rented residential premises from the respondent. His rental obligations were about R1 100 per month.

[6] A dispute arose between the parties about arrear rental. As a result, the respondent instituted an action against the applicant for the recovery of the rental owing and for his eviction, in the Johannesburg Magistrates' Court (Magistrates' Court) in November 2004. The applicant opposed the action on the basis that the rental had been remitted, owing to the premises' poor state of repair and the damage to his appliances caused by an electrical surge.

[7] It is common cause that the parties entered into a settlement agreement on 15 August 2005. In terms of this agreement, they would conclude a written lease agreement by 17 August 2005, the respondent would abandon its action and repair or replace the applicant's damaged appliances.

[8] Another dispute arose between the parties in 2007. Again it was about arrear rental. The applicant contested these allegations on the basis that his rental payments were up to date. The parties attempted to resolve this dispute but failed.

[9] Eventually, the respondent launched an application for the applicant's eviction in the High Court. It came before Bhika AJ who issued the eviction order with costs on an attorney and client scale.[5] In terms of this order, the applicant was to vacate the premises by 18 November 2007, failing which he would be evicted.

[10] The applicant later applied for leave to appeal against the eviction order. Although this application was launched in November 2007, it was only heard and dismissed by Bhika AJ on 15 June 2009, in these terms:

> "1. That the application for condonation is not properly before the court. Application for leave to appeal is dismissed with costs.
> 2. *That the Applicant must provide proof of payment of the Respondent's costs before being allowed to proceed further.*
> 2.1 *The Respondent must provide proof thereof;*
> 2.2 *The Applicant must lodge security for costs with the Registrar before he is allowed to proceed further in the matter.*" (Emphasis added.)

[11] On 13 May 2008, while the application for leave to appeal was pending, the respondent secured a writ of execution on the strength of which the applicant was evicted from the premises on 23 May 2008.

[12] Aggrieved by the eviction, the applicant brought an application for a spoliation order on 2 June 2008. He challenged the lawfulness of the execution of the eviction order on the basis that it was unlawful to execute an eviction order in circumstances

[5] Above n 3.

where leave to appeal against that eviction order is pending. Essentially, the applicant challenged the writ of execution, as a result of which he was ejected from the premises, on the same basis as in this Court. Satchwell J dismissed the application with costs.[6] The applicant then brought an application for the review of the dismissal of his application for a spoliation order. It was dismissed by Nkosi-Thomas AJ on 10 June 2008.

[13] The applicant brought an application for leave to appeal against the dismissal of the application for the spoliation order on 23 June 2008. He later approached the High Court for an order to compel Satchwell J to hear this application. It was postponed by Lamont J on 15 January 2009 to allow Satchwell J to deal with the application for leave to appeal. Satchwell J heard that application on 27 January 2009. She made the following order:

> "1. *That Mr Betlane may not approach this court in respect of this particular matter, that is, the eviction application or the application to be re-instated in occupation which appears under case 2007/13744*. This does not preclude him from properly following the procedures for an application for leave to appeal in respect of the order made by Acting Judge Bhika on 17 October 2007.
> 2. *As and when Mr Betlane has provided the attorneys for Shelly Court with his proper physical address and as and when Mr Betlane has made full payment in respect of the costs orders against him, Mr Betlane may only then again approach this High Court in respect of the eviction application and his re-instatement in possession/occupation of this flat in case 2007/13744.*
> 3. That the application for leave to appeal is dismissed." (Emphasis added.)

[6] *Shelly Court CC v Betlane*, South Gauteng High Court, Johannesburg, Case No 2007/13744A, 2 June 2009, unreported.

[14] On 6 October 2009 the applicant brought an urgent application for the rescission of the last order made by Bhika AJ. Ntsebeza AJ when seized with the matter made the following order:

> "1. The application is struck off the Roll.
> 2.1 The Applicant is ordered to comply with the orders of Satchwell J and Bhika AJ, in full.
> 2.2 The Applicant is ordered to fully comply and to co-operate with the Respondent in order for all cost orders made against the Applicant, to be taxed and paid.
> 3. *The Applicant may not enrol or bring any matters, relating to his eviction and proceedings which are connected thereto, until the Applicant has complied with the orders of Satchwell J and Bhika AJ*.
> 4. The Applicant will pay the costs of this application." (Emphasis added.)

[15] The effect of these orders was to debar the applicant from launching any proceedings relating to the order for his eviction unless he paid the costs previously ordered against him or furnished security for those costs.

[16] The applicant then applied for direct access to this Court for an order setting aside the restraining orders, and for leave to appeal against the eviction order and the writ of execution. He prayed for an order in the following terms:

> "(a) Review of order as to costs granted by the South Gauteng High Court (Security for costs).
> (b) Reinstatement of the applicant to the premises he leased.
> (c) Application for an order for a leave to appeal to proceed procedurally."

It follows from these prayers that he had three main concerns. First, the security for costs orders; second, his ejectment from the residential premises and third, the eviction order itself. In all these desperate attempts to hold onto the accommodation, the applicant was not represented.

[17] Both the applications for direct access and leave to appeal were set down for hearing on 24 August 2010.

[18] On 29 July 2010 the respondent filed a notice to abandon the following orders:

> "1. The order of Satchwell J dated 2 June 2007;
> 2. The order of Satchwell J dated 27 January 2009;
> 3. Paragraph 2 of the order of Bhika AJ dated 15 June 2009;
> 4. Paragraphs 2 and 3 of the order of Ntsebeza AJ dated 6 October 2009."

This abandonment has a dual effect. The first is to leave intact the eviction order, the order dismissing the application for leave to appeal and several orders for costs made against the applicant. The other is to clear all obstacles which hitherto prevented the applicant from taking steps to appeal against the eviction order.

[19] In light of the abandonment, further directions were sent to the parties, calling upon them to make submissions on costs and on whether the matter should still be proceeded with in view of the respondent's abandonment of orders relating to security for costs. In his written submissions, the applicant contended that the order for his eviction

deserved the attention of this Court, whereas the respondent held the contrary view. These opposing positions resulted in the matter being fully argued on 24 August 2010.

The issues

[20] There are two preliminary and two substantive issues that arise in this matter. The preliminary issues are the applications for direct access and leave to appeal and the substantive issues relate to the lawfulness or otherwise of the writ of execution and the appropriate orders for costs. I deal with these issues in the same sequence below.

Direct access

[21] Satchwell J, Bhika AJ and Ntsebeza AJ made orders which effectively put an end to any attempt by the applicant to challenge the eviction order made against him. When these restraining orders were made, their constitutional implications were not pronounced upon by the High Court.

[22] It was only when the applicant approached this Court to have this barrier removed, that these orders were attacked on the basis that they infringed his fundamental right of access to courts. This then is an application for direct access to this Court, to argue a point that was not raised in the High Court. Section 167(6)(a)[7] of the Constitution read

[7] Section 167(6) reads:

> "National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court—
>
> (a) to bring a matter directly to the Constitutional Court".

with rule 18 of the rules of this Court[8] allows this Court to grant leave for direct access when it is in the interests of justice to do so. This Court is, however, reluctant to be the court of first and last instance and it will only grant leave for direct access under exceptional circumstances.[9]

[23] An abandonment of orders does not automatically deprive this Court of its inherent jurisdiction to hear matters which raise constitutional issues of importance, when it is in the interests of justice to do so. In this case, however, the abandonment of the restraint orders is dispositive of the substance of the application for direct access. The parties are agreed that there is nothing left of the security for costs issue to be determined by this Court. The application for direct access is, for these reasons, to be dismissed on the basis that the issues connected with direct access have now been rendered moot and it is therefore not in the interests of justice for this matter to be heard by this Court.

[8] Rule 18(2) of the Constitutional Court Rules, 2003 reads:

> "An application in terms of subrule (1) shall be lodged with the Registrar and served on all parties with a direct or substantial interest in the relief claimed and shall set out—
>
> (a) the grounds on which it is contended that it is in the interests of justice that an order for direct access be granted".

[9] *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* [2004] ZACC 9; 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC) at para 11 and the cases cited therein. See also *Dormehl v Minister of Justice and Others* [2000] ZACC 4; 2000 (2) SA 987 (CC); 2000 (5) BCLR 471 (CC) at para 5 and *Bruce and Another v Fleecytex Johannesburg CC and Others* [1998] ZACC 3; 1998 (2) SA 1143 (CC); 1998 (4) BCLR 415 (CC) at para 9.

Leave to appeal

[24] Fundamental to the applicant's application to this Court was the setting aside of the restraining orders. One of his prayers was to have the matter remitted to the High Court for issues relating to the eviction order to be properly ventilated.

[25] When the respondent abandoned all the orders which effectively barred the applicant from approaching the Supreme Court of Appeal, the applicant then became free to do what he had always wanted to do. The way was cleared for him to petition the Supreme Court of Appeal for leave to appeal against the eviction and costs orders.[10]

[26] It is common cause that there are factual disputes relating to the granting of the eviction order, which are still lingering on. Further evidence might even have to be led for all the key issues to be properly ventilated. Some of the issues raised by the applicant are that: this Court should take into account that Bhika AJ did not give him the kind of assistance that a judicial officer ought to give to an unrepresented lay litigant;[11] some payments made by him are not reflected in the print-out of payments; the facts of this case disclose enough to doubt the correctness of the eviction order; and the High Court failed to fulfil its duties under section 4 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act,[12] namely, to investigate all of the applicant's defences to the eviction claim, in particular whether he was entitled to a remittal of rental and

[10] Above n 2.

[11] See *Mpange and Others v Sithole* 2007 (6) SA 578 (W) at para 15.

[12] 19 of 1998.

whether he had alternative accommodation; and the facts were not properly assessed. These allegations are disputed by the respondent. The applicant acknowledges that there is a dispute of facts.

[27] For these reasons, the applicant is asking this Court to set aside the eviction order, without pronouncing itself on its merits, and to remit the matter to the High Court for the proper ventilation of the factual disputes relating to the eviction order. No legal basis exists for the approach contended for. All these are matters which would best be handled by the Supreme Court of Appeal or the Full Court of the High Court, should leave to appeal be granted.

[28] Although eviction by its very nature implicates the right to housing and therefore raises a constitutional issue,[13] it is not in the interests of justice to entertain this appeal at this stage. Besides, it is inappropriate for appeals to be heard by this Court directly from the High Court without the benefit of the decision of the Full Court of the High Court or the Supreme Court of Appeal.[14] The other issue which is related to this application for

[13] *Machele and Others v Mailula and Others* [2009] ZACC 7; 2010 (2) SA 257 (CC); 2009 (8) BCLR 767 (CC) at para 26 and *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* [2004] ZACC 25; 2005 (2) SA 140 (CC); 2005 (1) BCLR 78 (CC) at para 34.

[14] See *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile and Others* [2010] ZACC 3; 2010 (5) BCLR 422 (CC) at paras 21-4 and *Campus Law Clinic, University of KwaZulu-Natal v Standard Bank of South Africa Ltd and Another* [2006] ZACC 5; 2006 (6) SA 103 (CC); 2006 (6) BCLR 669 (CC) at para 26 and cases cited therein.

leave to appeal, is the validity of the writ of execution and the lawfulness of applicant's ejectment, based on that writ.[15] This issue is addressed below.

[29] It is trite that one ought to stand or fall by one's notice of motion and the averments made in one's founding affidavit.[16] A case cannot be made out in the replying affidavit for the first time.[17] It was for this reason that some of the allegations made in the replying affidavit, such as the unlawfulness of the writ of execution, were challenged. The applicant's situation is special though. He is a lay person, who until recently did not have the benefit of legal assistance. When he approached this Court, he did so on his own. Consequently his notice of motion and founding affidavit did not properly set out all the relevant issues. It was as a result of the legal advice that was not previously available to him that he became aware of the need to attack frontally, the lawfulness of the writ of execution that was issued and executed, while his application for leave to appeal was pending.[18]

---

[15] The application for a spoliation order referred to in [12] and [13] above was based on a challenge to the lawfulness of the execution of the eviction order. This application for leave to appeal is, therefore, essentially a challenge to the High Court order dismissing the applicant's application for the setting aside of the writ of execution on the basis that it was unlawful and that for that reason his eviction amounted to spoliation. See [16] above and [36] below.

[16] *Van der Merwe and Another v Taylor NO and Others* [2007] ZACC 16; 2008 (1) SA 1 (CC); 2007 (11) BCLR 1167 (CC) at para 122; *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 11; 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) (*SARFU*) at para 150; *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* 2008 (5) SA 339 (SCA) at paras 29-30; *Port Nolloth Municipality v Xhalisa and Others; Luwalala and Others v Port Nolloth Municipality* 1991 (3) SA 98 (C) at 111E-F; *Langeberg Ko-operasie Beperk v Folscher and Another* 1950 (2) SA 618 (C) at 621; *Geanotes v Geanotes* 1947 (2) SA 512 (C) at 515; and *Pountas' Trustee v Lahanas* 1924 WLD 67 at 68.

[17] See *Van der Merwe* above n 16 at para 122; *SARFU* above n 16 at para 150; *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 636A-B; and *Bayat and Others v Hansa and Another* 1955 (3) SA 547 (N) at 553D.

[18] See rule 49(11) of the Uniform Rules of Court which is quoted and discussed at [34].

[30] To the applicant's credit, the notice of motion does reveal his desire to challenge the execution of the eviction order. He alludes to that desire by praying for his reinstatement to the residential premises. A compassionate reading of his notice of motion, mindful that it was settled by an unrepresented lay litigant, would lead to no other conclusion.[19] When counsel and the Socio-Economic Rights Institute Law Clinic (SERI) assisted the applicant by offering pro bono legal representation, they helped him to draft his replying affidavit in a manner that clarifies the relief sought from this Court.

[31] The writ of execution was issued by the appeals registrar.[20] It implicates the applicant's right to housing because it facilitated his ejectment from the residential premise.[21] This leg of the application for leave to appeal raises an important

[19] See in this regard *Registrar of Insurance v Johannesburg Insurance Co Ltd* 1962 (4) SA 546 (W) at 547A-B where the court emphasised that:

> "The rules of procedure are made to facilitate litigation; they are always subject to the over-riding discretion of the Court."

This Court, in *Xinwa and Others v Volkswagen of South Africa (Pty) Ltd* [2003] ZACC 7; 2003 (4) SA 390 (CC); 2003 (6) BCLR 575 (CC), construed a notice of motion that had been drafted by lay litigants and did not include a prayer for leave to appeal, as indicating that such leave was sought. It held, at para 13:

> "Lay litigants should not be held to the same standard of accuracy, skill and precision in the presentation of their case required of lawyers. In construing such pleadings, regard must be had to the purpose of the pleading as gathered not only from the content of the pleadings but also from the context in which the pleading is prepared. Form must give way to substance."

See also *S v Twala (South African Human Rights Commission Intervening)* [1999] ZACC 18; 2000 (1) SA 879 (CC); 2000 (1) BCLR 106 (CC) at paras 4 and 5 and *Viljoen v Federated Trust Ltd* 1971 (1) SA 750 (O) at 757B-C.

[20] In terms of rule 45 of the Uniform Rules of Court.

[21] This Court, in *Machele* and *Jaftha* above n 13 held that a person's eviction from his home always raises a constitutional issue. Section 26 of the Constitution provides:

> "(1) Everyone has the right to have access to adequate housing.
>
> (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

constitutional issue. And it is in the interests of justice to decide this issue given the exceptional circumstances under which it arose.

[32] In the result, I am satisfied that leave to appeal against the eviction order stands to be dismissed whereas leave to appeal ought to be granted in respect of the application to set aside the writ of execution. I now turn to consider the lawfulness of the writ.

The lawfulness of the writ of execution

[33] The application for leave to appeal against the eviction order was still pending in the High Court when the respondent applied for and was granted a writ to execute the order for the applicant's eviction. On the strength of this writ, the respondent executed the eviction order and the applicant was effectively forced out of the premises.

[34] This was done notwithstanding the provisions of rule 49(11) of the Uniform Rules of Court which read:

> "Where an appeal has been noted or an application for leave to appeal against or to rescind, correct, review or vary an order of a court has been made, the operation and execution of the order in question shall be suspended, pending the decision of such appeal or application, unless the court which gave such order, on the application of a party, otherwise directs."

---

(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."

An application for leave to appeal suspends the execution of an order unless leave to execute is sought and obtained, not from a registrar but, from the court which granted the order.[22] Although the respondent was aware of the pending application for leave to appeal, it nevertheless obtained the writ of execution and executed the eviction order. It is of some significance that the writ was issued by the appeals registrar of the same High Court in which the application for leave to appeal was pending. All this flew in the face of rule 49(11).

[35] The applicant is asking this Court to find that the writ of execution was unlawfully sued out and that the execution of the order for eviction, based on that writ, was also unlawful. Counsel for the respondent unequivocally, and rightly, conceded that the warrant of eviction should not have been granted while the applicant's application for leave to appeal was pending, and hence that the execution of that order was unlawful. I am satisfied that the writ is unlawful and it falls to be set aside.

[36] Ordinarily, an eviction which is carried out pursuant to an invalid writ of execution amounts to spoliation. The evictee would therefore, be entitled to restitution.[23] However, when the premises are already occupied by a bona fide third party, they are as a matter of fact not available, and restitution is impossible. It is for this reason that an order

[22] *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 544H-545A.

[23] This was the applicant's case in his application for a spoliation order in the High Court which was dismissed. See [12] above.

reinstating a tenant to premises cannot be granted when the premises are no longer available for occupation. Counsel for the applicant in these circumstances did not press for an order of reinstatement and in fact conceded that such an order would not be appropriate. We cannot, therefore, order the reinstatement of the applicant to the premises because they are presently occupied. The effect of the setting aside of the writ of execution, in this case, is merely to allow the applicant to exercise any right that flows from this order, as he might be advised to do.

Costs

[37] From the High Court up to the time when this Court was approached, the applicant was unrepresented. This Court intervened on his behalf and requested the Cape Bar Council to assist him. In response, the SERI and two counsel graciously stepped in to assist the applicant, for which this Court is grateful.

[38] Neither counsel nor the SERI has asked for costs. What they have asked for is that the SERI be reimbursed by the respondent for all the disbursements made in this case.

[39] The respondent did not abandon the restraint orders, as soon as they were prominently singled out for attack as barriers to the exercise of the applicant's fundamental right of access to court. It was only after the matter had progressed for a while, and disbursements had been made, that the respondent made the concession in its heads of argument and subsequently filed a notice of abandonment.

[40] Even when those orders were abandoned, the respondent failed to recognise that some disbursements had been made. This is borne out by its failure to tender costs for any disbursements. The applicant had to be heard to have this issue resolved.

[41] The respondent had no valid answer to the unlawfulness of the writ of execution and the execution of the eviction order. Yet it never conceded the unlawfulness until the matter was argued in this Court. Even after this concession, it still opposed the application for its setting aside.

[42] For the reasons set out above, the applicant is the successful party. All the disbursements made by the SERI from the time of their instatement as the applicant's attorneys, to the date of hearing, must be borne by the respondent.

Order

[43] In the event, the following order is made:

(a) The application for direct access is dismissed;

(b) Save for granting leave to appeal against the issuance of the writ of execution, the application for leave to appeal is otherwise dismissed;

(c) The appeal against the issuance of the writ of execution is upheld and the writ of execution is set aside;

(d) The respondent is ordered to pay all the disbursements incurred by the Socio-Economic Rights Institute Law Clinic, from its appointment as the applicant's attorneys to the date of hearing; and

(e) Each party is to pay his or its own costs.

Ngcobo CJ, Moseneke DCJ, Brand AJ, Cameron J, Froneman J, Khampepe J, Nkabinde J, Skweyiya J, and concur in the judgment of Mogoeng J.

For the Applicant:	Advocate A Friedman and Advocate S Wilson instructed by the Socio-Economic Rights Institute Law Clinic.
For the Respondent:	Advocate JF Roos SC and Advocate N Smit instructed by Anthony Berlowitz Attorney.