IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

10/11/2015

CASE NO:83409/2015

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED

10/11/2015 .....
DATE SIGNATURE

In the matter between:

S.M PITJE	**FIRST APPLICANT**
N. PITJE	**SECOND APPLICANT**
and	
J.E JOUBERT	**FIRST RESPONDENT**
MAGISTRATE FRANCIS	**SECOND RESPONDENT**

JUDGMENT

Issues:

- Whether a person who is declared a vexatious litigant requires the permission of a Court to defend or resist an action or application.
- Whether an insolvent requires the permission of his or her trustee to litigate.

- Whether a person who anticipates an interim interdict obtained ex-parte in the urgent court must himself seek an order that non-compliance with the provisions of Rule 6(12) of Uniform Rules of Court be condoned.
- Whether an order obtained in terms of Section 78 of the Magistrate's Act allowing execution of a court order notwithstanding an appeal having been noted may be suspended by the High Court.

RANCHOD J:

[1] In this matter, for the sake of convenience I will refer to the applicants who are husband and wife as the applicants or the applicant as it is only Mr Pitje who has addressed the court and the second applicant's attorney, Mr Sibiya has aligned himself with the submissions Mr Pitje made in the matter. I will also refer to the first respondent simply as the respondent because the second respondent, a magistrate who issued the eviction order which is the subject of the proceedings in the High Court, has not entered an appearance and it would seem will abide the decision of this court. The matter came before me in the urgent court after various orders were granted in the previous two weeks, also in the urgent court by Raulinga J and Mabuse J. There has also been an anticipation by the respondent of the *rule nisi* granted by Raulinga J on 15 October 2015. In view of the various applications, including an application to compel and a notice anticipating the *rule nisi* that were launched in these past few weeks in the urgent court it is necessary to set out the background to the matter before it finally was heard by me, as I said, also in the urgent court. I should of course say that as is well known when matters appear in the urgent court one does not have the luxury of time to prepare a detailed judgement in view of the urgency of the matter. Hence, I will try my best in encapsulating the facts in this matter as best I can and give my decision in light of the evidence before me in the circumstances. The delivery of judgment has been unavoidably delayed due to computer problems during the migration of the "IT" system from the Department of Justice and Constitutional Development to the Office of the Chief Justice.

[2] The genesis of this matter stems from a purported lease agreement entered into between the applicants and the first respondent during or about October 2014 in terms of which the respondent let to the applicant certain residential property. It was agreed between the parties that the applicants pay R22 100.00 for the deposit and first month's rental. However, the applicants furnished the respondent with his attorney's trust cheque for the deposit and first month's rental. The respondent was uneasy about the trust cheque and also on the strength of other information he received, purported to cancel the lease agreement and summarily evicted the applicants from the property. The upshot of it all was that the applicants obtained an order in the Magistrate's Court that the respondent restore occupation of the property to the applicants. The applicants then moved back and had been in occupation of the property until early October this year, that is, 2015. Respondent says the applicants have paid an amount of only R10 000.00 since taking occupation and they are owing in excess of R120 000.00 for rental since then. Their stance, particularly that of the first applicant, is that he has a damages claim against the respondent resulting from the eviction in October 2014, which has to be quantified and which he intends to set off against any rental owing by the applicants to the respondent, or so the argument goes. The respondent is of the view that this is not legally permissible in that a un-liquidated claim for damages cannot be set off against a liquidated claim for rental owing. On this basis, the first respondent instituted legal proceedings during November 2014 in the Magistrate's Court, Pretoria for the eviction of the applicants and obtained a final order on 26 May 2015 in terms of which they were ordered to vacate the premises by 13 June 2015 failing which the Sheriff was authorised to evict them. Applicants were ordered to pay costs on a punitive scale. The applicants then filed an application for leave to appeal on 11 June 2015. The respondent in turn launched an application before the learned magistrate in terms of section 78 of the Magistrate's Court Act 32 of 1944 which provides that the eviction order may be executed notwithstanding that an application for leave to appeal had been launched. The magistrate granted the order on 14 October 2015 and the respondent proceeded to evict the applicants.

[3] It appears from the papers that on the next day, first applicant telephoned respondent's attorneys at 8 o'clock in the morning requesting that the applicants be allowed to remain in occupation until the weekend of 17th and 18th October 2015. Respondent's attorney informed the first applicant that he had very clear instruction that applicants were to vacate the property immediately. That very morning a warrant of execution was issued by the Chief clerk of the Magistrate's Court at the behest of respondent's attorneys and handed to the Sheriff for execution. Just after noon the same day, the Sheriff began removing the goods of the applicants. Whilst doing so both the Sheriff and respondent's attorneys telephoned first applicant and informed him of the removal, first applicant said he would arrive within 30 minutes but never did.

[4] It appears that in the meantime the applicant had launched the application before Raulinga J and obtained the following order on the same day:

"1. This matter be regarded as urgent and that the formalities pertaining to service, form and time periods be dispensed with in accordance with the provisions of Rule 55 of the Rules of he (sic) Honourable Court;

2. A rule nisi operative with immediate effect be issued calling upon the respondent to show cause before the Honourable Court on the 27th October 2015 as to why prayers 3 and 4 below should not be made absolute;

3. The First Respondent forthwith be interdicted from executing the order made by the second respondent on the 26th May 2015 in the Magistrate's court, Pretoria under case number: 70756/2014, pending the outcome of the Appeal filed by the applicants before the Honourable Court under case number: A640/2015;

4. The order made by the Second Respondent on the 15th October 2015 in the Magistrate's Court, Pretoria under case number: 70756/2014 be varied and be replaced by an order to read that the applicants provide security by effecting on trust the sum of

R6000.00 per month, pending the outcome of the Appeal filed by the applicants before the Honourable Court under case no: A640/2015;

5. The costs of this application be costs in the said Appeal, however, if opposed then such costs be borne by the Respondent/s opposing so a (sic) punitive scale that may be justifiable."

[5] The first applicant telephoned the respondent's attorney at about 16h00 and informed him that he had obtained a court order stating that the Sheriff must replace all the applicant's belongings in the premises. First applicant was informed that the execution had already taken place and that in any event, neither the application nor the court order had been served on the respondent or his attorneys.

[6] As can be seen from the order the learned judge had granted a *rule nisi* returnable on 27 October 2015. It should also be noted that this order was obtained without the applicant's papers having been served on the first respondent and for that matter, I presume there was no service on the second respondent as well.

[7] On the next day, 16 October at the instance of the applicants, Raulinga J varied the original order by granting an additional order, noted as 3A which provides that:
'the first respondent is ordered and directed to restore the occupation of the premises situated at 7 Troetroe Avenue, Erasmuskloof Extension 11, Pretoria, Gauteng Province to the applicants with immediate effect.'

[8] As soon as the applicants brought the order as varied by Raulinga J to the attention of the first respondent he launched an application on the same day that is 16 October before the learned Judge to compel the applicants to provide the first respondent with copies of the papers which were filed in support of the application for the *rule nisi*. The Judge then granted the following order in favour of the first respondent:

'1. That the non-compliance with the rules be condoned and that the matter be heard as urgent in terms of rule 6(12) of the uniform rules of court.
2. The first, second and third respondent to (sic) ordered and compelled to provide the applicant and/or his attorneys of record with the first and second respondent's urgent application dated 14 or 15 October 2015, which application resulted in the order attached as annexure 'AA1' being granted, immediately. [The 3rd respondent is the second applicants' attorney].
3. Costs are reserved.'

[9] The applicants provided the first respondent with the papers as ordered and thereafter first respondent decided to anticipate the return day by filing notice of motion and opposing affidavit in the urgent court on 19 October 2015, again before Raulinga J. During arguments before me, the applicants contended that the first respondent did not seek an order in terms of Rule 6 (12) for that anticipation. I was of the view that where the applicants had themselves launched the main application in the urgent court and obtained a *rule nisi* returnable in less than two weeks, the notice to anticipate could not but be heard in the urgent court. Of importance is that the anticipation matter was heard by Mabuse J who in fact treated it as urgent, as he issued orders on an urgent basis. The first applicant's submission, in my view has no merit.

[10] The anticipation application was launched by way of notice in terms of Rule 6(8) of the Uniform Rules and it provided that the matter was to be placed before the court for adjudication on Tuesday, 20 October 2015 at 10AM. The anticipation was dealt with by Mabuse J who issued an order on 22 October 2015 which provides as follows:

"1. The matter stands down until tomorrow 23 October 2015 at 14:00;
2. The first applicant should bring an application in compliance with the court order dated 22 August 2003;
3. The first applicant should serve the said application on the first respondent by 12:00 on 23 October 2015 and;

4. The first respondent is to pay the wasted costs of today."

The reference to the court order dated 22 August 2003 is an order in terms of which the first applicant was declared a vexatious litigant in accordance with the provisions of the Vexatious Proceedings Act 3 of 1956. The first applicant had to seek the permission of the Court to litigate. I will revert to this presently.

[11] At this juncture I should point out that I raised the question about point 4 of the order in terms of which the first respondent was ordered to pay the wasted costs. It appeared to me that this is an error as the first respondent had substantially succeeded in obtaining the order that he sought. I was advised by first respondent's counsel during the hearing of the matter before me that he was not aware that it provided for the first respondent to pay the wasted costs and that it was patently an error and Mabuse J will be approached to rectify what appears to be an order erroneously granted. The applicants did not object in any way to the suggestion by first respondent's counsel. My attitude was that it was a matter that was dealt with by Mabuse J and he should be approached if any rectification of the order is to be sought.

[12] As a result of the order granted by the learned Judge the applicant or rather, in this instance, the first applicant then launched an application for condonation. As I understand it the application for condonation is concerning the first applicant having taken steps in these proceedings which emanated from the Magistrate's Court at the instance of the first respondent and is currently now in the High Court.

[13] The order by Mabuse J compelling the first applicant to comply with the court order dated 22nd of August 2003 needs some elaboration. As I said, the first applicant was declared a vexatious litigant in terms of the Vexatious Proceedings Act 3 of 1956. That order was granted on 22 August 2003. The order by Mabuse J was as result of the first respondent having contended that the first applicant was in violation of the order of 22 August 2003 as he had not sought permission from the court to litigate in this matter. Furthermore,

that as the first applicant had also been sequestrated, as an insolvent he requires the permission of his trustees to litigate in terms of the provisions of section 23(6) of the Insolvency Act 24 of 1936.

[14] In order that the main application before me could be finalised I adopted the approach that I had to make rulings with regard to the two issues about the first applicant having been barred from litigating by virtue of the order granted in 2003 and also because he was an un-rehabilitated insolvent. My view was that if those contentions of the first respondent were upheld that would be the end of the matter before me in that the main application would have had to be postponed indefinitely until such time that the applicant complied with the order made by Mabuse J and he also seek his trustee's permission. I ruled that it was not necessary for the first applicant to first apply for an order in terms of the Vexatious Proceedings Act in order to litigate. My reasons follow.

[15] Section 2(1)(a) of the Act provides for the State to seek on application that a person be declared a vexatious litigant. Sub section (1)(b) provides that any person may on application seek to have another person declared a vexatious litigant. Both sub sections (a) and (b) provide: "... no legal proceedings shall be instituted by him against any person in any court or any inferior court without the leave of that court, or any Judge thereof, or that inferior court, as the case may be...". (My underlining). No reference is made to a vexatious litigant having to seek the permission of a court to defend or resist any action or application.

[16] My view is that it was not the first applicant that initiated legal proceedings in the court *a quo*. It was the first respondent. Whatever followed since then including the proceedings in this court were a result of the application by the first respondent in the lower court to have the applicants evicted from his premises. A careful scrutiny of the Vexatious Proceedings Act in my view does not prohibit a vexatious litigant, once he has been declared as such, from defending or resisting any action or application initiated by another party. That Act provides that a litigant who has been

declared vexatious may not himself initiate any legal proceedings without obtaining consent from the court to do so.

[17] The second contention is that the first applicant is an un-rehabilitated insolvent. He was diminishing his estate by incurring legal costs without the permission of his trustees. In my view, for the purposes of this matter there is no absolute bar (see s23(6) of the Insolvency Act) to an insolvent litigating without the consent of his trustee more especially where he appears in person and in connection with eviction from a residential property he was occupying. I accordingly ruled that the matter could continue to proceed before me insofar as the main application was concerned.

[18] I turn then to the main application. As I said, the main application was heard by Raulinga J in effect as an ex-parte application and he granted the *rule nisi.* The crisp issue before me is whether the *rule nisi* should be made absolute or be discharged. The first respondent's main contention in this regard was that by the time the applicants obtained the interim order they had already been evicted; in other words "the horse had already bolted" and the order could not be put into effect. However that raises the question relating to the variation order in terms of which it was ordered that the premises be restored to the applicants. Respondent contends that what the applicant has done by obtaining the variation order was to obtain determination of an appeal against the section 78 order under the guise of an interim order. I agree.

[19] I raised several questions for both parties to address me on. Firstly, whether, if the learned magistrate had acted *unlawfully* in granting the order in terms of section 78 of the Magistrates Court Act this Court, in terms of its inherent powers to regulate the proceedings of a lower court, could intervene and remedy the situation. The parties agreed. I further put it to both parties and in particular to the applicants that if the magistrate was merely *wrong* in granting the order the correct course to follow was to launch an appeal. Again the parties agreed. I then put it pertinently to the applicants that if they contended that the magistrate was wrong then the correct course was to allow

the appeal procedure to take its course. The applicants conceded that that was indeed so.

[20] Neither in the heads of argument nor during oral submissions before me did the applicants contend that the magistrate had acted *ultra vires* or unlawfully. Indeed, the applicants have filed a notice to appeal the decision of the magistrate. In my view this determines the application before me. The appeal proceeding should take its normal course. In these circumstances it is my respectful view that the *rule nisi* must be discharged.

[21] I feel constrained to make some observations about the first applicant's conduct of this matter. He has been astute in claiming at times to act in person and at other times to be acting through an attorney or advocate. When addressing the court, he appeared personally and handed up 'heads of argument'. However, the heads have been prepared and signed by Mr Sibiya of Mtembu Sibiya Attorneys on behalf of both applicants. This has been a feature throughout the proceedings over several days in the urgent court. For example, a so-called application for condonation (actually an application for leave to litigate in terms of the Vexatious Proceedings Act) as has been filed by Mtembu Sibiya Attorneys but the first applicant appeared at various times personally or through counsel during the course of the hearing before Raulinga J and Mabuse J.

[22] The applicants raised a number or new issues in their replying affidavit in the main application. It is well settled that in application proceedings (and I might add, more so in urgent applications) an applicant must make out his case in the founding affidavit. In any event much of what is said is a repetition of what has already been said before, and much of it not directly relevant here. The applicants then argued that many of the allegations in the replying affidavit remained unchallenged!

[23] The facts of this case are strikingly similar to the facts in S.M Pitje and Another v G.T van der Merwe and Others; Case no 25095/2009 (North Gauteng High Court, Pretoria). The applicants in that case are the same

applicants in the one before me. There an eviction order was granted by this Court which they unsuccessfully attempted to overturn in the Supreme Court of Appeal. A petition to the Constitutional Court for leave to appeal to it failed as well. As in this matter, there too the matter appeared before several judges of this Court before it was heard in the Supreme Court of Appeal under the reference Gerrit Thomas van der Merwe v Simon Molefe Pitje (232/11) [2012] ZASCA 50 (30 March 2012).

[24] One would have thought the applicants would have carefully considered the judgment of the Supreme Court of Appeal before embarking on the present wave of applications in the urgent court. In my view, it justifies a punitive costs order as sought by the first respondent. In oral submission first applicant conceded that the section 78 order was an interlocutory order and thus not appealable yet he is intent on pursing an appeal. Perhaps it is time that the Vexatious Proceedings Act is amended to provide that a declared vexatious litigant may also not defend or resist legal proceedings against him or her without an order permitting such step. It may have the salutary effect of determining matters such as *in casu* at a much earlier stage.

[25] I accordingly make the following order:

> The rule nisi issued on 15 October 2015 is discharged with costs on the scale as between attorney and client including the costs reserved on 16 October 2015. The costs are to be paid by the first and second applicants jointly and severally, the one paying the other to be absolved.

RANCHOD J
JUDGE OF THE HIGH COURT

Appearances:

Counsel on behalf of first Applicant	: In person
Counsel on behalf of second Applicant	: Mr Sibiya
Instructed by	:Mtembu Sibiya Attorneys
Counsel on behalf of first Respondent	: Adv Pansegrouw
Instructed by	:DP Du Plessis incorporated
Date heard	: 29 October 2015
Date delivered	: 10 November 2015