**IN THE REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURTOF SOUTH AFRICA**

**(GAUTENG DIVISION, PRETORIA)**

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| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED. |
| (4) | SIGNATURE DATE |

**CASE NO: 24648/2016**

16/1/18

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| **MAGNUS PISTORIUS** | **APPLICANT** |
| **and** | |
| **NAOME BRUNNEHILDE MOLATUDI ZINDE** | **1ST RESPONDENT** |
| **THE OTHER UNLAWFUL OCCUPANTS ERF 1410, PRETORIUS PARK EXT 17** | **2ND RESPONDENT** |
| **THE CITY OF TSHWANE METROPOLITAN MUNICIPALITY** | **3RD RESPONDENT** |

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**JUDGMENT**

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**KHUMALO J**

***Introduction***

*[1] On 2 August 2016 Applicant brought an application in terms of s 4 (1) of the Prevention of Illegal Eviction from and of Unlawful Occupation of Land Act 19 of 1998 (PIEU) seeking an order for the eviction of Ms Naome B M Zinde, ("Zinde"), the 1st Respondent, all*

her family members and any other occupants from a property situated at 2 Nyala Street, Buffalo, The Wilds, Pretoria, ("the property"). Zinde rented the property from the Applicant and had failed to pay the monthly rental of R35 000.00 as per lease agreement she concluded with the Applicant. The Applicant also sought an order for the cancellation of the lease agreement.

[2] Without hearing the matter on the merits and by agreement between the parties, duly represented by their respective Counsel, Mr Snyman on behalf of Ms Zinde and Mr Kohn for the Applicant, a draft order that they had agreed upon, was made an order of court. In terms of the draft order Zinde was to vacate the property, by the 31 August 2016. The order also confirmed the cancellation of the rental agreement.

[3] On 2 September 2017, two days after the date she was supposed to have vacated the property, Zinde brought a late Application for leave to appeal against the agreed draft order. It was enrolled for hearing on 7 November 2017. On 14 September 2016 she launched an Application for the Rescission and Variation of the said draft order.

[4] When the parties appeared before me on 7 November 2017 for hearing of the leave to appeal Application, Zinde was represented by her attorney of record Mr Sibiya ("Sibiya") and the Applicant by Mr Kohn ("Kohn"). Mr Sibiya submitted to court that he has been instructed to bring an application for a postponement of the Application for leave to appeal pending the finalisation of the Application for Rescission and Variation. However the affidavit supporting the intended Application was not yet signed and he requested an indulgence to wait for Zinde's arrival at court to sign the Affidavit. Zinde was not at court when the proceedings commenced.

[5] The court adjourned, when it reconvened Mr Sibiya prayed for the postponement application documents to be handed over to the court and to proceed with postponement Application. The application was not ready to be heard, the Applicant has not been afforded an opportunity to respond and only served with the documents when the court reconvened notwithstanding the attorneys having known for a long time of the hearing date for the leave to appeal. As a result the court refused the hearing of the Application.

[6] While the Applicant had a few days before this hearing served an Application in terms of s 18 of the Superior Court Act of 2013, to revoke the suspension of the operation of the draft order pending the finalisation of the Application for leave to appeal. I refused the application by the Applicant for the s 18 (3) Application to be heard simultaneously with the leave to appeal. The leave to appeal application was set down for +- 1.5 hour in the morning before the formal sittings of the court therefore, having refused the application for a postponement, the arrangement was not accommodative of the hearing of any other matter except for the leave to appeal Application.

[7] At the end of the leave to appeal hearing and considering the grounds that were advanced for the Application for leave which was refused, the Court had *mero motu* requested the parties to address it on why an order for *bonis propiis* costs against Zinde's attorney Mr Sibiya should not be considered by the court.

[8] The grounds that were advanced in Zinde's affidavit filed in support of the leave to appeal were that the court erred and misdirected itself when it did not find that the

application for her eviction from the property and cancellation of the lease agreement could not succeed on the basis that:

> [8.1] The Applicant's Notice of Motion provided for the notice to oppose to be filed within 5 days instead of 10 days contrary to the practice manual of the honourable court.
>
> [8.2] The s 4 (2) notice of motion and order were served on the attorneys on 10 May 2016 instead of on Zinde. When the matter was removed from the roll the Applicant was obliged to serve a notice of set down upon Zinde.
>
> [8.3] The allegations made by the Applicant in his affidavit were self contradictory in that the Applicant is stated as the owner of the leased property when in the Deeds office registry the Pistorius Family Trust are stated to be owner of the property

[9] Mr Sibiya, was present at court when the draft order was presented to court with Counsels for both parties confirming that the order has been agreed upon between the parties and requesting that it be made an order of court.

[10] Prior to the agreed draft order that was made an order of court the matter was before the court on 3 occasions whereupon in the first instance, on 10 May 2016, the matter was removed from the unopposed roll granting Zinde an indulgence to file opposing papers and or parties to settle the matter. The Applicant was ordered by the court to re-serve the Application on Zinde c/o Sibiya Attorneys within 5 days of the order, who were Zinde's legal representative at the time and for Zinde to file her opposing affidavit by 31 May 2017. Service was then on 10 May 2016 effected upon Lucky who represented Zinde from Sibiya attorneys.

[11] Service was prior to the order of the court effected on Zinde on 6 April 2016 by affixing to the principal door of her residence, the Notice in terms of s 4 (2) of the PIEU Act 19 of 1998 that was set down for 20 April 2017. On 20 April 2016 the service of the 4 (1) Notice was authorised, setting the matter down for 10 May 2016. The Notice was then served on Zinde also by affixing at the door of her residence because according to the sheriff's report she had refused to accept service, pretending to be away from home. The court however ordered a precautionary service to be effected upon Sibiya Attorneys within 5 days of the order. Zinde was then to file her Opposing Affidavit by 31 May 2016.

[12] The parties in their argument referred to a letter filed of record by the Applicant dated June 2016 indicating that Zinde was afforded a further opportunity by the Applicant to file her papers by 10 June 2016. In the letter its further pointed out that by 21 June 2016, Zinde had still not filed any opposing papers, including a Notice to Oppose.

[13] The matter was again enrolled for hearing on 2 August 2017 and the Notice of set down served on Zinde's attorney, Mthembu Sibiya. On the date of the hearing, the status quo remained with Zinde still not having filed an Opposing Notice or Affidavit. When the draft order was presented, the respective Counsels confirmed their familiarity with its contents and their respective clients ágreement to its contents and it being made an order of court.

[14] I share the same sentiments as those raised by Mr Stevens when he referred to Lord Wagley AJ's statement in *Fourie No v Merchant Investers (Pty) Ltd & Another* 2004 (3) SA 244 (C) on 242 that:

> "In the matter before me, the parties concluded an agreement and sought for this court to make the agreement an order of court. This court exercises its discretion and sanction the agreement by making it an order of court. This court did not, as it was not required to consider the merits of the dispute between the parties. All the court was required to do was to satisfy itself that the agreement dealt with the issues obtained. A court cannot then, a party having obtained a court order, cannot then seek to undo the agreement by seeking to clothe its apparent desire not to be bound by its end of the bargain, by seeking to appeal against the order, which made the agreement an order of court. To grant leave in such circumstances would have the effect of granting a party leave to appeal against its own decision and not the decision of the court."

[15] Sibiya in Reply has argued that the case is different in that in *Fourie* the litigants themselves concluded an agreement presented to court by Counsel. In this instance he said Zinde could not communicate properly with her attorney, pertaining to instructions. He however confirmed that Counsel has to act in accordance with their client's instructions. He then turned around and said there was no consensus between their clients on what transpired in court and reiterated the 3 grounds of appeal he has already mentioned. There was no explanation in Zinde's Affidavit or by him about what happened on 2 August 2016 when the order was made. The allegation on there being no consensus was made by Sibiya from the bar.

[16] Furthermore there was no evidence under oath to indicate on whose instructions did then Counsel proceed when he indicated that Zinde agrees to the draft order. If Sibiya as the attorney alleges to have had no authority to instruct Counsel and now approaches court under the disguise that client did not give instructions, in order to nullify the order, the allegation must be made under oath with a full explanation of how it happened that Counsel confirm that it was agreed that the draft order be made an order of court. The failure to deal with that indicates the negligence of Zinde's legal representation in dealing with the matter, for which Sibiya must carry the responsibility and costs occasioned thereby.

[17] In *Machumela v Santam Insurance Company Ltd* 1977 (1) SA 660 (AA) at 664B it was stated that:

> "Regard being had to the fact that no blame attaches to the appellant himself in connection with the failure to comply with the Rules of Court, that his attorney was at fault and that the Rule of Court 5 (4) (c) was not invoked, I consider that justice requires that a special order as to the costs be made."

[18] In *South African Liquor Traders Association and Others v Chairperson, Gauteng Liquor Board and Others* 2009 (1) SA 565 (CC) the following was stated at 582 [54]:

> "An order of costs *de bonis propriis* is made against attorneys where a court is satisfied that there has been negligence in a serious degree which warrants an order for costs being made as a mark of the court's displeasure. An attorney is an officer of the court and owes a court an appropriate level of professionalism and courtesy."

**[19] Notwithstanding, there are also flaws in the issues raised as Zinde's grounds for seeking leave to appeal the draft order. Regarding the practice directive, on page 85 it directs that:**

> **[1.1] The Notice of Motion must follow Form 2A.**
>
> **[1.2] The Notice of Motion must allow not less than 5 days from date of service of the application for the delivery of a notice of intention to oppose. 'sdirect that the opposing party has 5 days within which to file its Notice of Opposition.**

**As already illustrated the Application was served at Zinde's residence by the sheriff by affixing at the door and further service on the attorney was at a direction of the court.**

**[20] During the presentation of the arguments Mr Sibiya argued without denying the instruction that were given to counsel to consent to the draft order that even though he is an attorney who was present at court when the order was agreed upon and presented to the court by Counsel, he says he only realised the improper service later and when he did, he was instructed by the client to bring an application for leave to appeal the draft order.**

**[21] The problem with that argument is that not only did Zinde have the advantage of his representation and presence at court but also that of Mr Snyman, a very senior junior Advocate who not only had sight of the documents since at least 10 May 2016 but both also had an opportunity to go through the papers numerous times to familiarise themselves with the issues raised to make an informed decision whether or not to compromise Zinde's rights to oppose the Application. Therefore the conveyance of her consent to the draft order would not be taken lightly by the court. Furthermore no explanation is offered why the attorney and counsel were not able to identify the alleged defects in the application or if they were identified before the consent why they were not raised until then. The order in this instance is not appealable.**

[22] Mr Sibiya also raised discontentment about the fact that although the Applicant is not an owner of the property, he is referred as one in the lease agreement. He argued that since his client did not conclude the lease agreement with the owner, it was not valid. The Applicant therefore lacks the *locus standi* to bring up the application. He says on that basis the court did not have jurisdiction to hear the matter.

[23] For eviction a Plaintiff does not have to allege and prove any title to the property from which the Defendant is to be evicted; see *Broompret Investments (Pty) Ltd v Paardekraal Concession Store (Pty) Ltd* 1990 (1) SA 347 (A) p351. He only has to prove the right of the Defendant to possess ( eg, lease with the Plaintiff as lessor through his ownership or as a person in charge), the termination of the right, the continued occupation of the property by the Defendant or its holding through the Defendant and compliance with the PIEU Act.

[24] The Applicant is the owner of the property in that ownership by the trust of property is held through the trustee. He is the owner as well as the lessee of the property and both capacities bestows the right upon him to confer the right upon the Defendant to possess. The lease therefore concluded by the Applicant as the owner is a valid lease.

[25] Nevertheless lack of title is not available to Zinde as a defence since the validity of the lease does not depend on the title of the landlord. In *Mighty Solutions t/a Orlando Service Station v Engen Petroleum Limited & Another*, 2016 (1) SA 621 (CC) it was held that the common law rule that the subtenant cannot raise the sub-lessor's lack of title as a defence in an action for eviction, flows naturally from the rule that a valid lease is not dependent on the title.

[26] Due to Sibiya's failure to explain his conduct of having not raised these issues by way of filing an opposing affidavit as directed by the court on 10 May 2016, instead consenting to the draft order, which he now disowns by filing the application for leave to appeal and bringing the said issues, even though there are no prospects of success if leave is granted.

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

[27.1] Mr Sibiya of Sibiya Mthembu Attorneys is ordered to pay the costs *de bonis propiis* occasioned by the dimissal of the application for leave to appeal.

**N V KHUMALO J**

**JUDGE OF THE HIGH COURT**
**GAUTENG DIVISION, PRETORIA**

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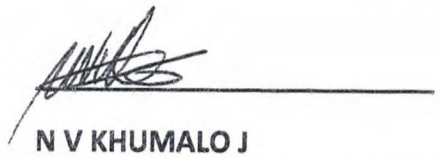
| **O.b.o Applicant/1st Respondent:** | **Mr Sibiya** |
| **Instructed by:** | **Mthembu Sibiya Attorneys**<br>**Tel: (012) 770 4045**<br>**Fax: (012) 323 4008**<br>**Ref: VS/LP/494/05/2016** |
| **O.b.o Respondent/Applicant:** | **Adv Kohn** |
| **Instructed by:** | **Gerhard Botha & Partners Incorporated**<br>**Tel: (012) 347 0480**<br>**Fax: (012) 347 6839**<br>**Ref: Mr Z Slabbert/Lb37-16**<br>**Email: Zander@bothapartners.co.za** |



N V KHUMALO J

JUDGE OF THE HIGH COURT
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