REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

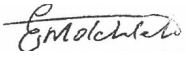
GAUTENG, JOHANNESBURG

CASE NO: 81006/2015

DELETE WHICHEVER IS NOT APPLICABLE

1. REPORTABLE: **NO**

2. OF INTEREST TO OTHERS JUDGES: **NO**
3. REVISED

23 February 2017 

DATE SIGNATURE

In the matter between:

KHALIL AHMED PROPERTIES CC **Applicant**

And

THE UNLAWFUL OCCUPIERS OF

ERF 1453 JOHANNESBURG **First Respondents**

THE CITY OF JOHANNESBURG **Second Respondent**

Heard: 16 February 2017

Delivered: 23 February 2017

JUDGMENT

Molahlehi J

Introduction

[1] This is an urgent application in terms of which the applicant seeks to have the first respondents (the respondents) evicted from the property situated at 271 Bree Street Johannesburg. This order which is sought under Part "A" of the notice of motion is sought pending the determination of Part "B". The application is brought in terms of rule 6 (12) of the Uniform Rule of the Court (the Rules).

[2] In Part "B" of the notice of motion the applicant will seek an order essentially compelling the second respondent to determine whether any of the respondents are of vulnerable demographic disposition which would entitle them to temporary accommodation by the second respondent.

[3] This matter has a protracted history of litigation between the parties. I do not intend dwelling into the details about that history save to say the following: During January 2014 the applicant instituted the eviction proceedings against the respondents on the urgent basis. Those proceedings were opposed by the respondents. The application came before Mphahlele J during July 2014. The outcome was that the second

respondent was directed to file a report regarding the alternate housing for the respondents.

[4] Another order was made by Tsoka J on 28 May 2015 the essence of which was again to order the second respondent to furnish the court with the report regarding the alternate housing for the respondents. The order further required the second respondent to indicate which of the respondents were eligible for temporary emergency accommodation assistance and what temporary emergency accommodation assistance would be provided for those who qualified.

[5] On 15 October 2015, Meyer J made the order similar to that of Tsoka J setting out in details what the second respondent was to do and also what was required of the respondents.

[6] On 3 December 2015, Wepener J made the order evicting the all the respondents from the property in question. The order reads:

> "1. The First Respondent and/or all persons in occupation of the premises known as ERF 1453, Johannesburg Township, Registration Division IR, Province of Gauteng and situated at 271 Bree street, Johannesburg are to vacate the property within thirty (30) days of granting of this Order, failing which the Sheriff is duly authorized to evict same."

[7] Aggrieved by the outcome of the above order the respondents filed an application for leave to appeal, assisted by SERI. It would appear from the applicant's founding affidavit that it subsequent to the application for leave to appeal by the first respondents, filed an application in terms of s 18(3) of the Superior Courts Act (the Act).[1] Section 18 of the Act provides:

> "18. (1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.
>
> (2) Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.

[1] Act number 10 of 2013.

(3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition, proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders."

The reason for urgency

[8] The reasons for the urgency as appears for the applicant's founding affidavit can be summarised as follows:

a. The length of time it has taken for the applicant to use or enjoy its property.

b. The unusual step it has taken to identify and undertake to subsidise the alternate accommodation for the respondents pending the determination by the second respondent as to whether the respondents qualify for temporary emergency accommodation assistance.

c. The applicant cannot afford to wait any longer whilst it continues to pay for the rates and taxes.

d. The applicant is suffering damages on a daily basis because it does not receive any rental income from the building.

[9] As indicated above the applicant's application is brought in terms of rule 6 (12) of the Rules. The relevant provisions of rule 6 (12) of the Rules read:

> "(a) In urgent applications the court or a judge may dispense with the forms and service provided for in these rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these rules) as to it seems meet.
>
> (b) In every affidavit or petition filed in support of any application under paragraph (a) of this sub-rule, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at hearing in due course."

[10] In dealing with the provisions of rule 6 (12) of the Rules the court in **Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another (t/a Makin's Furniture Manufacturers),**[2] had the following to say:

> "Mere lip service to the requirements of Rule 6 (12) (b) will not do and an applicant must make out a case in the founding affidavit to justify the particular extent of the departure from the norm, . . ."

[2] 1977 (4) SA 135 (W) at 137F.

[11] The same sentiments, similar to the above, are expressed in **East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others**,[3] where the court said:

> ''[6] The import thereof is that the procedure set out in rule 6(12) is not there for taking. An applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the Applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course. The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in an application in due course. The rules allow the court to come to the assistance of a litigant because if the latter were to wait for the normal course laid down by the rules it will not obtain substantial redress."

[12] In the present matter the applicant makes reference to the various orders that had been issued by the court. The most important order in relation to the applicant's effort to assert its right in relation to the property is that which is quoted above.

[13] It is eminently clear that the respondents were ordered to vacate the property within thirty (30) days of the granting of the order 3 December 2015. The order further authorized the Sheriff to evict the respondents in case they did not comply.

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[3] (11/33767) [2011] ZAGPJHC 196 (23 September 2011).

[14] The respondents did not comply with the court order but as indicated above instituted leave to appeal proceedings against the order. Except for stating that the leave to appeal "was considerably out of time," the applicant does not say what happened to that application.

[15] It is trite that leave to appeal would suspend the enforcement of the eviction order unless the court ordered otherwise in terms of s 18 (3) of the Act. This, in the present matter, means that the eviction order was suspended upon the filing of the leave to appeal. This assumption is made on the basis that there is no evidence indicating that the leave to appeal lodged by the respondents was dismissed due to the failure to comply with the timeframe for lodging same as suggested in the applicant's founding affidavit.

[16] The deponent to the founding affidavit indicates at paragraph 37 of his affidavit that the applicant made an application in terms of s 18 (3) of the Act. There is however, no evidence as to what happened to that application. In other words there is no evidence as to whether the application was successful or not. If the application was successful it would mean that the court would have ruled otherwise in relation the suspension of the order arising from the leave to appeal. This court is left in darkness in as far as this issue is concerned and thus the only reasonable inference to draw is that the application in terms s18 (3) of the Act was unsuccessful, in which case the eviction order remain suspended pending the leave to appeal or the appeal.

[17] The applicant seems to suggest that the respondents' leave to appeal is limited to the issue of the provision of temporary accommodation only. If this interpretation is correct, it would then mean that the part of the order relating to the eviction is not affected by the application for leave to appeal and thus in law that part of the order could be enforceable. If this argument was to be accepted then the question would be why not enforce that part of the order to obtain the relief that is now been sought on the urgent basis in the present matter.

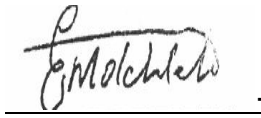
[18] In my view the proper reading of the respondents' application for leave to appeal is far from limiting that application to the issue of emergency temporary accommodation only. In this respect the respondents' notice of motion states inter alia: "(a) for leave to appeal against the order of His Lordship Justice Wepener on 3 December 2015, wherein he granted an eviction order" It is also stated that "the Court erred in granting the eviction order" The same is repeated in paragraph 9 of the supplementary grounds of leave to appeal.

[19] In my view, the relief which the applicant is seeking in this urgent application is the same as that which it obtained on 3 December 2015. The operation of that relief was suspended by the application for leave to appeal by the respondents which is still pending before this court. There is no evidence that the court has ordered otherwise in relation to the operation or execution of that order consequent the application for leave to appeal by the respondents.

[20] In light of the above I am of the view that the applicant's application stands to fail for lack of urgency. I see no reason why costs should not in the circumstances follow the result.

Order

[21] In the circumstances the applicant's application is struck off the roll for lack of urgency with costs.



E M Molahlehi

Judge of the High Court; Johannesburg

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