REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

24 APRIL 2020 **RT SUTHERLAND**

APPEAL CASE NO: A5007/2020

CASE NO: 23102/2019

In the matter between: -

CANDYLAND BEDFORDVIEW (PTY) LTD **FIRST APPELLANT**

(Registration number: 2015/126143/07)

CATHERINE LOUISE MITCHELL **SECOND APPELLANT**

AKP PROPVEST 60 (PTY) LTD **THIRD APPELLANT**

(Registration number: 2005/015037)

and

DENISE GLORIA JONES **RESPONDENT**

JUDGMENT

SUTHERLAND ADJP:

[1] This in an appeal regulated by section 18 of the Superior Courts Act 10 of 2013 (SCAct). Section 18(4)(iii) stipulates that such an appeal must be dealt with "….as a matter of extreme urgency".

[2] The three appellants were initially respondents (called hereafter collectively the Candylanders) in an application brought by then applicant (now respondent in the appeal; called hereafter Jones). The application was for the cancellation of the sale of fixed property to the second and third respondents. The Candylanders did not file an answering affidavit. A judgment was taken by default of an appearance which was granted by Mtati AJ. Thereafter, the Candylanders filed a notice of application for leave to appeal. Jones then filed an application in terms of section 18(2) and (3) of the SCAct to implement the order of Mtati AJ despite any process of appeal being prosecuted. The two matters came before Nel AJ. The Candylanders withdrew the application for leave to appeal. On 2 December 2020, Nel J granted an order as contemplated in section 18, having the effect of implementing forthwith, the order granted by Mtati AJ.

[3] It is the order and judgment of Nel AJ that is before this court. The Candylanders sought to appeal that order. Initially they fumbled over the correct procedure, ostensibly ignorant of the provisions of section 18. After reorienting itself to its right to an automatic appeal, they however failed to act with expedition to facilitate a hearing. The parties were put on terms to file papers by certain deadlines; the Candylanders are non-compliant therewith. As a result Jones took the initiative to set it down for hearing. The attorney representing the Candylanders withdrew on 20 March 2020.

[4] The Candylanders are not present at this hearing despite notice having been effective. We were informed from the bar that Adv. Mokoko, saying she had a mandate to represent the Candylanders, made contact with Jones' attorney of record, earlier during this week. She later informed that attorney that there would be no appearance at the hearing.

[5] Subsequent thereto, Jones' attorney received correspondence to the effect that the third appellant, AKP Propvest (Pty) Ltd was the subject of a winding up order granted on 6 December 2020. (Not without significance, that order was taken 4 days after the order was granted by Nel AJ.) The writer of the letter contended that this was a fact that inhibited the appeal from proceeding.

[6] However, the notice of appeal against the order of Nel AJ was filed on 3 February 2020. It was not filed by the liquidator. *Ipso Facto*, the notice of appeal is a nullity. As a result, on that ground alone, the appeal falls to be dismissed as regards AKP Propvest (Pty) Ltd. The last minute communication of these circumstances and the concealment of the liquidation since that order was granted are consistent only with an attempt to manipulate and abuse the process of the court. It is plain that the approach taken was to derail these proceedings.

[7] As regards the other two Candylanders, the considerations relating to the liquidation order in respect of AKP Propvest 60 (Pty) Ltd do not apply.

[8] It is plain the appeal is meritless. Nel AJ addressed the appeal in two parts.

[9] First, he referred appropriately to the insuperable barrier to prosecuting this appeal given that the order of Mtati itself was, on the authority of *Pitelli v Everton Gardens Projects CC* 2010 (5) SA 171 (SCA) not appealable. That case is authority for the proposition that an appeal is competent only when proceedings in the lower court are exhausted. Because a default judgment may yet be rescinded, the matter cannot be ripe to be appealed. On this ground alone the appeal and also the initial application for leave to appeal are incompetent.

[10] Second, Nel AJ considered the criteria applicable to the grant or refusal of such an order to put into force an order that was susceptible to the appeal process. The critical aspect is whether irreparable harm is done to a party if satisfaction of the order is delayed by the appeal process. (see*: Incubeta Holdings (Pty) Ltd v Ellis and Another* 2014 (3) SA 189(GSJ)). Demonstrably there is irreparable harm, inasmuch as the asset; i.e. the house which is the subject of the order of Mtati AJ, is vital to Jones generating a revenue stream to support herself. No contradiction of this allegation of fact is made. On the other hand, Candyland is a business running a crèche. As mentioned in the Judgment of Nel AJ, they can set up business elsewhere. The balance of probabilities is that the harm to Jones overwhelmingly trumps any harm to the Candylanders.

[11] One aspect of this matter warrants special attention. Reference has already been made to the ruse contrived to derail the proceedings. The contentions advanced in support of the appeal are preposterous and in our view reveal a mala fide basis for the appeal. A laughable claim is made about the constitutional rights of children and parents to use these premises as a crèche is made. It needs merely to be stated to be dismissed. Other specious arguments are also advanced, including that the PIE Act applies, when plainly it cannot, as there is no evidence adduced that the premises are residential; by contrast the papers show it is used as a business

premises; i.e. to run a crèche. To litter court papers with this sort of nonsense is an abuse of the judicial process and suggests that mere delay is the primary objective. The conduct of the Candylanders shall be visited with a punitive costs order.

[12] The appeal must be dismissed.

[13] These proceedings were convened using Zoom video conferencing platform. They have been recorded.

The Order

(1) The appeal is dismissed.

(2) The order of Nel AJ is confirmed.

(3) The costs of the respondent shall be paid jointly and severally by the appellants on the attorney and client scale, the one paying the others to be absolved.

SUTHERLAND ADJP

I agree.

TSOKA J

I agree.

WANLESS AJ

Date of Hearing: 23 April 2020

Order and Judgment: 23 April 2020

Appearances:

No appearance for the appellants

For respondent:

Adv T Moretlwe,

Instructed by Webber Wentzel