

REPUBLIC OF SOUTH AFRICA



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

- (1) REPORTABLE: NO / YES
(2) OF INTEREST TO OTHER JUDGES: NO / YES
(3) REVISED.

CASE NO: **43334/2018**

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SIGNATURE

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DATE

In the matter between:

ZWIEGERS, WILLEM BAREND JOHANNES

Applicant

and

BETHLEHEM, LAEL IRENE

First Respondent

COHEN, NINA

Second Respondent

LEWIS, DAVID HARRIS

Third Respondent

MORRIS, BRETT ANTONY

Fourth Respondent

WYNCHANK, DORA SOULEIKA REBECCA MASCHA

Fifth Respondent

JUDGMENT

(Application for leave to appeal)

Lapan AJ:

INTRODUCTION

[1] On 7 May 2020, the judgment and order of this court were handed down in the application for the eviction of the applicant from property acquired by the respondents at a sale in execution (the main application).

[2] On 1 July 2020, the applicant brought this application for leave to appeal which application ought to have been brought by no later than 28 May 2020. The applicant seeks condonation for the 5 (five) week delay in bringing this application.

[3] The respondents bring an application to vary the order granted on 7 May 2020, in relation to the eviction date, in view of the regulations made pursuant to the Disaster Management Act, 57 of 2002, which take account of the ongoing COVID-19 national lockdown which commenced on 26 March 2020. The applicant does not oppose the application to vary the order.

CONDONATION APPLICATION

[4] The applicant admits to receiving a copy of the judgment on 7 May 2020.

[5] The applicant states that he is 60 years old, asthmatic and that it took him some time to “*digest the judgment*”. He also states that he could not access the documents because of the national lockdown which also made it impossible to obtain assistance from his legal representatives. He also alleges that most of his documents were obtained by mid-June and his legal representatives were instructed thereafter although the lockdown still made it difficult to finalise this application.

[6] Condonation is not for the mere asking and sufficient cause must be shown, having regard to the various factors to be considered, to determine whether it would

be in the interests of justice to grant condonation.¹

[7] The applicant relies extensively on the national lockdown as having precluded him from gaining access to his files and to his legal representatives yet he provides no details as to what efforts were made in this regard and to what extent his age and medical condition impeded his ability to attend to this application.

[8] Alert level 4 of the national lockdown commenced on 1 May 2020 and, based on the directions issued in terms of regulation 4(2) of the regulations made under the Disaster Management Act, published in Government Notice 489 in Government Gazette No. 43268 of 4 May 2020, legal practitioners were permitted to provide specific services as listed in Annexure 1 thereof. Attending on applications for leave to appeal is listed as a permitted service.

[9] The applicant fails to explain why he could not brief his legal representatives to provide this service timeously after receiving a copy of the judgment. The explanation for the delay is not reasonable.

[10] Notwithstanding the aforesaid, the delay is not extensive in the circumstances of this matter and having regard to the fact that the eviction could, in any event, not proceed on 30 June 2020, due to changes in the regulations made pursuant to the lockdown which took effect after the judgment was handed down. The main application is important to both sides and finality is required in regard to the eviction proceedings.

[11] For the above reasons, it is considered to be in the interests of justice to condone the late filing of this application.

¹ *Grootboom v National Prosecuting Authority and Another* 2014 (2) SA 68 (CC) para [23].

GROUNDS OF APPEAL

[12] The grounds of appeal may be summarised as follows:

- [12.1] the sheriff lacked the authority to sell the property to the respondents due to the prior sale of the property by the previous owner, Ms Guedes, to the applicant;
- [12.2] the pending litigation in which the applicant is seeking to enforce the prior sale concluded with Guedes renders the matter *lis pendens* and precludes eviction pending the outcome of that litigation;
- [12.3] the applicant is exercising an improvement lien over the property, having taken possession of the property pursuant to the sale agreement concluded with Guedes and, in terms thereof, completing the building on the property and thereby incurring expenses in excess of R1,6 million;
- [12.4] since the applicant had at all times remained in possession of the property, the sale in execution did not defeat the lien; and
- [12.5] to the extent that this court held that an attachment and sale in execution defeats a lien, then the judgment conflicts with two earlier judgments which determined that a lien is not defeated by an attachment and a sale in execution of the property.

[13] These grounds are considered *ad seriatim* below.

The sheriff's authority to sell the property and the defence of lis alibi pendens

[14] The applicant alleged that he concluded a valid sale agreement with Guedes and that, in terms of section 22 of the Alienation of Land Act, 68 of 2001 (the Act), he was entitled to take transfer of the property but that the sheriff had refused to sign the necessary transfer documents. The matter is alleged to be *lis pendens*.

[15] The applicant does not challenge my judgment in relation to the application of the doctrine of *res litigiosa*. This principle permits successive sales of the property subject to the right of the first purchaser to re-acquire the property upon succeeding in pending litigation concerning the right of ownership of the property.

[16] Therefore, the applicant's reliance on the defence of *lis pendens* is misplaced as the successive sale of the property to the respondents is not precluded due to the application of the doctrine of *res litigiosa*.

[17] The applicant contends that the sheriff lacked authority to sell the property to the respondents since section 22 of the Act obliged the sheriff to transfer the property to him. This contention ignores the order made by the honourable Acting Justice Brenner, on 21 June 2017, pursuant to the applicant's first urgent application to interdict the sale in execution and in which application the applicant relied on his right to take transfer of the property in terms of section 22 of the Act (Brenner order).

[18] As held in paragraphs 13 and 14 of my judgment, the Brenner order authorised the sheriff to sell the property if the applicant failed to make arrangements, in terms of section 22 of the Act, to pay the amounts owing to the mortgagees. Since the applicant failed to make such payment arrangements timeously, the sale in execution took place as provided for in the Brenner order.

The improvement lien

[19] The applicant asserted an improvement lien, for the first time, in the main application. As held in paragraphs 32 to 36 of my judgment, the applicant had, at all times, required the sheriff to effect transfer of the property to him, in terms of section 22 of the Act, based on the sale agreement concluded between him and Guedes. He did not lay claim to a lien over the property.

[20] In this application, the applicant points out that he took possession of the property pursuant to the sale agreement concluded with Guedes, yet he does not dispute that he failed to make the sheriff aware of his right of retention over the property as explained in paragraphs 32 to 36 of my judgment.

[21] As held in paragraph 78 of my judgment, the respondents paid the realisable value obtainable for the property at the sale in execution. The applicant may well have a contractual claim, or an enrichment claim, against Guedes for the improvements made to the property but this does impugn the respondents' right to be in possession of the property.

Conflicting judgments

[22] The applicant contends that, if my judgment is interpreted to mean that an attachment and sale in execution defeats a lien, then it is in conflict with two earlier judgments. However, upon careful analysis of these earlier judgments, it is clear that there is no such conflict.

[23] In paragraphs 30 to 32 of my judgment, the reliance on *Testa* is in support of the proposition that the sheriff is permitted to transfer ownership and possession of

the property but that dispossession does not occur merely upon the attachment of the property.²

[24] The applicant claims that the decision in *Levy v Tyler*³ is in conflict with my judgment. In *Levy*, it was held that, at the time of purchasing property at a sale in execution, the plaintiff knew that the defendant claimed possession of the property pursuant to a builder's lien. In the circumstances, the court held that the plaintiff was bound by the lien to the same extent as the previous owner had been. This case supports the view that where the possessor makes the sheriff and the prospective buyer aware of his lien, the property is sold subject to the lien.

[25] In the present matter, the applicant consistently claimed the right to take transfer of the property in terms of section 22 of the Act without laying claim to a lien. Even in this application for leave to appeal, the applicant asserts his right to take transfer of the property which was denied him because of the sheriff's refusal to sign the necessary transfer documents. The failure to assert a lien at the time of the attachment and sale in execution is dispositive of the applicant's claim to retain possession of the property.

[26] Another decision relied on by the applicant, as being a conflicting judgment, is *Cooper & Hewson v Johnstone & Co*⁴. In this case, the appellants' attorney gave notice to the persons present at a sale in execution, and to the respondent (the prospective buyer), that the appellants had possession of, and would be retaining, the property until paid for work done on certain buildings. The court held that, although the appellant may well have been required to lay claim to the lien with the Master, the appellant had possession of the building and exercised a right of retention in terms of the special right allowed him by law.

² *Builder's Depot CC v Testa* 2011 (4) SA 486 (GJ)

³ 1933 CPD 377

⁴ (1899) 6 OFF Rep 130

[27] The above judgment is not in conflict with my judgment and is, based on the facts, consistent with the judgment in *Levy* that the applicant must assert his right of retention at the time of the sale in execution.

[28] Rule 45(9) of the uniform rules of court requires that the attachment of property subject to a lien be dealt with by the sheriff *mutatis mutandis* in accordance with rule 45(8)(b) which requires the sheriff, *inter alia*, to give notice to all interested parties of the attachment. Thus, if no lien is asserted, the property is sold without a lien and the possessor is not entitled to retain possession of the property.

THE TEST FOR GRANTING LEAVE TO APPEAL

[29] Section 17(1)(a) requires that leave to appeal only be given where the judge is of the opinion that (i) the appeal would have a reasonable prospect of success; or (ii) there is some other compelling reason why the appeal should be heard including conflicting judgments [underlining added].

[30] It has been held that the test for granting leave to appeal is now more stringent compared to the test in the (repealed) Supreme Court Act, 59 of 1959, having regard to the use of the word “only” in section 17(1)(a). Furthermore, the use of the word “would” in section 17(1)(a) “*indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against*”.⁵

[31] In the present matter, it cannot be said, with a measure of certainty, that the appeal would have a reasonable prospect of success.

⁵ *S v Notshokovu* [2016] ZASCA 112, para 2, *South African Breweries (Pty) Ltd v The Commissioner of the South African Revenue Services* [2017] ZAGPPHC340, para 5. *Acting National Director of Public Prosecutions v Democratic Alliance* 2016 JDR 1211 (GP) para 25.

[32] The test of reasonable prospects of success on appeal is a dispassionate decision, based on the facts and the law, that the appeal court could reasonably arrive at a conclusion different to that of the court *a quo*. In this regard, it has been held that there must be a “*sound, rational basis for concluding that there are prospects of success on appeal.*”⁶

[33] Having considered the grounds of appeal, and having regard to the other findings in my judgment which are not sought to be challenged and which would present insurmountable obstacles to succeeding on appeal, there is no sound, rational basis for concluding that there are prospects of success on appeal.

[34] There is also no compelling reason for granting leave to appeal as the earlier judgments relied on by the applicant as being in conflict with my judgment are in fact, upon careful analysis, consistent with my judgment.

[35] Since the application for leave to appeal does not satisfy the test formulated in sections 17(1)(a)(i) and (ii) of the Superior Courts Act, 10 of 2013, this application for leave to appeal ought to be dismissed with costs, including the wasted costs occasioned by the postponement of the hearing on 28 August 2020.

APPLICATION FOR VARIATION OF THE ORDER

[36] The respondents seek leave to vary the order in terms of rule 42(1). The order had made provision for the eviction to take place on or before 30 June 2020 and, in the event that the lockdown precludes eviction on or before the aforesaid date, then the date is revised to be a date which is 30 days after the lockdown restrictions have been lifted.

⁶ *S v Smith* 2012 (1) SACR 567 (SCA) para 7.

[37] In terms of regulation 19 of the regulations made pursuant to section 27(2) of the Disaster Management Act, 57 of 2002, evictions shall be stayed and suspended during Alert Level 4 unless the court decides that it is not just and equitable to stay and suspend the order until the last day of the Alert level 4 period. This regulation applied from 1 May 2020.

[38] In terms of regulation 36 of the regulations made pursuant to section 27(2) of the Disaster Management Act, 57 of 2002, evictions may be stayed and suspended until the last day of Alert Level 3 unless the court decides that it is not just and equitable to stay and suspend the order as aforesaid. This regulation applied from 1 June 2020 unless otherwise indicated.

[39] Since the applicant was required to vacate the property on or before 30 June 2020, in terms of the order granted on 7 May 2020, the eviction fell within the Alert Level 3 period which applied from 1 June 2020.

[40] In terms of regulation 53 of the regulations made pursuant to section 27(2) of the Disaster Management Act, 57 of 2002, a court may suspend or stay any order for eviction until after the lapse or termination of the national state of disaster unless the court is of the opinion that it is not just or equitable to suspend or stay the order having regard to various factors listed in the regulation, in addition to any other relevant consideration. This regulation applies during Alert Level 2 which took effect on 18 August 2020 and which remains in force at the date hereof.

[41] For the reasons set out below, this court is of the opinion that, in the circumstances of this matter, it would not be just and equitable to stay or suspend the eviction of the applicant from the respondents' property.

[42] The respondents, as the persons in charge of the property, gave notice to the applicant, on 31 July 2018, to vacate the property on or before 31 August 2018. To date, the applicant has refused to do so.

[43] The applicant has been in occupation of the property since 1 April 2016 and has consistently failed to pay the municipal charges levied in respect of the property including the charges for the consumption of water and electricity. Furthermore, the respondents are required to service the mortgage bond registered over the property but without deriving any benefit as owners of the property. These factors clearly indicate that the respondents are prejudiced by the applicant's continued occupation of the property. The applicant has consistently failed to indicate what prejudice, if any, he would suffer if he is evicted from the property.

[44] In the circumstances, it is just and equitable to vary the order for the eviction of the applicant from the property, giving the applicant at least 4 (four) weeks within which to vacate the property.

[45] The following order is made:

1. Prayer 2 of the order granted on 7 May 2020 is deleted and replaced with a new prayer 2 to read as follows:

*“The first respondent and all those who occupy the property by, through or under him, are ordered to vacate the property on or before **2 October 2020.**”*

2. The applicant is directed to pay the costs of this application including the wasted costs occasioned by the postponement of the hearing on 28 August 2020.

AJ LAPAN

**ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG**

COUNSEL FOR THE APPLICANT:	Mr W Boonzaier
APPLICANT'S ATTORNEYS:	Mashabane and Associates Inc
COUNSEL FOR THE RESPONDENTS:	Mr C van der Merwe
RESPONDENTS' ATTORNEYS:	Vermaak and Partners Inc
DATE OF HEARING:	1 September 2020
DATE OF JUDGMENT:	4 September 2020