

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 28030/2019

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

[Handwritten signature] *23/11/2021*

In the matter between:

FARAI MATSIKA

Applicant

(in the reconsideration application)

(Applicant a quo and respondent in the appeal)

and

MOSES CHINGWENA

Respondent

(in the reconsideration application)

(Respondent a quo and appellant in the appeal)

JUDGMENT

Delivered: By transmission to the parties via email and uploading onto Case Lines the Judgment is deemed to be delivered. The date for hand-down is deemed to be 23 November 2021

SENYATSI J:

- [1] On 22 September 2021, I issued an order confirming that the warrant of eviction issued under this case number is interdicted and stayed pending the outcome of the appeal under case number A5047/2021. The reasons for the order are as set out below
- [2] The *rule nisi* confirmation order was issued in spite of the contention by the respondent (the applicant) in the main application for eviction that the appeal which gave rise to the confirmation of *rule nisi* had lapsed.
- [3] The respondent argued that the appeal had lapsed on the basis that when the notice of appeal was launched the appellant failed to file the power of attorney on time and that for that reason, the *rule nisi* should be discharged.
- [4] The interim order of *rule nisi* was anticipated by the respondent and came before me in the Urgent Court. After having considered the matter I concluded that the application was urgent to anticipate the rule nisi.
- [5] On perusal of the papers of record, it became clear to this court that Mr Chingwena's notice of appeal was timeously filed and delivered on 10 May 2021 and the filing thereof is common cause between the parties as proof of service has been uploaded on case lines

- [6] It also became evident to this court that the application for the appeal hearing date had also been done on time on or about 3 August 2021 and proof of service is to be found on case lines under section 026.
- [7] In spite of these clear steps to prosecute the appeal, respondent took advantage of the non-filing of the special power of attorney and anticipated the *rule nisi* in the Urgent Court and as said, the Court refused to discharge *the rule nisi*.
- [8] Mr Matsika had approached the Urgent Court on Ex Parte basis when he was confronted with the warrant of eviction which was brought to his attention by the Sheriff of this Court and Windell J granted interim relief suspending the execution of the warrant of eviction pending the appeal. When the matter came before me after being anticipated by Mr Chingwena to discharge the *rule nisi*.
- [9] The common facts are that the parties are maternal cousins, businessmen and business partners in a business venture locally and outside of the Republic. This is confirmed in the founding affidavit.
- [10] The parties will be referred to as in the main application for convenience sake.
- [11] It is also common cause that Mr Matsika (the applicant in the main application) is the owner of an immovable property described as Section NO 16, The Hyde Close, Hyde Park, Johannesburg per Title Deed No: ST2004/180465 ("the property")
- [12] Furthermore, it is also common cause that the parties lived together in the said property by virtue of their relationship as maternal cousins.

- [13] After Mr Chingwena got married in 2012, his wife wanted a more space and was not amenable to continue staying in the property as she wanted a more spacious and upmarket house. This led to Mr Chingwena renting another house and leaving Mr Matsika to stay in the property for free, on condition that he would pay the municipal and electricity bills.
- [14] Unfortunately, the fortunes of Mr Chingwena turned for the worse and as a result, he moved back to the property where Mr Matsika had continued to live. Mr Matsika was served with the notice to vacate the property which he did not comply with.
- [15] An eviction application was launched and defended. The application was argued before court which culminated in an eviction order being granted on 27 November 2020 by Skibi AJ.
- [16] Leave to appeal was noted as per notice dated 15th December 2020 which was served on 17 December 2020 to Mr Chingwena's legal representatives.
- [17] Notice to oppose leave to appeal which is dated 6 January 2020, obviously a print error, instead of the year 2021, it was referred to as 2020.
- [18] The Heads of argument by Mr Chingwena dated 24 March 2021 were filed and served to Mr Matsika's legal representative by email.
- [19] Leave to appeal the judgment of Skibi AJ was granted on 12 April 2021.
- [20] Following the granting of leave to appeal by the court, Mr Matsika filed the paginated appeal record and index thereof and from the case lines record, it appears that this was filed on 2 August 2021.

- [21] The application for appeal hearing in terms of Uniform Rule 49(6)(a) was done as per notice dated 2 August 2021 and filed with the Registrar of court as evidenced by Registrar's stamp on 3 August 2021.
- [22] The notice of appeal itself had been served on Mr Chingwena's legal representatives by way of an email dated 10 May 2021.
- [23] Mr Chingwena proceeded, despite all these steps that had been taken to prosecute the appeal, to evict Mr Matsika from the property. He based his approach on the basis that Mr Matsika had failed to file the power of attorney together with his notice of appeal. This cannot be allowed.
- [24] Rule 7(2) of the Uniform Rules of Court provided as follows:

"The registrar shall not set down any appeal at the instance of an attorney unless such attorney has filed with the registrar a power of attorney authorising him to appeal and such power of attorney shall be filed together with the application for a date of hearing."

This provision in my respectful view, is a peremptory requirement to be complied with before the allocation of the date of hearing is given. It is by no means a reason to contend that leave to appeal has itself lapsed entitling as in this case, Mr Chingwena to anticipate *Rule Nisi* and argue for its discharge based on that reason. The rule refers to the fact that the set down will not be granted if the power of attorney is not filed with the Registrar, but does not state that the appeal shall lapse if on filing of the court record with the Registrar the appellant fails to file simultaneously the power of attorney. It is trite in our that the Rules of this Court are designed for Court to apply and dispense justice.

- [25] As at the preparation of this judgment, notice for leave to appeal the confirmation of *rule nisi* had been noted.
- [26] When the *rule nisi* was confirmed, consideration was given of the full documents that have been filed of record as regards to the prosecution of the appeal.
- [27] It was considered that it would be in the interests of justice to stay the warrant of eviction pending the hearing of the appeal. The fact that Mr Chingwena has anticipated hearing the *rule nisi* to discharge it so that the appeal would become moot was considered not to be in the interest of justice.

ORDER

- [28] It follows therefore that the order dated 22 September 2021 is hereby revised to read as follows:

- (1) Paragraph 5 of the Court order attached to that order and marked "X" ("the order") is varied to the following extent:

"5. The sheriff of this Court is prohibited from evicting Mr Matsika and/or all those who occupy the property more fully described as No16 The Hyde Close, Hyde Park, Johannesburg bearing title deed number ST2004/180465 until the final determination of the appeal case number A5047/2021 relating to case 28030/2020 of *court a quo*

(2) The *rule nisi* granted by Windell J as contained in the court order is hereby confirmed and varied in terms of 1 of 1 above. The order relating to the costs of the rule nisi as well as confirmation thereof is revised to read as follows:

(a) The costs of the interdict will be the costs of appeal;

(3) The sheriff of this Court is prohibited from evicting Mr Matsika pending the outcome of the appeal hearing under case no: A5047/2021.

A handwritten signature in black ink, consisting of a large, stylized initial 'S' followed by several vertical strokes and a final flourish. The signature is written over a horizontal line.

SENYATSI ML

***Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg***

REPRESENTATION

Date of hearing: 08 October 2021

Date of Judgment: 23 November 2021

Applicants Counsel: Mpyane Attorneys

Instructed by: Adv K Toma

Respondent's Counsel: Thomson Wilks Attorneys

Instructed by: Adv N Alli