IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

Case no: 2023/010995

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

In the application for leave to appeal between:

OWETHU TSHANGELA	Applicant
And	
MHLANGABEZI NOMBEMBE	First Respondent
CITY OF TSHWANE MUNICIPALITY	Second Respondent
SHERIFF OF THE COURT, CENTURION WEST	Third Respondent
STATION COMMANDER, SOUTH AFRICAN POLICE SERVICE, OLIEVENHOUTBOSCH POLICE STATION	Fourth Respondent

JUDGMENT: LEAVE TO APPEAL

DELIVERED: This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email and by upload to CaseLines. The date and time for hand-down is deemed to be 16h00 on 26 October 2023.

GOODMAN, AJ:

Introduction

1. On 3 July 2023, I handed down a judgment and order granting an application brought by the First Respondent (Applicant *a quo*) for the eviction of the Applicant (First Respondent *a quo*) from the property situated at Erf [...], Mokorie Street, Blue Valley Estate, Extension 80 Township ("the Property"), against the First Respondent's tender of providing alternative accommodation to the Applicant in the Blue Valley Estate, for a period of 3 months.

2. On 28 August 2023, the Applicant applied for leave to appeal that order to the Full Bench of this Court (alternatively, the SCA), as well as for condonation for the late filing of the application for leave. The First Respondent opposed both the condonation application and leave to appeal.

Condonation

3. Under the Uniform Rules of Court, the application for leave to appeal was due to be filed on 24 July 2023. It was filed 5 weeks out of time.

4. The Applicant lays the blame for that delay at the door of her erstwhile attorneys. Her condonation application states that she was not notified of the order by her attorneys, and instead learned of it on 5 July 2023, from a Facebook post. She thereafter contacted her attorneys for advice on the appropriate next steps and they indicated that they would revert – but failed to do so. On 11 August 2023, she approached new attorneys, and consulted with them on Sunday 13 August 2023. They came on record on 14 August 2023, and notified the First Respondent that they intended to apply for leave to appeal against the order, as well as for condonation and for leave to admit further evidence on appeal in terms of section 22 of the Superior Courts Act. The application for leave to appeal was filed two weeks later,

on 28 August 2023 (although, on its face, it is dated 15 August 2023). No application for leave to admit further evidence has yet been made; I am told that it will be filed before the Appeal Court if leave to appeal is granted.[1]

5. The Applicant submits that she has given a proper explanation for her delay, and that no prejudice arises from it. She also submits that she has good prospects of leave being granted, and that condonation should consequently be granted.

6. The First Respondent takes issue with each of those claims.

   6.1. On delay, he points out that his attorneys notified the Applicant's erstwhile attorneys, on 14 July 2023, that he had entered into a lease agreement effective from 1 August 2023 to 31 October 2023, to accommodate the Applicant at another unit at Blue Valley Estate, and called on her to vacate the Property by 31 July 2021 and take up that lease. The Applicant sent the First Respondent a strident text message in response stating, among others, that she was "*not going anywhere*" and that "*14 days isn't over*". The implication, it was submitted, was that the Applicant was aware of the order, and that there was a deadline within which she needed to act, and that she accordingly ought to have acted more expeditiously than she did in procuring legal advice and bringing her application for leave.

   6.2. In addition, the First Respondent pointed out that despite invitation, no explanation had been provided for how the application for leave to appeal came to be dated 15 August 2023, nor had any account been given for the period running from 15 August 2023 to the date of filing. The clear implication, it was submitted, was that the application for leave to appeal was ready to be filed by 15 August 2023, and that it had been held back for no good reason. That, the First Respondent's counsel argued, meant that the Applicant lacked good cause for the delay.

   6.3. As to prejudice, the First Respondent pointed out that the Applicant continues to occupy the Property to his detriment and at his cost, whilst the appeal remains pending. That, of itself, means that any delay translates into

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[1] An unsigned affidavit purporting to set out the further evidence to be led on appeal was emailed to my Registrar the day before the hearing. Given that it was not accompanied by any notice seeking its admission and that it was unsigned, I have not had regard to it.

real prejudice on his part. Such prejudice is compounded by his conclusion of a lease agreement to accommodate the Applicant for the three-month period tendered. The delay in prosecuting the application for leave to appeal means, he says, that the funds spend on securing the lease have been squandered.

7. I agree that the Applicant's explanation for the delay is scant, at best. It provides no meaningful account of what steps the Applicant took to secure legal assistance between 5 July 2023 (when she learned of the judgment) and 11 August 2023 (when she approached her new attorneys). An explanation should have been given, particularly in light of her text message which demonstrated that, by at least 18 July, she was aware that there was some deadline by which her application for leave to appeal had to be filed. It is not clear why it took her more than three weeks thereafter to retain new attorneys. Nor has an adequate explanation been provided for the delay in taking any steps between 14 August 2023 (when the new attorneys came on record) and the date of filing. The date on the application for leave to appeal suggests *prima face* that it was ready to be filed by 15 August 2023. I would have expected a proper account for the delay in light thereof; none was forthcoming.

8. That said, the total period of delay attributable to the Applicant is a relatively short, and at least some of that time is a consequence of inaction on the part of the Applicants' erstwhile attorneys. That should not deprive the Applicant of her rights.

9. As to prejudice: the Applicant remains in occupation of the Property and the First Respondent is deprived of his use and enjoyment of it as a result. I accept that he suffers consequent prejudice. But the First Respondent cannot blame the Applicant for any prejudice that might arise from his conclusion of a new lease agreement (assuming one was concluded, which I do not decide)[2] since, by his account, it was concluded before the time period for the filing of an application for leave to appeal, and the notice period for the Applicant's eviction, had run. If the First Respondent chose to conclude a lease in the knowledge that the eviction order could yet be overturned on appeal, he must bear the consequences of that election.

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[2] An inapplicable lease was attached to the First Respondent's answering affidavit in the condonation application, and no pertinent lease agreement has not been provided to the Court. The Applicant disputes that it was in fact concluded at all.

10. While I accept that the First Respondent has suffered prejudice as a result of the Applicant's delay, it must be weighed against the seriousness of depriving the Applicant, on purely procedural grounds, of her right to seek leave to appeal. That is a step not lightly taken.

11. On balance, I think condonation is appropriately granted.

Leave to appeal

12. The application for leave to appeal advances three grounds of appeal:

    12.1. First, that the application was brought as an urgent application under section 5 of PIE and could not properly be dealt with under section 4. For that to occur (according to the application for leave), the founding affidavit had to be amended, or a new application brought in terms of section 4.

    12.2. Second, that there was no proof that the unlawful occupier (i.e. the Applicant) and the Tswhane Metropolitan Municipality had been served with the application and thus that there had been compliance with sections 4(1) and (2) of PIE; and

    12.3. Third, that I failed to have sufficient regard to the dispute of fact that arose on the papers before me, and erroneously placed undue weight on the text message allegedly sent to the Applicant by the First Respondent, which I found to terminate consent to her continued occupation of the Property.

13. In argument, Mr Manala for the Applicant declined to make any submissions on the first two grounds (although he also did not abandon them).

14. In my view, neither has any reasonable prospect of success on appeal. The eviction application was initially brought as an urgent application. The returns of service on file show that it was served on both the Applicant and the Municipality. The urgent application was heard on 16 February 2023, when it was struck from the roll for want of urgency. The First Respondent then set it down, on the same papers, for hearing in the ordinary course. The Applicant filed a supplementary answering affidavit dealing with the merits of the case against her. She did not take issue with the matter proceeding as a section 4 application brought in the ordinary course, nor have I found any authority suggesting this approach was impermissible. A further return of

service demonstrates that the notice of set down for the hearing in the ordinary course was served by Sheriff on the Municipality. The Applicant must also have been aware of the set down date because she was represented at the hearing on 7 June 2023.

15. In short, both the Applicant and the Municipality were afforded proper notice of, and an opportunity to participate in, the eviction application. The objects of sections 4(1) and (2) were thus met. The Municipality chose not to participate, but that does not affect the validity of the proceedings since (as Mr Manala conceded) the Applicant does not claim to face a risk of homelessness if evicted and does not seek to be accommodated by the Municipality. The Applicant *did* participate – and acquiesced in the process by which the matter was brought. She also dealt, both in papers and in argument, with the factors relevant to the just and equitable determination of the matter under section 4 of PIE. There was no impediment to the application being determined under section 4, despite its genesis lying in section 5.

16. There is, in my view, no reasonable prospect that another court will overturn the grant of the eviction order on the procedural grounds advanced.

17. The main ground of appeal advanced in argument was the alleged dispute of fact that arose on the papers. The Applicant advanced two arguments on that score:

    17.1. First, it was argued that, had proper regard been paid to the papers, it would have been clear that a dispute of fact arose as to the terms on which the Applicant occupied the Property and the basis on which occupation could be terminated by the First Respondent. That dispute of fact ought to have been referred to oral evidence.

    17.2. Second and relatedly, if the matter had been referred to oral evidence, the Applicant would have had an opportunity to supplement the incomplete and/or incorrect account provided in her answering affidavit (which will apparently be dealt with further in the application for leave to admit further evidence if leave to appeal is granted). The matter would then have been dealt with on a full and correct conspectus of the facts.

18. As a starting point, the matter came before me as an opposed application. The *Plascon-Evans* rule generally applies to dispute that arise in motion proceedings

(including evictions[3]), and a referral to oral evidence will only be permitted where special circumstances demand it.[4] Generally, an application for a referral to oral evidence must be made at the outset of a hearing (before argument on the merits) by an applicant faced with irresoluble disputes of fact on the papers.[5] Courts should be circumspect in referring matters to oral evidence *mero motu* because there may be strategic reasons why the litigants may have elected not to pursue this course.[6] In short, referrals to oral evidence do not arise in motion proceedings as a matter of course.

19. In this case, neither of the parties sought a referral to oral evidence. Nor were there any factors that rendered a referral obviously necessary or appropriate – including in respect of the two issues expressly identified by the Applicant in the leave to appeal.

    19.1. There was, on the papers, no material dispute of fact as to the basis on which the Applicant occupied the Property. As Mr Manala conceded, the Applicant accepted that the First Respondent was the owner of the Property; her version was that they had agreed that it (and her property in St Helena) would be transferred into both of their names when and if they got married. It was common cause that marriage had not (and would not) eventuate. Consequently, she had no claim to title; she occupied the Property by dint of the First Respondent's consent, as owner. There was nothing before me, either on the papers or from argument, to suggest otherwise – and thus no basis to unilaterally refer this issue to oral evidence.

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3 Including in respect of eviction proceedings: see *Airports Company South Africa SOC Ltd v Airports Bookshops (Pty) Ltd t/a Exclusive Books* [2016] 4 All SA 665 (SCA) para 5.

4 Harms Civil Procedure in the Superior Courts (Lexis Nexis, 2023 update), B6.45.

5 See *Absa Bank Ltd v Molotsi* [2016] ZAGPHC 36 (8 March 2016) paras 25-27, and the cases cited therein.

6 See *Joh-Air (Pty) Ltd v Rudman* 1980 (2) SA 420 (T) at 428H - 429C holding:

> "It requires in my view a bold step, by a presiding Judge in an opposed application, to refer the matter to evidence or trial *mero motu*, because it is a real possibility that the applicant had decided not to ask for such procedure to be followed because: he may not want to be involved in the cost thereof; his prospects of success, after studying the answering affidavits, may be slender; it may possibly lead to an undesired protracted hearing; the amount involved may be small; the respondent may be a man of straw or on account of any of the other usual considerations in deciding whether or not to apply for the provisions of Rule 6(5)*(g)* to be invoked."

See also *Santino Publishers CC v Waylite Marketing CC* 2010 (2) SA 53 (GSJ) para 5.

19.2. There *was*, on the papers, as dispute as to whether the First Respondent had properly terminated his consent to the Applicant's continued occupation. The First Respondent pleaded that he was entitled unilaterally to terminate consent, and claimed to have done so by text message to the Applicant, alternatively through the institution of proceedings. The Applicant baldly disputed that he could or had terminated consent – but without alleging more. If (as was suggested in the application for leave to appeal) there were special requirements inherent in the agreement between them that had to be met before the First Respondent could lawfully withdraw consent to the Applicant's continued occupation, then those requirements had to be pleaded and proved by the Applicant. In the absence of her doing so, the question before me was whether the text message and/or the eviction application constituted adequate notice of termination. I determined that question by application of the *Plascon Evans* rule. There was no need or basis to refer this issue to oral evidence either.

20. Given the manner in which the matter was pleaded – and, in particular, the Applicant's failure to raise the disputes of fact on which she now seeks to rely – there is, to my mind, no reasonable prospect that another court would determine, on appeal, that the matter ought to have been referred to oral evidence or that the Court ought to have taken further steps to uncover further or different facts as to the Applicant's "true" position.

21. Given the lack of prospects of success, leave to appeal must be refused.

Costs

22. The Applicant sought the costs of both the condonation application and leave to appeal if they were granted. Her counsel argued that if leave to appeal was refused, I should nevertheless decline to award costs against the Applicant because of the importance of the matter to her and the disparity in the means of the parties.

23. For his part, the First Respondent sought punitive costs in respect of the condonation application, but submitted that the cost of the application for leave to appeal should follow the result, whatever the outcome.

24. As set out above, I granted condonation because the Applicant's delay was relatively short and because refusing to do so would seriously impact the Applicant's rights. But I accepted that the Applicant had failed to provide a full explanation for her delay, and that her delay had visited prejudice on the First Respondent. The Applicant succeeded in the condonation application but the First Respondent's opposition to it was reasonable. In those circumstances, I think it appropriate that each party pay their own costs of the condonation application.

25. I am not inclined to absolve the Applicant of costs of the application for leave to appeal. The application is without merit. The First Respondent has been forced to incur costs in opposing it. The usual rule that costs should follow the result is apposite.

26. I accordingly make the following order:

    (a) The Applicant's late filing of the application for leave to appeal is condoned.

    (b) Each party is to pay their own costs in respect of the condonation application.

    (c) The application for leave to appeal is dismissed, with costs.

I GOODMAN, AJ
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION JOHANNESBURG

Hearing date:	18 October 2023
Judgment date:	26 October 2023

Appearances:

Counsel for the Applicant:	M E Manala
Instructing attorneys:	Taleni Godi kupiso Inc
Counsel for the First Respondent:	E S Dingiswayo
Instructing attorneys:	Dube Lesley Attorneys