JM

IN THE HIGH COURT OF SOUTH AFRICA
(REPUBLIC OF SOUTH AFRICA)
PRETORIA

CASE NO: A507/2013

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

1 OCTOBER 2014
DATE

SIGNATURE

2/10/2014

In the matter between:

NTHOME STEVEN MATHALE — APPELANT

And

JJZ LINDA — FIRST RESPONDENT
EKURHULENI METROPOLITAN MUNICIPALITY — SECOND RESPONDENT

JUDGMENT

MSIMEKI J:

INTRODUCTION

[1] This appeal concerns an order in terms of section 78 of the Magistrates' Courts Act 32 of 1944 for the execution and enforcement of an order of a magistrate's court pending an appeal against an order evicting the appellant from a certain property.

BRIEF BACKROUND

[2] The learned magistrate, A Mnguni, on 10 February 2012 and in Tembisa magistrate's court granted an order evicting the appellant from what he calls his

home. The order was granted in favour of JJZ Linda who is the current first respondent. Nthome Steve Mathale, the respondent at the time, noted an appeal against the judgment and the order. In the meantime JJZ Linda, the current first respondent, brought an application in terms of section 78 of the Magistrates' Court Act 32 of 1944, for an interim execution order for eviction pending the appeal against the eviction order. The learned magistrate, N A J Van Niekerk, on 18 June 2013 granted the order. This appeal is, accordingly, directed against the judgment and the order of magistrate N A J Van Niekerk. I shall refer to this order as the Van Niekerk order and that of magistrate A Mnguni as the Mnguni order.

[3] Points in limine, on behalf of the first respondent, were argued. These are:

1. **COMPLIANCE WITH RULE 51 (3) OF THE MAGISTRATES' COURT RULES OF COURT.**

   It was submitted on behalf of the first respondent that the appeal had been noted out of time. However, it became clear during argument that the submission was incorrect as the appeal against the section 78 enforcement order had, in fact, been properly noted. Mr Masina, who appeared for the respondent, so conceded.

   Regarding the late noting of the main appeal, if the point in limine related to that, Mr Brand, who appeared for the appellant, submitted that the point was not raised when the section 78 enforcement order application was argued. It also became clear that even the main appeal could not be attacked at this stage as the issue could still properly be dealt with by the relevant forum which still could condone the late noting of the main appeal. The point was not persisted with.

2. **FAILURE TO COMPLY WITH RULE 51 (7)**

Mr Masina submitted that the first respondent had not complied with Rule 51 (7) (a) in that the notice of appeal failed to disclose whether the appeal was directed against the whole or only part of the Van Niekerk judgment and order. The notice, according to him, failed to indicate the parts that were involved in the appeal. The appeal, on its face, was said to be wanting regarding compliance with the Rule.

Mr Brand referred to the cases **of Holland v Deysel 1970 (1) SA (A) and Otavi Minen & Eisenbahn Gesellschaft v Neuhauser 1922 SWA 88** where it was held that the notice would be regarded as proper if it is clear therefrom that the whole judgment is dealt with. Similarly the notice will be in order and acceptable where the grounds of appeal clearly reveal that the appeal is directed against the whole judgment. That the whole judgment is clearly appealed against is very apparent in this matter.

Similarly the notice complies with Rule 51 (7) (b) as Mr Brand correctly submitted. This, because the points referred to in the notice clearly indicate whether they relate to law or facts. They, are, indeed, such that the first respondent cannot be heard to say that they do not clearly convey the case that the first respondent had to meet. Mr Brand further submitted that whatever was left unclear by the notice, such was amplified by the appellant's heads of argument. The submission has merit. **See: Leeuw v First National Bank Ltd 2010 (3) SA 410 (SCA) at 413F-G.**

3. **TIMEOUS PROSECUTION OF THE NOTED APPEAL**

The third point in limine was that the appellant had failed to comply with Rule 50 (1) of the Uniform Rules of Court read with Rule 51 (9) of the Magistrates' Court rules in that he failed to prosecute the appeal within the required time. Mr Brand submitted that the prosecution of an appeal once noted was regulated by Rule 6 of the Rules of this Court and not Uniform Rule 50 (1) read with Magistrates' Court Rule 51 (9). Rule 6 provides for extended time periods relating to prosecution of civil appeals from Magistrates' Courts. This point became ineffective as it had lost its sting.

[4] The points in limine were accordingly dismissed. Costs will be costs in the appeal.

THE ISSUES

[5] These are:

1. whether the section 78 enforcement order is appealable;
2. if not, whether it is in the interests of justice to allow the appeal in this matter and, on the assumption that the answer is in the affirmative;
3. whether magistrate Van Niekerk was correct in holding that the respondent will suffer irreparable harm if the eviction order is not executed and enforced, with the appellant, according to the magistrate, only suffering harm of a temporary nature which could be made good if the appeal is successful; and
4. whether the magistrate was correct when he held that the main appeal against the eviction order had no prospect of success regard being had to the magistrate's finding that the appeal was without malice, not frivolous or vexatious.

THE LAW

[6] 1. Section 78 provides:

"where an appeal has been noted or an application to rescind, correct or vary a judgment has been made, the court may direct either that the judgment shall be carried into execution or that execution thereof shall be suspended pending the decision upon the appeal or application. The direction shall be made upon such terms, if any, as the court may determine as to security for the due performance of any judgment which may be given upon the appeal or application." (my emphasis)

2. Section 78 must be read together with section 83 which reads:

"83 Appeal from magistrate's courts

Subject to the provisions of section 82, a party to a civil suit proceeding in a court may appeal to the provincial or local division of the Supreme Court having jurisdiction to hear the appeal against –

(a) any judgment of the nature described in section 48;

(b) any rule or order made in such suit or proceeding and having the effect of a final judgment, including any order under Chapter IX and any order as to costs;

(c) - - - - -"

(my emphasis)

[7] Both Mr Brand and Mr Masina are in agreement that section 78 enforcement orders which do not have the effect of final orders are currently not appealabe. **See: Van Leggelo v Transvaal Cellocrete (Pty) Ltd 1953 (2) SA 287 (T) at 288F-289D**

and South Cape Corporation (Pty) Ltd v Engineering Management Service (Pty) Ltd 1977 (3) 534 (A) 552.

Similarly, and as a general rule, High Court Orders for enforcement or execution pending an appeal have been regarded as not appealable. **See: Minister of Health and Others v Treatment Action Campaign and Others 2002 (5) SA 703 (CC); South Cape Corporation (Pty) Ltd (supra) at 551G-552H; Tuckers Land Development Corporation (Pty) Ltd v Soja (Pty) Ltd 1980 (1) SA 691 (W) at 699; Livanos v Absa Bank Ltd [1999] 3 All SA 221 (W) at 225B-C and South African Druggists Ltd v Beecham Group plc 1987 (4) SA 876 (T) at 800A-B.**

[8] Mr Brand, on behalf of the appellant, submitted that we should, in the interest of justice, interpret Sections 83 and 78 of the Magistrates' Courts Act 32 of 1944, in such a way that the interpretation falls in line with the trend that is followed in the High Courts, namely, that of regarding interlocutory orders appealable when it is in the interest of justice to do so.

[9] Mr Brand in this regard referred to the judgment of the Constitutional Court in **Minister of Health and Others v Treatment Action Campaign and Others (No. 1) [2002] (5) SA 703 (CC) and Machele and Others 2010 (2) SA 257 (CC)** in which it was held that, where an appeal is directed to the Constitutional Court against an eviction order, leave to appeal may be granted by that court if the application concerns a decision on a constitutional matter and if it is in the interests of justice for a litigant to be granted leave to appeal because irreparable harm would result if leave to appeal is not granted. He further referred to the judgment of the Supreme Court of Appeal in **Philani-Ma-Afika and Others v Mailula and Others 2010 (2) SA 573 (SCA)** in which it was held that High Court enforcement

orders pending an appeal are also appealable to the Full Bench of the High Court and to the Supreme Court of appeal if it is in the interest of justice to hold that the order is appealable. Mr. Brand urged us to find that the same approach should be adopted in respect of enforcement orders granted by magistrates' courts.

[10] I shall assume, without deciding, that the approach contended for by Mr. Brand is correct. For it then to be found that the Van Niekerk enforcement order is appealable, the appellant has to show not only that the matter involves a constitutional issue but also that he will suffer irreparable harm if it is found that the order is not appealable. For the reasons which follow, I am of the view that the appellant has not shown that he will suffer irreparable harm.

[11] The central dispute in the main eviction application was who the person was that the plot in question had been allocated to. These plots had been unlawfully grabbed and occupied by those who had no permission to do so. This applied to the appellant and the first respondent. This too is common cause. It is also common cause that there were numbers which were placed on the concrete toilets and the stand numbers that were given to the plots by the Gauteng Provincial Housing Board which is part of the second Respondent. The place used to be called Winnie Mandela settlement. The place, after formalisation, became Winnie Mandela Township. Plots would be allocated to those who were not occupying them. The first respondent had the same experience. The plot that was allocated to him is the stand that is occupied by the appellant and his family.

[12] The plot was allocated to the first respondent on or about 11 June 2000. The appellant was awarded stand number 426 Esselen Park. The appellant, however,

declined to take the stand which has now been allocated to someone else on the waiting list. The stand is no longer available.

[13] Mr Brand submitted that the appellant's constitutional rights to access to adequate housing (section 26 (1) of the Constitution of the Republic of South Africa Act 108 of 1996); to protection against arbitrary eviction (section 26 (3)) and to tenure security (section 25 (6)) would be affected if the section 78 enforcement order remained. These, according to him, constitute the irreparable harm that the appellant would suffer. The further submission is that the first respondent could easily bring about some alterations to the dwelling and the plot which may not be rectified should the appeal be successful. The appellant and his family would also be left homeless, it was further argued.

[14] The first respondent, on the other hand, according to Mr Masina, would suffer irreparable harm should the appeal be successful. Mr Masina pointed out that he has been responsible for payments of amounts which are due, owing and payable to the second respondent. This has not been controverted.

[15] I do not deem it necessary to deal with all the submissions of both counsel as, in my view, the concession of Mr Brand namely that the plot in question was allocated to the first respondent settles the issue. The allocation, in my view, can never be said to be unlawful. Both the appellant and the first respondent had been occupying the plots unlawfully as the occupation had been without the permission of the land owner, the second respondent.

[16] Indeed, the appellant had been very fortunate to be awarded the stand that he declined to take. The appellant, at this juncture, can blame no one. In any event, the plot has lawfully been allocated to the first respondent who must also vacate the one he is occupying by reason of the fact that the plot has been allocated to someone else who, too, must move in. Any harm which the appellant may suffer is, in my view, outweighed by the harm which the first respondent is presently suffering.

[17] Those being the facts, the appellant has, in my view, failed to show that it is in the interests of justice that it be found that the Van Niekerk judgment and order is appealable.

[18] In the result the following order is made:

The appeal is dismissed with costs.

M.W MSIMEKI
JUDGE OF THE NORTH
GAUTENG HIGH COURT, PRETORIA

I agree

J.W LOUW
JUDGE OF THE NORTH
GAUTENG HIGH COURT, PRETORIA

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