Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE No: 633/11

In the matter between:

CECIL CARL BURGHER	**Applicant**
And	
BASIL CHARLES BURGHER N.O.	**First Respondent**
NAWAAL CLOETE	**Second Respondent**
SHERIFF WYNBERG SOUTH	**Third Respondent**
NIGEL WALTERS, N.O.	**Fourth Respondent**
NADEEM JACOBS	**Fifth Respondent**

JUDGMENT

HENNEY, AJ:

INTRODUCTION

This Application was heard on 10 February 2011. The Applicant requested that the Fifth Respondent, Nadeem Jacobs, be joined as a Respondent. There was no objection to this and it was so ordered. I will now deal with the merits of this Application.

[1] An order for the eviction of the Applicant from a property known as 20 Blende Road, Crawford, was handed down by the Magistrate's Court, Wynberg, on 3 December 2010.

As a result of the order, the Applicant was ordered to vacate the said property by no later than 15h00 on 5 January 2011, failing which the Sheriff was authorised to evict the Applicant the following day on 6th January 2011.

[2] The Applicant on 14 December 2010 filed a Notice in terms of Rule 51 (1) of the Rules regulating the conduct of the proceedings in the Magistrate's Court in terms of Act 32 of 1944 – The Magistrate's Court Act ("the Act").

[3] The Applicant failed to vacate the property as ordered on 7 January 2011, and was finally evicted on 13 January 2011.

BACKGROUND

[4] The said property belonged to the deceased estate of the mother of the Applicant, was sold on 3 July 2010 to the Fifth Respondent, later joined in this matter. The Master of the High Court, notwithstanding the Applicant's objection thereto had given its consent for the property to be sold. Mainly due to the fact that the Applicant who lived alone in the home, and who could stay in his house for as long as he could, failed to contribute towards paying for municipal service. The Will of his late mother stipulated that in such an event, the house should be sold. The Applicant failed to vacate the property after it had been sold.

[5] As a result of this, thereafter proceedings for the eviction of the Applicant were initiated by the Respondents, which resulted in the order being given by the Magistrate

Wynberg, on 3 December 2010.

[6] The Applicant desisted an attempt by the Sheriff to evict him on 6 January 2011 and 13 January 2011, the Sheriff returned and in fact evicted the Applicant.

[7] **THIS APPLICATION**

The Applicant seeks an order from this court that:-

(a) declaring that the execution is stayed pursuant to the order handed down by the Magistrate Wynberg on 3 December 2010, pending reasons given to in terms of Rule 51(1) of the Rules in terms of the Magistrate's Court Act 32 of 1944.

(b) ordering that the Respondent's restore possession to the Applicant of the said property.

(c) the Respondents be interdicted from taking steps and/or action whether directly or indirectly, to interfere with the Applicants peaceful and undisturbed possession of the property mentioned.

(d) that the Respondents be ordered to pay the costs on a punitive scale to be determined by the Court.

[8] **ISSUES FOR DETERMINATION**

The crisp issue for determination in this matter is whether a request for written reasons from a Magistrate in terms of Rule 51(1) of the Magistrate's Court Rules, automatically

suspends the execution of the order of the Magistrate Wynberg, handed down on 3 December 2010.

The Applicant contends that the Rule 51(1) notice constitutes a step in the course of noting an appeal and as such automatically suspends the operation of the eviction order until the finalization of the appeal.

In support of his contention, the Applicant relies on an unreported judgment of Jansen J in **Saambou Bank Ltd v Mzozoyana (SECLD, case No 3215/98, 22 December 1998)**. The case, it seems, concerns the following:

The Respondent was the owner of property over which the Applicant bank had registered a mortgage bond to secure a loan to the Respondent. The Respondent defaulted and the Applicant bank obtained judgment against the Respondent. On the day that the Magistrate found against the Respondent, the Respondent filed a Rule 51(1) Notice, requesting the Magistrate's written reasons. The Respondent's attorney notified the Applicant bank that they were instructed to note an appeal in due course. The Applicant bank proceeded to sell the property at a sale in execution. It did however not proceed immediately with evicting the Respondent. The Applicant bank sought to do so in terms of Section 78 of the Magistrate's Court Act 32 of 1944 after the property had been sold. This section permits a court in the exercise of its discretion to direct that a judgment shall be suspended pending a decision upon appeal (where an appeal has been noted) or application (where an application to rescind, correct or vary a judgment has been made).

[9] The Court formed the view that (in what seems to have been *obiter*) *"a broad liberal interpretation should be given to the expression "appeal ...noted" in section 78 to include a step taken in terms of section (sic) 51(1) of the Rules."* The Court reasoned that it may result in an injustice or be unfair to a person affected adversely by a judgment of a

magistrate because magistrates often do not comply with the time restriction laid down by Rule 51(1). Accordingly, so that Court concluded, *"This leads to the conclusion that the execution of a judgment in the magistrate's court is automatically suspended the moment a request in terms of Rule 51(1) of the Rules is filed."*

[10] The Applicant in this court contends therefore that the execution of the order of the Magistrate's Court had been suspended due to the fact that a written reason had been requested in terms of Rule 51(1) of the Rules governing the considerations of equity and fairness motivated Jansen J to give a broad liberal interpretation to the words *"appeal noted"* in Section 78 to include a step taken in terms of Rule 51(1) of the Rules of the Magistrate's Court.

It would be appropriate for the purposes of this decision to once again have a closer look at Rule 51(3) and Rule 51(4) of the rules relating to conduct of proceedings in the Magistrate's Court.

"(1) Upon a request in writing by any party within 10 days after judgment and before noting an appeal and upon payment by such party of a fee of R70, which shall be affixed to such request in the form of a revenue stamp, the judicial officer shall within 15 days hand to the clerk of the court a written judgment which shall become part of the record showing -

(a) the facts he found to be proved; and

(b) his reasons for judgment:

Provided that the fee referred to herein shall not be payable by a party who, together with his request in writing, also lodges a document in which he is,

authorised by an officer or agent of a legal aid board, established by statute, to make such request.

[Subrule (1) amended by GN R1115 of 1974, by GN R689 of 1976, by GN R1928 of 1990, by GN R2407 of 1991 and by GN R1130 of 1996.]

(3) An appeal may be noted within 20 days after the date of the judgment appealed against or within 20 days after the clerk of the court has so supplied a copy of the written judgment to the party applying therefore, whichever period shall be the longer.

[Subrule (3) amended by GN R2407 of 1991.]

(4) An appeal shall be noted by the delivery of notice, and, unless the court of appeal shall otherwise order, by giving security for the respondent's costs of appeal to the amount of R1000: Provided that no security shall be required from the State or, unless the court of appeal otherwise orders, from a person to whom legal aid is rendered by a statutorily established legal aid board.

[Subrule (4) amended by GN R947 of 1972, by GN R2221 of 1977, by GN R1449 of 1979 and by GN R2409 of 1991.]

[11] In **Snyman v Crouse en 'n Ander 1980 (4) SA 42 (OPA)** (per Flemming J), it was held that:

"Meermale sal 'n verweerder dus nie, sonder toeligting deur die judisiële beampte, in sy kennisgewing van appèl die nodige spesifikasie kan doen van die feitebevindinge en ander beslissings wat hy wil aanveg nie. Hierdie omstandighede, tesame met die oorweging dat die redes nie volgens Hofreël 51 (1) aangevra kan word as 'n appèl reeds aangeteken is nie, oortuig dat Hofreël 51(1) die party teen wie uitspraak gedoen is geregtig maak om met die redes vir die bevel bekend te

word sodat hy in staat is om te besluit of hy wil appelleer en, indien wel, om die appèl aan te teken. Totdat optrede ooreenkomstig Hofreël 51 (4) plaasvind, kan dit nog nie gesê word dat daardie party appelleer nie. Tot dan is daar hoogstens 'n prosedure wat verband hou met 'n moontlike appèl, naamlik die Reël 51 (1) optredes wat tussen die "hof" en slegs een van die partye tot die geskil plaasvind. 'n Aanduiding tot die teendeel is nie daarin te vind dat die voorskrifte van Hofreël 51(1) vervat is in dieselfde Reël wat die aantekening van appèl reël nie."

(own emphasis)

[12] The rules furthermore clearly distinguish between a written request for reasons and a noting of an appeal.

[13] In the case of a request for reasons, in terms of Rule 51(1), such a request must be made in writing to the judicial officer concerned within 10 days after the judgment. In this process, only the judicial officer concerned and the party requesting the reasons are involved, there is no need to inform the opposing party about it. Any of the parties it seems can request such reasons.

[14] In the case of the noting of an appeal, there must be a delivery of notice in terms of the rules of court which means that it shall be served with the Clerk of the Court and a copy shall be served on the opposing party (see Rule 2(1)(b)).

[15] A further requirement that has to be satisfied is that unless the court order's otherwise, the Appellant shall furnish security for the costs of the Respondent to the amount of R1000,00.

[16] The Rules of Court prescribes different procedures when a request for written reasons from the judicial officer is made, in terms of Rule 51(1) and the noting of an appeal in terms of Rule 51(4).

[17] It is therefore clear that the legislature intended that there be two different and distinct processes when written reasons are requested and when an Appellant notes an appeal.

[18] In my view therefore, the two processes cannot be meant to be the same especially if regard is to be had to the provisions of Section 78, which gives the court, discretion whether execution of a judgment should be suspended.

[19] In the **Saambou** judgment, Jansen J does not expressly state why, apart from reasons of fairness and equity, a departure from the ordinary meaning of the expression *"appeal ... noted"* should be extended to include a written request for reasons in order for him to suspend the execution of an order. It seems that Jansen J gave an interpretation, which deviated from the ordinary meaning of the words "appeal noted", in my view, he did not apply the ordinary rules of interpretation as stated in the dictum of **Venter v Rex 1907 TS 910 at 913 as per 914-915**.

> *"[W]hen to give the plain words of the statute their ordinary meaning would lead to an absurdity so glaring that it could be never have been contemplated by the legislature, or where it would lead to a result contrary to the intentions of the legislature, as shown by the context and such other considerations as a court is justified to take into account, the court may depart from the ordinary effect of the words to the extent necessary to remove the absurdity and to give effect to the true*

intention of the legislature."

(See also Carolus Kraal Farms (Edms) Bpk v Eerste Nasionale Bank van Suider- Afrika 1994 (3) SA 407 (A))

It is trite that only in cases where the ordinary meaning of words would lead to absurd results that could never have been contemplated by the legislature and that would result in an intention contrary to the legislature, that a deviation would be permissible.

[20] Apart from what Jansen J says, in my view there were no compelling reasons to depart from the ordinary meaning of the phrase *"appeal noted"* within the meaning of Rule 51(4) read with Section 78 of 'the Act', to include *"upon requests of written reasons, the execution of a judgment is automatically suspended."*

The meaning of the phrase *"appeal noted"* is clear and unambiguous and so is the meaning of *"request for written reasons"*, it has two distinct and different meanings in the context of the rules of court. If interpreted individually, it would lead to no absurdity. The unfair consequences Jansen J, wanted to prevent by extending the meaning of *"appeal" noted* so as to include request for written reasons, so as to avoid execution of a judgment, could clearly have been avoided by the Applicant in that case as well as the Applicant in this case, if an application had been made in terms of section 62(3) of 'the Act', whilst the Applicant was awaiting the reasons of the Magistrate, prior to noting the appeal.

Section 62(3) of 'the Act' states:

"Any court may, on good cause shown, stay or set aside any warrant of execution

issued, by itself, including an order under section seventy two".

It is also trite law that when an appeal is noted, it may constitute good cause shown as contemplated in the subsection, to suspend the execution of a judgment.

The laudable and deserving interests that Jansen J sought to protect or harm that it sought to prevent could have been effected without having to have resorted to extending the interpretation of the words *"appeal noted"*. In my view, the ordinary meaning of the words *"appeal noted"* read with the other provisions of 'the Act' especially Section 62(3), if interpreted in its literal sense would not have lead to any absurdity and would not have been contrary to the intention of the legislature.

[21] It is clear that the Appellant in this matter after having requested the written reasons of the Magistrate also could have made an application in terms of Section 62(3) to have stayed the execution of the order of court, whilst awaiting the reasons of the Magistrate.

The intention of the legislature and the common law rule is to prevent irreparable harm to an Appellant pending the appeal. This is adequately protected and catered for by other provisions of 'the Act' as stated, especially section 62(3).

[22] It is instructive to note that in **Nel v Le Roux NO and Others 2006 (3) SA 56 (SECLD)** at **59C-60A**, a decision of the same division refused to follow this judgment, on this very point.

I am therefore not persuaded with respect that the judgment of Jansen J was correct where he says that by invoking the provision of Rule 51(1), an appeal is noted and the execution

of a judgment is therefore suspended.

It follows therefore in this matter that there being no appeal noted, that the order of execution against the Applicant, was therefore not suspended as envisaged in Section 78 of the Magistrate's Court Act 32 of 1944. The Third and Fourth Respondent were therefore entitled to execute the order of the Magistrate, Wynberg, dated 3 December 2010.

[23] The next issue for determination is whether the Applicant is entitled to the further relief sought in his Notice of Motion and that is:

a) that possession be returned of his property known as 20 Blende Road, Crawford, Western Cape;

b) that the Respondents be interdicted from taking any steps and/or actions, either directly or indirectly, to interfere with the Applicants peaceful and undisturbed possession of his said property.

[24] In essence, the Applicant is requesting the court for a mandament van spolie.

In order for this to succeed, the Applicant must prove that:

(a) he was in peaceful and undisturbed possession of the property;

(b) he was deprived unlawfully of possession;

See **Wille's Principles of South African Law 9th ed** at **456**.

Insofar as the further relief is concerned, it is trite law that there is no spoliation if the Respondent acted lawfully in depriving the Applicant of his possession. In this regard, see **Kleinsake Ontwikkelingskorporasie Bpk v Santambank BPK 1988 (3) SA 266 (C)**, and also **Ntai & Others v Vereeniging Town Council & Another 1953 (4) SA 579 (A)**. These cases are on point and are similar to the issue at hand in this matter. I am of the view that the Applicant had failed to prove that he was unlawfully dispossessed of his property.

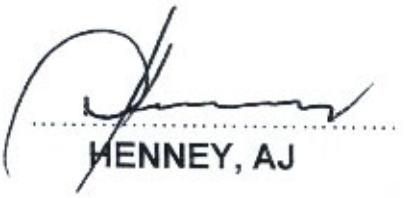
The mere fact that he believed that the Magistrate erred in granting the eviction order, does not make the actions by the Sheriff unlawful, merely because he had requested written reasons as a step in the prosecution of an appeal.

In **Kleinsake Ontwikkelingskorporasie**, Tebbutt R on **page 275 C – E** states the following:

> *"In elk geval moet dit ook bewys word dat die applicant onwettig van sy besit ontneem was. Lee en Honoré (op cit para 262) sê*
>
> > *'there is no spoliation if the respondent acted lawfully in depriving the applicant of his possession, eg ... if the messenger of the court attaches property in accordance with a writ of execution: Kemp v Roper NO (1886) 2 BAC 141; Sillo v Naude 1929 AD 21.'*
>
> *In die huidige geval is die masjiene vanaf die verhuurde persele verwyder deur die geregsbode op sterkte van 'n hofbevel van die landdroshof te Durban (cf Sillo v Naude 1929 AD 21 op 26). Daar is dus nie aan die vereistes van 'n mandament van spolie voldoen nie en kan applikant se aansoek ook nie op hierdie grondslag slaag nie."*

It therefore follows that the Third and Fourth Respondent were legally entitled as a result of a court order to evict the Applicant.

In summary therefore, the application is dismissed with costs.



HENNEY, AJ