

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

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

CASE NO: 42366/2018

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED: YES

Date: 31 August 2022

In the matter between:

GORMAN: ALAN NORMAN

APPLICANT

And

GORMAN: KEVIN

FIRST RESPONDENT

GORMAN: GEORGE ALFRED ARTHUR

SECOND RESPONDENT

JUDGMENT

ALLY AJ

INTRODUCTION

[1] This application came before this Court as a Counter-Application involving a long litigation history between the parties.

[2] The Counter-Application is opposed by the Applicant. The parties are referred to as in the main application, for convenience sake.

[3] The crux of the submissions made by Counsel, Ms Blumenthal, for the two Respondents is that the Order of Van Eeden AJ¹, forms part of a referral to trial issue in terms of an Order granted by Benson AJ² and therefore that the execution of the Order of Van Eeden AJ *supra*, stands to be stayed until finalisation of the oral hearing.

BRIEF BACKGROUND FACTS

[4] The Applicant is the owner of a property situate at Erf [....], M [....], Ext [....] Township, and known as [....] E [....] Street, T [....] Estate, M [....], Gauteng, hereinafter referred to as 'the property'.

[5] The Applicant allowed the Second Respondent, his father, to build a cottage on 'the property'.

[6] The Applicant and the Second Respondent became embroiled in a dispute and the Second Respondent claimed repayment for expenses in building the cottage on 'the property'.

[7] The dispute was settled out of Court the terms of which were:

7.1. the Second Respondent would withdraw his action;

7.2. the Applicant would pay the Second Respondent an amount on transfer of 'the property' to a suitable buyer;

7.3. the Second Respondent will not prevent the marketing and sale of 'the property';

¹ Caselines: 005-1 – 005-4

² Caselines: 005-6

[8] The Applicant fell ill and it is alleged that the Second Respondent, without authorisation, took over handling the affairs of the Applicant which included the cancelling of the sale agreement³ which was entered into with a buyer.

[9] As a result of the purported cancellation of the sale agreement by the Second Respondent, the estate agent dealing with the sale of 'the property' intended taking legal action.⁴

[10] A mortgage bond was registered in favour of the First Respondent in order to satisfy, so it alleged, claims against the Applicant by the Estate Agent. It must be stated that the allegations regarding the obtaining of the mortgage bond and the reasons therefore, remain disputed between the parties as well as other issues relating to the main application.

[11] As a result of the dispute between the parties, certain Court Orders were obtained and can be found on Caselines.

ANALYSIS AND EVALUATION

[12] As indicated earlier, Counsel for the two respondents, submitted that all this Court needs to decide is whether a case has been made out to stay the execution of the Order of Van Eeden AJ.

[13] Counsel for the Applicant, Ms Scallon, submitted that the Counter-Application, was in her words, putting the cart before the horse. Furthermore, the Order by Windell J remains in effect and has not been set aside and therefore the relief claimed by the two Respondents in the Counter-Application would amount to nothing because, so she argued, this Court cannot set aside the Order of Windell J unless and until an application for the rescission of Windell J's Order is made.

³ Caselines: 001-23 – 001-31

⁴ Caselines: 001-34

[14] In my view, the matter before this Court is a simple one but has been made complex and confusing by the parties. It is apposite at this point to refer to the Orders of this Court in chronological order to put them in proper context in respect of the application before me.

[15] On 21 August 2019, Van Eeden AJ granted an Order⁵ effectively allowing for the sale of 'the property' and certain other relief.

[16] On 10 October 2019, Windell J granted an Order⁶ to the effect, firstly, that the Respondent, the Applicant, must provide the two Respondents with 48 hours' notice relating to the marketing and sale of 'the property'. The second order as it stands is confusing, and I make no comment thereupon as it does not affect my intended Order.

[17] On 13 February 2020, Benson AJ, granted an Order referring the matter to trial.

[18] On 17 February 2020, Lamont J granted an Order effectively ordering the two Respondents to allow the estate agent together with purchasers, access to 'the property' for purposes of inspecting 'the property' as well as striking the counter-application off the roll for lack of urgency and further reserving the costs.

[19] On 1 June 2021, Molhlehi J struck the matter from the roll with costs.

[20] Now if one has regard to the various orders granted, as outlined above, then, in my view, the Orders in paragraphs 15 and 17 are of importance. The reason for this is that the Order of Benson AJ deals with, in my view, the essence of the dispute between the parties.

⁵ supra

⁶ Caselines:

[21] Counsel for the Applicant, Ms Scallon, in my view, has misunderstood the relief sought by the Respondents and her submissions in that regard stand to be rejected.

[22] Counsel for the Applicant also sought to deal with the issue of costs that were reserved by my brother Lamont J which, in my view, is not properly before this Court and thus this issue of the reserved costs stands to be decided by the Court at the oral hearing where a better ventilation of the issues will heard.

[23] Now in order to succeed with an application to stay the execution of an order, an Applicant must show that an injustice will be caused and that he or she will be substantially prejudiced if the order is not granted.⁷ If a stay is not granted in this matter, I am satisfied that an injustice will be visited upon the two Respondents as the case in the oral hearing needs still to be adjudicated upon. Furthermore, I am satisfied that the two Respondents will also be substantially prejudiced should a stay of execution of the Order of Van Eeden AJ not be granted as any submissions made during the oral hearing would be made futile.

[24] I agree with the principle that a Court has a discretion in an application for a stay of execution and that such discretion must be exercised judicially within the guidelines as set out in the *Soja* and *Gois* cases *supra*. In this regard I exercise such discretion in favour of the two Respondents as they have met the threshold for granting a stay of execution of the Order of my brother Van Eeden AJ.

CONCLUSION

[25] Having regard to what I have stated above, this Court is satisfied that the two Respondents have met the requirements for a stay of execution of the Order of my brother Van Eeden AJ.

COSTS

⁷ *Soja (Pty) Ltd v Tuckers Land Development Corporation & Ano* 1981 (2) SA 407 W @ 411 E-F

Gois t/a Shakespeare's Pub v Van Zyl 2011 (1) SA 148 LC @ para 37

[25] It is trite that the issue of costs rests in the discretion of the Court and that costs should follow the result unless exceptional circumstances are shown why same should not be granted.

[26] Counsel for the two Respondents argued strenuously for a punitive order as to costs in the event that this Court finds in favour of the two Respondents. The basis for this submission, as I understood it, was that the opposition of the Applicant has been unreasonable.

[27] I am not convinced that a punitive costs order is appropriate in the circumstances of the present matter before me. The Counter-Application raised issues that needed to be dealt with by the Applicant and I am satisfied that costs should follow the result and a punitive costs order is not appropriate.

Accordingly, an Order in the following terms will issue:

- a). the execution of the Order of Van Eeden AJ dated 21 August 2019 and the resultant offer to purchase between the Applicant and Kyle Nicholas Bosman and Kirsten Joy Bosman is hereby stayed pending the outcome of the hearing to set aside the Order of Van Eeden AJ;
- b). the Applicant is to pay the party and party costs of this application.

G ALLY
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, JOHANNESBURG
Electronically submitted therefore unsigned

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 31 August 2022.

Date of virtual hearing: 31 January 2022

Date of judgment: 31 August 2022

Appearances:

Attorneys for the Applicant: **STRYDOM M & ASSOCIATES**
attorneys@mstrydom.co.za

Counsel for the Applicant: **Adv. J. Scallan**

Attorneys for the Respondent: **LEON JJ VAN RENSBURG ATTORNEYS**
rudie@leonjjvanrensburgattorneys.co.za

Counsel for the Respondent: **Adv. R. Blumenthal**