IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: 1325/2017

In the matter between:

ARMAS DEVELOPMENTS (PTY) LIMITED	Applicant
and	
DARREN SINGH	First Respondent
FARGO FREIGHTLINES CC	Second Respondent

JUDGMENT

Date Delivered: 12 June 2017

MASIPA J:

Background

[1] The applicant in this matter brought an urgent application for what it termed interim relief. The relief sought by the Applicant was the following:

> '1. Pending the outcome of an action or application to be instituted for final eviction relief, the respondents and all those holding by or through one or

other of them be and they are hereby evicted from the premises more fully described as :

1.1 Erf 2347 of Amanzimtoti, Ext 16, measuring in extent 1974 square metres and situated at 7 Aarden Place, Amanzimtoti, KwaZulu-Natal; and

1.2 Erf 2348 of Amanzimtoti, Ext 16, measuring in extent 1662 square metres and situated at 5 Aarden Place, Amanzimtoti, KwaZulu-Natal.

2. That the Respondents are ordered to pay the costs of this application jointly and severally, the one paying the other to be absolved;

3. Further and/or alternative relief;'

[2] The facts recorded by the Applicant which are in dispute are that it is the owner of the two properties described in paragraph 1 above and in support of this contention attached a copy of the tittle deed. After purchasing the property, a settlement agreement was concluded with the previous occupant of the property, Nikesh Roopchand, where it was agreed that he would vacate the premises by 31 December 2016. Consequently, on 10 January 2017 Lerry Holm, a director of the Applicant who deposed to its founding affidavit went to the premises with his attorney Dean Pierre Merrick Petit of Brogan and Olivier Attorneys to confirm that Roopchand had vacated from the premises. The Respondents agree that Holm visited the premises but aver that he was alone.

[3] On arrival at the premises, the First Respondent introduced himself and said he was the owner of the Second Respondent. According to Holme, it was apparent that the Respondents were conducting their transportation business from the premises. They were surprised to find the Respondents there as they had no right of occupation. When they raised this with the First Respondent, he admitted it. The First Respondent however avers that the Applicant was aware of the Second Respondent's business operated in the premises since they had been carrying on business from those premises for a period of a year.

[4] The Applicant avers that the Respondents confirmed that they were aware that they had no right of occupation but had nowhere else to go. They requested that they be allowed to remain in occupation and offered to pay rent. This offer was

rejected and the Respondents given until 23 January 2017 to vacate the premises. An email confirmation was sent by Petit, the Applicant's attorney who deposed to a confirmatory affidavit, annexure LH3.

[5] The Respondents did not respond to this in their answering affidavit but instead introduced a new version where it contends that the Applicant was aware that it had concluded a lease agreement with Roopchund terminating January 2019 after Roopchund informed the First Respondent that he had purchased the property and was awaiting transfer from the Applicant. The First Respondent contends further that the Applicant had indicated that it was unhappy with the rental amount payable and wanted to renegotiate an increase in amount and the duration of the lease.

[6] On or about 17 January 2017, Holm received a text message where the First Respondent requested that he grant him an extension until he found suitable premises and would pay R35 000 for two months in advance. There was no reply to this message and on 24 January 2017 when Holm and Petit went to the premises, they found the Respondents still in occupation. The reason advanced for their presence was that they could not find suitable premises. The Respondents were told to vacate the premises by 27 January 2017.

[7] In answer to this, the Respondents stated that there was a valid lease between them and Roopchund and would require time to find suitable premises should they move after January 2018. In view of this, the Respondents contend that they are in lawful occupation.

[8] The Applicant contends that the Respondents are in unlawful occupation and that they have failed to set out the basis for alleging that they are in lawful occupation. Further that they do not expressly deny that they had given an undertaking to vacate. The Applicant contended also that the Respondents were simply playing for time while the Applicant is suffering daily loss and damages which were 'probably' irrecoverable. The Respondents deny that they are playing for time. The Respondents contended that the Applicant's case of the damages being possibly irrecoverable did not satisfy the requirements of a final interdict. Further that there were no allegations to support any irrecoverable loss as was required.

[9] The Applicant contends that it secured a tenant for the premises with rental of between R35 000 and R38 000, who was reluctant to sign a lease due to the Respondents' occupation of the premises. The Applicant contended that as there was no security for the recovery of the loss it was suffering, it was suffering irreparable harm which issue was not necessary for the court to determine since it had established a clear right.

[10] Having denied the existence of a tenant, the Respondents averred that the application was an absolute abuse of the court process since irreparable harm was one of the requirements for an urgent interdict. They averred that the Applicant's case was one of commercial urgency which could not be granted. The Respondents sought a punitive cost order.

[11] The Applicant averred that the court did not need to consider the balance of convenience but that in so far as it was necessary, the balance of convenience favoured it as it had good prospects of success and the Respondents had no case. This contention is denied by the Respondents. The Respondents denied that the Applicant was entitled to the relief sought and averred that the Applicant could institute an action.

The Points *in limine*

[12] The Applicants raised numerous points *in limine* in view of the facts set out above which points are dealt with hereunder.

[13] That the Applicant launched an urgent application using form 2 rather than complying with the requirements in Rule 6(12). Mr *Naidoo* submitted that the Applicant in bringing the urgent application used form 2 when it ought to have complied with the provisions of Rule 6(12) regulating urgent applications. Mr *Bingham* submitted that the practice in this court was to use form 2.

[14] In *Sikwe v S A Mutual Fire & General Insurance* 1977 (3) SA 438 (W) , the Court stated that an application was not defective merely because the Applicant failed to strictly adhere with the form referred to in the Rules since it is the substance and not form which the court must consider.

[15] The Applicant did not in its prayer ask for condonation for the non-compliance with the time frames as laid down in the Uniform Rules of court. It was contended for the Respondents that by failing to comply with the provisions of Rule 6(12), the Applicant did not ask for condonation of its non-compliance with the Uniform Rules of Court. Although the matter was before court as an opposed application, since it was initiated as an urgent application, it still had to satisfy the requirements set in Rule 6(12). It was argued for the Applicants that the practice of the division was that it was not a requirement to ask for relief condoning non-compliance with the rules. Mr *Bingham* submitted that this was in line with the practice directive.

[16] DR Harms *Civil Procedure in the Superior Courts* at B6.64 states that in urgent applications, applicants must apply for condonation of the non-compliance with the rules. In *I L & B Marcow Caterers (Pty) Ltd v Greatermans SA Ltd and another; Aroma Inn (Pty) Ltd v Hypermarkets (Pty) Ltd and another* 1981 (4) SA 108 (C), at 109H to 110B the court stated that Rule 27 entitled the court upon application and on good cause shown to condone any non-compliance with the Rules. At 110H to 111A, the court stated that in terms of Rules 27 and 6(12) applicants had to show good cause why time frames should be abridged.

[17] The court in *Kayamandi Town Committee v Mkhwaso and Others* 1991 (2) SA 630 (C) at 633I-634A found the applicant's failure to apply for and order dispensing with the operations of any of the Rules of court was sufficient to refuse the rule *nisi*.

[18] In terms of the Practice Manual of the KZN Division of the High Court Government Notice 535 of 2004, GG 26180 of 2 April 2004, practice directive 8.1.3 requires that all applications be brought in terms of Rule 6(5)(a) using notice of motion in accordance with form 2(a) of the first schedule and that condonation will only be granted in extremely urgent matters where a case has been made out in the founding affidavit. Although Mr *Bingham* relied on a practice directive, his submission that an application for condonation was unnecessary could not be found and on the contrary, it is apparent from a reading of the Practice Manual that application for condonation is a requirement.

[19] I am therefore of the view that the point *in limine* regarding the form must fail. This must however not be seen as an approval of the incorrect form /procedure followed by the Applicant in this matter. As regards the Applicant's failure to apply for condonation, this is a serious nonconformity from the Uniform Rules. In the absence of this, the application for interim relief cannot be granted. The point *in limine* relating to this issue is therefore upheld. However, if I am wrong, I proceed to deal with the merits of the application hereunder.

[20] The relief sought is final in nature although claiming that it is interim pending the outcome of an application or action for eviction. Although the Applicant stated in its prayer that it was seeking an interim relief, if the order is granted, the Respondents will be evicted. The relief sought is therefore final and brought in an incorrect form. He submitted that the application was not for a spoliation order. Mr *Naidoo* submitted that it was clear that the Applicant was seeking to execute before judgment which was an absolute abuse of court.

[21] In order to comply with the requirements for an interim relief, the Applicants had to show a *prima facie* right; the Applicant says it has a clear right. In respect of the irreparable harm, the Applicant states in its founding affidavit that damages are in all probabilities irrecoverable when it must show the court that it would suffer irreparable harm. He argued that the Applicant failed to prove irreparable harm since it has an alternative remedy for damages.

[22] Mr *Bingham* submitted that the notice of motion stated that the relief sought was interim pending the institution of an eviction action. As regards whether the relief is final or interim, *Erasmus Superior Court Practice* Vol 2 at D6-3 to 4 distinguishes between final and interim interdicts. A final interdict is set out as being granted without any limitation as to time and which secures a permanent cessation of an unlawful course of conduct. The substance of the relief sought must be considered. An interlocutory interdict on the other hand is granted *pendente lite* to protect that right of the complainant to protect or reserve his rights pending an action or application between the parties. It does not involve or affect the final determination of the right of parties. It merely suspends or reverses the position complained of until the main issues are determined and then ceases to operate.

[23] The relief sought by the Applicant directly affects the determination of the parties since the granting of the order results in the removal of the Applicants from the premises which the Applicant asserts ownership to when this issue should be determined by the trial court.

[24] Mr *Bingham* argued that since there was no security, no averment that the Respondents were paying rent in advance or that they paid the security in their attorney's trust account after the Applicant failed or refused to receive it, there was irreparable harm suffered by the Applicant. Notably, as contended by Mr *Naidoo,* this issue was not in the Applicant's papers.

[25] Mr *Naidoo* contended that the Applicant based its application on *rei vindicatio*, an action *in rem.* The basis for the Applicant's claim is an application *in rem* instead of an action. The Applicant should have issued summons and would have an alternative remedy for damages. Mr *Bingham* submitted that the relief sought was vindicatory relief. He submitted that in the application, the Applicant sought interim relief. Although it did not appear in the papers, an action had been instituted with the Respondents entering appearance to defend.

[26] I agree with Mr *Naidoo* that the Applicant is seeking relief to enforce a vindication judgment before the action is heard. The nature of the relief sought says so since it seeks an interim order evicting the Respondents pending the determination of the action. However, if the purported interim relief is granted, the Respondents will be evicted from the premises. There can be no other meaning to this.

[27] The Applicant contends that it is not required to prove that it would suffer irreparable loss and relies on numerous authorities referred to in *Erasmus* including *Kilroe v Kilroe* 1928 WLD 112 and *VSA Motor Distributors (Pty) Ltd v Rossman and another* 1980 (3) SA 1164 (D). According to *Erasmus*, in interdicts sought pending vindicatory action, all other considerations applicable to interim interdicts apply. This is confirmed in *VSA Motor Distributors*.

[28] Mr *Bingham* has shown through the title deed that the Applicant is the rightful owner of the premises. Although this is disputed by the Respondent, the contention advanced by them that Roopchand was in the process of purchasing the premises is improbable and in any event, does not assist their case. I have already addressed the issue of irreparable harm. Since the Respondents are already trading from the premises and have been so trading for some time, I am of the view that the balance of conveniences favours them. It is apparent from the papers and submissions by Counsel that there is other satisfactory remedy.

[29] Mr *Bingham* relied on *Chetty v Naidoo* 1974 (3) SA 13 (A) in support of the application. In my view, the court in *Chetty* confirmed that vindicatory relief must be sought by way of action. This confirms what Mr *Naidoo* contended that the Applicant has other relief being to bring an action against the Respondents. In fact, as submitted by Mr *Bingham*, the Applicant has already taken steps by issuing summons which are defended.

[30] As regards costs, Mr *Naidoo* asked for a punitive cost order against the Applicant. The Applicant genuinely believed that bringing this application was the appropriate procedure to follow to preserve their right. It is however inexcusable that the Applicant comes to court and expects the court to hear him without first asking the court for an indulgence to deviate for the Uniform Rules of Court. In order to prevent other litigants from abusing the court process, I deem it necessary to make a cost order against the Applicant. I however am of the view that a punitive cost order is not justified in the circumstances.

[31] In the result, the following order is made:

1. The application is dismissed with costs.

M.B.S. Masipa

MASIPA J

APPEARANCE DETAILS:

For the Applicant:	Adv. M Bingham
Instructed by:	Brogan Olivier
For the Respondents:	Adv. M R Naidoo
Instructed by:	Kushen Sahadaw Attorney
Matter heard on:	11 May 2017
Judgment delivered on:	12 June 2017