REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(MPUMALANGA DIVISION, MBOMBELA)

(1)	REPORTABLE:NO
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED: YES
	12/05/2022

CASE NO: 3359/2020

In the matter between:

WALTER HLONGWANE	First Applicant
TIKI LAZARUS ZITHA	Second Applicant
WALLY ELVIS NGOMANE	Third Applicant

and

PETRUS ZEELIE N.O.	Respondents
(in his capacity as interim administrator	

of the Mjejane [IT 6335/04])

JUDGMENT

MASHILE J:

[1] On 9 March 2022, I confirmed the rule nisi granted on 8 December 2020 by Shabangu-Mndawe AJ. Other than the confirmation of the rule *nisi* the order reads as follows:

"1…..

2. *The above-named Eleventh to Thirty-First Respondents are joined to the proceedings as such.*

3. *The unknown trespassers of the property known as the Farm Impala Boerdery 231, JU, Mpumalanga, comprising the First Respondent, together with the Eleventh to Thirty-First Respondents, are interdicted and restrained from entering onto the property without the Applicant's consent.*

4. *The unknown trespassers, comprising the First Respondent, together with the Eleventh to Thirty-First Respondents, are interdicted and restrained from clearing or preparing any land forming part of the property known as the Farm Impala Boerdery 231, JU, Mpumalanga for any purpose whatsoever, including but not limited to the purpose of constructing or erecting any structure or dwelling thereon.*

5. *The unknown trespassers, comprising the First Respondent, together with the Eleventh to Thirty-First Respondents, are interdicted and restrained from utilising and/or damaging the irrigation canals on the property known as the Farm Impala Boerdery 231, JU, Mpumalanga.*

6. *The Sheriff and/or the South African Police Service are directed to ensure compliance with the relief granted herein and the order of 8 December 2020 when called upon to do so by the Applicant.*

7. *The Second, Third and Fourth Respondents are directed to pay the costs of the application."*

[2] It is this order that the Second to the Fourth Respondents are appealing. Their argument is that given the decision of this Court, reasonable prospects that another court would reach a different conclusion exist. I have considered all eight grounds raised by the Applicants, and do not believe that there is merit in any of them for reasons that follow below. That said, I must make it clear that I do not intend to discuss each and every ground described in the Notice of Appeal. What I proceed to state applies to all the grounds generally.

[3] At Paragraphs 20 to 22 of the impugned judgment and order, this court states:

"[20] The three instances described by the Respondents on when a party can approach a court on ex parte basis are trite. The source is of course the Uniform Rule of Court 6(4) to which the Respondents have so aptly referred. While the Respondents might have a valid point, it is raised somewhat belatedly because they have failed to anticipate its hearing as envisaged in Uniform Rule of Court 6(8). For completion's sake, the Rule provides that any person against whom an order is granted ex parte *may anticipate the return day upon delivery of not less than twenty-four hours' notice.*

[21] To date there is no answering affidavit addressing the inappropriateness of the ex parte relief. As such, the court order of 8 December 2020 is still extant. Besides, Uniform Rule of Court 6(12)(C) deals with reconsideration and it provides that a person against whom an order was granted in his absence in an urgent application may by notice set down the matter for reconsideration of the order. It is evident that the Respondents did not take advantage of the provisions of the aforesaid Rule.

[22] At the risk of sounding like this Court is advising the Respondents, this point should have been raised as soon as they learnt of the court order granting relief on ex parte basis. Their failure to use either Rules 6(8) or 6(12)(C) has shut the door for them and they must live with that fact."

[4] The statement of the court that 'their failure to use either Rules 6(8) or 6(12)(C) has shut the door for them and they must live with that fact.' Is of course legally incorrect. However, considering the provisions of the order, it is apparent that the parties affected by this do not include the Second to the Fourth Respondents represented by Mr Ngwenya and no argument to the contrary was presented. The order affects the Unknown trespassers comprising the First and the Eleventh to the Thirtieth Respondents. These Respondents are not appealing the judgment and quite appropriately, they are not represented before court.

[5] Confronted with this difficulty, Mr Ngwenya referred this court to the Constitutional Court case of *Zulu & Others v Ethekwini Municipality & Others* [1]["Zulu"]. The case was not referred to in the heads of either the one Counsel or the other when the matter was argued but at first glance, this Court thought that there might be substance to contemplate its relevance to this leave to appeal. In consequence I directed the parties to file short heads dealing with the pertinence of the case. They have done so and I am indebted to them for their respective contributions.

[6] The Applicant quoted the following 4 paragraphs from the Zulu case on which he stated I should rely to grant leave:

"[24] Paragraph 1.1.1. of the interim order authorized the Municipality and second respondent to take all reasonable steps to prevent any persons from, inter alia, occupying the Lamontville property. There is nothing in that part of that order to suggest that the occupation of the property that was to be prevented did not include continuing occupation that commenced prior to the granting of the order. Indeed, the order seems wide enough

[1] 2014 (4) SA 590 (CC)

to include the prevention of the continuation of such occupation. That means that in terms of that part of the order the appellants could be prevented from continuing to occupy the Lamontville property.

[25] Preventing the appellants from continuing to occupy the property would amount to an eviction because they would be precluded from either returning to their homes after a temporary absence or because they would be kicked out of their homes to prevent them from continuing to occupy the property. This means that, to this extent, that part of the interim order is an eviction order.

[26] Paragraph 1.2. of the interim order interdicted any person from occupying ...any structures... upon [the Lamontville property]. This part is open to a reading that it applies to continuing occupation of structures on the property which had commenced prior to the grant of the interim order. Therefore, it could be used by the respondents to restrain the appellants from continuing to occupy structures that had been built on the property prior to the granting of the interim order. Furthermore, to enforce this part of the order the Municipality and the second respondent could get the South African Police Service to physically restrain the appellants from continuing to occupy their shacks. This means that when the appellants returned from work, they could be restrained physically by police officers from having access to their homes. That also makes this paragraph an eviction order.

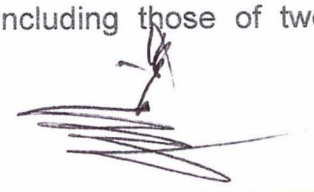
[27] Based on the above, there can be no doubt that the interim order will arise the taking of steps which could have the effect of evicting from the Lamontville property persons who were already living on the property or who have already completed building their homes on the property when that order was granted. Even on the Municipality's and MEC's version, when a person has built his own shack on the property of another, that is an act of occupation of the latter's property and eviction protections apply if that person is to be prevented from occupying that shack."

[7] Perhaps I should open by stating that context is everything. These four paragraphs were articulated against the background of the High Court having denied the unlawful occupiers opportunity to intervene. Perusing the entire case, particularly the paragraphs as I have described above, it is indubitable to conclude that indeed the unlawful occupiers

had a direct interest in the matter and that the High Court should have afforded them the opportunity to state their case before it. Whether or not their argument would have carried the day before the High Court was irrelevant for the Constitutional Court but the point is that they should have been given the opportunity to state their case. Their success stops at the decision of the Constitutional Court to allow them to join the proceedings.

[8] The Zulu case is therefore not directly in point and reference to it is categorically misguided. In any event even if it were applicable, which I have concluded it is not, it would not have applied to the Second to the Fourth Respondents because they are simply not affected. In the circumstances, I do not agree that reasonable prospects exist that another court would reach a different conclusion from that which this Court has decided. I make the following order:

1. Leave to appeal is dismissed with costs including those of two Counsel, if applicable.



B A MASHILE

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION, MBOMBELA

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 12 May 2022 at 10:00.

APPEARANCES:

Counsel for the Applicants:	**Adv TS Ngwenya**
Instructed by:	**Cronje, De Waal – Skhosana Inc**
Counsel for the Respondents:	**Adv GR Egan**
Instructed by:	**Du Toit Smuts Attorneys**
Date of Judgment:	**12 May 2022**