

SOUTH AFRICA / JUDGMENT

Groenewald and Others v Galloptic Trade and Investment 15 (Pty) Ltd and Others (2024/0699930) [2024] ZAGPJHC 993 (4 October 2024) [2024] ZAGPJHC 993

COURT

South Gauteng High Court, Johannesburg

BEFORE

A Bester

CASE / FILE NUMBER

2024/0699930

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NO: 2024-069930

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: YES

In

the matter between:	DEON GROENEWALD First Applicant KOOS GROENEWALD Second Applicant UNLAWFUL OCCUPIERS OF PORTION 17 OF THE FARM WELTEVREDE NO 517, JQ Third Applicant and GALLOPTIC TRADE & INVESTMENTS 15 (PTY) LTD First Respondent THE SHERIFF FOR THE DISTRICT OF KRUGERSDORP Second Respondent JOHAN HOMAN Third Respondent
Delivered:	4 October 2024 – This judgment is handed down electronically by circulation to the parties' representatives via email, uploading it to CaseLines and releasing it to SAFLII. ORDER 1. Mr Johan Homan is joined as the third respondent in the application. 2. It is declared that the applicants' appeal under case number 9333/2020 has not lapsed. 3. The questions of whether the third respondent is in occupation of the Farm Weltevrede No 517, JQ, (the property) and whether it is possible to restore possession of the property to the applicants, are referred to oral evidence. 4. The evidence shall be that of any witnesses whom the parties may elect to call, subject to paragraph 5. 5. Save in the case of Deon Groenewald, Koos Groenewald, Carla Cato, David Hlatshwayo, and Johan Homan, a party shall not be entitled to

call a witness unless:

- a. That party has served on the other parties a statement setting out the evidence to be given in chief by that witness, within 20 days of the date of this order if the witness is called by an applicant, and within 30 days of the date of this order if the witness is to be called by a respondent; or
- b. The Court, at the hearing, permits such person to be called, despite the fact that no such statement has been served; or
- c. The witness has been subpoenaed to give evidence at the hearing, whether such person has consented to furnish a statement or not.

6.
The fact that a party has served a statement in terms of paragraph 5a above, or has subpoenaed a witness, shall not oblige that party to call the witness concerned.

7.
Within 10 days of this order, each party shall make discovery, on oath, of all documents relevant to the issues referred to in paragraph 3 above, which is or has at any time been in the possession or under the control of that party.

8.
Discovery shall be made in accordance with Uniform Rule of Court 35 and the provisions of that rule regarding the inspection and production of documents shall be operative.

9.
Pending the finalisation of the matter the first applicant and/or his representatives shall be given access to the property every Tuesday and Friday between the hours of 08h00 and 10h00.

10.
The costs pertaining to the hearings of 2 July 2024 and 11 July 2024 are costs in the application.

JUDGMENT

BESTER AJ:

Introduction

- [1] The first respondent, Galloptic Trade & Investments 15 (Pty) Ltd, owns the immovable property known as Portion 17 of the Farm Weltevrede 517, JQ (the property). The first respondent obtained an order for the eviction of the applicants from the property on 20 April 2022, under case number 9333/2020 in this Division of the High Court. On 4 October 2022, the applicants were granted leave to appeal the order to the Full Court.
- [2] On 21 June 2024, the second respondent, the Sheriff of this Court for the district of Krugersdorp, evicted the applicants from the property on the strength of a warrant of ejectment issued upon the first respondent's statement that the appeal had lapsed.
- [3] The applicants deny that the appeal had lapsed and urgently apply to have their possession of the property restored pending the outcome of the appeal.
- [4] The first respondent contested the urgency of the application, but at the hearing, I determined that it was sufficiently urgent to be enrolled.
- [5] The first respondent opposes the application on two grounds. First, it contends that the appeal has lapsed, and that the execution of the order was therefore no longer suspended in terms of section 18(1) of the Superior Courts Act, 10 of 2013. As a result, it argues that the ejectment was lawfully executed.
- [6] Second, the first respondent contends that it was in any event not possible to restore possession of the property to the applicants. This is so, the first respondent contends, because the third respondent, Mr Homan, has taken occupation of the property. The applicants claim that Homan acted as an agent of the first respondent as part of a scheme devised by the first respondent, and further that he, at best, only took occupation of a second dwelling on the farm and no more. They did not, however, initially join him as a party to the proceedings.
- [7] On 3 July 2024, the issue of whether the appeal had lapsed was argued by the applicants and the first respondent. The applicants accepted that the issue of whether the restoration of possession of the property is possible, cannot be determined without Homan's participation or acquiescence to the outcome of the application. In the result, the applicants sought an opportunity to apply for the joinder of Homan on an urgent basis, which I allowed.
- [8] Of immediate concern to the applicants was that some of the first applicant's animals remained on the property and were not taken care of. He thus sought interim relief in that regard as well.
- [9] I therefore granted an order on 3 July 2024, in the following terms:
 - "1. *The application is postponed to 11 July 2024 at 10h00.*
 - 2. The applicants are afforded an opportunity to supplement their papers.

3. The first respondent is afforded an opportunity to supplement its answering affidavit.
4. The applicants are directed to join Mr Johan Homan to the application.
5. The first applicant and all persons necessary in order to assist him, is given access to Portion 17 of the Farm Weltevrede 517, JQ (the property), in order to assess and search for his animals and to take care of his animals.
6. The first applicant is given reasonable access forthwith to the property, in order to inspect the property.
7. All aspects of costs are reserved.”

[10] The applicant delivered an application to join Homan, who did not oppose the joinder but opposed the ultimate relief sought by the applicants. Counsel for the parties informed me that they agree that the issues of whether Homan is in possession of the property, and whether restoration of possession is possible, cannot be resolved on the papers due to factual disputes. They proposed, by agreement, that the issues be separated, and that I determine the issue of whether the appeal had lapsed. Should I find that it had lapsed, that would be the end of the matter, and the application must fail. However, should I conclude that the appeal has not lapsed, the parties requested that I refer the remaining issues to oral evidence. The approach is a sensible one and I agreed.

[11] In the result, the parties, by agreement, moved for an order which I granted on 11 July 2024 in the following terms:

“1. The issue of whether the appeal has lapsed is separated from the remainder of the dispute.

2. Pending the finalisation of the matter the first applicant and/or his representatives shall be given access to Portion 17 of the Farm Weltevrede 517, JQ (“the property”) pending the finalisation of this application on the following terms:

2.1 Every Tuesday and Friday between the hours of 08h00 and 10h00.

3. Judgment in respect of paragraph 1 is reserved.”

[12] Mr Homan’s joinder as third respondent was not mentioned in the order, and I will include it in the order I make here. He is a necessary party to the application and should be joined to the proceedings.[1] The parties agreed on this. A court in any event may join a necessary party.

[13] I now turn to the question of whether the appeal has lapsed. To do so, it is necessary to briefly consider the procedure of prosecuting a civil appeal in the High Court.

Prosecuting an appeal

[14] Uniform Rule 49 regulates the procedure for obtaining leave to appeal from the court of first instance and prosecuting the appeal if it lies to

the full court of the division. The appellant must deliver its notice of appeal within 20 days from the date upon which leave to appeal was granted.[2] The appellant has a further 60-day period to make a written application to the Registrar for a date for the hearing of the appeal. Should the appellant fail to do so, any respondent in the appeal may apply for the set down of the appeal, within 10 days of the expiry of the 60 days. If no application is received within the 70 days, the appeal shall be deemed to have lapsed.[3]

[15] The appellant is furthermore obliged to file three copies of the record on appeal with the Registrar and furnish two copies to the respondent when the application for a date for the hearing is made. If the copies of the record are not ready timeously, the Registrar may accept an application without the copies of the record, if the application is accompanied by a written agreement between the parties that the copies of the record may be handed in late, or upon simultaneous receipt of a condonation application.[4]

[16] After delivery of the copies of the record, the Registrar must assign a date for the hearing of the appeal and set it down for hearing, on at least 20 days' written notice to the parties.[5] If the party who applied for the hearing date fails to file the copies of the record within 40 days after the Registrar accepted the application for a hearing date, the other party may approach the court for an order that the appeal has lapsed.[6]

[17] The appellant must further provide security for the respondent's costs of appeal before lodging copies of the record with the Registrar unless the respondent waives its right to security or the Court on application releases the appellant.[7]

[18] In terms of Rule 49(15), the appellant shall deliver a concise and succinct statement of the main points which it intends to argue on appeal, with a list of authorities, not later than 15 days before the appeal is heard. The respondent shall do the same, not later than 10 days before the appeal is heard.

[19] In addition, there are practice directives for the Gauteng Division of the High Court regarding the prosecution of an appeal. With effect from 1 October 2023, Consolidated Practice Directive 1 of 2023 replaced Consolidated Practice Directive 2 of 2022 but retained the same directives in respect of civil appeals. The directive required the legal representatives to upload all documents, including heads of argument and practice notes to the appeal file but did not make it a precondition for the application for a hearing date.

[20] Consolidated Practice Directive 1 of 2024 replaced Consolidated Directive 1 of 2023 with effect from 26 February 2024. Paragraphs 33.17 to 33.20 stipulate:

“33.17. Once an appeal has been timeously noted, the registrar shall not accept any appeal matter [as contemplated in Rule 49(2), 6(a) and 7(a) or Rule 50 6(a) and 7(a)], unless the appellant or the attorney of the appellant simultaneously uploads to the electronic court file:

33.17.1. complete record, indexed and paginated;

33.17.2. The appellant's heads of argument and practice note.

The registrar shall thereupon issue an acknowledgement of receipt thereof.

33.18. The appellant or the appellant's attorney shall:

33.18.1. Thereupon serve on the respondent or the respondent's attorney of record, the record and the appellant's heads of argument, practice note and a copy of the registrar's acknowledgement, and further state that the respondent's heads of argument and practice note must be uploaded to the electronic court file not later than 30 court days from the date of that service; and

33.18.2. Upload a copy of such service to the electronic court file within 5 days of such service.

33.19. The appellant or the appellant's attorney shall not earlier than the day after the respondent's heads of argument and practice note are due, act as follows:

33.19.1. If the respondent has complied with paragraph 33.18.2, apply to the registrar to have the matter set down, whereupon the registrar shall provide the appellant or the appellant's attorney with a notice of set down, which the appellant or the appellant's attorney shall serve on the respondent or the respondent's attorney forthwith, and upload a copy of such service with to the electronic court file within five days of such service;

33.19.2. If the respondent has not complied with paragraph 33.18.1, set down an application to compel compliance in the special interlocutory court;

33.19.3. The registrar shall, notwithstanding the non-compliance by the respondent, upon presentation by the appellant or the appellant's attorney with an order of the special interlocutory court, act further in accordance with that order to set down the matter and issue a notice of set down.

33.20 The Deputy Judge President may direct, in any particular matter, that the parties deliver heads of argument otherwise than as provided for in paragraph 33.17 and 33.18 above, either of his/her own accord or on receipt of a written request from one or both parties."

The prosecution of the appeal

[21] The applicants were granted leave to appeal on 4 October 2022, whereafter they delivered their notice of appeal timeously on 24 October 2022. On 16 January 2023 (thus shortly before the 60-day period within which to apply for a hearing date would expire), the applicants' attorney applied for a hearing date for the appeal.

[22] On 15 March 2023 the appeal record was lodged, with security for costs and a power of attorney. However, no date for the appeal has yet been allocated.

[23] The first respondent contends that the applicant did not timeously apply for a hearing date. It argues that proper application was not made, because the application was not accompanied by the record as required by Rule 49, and the applicants' heads of argument and practice note as required by the practice directives. It further contends that the Registrar did not accept the application, as there was no confirmation of the acceptance, and a note placed on CaseLines indicates that the application had not been accepted.

[24] I address each of these arguments in turn.

[25] As pointed out above, Rule 49(7) requires the record to be delivered with the application for a hearing date, unless the parties agreed to deliver the record later, or, if not, the application is accompanied by an application to condone the late delivery of the record. The applicants claim that the parties had agreed to deliver the record later. This is denied by the first respondent.

[26] On 10 January 2023, Mr Crawford, the applicant's attorney, wrote to Mr Van Zyl, the first respondent's attorney, in the following terms:

"2. We advise that we are desirous to apply for a date for the hearing of the appeal of this matter.

3. Accordingly we advise that the record will be finalised today, however that we would like to afford your office an opportunity to consider the index and advise if you would like any further documents to be included.

4. To this end we request your agreement that we may proceed to apply for the appeal date and that the final appeal record shall then follow when your office has had an input."

[27] Mr Van Zyl replied on 16 January 2023, stating that "we confirm that the arrangements proposed in paragraphs 3,4 and 5 [is] acceptable to our client". Rule 49 requires the agreement to be in writing. The exchange of the letter complies with this requirement.[8]

[28] The same day Mr Crawford addressed a letter to the Registrar and included the two letters. He stated as follows:

"2. We herewith present an agreement between the parties that the record be handed in later, the signed leave to appeal judgment still being outstanding and request that a date for the hearing of this matter be allocated."

[29] In the answering affidavit, Ms Cato, the first respondent's sole director, states that Mr van Zyl denies that an agreement was concluded. Mr Van Zyl deposed to a confirmatory affidavit in the generic style merely confirming the contents of Ms Cato's affidavit insofar as it related to him.

[30] Ms Cato further claimed that the correspondence attached to the founding papers bears out that no agreement had been reached, saying that Mr van Zyl's letter of 16 January 2023 on the face thereof clearly does not confirm paragraph 2 of the letter to the Registrar.

- [31] The first respondent seems to have misread the founding affidavit and the annexures. The applicants attached as annexure C to the founding papers the email to the Registrar, the letter to the Registrar from which I quoted above, and the two letters exchanged between the parties' attorneys regarding the agreement. The letter from Mr Van Zyl was attached before the letter from Mr Crawford, so that a cursory look at annexure C may create the impression that Mr Van Zyl's letter is a response to the letter to the Registrar, whereas in fact, it was a response to Mr Crawford's letter, which appears immediately thereafter in the papers.
- [32] The above illustrates the need for parties to take care in managing documents. It is a better practice to individually mark attached documents, even if they are grouped through sub-numbering under a main reference, such as, in this instance, C1, C2, C3 and C4 respectively. It also shows the importance of being clear when documents are referred to in affidavits. One would expect a prudent deponent to explain in the affidavit that a particular annexure includes the documents attached thereto upon transmission.
- [33] Mr Van Zyl confirmed Ms Cato's statement that no agreement had been reached. This is something he would have personal knowledge of. It was not a peripheral issue in the application – the first respondent put the issue front and centre as a reason why the appeal had lapsed. One must be concerned how it came about that Mr van Zyl, in the circumstances, could state on oath that no agreement was reached when it is patent from his letter that such an agreement had been reached. This unfortunate situation also illustrates why parties should be slow to present evidence through confirmatory affidavits not dealing with the evidence itself, but merely confirming what another witness has said. This type of affidavit is only suitable for noncontentious evidence.[9]
- [34] The first respondent did not "seriously and unambiguously address the fact said to be disputed" and there is thus no real, genuine and bona fide dispute of fact on the papers.[10] I find that the parties did agree to deliver the record later. In this regard, Rule 49 was complied with.
- [35] The first respondent further argues that the application was not and could not have been accepted by the Registrar, because on 17 January 2023, the Registrar placed a note on the CaseLines file requiring the attorneys to create and upload the notice of appeal on CourtOnline, and not CaseLines, whereafter a new number were to be issued.
- [36] In reply, the applicants contend that they had complied with the requirements of the Practice Directive and the Registrar's note was only a practical requirement in the move to initiate matters on CourtOnline rather than on CaseLines. I agree. The note was neither a prerequisite to applying for a hearing date nor an indication that the Registrar did not accept the application.

- [37] This, in my view, also deals with the argument that there is no indication that the Registrar accepted the application for a hearing date. The Registrar did not expressly communicate an acceptance of the application but gave further instructions about the prosecution of the appeal. In my view, that indicates that the Registrar accepted the application.
- [38] What remains, is to confirm whether the Registrar could have accepted the application when it was not accompanied by the applicants' heads of argument and practice note.
- [39] Having concluded that the Registrar accepted the application for a hearing date on 17 January 2023, the provisions of Practice Directive 1 of 2024 are moot in respect of the acceptance of the appeal by the Registrar, as referred to in paragraph 33.17 of that directive. The paragraph expressly refers to compliance with the steps contemplated in Rule 49(2), 49(6)(a) and 49(7)(a). All three of those steps had already taken place before the effective date of the practice directive. In the circumstances, the applicants had applied for a hearing date for the appeal as required by Rule 49, read with the Practice Directive operative at the time. The appeal is thus not deemed to have lapsed.

The order

- [40] In the circumstances, I deem it appropriate to make an order referring the question of whether the third respondent is in occupation of the property to oral evidence in the customary form,[11] adjusted to align with the current practice requiring matters to be fully prepared for a hearing before a date is allocated.
- [41] In the result I make the following order:
- a) Mr Johan Homan is joined as the third respondent in the application.
 - b) It is declared that the applicants' appeal under case number 9333/2020 has not lapsed.
 - c) The questions of whether the third respondent is in occupation of the Farm Weltevrede 517, JQ, (the property) and whether it is possible to restore possession of the property to the applicants, are referred to oral evidence.
 - d) The evidence shall be that of any witnesses whom the parties may elect to call, subject to paragraph 5.
 - e) Save in the case of Deon Groenewald, Koos Groenewald, Carla Cato, David Hlatshwayo, and Johan Homan, a party shall not be entitled to call a witness unless:
 - i) That party has served on the other parties a statement setting out the evidence to be given in chief by that witness, within 20 days of date of this order if the witness is called by an applicant, and within 30 days of date of this order if the witness is to be called by a respondent; or
 - ii) The Court, at the hearing, permits such person to be called despite the fact that no such statement has been served; or

iii) The witness has been subpoenaed to give evidence at the hearing, whether such person has consented to furnish a statement or not.

- f) The fact that a party has served a statement in terms of paragraph (i) above, or has subpoenaed a witness, shall not oblige that party to call the witness concerned.
- g) Within 10 days of this order, each party shall make discovery, on oath, of all documents relevant to the issues referred to in paragraph (c) above, which is or has at any time been in the possession or under the control of that party.
- h) Discovery shall be made in accordance with Uniform Rule of Court 35 and the provisions of that rule with regard to the inspection and production of documents discovered shall be operative.
- i) Pending the finalisation of the matter the first applicant and/or his representatives shall be given access to the property every Tuesday and Friday between the hours of 08h00 and 10h00.
- j) The costs pertaining to the hearings of 2 July 2024 and 11 July 2024 are costs in the application.

A Bester

Acting Judge of the High Court of South Africa

Gauteng Local Division, Johannesburg

Heard: 2 & 11 July 2024

Judgment

Date: 4 October 2024

Counsel for the Applicants: JW Kloek, instructed by Crawford Harris Inc.

Counsel for First Respondent: HF Geyer, instructed by Swanepoel Van Zyl Attorneys

Counsel for Second Respondent: No appearance

Counsel for Third Respondent: J Swanepoel, instructed by Mosterts Inc.

[1] Matjhabeng Local Municipality v Eskom Holdings Ltd and Others 2018 (1) SA 1 (CC) in paras 91 to 93.

[2] Uniform Rule 49(2).

[3] Uniform Rule 49(6)(a).

[4] Uniform Rule 49(7)(a)(i).

[5] Uniform Rule 49(7)(c).

- [6] Uniform Rule 49(7)(d).
- [7] Uniform Rule 49(13).
- [8] See for instance *Goldblatt v Fremantle* 1920 AD 123 at 126.
- [9] See for instance *Drift Supersand (Pty) Ltd v Mogale City Local Municipality*
- [2017] 4 All SA 624 (SCA) [2017] JDR 1611 (SCA) in para 31.
- [10] See *Wightman t/a JW Construction v Headfour (Pty) Ltd and another*
- [2008] ZASCA 6; 2008 (3) SA 371 (SCA) in paras 12 and 13.
- [11] *Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd* 1971 (2) SA 388 (W) at 396 G – 397 B.
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