

SOUTH AFRICA / JUDGMENT

Jiyana and Another v Hardisty and Others (22862/2023) [2024] ZAWCHC 4 (19 January 2024)

[2024] ZAWCHC 4

COURT

Western Cape High Court, Cape Town

BEFORE

Lekhuleni

CASE / FILE NUMBER

22862/2023

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Policy

In the High Court of
South Africa
(Western Cape
Division, Cape Town)

Case

No: 22862/2023

In

the matter between:

THEMBINKOSI
RUDOLF JIYANA
First
Applicant
NOMVO
JIYANA
Second
Applicant
And
GARY
NIGEL HARDISTY
First
Respondent

JENNIFER
JANINE HARDISTY
Second
Respondent
CAPE
TOWN NORTH SHERIFF
Third
Respondent
MRS
AMANDA J.L TOBIAS-TITUS

Heard: 14 December 2023
Delivered
(electronically): 19 January 2024

JUDGMENT

LEKHULENI J

- [1] This is an urgent application which served in the urgent court during the recess period. Applicants sought an order interdicting the first and second respondents from taking occupation of an immovable property situated at No 1[...] E[...] Close, E[...] Road, Parklands pending the determination of proceedings to be instituted against Absa Bank within 30 days of the said order being granted. The applicants also sought an order directing the third respondent to grant them access to the property, and to provide them with the necessary keys.
- [2] In the event the keys to the said property are in the possession of the first and second respondent, the applicants sought an order that such respondents be directed to unlock the property and to hand the keys of the property to the applicants immediately. In addition, the applicants also sought an order that upon the granting of this order, the applicants be permitted to take immediate possession of the property.
- [3] The first and second respondents filed a notice to oppose and did not file any answering affidavit. The third respondent did not file any opposing papers.

THE FACTUAL BACKGROUND

- [4] The applicants assert that they resided at the impugned property in Parklands with their two children for an uninterrupted period of 18 years. They regarded this property as their home. The bondholder of this property, Absa Bank, issued summonses against the applicants in 2006 for failure to make bond instalment payments. The applicants defended the action. As it happened, Absa Bank applied for default judgment notwithstanding that the matter was defended. Pursuant to that application, a default judgment was granted. The applicants thereafter applied for rescission of that judgment. At the hearing of that application, on 13 October 2008, the parties reached an agreement which was reduced to a draft order which Thring J, as he then was, made an order of the court ('the consent order').

- [5] Among other things, in terms of the said agreement, the applicants agreed to pay the arrears of the home loan account in the sum of R58 059.04 on 07 November 2008, and the subsequent bond instalments in terms of the bond agreement. The parties also agreed that should the applicants fail to make any payment on or before the due date and or fail to comply with any of the terms of the consent order on or before the due date, the full outstanding balance in terms of the Mortgage bond agreement would become immediately due and payable. In the event of the applicants not complying with the terms of the consent order, Absa Bank was entitled on five days' notice to the applicants to apply for judgment for the outstanding balance on the mortgage bond together with interest and legal costs as well as for an order declaring the property specially executable forthwith.
- [6] The applicants assert that they complied with the order and paid the arrears as agreed; however, in 2013, they failed to comply with the terms of the order by not paying the scheduled instalments on the due date as directed. As a result, the Absa bank invoked the provisions of the consent order, proceeded to take judgment against the applicants and declared the property executable. Pursuant to that judgment and the declaration of executability of the property, the bank proceeded to sell the property in execution to the first and the second respondent.
- [7] Acting in terms of the judgment granted in default as well as the declaration of executability of the property, the first and the second respondent instituted eviction proceedings in this court against the applicants. The applicants opposed the application. Notwithstanding their opposition, an eviction order was granted against the applicants.
- [8] I pause to mention that the applicants challenged the order declaring their property executable on constitutional grounds in this court, and their application failed. They approached the Supreme Court of Appeal and the Constitutional Court; however, their application suffered the same fate. After the eviction order was granted, they applied for leave to appeal that order. They did not pursue that application, as their constitutional challenge to the order declaring their property executable was pending in the Supreme Court of Appeal and the Constitutional Court. On 12 December 2023, the third respondent executed the eviction order and ejected the applicants from the house in terms of a court order.
- [9] The applicants argue that the consent order Thring J granted in the present matter, on 13 October 2008, including paragraph 7, is unlawful. The applicants further contend that the parties could not have lawfully agreed to terms in a draft order which conflicts with section 129(3) of the National Credit Act 38 of 2005 ('the NCA'). Similarly, the applicants are of the view that the court was not competent to make such terms an order of the court as such draft agreement was offending the provisions of section 129(3)(a)(b) of the NCA as amended. The applicants also contend that due to the order granted by consent being unlawful, all the subsequent orders that followed, namely the order declaring their house executable and the eviction order, are unlawful and a nullity, as they are proverbially a fruit of a poisoned tree.

- [10] The applicants, therefore, seek an order that, pending a determination of the proceedings to be instituted against Absa Bank within 30 days of the grant of the order, the first and second respondents be interdicted from taking occupation of the property in question and that the applicants in the interim be allowed to possess the property.

PRELIMINARY

ISSUES

- [11] Mr. Nöthling, the legal representative of the first and second respondent, raised two preliminary arguments during the hearing of this application. First, Mr. Nöthling argued that the two applicants had been declared vexatious litigants in March 2023 and did not apply for leave to institute these proceedings before they instituted this application. Secondly, Mr Nöthling submitted that the time or the dies the applicants gave the respondents to file their answering affidavit was unreasonable and impracticable; hence, the respondents could not file their answering affidavit.
- [12] For convenience, I will deal with these preliminary issues one after the other.
- Failure to timely apply for leave to institute these proceedings.
- [13] As previously stated, Mr Nöthling submitted at the hearing of this application that the applicants were declared vexatious litigants by this court on 09 March 2023 and that they are precluded from instituting proceedings or bringing this application without the leave of court as required by the Vexatious Proceedings Act 3 of 1956 ('the Vexatious Proceedings Act'). Counsel submitted that the application for leave to institute proceedings was only launched after the application for an interdict was instituted. Mr Nöthling submitted that the first applicant was an attorney, who represented himself in the proceedings where he was declared a vexatious litigant. It was Counsel's submission that the first applicant knew or should have known that he had to seek the court's permission before he could institute proceedings. On this basis alone, the contention continued; this matter should be struck from the urgent roll.
- [14] The applicant's legal representative, Mr Lingani, acknowledged that they did not seek leave to institute proceedings prior to filing the interdict application. Mr Lingani stated that during the lunch hour, prior to the hearing of this application, his colleague, the respondents' Counsel, informed him that these proceedings were not proper before this court. According to his colleague, the applicants should have first sought leave before instituting the interdict application. The respondents' Counsel further informed him that he would apply to strike off the case from the court roll and claim costs de bonis propriis. Following the discussion with the respondents' Counsel, he returned to his office to prepare the condonation application.

- [15] Mr Lingani further submitted that the failure to seek leave to institute legal proceedings as envisaged in the Vexatious Proceedings Act was an oversight on his part. It was his submission that during the drafting of the interdict application, it was raised with him that the applicants had been declared vexatious litigants in the past. However, he inadvertently and mistakenly overlooked the necessity to bring the application for leave to institute the interdict application. According to his assertion, the error was not deliberate but rather unintentional on his part, and he implored the court to accept it.
- [16] According to Mr. Lingani, the applicants' application does not constitute an abuse of process. He contended that the consent order of Thring J, is challenged by the applicants' application. His central argument was that the consent order was unlawful even if it was established through an agreement. Therefore, the court should not have made the parties' agreement an order of court. According to him, the order circumvented the provisions of the NCA, giving the judgment Creditor (Absa Bank) the power to proceed and obtain judgment without again serving the applicants with the necessary section 129 Notice as required by the NCA. To this end, he contended that the agreement between the parties, which was made an order of court, was unlawful and that any subsequent order granted pursuant to that order was unlawful. He implored the court to grant the relief sought in the notice of motion.
- [17] It is common cause that on 09 March 2023, Henney J granted an order declaring the applicants vexatious litigants. The relevant part of the order stated:
- "[68] In respect of the counterapplication, I make the following order:*
- (1) The applicants in both their personal and representative capacities are declared vexatious litigants in terms of Section 2 of the Vexatious Proceedings Act 3 of 1958. And that no legal proceedings were (sic) instituted by the applicants in either the personal or representative capacities against any person or legal personnel in any division of the High Court of South Africa or any inferior court without leave of the court for any judgment of the High Court.
 - (2) The registrar is directed to cause a copy of the order to be published as soon as possible in the Government Gazette in accordance with section 2(3) of the Act."
- [18] It is common cause that the applicants did not seek the necessary leave of court when they instituted this application. They brought this application as if no order had been granted against them in terms of Section 2(b) of the Vexatious Proceedings Act. The applicants were aware that they were required to obtain leave of court before they could bring this application, but they chose to disregard the court order. Mr Lingani's claim that this was an oversight is too shallow, tedious, and unconvincing. The applicants' legal representative was aware that the applicants had been declared vexatious litigants, yet he still brought this application without following due process.

- [19] Mr. Lingani stated in the tenth paragraph of the proposed condonation application for leave to file this application (interdict) that he was informed that the applicants had been previously declared vexatious litigants during the drafting of the application. However, he erroneously failed to recognise the necessity and significance of bringing the present application before the court prior to instituting the interdict application. This assertion is of much concern to the court. In my opinion, in his capacity as the applicants' legal counsel, he ought to have been aware that permission was necessary prior to instituting legal proceedings in this court.
- [20] The order of Henney J was made in March 2023. It is still fresh in the applicants' minds. During the hearing of these proceedings, this court was informed that the first applicant represented himself during the proceedings before Henney J. He was an attorney of this court. Surely, he was aware that prior to approaching this court he had to comply with the order of Henney J and apply for leave to institute proceedings before they could approach this court concerning the interdict application. Notwithstanding, they did not do so. Instead, they proceeded to institute these proceedings as if no order against them existed.
- [21] It is crucial to emphasise that court orders must be respected and followed without exception. A flagrant disregard of court orders cannot be sanctioned or tolerated. Non-compliance with any court order for that matter must be deprecated in the strongest possible terms. The applicants' failure to comply with this court's order is a serious violation of the court's integrity and honour and must be condemned with the utmost vigour.
- [22] The seriousness and magnitude of this infringement is reflected in section 2(4) of the Vexatious Proceedings Act, which criminalises the applicants' conduct. Section 2(4) of the Act provides that 'any person against whom an order has been made under subsection
- (1) who institutes any legal proceedings against any person in any court or any inferior court without the leave of that court or a judge thereof shall be guilty of contempt of court and be liable upon conviction to a fine not exceeding one hundred pounds or to imprisonment for a period not exceeding six months.'
- [23] The belated application for condonation does not help the applicants. The explanation for why leave was not sought is flimsy and unconvincing. As stated above, the applicant's legal representative averred that it was raised with him at the point of drafting the application that the applicants were declared vexatious litigants. He did not indicate who brought this information to his attention in his affidavit. Notwithstanding, he overlooked the need to bring this application. He only considered bringing this application when he was informed that the respondents would raise it as a preliminary point.

- [24] Crucially, the applicants did not file any confirmatory affidavit to that of Mr Lingani to confirm his averments. The applicants failed to explain to the court why they instituted these proceedings without the leave of the court. It seems to me, the approach adopted by the applicants was a stratagem to circumvent the court order that declared them vexatious litigants.
- [25] In any event, I am of the view that the applicants' application on the merits constitutes an abuse of the court process. The application contains absolutely no merits. The applicants raised a defence which has long been dismissed in this court. It must be borne in mind that the Vexatious Proceedings Act requires that two conditions be satisfied before a vexatious litigant can institute legal proceedings. First, a court must be satisfied that the proceedings are not an abuse of the court's process, and second, the proceedings must have prima facie grounds. Alternatively stated, applicants are required to show that they have a bona fide claim and that their claim is prima facie meritorious. See *Beinash and Another v Ernst and Young and Others* 1999 (2) SA 116 (CC) at para 13.
- [26] From the above, it is abundantly clear that the Act allows a court to screen an individual who has persistently and without any reasonable ground instituted legal proceedings in any court or inferior court. According to section 165(3) of the Constitution, no person or organ of State may interfere with the functioning of the courts. Vexatious litigants manipulate the courts' functioning to achieve a purpose other than that for which the courts are designed. *Beinash and Another v Ernst and Young and Others* 1999 (2) SA 116 (CC) at para
17. This is precisely what the applicants are doing in the present matter. Thus, the Act aims to stop persistent and ungrounded institution of legal proceedings by vexatious litigants such as the applicants and to halt them from making unjustified claims against others. *S v Sitibe* 1965 (2) SA 908 (N) at 911B-C.
- [27] The applicants contend that the order granted by Thring J, as he then was, by consent is unlawful because it circumvents the provisions of the NCA. Mr Lingani submitted that this order was unlawful because after the applicants paid their arrears, the bank should have first issued a Notice in terms of section 129 of the NCA to the applicants before it could take judgment against them. This argument, with respect, is fallacious and fundamentally flawed. The law reports are replete with cases dealing with relevant instances for invoking section 129 of the NCA. I deem it unnecessary to repeat those principles in this judgment. However, it suffices to say that it was not a legal requirement in terms of the NCA after the summons was issued and served upon the applicants and after the pleadings were exchanged for Absa bank still to file a notice in terms of section 129 before it could take judgment against the applicants.
- [28] Notably, the applicants are fastidiously selective in interpreting Thring J's order. According to the explicit provisions outlined in paragraph 2 of that order, in the event that the applicants neglect to make any of the aforementioned payments (including arrears and bond installments) or fail to comply with any of the terms of the order by the due date, the

entire outstanding balance under the mortgage bond would promptly become due and payable. Paragraph 7 clearly stated that in the event the applicants fail to comply with the terms of the order, the respondents would be entitled on five days' notice to the applicants to apply for judgment for the outstanding balance under the mortgage bond agreement together with interest and legal cost as well as to apply for an order to declare the property situated at erf 1593 Parklands executable forthwith.

- [29] It is common cause that the applicants paid the arrears as agreed but later fell in arrears with their bond payments and thus breached the consent order. The bank obtained a judgment in terms of the consent order as it was so entitled. The court subsequently declared the property executable and eventually granted an eviction order.
- [30] Those orders (the declaration of executability and eviction order) remain in effect until a competent court sets them aside. Until that is done, those court orders must be obeyed. See *Department of Transport and Others v Tasima (Pty) Ltd 2017 (2) SA (CC)*. In *Municipal Manager OR Tambo District Municipality and Another v Ndabeni*
- [2022] ZACC 3, the Constitutional Court reiterated that court orders granted by a court are binding until set aside by a competent court in terms of section 165(5) of the Constitution, irrespective of whether they are valid; and that wrongly issued judicial orders are not nullities.
- [31] What sounds a death knell in the applicants' application is that the order of Thring J, was granted by agreement on 13 October 2008. The applicants have consistently paid the bank in terms of that agreement until they fell in arrears. For 15 years, the applicants failed to see anything wrong with that order. They abided by its terms. I repeat, they paid the bond instalments in terms of the order until they fell in arrears. The bank obtained a judgment against them because of their default. They now seek to impugn the very order that they acquiesced with. In my view, the applicants have abandoned their right to challenge the draft order. They had committed themselves to abide by the court order and to fulfil its terms. Thus, they are perempted from impugning that order. See *Eke v Parsons 2016*
- (3) SA 37 (CC) at para 31.
- [32] Lastly, from the reading of Henny J's judgment declaring the applicants' vexatious litigants, it seems to me that the same argument raised in this court based on section 129 of the NCA, was raised in that court and in previous rescission applications. At para 37 of the judgment, the learned justice stated:
- “The NCA defence was one of the core issues that was raised in the second rescission application, which served before Meer J, a full bench of this court and the SCA, on further appeal. This defense was dismissed in all these courts.”*
- [33] Given all these considerations, I am of the view that this application is a clear abuse of the legal process, and there is no apparent justification for these proceedings. I thought of invoking the provisions of section 2(4) of the Vexatious Proceedings Act and holding the

applicants in contempt of court to vindicate the honour and integrity of this court. However, I have decided against that. Instead, I would like to sound a note of caution to the applicants to be cautious and follow the appropriate legal process if they plan to take any legal action in the future. Failure to do so may result in them being held in contempt of court, which could lead to appropriate sanctions being imposed. Pursuant to the above finding, I deem it unnecessary to consider the second preliminary point. The applicants' application must fail.

COSTS

[34] As far as costs are concerned, Mr Nöthling submitted that the matter be postponed, and that the applicant's legal representative be given notice to show cause why costs should not be granted against him *de bonis propriis*. Mr Lingani, on the other hand, submitted that he had never dealt with the applicants before in their previous cases and was acting *pro bono* in this matter.

[35] It is a trite principle of our law that a court considering an order of costs exercises a discretion and that the court's discretion must be exercised judicially. *Ferreira v Levin NO and Others*; *Vreyenhoek and Others v Powell NO and Others*

[1996] ZACC 27; 1996 (2) SA 621 (CC); *Motaung v Makubela and Another, NNO*; *Motaung v Mothiba NO* 1975

(1) SA 618 (O) at 631A. The court is expected to take into consideration the peculiar circumstances of each case, carefully weighing the issues in each case, the conduct of the parties as well as any other circumstances which may have a bearing on the issue of costs and then make such an order as to costs as would be fair in the discretion of the court.

[36] As stated above, the first applicant was an attorney of this division, and he knew or should have been aware that he had to apply for leave to institute these proceedings. He received the judgment declaring him and his wife vexatious litigants. From Mr Lingani's affidavit, it can be reasonably inferred that he discussed this with Mr Lingani. Notwithstanding, he failed to seek leave to institute proceedings in this court. In my view, the applicants must be ordered to pay the costs of this application.

ORDER

[37] In the result, the following order is granted:

37.1 The applicants' application is hereby dismissed.

37.2 The applicants are ordered to pay the costs of this application including the costs of Counsel.

LEKHULENI JD

JUDGE OF THE HIGH COURT

APPEARANCES For the Applicants: Mr Lingani Instructed by: Venfolo Lingani Inc 5th Floor, No 36 on Long Street Cape Town For the Respondents: Adv Nöthling Instructed by: Martin E Coetzee and Associates C/o Combrink Attorneys 9th Floor Pinnacle Building Cape Town

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