
SOUTH AFRICA / JUDGMENT

Limbada NO v Stander (1230/2013) [2014] ZAECPEHC 70 (14 October 2014) [2014] ZAECPEHC 70

COURT

Eastern Cape High Court, Port Elizabeth

BEFORE

P.W. Tshiki

CASE / FILE NUMBER

1230/2013

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH

Case no: 1230/2013

Date heard: 14.8.2014

Reasons

made available: 14.10.2014

In the matter between:

LEYLA LIMBADA N.O.

Applicant

vs

NATALIE STANDER

Respondent

REASONS

FOR JUDGMENT

TSHIKI J:

- [1] In this matter, applicant seeks an order for the eviction of the respondent and other people who reside in the same premises from an immovable property owned by Lanor Design and Manufacturing CC (“Lanor”) in liquidation. Lanor was finally

liquidated by this Court on the 2nd November 2011. The applicant herein is the liquidator of Lanor Design and Manufacturing CC which owns a residential property being Erf [.....] in Nelson Mandela Bay Metropolitan Municipality in Port Elizabeth. The property is situated at no [.....], Port Elizabeth. The respondent and/or his relatives are presently occupying the property in issue. At the instance of the creditors of the corporation a resolution was made to have the property sold and a Deed of Sale be concluded in favour of the seller and the purchaser. This was to be done through the office of the applicant’s attorneys. Respondent, who was interested in purchasing the said property could not obtain sufficient finance and therefore nothing came of the sale between respondent and the applicant herein. The property had to be marketed for sale and in the interests of the sellers.

- [2] The respondent’s right in the property was subject to an express agreement that she would vacate the property on one calendar

months’ notice being given to her. After such notice had expired the respondent was requested to vacate the property.

Respondent and/or any other occupants who occupy the property at his instance have refused to vacate.

- [3] Respondent’s refusal to vacate the property is based on the fact that the respondent has appealed against the order of this Court dated the 4th October 2011. The notice of appeal was filed on the 21st May 2013. In my view, as this issue has been narrated in the judgment of Werner De Jager NO and Two Others v Royden Edward Minto Thompson and Another case no 2121/2013 delivered by this Court on the 8th July

2014. In that judgment Eksteen J dismissed the respondent’s reliance on the fact that the respondent could raise a defence that the matter is still pending on appeal and therefore no eviction proceedings could be enforced. This in fact is governed by section 150 (3) of the Insolvency Act 24 of 1936 which provides:

“When an appeal has been noted ... against a final order of sequestration, the provisions of this Act shall nevertheless apply as if no appeal had been noted: Provided that no property belonging to the sequestrated estate shall be realized without the written consent of the insolvent concerned.”

- [4] This means that even where an appeal is noted against the final sequestration order, the sequestration follows its normal course and the provisions of the above Act apply as if no appeal has been noted, provided, however, that the trustees may not realise assets in the estate without the consent of the insolvent. Once the appeal lapses the trustees are free to sell the immovable property vesting in the insolvent estate. In the present case, I am advised

that there is no valid application for leave to appeal because it was filed late and without the Court having granted condonation of the late filing to the respondents. Therefore, there is nothing preventing the applicant from evicting the respondent herein.

- [5] The facts of this case and the issues therein are similar to those of the applications in case no's 2122/2013 and 676/2013. In all three cases the respondents who occupied the premises hold the view that they could not be evicted from the premises and for their refusal they rely on the fact that they have filed an application for leave to appeal. The one in case no 676/2013 also relies on the fact that there is an application for rescission of judgment which is pending. All those applications have been filed out of time and no condonation has been granted by the Supreme Court of Appeal in this regard. In fact, the application for leave to appeal in the present matter was heard and dismissed on the 19th March 2014 and no other pending application for leave to appeal has been filed. Section 150 (5) of the Insolvency Act 24 of 1936 provides that there shall be no appeal against any order made by the Court in terms of the Insolvency Act except as provided for in section 150. Section 150 (1) gives the High Court the power to hear appeals by anyone aggrieved against the grant or refusal of sequestration orders in certain circumstances. An appeal, therefore, may be granted with regard to: (a) an order of final sequestration; (b) the order setting aside, of a provisional sequestration order; and (c) orders other than those made in terms of the Act.
- [6] In this case, the respondent contends that the notice of withdrawal of the eviction application was never served on him. Applicant has filed an affidavit by the Sheriff which confirms that the Sheriff served the respondent with the notice of withdrawal and he claims not to have received it by way of service. A copy of the return of service has been annexed to the replying affidavit as proof of such service. There is, therefore, no merit in the applicant's contention that such documents being the withdrawal of the eviction application were never served on him.
- [7] From the papers before me it is clear that the respondent has no leg to stand on in its application for a postponement herein. In fact, as I have alluded to in case no 2122/2013 there were no valid grounds for the application for postponement of the case. All of them had no valid reasons to only file the notice of application for the postponement at the last hour. This Court was not even informed of the reason not to have the papers filed on the 14th August 2014 on the day of the hearing. The applicant's attorney was not even available in one of the cases in the afternoon

to hear the judgment or order of the Court which was delivered at about 14h15. Ms Carruthers did not even have the decency to inform the Court of her absence whether before or after the hearing. I am advised by my

secretary that she came at 14h30 after the Court had adjourned. In my view, that does not exonerate her from making an official

explanation for her absence in Court in the circumstances. Even today this Court is groping in the dark as to her absence when her case was called and when the order was pronounced. Perhaps this is a matter for the knowledge of the law society of the Cape of Good Hope.

[8] I am therefore not persuaded that the applicant herein has convinced the Court that he was entitled to an indulgence by way of a postponement. It is for the above reasons that I refused with costs the applicant's application for postponement and ordered applicant to pay costs. The affidavit by Jeanette Thompson which accompanies the application for rescission of judgment fails to explain good grounds for the postponement. The papers contained in the file do not support the applicant's averments that there are good prospects of success in the application for rescission of judgment. In any event, this case has taken the final route. There has been no compliance with Rule 6 of the Supreme Court of Appeal which requires that the application for leave to appeal to that Court must be filed within one month after the leave to appeal has been refused by the trial Court. In this case, no such application has been made and therefore there is no further proceedings to pursue the intended appeal. It is for the above reasons that I refused with costs the application for a postponement.

P.W. TSHIKI

JUDGE OF THE HIGH COURT

Counsel for the applicant : Adv P.W.A Scott SC

Instructed by

: BLC Attorneys

PORT ELIZABETH

(Ref: Mr LT Schoeman/wjd/K48887)

Attorney for the respondent : Ms Carruthers

Instructed by

: Carruthers Attorneys

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