

SOUTH AFRICA / JUDGMENT

Minister of Justice And Constitutional Development v Herman and Another (67151/2013) [2013] ZAGPPHC 485 (19 December 2013)

[2013] ZAGPPHC 485**COURT**

North Gauteng High Court, Pretoria

BEFORE

S P Mothle

CASE / FILE NUMBER

67151/2013

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Source record**IN THE NORTH****GAUTENG HIGH COURT. PRETORIA****(REPUBLIC OF
SOUTH AFRICA)****CASE****NO: 67151/2013****DATE:**

19 DECEMBER 2013

In the matter

between:THE MINISTER OF
JUSTICE

AND.....Applicant

CONSTITUTIONAL
DEVELOPMENT

And

JOHN

HERMAN.....First

Respondent

NKWADI SIMON

MAREMANE.....Second

Respondent

JUDGMENT

MOTHLE, J

1. This is an application for leave to execute a judgment order in terms of Rule 49(11) of the Uniform Rules of Court. The Applicant in this matter is the Minister of Justice and Constitutional Development ("the Minister"), who obtained an order in this Court on 5 November 2013, following an application brought by way of urgency for the removal of a Sheriff. The Court in granting relief, ordered amongst others that the First Respondent ("Herman"), a Sheriff of Mokopane/Potgietersrus district, must hand over all processes and documentation in his possession as well as records to the Court Manager of Mokopane Magistrate's Court within 48 hours of the service of the Court order, including payment for costs of the application.
2. This application was heard on 6 December 2013, on the same day the application for leave to appeal the main judgment by Herman was heard and dismissed. After reading the documents filed of record in this application, including the opposing affidavit by Herman, and having heard argument by both counsel, I granted an order in terms of prayers 1 and 2 of the Notice of Application. Prayer 3 dealing with the question of costs as well

as the reasons for the decision was reserved for this judgment. I now proceed to state the reasons for my decision as well as my decision on the issue of costs.

3. It is common cause that after the judgment was handed down on 6 November 2013, Herman filed a notice of application for leave to appeal the judgment the very following day (erroneously dated "7th DAY OF OCTOBER 2013") and he is currently continuing in the position of Sheriff, pending the finalization of the application for leave to appeal. That application has been dismissed and the Minister now request this court to make an order in terms of rule 49(11) uplifting the suspension of the execution of the judgment, which automatically sets in when an application for leave to appeal or appeal is noted.

4. Rule 49(11) reads thus:

"Where an appeal has been noted or an application for leave to appeal against or to rescind, correct, review or vary an order of a court has been made, the operation and execution of the order in question shall be suspended, pending the decision of such appeal or application, unless the court which gave such order, on the application of a party, otherwise directs."

5. It is trite that in adjudicating on such application, the court has to primarily consider the prospects of success of the intended appeal as well as the impact or prejudice which will result if the order were to be executed pending adjudication of the appeal. The approach and test applicable in applications of this nature was considered in the matter of *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 3 SA 534 (A) wherein at 545C-G it was held that the court to which application for leave to execute is made, has a wide general discretion to grant or refuse leave and, if leave be granted, to

determine the conditions upon which the right to execute shall be exercised.

"This discretion is part and parcel of the inherent jurisdiction which the court has to control its own judgments. In exercising this discretion the court should, in my view, determine what is just and equitable in all the circumstances and, in doing so would normally have regard, inter alia, to the following factors:"

6. The learned judge then went on to state the numerous factors which the court needs to take into account in deciding applications of this nature. These included the possible prejudice if the court were to lift the suspension as well as prospects of success in the appeal itself.
7. During the hearing of this application I had already found that there were no prospects of success in the appeal sought by Herman. The reasons thereof are stated in the written judgment dismissing the application for leave to appeal. The only relevant issue for this rule 49(11) application is whether there would be prejudice to Herman if leave to execute is granted.
8. Herman's contention is that if leave to execute is granted and he is successful in his possible petition and subsequent appeal, he shall have lost income for the duration of his removal as Sheriff. He then referred the Court to rule 49(12), which provides for payment of security for restitution by the applicant if the court so orders. The security is intended, as in this case, to protect lost income in the event the appealing party succeeds.
9. The Minister on the other hand contends that the government will suffer prejudice consequent to the delay in execution of the court order in that Maremane, who by now should have taken over as sheriff is unable to commence with his duties. This delay also puts government at risk of a law suit
10. It seems to me that the prejudice contended for by Herman is such that if he is successful on petition and the eventual appeal, this could be cured by the appeal court ordering that he should be reinstated as Sheriff. In which event he may then claim from government the loss of income. In this regard, there would be no need to even order payment of security in terms of rule 49(12).
11. I have already found that there are no prospects of a success in the intended appeal. There will thus, in my view, be no prejudice suffered by Herman if the court order is executed. In the event I am wrong on this view, the appeal court, if he is successful, would be in a position to order restitution. I am therefore of the view that it will be just and equitable that the execution of judgment order be allowed.
12. On the question of costs, the Minister claims award of costs on an attorney and client scale. The award of costs is a matter of discretion for the court, the general principle applicable being that the costs should follow the result.

13. However Herman claims that the deponent to the Minister's replying affidavit not only introduced new matter, but made false allegations to the effect that Herman is no longer Sheriff as his fidelity fund certificate has been withdrawn by the Board of Sheriffs ("the Board"). Copies of the correspondence between the Board and Herman's attorneys, which was attached to the replying affidavit, attest to this. It appears from the correspondence that these are developments which occurred after this Court had handed down judgment in this matter. The letter from the Board withdrawing the fidelity fund certificate is dated 8 November 2013. This was clearly before the founding affidavit to the rule 49(11) application was deposed to on 14 November 2013.
14. It is trite that an applicant has to state its/ his/her case fully in the founding affidavit. A new matter cannot be brought in the replying affidavit as the respondent(s) is denied the opportunity to answer a belated averment raised in the replying affidavit. The averment in this instance was known to the Minister at the time the founding affidavit was deposed to. It should have been made in the founding affidavit.
15. Herman is therefore correct that the averment concerning the withdrawal of the fidelity fund certificate is a new matter which

ordinarily would have been excluded by an application to strike out. Such application to strike out if granted, would attract a cost order, normally limited to the extent of the impugned averments. Under the circumstances, it would not be fair and just to mulct Herman with a punitive cost order on the attorney and client scale as requested by the Minister.

16. As already stated, I have granted an order for prayers 1 and 2 of the Notice of Application in terms of rule 49(11). I will for the record repeat the order, including the issue of costs which at that time I had reserved for consideration.

In the premises I make the following order:

1. That prayer 1 of the order (the order) granted by the Honourable Mr Justice Mothle (the Court) on the 6th November 2013 under case number 6751/2013 shall not be

suspended pending the finalisation of the First Respondent's application for leave to appeal against the judgment;

2. That pending the finalisation of the First Respondent application for leave to appeal against the judgment delivered by the Court on 6th November 2013 (the judgment) alternatively the appeal against the judgment, the Applicant be and is hereby granted leave to execute prayer 1 of the order;
3. The First Respondent is ordered to pay the costs of this application, including costs of counsel but excluding 20% of all costs relating to the consultations, drafting, perusal and delivery concerning the replying affidavit.

S P Mothle

Judge of the High Court

FOR THE APPLICANT: ADV. MOTSWENE

INSTRUCTED BY. THE STATE ATTORNEY

PRETORIA

FOR THE 1 ST RESPONDENT: ADV VAN KOLLER

INSTRUCTED BY: MESSRS JACQUES VAN DER MERWE

ATTORNEYS

176 OLIVER STREET

BROOKLYN

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