

SOUTH AFRICA / JUDGMENT

Mouton v Salim (CIV APP FB 16/2022;M112/2021) [2023] ZANWHC 100 (22 June 2023)

[2023] ZANWHC 100

COURT

North West High Court, Mafikeng

BEFORE

DJAJE, PETERSEN, REID

CASE / FILE NUMBER

CIV APP FB 16/2022;M112/2021

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IN THE HIGH COURT OF
SOUTH AFRICA
NORTH WEST DIVISION,
MAHIKENG
CASE NUMBER: CIV
APP FB 16/2022
CASE
NO: M112/2021

Reportable:

YES / NO
Circulate
to Judges: YES / NO
Circulate
to Magistrates: YES / NO
Circulate
to Regional Magistrates: YES / NO
In

the matter between:

WILLEM
JOHANNES MOUTON
Appellant
AND
JOSEPH
ANTHONY SALIM
Respondent
In

re: JOSEPH
ANTHONY SALIM
Applicant
And
WILLEM
JOHANNES MOUTON
1ST Respondent
THE
ILLEGAL OCCUPIERS
2ND Respondent
RAMOTSHERE
MOILOA LOCAL MUNICIPALITY
3RD Respondent
CIVIL
APPEAL

CORUM: DJAJE DJP, PETERSEN J and REID J
This
judgment is deemed to be handed down electronically on the 22 June
2023 by e-mail distribution to the parties' legal
representatives.
ORDER
The

following order is made: 1.
The appeal is upheld with costs on
attorney and client scale.
2.
The order of the court a
quo is set aside and replaced with the

following order: 2.1
The matter is postponed sine die, with no cost order;
2.2
The First Respondent (current Appellant) is directed to file an
Answering Affidavit within
15 (fifteen) days of
this order, where after the normal rules will apply;
2.3
The Applicant (current Respondent) is ordered to duly comply with
Section 4(2) of Act 19
of 1998 in respect of all Respondents before
any new hearing date and to properly serve all documents concerned;
2.4
The matter will be adjudicated by a different Judge.

JUDGMENT

DJAJE DJP

[1] This is an appeal against the order of the court a quo where the appellant was ordered to:

“PART A

1. THAT: The return date of the provisional order granted on 25 February 2021 by the Honourable Mr. Justice Hendricks (DJP) under the abovementioned case number is hereby anticipated to 25 March 2021;
2. THAT: It is declared that the First Respondent is in willful contempt of the court order granted on 25 February 2021 by the Honourable Mr. Justice Hendricks (DJP) under the abovementioned case number
3. THAT: The First Respondent is committed to imprisonment for a period of 3 (three) months, which period of imprisonment shall be wholly suspended on condition that:

3.1 The First Respondent returns, reinstalls and reinstates, in full working order, any improvements and equipment that were installed and attached to the property known as Portions 22 and 23 of the Farm Rietvaly 311, Registration Division JP, North West Province, in extent respectively 50,4641 and 46,5168 hectares, respectively, and which the First Respondent removed, disengaged, and/or broke down, within 48 (forty-eight) hours from date of service of this order;

4. THAT: Should the First Respondent fail to comply with paragraph 3.1 of this order, within 48 (forty-eight) hours from date of service hereof, the Sheriff of the High Court, or the South African Police Service, or any other statutory body so tasked, is hereby authorised to give immediate effect to the order that the First Respondent be taken into

custody and imprisoned for a period of 3 (three) months,

5. THAT The First Respondent is ordered to pay the costs of Part A of this Application on the scale as between attorney-and-client.

PART B:

6. THAT: The First Respondent is ordered and compelled to, within 48 (forty- eight) hours from date of service of this order, return, reinstall and reinstate, in full working order, any improvements and equipment that were installed and attached to the property known as Portions 22 and 23 of the Farm Rietvaly 311, Registration Division JP, North West Province, in extent respectively 50,4641 and 46,5168 hectares, respectively, and which the First Respondent removed, disengaged, and/or broke down, within 48 (forty-eight) hours from date of service of this order;

7. THAT: The First Respondent is ordered and compelled to give a full inventory of any and all improvements and equipment that were installed and attached to the property known as Portions 22 and 23 of the Farm Rietvaly 311, Registration Division JP, North West Province, in extent respectively 50,4641 and 46,5168 hectares, respectively, and which the First Respondent removed, disengaged, and/or broke down, to the Applicant in writing within 48 (forty-eight) hours from date of service of this order,
8. THAT: The First Respondent is ordered and compelled to make known the whereabouts, and/or location, of any and all improvements and equipment that were installed and attached to the property known as Portions 22 and 23 of the Farm Rietvaly311, Registration Division JP, North West Province, in extent respectively 50,4641 and 46,5168 hectares, respectively, and which the First Respondent removed, disengaged, and/or broke down to the Applicant within 48 (forty-eight) hours from date of service of this order;
9. THAT: The First Respondent is ordered to pay the costs of Part B of this Application on the scale as between attorney-and-client.

PART C:

10. THAT: The First and Second Respondents are evicted from the premises known as Portions 22 and 23 of the Farm Rietvaly 311, Registration Division JP, North West Province, in extent respectively 50,4641 and 465168 hectares ("the premises") with effect from 31 March 2021;
11. THAT: The First and Second Respondents are ordered to pay the costs of the removal of any and all illegal occupants from the premises, jointly and severally and in solidum, the one paying the other to be absolved, which costs shall include the cost of the removal of any and all of the First and/or Second Respondents' movable property from the premises;
12. THAT: In the event of the First and/or Second Respondents failing to vacate the premises on the date as determined by the Honourable Court, the Sheriff of the High Court, and/or his Deputy, is authorised to engage the services of the South African Police Services to effect the immediate eviction of the First and Second Respondents, and all those occupying under them, from the premises;
13. THAT: The First and Second Respondents are ordered to pay the costs of Part C of this Application on the scale as between attorney-and client, jointly and severally and in solidum, the one paying the other to be absolved;

PART D:

14. THAT: The First Respondent is hereby ordered to pay the amount of R588 481-50 (Five Hundred And Eighty Eight Thousand Four Hundred And Eighty One Rand And Fifty Cents), alternatively such higher amount as may be due to it on date of this order, to ESKOM within 48 (forty-eight) hours from date of service of this order, in compliance with his obligation to make payment of the electricity consumption on the premises known as Portions 22 and 23

of the Farm Rietvaly 311, Registration Division JP, North West Province, in extent respectively 50,4641 and 46,5168 hectares;

15. THAT: The Applicant is authorised to employ the services of a qualified electrician to conduct an inspection on the premises and to replace and repair the premises to such a state that a valid Electricity Compliance Certificate can be issued to the Applicant by the said electrician.
16. THAT: The First Respondent shall be held liable for the payment of the services of the electrician, together with any repairs effected to the premises in order to get the premises to an acceptable state for the issuing of an Electricity Compliance Certificate, which payment shall be made directly to the Applicant, free of set-off or deductions, into a banking account nominated by the Applicant in writing, within 48 (forty-eight) hours from the date upon which the invoice is sent to the First Respondent, and his attorneys of record, via electronic mail;
17. THAT: The First Respondent is ordered to pay the costs of Part D of this Application on the scale as between attorney-and-client.”
- [2] The appellant and the respondent on 3 August 2015 entered into a sale agreement whereby the respondent was selling to the appellant Portions 22 and 23 of the farm Rietvaly 311. The purchase price in terms of the agreement was the amount of R4 000 000-00 (four million rand) which had to be paid on the date of registration of transfer of the properties to the appellant. It was further agreed that the appellant had to provide a bank guarantee for payment considerations to the respondent by no later than 31 December 2016.
- [3] The appellant took occupation of the properties on 11 August 2015 and utilised the chicken houses to rear day old chickens. In addition, the appellant would pay occupational rent of R15 000-00

(fifteen thousand rand) per month for the chicken houses and the house on the property. When the respondent realised that the appellant had not supplied the bank guarantees, the two entered into a verbal agreement the terms of which were that the appellant would continue to lease the farm until there is another buyer for the properties. Further that in the event of a new buyer being found the appellant would be allowed to complete the chicken raising cycle that would be in progress at the time and afforded an opportunity to complete another cycle. The appellant was then required to leave the equipment in good working order and not remove the generator on the property.

- [4] In December 2020 the respondent sent a letter to the appellant that a new buyer was found and that he should prepare to vacate the property, complete the chicken raising cycle and to ensure that the equipment is left in good condition. When the appellant did not respond to the letter by the respondent dated 4 December 2020, the respondent approached Court on 25 February 2021 with an ex parte application and the following order was granted:

“1. THAT: The First Respondent be and is hereby interdicted from removing any improvements and equipment installed and attached to the properties known as Portions 22 and 23 of the farm Rietvaly 311, Registration Division JP, North West Province, in extent respectively 50,4641 and 46,5168 ha;

2. THAT: The forms and content of the draft notice in terms of the provisions of Section 4(2) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, Act 19 of 1998, attached hereto as Annexure "A" be authorized;
 3. THAT: The Applicant be permitted and directed to serve the Notice of Motion and the founding papers in the main application, together with this order and Annexure "A" hereto, on the First and Second Respondents, occupying the premises known as Portions 22 and 23 of the Farm Rietvaly 311, Registration Division JP, North West Province, in extent respectively 50,4641 and 46,5168 ha, in accordance with the provisions of Rule 4(1) of the Uniform Rules of Court;
 4. THAT: The cost of this application shall be costs in the main application.”
- [5] Notably so, the above order did not have a return date and is clearly flawed as it purports to be a final ex parte order. This was accepted by the respondent. This order was served personally on the appellant on 19 March 2021 and the Sheriff recorded the following on the return of service:

“Remarks

Kindly note that Mr Mouton informed us that he is going to leave the farm in two months’ time and he is going to remove the chicken coop”.

- [6] It was as a result of the above remarks on the return of service that the respondent approached Court on 25 March 2021 for contempt proceedings and for the relief as granted in paragraph [1] above. On the date of hearing the appellant appeared in person and applied for a postponement. The reason for the application was that his attorney had passed on a few days before the hearing date and he required two to three weeks to secure the services of another attorney. This application was summarily dismissed. The reasons for the dismissal are recorded as follows in the Court a quo’s judgment:

“[33] Counsel for the applicant’s fears and objection should be understood keeping in mind what the first respondent is alleged to have told the Sheriff when he was served with the court order which was issued on 25 February 2021 by Hendricks DJP. Amongst others, that court order restrained the first respondent from removing any improvements and equipment installed and attached to the current properties. The first respondent is alleged to have told the Sheriff that he would be leaving the properties in two months’ time and he was going to remove the chicken coop. Applicant’s attorney then realized thereafter that the chicken houses and some equipment had been removed from the property by the first respondent. The applicant’s attorney appealed to the first respondent’s attorney to advise the client (first respondent) to desist from defying the court order. Surprisingly, the first respondent told his attorney that his conduct (of removing the said equipment) would not prejudice the applicant.

- [34] It is this attitude of the first respondent which makes it difficult for the court to lean in favour of his application for postponement. It is clear that more properties or equipment or structures may be removed by the first respondent whilst the case is pending. It was the court's view that the matter needed to be heard urgently in view of further potential harm which the applicant's stood to suffer. It was due to the aforesaid reasons that the application for postponement was refused."
- [7] In contention the respondent argued that the appellant's request for postponement was refused as a result of his own actions, in that when he was served with the court order he told the Sheriff that he was going to remove the equipment. It was argued that this was a flagrant disregard of the court order by the appellant and the Court a quo was justified in ordering that the matter proceeds. This submission by the respondent did not consider the consequences of having denied the appellant the opportunity of securing legal representation.
- [8] Section 35(3) of the Constitution of the Republic of South Africa Act 108 of 1996 ("the Constitution") provides that: "Every accused person has a right to a fair trial, which includes the right-
- (f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly."
- [9] The appellant was appearing in court facing serious allegations of having been in contempt of a court order. He enjoyed the protection afforded by the section 35(3) of the Constitution, which was not the case. See: Secretary of the Judicial Commission of Inquiry Into Allegations of State Capture v Zuma & Others 2021 (5) SA 327 (CC) at par 67.
- [10] After the application for a postponement was dismissed the matter proceeded on an unopposed basis as the appellant had not filed an answering affidavit. Despite having addressed the Court on the merits of the matter, the appellant's evidence was disregarded and an order granted against him. It is unfortunate that we were not favoured with the record of proceedings and as a result the version of the appellant is not before us.
- [11] The refusal of postponement by the Court is a crucial aspect in this appeal. The appellant herein was forced to proceed unrepresented despite facing contempt proceedings and eviction. The right to legal representation is one of the rights entrenched in our Constitution and availed to every person appearing before our courts. Every person has the right to be heard before a court of law especially when facing serious consequences of imprisonment for contempt of court. In *De Lange v Smuts NO and Others* [1998] ZACC 6; 1998 (3) SA 785 (CC) at par 131 the court held that:

"... Everyone is entitled to an impartial judge, not because this guarantees a correct decision, but because the human arbiter, not being omniscient, should not be presented with a point of view that his or her position inherently loads. Everyone has the right to state his or her own case, not because his or her version is right, and must be accepted, but because in evaluating the cogency of any argument, the arbiter, still a fallible human being, must be informed about the points of view of both parties in order

to stand any real chance of coming up with an objectively justifiable conclusion that is anything more than chance. Absent these central and core notions, any procedure that touches in an enduring and far-reaching manner on a vital human interest, like personal freedom, tugs at the strings of what I feel is just, and points in the direction of a violation. When the clear basis for committing a person to prison is coercive rather than punitive, warning lights begin to flash.”

- [12] In dismissing the appellant’s request for a postponement to secure the services of an attorney, it was clearly a foregone conclusion by the court a quo that he was in contempt of the Court order of 25 February 2021 without being afforded an opportunity to get his version before Court. This is clear from the following words of the court a quo: “It is clear that more properties or equipment or structures may be removed by the first respondent whilst the case is pending.” The Court a quo through this utterance that the appellant was removing equipment or structures prematurely found that such alleged conduct was in contravention of the order of 25 February 2021. This in circumstances where the appellant had not been afforded an opportunity to explain his version in relation to the order granted against him. This was a serious violation of the appellant’s right to a fair hearing and on this ground alone the appeal should succeed.
- [13] The court a quo pronounced on the merits of the application without having afforded the appellant an opportunity to be legally represented and to properly file an answering affidavit to ventilate the issues. It is prudent that the matter be remitted to the court a quo to allow the appellant to file his answering affidavit and place his version before a differently constituted court – judge.
- [14] It is trite that costs follow the result and in this matter the appellant is successful. The respondent was clearly alive to the defects in the matter once the notice of appeal was filed. Rather than persist in opposing this appeal the respondent could have elected to abandon the judgment of the court a quo and not compel the appellant to proceed with the appeal where such glaring Constitutional violations exist. This warrants a cost order against the respondent.

Order

[15] Consequently, the following order is made:

1. The appeal is upheld with costs on an attorney client scale.

2.3 The Applicant (current Respondent) is ordered to duly comply with Section 4(2) of Act 19 of 1998 in respect of all Respondents before any new hearing date and to properly serve all documents concerned;

J T DJAJE

DEPUTY JUDGE PRESIDENT

NORTH WEST HIGH COURT

I agree

A H PETERSEN

JUDGE OF THE HIGH COURT

NORTH WEST DIVISION

F M M REID

APPEARANCES

DATE OF HEARING: 24 MARCH 2023 DATE OF JUDGMENT: 22 JUNE 2023 COUNSEL FOR THE
APPELLANT: ADV HAMMAN COUNSEL FOR THE RESPONDENT ADV LOUW

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