

SOUTH AFRICA / JUDGMENT

Ninarich Trading 3 (PTY) Ltd and Another v Myatyana and Others (047559/2022) [2022] ZAGPJHC 962 (5 December 2022) [2022] ZAGPJHC 962

COURT

South Gauteng High Court, Johannesburg

BEFORE

Twala M L

CASE / FILE NUMBER

047559/2022

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NO: 047559/2022

REPORTABLE:

NO
OF
INTEREST TO OTHER JUDGES: NO
REVISED.
5th
December2022
In

the matter between:

NINARICH
TRADING 3 (PTY) LTD
(Registration
No: 2009/023929/07)
FIRST APPLICANT
NINARICH
INVESTMENTS 1 (PTY) LTD
(Registration
No: 2009/023856/07)
SECOND APPLICANT
And
MYATYANA,
SIMPHIWE & THOSE LISTED
IN

ANNEXURE “A” TO THE NOTICE OF MOTION
FIRST RESPONDENT
MANTENGU,
SANDISIWE ZANELE &
THOSE
LISTED IN ANNEXURE “B” TO
THE
NOTICE OF MOTION
SECOND RESPONDENT
ZIKHALI,
NOKULUNGA & THOSE
LISTED
IN ANNEXURE “C” TO THE
NOTICE
OF MOTION
THIRD RESPONDENT
MBATHA,
SENAMSILE FUNDISIWE &
THOSE
LISTED IN ANNEXURE “D” TO
THE
NOTICE OF MOTION
FOURTH RESPONDENT
THE
UNLAWFUL INVADERS/OCCUPIERS
OF
31 BETTY STREET, JEPPESTOWN
FIFTH RESPONDENT
THOSE
INTERFERING WITH THE
APPLICANTS’
CONTROL OF THE
PROPERTIES
DESCRIBED IN THE
NOTICE
OF MOTION
SIXTH RESPONDENT
THE
CITY OF JOHANNESBURG
SEVENTH RESPONDENT

JUDGMENT

Delivered: This judgment and order was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to Parties / their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the order is deemed to be the 5th of December 2022.

TWALA J

[1] This application served before the urgent Court on the 29th of November 2022 in which the applicants sought a spoliatory relief against the fifth and sixth respondents and an interim interdict

against the first to the sixth respondents and other ancillary orders against all but the seventh respondents.

[2] The application was opposed by the first to fourth and the sixth respondents and they filed a notice in terms of Rule 6(5)(d)(iii) wherein they raised the questions of law and in the alternative sought an indulgence of this Court to file an answering affidavit. In essence the questions of law raised by the respondents were the deficiencies in the notice of motion and the authority or lack thereof of the deponent to the founding affidavit.

[3] After hearing argument briefly, the Court directed that the respondents file their answering affidavit by 10:00 on the 30th of November 2022 and the applicants to file their replying affidavit by 12:00 on the 1st of December 2022 and the matter was rolled over for hearing on the 2nd of December 2022. Furthermore, in this judgment I propose to refer to the applicants as applicants and to the first to the fourth and sixth respondents as the respondents and to the fifth respondent respectively for the reasons that follows in this judgment.

[4] Before dealing with the points in lime as raised by the first to the fourth and sixth respondents, it is noteworthy that at the commencement of the hearing on the 2nd of December 2022, counsel for the respondents informed the Court that he has been instructed by the fifth respondent that it also wanted to join the proceedings and has since filed its notice to oppose the application. Furthermore, that the fifth respondent would seek a postponement of the matter since it would want to familiarise itself with the more than 400 pages of the documents already filed in this case to enable it to formulate its defence.

[5] It is useful to consider the background facts and chronology of this application from the time it was instituted up to the date when it came before Court on the 29th of November 2022. Briefly, the applicants are private companies with limited liability and the registered owners of the immovable properties which are the subject matter of this application. The respondents, including the fifth respondent are by and large the occupiers of the properties in question. The application is in two parts, Part A which is the spoliatory relief and the interim interdictory relief. Part B deals with the eviction of the respondents and is at this

stage not before this Court. The applicants launched this application on the 16th of November 2022 as ex parte and set it down for hearing on the 18th of November 2022.

[6] However, the applicants circulated the notice of motion, without the other founding papers, in the WhatsApp group that it created with the respondents. On the 18th of November 2022 the respondents appeared in Court which appearance prompted the applicants, after some discussions with the respondents, to remove the matter from the roll. Thereafter there was some engagement and certain correspondence were exchanged between the applicants and the respondents and apparently agreement could not be reached between the parties. On the 24th of November 2022 the applicants enrolled the case for hearing in the urgent court on the 29th of November 2022. On the 25th of November 2022 the applicants served the notice of motion and founding papers including the notice of set down by sheriff on the respondents. On the morning of the 29th November 2022 the respondents filed their Rule 6(5)(d)(iii) notice raising the issues as enunciated above.

[7] At the beginning of hearing counsel for the respondents informed the Court that he was not persisting with the issue of lack of authority on the part of the deponent to the founding affidavit of the applicants for the applicants have since filed a resolution confirming such authority. However, he was persisting with the point of law in that the notice of motion does not comply with the provisions of rule 6 in that it does not state the date and time by when the respondents are supposed to file their notices to oppose and by when are they supposed to file their answering affidavits. Moreover, the applicants have not filed an application for condonation or stated in their founding papers that they seek the indulgence of the Court in this regard nor did they explain or furnished reasons for their transgression.

[8] Furthermore, so it was contended by counsel for the respondents, there was no agreement between the parties that the respondents will file their answering affidavit by the 22nd of November

2022. Even if the Court were to mero moto condone this transgression, so the argument went, the applicants continued to disregard the rules of Court by filing further three affidavits without seeking the indulgence of the Court nor explaining and furnishing their reasons for the transgressions.

[9] It has long been established that the observance of the rules of procedure is fundamental to the course of litigation for they provide the necessary framework for the achievement of justice between the parties. Put differently, it is trite that the rules of civil procedure exist in order to enable the Courts to properly perform its function to try disputes between litigants who have real grievances so as to see to it that justice is done.

[10] In *Khunou & Others v Fihrer & Son* 1982 (3) SA (WLD) the Court stated the following:

“The proper function of a Court is to try disputes between litigants who have real grievances and so see to it that justice is done. The rules of civil procedure exist in order to enable Courts to perform this duty with which, in turn, the orderly functioning, and indeed the very existence, of society is inextricably

interwoven. The Rules of Court are in a sense merely a refinement of the general rule of civil procedure. They are designed not only to allow litigants to come to grips as expeditiously and as inexpensively as possible with the real issues between them, but also to ensure that the Courts dispense justice uniformly and fairly, and that the true issues aforementioned are clarified and tried in a just manner.”

- [11] In *Trans-African Insurance Co Ltd v Maluleka* 1956 (2) SA 273 (A) which was quoted with approval in *Life Healthcare Group (Pty) Ltd v Mdladla & Another* (42156/2013) [2014] ZAGPJHC 20 (10 FEBRUARY

2014) the court stated the following:

“No doubt parties and their legal advisers should not be encouraged to become slack in the observance of the Rules, which are an important element in the machinery for the administration of justice. But on the other hand technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits.”

- [12] In *Grootboom v National Prosecuting Authority and Another* (CCT 08/13) [2013] ZACC 37; 2014 (2) SA 68 (CC) the Constitutional Court quoted with approval the case of *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* [2000] ZACC 3; 2000 (2) SA 837(CC) and stated the following:

“Paragraph 32: I need to remind practitioners and litigants that the rules and courts’ directions serve a necessary purpose. Their primary aim is to ensure that the business of our courts is run effectively and efficiently. Invariably this will lead to the orderly management of our courts’ rolls, which in turn will bring about the expeditious disposal of cases in the most cost-effective manner. This is particularly important given the ever-increasing costs of litigation, which if left unchecked will make access to justice too expensive.”

- [13] The Constitutional Court continued in paragraph 33 as follows”

“Paragraph 33: Recently this Court has been inundated with cases where there have been disregard for its directions. In its efforts to arrest this unhealthy trend, the Court has issued many warnings which have gone largely unheeded. This year, on 28 March 2013, this Court once again expressed its displeasure in eThekwini as follows:

“The conduct of litigants in failing to observe Rule of this Court is unfortunate and should be brought to a halt. This term alone, in eight of the 13 matters set down for hearing, litigants failed to comply with the time limits in the rules and directions issued by the Chief Justice. It is unacceptable that this is the position in spite of the warning issued by this Court in the past in [Van Wyk], this Court warned litigants to stop the trend. The Court said:

‘There is now a growing trend for litigants in this court to disregard time limits without seeking condonation. Last term alone, in eight out of ten matter, litigants did not comply with the time limits or the directions setting out the time limits. In some cases litigants either did not apply for condonation at all or if they did they put up flimsy explanations. This non-compliance with the time limits or the rules of Court resulted in one matter being postponed and the other being struck from the roll. This is undesirable. This practice must be stopped in its tracks.’

- [14] It is apparent in this case that there is no application for condonation filed by the applicants explaining their failure to comply with the provisions of rule 6 of the Rules of Court. There is no good cause shown why the applicants failed to comply with the rules nor is there any application to condone such failure which has in this case caused enormous prejudice to the respondents and to the orderly function of the Court. It should be recalled that this case was enrolled for the 29th November 2022 and it could not proceed on that day because of the manner it was brought to court with the use of e-mails and WhatsApp messages and most importantly, the notice did not state the date and time by when the respondents were to file their answering papers. These infractions of the rules of Court affected the running of the Court in an effective and efficient manner.
- [15] Furthermore, when the case was to proceed on 2nd of December 2022, then came the fifth respondent who requested that the matter be postponed to enable them to consider their position. It is clear that the non - compliance with the rules in this regard, the fifth respondent having said that it was under the impression that the matter was heard ex parte, has interfered with the smooth running of the court. I am mindful that the Court has a discretion to condone some infractions of the rules of court where there is no substantial prejudice to be suffered by the other parties, but such a discretion has to be exercised judicially. However, in this case, there is no good cause show why the applicants failed to comply with the rules even when they had the opportunity to do so after the matter was removed from the roll on the 18th of November 2022.
- [16] It is accepted that the filing of further affidavits may be of assistance to the Court by bringing more information before the court in order to enable it to arrive at the right decision. However, there are rules governing such a process. It cannot be correct that a party may choose to file further affidavits without following the normal processes of seeking condonation to do so. Nothing prevented the applicants from stating in those additional affidavits what the reasons were for their filing and sought condonation therefore since the filing of such affidavits was outside the rules of court.
- [17] It must be recalled that each respondent in this case is made up of a number of persons who stand to be adversely affected in due course when Part B of these proceedings is heard. It is for the applicants to follow the due processes in enforcing its rights and to ascertain that it does not prejudice the respondents in the process. It is not in the interest of justice that the respondents be dragged into court without following the due process. It follows ineluctable therefore that the application falls to be struck from the roll for non-compliance with the rules of Court. With regard to the fifth respondent, the application falls to be postponed as

sought by the respondents.

[18] In the circumstances, I make the following order:

1. The application is struck from the roll for non-compliance with the rule 6 of the Uniform Rules of Court.
2. The applicants are to pay the costs of the application.

With regard to the fifth respondent, the order is as follows:

I. The application is postponed sine die,

II. The fifth respondent is to file its answering affidavit by not later than 12:00 noon on the 13th of December 2022

III. Costs to be costs in the course.

TWALA M L

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

Date of Hearing:

2nd December 2022

Date of Judgment:

5th December 2022

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