

SOUTH AFRICA / JUDGMENT

Nxumalo v Curoscore (Pty) Ltd (445/2021) [2021] ZAECPEHC 16 (16 March 2021)

[2021] ZAECPEHC 16

COURT

Eastern Cape High Court, Port Elizabeth

BEFORE

T Zietsman

CASE / FILE NUMBER

445/2021

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE LOCAL DIVISION, PORT ELIZABETH)

Case

No.: 445/2021

Date

heard: 4 March 2021

Date

delivered: 16 March 2021

In the

matter between:

NQOBILE

MOFFAT NXUMALO

Applicant

and

CUROSCORE (PTY) LTD

Respondent

JUDGMENT

ZIETSMAN AJ:

[1] On 2 February 2021 an order was granted by the Magistrate's Court, Port Elizabeth for the attachment of property in terms of section 32 of the Magistrates' Court Act 32 of 1994 ("the Act"). In terms of the Order Respondent was the applicant, and Applicant was the respondent.

[2] The Order was also endorsed in terms of rule 41

(7) of the Magistrates' Court Rules ("the Rules"). Applicant takes issue with this endorsement.

[3] Subsequently, Applicant launched an application, on an urgent basis, in terms whereof he seeks orders:[1]

"1. Declaring the application to be a matter of urgency and dispensing insofar as necessary in terms of Rule 6(12) with the usual forms and service provided for in the Uniform Rules of Court.

2. Declaring the removal of the Applicant's movable property listed in the Notice of Attachment in Execution dated 3 February 2021, by the Sheriff of the Court South on the instruction of the Respondent, be declared unlawful.

3. The Sheriff of the Court South, at no costs at all to the Applicant, is to immediately return all items removed as listed in the Notice of Attachment in Execution dated 3 February 2021.

4. The Sheriff of the Court South, on receipt of this order, is to immediately release to the Applicant the Mercedes Benz motor vehicle with registration HNX 774 EC.

5. The Sheriff of the Court South is to complete the return of all items as stated above no later than 3pm, on the day of receipt of this order.

6. That the instructions by the Respondent to the Nelson Mandela Bay Municipality to disconnect the electricity at the Applicant's residence, being Number 7 Summit Place, Summerstrand, Port Elizabeth, is set aside and the Nelson Mandela Bay Municipality is to immediately ensure restoration of electricity at the Applicant's residence forthwith.

7. That such restoration of electricity, as state above, should be completed before close of business of the day of receipt of this order.

8. Further and alternative relief."

[4] What is evident from the notice of motion is that Applicant is not seeking relief that the Order or the endorsement in terms of rule 41(7) be set aside.

- [5] Applicant seeks an order that the removal of his movable property “listed in the Notice of Attachment in Execution dated 3 February 2021, by the Sheriff of the Court South on the instruction of the Respondent, be declared unlawful”. [2] I pause to mention that this notice of attachment was not annexed to the papers.
- [6] With regard to the remainder of the relief, [3] Applicant seeks orders against both the sheriff and the Nelson Mandela Bay Municipality (“the Municipality”).
- [7] At the outset it is necessary to deal with the relief Applicant seeks against the sheriff and the Municipality.

Non-joinder

- [8] The issue of non-joinder, of the sheriff and the Municipality, was pertinently raised with Applicant at the commencement of the hearing of the application. Applicant confirmed that he abandons the relief that he seeks against the Municipality.
- [9] With regard to the relief against the sheriff, Applicant referred to the “amended relief” that he now seeks as per his replying affidavit, which, according to him, falls under “further and alternative relief”. Applicant sought to amend the relief he seeks against the sheriff, without amending his notice of motion, and by merely rephrasing the relief to read “Respondent is to instruct the sheriff”, or words to that effect. This is simply unacceptable. It matters not which way you play around with the words, the effect of what Applicant seeks is essentially an order against parties that are not before court.
- [10] Our courts have over more than half a century ago confirmed, in *Amalgamated Engineering Union v Minister of Labour*, [4] that:
- “...the Court has consistently refrained from dealing with issues in which a third party may have a direct and substantial interest without either having that party joined in the suit or, if the circumstances of the case admit of such a course, taking other adequate steps to ensure that its judgment will not prejudicially affect that party’s interests.”*

- [11] Accordingly, the non-joinder of the sheriff is fatal to the relief sought by Applicant in prayers 2 to 7 of his notice of motion.
- [12] What then remains is prayer 1 of Applicant’s notice of motion, in terms whereof he seeks an order that the removal of his movable property be declared unlawful.

Urgency

- [13] Respondent takes the point that the matter is not urgent. In order to deal with this point, it is necessary to briefly set out the steps taken up to the hearing of the matter.
- [14] It appears from an “affidavit of service” filed by Applicant, that one Ntomboxolo Janice Nxumalo served a copy of the papers on Respondent on 19 February 2021. Notice was given that the matter would be heard at 09h00 on Tuesday, 2 March 2021 and Respondent had to file its answering affidavit by 25 February 2021. Respondent served its answering affidavit on

Applicant on 1 March 2021. The matter came before me in motion court on 2 March 2021 and the parties agreed that Applicant is to file his replying papers the following day and that the matter be argued on Thursday, 4 March 2021.

[15] It is trite that the Rules exist for the Court, rather than the Court for the Rules.

[16] In *Nelson Mandela Metropolitan Municipality and Others v Greyvenouw CC and Others*[5] Plasket J (as he then was) reaffirmed that:

"[37] It is trite that applicants in urgent applications must give proper consideration to the degree of urgency and tailor the notice of motion to that degree of urgency. It is also true that when Courts are enjoined by Rule 6(12) to deal with urgent applications in accordance with procedures that follow the Rules as far as possible, this involves the exercise of a judicial discretion by a Court 'concerning which deviations it will tolerate in a specific case'.

[38] ... it is not in every case in which the applicant may have departed from the Rules to an unwarranted extent that the appropriate remedy is the dismissal of the application. Each case depends on its special facts and circumstances. This is implicitly recognised by Kroon J in the *Caledon Street Restaurants CC* case when he held

- looking at the issue from the other perspective, as it were - that the 'approach should rather be that there are times where, by way of non-suiting an applicant, the point must clearly be made that the Rules should be obeyed and that the interest of the other party and his lawyers should be accorded proper respect, and the matter must be looked at to consider whether the case is such a time or not'.

[40] ... Indeed, the erstwhile Appellate Division has on a number of occasions turned its back on such formalism in the application of the Rules. For instance, in *Trans-African Insurance Co Ltd v Maluleka Schreiner JA* held that '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'. ... in *D F Scott (EP) (Pty) Ltd v Golden Valley Supermarket, Harms JA* held that the Rules 'are designed to ensure a fair hearing and should be interpreted in such a way as to advance, and not reduce, the scope of the entrenched fair trial right' contained in s 34 of the Constitution."

[17] Respondent cannot be said to have been prejudiced, it was also not submitted that it was. I am consequently of the view that, in this matter, technical objections to less than perfect procedural steps will only hamper the expeditious and inexpensive decision of the case on the real merits.[6] For these reasons, the challenge to the urgency of the application must fail.

The

legal framework

[18] With regard to disputes of fact in motion proceedings, the time-honoured Plascon-Evans[7] rule applies. As more recently referred to in the matter of Shepherd Real Estate Investments (Pty) Ltd v Roux Le Roux Motors[8] as follows:

“The rule was expressed as follows in Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd

[1984] ZASCA 51; 1984 (3) SA 623 (A) ([1984] 2 All SA 366; [1984] ZASCA 51) at 634-635:

‘(W)here in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to

give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by

respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6(5)(g) of the Uniform Rules of Court . . . and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers”

[19] With regard to Applicant's cause of action being based on a purported spoliation, Goosen AJA (for the majority) recently reaffirmed the doctrinal basis for, and requirements of, the remedy afforded by the mandament van spolie in Monteiro and Another v Diedricks[9], as follows:[10]

“[15] ... The principle underlying the remedy is that the entitlement to possession must be resolved by the courts, and not by a resort to self-help...”

[17] Two requirements must be met in order to obtain the remedy. Firstly, the party seeking the remedy must, at the time of dispossession, have been in possession of the property. The second is that the dispossessor must have wrongfully deprived them of possession without their consent...”

[20] It is in the context of the legal framework set out above that I now turn to deal with the facts and the issues.

The facts and issues in the context of the Magistrates' Court Act and Rules

- [21] Applicant admits that he occupies 7 Summit Place, Jenvey Road, Summerstrand, Port Elizabeth without paying rental for such occupation since December 2018.[11]
- [22] Having regard to Applicant's founding affidavit, he bases his cause of action on a purported spoliation or the allegation that no warrant of execution exists.
- [23] Applicant takes issue with the removal of the movable property based on two grounds. Firstly, that the removal was unlawful since there is no warrant of execution and secondly, that rule 41(7) is not applicable to section 32 of the Act, or so the argument went.
- [24] Applicant at the hearing of the matter also took issue with the Order in that it apparently does not relate to the unit that he resides in, however this was neither raised in his founding affidavit nor pertinently raised in his replying affidavit (and it took up a considerable amount of time during argument). Mr Beyleveld SC, who appeared for Respondent, pointed out, correctly so,

that in motion proceedings affidavits constitute both the pleadings and the evidence and the issues and averments in support of the parties' cases should appear clearly therefrom.[12]

- [25] I digress to also mention that it is trite that the applicant must make out his/her case in the founding affidavit. A litigant should not be allowed to try and make out a case in the replying affidavit.
- [26] Before I proceed to deal with the issue of whether the removal was unlawful, in the context of section 32 of the Act and rule 41(7), it is necessary to say something about the status of an order of court.
- [27] All orders of court, whether correctly or incorrectly granted, have to be obeyed until they are properly set aside.[13]
- [28] The Order was granted in term of section 32 of the Act. This section is designed to protect a landlord from losing the security which he enjoys by virtue of his hypothec. Its purpose is to preserve the status quo until such time as judgment may be obtained for arrear rental.[14]
- [29] Section 32(1) and 32 (2) of the Act read as follows:

"(1) Upon an affidavit by or on behalf of the landlord of any premises situate within the district, that an amount of rent not exceeding the jurisdiction of the court is due and in arrear in regard to the said premises, and that the said rent has been demanded in writing for the space of seven days and upwards, or, if not so demanded, that the deponent believes that the tenant is about to remove the movable property upon the said premises, in order to avoid the payment of such rent, and upon security being given to the satisfaction of the clerk to the court to pay all damages, costs and charges which the tenant of such premises, or any other person, may sustain or incur by reason of the attachment hereinafter mentioned, if the said attachment be thereafter set aside, the court may, upon application, issue an order to the messenger requiring him to attach so much of the movable property upon the premises in question and subject to the landlord's hypothec for rent as may be sufficient to satisfy the

amount of such rent, together with the costs of such application and of any action for the said rent.

(2) Any person affected by such order may apply to have it set aside.”

[30] It appears from the Order granted that Respondent put up the required security and the Order was granted in the following terms:

“That the sheriff of the court south do attach so much of the movable property as may be found at the property situated at 7 Summit Place, Jenvey Road, Summerstrand, Port Elizabeth immediately...”

[31] Applicant takes issue, as I understand him, with the immediate removal of the movable property. Applicant’s submission in this regard was that the only way the immediate removal could have been authorised was by way of an order of court, that there is no such order and therefore any conduct is based on “tempering (sic) with the order” by the clerk of the court. Applicant does not set out any facts to prove the bald and serious allegation of “tempering (sic) with the Order”

on instruction of Respondent. Further, that the “purported rule 41(7) order”, which according to him does not exist, is unlawful.

[32] The answer to this lies in the provisions of rule 42(3). In terms of this rule the method of attachment of property under section 32 of the Act shall mutatis mutandis be the same as that of attachment in execution.

[33] Accordingly, rule 42(3) renders the provisions of rule 41(7) applicable to the attachment of property in security of rent in terms of section 32. The clerk of the court must accordingly follow the instructions of the landlord, if properly given, as to the immediate removal of the property attached and convey such instructions to the sheriff. The magistrate’s court hearing the application is not entitled to order the removal of the goods. The removal can take place only after the provisions

of rule 41 have been complied with.[15]

[34] Respondent attached to its answering affidavit the instructions, from its attorney of record to the clerk of the court, for the immediate removal of the property attached. The words “immediate removal” appear in manuscript on the left hand side of the Order.

[35] Accordingly, there was no unlawful deprivation of possession as there was an order by the magistrate, followed by an endorsement by the clerk of the court, for the immediate removal of the property attached.

Address to which the Order relates (7 Summit Place)

- [36] At length Applicant referred to various documents attached to his papers, and Respondent's papers, in developing his argument that the Order granted does not relate to the property that he resides in. In doing so he came to the conclusion that he actually resides in section 7, which is door 6, and that the Order relates to section 3 which is door 7.
- [37] The inescapable inference to be drawn from Applicant's papers are that he resides in 7 Summit Place, the Order was granted in respect of 7 Summit Place and neither in Applicant's founding affidavit nor in his replying affidavit did he allege that he resides in "door 6" (section 7).
- [38] It is in any event difficult to understand why Applicant would launch an application in circumstances where an order was granted in terms of a unit that he does not reside in. Although the return of service does not form part of the papers, the obvious inference to be drawn is that the sheriff could only have executed at the address referred to in the Order.
- [39] Not only is the argument with regard to the address to which the Order relates so far-fetched it justifies being rejected out of hand,[16] it also does not form part of Applicant's founding papers.

Unconcluded proceedings in the Magistrate's Court

- [40] Even if I am wrong in all of the above, it is trite that the higher Courts' power to intervene in unconcluded proceedings in lower courts will be sparingly exercised. As Cameron JA (as he then was) affirmed in *Magistrate, Stutterheim v Mashiya*: [17]

"[14] The higher Courts, however, have emphasised repeatedly that the power to intervene in unconcluded proceedings in lower courts will be exercised only in cases of great rarity - where grave injustice threatens, and where intervention is necessary to attain justice. The same approach has been followed under the Constitution. At the same time, although the cases in which intervention has actually occurred are uncommon, this Court has refused to define or limit the circumstances in which intervention would be justified. The categories remain open."

- [41] It is common cause in this matter that there are pending proceedings in the Magistrate's Court, Port Elizabeth. This is not a case where grave injustice threatens or where intervention is necessary to attain justice. For this reason too, the application cannot succeed.

Conclusion

and costs

- [42] For all the reasons set out above I am of the view that Applicant has not made out a case for the relief that he seeks.
- [43] Applicant ought to have followed the procedures as provided for in section 32 of the Act, which from the papers it appears that he did. But, instead of waiting for the result thereof he jumped the gun and launched this application.

[44] I can see no reason why there should be any deviation from the rule that costs follow the result.

Order

[45] The application is dismissed with costs.

T. Zietsman

ACTING JUDGE OF THE HIGH COURT

Appearances:

Obo Applicant: In person

Obo Respondent: Adv. A. Beyleveld SC, instructed by Leon Keyter Attorneys, Port Elizabeth

[1] Verbatim quote from Applicant's notice of motion (prayers 1 to 8 thereof).

[2] Prayer 1 of the notice of motion.

[3] Prayers 2 to 7 of the notice of motion.

[4] 1949 (3) SA 637 (A) at 659. See also Johannesburg Society of Advocates and Another v Nthai and Others (879/2019; 880/2019) [2020] ZASCA 171 (15 December 2020) at para [31].

[5] 2004 (2) SA 81 (SE) at paras [37], [38] and [40] (footnotes omitted).

[6] Borrowing from Schreiner JA (as he then was) in Trans-African Insurance Co Ltd.

[7] Plascon-Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634H – 635C.

[8] 2020 (2) SA 419 (SCA) at paras [21], [23] and fn 21.

[9] (Case no. 1199/19) [2021] ZASCA 015 (2 March 2021).

[10] At paras [15] and [17].

[11] With regard to rental, cf. answering affidavit para 7 and replying affidavit p 7 at para 17.

[12] See Minister of Land Affairs & Agriculture v D & F Wevell Trust 2008 (2) SA 184 (SCA) at 200D; see also Masstones (Pty) Ltd v Pick 'n Pay Retailers (Pty) Ltd 2017 (1) SA 613 (CC) at fn 35.

[13] Culverwell v Beira 1992

(4) SA 490 (W) at 494A – C; Bezuidenhout v Patensie Sitrus Beherend Bpk 2001

(2) SA 224 (E) at 229B – C. See also Jacobs and Others v Baumann NO and Others 2009 (5) SA 432 (SCA) at para [20].

[14] Halstead v Durant NO 2002

(1) SA 277 (W) at 281B – C.

[15] Jones & Buckle: The Civil Practice of the Magistrates' Courts at Act – 225.

[16] Plascon Evans.

[17] 2004 (5) SA 209 (SCA) at para [14].

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