

SOUTH AFRICA / JUDGMENT

**Picnoord Kitchen and Another v
Lynx Investment (Pty) Ltd and Others
(2024/054493) [2024] ZAGPJHC 712;
2024 (6) SA 599 (GJ) (8 July 2024)
[2024] ZAGPJHC 712**

COURT

South Gauteng High Court, Johannesburg

BEFORE

L Windell

CASE / FILE NUMBER

2024/054493

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case No: 2024-054493

1. REPORTABLE: YES/NO
2. OF INTEREST TO OTHER JUDGES: YES/NO
3. REVISED.

8 July 2024

In the matter between:

PICNOORD KITCHEN (PTY) LTD

First Applicant

MICHELE BUVE Second Applicant

and

LYNX INVESTMENT (PTY) LTD

First Respondent

BENFLAT PROPERTIES (PTY) LTD

Second Respondent

SHERIFF KRUGERSDORP

Third Respondent

WRITTEN REASONS FOR ORDER

WINDELL, J:

- [1] This is an urgent application for a mandatory interlocutory interdict pending the outcome of an appeal. The application was brought with reasonable expedition. I am satisfied that the matter is urgent as the applicants will not be afforded substantial redress at a hearing in due course.[1]
- [2] It is common cause that the first applicant (Picnoord) was ejected on 13 May 2024 from the leased premises situated at Shop 2[...], V[...] V[...] R[...] C[...], C[...] R[...] B[...] Drive and V[...] O[...] Street, N[...] Ext 1[...], Krugersdorp ('the premises'), which is owned by the first and second respondents, trading as Valley View Co-owners. It was evicted in terms of an order of the Kagiso Regional Court ('court a quo') on 7 May 2024 ('the judgment').
- [3] The applicants seek an order reinstating Picnoord's occupancy of the premises pending the finalisation of the appeal that was noted against the judgment on 14 May 2024. In the interim, Picnoord tenders to continue making payment of its monthly obligations towards the respondents should Picnoord's possession of the premises be reinstated.
- [4] Although the facts are largely undisputed, it is necessary to set them out in some detail. Picnoord occupied the premises in terms of a written lease agreement entered into with the respondents on 30 July 2019. The second applicant (Buve) is the director of Picnoord and signed a deed of suretyship wherein he bounded himself as surety and co-principal debtor with Picnoord for the performance of all its obligations to the respondents.
- [5] During the Covid 19 epidemic, South Africa was placed under a lockdown from 27 March 2020 to 5 April 2022 in terms of the Disaster Management Act.[2] The lockdown was regulated by Regulations issued in terms of the Disaster Management Act and which Regulations were amended from time to time.
- [6] Picnoord paid a reduced rental to the respondents during the different stages of lockdown. This caused the respondents to issue summons against the applicants on 14 December

2021. In terms of the summons issued, the respondents claimed arrear rentals in the amount of R 1 191 961.12 as well as damages in the sum of R11 610 671.40. In addition to the arrear rentals, the respondents sought the following additional relief: (a) Confirmation of the rent interdict as contained in the summons (b) Confirmation of cancellation of the lease agreement (c) Ejectment of Picnoord as well as all those occupying by, through or under it from the premises (d) Costs of suit on the attorney and client scale.
- [7] The applicants defended the action on the basis that Picnoord was entitled to a remission of the rental because the respondents could not give it access and beneficial occupation of the premises at different stages during the different levels of lockdown. The action proceeded on a stated case and the court a quo was asked to determine certain questions of law. It is important to mention that prior to the pandemic and after 15 December 2021, Picnoord has made full payment to the respondents of the basic rental, water, and electricity in terms of the lease agreement.
- [8] The court a quo found that Picnoord was entitled to a remission of rental for a certain period and for a second period 'if it had proven same'. As far as the second period was concerned, the court a quo concluded that Picnoord had not proven the 'nature and extent of the reduction of the beneficial occupation to entitle it to a remission of rental' and that Picnoord was required to approach the court to compute 'any remission of rental' it was entitled to and that pending such a decision it should have paid the full rental. The magistrate then proceeded to find that the lease agreement was validly cancelled and that Picnoord falls to be evicted from the premises.
- [9] As stated before, the judgment was granted on 7 May 2024. In terms of Rule 51(3) of the Magistrate Court Rules (the Rules) a party has 20 days in which to file a notice of appeal. However, five days later, on 13 May 2024, whilst the applicants were still considering the judgment, Buve received an urgent phone call from Picnoord's manager Tyron Rakow ('Tyron'). Tyron informed Buve that the third respondent (the Sheriff) was present at the premises to eject Picnoord from the premises, and to remove the movables from the premises.
- [10] Urgent correspondence was addressed to the respondents' attorneys, Swanepoel Van Zyl ('SvZ'), by the applicants' attorneys of record, Raymond Joffe & Associated ('RJA') on the same day. SvZ were advised that Buve had instructed RJA to note an appeal against the judgment. In the letter RJA emphasised that the noting of the appeal would automatically suspend Picnoord's ejectment from the premises. Consequently, RJA sought urgent confirmation from SvZ that the Sheriff would cease

the ejectment and the removal of Picnoord's assets from the premises. RJA also attempted to contact SvZ telephonically to discuss the matter, however, this was unsuccessful.

- [11] In addition, Buve phoned the Sheriff and informed him that he had instructed RJA to note an appeal against the judgment, and further indicated to the Sheriff that the Notice of Appeal automatically suspends the ejectment of Picnoord from the premises. The Sheriff was however adamant that he had been instructed to proceed with the ejectment of Picnoord from the premises, and that they were not to leave the premises until all the goods had been removed from the premises.
- [12] The ejectment of Picnoord continued until the early hours of the morning of 14 May 2024. All the movable assets were removed, and the premises was subsequently locked by the Sheriff and Tyron was advised that no one was allowed access to the premises.
- [13] The respondents contend that Picnoord's movable assets were not removed at their instance, but at the instance of one of Picnoord's

erstwhile employees, Mr Norman Khuzwayo, in terms of a default arbitration award obtained during December 2023. The applicants

dispute this allegation. During the hearing of the matter counsel for the applicant, Mr Hinrichsen, agreed that this issue does not need to be resolved as it does not take the matter any further.

- [14] In any event, the Notice of Appeal was served on the respondents' attorneys on 14 May 2024 and subsequently filed at court. The bond of security, as required in terms of the Rules, was further paid at court. The applicants submit that there are good prospects of success on appeal as the magistrate allowed the distinguishing of the two time periods to influence his judgment in circumstance where once he had found that Picnoord was entitled to a remission of rental, the need to distinguish between the different time periods became irrelevant. It is further submitted that in determining whether the payments made by Picnoord to the respondents

was reasonable, the court a quo was only requested to consider the content of Annexure A to the stated case. The parties did not require a consideration of any other factors in determining whether the payments made by the Picnoord was reasonable. In these circumstances, the court a quo erred in finding that Picnoord had failed to prove the nature and extent of the reduction of beneficial occupation to which it was entitled and that the lease agreement was therefore validly cancelled.

- [15] Pursuant to the service and filing of the Notice of Appeal, further urgent correspondence was addressed to SvZ on 14 May 2024. RJA reiterated, inter alia, that the service of the Notice of Appeal automatically suspends the execution of the judgment, and as such they demanded that the respondents reinstate Picnoord's occupation of the premises, failing which they had been instructed to launch an urgent application. The respondents refused. The applicants subsequently became aware that the respondents have permitted potential tenants to view the said premises, notwithstanding the Notice of Appeal which has been served and filed.

- [16] The respondents' main opposition to the application, is that at the time that Picnoord's ejectment was commenced with, there was no Notice of Appeal, and the respondents were entitled to, despite the applicants request to hold over the ejectment, to execute the judgment. It is thus not competent, so it is argued, for Picnoord's possession of the premises to be reinstated because the law does not prescribe any restorative measures pending appeal; it merely places a stay of execution.
- [17] The applicants deny that the execution of the order has been completed. Relying on the matter of *O'Sullivan v Mantel and Another*,^[3] the applicants contend that because Picnoord's jungle gym equipment remained installed and intact at the premises, Picnoord's ejectment had not yet been completed and consequently is entitled to its possession being restored. In *O'Sullivan* the court had occasion to consider an application to stay an ejectment pending an appeal. It was argued on behalf of the respondent in *O'Sullivan* that once an ejectment has taken place, the person ejected cannot be restored to possession, even though the judgment in pursuance of which the ejectment took place was later reversed on appeal.
- [18] In considering the respondent's submission, Vermooten J took into account that the applicant's furniture and belongings (worth in all R80 000) was not removed; that there was a 'freezing order' granted by the court before the ejectment was completed, and that the Sheriff did not take possession of the keys nor handed them over to the first respondent or his representative. On the facts he held in favour of the applicant on the basis that the 'execution on a warrant of ejectment has not been completed until the messenger of the court has removed the occupier and those claiming to occupy through him as well as his belongings from the premises and handed over the keys of the premises to the execution creditor. Then and then only has he been ejected and the execution creditor given that which the court awarded him.'^[4]
- [19] In the circumstances of the present matter, I consider this line of argument to be forced and akin to legal acrobatics. Does this imply that an eviction was incomplete if, for instance, knives and utensils are left behind during an eviction? I am inclined to disagree. Nevertheless, in light of the conclusion I have reached in this matter, I do not believe it is necessary to provide an opinion on the applicability of the dictum in *O'Sullivan*.
- [20] In my view it is only necessary to answer one question. Does Picnoord meet the requirements of a mandatory interlocutory order and if so, should this court exercise its discretion and reinstate it onto the premises pending the outcome of the appeal?
- [21] The requirements for the granting of an interlocutory interdict are well known. They are: a prima facie right although open to some doubt, a well-grounded apprehension of irreparable harm if the interim relief is not granted and the

ultimate relief is eventually granted, the balance of convenience favours the granting of an interim relief, and, the applicant has no other satisfactory remedy. [5] In interim interdicts, the requirements of a prima facie right and the balance of convenience are inversely related: the stronger the one, the weaker the other is permitted to be.

[22] Holmes J formulated the approach to be adopted to interlocutory applications in *Olympic Passenger Service (Pty) Ltd v Ramlagan*: [6]

“It thus appears that where the applicant's right is clear, and the other requisites are present, no difficulty presents itself about granting an interdict. At the other end of the scale, where his prospects of ultimate success are nil, obviously the Court will refuse an interdict. Between those two extremes fall the intermediate cases in which, on the papers as a whole, the applicants' prospects of ultimate success may range all the way from strong to weak. The expression 'prima facie established though open to some doubt' seems to me a brilliantly apt classification of these cases. In such cases, upon proof of a well-grounded apprehension of irreparable harm, and there being no adequate ordinary remedy, the Court may grant an interdict - it has a discretion, to be exercised judicially upon a consideration of all the facts. Usually this will resolve itself into a nice consideration of the prospects of success and the balance of convenience - the stronger the prospects of success, the less need for such balance to favour the applicant: the weaker the prospects of success, the greater the need for the balance of convenience to favour him. I need hardly add that by balance of convenience is meant the prejudice to the applicant if the interdict be refused, weighed against the prejudice to the respondent if it be granted.”

[23] The common law provides that the execution of a judgment is automatically suspended upon the noting of an appeal, with the result that the judgment cannot be carried out and no effect can be given thereto pending the appeal. [7] Section 78 of the Magistrate's Court Act, (the Act) [8] however provides that ‘the court may direct that the judgment shall be carried into execution’ pending the decision upon appeal. To obtain such leave the party in whose favour the judgment was given must make special application.

[24] As a starting point it is helpful to be reminded of what the basis and purpose is for the suspension rule. It is to avoid irreparable damage to the intending appellant, either by levy under a writ of execution or by execution of the judgment in any other matter appropriate to the nature of the judgment appealed from. [9] In *Knoop NO and Another v Gupta (Execution)* [10] Wallis JA remarked on the prejudice as follows:

‘The immediate execution of a court order, when an appeal is pending and the outcome of the case may change as a result of the appeal, has the potential to cause enormous harm to the party that is ultimately successful. That was well illustrated by the facts in

Philani-Ma-Afrika, where the judge granted leave to appeal against an eviction order and at the same time gave leave to execute. Only an urgent application to the Constitutional Court, made in the mistaken belief that the execution order was not appealable to this court, forestalled the inevitable and irreparable harm that would have resulted from giving effect to the execution order. In giving the judgment of this court, Farlam JA said: ‘The facts of this case provide a striking illustration of the need for orders of the nature of the execution order to be regarded as

appealable in the interests of justice.’[11]

- [25] Hence, the intended consequence of the suspension rule is that as soon as an appeal is noted, the order is stayed and the status quo (the position the appellant was in before the judgment was delivered) is maintained until the pending appeal is finalized. The successful party is not left remediless. If there is the potentiality of irreparable harm or prejudice being sustained by the successful party as a result of the suspension rule, the successful party has the right in terms of section 78 of the Act to apply for the execution of such order even though there is an appeal pending.[12]
- [26] What is the status of the order if it is executed within the 20-day period specified in Rule 51(3) of the Rules, but before an intended appellant notes an appeal, albeit timely? First, in the absence of proper service of the notice of appeal upon the respondent or his attorney no appeal has been noted. The successful party is entitled to assume that the judgment is a final judgment unless the other party notes an appeal in terms of the Rules. Second, the successful party is only entitled to make such an assumption when the 20 days provided for in Rule 51(3) has expired. The status of the order thus remains one of suspension and the appellant remains entitled to the protection of the suspension rule until the appeal has been finalized. That is just simple justice between man and man. In the current matter the applicants are therefore entitled to the protection of the suspension rule and entitled to be in possession of the property until the appeal is finalized.
- [27] The respondents' collective conduct was evidently intended to render any notice of appeal that would have stayed the execution of the order of no consequence, as they were aware that the notice of appeal would be served shortly. Consequently, their refusal to halt Picnoord's ejectment is regrettable. Section 78 of the Act cannot be negated by a landowner by executing the order before the 20 days has expired during which a party can note an appeal. By stealing a march, the applicants have been deprived of the protection of the suspension rule and deprived of the opportunity to remain in the premises until the appeal has been finalized.
- [28] The respondents rely on two cases in support of their contention that an interlocutory order is not permitted in law. The first is *Perelson v Druain*[13] and the second is *BP Southern Africa (Pty) Ltd v Mega Burst Oils and Fuels (Pty) Ltd* and a similar matter.[14] In *Perelson* a writ was issued the day after judgment. A full bench held that there is no rule of law that a writ of execution issued without allowing an intervening period is invalid. The court thus held that it is in order to seek payment almost immediately after judgment.
- [29] The facts in *Perelson* are wholly distinguishable from the present matter. Although the question whether a judgment creditor is bound to wait a reasonable time before issuing a writ of execution was discussed, but not decided, I agree that there is nothing in the Act or the Rules that prohibit a successful party from executing an order immediately after delivery thereof. *Perelson*, however, did not deal with the rights of an intending appellant when an order is immediately executed during the period afforded to it to note an appeal.

[30] In BP Southern Africa (Pty) Ltd, the applicant sought an order suspending the execution of the judgments pending the outcome of a petition for leave to appeal that was yet to be delivered. It argued that it had a 'clear right' to an interdict suspending the High Court's order pending the finalisation of the appeal process. In the same vein, this judgment did not address the complex issue of the rights of a blameless party against whom an order is executed during the period allotted by the Rules for appealing.

[31] Every case must be determined on its merits. The applicants have set out in their founding affidavit the attempts it had made to secure an undertaking that the respondents would not proceed with the ejectment of Picnoord in circumstances when the applicants notice of appeal would be served eminently. The

respondents refused this request and continued with the ejectment.

[32] The interim right which is sought to be protected at this stage by the appellants is the right to have the benefit of a suspension order while remaining in the premises until the appeal has been finalized. This right lies at the heart of the rule of law. A contrary approach would lead to a situation where the protection of this fundamental right might exist only on paper and would have the effect of eroding the very right which was sought to be protected.[15]

[33] As far as the remainder of the requirements for an interlocutory order are concerned, I am satisfied that they were all met. The applicants have a well-founded fear of irreparable damage in the event that the interim relief is not granted. The damage is ongoing. The balance of convenience weighs heavily in favour of the applicants who seeks to uphold and preserve the integrity of the judicial process and the rule of law and there is no other adequate remedy.

[34] In Winkelbauer and Winkelbauer t/a Eric's Pizzeria and Another v Minister of Economic Affairs and Technology and Others[16] the court held that:

'the purpose of interim relief pendente lite is to obviate an injustice to a party who prima facie has been wronged, but who needs time to obtain redress through the due process of law. The Court grants interim relief on the assumption that the relief should have been granted in the first place.'

[35] I have no doubt that the applicants have been wronged and have suffered an injustice. This court should therefore exercise its powers to prevent the applicants from being defeated by the respondents' conduct. I accordingly make an order in the following terms:

1. The rules of time and service in accordance with Rule 6(12) of the Rules of the above Honourable Court are dispensed with and the matter is declared to be one of urgency.
2. It is ordered that the execution of the Judgement handed down by the learned Magistrate Louw on 7 May 2024 in the Kagiso Regional Court under Case Number RCK541/2021, and the consequent warrant of ejectment and execution, is stayed pending the outcome of the Appeal.

3. The First and Second Respondents are ordered to immediately reinstate the First and Second Applicants' occupancy of the leased premises situated at Shop 2[...], V[...] V[...] R[...] C[...], C[...] R[...] B[...] D[...] and V[...] O[...] Street, N[...] Ext 1[...], K[...] ("the leased premises").
4. The First and Second Respondents are ordered to reinstate, within five (5) days of this order and at its cost, the leased premises to the condition in which the leased premises were at the time of the ejectment of the First Applicant, to enable the First Applicant to operate the business of a restaurant.
5. The First Applicant is ordered to continue effecting full payment of its monthly obligations to the First and Second Respondents as provided for in the lease agreement entered into between the parties dated 31 July 2019.
6. The First and Second Respondents are ordered to pay the costs of this application, on party and party (Scale C), jointly and severally, the one paying the other to be absolved.

L. WINDELL

JUDGE OF THE HIGH COURT

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 8 July 2024.

APPEARANCES

Counsel for the applicants: Advocate D.H. Hinrichsen

Attorneys for the applicants: Raymond Joffe & Associates

Counsel for the respondents: Advocate R. Bhima

Attorneys for the respondents: Swanepoel van Zyl Attorneys

Date of hearing:

12 June 2024

Date of order:

8 July 2024

Date of written reasons:

15 July 2024

[1] Luna Meubel Vervaardigers (Edms) Bpk v Makin (trading as Makin Furniture Manufacturer) 1977

- (4) SA 135 (W) at 137 F; East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd 2011 JDR 1832 (GSJ) at para 6; Mogalakwena Local Municipality v Provincial Executive Council, Limpopo and Others 2014 JDR 1312 (GP) at para 64. [2] Act 57 of 2002.
- [1] Luna Meubel Vervaardigers (Edms) Bpk v Makin (trading as Makin Furniture Manufacturer) 1977
- (4) SA 135 (W) at 137 F; East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd 2011 JDR 1832 (GSJ) at para 6; Mogalakwena Local Municipality v Provincial Executive Council, Limpopo and Others 2014 JDR 1312 (GP) at para 64.
- [2] Act 57 of 2002.
- [3] 1981 (1) SA 664 (W).
- [4] At page 669B to C.
- [5] See Setlogelo v Setlogelo 1914 AD 221; Masuku v Minister van Justisie en Andere 1990 (1) SA 832 (A).
- [6] Olympic Passenger Service (Pty) Ltd v Ramlagan 1957
- (2) 382 (D) at 383 D; Erikson Motors (Welkom) Ltd v Protea Motors, Warrenton, and Another 1973
- (3) SA 685 (A) at 691.
- [7] Jones and Buckle RS16, 2018 Act-p557.
- [8] Act 32 of 1944
- [9] Reid and Another v Godart and Another 1938 AD 511 at 513.
- [10] Knoop NO and Another v Gupta (Execution) 2021
- (3) SA 135 (SCA)
- [11] At para 1.
- [12] Thirlwell v Johannesburg Building Society 1961
- (4) SA 665 (D); Lewis v Culwick 1966
- (3) SA 52 (D) at 58; South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977
- (3) SA 534 (A) at 545G; Burlington Hosiery Mills (SA) Ltd v Arwa (Pty) Ltd 1977
- (4) SA 150 (W) at 153C; Beecham Group plc v South African Druggists Ltd 1987
- (4) SA 869 (T) at 874G–875C; Ncube v Department of Home Affairs 2010

(6) SA 166 (ECG) at 169B–C.

[13] 1910 TS 458

[14] 2022 (1) SA 162 (GJ)

[15] Ferreira v Levin, NO and Others; Vryenhoek and Others v Powell, NO and Others 1995

(2) SA 813 (W).

[16] Winkelbauer and Winkelbauer t/a Eric's Pizzeria and Another v Minister of Economic Affairs and Technology and Others 1995

(2) SA 570 (T). See also Joubert The Law of South Africa vol 11 at 297.

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