

SOUTH AFRICA / JUDGMENT

Sports tarven (Pty) Ltd and Another v Executor, Estate Late A.P Santos and Another (1902/2019) [2019] ZALMPPHC 51 (31 October 2019)

[2019] ZALMPPHC 51

COURT

Limpopo High Court, Polokwane

BEFORE

MF. Kganyago

CASE / FILE NUMBER

1902/2019

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REPUBLIC OF SOUTH

AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION,

POLOKWANE

(1)

REPORTABLE:

YES/NO

(2)

OF

INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED

CASE

NUMBER: 1902/2019

31/10/2019

In

the matter between:

THE
SPORTS TARVEN (PTY) LTD
FIRST
APPLICANT
MOAGABO
ELIZABETH MOLAPO
SECOND APPLICANT
AND
THE
EXECUTOR, ESTATE LATE A.P SANTOS
FIRST RESPONDENT
SHERIFF
A.T RALEHLAKA
SECOND RESPONDENT

JUDGEMENT

KGANYAGO J

- [1] On the 24th of April 2018 the first respondent obtained an eviction order against the first and second applicants in the Magistrate Court Polokwane. On the 9th May 2018 the applicants' attorneys filed a notice requesting a written judgment and reasons for the judgment from the Presiding

Magistrate. The Presiding Magistrate responded on the 14th May 2018 stating that the proceedings were mechanically recorded, judgment and facts found to have been proved are on record and he has nothing to add, save to say the transcript will be a true reflection of his judgment.

- [2] The applicants' attorneys were not satisfied with the Presiding Magistrate's response, and brought a mandamus application to compel the Magistrate to deliver his judgment. The application is still pending as the Presiding Magistrate is opposing it.
- [3] On the 22nd August 2018, the applicants lodged an appeal against the judgment and order of the Presiding Magistrate. The applicants struggled to transcribe the record of the proceedings, and that resulted in them failing to prosecute their appeal timeously. As a result of that their appeal lapsed.
- [4] On the 18th February 2019, the first respondent gave the applicants thirty days notice within which to vacate the premises, failing which they will be evicted. On the 15th March 2019, the applicants' attorneys served the first respondent's attorneys with an application for a date of hearing of the appeal. The applicants' attorneys also wrote a letter to the first respondent's attorneys to hold in abeyance the eviction process as they were in the process of prosecuting the appeal. The first respondent's attorneys replied informing the applicants' attorneys that they were not condoning the late prosecution of their appeal and that they were proceeding with the eviction application. The applicants received the transcribed record on the 27th

March 2019.

- [5] On the 27th March 2019 the second respondent went to the applicants' premises to execute the writ of eviction. On the 28th March 2019 the applicants obtained an interim relief on ex parte basis interdicting the respondents from evicting the applicants. A rule nisi was also issued. The applicants are seeking confirmation of the rule nisi on the basis that the warrant of eviction be set aside being as a nullity, and that the first respondent be interdicted from evicting them pending the finalisation of their appeal.
- [6] The first respondent is opposing confirmation of the rule nisi and has also brought a counter-claim seeking an order that it be declared that the applicants' appeal has lapsed. The first respondent has submitted that the applicants' appeal was not properly noted and further that the applicants' appeal has lapsed. The first respondent contends that once the appeal has lapsed, the order granted by the Magistrate Court is no longer suspended and therefore they were entitled to execute such order.
- [7] The first issue to be determined is whether the warrant of execution issued by the first respondent on the 20th March 2019 against the applicants was valid, and the second issue is whether the applicants have satisfied the requirements for an interim relief.
- [8] The basis for the first respondent to issue the warrant of eviction was that the appeal has lapsed. In terms of section 51(9) of the Magistrates' Courts Rules of Court, a party noting an appeal or cross appeal shall prosecute it within such time as may be prescribed by rule of the Court of appeal and, in default of such prosecution, the appeal or cross appeal shall be deemed to have lapsed, unless the court of appeal shall see fit to make an order to the contrary.
- [9] In terms of rule 50(1) of the Uniform Rules of Court, an appeal shall be prosecuted within 60 days after it has been noted, failing which such appeal shall be deemed to have lapsed. However, the court of appeal has a discretion to grant an indulgence taking into consideration of all the circumstances of the case.
- [10] Both rule 50(1) of the Uniform Rules of Court and rule 51(9) of the Magistrates' Courts Rules of Court provides that if the appeal is not prosecuted within the stipulated time period it shall be deemed to have lapsed. The court of appeal taking into consideration all the circumstances surrounding the lapsing of the appeal, may exercise its discretion and reinstate the appeal. The mere fact that an appeal has lapsed, does not mean that it is the end of it. It may still be revived as it has merely been deemed to have lapsed.
- [11] The word "deemed" will need some interpretation. According to the Concise Oxford Dictionary, "deemed" means regard or considered in a specified way. In the context of a lapsed appeal in my view, while the appeal has lapsed, it may still be revived by presenting facts which will persuade the appeal court to exercise its discretion in favour of reinstating it.

- [12] In *Assign Services (Pty) Ltd v NUM and Others* [2018] ZACC 22; 2018 9 BLLR 837 (CC); (2018) ILJ 1911 (CC); 2018(5) SA 323 (CC); 2018 (11) BCLR 1309 (CC) (26 July 2010 at para 92 Cachalia AJ said:

“Deeming provisions are often used in statutes to give the subject-matter a meaning not ordinarily associated with it”

- [13] In *S v Rosenthal* 1980 (1) 65 (A) at 75 F -76 A Trollop JA said:

“The word “shall be deemed” (word geag” in the signed Afrikaans text) are a familiar and useful expression often used in a legislation in order to predicate that a certain subject-matter, e.g. a person, thing, situation, or matter, shall be regarded or accepted for the purpose of the statute in question as being of a particular, specified kind whether or not the subject-matter is ordinarily of that kind. The expression has no technical or uniform connotation. Its precise meaning and especially its effect, must be ascertained from its context and the ordinary canons of construction. Some of the usual meanings and effect it can have are the following. That which is deemed shall be regarded or accepted (i) as being exhaustive of the subject-matter in question and thus excluding what would or might otherwise have been included therein but from the deemed, or (ii) in contradistinction thereof, as being merely supplementary, i.e., excluding and not curtailing what the subject-matter included, or (iii) as being conclusive or irrebuttable, or (iv) contrarily thereto, as being merely prima facie or rebuttable. I should add that in the absence of any indication in statute to the contrary, deemed provision that is exhaustive is also usually conclusive, and one which is merely prima facie or rebuttable is likely to be supplementary and not exhaustive”.

- [14] In terms of rule 51(9) of the Magistrates’ Courts Rules, the appeal is deemed to have lapsed unless the court of appeal shall see it fit to make an order to the contrary. That shows that it is not exhaustive that the appeal has lapsed. In my view, if it was the intention of the drafters of the rules that after 60 days it is exhaustive that the appeal has lapsed, they would not have included the deeming provisions in the Uniform Rules of Court and Magistrates’ Court Rules of Court.

- [15] For one to be certain that indeed the appeal has lapsed, an application to declare that should be made. In *Nawa and Other v Marakala and Another* 2008 (5) SA 275 (BHC) at 278 A Landman J said:

“I am satisfied that a single judge has by virtue of section 13(1) (a) of the Supreme Court Act 59 of 1959 the jurisdiction to entertain an application, such as this one for a declaration that an appeal has lapsed”.

- [16] Before the court declares that the appeal lapsed, it would not be appropriate for the first respondent to issue and execute a writ of eviction against applicants. The applicants still had an opportunity to bring a condonation and reinstatement application for the lapsed appeal. Until that process has been exhausted, it will be premature for the first respondent to issue a writ of eviction against the applicants. Should the first respondent proceed with the issuing of the writ before the court has declared the appeal to have lapsed, it follows that the writ of eviction issued will be a nullity. The first respondent has issued a writ of eviction against the

applicants prematurely and it is therefore void.

- [17] The first respondent has brought a counterclaim seeking an order that it be declared that the appeal has lapsed. That is the process which he should have first followed. At the moment his counterclaim will not cure the damage already done. Therefore, in my view, the first respondent's counterclaim lacks merit.
- [18] The second issue that the applicants are seeking is an interim relief pending the finalisation of their appeal. It is trite that the granting of an interim relief pending action is an extra ordinary remedy which is within the court to either grant or withhold. The test for granting an interim relief was formulated in the well-known case of *Setlogelo v Setlogelo* 1914 AD 221 at 227 being (i) a prima facie right; (ii) well-grounded apprehension of irreparable harm; (iii) balance of convenience and; (iv) the absence of any other satisfactory remedy.
- [18] The first requirement which the applicants must satisfy is a prima facie right. The applicants have legally been operating their business on the premises in which the first respondent's wants to evict them. The legality of the eviction is the subject of the dispute that will be determined by the appeal court. The issue at

this stage is not whether the applicants are occupying the premises lawfully or not. That will be determined when the appeal is heard if the applicants succeed in reinstating their appeal. It is trite that the right is required to be prima facie, though open to some doubt. The court is therefore satisfied that the applicants have established a prima facie right.

- [19] The second requirement which the applicants must satisfy is to show that there is a reasonable apprehension of irreparable and eminent harm eventuating should the order not be granted. Should the applicants be evicted whilst the appeal has not yet been finalised, they will not be able to trade and will lose income which even if they succeed on appeal they will not be able to recover. That will also damage their goodwill which will not be easy for them to rebuild it. The court is therefore satisfied that the applicants have satisfied the second requirement.
- [20] The third requirement which the applicants must establish is the balance of convenience. The applicants' customers are already used to the place where the applicants are trading. If they are evicted and moved to another premises and later are successful with their appeal, they will be forced to move back. It will therefore be convenient for them to remain in the same premises until the appeal is finalised. The court is therefore satisfied that the applicants have satisfied the third requirement.
- [21] The fourth requirement which the applicants must satisfy is the absence of any other remedy. The applicants are still exhausting the legal remedies available to them, which at this stage is to appeal the judgment of the court a quo, of which they have done. Since the appeal is still pending, they don't have any other remedy to minimize the losses which they might suffer should they be evicted from the premises. Their only remedy is to wait for the outcome of the appeal. The court is therefore satisfied that the applicants have satisfied the

fourth requirement.

[22] The court is therefore satisfied that the first respondent's writ of eviction is a nullity and that the applicants have satisfied the four requirements to obtain an interim relief. Under the circumstances, the applicants are entitled to the relief that they are seeking.

[23] In the results I make the following order:

23.1. Pending the finalisation of the appeal under case number ACA04/2019, the interim relief granted on the 28th March 2019 is confirmed on the following basis:

23.1.1. The warrant of eviction issued by the first respondent on the 20th March 2019 is hereby set aside as a nullity.

23.1.2. The first respondent is interdicted from evicting the applicants from the property known as shop number 10 and 11 situated at 17 Witklip Street, Ladanna, Polokwane pending the finalisation of their appeal.

23.2. The first respondent's counterclaim is dismissed.

23.3. The first respondent to pay the applicants' costs on party and party scale.

MF. KGANYAGO J

JUDGE OF HIGH COURT OF SOUTH AFRICA, LIMPOPO DIVISION, POLOKWANE

APPEARANCE:

COUNSEL FOR THE APPLICANTS : ADV K.K. KEKANA

INSTRUCTED BY

: MAKWELA & MABOTSA

ATTORNEYS

COUNSEL FOR 1ST RESPONDENTS : MR. G. ELLERS

INSTRUCTED BY

: DDKK ATTORNEYS INC.

DATE OF HEARING

: 10 October 2019

DATE OF JUDGEMENT

: 31st October 2019

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