THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 232/11

In the matter between: Not Reportable

GERT THOMAS VAN DER MERWE **First Appellant**

ANDRIES PETRUS JACOBUS ELS **Second Appellant**

SHERIFF PRETORIA EAST **Third Appellant**

and

SIMON MOLEFE PITJE **First Respondent**

NELLY PITJE **Second Respondent**

Neutral citation: *Gert Thomas van der Merwe v Simon Molefe Pitje* (232/11) [2012] ZASCA 50 (30 March 2012)

Coram: MPATI P, NUGENT, HEHER and LEACH JJA and PLASKET AJA

Heard: 17 February 2012

Delivered: 30 March 2012

Summary: **Practice and procedure – interlocutory orders – execution order suspended pending finalisation of application to rescind it – suspension order lapses on abandonment of rescission application.**

ORDER

On appeal from: North Gauteng High Court, Pretoria (Makgoka J sitting as court of first instance).

1. It is declared that the order made by Potterill AJ on 30 October 2009 authorising the eviction of the respondents is of full force and effect and has not been superseded by any further orders.
2. The respondents are ordered to pay appellants costs of the proceedings before Webster J and before the court a quo, as well as the costs of this appeal.
3. Save for the above the appeal is dismissed.

JUDGMENT

MPATI P (NUGENT, HEHER, LEACH JJA, and PLASKET AJA CONCURRING):

[1] This appeal is against an order of the Pretoria High Court (Makgoka J) varying an earlier order made by Webster J, dismissing an application to vary an even earlier order made by Potterill AJ, granting leave to execute on an eviction order.

[2] The respondents, who are husband and wife, were the registered owners of certain mortgaged fixed property situated at 22 Verbenia Street, Lynnwood Ridge, Pretoria (the property). Subsequent to the mortgagor foreclosing, the first and second appellants purchased the property at a public auction on 22 August 2007. (Since the third appellant has no interest in the appeal I shall refer to the first and second appellants as 'the appellants'.) Transfer of the property into the names of the appellants was effected on 7 March 2008. The appellants thereafter sought, and obtained, an eviction order in the Pretoria High Court on 30 October 2009 against the respondents who, since the mortgagor foreclosed on 12 January 2004, had remained in occupation of the property. On 20 November 2009 the first respondent lodged an application for leave to appeal against the eviction order. The appellants countered by bringing an application on 25

November 2009, in terms of Uniform rule 49(11), for leave to execute on the eviction order. Both applications were set down for argument on 2 December 2009, but on that day the respondents' application for leave to appeal was removed from the roll, while the court (Potterill AJ) granted the appellants leave to execute on the eviction order (the execution order).

[3] However, as appears from the judgment of the court a quo, the respondents launched two applications on 3 December 2009, both on an urgent basis. In the first, so it seems, they sought rescission of the execution order and other ancillary relief. In the second, an order was sought suspending the operation of the execution order pending the finalisation of the rescission application.[1] (Like the court below, I shall refer to the second application as 'the suspension application'.) The suspension application came before Webster J on 4 December 2009 and after hearing argument the learned judge dismissed it with costs.

[4] But the respondents were not about to surrender for, on 5 December 2009, they brought yet another urgent application seeking the following order:

'1 . . .

2 That the judgment and order made by the Honourable Mr Justice WEBSTER on the 4th December 2009 be varied to read as follows:

2.1 That it is hereby declared that the execution granted by Acting Justice POTTERILL on the 2nd December 2009 is suspended, pending the finalisation of the rescission application launched by the Applicants on the 3rd December 2009;

2.2 That the Respondents are hereby interdicted and restrained from executing on the order made by Acting Justice POTTERILL on the 2nd December 2009 in any manner

[1] In their founding affidavit in the present matter the respondents (the first respondent being the deponent) aver that the first respondent 'served our Notice of Motion in terms of which we are seeking a variation and/or rescission of the judgment and order made by Acting Justice POTTERILL on the 2nd December 2009'.No reference is made to a further application.

whatsoever, pending the finalization of the rescission application launched by the Applicants on the 3rd December 2009;

2.3 That the Respondents are hereby directed to immediately return [the property] to the Applicants; . . .

. . ..'

The application was ultimately argued before Makgoka J on 24 March 2010. On 10 June 2010 the learned judge granted prayers 2, 2.1 and 2.3 of the order sought and ordered further that the costs of the proceedings before Webster J and before him 'be costs in the rescission application'. He subsequently refused leave to appeal. This appeal is with leave of this court.

[5] One of the grounds upon which the appellants sought leave to appeal against Makgoka J's order was that the learned judge 'erred by finding that the Applicants [were] entitled to a variation of an interlocutory order because the court of first instance erred in law or in fact on the evidence before it'. This ground was elaborated upon in the appellants' heads of argument and their counsel's submissions before us that the respondents' variation application before Makgoka J was a disguised appeal against the order made by Webster J dismissing their application for variation of the execution order. The question, therefore, is whether Webster J's order was capable of being varied. Put simply, did the court below have jurisdiction to vary Webster J's order? In view of what follows, however, it is not necessary to consider that question.

[6] In response to enquiries from the registrar of this court the respondents' Pretoria attorneys, Messrs F S Kabini and Associates Inc (Kabini Attorneys), advised, by letter dated 3 February 2012, that the respondents' application for leave to appeal against the eviction order was dismissed by Claasen J; that a petition to the President of this court was refused and that a further application for leave to appeal to the Constitutional Court was likewise refused. The application for rescission of the execution order was never finalized. Thus, as to the eviction order, the respondents have reached the end of the road. The appellants' rights of ownership and possession of the property have now finally been confirmed by the refusal of leave to appeal by the Constitutional Court. The

respondents have no claim to it.

[7] The application for rescission of the execution order was lodged on 3 December 2009, more than two years ago. The decision of the Constitutional Court refusing leave to appeal to it was conveyed to the respondents on 28 September 2011,[2] according to the letter from Kabini Attorneys. Nothing has been done to bring the rescission application to finality. Consequently, we are at large to assume that it has been abandoned. In any event, there would be no point in pursuing it now that the proprietary rights in respect of the property have been settled. The respondents have no rights in the property. There was never any rental agreement between them and the appellants.

[8] It follows that since leave to appeal has been refused and the application for rescission abandoned, the order of the court a quo has lapsed and the execution order no longer suspended. That order of the court a quo was purely interlocutory and its life was dependent on the finalization of the rescission application. This appeal has thus become academic. No order will therefore be made on the merits of the appeal. I need to stress, though, that the route I have taken in dealing with this appeal must not be construed to mean that I agree with the court a quo's assumption of jurisdiction and consequent variation of what appears to be an order that was final in effect. Moreover, in order to dispel any uncertainty, I propose making a declaratory order relating to the present efficacy of Potterill AJ's order made on 30 October 2009.

[9] There is another matter that requires mention. When the matter was called in this court the respondents were absent and there was no legal representation on their behalf, although heads of argument had been lodged timeously. We were informed from the Bar by the appellants' counsel, a fact later confirmed by the registrar of this court, that the respondents' erstwhile Pretoria attorneys, Messrs Mkhabela Attorneys, had withdrawn as attorneys of record, but that the new attorneys, FS Kabini Attorneys, were still using the same local attorneys, Messrs Mphafi Khang Inc (Khang Attorneys), as their correspondents. Proceedings were thus adjourned and Mr Khang of Khang Attorneys was summoned to explain to this court why there was no representation on behalf of the

[2] The order was made on 5 August 2011.

respondents.

[10] Upon resumption of the proceedings Mr Khang informed us that although he was the local correspondent attorney for the respondents he had never received any instructions other than to act as a 'postbox'; that on 29 November 2011 he faxed the notice of set down of the appeal to the respondents' erstwhile attorneys, Mkhabela Attorneys, and thereafter sent it by registered post the next day and that he had been under the impression that someone from the respondents' new attorneys would be present at court. He applied for a postponement of the appeal for the reason that he was not in a position to argue the appeal. Because it was clear that Mr Khang had no instructions even to apply for a postponement, he was afforded an opportunity to contact Kabini Attorneys for instructions in respect of the further conduct of the matter. When the court reconvened Mr Khang informed us that he had spoken to Mr Kabini, who was unable to give him instructions. He, however, received a telephone call from the first respondent who advised him that he (first respondent) was not aware of the date of the hearing of the appeal and that Mr Khang should seek a postponement. Mr Khang accordingly moved for a postponement, submitting that the respondents would be prejudiced if the appeal were to proceed in their absence.

[11] Counsel for the appellants opposed the application for a postponement. He submitted that at least by 8 February 2012 Kabini Attorneys knew of the date of set down of the appeal. The appellants' attorneys had received a copy of a letter from Kabini Attorneys dated 3 February 2012 and addressed to the registrar of this court requesting, inter alia, a copy of the notice of set down of the appeal. On 8 February 2012 the appellants' attorneys sent a copy of the notice of set down[3] to Kabini Attorneys by facsimile under cover of a letter of the same date, the third paragraph of which reads as follows:

'We attach in any event the notice of set down hereto for your attention as well as correspondence received from the Constitutional Court. Seeing that you are still utilising the services of the same correspondent … we find it strange that you have not requested the notice from them. They are your correspondents.'[4]

[3] The date of set down was 17 February 2012.
[4] Proof of a successful facsimile transmission was made available to the court.

[12] In my view, it is quite clear from the above that Kabini Attorneys were aware of the date on which the appeal was to be argued, at the latest by 8 February 2012. If that was not the case, Mr Kabini would have said so when Mr Khang spoke to him on the telephone. Instead, he was simply unable to give instructions for the further conduct of this appeal. In my view, the attitude displayed by the respondents and their legal representatives, including Khang Attorneys, is unacceptable and indeed contemptuous towards this court. As the respondents' local attorneys Khang Attorneys should have established from their Pretoria correspondents before the date on which the appeal was to be argued, whether or not the respondents would be represented in this court. If not, they should have dispatched someone from their offices or obtained the services of counsel to be present when the matter was called so as to explain the absence of the respondents and why they were not legally represented. In the prevailing circumstances, I could find no reason why the appeal should be postponed to the obvious prejudice of the appellants, who would have to endure yet further delay, through no fault of theirs, before the ultimate finalisation of the matter.

[13] Moreover, the respondents sought an order before Webster J suspending the execution order pending the finalization of an application for its rescission. From the record of proceedings before Webster J (excluding the application papers), which formed part of the record before the court a quo, it is clear that the order suspending the execution order was sought on the basis that the execution order was granted in the respondents' absence. Assuming that the respondents' case that the execution order was granted in their absence was true,[5] it does not appear that any attempt was made to show 'good cause',[6] which Webster J could consider in deciding whether or not to vary or suspend the execution order. No substantial defence was disclosed.[7] In the opposing affidavit in the court below the appellants, averred that '[t]o date [respondents] have not disclosed any defence to the merits of the main application'. There was no response to this averment in the respondents' 21-page replying affidavit. On the face of it, therefore, it

[5] Webster J dismissed the application on the ground that the order was not granted in the respondents' absence because the first respondent was present even though it was argued that he did not make any submissions.
[6] See Rule 31(2)(*b*).
[7] *Silber v Ozen Wholesalers* (Pty) Ltd 1954 (2) SA 345 (A) at 352F-H.

appears that there was no proper case for the order sought before Webster J. For these reasons the application for a postponement was refused. And because Mr Khang had no further instructions his request to be excused was exceeded to.

[14] What remains is the question of costs. As I have mentioned above, the court a quo ordered that the costs of the proceedings before Webster J and itself be costs in the rescission application. There is no reason why the respondents should not be ordered to pay those costs.

[15] In the result I make the following order:

1. It is declared that the order made by Potterill AJ on 30 October 2009 authorising the eviction of the respondents is of full force and effect and has not been superseded by any further orders.
2. The respondents are ordered to pay appellants costs of the proceedings before Webster J and before the court a quo, as well as the costs of this appeal.
3. Save for the above the appeal is dismissed.

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L Mpati

President

APPEARANCES

For the Appellants:	N F de Jager
Instructed by:	Van der Merwe & Associates, Pretoria Rossouws Attorneys, Bloemfontein
For the Respondents:	M J Khang
Instructed by:	F S Kabini Attorneys, Pretoria Mphafi Khang Inc, Bloemfontein