IN THE HIGH COURT OF LESOTHO

HELD AT MASERU **CIV/APN/440/19**

In the matter between

MPHAPHATHI QHOBELA **1st APPLICANT**

KATLEHO QHOBELA **2ND APPLICANT**

TUMISANG QHOBELA **3RD APPLICANT**

AND

PHIRI NKOE **1ST RESPONDENT**

NTHABISENG LITABE **2ND RESPONDENT**

MASTER OF THE HIGH COURT **3RD RESPONDENT**

DEPUTY SHERIFFF OF THE HIGH COURT **4TH RESPONDENT**

COMMISSIONER OF POLICE **5TH RESPONDENT**

CORAM: BANYANE AJ

HEARD: 10/02/2020

DELIVERED: 24/03/2020

JUDGEMENT

Summary

Enforcement of a warrant of ejectment issued by the Magistrate Court against persons in occupation of premises but were not parties in the ejectment proceedings - Rule 46 of subordinate Court Rules provides a remedy for persons adversely affected by the judgement granted in proceedings in which they were not joined - applicants failing to invoke the

rule but seek a declaratory order that the writ is not executable against them - application dismissed.

Punitive costs- applicants suppressing material facts in their founding affidavit, by indirectly seeking reinstatement into premises from which they have already been ejected pursuant to the Order of the Magistrate - award of costs at attorney and client scale made.

Annotations

Cited Cases

Phiri Nkoe v Nthabiseng Litabe C of A (CIV)11/17

Jobo v Lenono C of A (CIV) 28/10

Madalane v Van Wyk (87/2015) [2016] ZASCA 25 (18 March 2016)

Mamello Morrison & 5 Others v Headmaster & 1 CIV/APN/165/95

Lerato Tsiu v Lesotho General Insurance Company (Ltd) CIV/T/84/97

Schesinger v Schesinger 1979(4) SA 342 at 348-349

Andrew Phillips and Others v The National Director of Public Prosecution No.202/2002 (SCA) para 26

Makoala v Makoala C of A (CIV)04/09

Lesotho Nissan (Pty) Ltd v Katiso Makara C of A (CIV)72/2014

Trans African Insurance Co. Ltd v Maluleka 1956(2) SA 273(A) at 278

Uitenhage Municipality v Uys 1974 (3) SA 800(E) at 805D-F

Amalgamated Engineering Union v Minister of Labour 1949(3) SA 637(A)

Ntai and Others v Vereeniging Town Council and Another 1953(4) SA 579

Joy to the World v Neo Malefane C of A (CIV)16/2013

Joy to the World v Neo Malefane C of A (CIV)09/2016

Introduction

[1] This is an urgent application in terms of which applicants seek an order declaring that a certain warrant of ejectment (the warrant) issued by the Magistrate's Court for the District of Maseru in 2008 against the 2nd respondent is not executable against them because they were not parties in the proceedings that gave rise to the warrant. The reliefs sought are couched in the following terms;

> 1. That the rules of this Honourable Court pertaining to the normal modes and periods of service be dispensed with on account of the urgency hereof.
>
> 2. That a rule nisi be and hereby issued returnable on the date determinable by the Honourable Court calling upon the respondents to show cause (if any) why an order in the following terms shall not be made absolute:
>
> a) That the execution of the warrant of execution concerning the applicants' property at Ha Mabote, Khubetsoana in the district of Maseru be stayed pending finalization hereof.
>
> b) It is hereby declared that a writ of execution is not executable against a party not joined in the proceedings and not cited in the court order.
>
> c) That upon granting prayer (b) above the writ of execution in the hands of the 4th respondent cannot be executed upon the applicants who were not joined and cited in the proceedings.
>
> d) Further and/or alternative relief.
>
> e) Costs of suit.
>
> 3. That prayers **1, 2 and 2(a)** shall operate with immediate effect as interim relief.

[2] A rule nisi was granted staying execution pursuant to the warrant. On the return day, only the 1st respondent opposed the application. In his answering affidavit, six points are raised in *limine*;

a) Jurisdiction
b) Non-disclosure of material facts
c) Lack of urgency
d) Locus standi
e) Capacity to sue
f) Non-compliance with the rules.

[3] Before I address these preliminary issues, it is appropriate to set out facts which gave rise to this application.

Background

[4] The 1st respondent is the registered title holder of plot number 13282-043, situated at Mapeleng, in the Maseru Urban Area. The lease in his names was registered on the 08th March 1983. The dispute in relation to this plot has a protracted history of litigation between the 1st and 2nd respondent herein.

[5] The background leading to the issuance of the warrant may be summarised as follows;

The litigation in which the 1st respondent and 2nd respondent were embroiled in dates as far back as 2007 when the 1st respondent sued Nthabiseng Litabe (2nd respondent in this matter) in the Magistrate Court for ejectment under CC 447/07. During the pendency of this action, the Magistrate Court, on the 31st May 2007, issued an order interdicting the respondent from putting up a structure on this plot pending finalization of the ejectment proceedings. This was under CC 502/07. An order of

ejectment against the 2nd respondent was granted on the 10th March 2008. On the 26th of March 2008, a warrant of ejectment was issued pursuant to the order of Court dated 10th March 2008. This warrant forms the basis of the application before this Court.

[6] An application for contempt of the order of court granted on the 31st May 2007 was filed in 2007. For reasons not immediately clear from the record, it was only heard on the 07th February 2014. The respondent was found guilty of contempt in a judgement handed down in April 2014. Arguments on an appropriate sentence were only made in March 2016; reasons for this further delay are also undisclosed.

[7] During arguments, it transpired that some structures were built on this plot despite the interdict earlier granted. The 2nd respondent at this time claimed to have relinquished the plot in favour of someone else. The applicant (now 1st respondent) then asked for an order of demolition of the said structures. The 2nd respondent opposed the demolition order sought, contending that this was never sought in the contempt proceedings and further that the ejectment of the new occupants should only be attained through institution of independent proceedings against them.

[8] After hearing arguments by both parties, the Court granted an order *directing the 2nd respondent to vacate the site with all her agents or people answerable to her and to destroy the building structure she made thereon for the applicant to assume possession and control of the plot. Failure of compliance within 30 days of the order, she should be imprisoned for 3 years or pay a fine of M 15 000*.

[9] Aggrieved by this order, the 2nd respondent noted an appeal against it. Apparently the appeal lapsed and the 2nd sought to reinstate it. This appears from the judgement of the Court of Appeal in ***Phiri Nkoe v Nthabiseng Litabe C of A (CIV) 11/17*** which I came across on LESLII and take judicial notice of. The Court of Appeal had directed the High Court to finalise the matter in which reinstatement of the lapsed appeal was sought. This court is left in darkness on the issue whether the lapsed appeal was reinstated or not because there is no evidence as to what happened to that application.

9.1 That notwithstanding, It appears from the papers filed that the applicant sought and obtained an order on the 07th August 2019 authorising him to demolish the structures on his plot since the 2nd respondent failed to do as directed in the impugned order.

Before this Court

Applicants' case

[10] The 1st applicant avers that she sues as the sister of the late 'Mapaseka Qhobela who allegedly made some improvements on the plot after concluding a sale agreement with the 2nd respondent herein back in 2007. According to the 1st applicant, she only knew of the existence of the ejectment and demolition order in September 2019, through a letter addressed to occupiers of the site to vacate the premises within a period of one month. In November 2019, through her legal representative, she proposed amicable settlement which however bore no fruits.

[11] It is the applicants' case that they have a right to have the execution of the judgement stayed for the reason that the minor children (2nd and 3rd applicant) of her late sister were never joined in the litigation that

culminated into the issuance of the warrant of ejectment. 1st Applicant claims that they are prejudiced by the judgement because it authorises the demolition of property which is an "inheritance" of the two minor children.

The respondents' case

[12] The 1st respondent's case is simply that as far back as 2007, he was alerted that there was an ongoing construction on his plot. He reported the matter to the chief after having established from the labourers thereon that the 2nd respondent was responsible for the construction. He did not however sue the 2nd respondent as soon as he learned of the development, but approached the chief of the area for intervention. The 2nd respondent did not turn up on the date appointed for the hearing of the complaint by the chief. He then instituted ejectment proceedings. Despite the launching of the application, the 2nd respondent continued to develop. He then obtained an interdict against her the on the 31st May 2007, but that the development continued despite the interdict.

[13] He avers that an appeal lodged by the 2nd respondent lapsed and that he is therefore entitled to execute the judgment.

[14] I proceed now to deal with the points raised in limine. Of significance, before I set out to do so is that that some of these points are related and they would conveniently be addressed together.

Jurisdiction

[15] The respondent's view is that this is not an application for review or appeal and therefore an application for stay of execution should be made at the Magistrate Court and that it is only in the event that the Magistrate dismisses the application that the High Court may be approached.

[16] The applicants' contention on the other hand is that they sought stay of execution as an interim relief, and that the substantive prayer they seek is a declaratory order, which falls exclusively within the jurisdiction of the High Court. The case of **Jobo v Lenono C of A (CIV) 28 of 2010** was cited in this regard**.**

[17] It is true that the applicants are seeking a declaratory order as a substantive prayer and it is indisputable that on the authority cited, the High Court is the proper forum before which to seek a declaratory order. As to whether or not they are entitled to the order, is an issue to be dealt with later in the judgement. I thus assert the jurisdiction of this Court and hear the matter.

***Locus standi* and Legal capacity to sue**

[18] The 1st respondent's contention in this regard is that the 1st applicant is neither an heir, executor nor legal guardian of the minor children in question and as such she has no *locus standi* to bring this application.

[19] As regards the capacity to sue, it was contended that the 2nd and 3rd applicants have no capacity to sue and that litigation on their behalf can only be instituted by their guardian in terms of the Children's Protection and Welfare Act.

[20] On behalf of the applicants, it was contended that the 1st applicant as the sister of the late Mapaseka who effected substantial improvements on the plot, and as the guardian of her sister's minor children, has the

necessary *locus standi* to institute these proceedings on behalf of these minor children.

[21] As correctly submitted by the 1st respondent's counsel, the position of the Law is that; in legal proceedings a minor requires assistance of a guardian if he has one. Consequently the minor may sue or defend legal proceedings in his/her name "assisted by" his/her guardian or may sue/defend in the name of his/her guardian representing him or her, in which case, it has to be clear that the guardian is only a party in his/her representative capacity. This means the minor's *locus standi in judicio* is limited. ***Madalane v Van Wyk* (87/2015) [2016] ZASCA 25 (18 March 2016).** Guardianship being a legal status created by Law, cannot be self-assumed or self-endowed but must be conferred upon a person by Law. ***Mamello Morrison & 5 Others v Headmaster & 1 CIV/APN/165/95.***

[22] It is clear from the pleadings that the applicant is not the natural guardian of the 2nd and 3rd applicants. There is no evidence that their father is also deceased nor evidence that the first applicant has been appointed by the deceased family or Court as their legal guardian. She is not even applying to be appointed as one nor seeks authorisation to institute this case on their behalf. It is also not immediately clear from the citation of the parties that the proceedings are instituted on behalf of the children concerned nor that they are duly assisted in these proceedings.

[23] These notwithstanding, the court in proper cases may ratify the institution of proceedings on behalf of a minor without an application to institute same. In ***Lerata Tsiu v Lesotho General Insurance Company (Ltd) CIV/T/84/97***, it was stated that the court being the upper guardian of minor children, it has a duty to safeguard the interests of minor children. It can therefore ratify an action that has been done or taken on behalf of a

minor by a person who *bona fide* but mistakenly believed himself to be a natural guardian of the minor where such action is for the benefit or serves the best interests of the minor and that no prejudice would be occasioned to the respondents.

[24] While the citation is defective as explained above, the application cannot be dismissed for this reason, regard being had to the stake of the minor children in this litigation and the fact that no prejudice is alleged by the respondents as a result of these omissions/errors.

Material non-disclosure of material facts

[25] The 1st respondent's main contention under this head is that, the 1st applicant deliberately failed to disclose in the founding affidavit when seeking the interim relief that they had already been evicted from the plot in question. Notably, they do not deny the truthfulness of these material allegation in their replying affidavit.

[26] It is trite that where an order of Court is sought ex parte, utmost good faith must be observed and all material facts must be disclosed which might influence a court in coming to a decision and the withholding or suppression of material by itself entitles the court, after having been appraised of the true facts on the return day, to set aside the Order even if the non-disclosure was not wilful or *malafide*. Unless there is a cogent practical reason why an order should not be rescinded, the court will always frown on an order on incomplete information and will set it aside even if relief could be obtained on a subsequent application by the same applicant. A litigant who approaches a court ex parte is therefore not entitled to omit facts which are relevant to the point in issue merely because he is not prepared to accept the correctness thereof. ***Schesinger v Schesinger***

1979(4) SA 342 at 348-349. In exercising the discretion on whether or not to set aside the order, the court should have regard to the extent of non-disclosure and its effect, the question whether it might have been influenced by a proper disclosure, the reasons for non-disclosure and the consequences of setting aside the order. ***Andrew Phillips and Others v The National Director of Public Prosecution case No 202/2002(SCA) para 26.***

[27] In the reasons advanced to justify the urgency as encapsulated in the certificate of urgency, counsel states;

"*The 4th respondent is in the process of ejecting the applicants from their residence pursuant to a judgement of which the applicants were not joined*.

[28] At para 5.3 of the founding affidavit, the 1st applicant avers;

We were furthermore informed that the 4th respondent intends to eject us from the premises and further that he intends to demolish the structures erected on the said premises

[29] At 6.3; *the respondents have already commenced attempts to eject the applicants…all the people including the tenants will be standing in the rain if the Court does not grant the temporary relief".*

[30] The allegations by the 1st respondent on non-disclosure are actually confirmed by the messenger's return filed on the 05 December 2019. It reads as follows;

"*On the 05th December 2019, we went to Ha Mabote plot number 13282-043 to eject the defendant. We found miss Mphaphathi Qhobela who told*

us that her parents buy(sic) that plot to defendant(sic) and adv. Molati he(sic) said; if the names of her(sic) are absent been shown on the papers she must refused(sic) to allow us to take out her property outside"

[31] Another return filed on 12/12/2019 reads:

"*We ejected defendant and one Miss Mphaphathi Qhobela at plot number 13282-043*".

[32] It becomes clear that a day following their ejectment, this application was moved. This was at 20:00 hrs. It is evident that the applicants indirectly sought reinstatement into the premises from which they have already been ejected by concealing facts which would have influenced the Court to direct service on the 1st respondent before the interim order was granted.

[33] It is perhaps worthy to comment that a legal representative presenting a case before a Judge or Magistrate have an ethical duty to bring to the attention of the judicial officer facts that might affect a decision in any given application. It is reprehensible that an officer of the Court would advise or encourage client to ignore an order of Court instead of invoking relevant legal procedures for challenging orders and subsequent writs of execution.

[34] The question however is whether this point renders the application dismissible. In ***Makoala v Makoala C of A (CIV) 04/09*** the Court of Appeal stated that non-disclosure is not a proper point to be raised in *limine*. As much as I agree with the 1st respondent's counsel on non-

disclosure, I will not dismiss this application on this ground, but an appropriate order of costs will be made.

[35] This point of non-disclosure affects the next point to which I now turn, lack of urgency.

Lack of Urgency

[36] The 1st respondent's contention is that the application is not urgent at all because the 1st applicant had been aware from September 2019 that the 2nd respondent intends to have possession of the site restored to him; That the sheriff on the 5th December proceeded to execute the order but the applicant refused saying the order has not been granted against her. She did not approach the Courts for redress as soon as the negotiations failed in November 2019 but only did so after their ejectment from the plot which took place on the 12th with the assistance of the police.

[37] The 1st applicant takes the view that they did not approach the Court in September because the parties attempted negotiations to settle the matter out of Court and that the application was filed as a matter of urgency because the 2nd respondent sought to demolish the structures worth of substantial value, erected the 2nd and 3rd applicants' mother on the plot when they had not been joined in the proceedings in which the order of demolition was sought and granted.

[38] Leaving aside the period during which the negotiations were ongoing, the 1st applicant despite execution on the 05th December 2019 which she resisted, did not deem it fit to apply for stay of execution. She was only jolted to act after their removal from the premises. Clearly, had they not been removed, they would not have sought this order nor instituted the

case in the land court. Their conduct coupled with non-disclosure is suggestive of a person who was and still is comfortable to resist the order of the Magistrate and frustrate execution of same without proper legal recourse. However, the length of the delay in instituting an application should be considered in deciding whether the matter should treated as urgent. ***Lesotho Nissan (Pty) Ltd v Katiso Makara C of A (CIV) 72/2014.***

[39] In ***Makoala v Makoala (supra),*** it was stated that when a point in *limine* is raised, the issue for determination is whether the applicant's affidavit make out a prima facie case. Consequently the applicant's affidavits alone should be considered as true for purposes of deciding upon the validity of the preliminary point.

[40] In *casu*, the applicants mainly complain of imminent demolition of the premises, which they claim to occupy as bona fide occupiers. In the absence of evidence to gainsay their averment that they only came to know of the order in September 2019, the certificate of urgency filed as well as circumstances stated in the founding affidavit made a good case for urgency. The circumstances stated therein are such that irreparable/ irreversible harm would result if the matter would not be heard on urgent basis. Clearly they could not be afforded substantial redress at a hearing in due course. The matter was therefore properly treated as urgent regard also being had to the fact that the length of the delay in bringing this application is not unreasonably long, despite the 1st applicant's attitude alluded to above.

Non-compliance with the Rules of Court

[41] The 1st respondent avers that the applicant failed to observe a 48 hour notice in urgent applications.

[42] In ***Trans African Insurance Co. Ltd v Maluleka 1956(2) SA 273(A) at 278,*** Schreiner JA stated "*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 merits".*

[43] In **U*itenhage Municipality v Uys 1974(3) SA 800(E) at 805D-F*** it was held that;

"*The principle has repeatedly been laid down in our courts that the Court is entitled to overlook, in proper cases, any irregularity in procedure which does not work any substantial prejudice to the other side.*"

[44] In its inherent jurisdiction, this court may excuse any party from strict compliance with any of its rules if there is no prejudice to the other party. This should not however be taken as licence to lax approach to pleadings by legal practitioners.

[45] In *casu*, the failure to notify the 1st respondent clearly resulted in prejudice to the respondent. It would not however serve the interests of justice to dispose of this application purely on this technical procedural defect/point, regard being had to the history of litigation in relation to the occupancy of this plot. It is prudent in my view that the matter must be decided on the merits.

The Merits

[46] As stated at the prelude of the judgement, the applicants seek an order declaring that a writ of execution is not executable against a party

not joined in the proceedings and not cited in the Court Order; and therefore that the impugned warrant cannot be executed against them. It is important to note that the applicants have also launched an application in the Land Court under LC/APN/ 35/19 on the 12/12/2019, a day before filing this application.

[47] It is crucial to note that in their applications before this Court and the Land Court, they do not seek the setting aside of the judgement granted by the Magistrate Court. In the Land case, their case is based on a claim that they are bona fide occupiers who had not been joined. Notably too, they do not suggest a desire to defend the ejectment proceedings in the Magistrate Court on the basis of this status. It is clear from their averments that they resist the warrant on the ground of non-joinder.

[48] The main question to be decided is; can an occupier of land be removed from the Land under a warrant issued pursuant to a judgement obtained in proceedings to which he was not a party?

[49] It is trite that all necessary persons in a given litigation must be joined in those proceedings. The test whether there has been non-joinder is whether a party has a direct and substantial interest in the subject matter of litigation which may prejudice the party that has not been joined. If an order or judgement cannot be sustained without necessarily prejudicing the interest of 3rd parties that had not been joined, then the 3rd party has a legal interest in the matter and must be joined. **Amalgamated Engineering Union v Minister of Labour 1949(3) SA 637(A).**

[50] In this instant case, the pleadings reveal that at the time the ejectment proceedings as well as the interdict application were launched in

2007, it is indisputable that the information presented before the Magistrate Court was that the 2nd respondent was the person in occupation of the land in question, and it was only in 2016, during the contempt proceedings when she claimed to have relinquished the plot in favour of someone else. This in my view means that the 1st respondent could not have joined a party whose existence he was not aware of, namely the 1st applicant nor her deceased sister. This does not however mean that a person who has not been joined but who claims to have been adversely affected by a judgement given in proceedings to which he was not a party is remediless. That person is entitled in terms of Rule 46(11) of the *Subordinate Court Rules 1996* to have the judgement set aside. This rule reads;

"Any judgement of the court may, on application of any person affected thereby, who was not a party to the action or matter, made within a month after he has knowledge thereof, be so rescinded or varied by the Court"

[51] The issue for central inquiry is therefore whether the applicants are entitled to an order declaring the impugned warrant unexecutable against them while they have not invoked Rule 46 to have the judgement set aside?

[52] In ***Ntai and Others v Vereeniging Town Council and Another 1953(4) SA 579,*** the court dealt with the question whether a warrant authorising removal of the defendant and any person claiming through him was invalid and not executable against such persons when they were not joined in the ejectment proceedings. In that case, it was argued on behalf of the persons claiming the invalidity of writ that the order/ejectment judgement of the Magistrate had been obtained or directed solely at the defendant and no mention of persons claiming under him was made.

[53] In determining the validity of the argument, the Court provided for a reasonable construction of form 34 i.e. warrant of ejectment (similarly worded as our form 21 in the subordinate Court Rules 1996) particularly the following words;

"*…this is to authorise and require you to put the plaintiff into possession of the said premises or land by removing therefrom the said defendant for which this shall be your warrant*".

[54] Emphasis was placed on the opening words which require the messenger to put plaintiff into possession of the premises. The court stated that the form should be construed in such a manner as to require a messenger to remove from the premises any person claiming through or under the defendant because the object of the Court's order is to put the plaintiff into possession and this cannot be achieved unless the defendant and persons holding under him are removed.

[55] The court stated the position as follows at p 590;

"*the primary object of ejectment proceedings is to put the plaintiff into possession as reflected in form 34(our form 21)and that this is usually done by removing the defendant from the premises, since he is the only one claiming against the plaintiff. But it is not necessary expressly to warrant the removal of his wife or children or persons whom he has allowed to occupy the premises, for their title to occupy is dependent upon his; they can have no greater rights than he has…under a judgement ordering ejectment, the plaintiff is entitled to unrestricted possession of the premises in question, and he cannot be put in possession without ejectment of other persons claiming under the defendant*".

[56] At p 592 para E-G, it was stated;

"In the normal course, the defendant would be ejected being the person who claims adversely to the plaintiff, but that does not mean that the owner would have to take separate action against every licensee of the defendant professing to be on the premises by the defendant's authority. Exhypothesi the defendant has no right to occupy and I fail to see why alleged rights derived from a non-existent right should be protected by law. Where persons other than the defendant actually do have rights of tenure they could either intervene, or if they have no knowledge of the proceedings at the time, subsequently move to have the writ set aside"

[57] This decision was cited with approval in ***Joy to the World v Neo Malefane C of A (CIV) 16/2013 and In Joy to the World v Neo Malefane C of A (CIV) 09/2016.*** In this case***,*** a warrant of ejectment had been issued against the seller and the person in occupation, the purchaser, had not been joined. The warrant was challenged on the basis of the non-joinder of the person in occupation and on the basis that the occupier had the right of retention based on useful improvements effected on the plot.

[58] The court in addressing the question of joinder, emphasised in both cases that the primary object of ejectment proceedings is to put the plaintiff in possession, regardless of whether the defendant or some other person holding under him is in occupation. As regards the claim on the right of retention, it was stated (in the 2013 judgement) that:

"The only rights of tenure the appellant has, arise by virtue of the improvements it effected. Significantly that the writ cannot however be ignored on that account. The appellant's remedy is to move to have the writ set aside. Until then the writ must be obeyed"

[59] In *casu*, the order granted by the Magistrate in 2016 authorises removal or ejectment of the agents and people answerable to defendant (now 2nd respondent) from the plot. It is worthy to note that the inclusion of other occupants was based on the claim by the 2nd respondent during the contempt proceedings that she relinquished the plot in favour of someone else. This means all occupants whose occupancy derive from the 2nd respondent regardless of whether they are named in the warrant should be removed from the applicant's (1st respondent land).

Conclusion

[60] The applicants in this case opted not to invoke rule 46, instead approached this Court to obtain a declaratory order. In essence, they seek to have the Magistrate's order set aside through the backdoor. I say this because, 1st applicant avers that she only came to know of the judgement and the subsequent warrant in September 2019 when they were notified to vacate the premises. Instead of moving to have the order set aside in terms of rule 46(11), she opted to approach this Court in the manner in which she did. Regrettably for her, unless the order is set aside through proper procedure, it ought to be enforced against the applicants and other occupants because as things stand, the order authorises the ejectment of the 2nd respondent and all people who derive their occupation from her as well as demolition of the structures. In any case, the order had already been enforced per the messenger's return.

[61] Unless the applicants move to have the order set aside, the order of the Magistrate stays intact and the messengers of Court were correct in removing her and other occupants from the premises. In other words, the writ was correctly enforced against all occupants of the plot deriving their occupancy from the 2nd respondent. The applicants cannot therefore obtain the order sought before this court for reasons stated. The rule should therefore be discharged.

Costs

[62] As regards costs, it is the general rule that costs lie pre-eminently in the discretion of the court to be exercised judicially in the light of circumstances of each case. I stated earlier that the applicants have concealed crucial facts in their founding affidavit. This is my view was done in bad faith. 1st applicant clearly abused the urgency procedure to reverse execution which had already taken place. Instead of properly challenging the writ, counsel advised client to ignore an order of Court. The court therefore awards costs at a punitive scale as a sign of its displeasure and admonition to the 1st applicant for her untoward handling of this matter**.**

Order

[63] In the result, the followings orders are made

a) The rule is discharged;
b) The Application is dismissed
c) 1st respondent is awarded costs of this application on attorney and client scale

P BANYANE
(ACTING JUDGE)

For Applicants: Advocate Molise

For 1st Respondent: Advocate Maseko