

**January v Standard Bank of South Africa Limited
[2015] JOL 34176 (ECG)**

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Case No: 2235 / 2008
Judgment Date(s): 28 / 01 / 2010
Hearing Date(s): 12 / 11 / 2009
Marked as: Reportable
Country: South Africa
Jurisdiction: High Court
Division: Eastern Cape, Grahamstown
Judge: Goosen J
Bench: Goosen J
Parties: Penelope January (At); Standard Bank of South Africa Limited (R)
Appearance: Mr Majeke, Justice Centre, King Williamstown (At); Mr JR Koekemoer (R)
Categories: Application - Civil - Substantive - Private
Function: Confirms Legal Principle
Relevant Legislation: Uniform Rules of Court

Key Words

Civil procedure - Urgent application - Grounds for urgency - Costs - Punitive costs order

Mini Summary

The applicant's former husband had obtained a loan from the respondent. The loan was secured against the couple's property. The applicant only discovered the existence of a mortgage bond over the property after her divorce.

In 2008, the respondent commenced foreclosure proceedings in terms of the mortgage bond. Default judgment was obtained against the applicant and her ex-husband. The applicant approached the court for an interim interdict pending the bringing of a rescission application and a related stay of execution of judgment.

Held that the application was brought on an urgent basis, and the applicant therefore had to establish grounds for urgency. In establishing a basis for the urgent intervention of the court, a litigant is required to allege facts that render the matter urgent and to explain why relief cannot be obtained in the ordinary course of the conduct of litigation. No case for urgency was made out in this matter.

Turning to the merits, the court found that the applicant had failed to establish grounds for rescission. Her application was therefore dismissed.

As far as costs were concerned, the court highlighted the grossly negligent manner in which the applicant's attorneys handled the matter. Restating the principles in that regard, the court ordered costs *de bonis propriis* on an attorney and client scale against them.

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GOOSEN AJ:

[1] This is an application, brought on an urgent basis, in which the applicant in her notice of motion seeks orders:

- a) Rescinding a judgment of this Court granted on 3 December 2008;
- b) Staying the execution (of that judgement) or any eviction process instituted pursuant to the judgment, pending:
 - i) An application for an interdict against the respondents (sic) in the King Williamstown case number 2110/09;
 - ii) An appeal against the above judgment in the King Williamstown case number 2110/09;
 - iii) An application for rescission of judgment of the judgment of the High Court in case number

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2235/2008; and

- iv) The holding of an enquiry in terms of the Prevention of Illegal Evictions and Unlawful Occupation of Land Act, 1998;
- c) Cancelling the transfer of the title of the property to any person until the question of title to the property has been resolved;
- d) Ordering the respondent to return all goods confiscated by the first respondent (sic) in the King

Williamstown series of eviction orders granted by the second respondent (sic);

- e) Allowing the applicant and her family to take possession of the property; and
- f) Ordering the respondent to refrain from taking action that will have the effect of escalating the costs involved in the litigation.

[2] The applicant seeks these orders in the form of a rule *nisi* but seeks a further order directing that the orders sought shall operate as an interim interdict pending the return date.

[3] Before dealing with the merits of the application and the particular relief sought, it is appropriate to record the history of and background to the matter now before me.

[4] The applicant was married, apparently in community of property, to one Malaki January. Three children were born of this union. The marriage relationship, it appears, was far from a happy one, it being alleged that the applicant was subjected to verbal and physical abuse and that Malaki January was guilty of serial infidelity. During the course of the marriage the applicant had to seek orders to compel the payment of maintenance to her in order to support the children.

[5] In March 2005 the applicant and her former husband were divorced. Prior to the divorce however, and in order to facilitate payment of arrear maintenance due to the applicant, her husband obtained loan finance from the respondent. This loan finance was secured by way of a mortgage bond registered against an immovable property, being 1133 Zaula Street in Ginsburg, a suburb of King Williamstown. It is this property which is the subject of the dispute in this application.

[6] The applicant alleges that although she signed certain documents

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related to the loan sought by her then husband, she was not aware that a mortgage bond had been registered against the property.

[7] As indicated the parties were divorced in March 2005. It appears that they were married in community of property, although there is no allegation to this effect clearly stated on the papers. I should pause here to mention that the sorry state of the papers in this matter will, unfortunately, surface from time to time throughout this judgment. I draw the inference of a marriage in community of property from the allegation, made by the applicant, that she is entitled to 50%rcent ownership of the house in Ginsburg.

[8] There is no allegation on the papers which deals with neither the terms of the dissolution of the marriage, or what transpired (if anything) in respect of the joint assets of the community estate subsequent to the divorce order being granted. There is no indication at all as to the basis (assuming that there is one) upon which the applicant has occupied the house in Ginsburg until her recent eviction therefrom. This, it should be noted, is a period of more than four years.

[9] In October 2008 the respondent issued summons against both Malaki January and the applicant. Respondent's claim was one founded upon the failure to effect payment of amounts due in terms of a loan agreement and constituted foreclosure proceedings in terms of the mortgage bond registered over the property in Ginsburg.

[10] The summons commencing action was served on the applicant personally on 14 November 2008. Following receipt of the summons the applicant consulted one Mr *Ndunyana*, an attorney employed by the Justice Centre in King Williamstown. She was informed by him that there was nothing that could be done to resist the foreclosure and that it would not be possible to prevent her eviction from the property.

[11] On 3 December 2008 a default judgment was entered against the applicant and her former

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husband. In consequence of this a writ of execution was issued and on 4 February 2009, a notice of sale in execution was advertised to take place on 17 March 2009.

[12] On that date the property was sold by public auction to a certain Mr du Preez. A letter dated 18 March 2009 was delivered to the applicant advising her that the property had been sold and that she would be required to vacate the property.

[13] On or about 12 May 2009, Mr du Preez, the new owner of the property, delivered to the applicant a demand that she vacate the property failing which proceedings would be commenced to evict her from the property.

[14] On 18 May 2009 the applicant, represented by Mr *Majeke*, an advocate acting on the instructions of Mr *Ndunyana* of the Justice Centre launched an urgent application in this Court in which relief framed in essentially the same terms as that set out above was claimed. Notice of the application was given to the Registrar, as is evidenced by his date stamp bearing the date of 14 May 2009. That application cites the applicant (in this matter) as the second execution debtor, her former husband as first execution debtor and the respondent (in this matter) as the execution creditor. It seems that the application was brought in the name of the applicant. There is no proof of service of any kind in respect of this application.

[15] When the matter came before Tshiki J on 18 May 2009, the learned Judge struck the matter from the roll. The

file records no reasons for so doing. The applicant however contends, rather convolutedly, that Tshiki J "refused to hear the matter as urgent unless and until the process reflected only me and that the names of my former husband be removed". Mr *Majeke* sought in argument to belabour the fact that Tshiki J had "advised him" what steps were required to rectify problems with the papers and that he had acted upon that advice, proffering this as a partial explanation for the delay in prosecuting the matter.

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[16] It is as well to record here that on 18 May 2009 a letter was addressed to the Registrar by the respondent's attorneys which records that the attorney was informed by Mr *Majeke* that an application would be brought by the applicant. The respondent's attorneys sought assurance that in the event that such application was launched, it be recorded that the respondent wished to oppose such application.

[17] Nothing further occurred in relation to this application until 19 August 2009 when a second version of the same application was launched. This second version of the application cites the parties as they are now cited. It consists of a notice of motion upon which no date for the hearing of the application is endorsed together with a founding affidavit signed by the applicant. A certificate of urgency - as is required by the rules of this Court - is attached to the notice of motion. It is signed by Mr *Majeke* and dated 19 August 2009.

[18] A notice of set down was issued on 9 September 2009. On 17 September 2009 the matter came before Schoeman J. The matter was again struck from the roll, there having been no service upon the respondent.

[19] On 7 October 2009 copies of the papers were delivered to Messrs Drake Flemmer and Orsmond Attorneys apparently representing the respondent (this notwithstanding the fact that Messrs Netteltons had communicated their interest in the matter on behalf of the respondent) and to Monaghan Attorneys, who seemingly represented applicant's husband. On 8 October 2009 the matter came before Roberson AJ (as she then was) in chambers. There is no indication as to how this occurred, there being no notice of set down on the file.

[20] Mr Morrison Toyisi, of the Registrar's office, attended in chambers with the learned Judge. On that occasion the matter was again struck from the roll, the principal reason being, it appears, that there had not been proper service upon the respondent.

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[21] I pause here to record what transpired before Roberson AJ, as is evidenced by the applicant's description in the latest version of her application and correspondence addressed to the Registrar and filed on the court file.

[22] The applicant says that this occurred on 13 or 14 October (although the court file reflects that it was dealt with by Roberson AJ on 8). She says the following:

"We appeared on that date before the Lady Judge who had presided on the matter before and we were in her offices accompanied by a Mr Morrison, who was acting on behalf of the Registrar.

This is where the matter collapsed again because the Lady Judge completely refused to grant an interim order with the usual return date on the basis that the other lawyers must have been served with papers with a firm date for the interim order as well instead of the papers without a date on the hope that they will have their chance on the return date. Dr Majeke tried to convince the Judge that the present arrangement had been agreed upon by Mr Pringle for the Bank in the Grahamstown case in his offices in King Williamstown and by Mr Mongahan for the present Respondent in this matter in his offices in King Williams Town, so that all they required was the return date to appear in Court. The Lady Judge would not accept that."

[23] The existence of this alleged agreement is, however, denied by the respondent. The deponent to the answering affidavit, Attorney Pringle, states in this regard that:

"The Applicant's counsel makes the submission in the first paragraph of page 7 of the certificate of urgency that the application placed before Madam Justice Roberson on 13th or 14th October was done with my consent. I reject this statement in strongest terms. The statement is simply dishonest. A complaint has been laid with the bar council requesting their intervention in the matter."

[24] On 30 October 2009 the matter came before Pickering J when the applicant sought to move the application in the late evening. No service had been effected on the respondent and the matter was again struck off the roll.

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[25] On 6 November 2009 the applicant gave notice to the respondent of her intention to move an application (this being the third version of the application) on 10 November 2009.

[26] As duty Judge I was informed that an urgent application would be moved before me at 2pm. No prior arrangement had been made with me as is required by the rules of practice of this Court. Shortly before the matter was to be called I was informed that Mr *Majeke* was engaged in an urgent criminal matter in the Bhisho High Court. A telefax sent by Mr *Majeke* to the Registrar was handed to me in which he requested that I stand the matter down until "around 5pm" to allow him to attend to the matter. I declined his invitation and, despite the request by respondent's counsel to strike the matter from the roll, postponed the hearing to the ordinary motion court roll on

12 November 2009 and directed the Registrar to request Mr *Majeke* and his attorney to appear then to explain their conduct. I shall hereunder advert to that explanation.

[27] At the outset of argument in the matter Mr *Majeke* made application from the bar for a postponement. He founded his request for a postponement on the fact that Mr *Koekemoer*, who appeared for the respondent, had prepared and handed up short heads of argument dealing with the submissions he proposed to make. In the light of the fact that these heads of argument indicated that the respondent would argue, *in limine*, that the failure to cite Du Preez, the owner of the property, was fatal in the circumstances and that no case for urgency had been made out on the papers, Mr *Majeke* argued that he required time to file certain further affidavits dealing with these aspects.

[28] The heads of argument contain no new evidentiary material. They consist of legal submissions based upon the papers already filed in the matter. Nevertheless, so it was argued, the applicant was in a position to obtain affidavits which would go to show that the matter was indeed urgent and that the failure to cite Du Preez was in consequence of "advice" received from the court when the matter was first brought on an urgent basis.

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[29] This latter allegation is already contained in the papers. In regard to the former, an applicant, particularly in urgent proceedings, is required to set out explicitly in its founding papers the factual basis upon which it is contended that the matter is urgent. A failure to do so may lead to the application being dismissed on that ground alone.

[30] The argument advanced by Mr *Majeke* was devoid of logic. As I understood it, he required a postponement of the matter, which would inevitably delay its finalisation, in order to produce supplementary affidavits which would show that the matter should be dealt with expeditiously.

[31] A postponement of a matter is not to be obtained by the mere asking. Reasonable grounds must be advanced as to why a matter which is otherwise ripe for hearing should not then be dealt with, particularly where the respondent has been brought to court and placed on his defence. (*Nelson Mandela Metropolitan Municipality and others v Greyvenouw CC and others* [2004 \(2\) SA 81](#) (SE) at paragraphs 17-20 [also reported at [2003] JOL 10796 (SE) - Ed]).

[32] The applicant is *dominus litis* and it is to be expected that counsel appearing is prepared to deal with the matter when it is called. It is one thing for counsel who may be taken by surprise by a particular legal point not anticipated to seek time to deal with the issue adequately. It is quite another to seek a postponement in order to file affidavits in order to deal with legal submissions raised in an opponent's heads of argument.

[33] Having heard the arguments advanced, I came to the conclusion that the application for postponement was without merit and I accordingly refused the application.

Urgency

[34] Rule 6(5) requires that every application other than one brought *ex parte* shall be brought on notice of motion as near as may be in accordance with form 2(a) of the first schedule and that true copies of the notice, and all annexures thereto, shall be served upon every party to whom

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notice thereof is to be given. This rule applies whether or not relief is sought on an urgent basis.

[35] In establishing a basis for the urgent intervention of the court, a litigant is required to allege facts that render the matter urgent and to explain why relief cannot be obtained in the ordinary course of the conduct of litigation.

[36] The rules of practice of this Court also require that a certificate of urgency be filed in which is set out the basis upon which it is contended that the matter is urgent. Rule 12 provides as follows:

"(a) In urgent applications:

- (i) The practitioner who appears for the applicant must sign a certificate of urgency which is to be filed of record before the papers are placed before the judge and in which the reasons for urgency are fully set out. In this regard, it is insufficient merely to refer to passages in the papers and sufficient particularity is to be set out in the certificate for the question of urgency to be determined solely therefrom and without perusing the application papers, which will not be read until such time as a proper certificate of urgency has been filed.
- (ii) Details of why the applicant alleges a matter of urgency should also be set out in the founding affidavit.

(b) In all applications brought as a matter of urgency, the matter should be set down for hearing at a time which has been determined as convenient for the judge who is to hear the matter."

[37] The certificate of urgency filed by Mr *Majeke* in this matter does not comply with the provisions of the rules of practice.

[38] The certificate runs to 11 typewritten pages containing as it does a long and detailed history of the matter, as

well as an account of the various steps taken by him as the applicant's counsel in relation to the prosecution of the matter. Nowhere does the certificate disclose what the grounds are upon which it is contended that the matter is urgent and should enjoy preference on the roll, nor does the certificate set out why the applicant cannot obtain substantive relief in due course. This failure to address the grounds upon which relief is urgently sought reflects what is contained in the founding affidavit, where similarly no

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grounds for urgency are addressed.

[39] In dealing with the matter it was left to the court to surmise that the trigger for the launching of the application for the third time, and this many months after it was first struck off the roll, was the conclusion of the eviction proceedings in the Magistrates' Court which resulted in an order of eviction in October 2009.

[40] The purpose of a certificate of urgency is to enable the court called upon to deal with the matter to gather, from a perusal of the certificate alone, why the matter is to be regarded as urgent. The certificate should also enable the Judge to decide - at least upon a *prima facie* basis - that the matter is in fact urgent enough to warrant immediate attention. Once that decision is taken, the Judge can be assured that the matter ought to enjoy preference on the roll and can then proceed to read the papers in preparation for the matter being called. The certificate is calculated to ensure efficiency in the administration of justice and to avoid an unnecessary waste of time in dealing with matters which ought not to be dealt with other than in the ordinary course.

[41] A failure to file a certificate which not only accords with the provisions of the rules of practice and which manifestly does not meet its purpose may well result in the matter being struck from the roll. It may also, in an appropriate matter, result in an appropriate costs order being made, not against the litigant but against the practitioner responsible for the failure to comply with the rules of practice.

[42] In this instance the substantial delay in the prosecution of a rescission application together with the ancillary relief now sought, is attributable to the fact that this application (in its several forms) has been struck off the roll on four occasions over a span of five or six months. The failure of the applicant to take any steps in relation to the matter between May and August was, so Mr *Majeke* argued, as a result of the fact that he had taken ill and was unable to attend to the matter. When asked why the

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matter could not have been dealt with by some other counsel he contended that the applicant had no funds to instruct other counsel, he having agreed to deal with the matter on a contingency basis.

[43] This latter submission is startling in the light of the fact that the applicant is represented by the Justice Centre in King Williamstown and that Mr *Majeke*'s instructions must emanate from that Justice Centre. In the circumstances there appears to be no reason why, in the event that Mr *Majeke* became indisposed, the Justice Centre could not brief someone else to deal with the matter. As a result of the failure to do so such urgency as there may have been initially, disappeared. In the circumstances, a proper case for urgent relief was not made out.

[44] I turn now to deal with the merits of the application.

Substantive issues raised in the application

[45] The applicant seeks, in the first instance, the rescission of a judgment of this Court. The application is, however, not formulated in terms of rule 42 nor is the basis upon which rescission may be sought at common law relied upon.

[46] Indeed, the only basis upon which it is sought to have the judgment rescinded is the allegation by the applicant that it was "taken without my knowledge". The rest of the applicant's papers deal, in some length, with the effect of the judgment upon her and her family. There is, accordingly, no basis upon which it could be contended that the judgment was either erroneously sought or granted by the court.

[47] On the contrary the applicant herself states that the summons commencing action by the respondent was served upon her personally and that upon receipt thereof she consulted her attorney. According to her the attorney advised her in regard to the matter. No appearance to defend was filed and the applicant took no further

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steps in relation to the matter.

[48] The only inference that can properly be drawn from these facts is that the applicant heeded the advice of her attorney then and that her failure to take any action to defend the case was based on that advice.

[49] It seems highly improbable that if she disclosed a defence to the attorney that he would have permitted judgment to have been taken by default against her. It seems equally improbable that he would advise her in the absence of an enquiry as to whether she had a defence to the action instituted by the respondent.

[50] In my view the decision not to take steps to defend the action and therefore to avoid a judgment by default is one that must have been taken on the strength of advice received. An applicant who seeks a rescission of judgement is required to show sufficient cause for the default. (*De Wet and others v Western Bank Ltd*

[1979 \(2\) SA 1031 \(A\)](#) at 1042F-H; *cf Harris v Absa Bank t/a Volkskas* [2006 \(4\) SA 527 \(T\)](#) at 530 B [also reported at [\[2002\] 3 All SA 215 \(T\)](#); [2002] JOL 9642 (T) - Ed].) In this instance no such cause is demonstrated. There is accordingly no basis upon which it can be accepted, for purposes of the interim relief now sought, that sufficient cause to find that the judgment was erroneously sought or granted will in due course be established.

[51] The further difficulty is that the papers do not disclose a defence to the claim by respondent. The applicant seeks to rely upon the fact that she did not sign the mortgage bond and that she was apparently under the impression that a loan for an amount of R10 000 had been obtained. She therefore alleges that she is not responsible for the debts of her former husband.

[52] It is common cause that the loan was obtained whilst the parties were married. Even if it were to be assumed that the liability on the joint estate is one which properly was to be regarded as her husband's liability only, there is simply nothing on the papers before me which deals with the nature of the division of the joint estate upon the applicant's

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divorce. There is therefore nothing which could be construed as to entitling the applicant to ownership of the former common property. The papers are silent as to the basis upon which she occupies the former common home. Was it settled upon her as part of the divorce settlement? Was the common property to be sold and the nett value realised from the sale to be divided between the parties? Or was the former husband required to settle the mortgage bond in full? Without any evidence as to the nature of the proprietary settlement it cannot be determined that the applicant has any defence to a claim instituted by the respondent founded upon a mortgage bond which encumbered the joint estate.

[53] In the circumstances there is no basis upon which I could exercise a discretion in favour of the applicant and grant the relief now sought.

[54] There are of course other fundamental difficulties with the applicant's case. She seeks a rescission of judgment and a stay of the execution of that judgment. The judgment has of course already been executed and in consequence of the execution the property was sold by public auction. Du Preez purchased the property and, as I understand the papers filed in respect of the third version of the application, the ownership of the property has already been transferred to Du Preez. Du Preez is therefore the registered owner of the property. Yet Du Preez has not been cited in these proceedings.

[55] When asked whether the failure to cite Du Preez does not render the application fatally defective, Mr *Majeke* sought to suggest that the problem could be remedied by granting an interim order pending the return date and then directing that the papers be served on Du Preez. He also sought to suggest that Du Preez was aware of the proceedings because an application for rescission of the eviction order obtained by him in the Magistrates' Court had been served on him and/or that an application for leave to appeal against the refusal of that application had been noted. This latter submission is without merit. There is no basis to impute

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knowledge of these proceedings because Du Preez is aware of other proceedings in another court.

[56] In this matter Du Preez manifestly has rights which would be directly and substantially affected by any order to be granted in relation to the rescission of a judgment pursuant to the execution of which he acquired rights in property. The joinder of Du Preez in the application is therefore necessary and not merely a matter of convenience (see *Rosebank Mall (Pty) Ltd and another v Cradock Heights (Pty) Ltd* [2004 \(2\) SA 353 \(W\)](#) [also reported at [\[2003\] 4 All SA 471 \(W\)](#) - Ed]). The test to determine whether it is necessary to join a party is whether the party has a direct and substantial legal interest in the subject matter of the litigation. If he or she has a direct and substantial interest in any order which the court may make or if such order cannot be sustained or carried into effect without prejudicing the rights of the party concerned, such party must of necessity be joined unless the court is satisfied that he or she has waived his right to be joined. (*Pick 'n Pay Stores Ltd v Teazers Comedy Revue CC and others* [2000 \(3\) SA 645 \(W\)](#) [also reported at [\[2000\] 2 All SA 604 \(W\)](#); [2000] JOL 6504 (W) - Ed]).

[57] As to the further question, namely whether the court may nevertheless grant an interim order and further direct that the application be served on interested parties and that same be joined, it is so that a court has an inherent jurisdiction to require the joinder of a party in proceedings which have already been commenced where such is a necessary party to the proceedings. (See *Harding v Basson* [1995 \(4\) SA 499 \(C\)](#) [also reported at [\[1995\] 1 All SA 431 \(C\)](#) - Ed].)

[58] The circumstances of the *Harding* matter were however quite different to the present matter. There the plaintiff had sued for rectification of a deed of sale in respect of certain immovable property and had, amongst other orders, sought an order requiring the seller to do all things necessary to give effect to the subdivision of the property. The court had *mero motu* raised the question as to whether the mortgagee, who had an interest in such order, should not have been joined. After considering the authorities and its inherent jurisdiction the court stated (at

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501I-502C):

"A supreme court will exercise its discretion to order the joinder of a party, *inter alia*, to ensure that all

persons interested in the subject-matter of the dispute and whose rights may be affected by the judgment of the court are before it to avoid a multiplicity of actions and to avoid a waste of costs (see *SA Steel Equipment Co (Pty) Ltd v Lurelk (Pty) Ltd* (*supra* at 172h-173a)) [reported at [\[1951\] 4 All SA 163 \(T\)](#) - Ed]. Although, as already stated, united bank could prevent the implementation of any orders made in terms of prayers (b) and (e), such orders would in fact affect its rights in the subject-matter of the dispute in the sense that the court's order would influence the extent of the property which serves as security for the loans made by united bank to the first defendant. In addition, substantial costs have been incurred by the parties in the prosecution of the proceedings and court time has been invested in the proceedings. Such costs and time would be rendered worthless unless the orders sought, if granted, are capable of enforcement. In the premises i intend exercising my discretion and direct that united bank be joined as a third defendant in these proceedings."

[59] In this matter the orders sought in respect of the rescission of judgment and the stay of execution thereof would effectively strip Du Preez of rights that he has acquired by reason of the execution of the judgment. In my view, little or no point would be served in granting an order requiring that Du Preez be served and joined in these proceedings in circumstances where the applicant has made out no case for the relief she seeks. To grant an order requiring that Du Preez be joined would serve only to delay the inevitable, namely the failure of the application on the basis that no case is properly made out.

[60] In so far as the further relief is concerned, the applicant seeks orders effectively interdicting and preventing the ejectment of the applicant from the property as well as the return of property removed from the premises. These orders are sought against the respondent.

[61] It is however common cause that the respondent is not a party to the eviction proceedings which were commenced in the Magistrates' Court at East London. This much is clear from the applicant's own papers. These proceedings have been initiated by Du Preez as

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registered owner of the property. The respondent has no interest in that matter. The applicant has accordingly proceeded against the wrong party in relation to this relief.

[62] Quite apart from this the evidence establishes that the eviction proceedings commenced by Du Preez in the Magistrates' Court have progressed to the point where an eviction order was granted and executed. There is a suggestion on the papers that the applicant sought to note an appeal against the judgment of the Magistrate granting an eviction order against her, although it does not appear from the papers that an appeal was in fact noted. All that is stated in this regard is that Mr *Majeke* requested the Magistrate to afford him the usual time period within which to note the appeal and that this was refused. Nevertheless, in this application the applicant seeks an interdict preventing execution of the eviction order in order to prosecute an appeal.

[63] In the light of these considerations I am of the view that no relief can properly be given on the papers before me. The application must accordingly be dismissed.

Costs

[64] The respondent sought, in the event that the application is dismissed, an order that the applicant's legal representatives pay the costs of the application *de bonis propriis* on an attorney and client scale. Such order was sought on the basis of the manner in which the application had been conducted by both the attorney and counsel acting for the applicant.

[65] The general principle at common law is that a party who litigates in a representative capacity (such as a trustee) cannot be ordered to pay the costs *de bonis propriis* unless he or she has been guilty of improper conduct. (*Cooper NO v First National Bank of South Africa Limited* [2001 \(3\) SA 705](#) (SCA) [also reported at [\[2000\] 4 All SA 597 \(A\)](#); [2001] JOL 7527 (A) - Ed]). Such

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party may however be ordered to pay such costs where there is a want of *bona fides* on his or her part or if he or she has acted with gross negligence. (*Blou v Lampert and Chipkin NNO and others* [1973 \(1\) SA 1](#) (A) [also reported at [\[1973\] 1 All SA 229 \(A\)](#) - Ed]).

[66] Orders of this nature have been made against attorneys where, in the prosecution of an appeal, there has been a flagrant disregard of the rules applicable to such appeals and in particular the preparation of the record. (*Cf Napier v Tsaperas* [1995 \(2\) SA 665](#) (A) [also reported at [\[1995\] 2 All SA 262 \(A\)](#) - Ed]; *H Merks & Co (Pty) Ltd v B-M Group (Pty) Ltd and another* [1996 \(2\) SA 225](#) (A); *Salviati & Santori (Pty) Ltd v Primesite Advertising (Pty) Ltd* [2001 \(3\) SA 766](#) (SCA) [also reported at [\[2001\] 3 All SA 172 \(A\)](#); [2001] JOL 8058 (A) - Ed]; *Jeebhai and others v Minister of Home Affairs and another* [2009 \(4\) SA 662](#) (SCA) [also reported at [\[2009\] 2 All SA 330 \(SCA\)](#); [2009] JOL 23193 (SCA) - Ed].)

[67] Where a legal practitioner has conducted himself in an irresponsible and grossly negligent manner in relation to the litigation such a cost order marks the court's disapproval of the conduct. (*Khunou and others v M Fihrrer & Son (Pty) Ltd and others* [1982 \(3\) SA 353](#) (W) [also reported at [\[1982\] 3 All SA 416 \(W\)](#) - Ed]; see also *Washaya v Washaya* [1990 \(4\) SA 41](#) (ZH)).

[68] In *South African Liquor Traders Association and others v Chairperson, Gauteng Liquor Board and others*

[2009 \(1\) SA 565](#) (CC) [also reported at [2006] JOL 17575 (CC); [2006 \(8\) BCLR 901 \(CC\)](#) - Ed] it was stated (at paragraph 54) that:

"An order of costs de bonis propriis is made against attorneys where a Court is satisfied that there has been negligence in a serious degree which warrants an order of costs being made as a mark of the Court's displeasure. An attorney is an officer of the Court and owes a Court an appropriate level of professionalism and courtesy. Filing correspondence from the Constitutional Court without first reading it constitutes negligence of a severe degree. Nothing more need be added to the sorry tale already related to establish that this is an appropriate case for an order of costs de bonis propriis on the scale as between attorney and client. The order is made against the office of the State attorney, not personally against the attorney concerned. This Court's displeasure is primarily directed against the office of the State Attorney in Pretoria whose systems of training and supervision appear to be woefully inadequate." (Footnote omitted).

[69] In *Makuwa v Poslson* [2007 \(3\) SA 84](#) (T) [also reported at [\[2007\] 4 All SA 1260 \(T\)](#) - Ed], a matter in which the plaintiff had proceeded to set down and persist with a rule 30 application which had previously been dismissed, Patel J (at paragraphs 6 and 7) remarked that:

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"The appalling carelessness with which the plaintiff's attorneys persisted in this sterile application certainly demands censure. I asked Mr Khanye why the plaintiff's attorneys should not be ordered to bear the wasted costs, since the application was previously dismissed with costs. He declined to make any worthwhile submissions.

What is of significance is the plaintiff's attorneys' slackness in re-enrolling the application and total failure to acquaint themselves [with the fact] that there was already an order of Court in existence. It is clear that the attorneys were negligent and their conduct was unreasonable. Thus, in my opinion, it will be grossly unfair to mulct the plaintiff with the costs of this futile application."

[70] Similar considerations motivated the order in *Khan v Mzovuyo Investments (Pty) Ltd* [1991 \(3\) SA 47](#) (Tk) [also reported at [\[1991\] 3 All SA 481 \(Tk\)](#) - Ed] where the court, in provisional sentence proceedings, ordered the plaintiff's attorneys to pay the costs of a postponement of the matter *de bonis propriis* when it appeared that the matter had been set down when it was not ripe for hearing, it having been removed from the roll on seven previous occasions. Hancke J outlined the approach (at 48) as follows:

"The principle of awarding costs de bonis propriis is summed up by Innes CJ in *Vermaak's Executor v Vermaak's Heirs* 1909 TS 679 at 691 as follows:

'The whole question was very carefully considered by this Court in *Potgieter's* case (1908 TS 982), and a general rule was formulated to the effect that in order to justify a personal order for costs against a litigant occupying a fiduciary capacity his conduct in connection with the litigation in question must have been mala fide, negligent or unreasonable.'

(My italics.) See also *Estate Orr v The Master* 1938 AD 336; *Gangat v Bejorseth* NO [1954 \(4\) SA 145](#) (D) at 150; *Grobbelaar v Grobbelaar* [1959 \(4\) SA 719](#) (A) at 725B - C [also reported at [\[1959\] 4 All SA 439 \(A\)](#) - Ed]; *Venter NO v Scott* [1980 \(3\) SA 988](#) (O) at 993H [also reported at [\[1980\] 4 All SA 385 \(O\)](#) - Ed].

In my view plaintiff's attorney's slack and apparently unconcerned handling of his client's case in the present matter, namely to enrol the matter while it was not ripe for hearing at a stage when it had been either postponed or removed from the roll on seven previous occasions, amounts to such unreasonable conduct as to warrant the present order as to costs. In my opinion it would be grossly unfair to order the plaintiff to bear the costs occasioned by his attorney's unreasonable and negligent conduct, particularly in view of the fact that plaintiff was mulcted with costs on three previous occasions."

[71] The circumstances of this matter are, in my view, comparable. The manner in which this application has been prepared and prosecuted in this Court is indicative of grossly unreasonable and negligent conduct on the part of both the applicant's attorney and counsel instructed by him.

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[72] In the first instance, the evidence establishes that the respondent's summons upon which default judgment was obtained against the applicant was served upon the applicant. She thereupon sought and obtained the advice of Mr *Ndunyana*, her attorney. No appearance to defend was filed, no doubt in accordance with the advice obtained. Nevertheless Mr *Ndunyana* thereafter furnished instructions to counsel to prepare an application for rescission of the judgment contending therein that the judgment was erroneously obtained on the basis that the judgment was "taken without my knowledge" - an allegation which is manifestly false.

[73] As the background set out hereinabove indicates, applicant's legal representatives thereafter prosecuted the application in a manner which resulted in it being struck off the roll on four separate occasions either because of a failure to effect service of the application on the respondent in accordance with the rules or because of the woeful state of the papers.

[74] Mr *Majeke* concedes the parlous state of the papers in his certificate of urgency filed in the matter where he

states, in relation to the proceedings before Pickering J, that:

"I immediately prepared the appeal and the application for an interdict to stop any evictions. I had them served on all the parties including the (sic) Mr Nel. The Sheriffs ignored that process and the Applicant and her family were evicted on the 30th of October on Friday. I managed to reach Mr Justice Pickering in Grahamstown at about 20H00 that night who complained that the papers were so badly prepared and drawn up he could not grant the required relief. He also advised that they be served on a *Rule Nisi* Action the following week since no service could be effected on Mr Nel on the Appeal and the Sheriffs during the weekend. I again returned empty handed.

I submit with respect that Mr Justice Pickering's criticisms of the papers were not only accurate and based on realistic legal considerations, but also that my own sense of outrage at what was happening considerably affected my technical capacity to focus and I apologize for the inconvenience caused."

[75] To compound matters, applicant's representatives failed to comply with the rules of this Court in respect of urgent matters. As already noted the matter was set down before me on Monday 10 November only to be postponed because Mr *Majeke* was otherwise engaged in the Bhisho High Court and unable to appear

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when the matter was to be called. When the matter was called on 12 November Mr *Majeke* appeared without an attorney, despite a request that he be present.

[76] During argument of the matter it transpired that a copy of the papers had not been lodged with the Registrar and no explanation for this could be given.

[77] In my view this conduct on the part of the applicant's attorney and counsel is grossly unreasonable and negligent and it warrants an appropriate punitive costs order.

[78] A litigant who engages the services of an attorney and counsel is entitled to expect that such professionals will prosecute his or her cause with due diligence and with due regard to the rules applicable to the conduct of proceedings. Litigants are also entitled to expect that every effort will be taken to ensure that their cases are properly prepared and presented. This is the duty that legal representatives owe to their clients.

[79] Where, in the drafting and preparation of pleadings or court process, a reasonable standard of workmanship is not maintained this amounts to a breach of such duty. If in consequence of such breach a litigant's cause fails, the failure is attributable to the negligence of the practitioner. In such circumstances it would be unfair to mulct the unsuccessful litigant in the costs of the failed action or application. This is such a case and an appropriate costs order would be to order the applicant's legal representatives to pay the costs of this application *de bonis propriis* the scale as between attorney and client.

[80] One final aspect warrants attention. As indicated Mr *Majeke* failed to appear when the matter was to be called on 10 November 2009. His explanation was that he had been scheduled to appear in a criminal matter that was provisionally enrolled for 9 November in the Bhisho High Court. Apparently this was not a trial date. According to him the presiding Judge in that matter (whom I have established was Da Silva AJ) insisted that the matter proceed to trial on 10 November. As a result he was unable to appear before me in Grahamstown on that day.

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[81] I have grave misgivings about the explanation tendered. It seems highly improbable that a criminal matter which is not scheduled to proceed to trial would, on the insistence of the presiding Judge, be enrolled to proceed to trial on the very next day particularly in circumstances where counsel who is to be involved in the matter is engaged on brief in another court on that day. In my view this explanation warrants consideration by the Bar Council of the Eastern Cape Society of Advocates.

[82] There is also the conduct of the attorney in this matter who, it appears from the papers proceeded with an application in which a material allegation made by the applicant was known by him to be false. In my view this too should enjoy the attention of both the Justice Centre, with whom the attorney is employed, and the Law Society.

[83] In the circumstances I propose to direct that a copy of this judgment be dispatched to the relevant professional bodies for their consideration.

In the result I make the following order:

1. The application is dismissed.
2. The applicant's instructing attorney, Mr *Ndunyana*, and the applicant's counsel, Mr *Majeke*, are ordered, jointly and severally, to pay the respondent's costs incidental to this application *de bonis propriis* on the scale as between attorney and client.
3. The Registrar is directed to provide a copy of this judgment to the Secretary of the Eastern Cape Society of Advocates; the Secretary of the Law Society of South Africa; and the Director (or other appropriate officer in charge) of the King Williamstown Justice Centre.

