REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES/NO
_____	_____
DATE	SIGNATURE

Case Number: 2024-106288

In the matter between:

AYANDA BHEKISIZWE HLOPHE	Applicant
and	
JOHANNESBURG SOCIAL HOUSING COMPANY	First Respondent
THE SHERIFF, ROODEPOORT SOUTH	Second Respondent
CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY	Third Respondent

In re:

JOHANNESBURG SOCIAL HOUSING COMPANY	Applicant
and	

AYANDA BHEKISIZWE HLOPHE First Respondent

CITY OF JOHANNESBURG Second Respondent

JUDGMENT

Strydom, J

[1] This is an urgent application in which the applicant approached the court for, *inter alia,* the following relief:

> "*1. To restore the applicant and her children to her (sic) unit B[…], F[…], R[…], Cnr B[…] and H[…] Road, R[…], Gauteng Province.*
>
> *2. Pending the final determination of the rescission application, the order of the court granted by the Honourable Judge Sigobo under Case No: 2019/01339 on the 19th of November 2019 be stayed.*
>
> *3. Interdicting and restraining the first and second respondent and any other person who may be directed by the first respondent from evicting the applicant pending the final determination of the rescission application.*
>
> *4. The orders in paragraphs 2 and 3 hereof are to operate in the interim with immediate effect.*
>
> *5. The first and second respondents, as well as any party who opposes the granting of the relief being ordered, are to pay the costs of this application on an attorney and client scale."*

[2] Three respondents were cited. They are the Johannesburg Social Housing Company (JOSHCO) as the first respondent. The Sheriff, Roodepoort, as the second respondent and the City of Johannesburg Metropolitan Municipality (the City) as the third respondent.

[3] The applicant alleges that he is employed and currently resides at the property belonging to the City.

[4] An eviction order against applicant was previously granted by default in this court on 19 November 2019. This is the order which the applicant now, after almost five years, wants to rescind. The rescission application had not been filed by the applicant seeking interim relief pending the final determination of the rescission application.

[5] The intended rescission is predicated on three grounds relied upon by the applicant providing good cause as to why the eviction order should be rescinded. According to applicant JOSHCO failed to meaningfully engage with the applicant or to report to the court on the availability of alternative accommodation. Secondly, the personal circumstances, including the risk of homelessness upon the eviction of applicant, were not taken into account by the court which ordered the eviction. Thirdly, the date of eviction was not linked to the provision of temporary alternative accommodation by the City.

[6] Reliance is placed on Rule 42(1)(a) of the Rules of this Court, submitting that the eviction order was erroneously sought or erroneously granted. It was submitted that there was no meaningful engagement between the applicant and the City considering that the eviction order would render the applicant homeless. It was argued that an injustice would occur if an eviction order is executed rendering the applicant homeless.

[7] The applicant placed reliance on the case of *Occupiers, Berea v DeWet NO and Another.*[1] In this matter the Constitutional Court held at paragraph 48 as follows:

> "*The court will grant an eviction order only where :*
> *(a) it has all the information about the occupiers to enable it to decide whether the eviction is just and equitable; and*
> *(b) the court is satisfied that eviction is just and equitable having regard to the information in (a).*

[1] 2017 (5) SA 346 (CC).

The two requirements are inextricable, inter-linked and essential. An eviction order granted in the absence of either one of these two requirements will be arbitrary. I reiterate that the enquiry ha nothing to do with the unlawfulness of occupation. It assumes and is only due when the occupation is unlawful."

[8] The applicant is then relying on an injustice which will occur if his occupancy is not restored and if he is not protected from eviction. All of this is predicated on his submission that he will be rendered homeless if evicted.

[9] It is common cause before this Court that the applicant and his family were in fact evicted on 29 August 2024 from the premises but that he subsequently, with the assistance of the other occupants of the building, re-occupied the unit.

[10] This is the date on which the applicant alleges that he first became aware of an eviction order being granted against him in this Court.

[11] On behalf of JOSHCO it was argued that before the order was granted in November 2019, the application was, on three occasions, served on the applicant. The applicant elected not to oppose the application and acted in wilful default.

[12] The relationship between the applicant and JOSHCO is contractual. The latter leased the premises to the applicant in terms of a written lease from 1 January 2017. Rental payable was R2,140 per month. The applicant chose his *domicilium citandi et executandi* to be at the premises. Since 2018, the applicant fell into arrears which situation continues. This led to cancellation of the lease agreement.

[13] Currently the applicant owes JOSHCO over R194,000. For many years he has paid no rental at all.

[14] The eviction application served before the court on more than two occasions. The notice of motion under case number 01339/19 indicated that the application would be heard on 21 February 2019. This application was served on the applicant's *domicilium* address by the sheriff on 26 January 2019 by way of affixing. The date of the hearing on the notice of motion was changed in manuscript from 21 February to

18 April 2019. Whether the matter was heard on 21 February 2019 is unclear but on 27 February 2019 Judge Vally authorised the service of a section 4(2) notice in terms of Act 19 of 1998, (the PIE Act). Leave was granted to serve the notice on the *domicilium* address of the applicant, being the premises which he occupied. In this notice, the hearing date of the eviction application was set to be 18 April 2024, and the applicant was informed that he could oppose the application. This section 4(2) notice was served on the applicant by the sheriff on 6 April 2019 by leaving a copy on a table within the applicant's unit as the person found at the unit was under 16 years old.

[15] As the abovementioned sheriff's return of service could not be obtained timeously, a new date was obtained for 18 June 2019 and the section 4(2) notice, this time containing the date of 18 June 2019, was served on 4 June 2019 by affixing on the applicant's premises, as the occupant of the unit found there was younger than 16.

[16] On 18 June 2019 at the hearing of the eviction application, the court postponed the application *sine die* for the City to file a report regarding the availability of alternative housing. Such report was filed. In this report the dire situation to supply housing to many people with a limited budget was set out.

[17] After the report was filed a further notice in terms of section 4(2) was served at the *domicilium* address on 7 November 2019 by affixing the notice to the principal door of the premises. It was stated on the return of service that the appearance date would be 19 November 2019. On this date the court granted the eviction order in the absence of the applicant.

[18] JOSHCO waited until 29 August 2024, nearly 5 years later, to execute the writ of eviction.

[19] The reasons for the delay were provided, *inter alia*, caused by the staying of evictions during the Covid-19 pandemic.

[20] The applicant averred that he received none of the notices. It is the applicant's case that he only became aware of the eviction order when the writ was executed. He could only after 29 August 2024 start to take steps to apply for the stay of the execution. He could only do this with the financial assistance of the community. He then appointed a legal representative to bring the current application on an urgent basis.

[21] JOSHCO opposed the urgency of the matter, submitting that the applicant dragged his feet from 19 August 2024 until the application was filed during mid-September 2024. It was argued that he knew since 2019 about the pending eviction application but that he, even on his own version, created his own urgency by not acting with expedience.

[22] The court is satisfied that the matter is sufficiently urgent to have been placed on the urgent court roll. It cannot be found that the urgency was self-created considering the difficulty the applicant would have experienced to obtain legal representation considering his financial position.

[23] The question which should be considered is whether a case has been made for interim relief, i.e. the stay of the execution pending the institution of a rescission application.

[24] The first question to consider is whether the applicant was in wilful default when the eviction order was granted on 19 November 2019. It is common cause that personal service was never affected and service took place at the *domicilium* address of the applicant either by affixing or by leaving a copy of the notices.

[25] Service of notices were done in terms of the Rules of court but there is no evidence that the applicant was aware of the date of hearing of the eviction application on 19 November 2019. There was not attached to the papers the section 4(2) notice for the hearing on 19 November 2019. The veracity of the applicant's averment that he was not made aware of the hearing date sounds improbable but cannot be rejected. Consequently, it cannot be said that the applicant acted in wilful default not to oppose the application on 19 November 2019.

[26] In *Gois t/a Shakespear's Pub v Van Zyl and others*[2] the requirements which should be satisfied for a stay of execution were stated to be as follows:

> *"(a) A court will grant a stay of execution where real and substantial injustice requires it or where injustice would otherwise result.*
>
> *(b) The court will be guided by considering the factors usually applicable to interim interdicts, except where the applicant is not asserting a right, but attempting to avert injustice.*
>
> *(c) The court must be satisfied that:*
>
> *(i) The applicant has a well-ground apprehension that the execution is taking place at the instance of the respondent(s); and*
>
> *(ii) irreparable harm will result if execution is not stayed and the applicant ultimately succeeds in establishing a clear right*
>
> *(d) Irreparable harm will invariably result if there is a possibility that the underlying causa may ultimately be removed, i.e. where the underlying causa is the subject-matter of an ongoing dispute between the parties.*
>
> *(e) The court is not concerned with the merits of the underlying dispute – the sole enquiry is simply whether the causa is in dispute or susceptible to setting aside."*

[27] In my view, the applicant must be afforded the opportunity to place facts before court in an attempt by him to convince the court that it would not be just and equitable to order his eviction. The only way to do this would be to stay the current execution order and afford the applicant an opportunity to rescind the eviction order. If such stay is not granted there exists a possibility that a real and substantial injustice could result should the eviction order be carried out without the applicant being provided with the opportunity to place facts before the court to consider whether it would be just and equitable to evict the applicant. On the papers before court he avers that he and his family would be rendered homeless. This court does not have to decide whether that eventuality would in fact occur when the applicant is evicted. It may very well not be the case as the applicant on his own version earns

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[2] 2011 (1) SA 1 48 (LC)

an income of approximately R5,800 per month which may make it possible for him to obtain alternative housing.

[28] For purposes of the rescission application, the applicant will have to show that he has a reasonable prospect of success to obtain such relief. The mere fact that the court must accept for purposes of this application that the applicant did not have the opportunity to place facts before the court as to why an eviction should not be granted is sufficient to meet this requirement.

[29] It is unclear what enquiry the court conducted when the eviction application was granted. In so far as a *bona fide* defence is concerned that has some prospect of success, there is no evidence that the court ordering eviction engaged in the obligatory enquiry required in terms of section 4(7) of PIE to consider all the factors in order to decide whether it would be just and equitable to grant the eviction order. Moreover, there was a delay of almost five years between the eviction order and the execution thereof. The circumstances of the applicant and his family could have changed.

[30] It was found in the matter of *Nomthandazo Makhunzi v Raymond Hlazo NO and three others* (Case No: 8797/2018) [2023] ZAGPJHC 479 (15 May 2023) as follows in a case that bears a lot of similarity with the current matter:

> "*12. It is however not necessary for the applicant to prove the necessary enquiry was not carried out. For purposes of assuming under common law, there is enough of an insufficiency of evidence that the necessary enquiry was carried out by the court on 15 November 2018, the absence of which enquiry which would constitute a bona fide defence that has some prospect of success."*

[31] The court is satisfied that the applicant established that an injustice would present itself if the applicant is not afforded an opportunity to place facts before court to attempt to convince the court not to order eviction. At least a *prima facie* case, although open to some doubt, was established that he would be entitled to a rescission order. This would mean that he is entitled to a stay of the eviction order.

[32] The other requirements for an interim interdict being met, the court is satisfied to grant the staying application. The applicant must be placed on terms to file the recission application within 15 days in lieu of which the interim order would lapse.

Order

[33] The following order is made:

a. Condonation is granted for the non-compliance with the Rules of this Court in terms of Uniform Rule 6(12)(a).

b. To the extent that the applicant no longer occupies the premises, the first respondent should restore the applicant and his children to unit B[…], F[…] Flats, M[…] R[…] Road, F[…], Roodepoort, Gauteng.

c. Pending the final determination of a rescission application to be instituted within 15 days of this order, the order of the court granted by Acting Judge Sigogo under Case No. 2019/01339 on 19 November 2019 and the execution thereof be stayed. If the rescission application is not filed and served within the said 15-day period the interim relief would lapse and the first respondent can proceed with the eviction of the applicant.

d. Interdicting and restraining the first and second respondents and any other person who may be directed by the first respondent from evicting the applicant pending the final determination of the rescission application if filed and served within the 15-day period mentioned in (c) above.

e. The order in paragraphs (c) and (d) hereof to operate in the interim with immediate effect.

f. The costs of this interim application to be cost in the proposed recission application.

R STRYDOM
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Heard on: 02 October 2024
Delivered on: 11 October 2024

Appearances:

For the Applicant:	Adv. K. Kabinde
Instructed by:	Sithi and Thabela Attorneys
For the First Respondent:	Adv. S. S. Maelane
Instructed by:	GMINC Attorneys