In the High Court of South Africa
KwaZulu-Natal Local Division, Durban

Case No : 13019/14

In the matter between :

Woodglaze Trading (Pty) Ltd — Applicant

and

The persons who are presently
occupying the Hilldale Complex
situated at Castlehill Drive — First Respondents
The Ethekwini Municipality — Second Respondent
Department of Human Settlements
(Province of KwaZulu-Natal) — Third Respondent

Judgment

Lopes, J:

[1] This matter has its origins in the unfortunate fact that a great number of people in our country find themselves in the situation that they are unemployed and/or without the necessary resources to ensure that they are able to live in what may be described as adequate and proper housing. Inevitably this results in a

tension developing between those persons in society who are so disadvantaged and the ability of national, provincial and local government to provide the necessary facilities to enable them to be accommodated in housing in accordance with the Constitution.

[2] The applicant, Woodglaze Trading (Pty) Ltd ('Woodglaze') is a company which purchased property from the second respondent, the Ethekwini Municipality with the purpose of developing sixteen accommodation blocks each compromising six apartments. In total therefore it was envisaged that 96 units would be constructed at what is described as the Hilldale Complex at Castlehill Drive in Newlands ('the development'). The purpose of the development was to develop medium to high density housing for residential development in the Newlands area. Although the construction appeared to have been pursuant to a contract concluded with the Ethekwini Municipality, I was told by Mr *Pammenter* SC, who appeared for Woodglaze, that the development is privately funded, and the units are to be leased to members of the public on a normal commercial basis.

[3] The following matters are common cause, or at least not disputed on the papers :

(a) Woodglaze started the construction of the 96 units with an envisaged completion date being the end of January 2014;

(b) construction was delayed but towards the end of September 2013 the project was nearing completion. In this regard lease agreements had been

concluded with 96 individuals who had each paid a deposit of R6 500 to Woodglaze, who was obliged to give those individuals vacant possession of the units upon their completion;

(c) at that stage, Woodglaze had expended some R22m in the development of the units;

(d) during December of 2013 a group of some 100 persons from the nearby Polokwane and West Ridge squatter camps at Newlands invaded the development by overpowering security guards and occupying the units. None of these were persons with whom Woodglaze had concluded contracts, and their occupation of the units was clearly unlawful;

(e) Woodglaze accordingly moved an urgent application which came before this court on the 6th December 2013. Kruger J granted a rule calling upon the unlawful occupiers to restore peaceful and undisturbed possession of the development to Woodglaze, together with interim relief;

(f) the rule was confirmed by Nkosi J on the 14th January 2014;

(g) Woodglaze's version is that the order of the 14th January 2014 was fully executed and the unlawful occupiers removed from the units, possession of which was then restored to Woodglaze. Woodglaze was then obliged to expend some R4m in repairing the damage caused by the unlawful occupiers. These allegations, as will appear below, are partly denied by the first respondents;

(h) on the 7th October 2014 a similar incident occurred when security guards at the development were overcome by persons who then unlawfully invaded the

units. Despite efforts by the employees of Woodglaze, and after the intervention of employees of the third respondent, the Department of Human Settlements, the unlawful occupiers refused to vacate the premises;

(i) on the 14th November 2014 Woodglaze brought an urgent application in this court before van Zyl J who granted a rule calling upon the unlawful occupiers to show cause why they should not restore peaceful and undisturbed possession of the units to Woodglaze. The order of van Zyl J also set out the manner in which service of the order was to be effected, including the reading out of the order in both English and isiZulu over a loudhailer at the development, by handing out copies of the application papers and the order, and by affixing them to a prominent position at the entrance to the development. Pursuant to that order the first respondents were removed from the development on the 17th December 2014 (after discussions between the various parties' representatives had afforded them a further temporary reprieve). They now reside in tents on property alongside the development;

(j) on the 21st November 2014, and no doubt having satisfied himself that there had been service in accordance with the rule, Nkosi J confirmed the rule and made a further order dealing with service of the final order, once again by loudhailer and the handing out of copies, and affixing a copy of the application and his order at a prominent position at the entrance of the development;

(k) on the 13th January 2015 the first respondents, described in the papers merely as the persons who formerly occupied the development, brought an urgent application ('the reconsideration application') seeking the following relief :

(i) interdicting Woodglaze from permitting or taking steps to allow any third parties to occupy the units in the development;

(ii) interdicting the South African Police Services from assisting any third party to occupy the units;

(iii) setting aside the confirmation of the rule granted by Nkosi J on the 21st November 2014;

(iv) dismissing the spoliation application brought by Woodglaze on the 14th November 2014;

(v) after restoration of the property to the first respondents, interdicting and restraining Woodglaze from taking any steps with the intention of evicting them from the property without a court order entitling them to do so;

(vi) restoring the status quo ante of the grant of the interim order and final order, and allowing the first respondents to resume occupation of the units that they occupied prior to their eviction.

[4] The matter came before Ploos van Amstel J, and he granted interim relief to the first respondents, only interdicting Woodglaze from allowing third parties to occupy the units, and making provision for the delivery of further affidavits.

[5] Both the main application and the reconsideration application now come before me by way of a direction from the Judge President, upon the request of the

first respondents, that the reconsideration application be heard as a matter of urgency.

[6] Mr *Pillemer* who appears for the first respondents submits that this is an application for reconsideration in terms of Rule 6(12)(c) of the Uniform Rules. Rule 6(12)(c) provides :

'A person against whom an order was granted in his absence in an urgent application may by notice set down the matter for reconsideration of the order.'

[7] The first respondents are entitled to a reconsideration of the main application once they establish two facts :

(a) that the main application was heard as a matter of urgency; and

(b) that the first order was granted in their absence.

[8] In *Oosthuizen v Mijs* 2009 (6) SA 266 (W) at 269 C – D Wepener AJ quoted with approval what was said in *Sheriff Pretoria North-East v Flink and Another* [2005] 3 All SA 492 (T):

'Once these jurisdictional facts have been established, the Court is free to reconsider the order initially given in the widest sense of the word. By direct implication, it is free to consider any judgment given in the urgent application, which led to the order.'

[9] In *ISDN Solutions (Pty) Ltd v CSDN Solutions CC and Others* 1996 (4) SA 484 (W) at 486 H – 487 C, Farber AJ stated :

'The Rule has been widely formulated. It permits an aggrieved person against whom an order was granted in an urgent application to have that order reconsidered, provided only that it was granted in his absence. The underlying pivot to which the exercise of the power is coupled is the absence of the aggrieved party at the time of the grant of the order.

Given this, the dominant purpose of the Rule seems relatively plain. It affords to an aggrieved party a mechanism designed to redress imbalances in, and injustices and oppression flowing from, an order granted as a matter of urgency in his absence. …

Factors relating to the reasons for the absence, the nature of the order granted and the period during which it has remained operative will invariably fall to be considered in determining whether a discretion should be exercised in favour of the aggrieved party. So, too, will questions relating to whether an imbalance, oppression or injustice has resulted and, if so, the nature and extent thereof, and whether redress is open to attainment by virtue of the existence or other or alternative remedies … Each case will turn on its facts and the peculiarities inherent therein.'

[10] This was quoted with approval by Sutherland J in *Industrial Development Corporation of South Africa v Sooliman* 2013 (5) SA 603 (GSJ) para 14 and Southwood J in *Lourenco and Others v Ferela (Pty) Ltd and Others (No. 1)* 1998 (3) SA 281 (T) at 290 E – H. I accept that the above represents a correct interpretation of the requirements of Rule 6(12)(c).

[11] It is common cause that the first requirement has been established, and further that the first respondents were not present when the orders were granted. Why they were not present is a question which flows naturally from their absence.

[12] Prior to moving the initial application before van Zyl J, Woodglaze engaged the services of the Deputy Sheriff for Verulam to ensure service of the notice of motion affidavit, annexures and certificate of urgency. According to the returns of service of the Deputy Sheriff, service was effected by affixing a copy to the main gate of the development on the 10th November 2014. In addition there was service upon a Mr Sizwe Mbambo, the order sought was read out in English and isiZulu on a loudhailer, and there was also service on a Mr Sandile Dlamini, a Mr Menzies Zulu and a Mr Mangushi Mkhize The persons named by the Deputy Sheriff were persons apparently in charge of the premises at the time of his arrival. The rule granted by van Zyl J on the 14th November 2014 was presumably granted on the basis of these returns of service.

[13] There are also in the court papers, a further ten returns of service dealing with service on the first respondents of the application papers and the rule granted on the 14th November 2014. According to these returns service took place on the 17th November 2014. The modes of service which the Deputy Sheriff alleges he carried out included service upon Mr Sandile Mhlongo, Miss Gugu Gulne, Mr Bhekani Memela, Mr Thami Zwane, Mr Menzies Zull (presumably intended to be Mr Menzies Zulu), Mr Bongani Mhlongo, Mr Eric Mkhize, Mr Sibusiso Mkhize, Mr Zama Mzunza and Mr Alungile Shanga. The allegation is made in all the returns that the persons served were then occupying the development, over the age of 16 and apparently in charge of the premises. The order was also read out by loudhailer in both English and isiZulu.

[14] Presumably relying on these returns of service, Nkosi J confirmed the rule on the 21st November 2014. The importance of these returns relates both to the interpretation of Rule 6(12)(c) and consequently whether or not reconsideration of the rule granted and confirmed is appropriate. In order to strengthen the suggestion of the first respondents that they are entitled to invoke the rule, the deponent to the affidavit in support of the reconsideration application, Mr Sanele Wiseman Xhakaza states in paragraph 18 :

'We were not present at nor were we advised of the proceedings which took place on 14 November 2014. … We were removed from the property on 17 December 2014, but were not provided with copies of the 2014 application or the interim order prior to this. The 2014 final order, which is the subject of this application, was granted on 21 November 2014 by Nkosi J in our absence.'

[15] At paragraph 30 of the affidavit Mr Xhakaza states :

'We accordingly dispute the veracity of the information contained in the Sheriff's return of service which states that he served the interim order in the 2014 application on us on 17 November 2014 and that he served copies on various residents personally. In fact, we do not recognise any of the names of the individuals upon whom personal service claims to have been effected. We refer in this regard to the list of the residents still living in tents alongside the property marked "AA".'

[16] At paragraph 33 Mr Xhakaza states :

'The 2014 final order was erroneously sought and granted, because the residents had not been given proper notice of the 2014 application and the interim order which was in place. On that ground alone, the 2014 final order is a nullity.'

[17] In the affidavit for Woodglaze to oppose the reconsideration order deposed to by Mr Inderjeeth the General Manager of Woodglaze, he refers to the various returns of service and states :

'The residents cannot impeach the contents of those returns. The occupiers were given proper notice both in the 2013 and 2014 applications. The court was satisfied and the Orders ensued. There is no nullity. '

[18] Mr Inderjeeth accuses the deponent to the founding affidavit in the reconsideration application of being untruthful with regard to the non-service of the order. Significantly, at least one of the returns of service records the presence of Mr Inderjeeth when service was affected.

[19] So what am I to make of the competing allegations in the reconsideration application? On the one hand I have the returns of service of the Deputy Sheriffs who certify that they have effected service both prior to the grant of the rule and the grant of the final order. On the other hand I have the allegations by Mr Xhakaza who claims that there was no service and that is why there was no representation on behalf of the first respondents when the rule and final order was granted. (Counsel are agreed that the first respondents were not present at court when the provisional and final orders were granted.)

[20] With regard to the acceptance of the Deputy Sheriffs' returns of service, sub-s 43(2) of the Superior Courts Act, 2013 (which commenced on the 23rd August 2013) provides :

'(2) The return of the Sheriff or a Deputy Sheriff of what has been done upon any process of a court, shall be *prima facie* evidence of the matters therein stated.'

[21] The provisions of this Act are in identical terms to the now repealed s 36(2) of the Supreme Court Act, 1959 which previously governed these matters. I am therefore able to consider authorities on the repealed Act dealing with this matter.

[22] In *Sussman & Co (Pty) Ltd v Schwarzer* 1960 (3) SA 94 (O) Potgieter J held that where a return of service is filed which on the face of it is valid, it can be relied upon by the applicant. If the respondent wishes to challenge the facts set out in the return, the onus is on the respondent to show by clear evidence that although the return shows that the requirements of the Act had been complied with, they were in fact not complied with and that the return is not a proper return. Different considerations obviously apply where the return of service is, on the face of it, insufficient.

[23] In *Deputy Sheriff for Witwatersrand District v Harry Goldberg and the Assignees of Goldberg Bros. & Gersin* 1905 TS 680 at 684, Solomon J stated :

'It is, I think, clear, in the first place, that if the return can be impeached it can only be impeached on the clearest and most satisfactory evidence. Now the Sheriff's clerk has made an affidavit in this case explaining the circumstances under which the return was made …'

The judgment then goes on to deal with the affidavit of the Sheriff's clerk. It continues at 684 – 685 :

'That is the evidence of the Sheriff's clerk as to what took place and the facts upon which he based his return, and clearly upon those facts he was justified in making the return that service had been made on Harry Goldberg. But then we have the denial that the Sheriff's return was correct. We have the affidavits of Harry Goldberg and Nick Goldberg. Harry Goldberg says that he was never served with a copy of the summons and makes an affidavit to that effect. Nick Goldberg says that it was he who was served with a copy of the summons, but denies that a second copy was left with him to be served upon his brother. Now I must say, speaking for myself, that I should certainly not have been prepared upon that evidence to come to the conclusion that Harry Goldberg's evidence was necessarily to be accepted, and therefore to hold that he had not been served with a copy of the summons. If I had been sitting in the case I certainly think that I should have required the witnesses to be produced in court. They might have been examined and cross-examined, and other evidence also might have been produced to show whether Harry Goldberg's evidence was true or not. But, simply upon the strength of his affidavit and that of Nick Goldberg, I should certainly hesitate to come to the conclusion that there had been no service of the summons made upon Harry Goldberg. However, the learned Judge in the court below was satisfied from those affidavits that Harry Goldberg had not been served, and for the purpose of this appeal let me accept his finding. …'

[24] In that case the court of appeal held that the further conduct of the person alleged to have been served ratified the act of the person who had accepted service on Harry Goldberg's behalf. The judgment granted on the return of service was then upheld.

[25] What *Goldberg* was really concerned with, however, is whether or not the summons actually came to the attention of the person upon whom the Sheriff alleged he had served, but who had denied such service. In the circumstances the court was so satisfied. The principle, however, remains that clear evidence is required to be adduced by the person challenging the facts set out in the Sheriff's return of service.

[26] Is the evidence of Mr Xhakaza sufficient to disregard the prima facie case established by the Deputy Sheriffs' returns? The problem which presents itself here is that Mr Xhakaza speaks in very general terms in his affidavit about the identity of the first respondents. He is, however, careful to mention that the persons referred to in the returns of service are persons of whom 'we do not recognise the names of …'. A comparison is made in this regard between the list of the residents still living in the tents alongside the property and those allegedly served with documents by the Deputy Sheriff. A list of the first respondents is also put up as an annexure to Mr Xhakaza's affidavit. From my own perusal of that list none of the persons reflected thereon bear the same names as the persons in the Deputy Sheriffs' returns of service.

[27] In reply to a challenge to the authority of Mr Xhakaza to represent the first respondents, he attaches to his replying affidavit an annexure reflecting a resolution

passed by a list of named persons. In addition some 60 affidavits are put up, apparently confirming his authority.

[28] The confirmatory affidavits, which are all identical in form were annexed to the first respondents' replying affidavit and record merely that the deponents have read 'the answering affidavit' of Mr Xhakaza and confirm the contents as true and correct. It is not clear to me whether in using the phrase 'answering affidavit' the persons preparing those documents intended to refer to the affidavit by Mr Xhakaza to lead the reconsideration application, or his replying affidavit and/or solely with regard to the question of authority.

[29] What is significant is that in the founding affidavit in the reconsideration application Mr Xhakaza was vague about the persons who occupied the development at the various stages. Examples of this are where he states :

'Most of the residents took up occupation on the property at the beginning of December 2013.'

'We have come mainly from transit and squatter camps in Newlands where we had been residing for many years.'

'In December 2013 shortly after we took occupation of the property the Applicant brought an urgent (spoliation) application to remove us from the property ("the 2013 application"). We are not in possession of the founding papers in the 2013 application, but became aware of the application as the interim and final orders were attached to the 2014 application.'

'The 2013 application was heard on the 6 December 2013 and an interim order was granted by Kruger J on this date. The interim order was not implemented : Some time on or about 7 December 2013 the Sheriff came onto the property. He removed some of our possessions from our units but did

not confiscate them. Instead he proceeded to take photos of the units and the property generally, after which he allowed us to return to our respective units. We also took possessions back into our units.'

'We did not understand at the time that an order had been granted by a Court directing that we vacate the property. We were not provided with copies of the 2013 application in December when it was issued, the 2013 interim order or the final order which was granted in January 2014.'

[30] Mr Xhakaza then refers to the fact that notices had been pinned up on the property requiring them to vacate the property and in this regard he annexes to his founding affidavit various notices drafted by Woodglaze referring to the fact that the High Court had granted an order that persons occupying the premises illegally must be ejected. He maintains that from this 'they' did not understand that a court application had already been brought and an order granted. Mr Xhakaza then relates that a group of residents had then approached Pro Bono.org (Durban) in February 2014 and told them that they had not been served with court papers and never appeared in court. Apparently the advice they were given was that they could not be evicted without a court order and if it happened again they were to approach Pro Bono.org.

[31] Mr Xhakaza directly contradicts the contents of two sets of returns made by different Deputy Sheriffs in two different years. This would suggest an improbable degree of dereliction of their duties or a highly improbable level of duplicity. Mr Xhakaza also states that during 'their' occupation of the development, construction continued from December of 2013 until April of 2014, including the laying of pipes and paving and that the builders had left the property during or about April 2014.

Security guards came onto the property intermittently but stopped coming in April of 2014 and never attempted to remove them from the property.

[32] In the affidavit to oppose the reconsideration application, Mr Inderjeeth paints a somewhat different picture. He states that on or about the 7th December 2013 the possessions of those who had unlawfully invaded the development were removed but they then forcibly took back their possessions. With the assistance of the South African Police, on the 11th December 2013 some 120 persons were ejected.

[33] Mr Inderjeeth also records that construction work could not have continued had the unlawful occupiers continued in occupation from December 2013. He maintains that the unlawful occupiers only again returned during October of 2014.

[34] Mr Inderjeeth does admit that sometime during late June 2014 three or four families again invaded the property and took up residence, but after having been shown the court orders, they vacated the premises. Mr Inderjeeth also confirms that the unlawful occupiers of the development were evicted on the 17th December 2014.

[35] The fact of the matter is that the first respondents chose not to attend court. They give as their only reason for not doing so the fact that they were unaware that court orders would be, or were obtained, and they deny entirely the prima facie evidence established in the returns of the Deputy Sheriffs.

[36] Given the events which occurred prior to October of 2014, it is wholly improbable that the first respondents did not understand that they had been evicted pursuant to a court order. This is more particularly so if they had approached the Pro Bono.org organisation which, on the evidence of Mr Xhakaza did not assist them to be reinstated when their allegations were apparently that they had been evicted without a court order. There is also no indication (other than the use of the word 'we') to indicate which of the first respondents were in occupation during 2013 and remained in occupation until their eviction in 2014. It also seems to me improbable that they could have continued to do so in circumstances where Woodglaze was continuing to carry out the construction of the units. Mr Xhakaza confirms that there were no utilities available to the units of the development at the time that they occupied the units in 2013. Viewed together with the undisputed allegation in the Deputy Sheriff's returns that Mr Inderjeeth was present at the time the orders were served I have no confidence in resolving the dispute of fact regarding the returns of service on the papers alone, in favour of the first respondents.

[37] In all the circumstances I am of the view that there is no acceptable explanation for the absence of the first respondents from court at both the hearing of the rule granted on the 14th November 2014 and the return date on the 21st November 2014 when the rule was confirmed. In my view the evidence which is adduced to challenge the contents of the returns of the Deputy Sheriffs does not pass the test of 'clear evidence' set forth in the *Sussman* and the *Goldberg* cases.

[38] Mr *Pillemer* submitted that only in the event that I were to be against him on the submissions that he made regarding the right of the first respondents to have the final order reconsidered, that I should refer the matter for the hearing of oral evidence. Despite the practice which formerly prevailed in this division, I of the view that it may no longer be proper to adopt that approach. In this regard I refer to the judgment of Harms DP in *Law Society, Northern Provinces v Mogami and Others* 2010 (1) SA 186 (SCA), paragraph 23 where the Deputy President stated :

'An application for the hearing of oral evidence must, as a rule, be made *in limine* and not once it becomes clear that the applicant is failing to convince the Court on the papers or on appeal. The circumstances must be exceptional before a court will permit an applicant to apply in the alternative for the matter to be referred to evidence should the main argument fail.'

[39] The dispute of fact regarding the reasons why the first respondents were not present at court on either the 14th or the 21st November 2014 emerges clearly from the stark contrast between the two versions. In those circumstances I would have expected an application for a referral to oral evidence at the outset. I do not believe that this is a matter where it can be suggested that circumstances are so exceptional that a referral to oral evidence could only be considered in the alternative, and as a last resort. Mr *Pammenter* SC submitted, correctly in my view, that the first respondents having not elected to apply for oral evidence on the issue of why they did not attend court, must stand or fall on the papers. As stated above, they bore the duty to adduce clear evidence in that regard and have failed to do so.

[40] With regard as to whether an imbalance, oppression or injustice has resulted, in my view it has not. In this regard I am not unsympathetic to the plight of the first respondents. In this regard I refer to the dicta of Yacoob J in *Government of the RSA and Others v Grootboom and Others* 2001 (1) SA 46 (CC), paragraph 2 where he stated :

'The issues here remind us of the intolerable conditions under which many of our people are still living. The respondents are but a fraction of them. It is also a reminder that, unless the plight of these communities is alleviated, people may be tempted to take the law into their own hands in order to escape these conditions. The case brings home the harsh reality that the Constitution's promise of dignity and equality for all remains for many a distant dream. People should not be impelled by intolerable living conditions to resort to land invasions. Self-help of this kind cannot be tolerated, for the unavailability of land suitable for housing development is a key factor in the fight against the country's housing shortage.'

At paragraph 92 Yacoob J continued :

'This judgment must not be understood as approving any practice of land invasion for the purpose of coercing a State structure into providing houses on a preferential basis to those who participate in any exercise of this kind. Land invasion is inimical to the systematic provision of adequate housing on a planned basis. It may well be that the decision of a State structure, faced with the difficulty of repeated land invasion, not to provide housing in response to those invasions, would be reasonable.'

[41] If I were to have entertained and granted the reconsideration order, I would surely be opening the door to anarchy and civil disorder. Viewing the evidence as a whole, and the conduct of the first respondents, society at large would never accept as just and equitable that in a free and democratic society, economically deprived persons could simply help themselves to the assets of others.

[42] This is not a case where the invasion of the properties by the first respondents occasioned no great inconvenience to Woodglaze. Indeed, Woodglaze maintains that it spent approximately R4m repairing damage caused by the first invasion. In addition all those persons who had signed the 96 contracts with Woodglaze to lease the units in the development have been left waiting by the conduct of the first respondents, and have been unable to be given what they were contractually entitled to receive.

[43] Mr *Pillemer* also submitted that I should take into account the fact that in the main application Woodglaze relied on the fact that the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 1998 was not used by Woodglaze and ignored by both the judges concerned. In my view whilst those considerations may play a role in an overall assessment of the justice and equity of this decision, they do not outweigh the fact that the first respondents have not satisfied the jurisdictional requirements for a reconsideration. If the first respondents were unhappy with the final order on the basis that an incorrect assessment of the law had been made by the learned judge who confirmed the rule, then that should have been dealt with either on appeal or possibly by way of a review. It is not for me to second guess those decisions.

[44] In all the circumstances the application for reconsideration cannot succeed. With regard to the question of costs, given the plight of the first respondents, there

would appear to be no utility in making any order for costs against them. In my view it would only lead to a further waste of time and effort for no reward. In the circumstances I make the following order :

The application for reconsideration is dismissed.

Date of hearing : 5th February 2015

Date of judgment : 18th February 2015

Counsel for the Applicant : C J Pammenter SC with I Pillay (instructed by Omprakash Ramlakhan Incorporated)

Counsel for the Respondents : R Pillemer (instructed by Seri Law Clinic)