



**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION PRETORIA**

**CASE NO: 56930/2020**

|                                                         |                                                                                   |
|---------------------------------------------------------|-----------------------------------------------------------------------------------|
| <b>DELETE WHICHEVER IS NOT APPLICABLE</b>               |                                                                                   |
| (1) REPORTABLE: <del>YES</del> /NO                      |                                                                                   |
| (2) OF INTEREST TO OTHERS JUDGES:<br><del>YES</del> /NO |                                                                                   |
| (3) REVISED                                             |                                                                                   |
| 19/09/2024                                              |  |
| DATE                                                    | SIGNATURE                                                                         |

In the matter between: -

**FARHAD DAWSON INVESTMENT  
HOLDINGS (PTY) LTD**

**APPLICANT**

and

**MOHAMED ADAM**

**FIRST RESPONDENT**

**MIRIAM ADAM**

**SECOND RESPONDENT**

**MOHAMED YASEEN ADAM**

**THIRD RESPONDENT**

**THE CITY OF TSHWANE METROPOLITAN  
MUNICIPALITY**

**FOURTH RESPONDENT**

**ADRIAAN EVERT PRAKKE N.O.  
(In his capacity as the duly appointed  
business rescue practitioner of  
LOUIS PASTEUR INVESTMENTS LIMITED  
(In business rescue)**

**FIFTH RESPONDENT**

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**JUDGMENT – LEAVE TO APPEAL**

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*(The matter was heard in open court but judgment was reserved and delivered electronically, uploaded onto Caselines to the electronic files of the matter and electronically submitted to the parties/their legal representatives on Caselines. The date of uploading onto Caselines is deemed to be the date of the judgment.)*

**MADIBA AJ**

- [1] The applicant seeks leave to appeal against the whole judgment and order delivered by this court on the 09<sup>th</sup> of March 2022.
- [2] The contentions by the applicant is that there is a reasonable prospect that another court would come to a different conclusion and would hold that this Court misdirected itself in its reasoning, in fact and in law, in its judgment. Leave to appeal is sought to the full court of North Gauteng Division Pretoria or the Supreme Court of Appeal on the grounds as tabulated in the notice of application for leave to appeal dated 31 March 2022.
- [3] Basically, the application for leave to appeal is premised on the following grounds: -

- a) That there was non-compliance with the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998;
- b) In refusing to consider the return of service of the Section 4(2) notice by the Sheriff and finding that no such return of service exists and that no service of any notices were ever served on the respondents;
- c) In finding that the Section 4(2) notice was defective as it provided no reasons for the intended eviction, and no dates and time period were stipulated on the Section 4(2) notice;
- d) That all and any occupant of the premises should have been joined to the eviction proceedings and served with the Section 4(2) notice;
- e) In dismissing the application for eviction and awarding costs against the applicant.

[4] Applications for leave to appeal are regulated by Section 17(1) of the Superior Courts Act 10 of 2013 which provides as follows:

*Leave to appeal may only be given when the judge or judges concerned are of the opinion that: -*

- a. (i) *the appeal would have a reasonable prospect of success; or*
  - (ii) *there is some compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;*
- b. *The decision sought on appeal does not fall within the ambit of Section 16(2)(a); and*
- c. *Where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.*

[5] With the enactment of Section 17 of the Superior Courts Act, the threshold for granting leave to appeal a judgment of the High Court has been significantly raised. Leave to appeal will therefore only be granted when the judge concerned is of the opinion that the appeal would have a reasonable prospect of success..

[6] The court in **Mount Chevaux Trust (IT2012/18) v Tina Goosen and 18 others 2014 JDR 2325** held as follows: -

*“It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court may come to a different conclusion. See*

**Van Heerden v Cronwright and others 1985 (2) SA 342 (T) at 343H.** *The use of the word “would” in the new statutes indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against”.*

In **MEC for health Eastern Cape v Mkhita (1221/15) (2016) ZASCA 176 25 Nov 2016)** the test was formulated as follows: -

*“An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chances of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be a sound rational basis to conclude that there is a reasonable prospect of success on appeal”.*

## **PRINCIPAL SBMISSIONS OF THE PARTIES**

- [7] The applicant’s submission is that there is a reasonable prospect of success on appeal in that the court misdirected itself by providing unsatisfactory reasons for its decision and overlooked and disregarded certain facts before court and did not properly consider all evidence before it. The applicant conceded that at the beginning of the hearing of this application the return of service of the Section 4(2) notice were not uploaded onto the Caselines platform. Upon realising that indeed the return of service of the Section 4(2)

notice was not uploaded on Caselines and that neither the court nor Counsel for the respondents had seen the said return of service, Counsel for the applicant instructed her attorney to upload the return of service in the middle of the hearing of this application without notifying Counsel for the respondents and did not request the court's permission to do so.

[8] The applicant's submission that the return of service of the Section 4(2) notice was properly before court, in my view, cannot be correct as the return of service was not before the court as they were only snuck in during the hearing when it was pointed out that the return of service was not uploaded. Despite Madam Justice Van der Schyff having ordered that the applicant must serve the respondents with the Section 4(2) notice, there was no proof of service before the return of service was surreptitiously uploaded on Caselines during the hearing of the application.

[9] It is contended by the applicant that it complied with all the requirements of the PIE Act more specifically Section 4(2) thereof. The applicant stated that it is common cause that the Section 4(2) notice and its service has already been authorised by her Ladyship Madam Justice Van der Schyff on the 15<sup>th</sup> of March 2021 and that all other unlawful occupiers have been notified. The applicant argued that the respondents' submissions are that the applicant failed to comply with the PIE Act is not only belated but highly technical in nature, frivolous, an afterthought, opportunistic and it is a delaying tactic to

delay the respondents' eviction. Without admitting non-compliance with the PIE Act, the applicant submitted that non-compliance with the rules accordingly does not result in prejudice and that the respondents failed to show prejudice by the non-compliance with the PIE Act of the applicant, if any.

[10] The applicant citing the case of unlawful occupiers of the **School Site .V. City of Johannesburg 2005 (4) 199 SCA** submitted that it is not every deviation from the literal prescription that is fatal. Even in that event, the question remains whether in spite of defects, the object of the statutory provisions has been achieved.

[11] In response, the respondents deny that it was common cause that an ex-parte court order in terms of Section 4(2) of the PIE Act was already authorised and served on the respondents. The respondents submitted that they have never been served with nor seen the ex-parte application and further that it is not part of the papers before this court except the court order of the Ladyship Madam Justice Van der Schyff dated the 15<sup>th</sup> of March 2021. According to the applicant, the court order authorising the form and contents of the draft notice in terms of Section 4(2) of the PIE Act was annexed to the deponent, Mr Ismael's founding affidavit.

[12] The respondents deny that the Section 4(2) notice was annexed to the founding affidavit as it was impossible to do so. The respondents argue that the applicant has got to first issue the application then approach the court once applicant has got the date for the approval of the notice including the date of the hearing of the eviction proceedings. The respondents contended that the applicant's notice is defective as there is no date upon which the court would be approached and it fails to give reasons for the eviction. When faced with the defective notice counsel for the applicant advised the attorneys to draft another notice and it was attached to the notice that was served before Madam Justice Van der Schyff.

[13] Clearly the redrafted notice was not authorised by Madam Justice Van der Schyff. Careful scrutiny of the papers shall reveal that there is another draft notice by the applicant which notice was not served on the respondents. All three notices have different dates. I hold the view that in the circumstances, not all of the requirements of the PIE Act were complied with.

[14] The defects in this matter are so gross that it cannot be said that applicant's Section 4(2) has satisfied the statutory provisions of the PIE Act and thus has achieved the purpose of the said statutory provisions. In my opinion, the defects in the applicant's Section 4(2) notice are fatal and that the applicant failed to comply with the PIE Act.

[15] During the hearing of the application there was no ex-parte application by the applicant and no return of service of Section 4(2) notice which were snuck in at a later stage. There can be no deviation from the literal prescription of the PIE Act under the circumstances and that non-compliance of the PIE Act is fatal, in my view.

### **NON CONSIDERATION OF THE RETURN OF SERVICE**

[16] The applicant's submission is that all requisite formalities in respect of the PIE Act including the service of the Section 4(2) notice of the PIE Act were complied with. According to the applicant, the Section 4(2) notice was served on all the respondents including the municipality. That the ex-parte court order was authorised by Madam Justice Van der Schyff on the 15<sup>th</sup> of March 2021. It is noteworthy that the issue of service and the ex-parte application was dealt with by this court as aforementioned and this court does not intend to rehash the said issue. However, of concern to this court is that the applicant's counsel does not address the fact that the return of service were uploaded shortly after the respondents' counsel had made submissions and argument on the issue of the return of service during the *point in limine* as raised by the respondents.

[17] Counsel for the applicant failed to make any submissions in her heads of argument that she instructed the uploading of the said return of service during the hearing and further that she instructed counsel to cure and redraft the Section 4(2) notice which was defective after Madam Justice Van der Schyff had authorised it and same was attached on Madam Justice Van der Schyff's order.

[18] This court indicated its displeasure of the applicant's conduct of sneaking in the return of service and that the said irregular conduct will not be considered by this court. The applicant's counsel conceded that applicant's conduct was unacceptable and apologised for it and wanted to remove the return of service and submit an affidavit instead which the court declined.

[19] Since the Section 4(2) notice was defective, the return of service so snuck in, it was not of assistance to the applicant. In fact as stated above the applicant submitted two other Section 4(2) notices which were not authorised by the court including Madam Justice Van der Schyff.

### **NON-JOINDER OF OTHER OCCUPANTS**

[20] The applicant argued that the issue of the non-joinder was only raised as a *point in limine* in the respondents' supplementary affidavit. It came to light that the second respondents' family reside with second respondent's

grandmother who is 90 years old, his twin sisters who are attending high school and two staff personnel and the lessee FCP and the respondent's submission is that the above mentioned people/occupiers were supposed to have been joined as respondents which the applicant failed to do.

[21] The applicant contended that the aforementioned occupiers were duly notified by the Section 4(2) authorised by Madam Justice Van der Schyff which notice gave proper notice to all unlawful occupiers to place information before the court in respect of their circumstances. Regarding the service of the Section 4(2) notice on the lessee FCP, the applicant submitted that it was not necessary in law and/or otherwise to join FCP to the eviction proceedings as its lease was cancelled. The applicant argued that there is no evidence presented that the other occupants who were not joined will suffer prejudice. The respondents' contention is that the *points in limine* i.e. non-compliance with the PIE Act and non-joinder, are interlinked and the parties who were not joined were also given notice in terms of the PIE Act.

[22] Regarding the *points in limine* in the supplementary affidavit, the applicant was offered an opportunity to consider the *points in limine* so raised and may apply for a postponement which will not be opposed. The applicant responded that there was nothing new in the *points in limine* and that counsel for the applicant has read them and was ready to proceed with the

points raised. The respondents contended that the applicant has not disputed that there is an elderly person 90 years old, children and other three persons residing on the premises where the eviction was to be effected. In its founding affidavit, the applicant stated that there are no elderly people or people with health problems or anybody else residing on the premises. The respondents' submission is that the other five people were supposed to have been joined in the eviction proceedings in terms of the PIE Act.

[23] According to the respondents, applicant's contention that it was not necessary to join the other five people as Section 4(2) includes all the unlawful occupiers is not helpful to the applicant. The Section 4(2) notice referred to by the applicant is defective and non-compliant with the court order which directed service by the sheriff but was not done in this case. It is trite law that a third party should be joined in a matter if it appears that the third party has a direct and substantial interest in the subject matter.

[24] In **Amalgamated Engineering Union .V. Minister of Labour 1949 (3) SA 637 (A)** the court held that a third party who may have a direct and substantial interest in any order the court might make in proceedings or if such an order cannot be substantiated or carried out into effect without prejudicing that party, is a necessary party and should be joined in the proceedings.

[25] The test is whether the party that is alleged to be a necessary party for a purpose of joinder had a legal interest in the subject matter of litigation which may be affected prejudicially by the judgment of the court in the proceedings concerned. The PIE Act specifically make mention of the elderly and children that need to be considered when the court is dealing with the eviction proceedings and the court has to authorise the manner of service in such circumstances. In my view, these occupiers need to be joined. The staff personnel, in my view, are to be joined as well as the lessee in this proceedings as they have direct and substantial interest in any order the court might make. As far as the lessee FCP is concerned there is a dispute as to whether the lease was cancelled or not. The lessee, in my opinion, is also an interested party and needs to be joined in this matter.

[26] I accordingly hold that the applicant should have joined all the other five occupants as mentioned above in these proceedings.

### **OVERLOOKING AND NOT PROPERLY CONSIDERING EVIDENCE**

[27] The applicant's submission is that the Section 4(2) notice has already been authorised by Madam Justice Van der Schyff and that all other unlawful occupiers have been served with Section (2) notice. It is further contended

by the applicant that the other occupiers are aware of the eviction proceedings and they are legally represented. The applicant argued that there is no need to join the other occupiers who are occupying the property through the first to the third respondents as there were properly served with the Section 4(2) notice.

[28] The respondents submitted that there was service of an unauthorised Section 4(2) notice which was not compliant with the PIE Act. It is further contended by the respondents that it does not matter that the respondents were legally represented or not the applicant still has to comply with the PIE Act which is peremptory.

[29] I have already held that the applicant's Section 4(2) notice is defective as it provided no date as to when the respondents must appear in court or what the reason of their eviction was. The fact that the first to the third respondents might have been aware of the eviction notice is not helpful to the applicant. There is no evidence that other occupiers, the elderly, children, employers and the lessee were served with the Section 4(2) notice and they were not joined in the eviction application. The assertion by the applicant that the first to third respondents must have informed the other occupiers is unconvincing and flawed as it is speculative.

[30] I reiterate that in my opinion the Section 4(2) is defective and that there is non-joinder of the other occupiers. This court considered all the evidence placed before it bar the evidence snuck in which was irregularly uploaded during the proceedings.

**FAILURE TO RECOGNISE JUDGMENTS REFERRED TO DURING ARGUMENT**

[31] The court considered all the evidence properly placed before it including all relevant judgments referred to by both counsel in this application. The facts of judgment comparable with the facts *in casu* were carefully considered and a ruling accordingly made.

**RESPONDENTS EFFECTIVELY INFORMED AND THAT THE POINTS IN LIMINE SHOULD HAVE BEEN DISMISSED AND THE APPLICATION GRANTED**

[32] The court dealt extensively and thoroughly with the factors it considered for the non-joinder of the other occupiers and the reasons why the *points in limine* were upheld as well as the dismissal of the applicant's application and this court does not intend to rehash and regurgitate same.

## **FLAGRANT CONDUCT**

[33] The uploading of the return of service during the proceedings without notifying Counsel for the respondents and without seeking the court's permission to do so is unbecoming of conduct expected from the legal representatives as officers of the court. Substitution and amendment of a court order without due processes being followed is despicable and not befitting of the conduct expected from a legal representative. Such conduct is punishable by the court with a punitive costs order to show its displeasure towards such unbecoming conduct. The applicant's Counsel conceded that such conduct was unacceptable and tendered an apology.

## **COSTS**

[34] The award of costs is a matter of judicial discretion by the court. The conduct of the applicant's legal representatives is in my view deserving of a punitive costs order. This court accordingly ordered a cost order on an attorney and client scale. The submissions made by both parties in the leave to appeal application were carefully considered and irrefutably and substantially dealt with. In the premises, I am not persuaded that the applicant demonstrated that there are prospect of success on appeal. I find that there are no compelling reasons why leave to appeal should be heard.

[35] There is non-compliance with the PIE Act as the Section 4(2) notice was defective; a fact admitted by the applicant in not so many words. Realising the defect in the Section 4(2) notice, an amendment and redrafted Section 4(2) notice was annexed to Madam Justice Van der Schyff's order which amended Section 4(2) notice but was never served before Madam Justice Van der Schyff.

[36] There is no evidence before court that the return of service was served on the respondents and other occupiers as the return of service was uploaded after the respondents' counsel had already addressed the court on the *points in limine* raised and the court was also not aware of such return of service as it was not before the court. The other occupiers as aforementioned were not joined in the eviction application. The conduct of the applicant's legal representatives cannot be tolerated as mentioned above and ought to be discouraged by the court. This court accordingly imposed a punitive costs order under the circumstances. The appeal has no reasonable prospect of success and no other court would make a finding in favour of the applicant.

[37] The leave to appeal, in my view, must fail.

I make the following order: -

The application of leave to appeal is refused with costs on attorney and client scale.

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**MADIBA AJ**

**APPEARANCES**  
**FOR THE APPLICANTS:**

**INSTRUCTED BY:**

**ADV LA PRETORIUS**

**VEZI & DE BEER INC**  
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**FOR THE 1<sup>ST</sup> – 3<sup>RD</sup> RESPONDENTS:**

**INSTRUCTED BY:**

**ADV NAUDE**

**MORNE COETZEE**  
**ATTORNEYS**  
REF: MCOETZEE H-HA-3742