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

GJ APPEAL CASE NO.: A2023/105517

GJ CASE NO.: 12423/2021

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED: YES
_2December2024 _____	
DATE	SIGNATURE

In the matter between:

**THE OCCUPIERS OF 2[...] O[...] D[...] B[...] STREET,
F[...] T[...], JOHANNESBURG**

Appellants

and

**EMIKON AUCTIONEERING SERVICE
AND IMPORT AND EXPORT (PTY) LTD**

First Respondent

**CITY OF JOHANNESBURG METROPOLITAN
MUNICIPALITY**

Second Respondent

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Summary: Appeal against dismissal of rescission application – order granted in absence of appellants - eviction application not properly served - principles pertaining to proper service restated – inaction of Municipality deprecated – proper case for rescission under Rule 42(1)(a) made out .

JUDGMENT

FARBER AJ (MUDAU AND DIPPENAAR JJ CONCURRING)

Introduction

[1] The appellants are the unlawful occupiers of an immovable property situate at 2[...] O[...] D[...] B[...] Street, F[...] Township, Johannesburg (“the property”). The property houses approximately 45 people, comprising 17 independent family units. One such unit is housed in a room of a residential dwelling erected on the property. The remaining units are housed on separately constructed makeshift shacks.

[2] The first respondent is the registered owner of the property. It sought and obtained an order from Senyatsi J on 19 July 2021 evicting the appellants from it. This order was granted in the absence of the appellants who, when it came to their knowledge, took a number of steps to redress the situation in which they then found themselves. One such step was an application for the rescission of the judgment for their eviction. This was opposed by the first respondent and ultimately dismissed by the order and judgment of Makume J (“the court *a quo*”) on 11 and 18 July 2023 respectively. However, and with its leave, the appellants now appeal against the whole of that judgment and order.

The facts

[3] The first respondent purchased the property on 3 March 2020 and on 2 October 2020 it was registered in its name. Mr Emmanuel Oradiegwu, a director of the first respondent endeavoured to contact the appellants in order to address their continued occupation of the property, seemingly with little success.

[4] On 11 February 2021 the first respondent's attorney Mr K Bam addressed a letter to the appellants demanding that they vacate the property within 30 days, failing which the first respondent would institute proceedings for their eviction from it. Although the letter was sent by registered post there is no evidence on record which suggests that the appellants received it. They certainly did not vacate the property as demanded of them.

[5] Not unexpectedly, the first respondent on 15 March 2021 instituted motion proceedings against the appellants for their eviction from the property and for relief ancillary thereto. It is alleged by the first respondent that service of the notice of motion, the founding affidavit and the annexures thereto was effected on the appellants. As to how that supposedly happened, the deputy sheriff recorded the following in his return of service:-

“THIS IS TO CERTIFY THAT ON THE 21ST MAY 221 (sic) AT 10H57 AT 2[...] O[...] D[...] B[...] STRET (sic) F[...] A COPY OF THE ANNEXED NOTICE OF MOTION, FOUNDING AFFIDAVIT AND ANNEXURE THERETO WAS DULY SERVED UPON MRS SUE MUKOKA OCCUPIER A RESPONSIBLE PERSON APPARENTLY NOT LESS THAN SIXTEEN YEARS OF AGE WHO ACCEPTED THE DOCUMENT ON BEHALF OF THE FIRST RESPONDENT AND UNLAWFUL OCCUPIERS OCCUPYING 2[...] O[...] D[...] B[...] STREET F[...] JOHANNESBURG (AND ALL THOSE OCCUPYING UNDER THE FIRST RESPONDENT) AFTER THE DOCUMENT HAD BEEN SHOWN AND THE NATURE AND CONTENTS THEREOF EXPLAINED TO THE SAID MRS SUE MUKOKA”

[6] On 25 May 2021 the first respondent issued the notice required of it in terms of section 4(2) of The Prevention of Illegal Eviction and Unlawful Occupation of Land Act No 19 of 1998 (PIE). This notice, *inter alia*, recorded that the first

respondent intended to make application to the High Court in Johannesburg on 19 July 2021 for the eviction of the appellants from the property. The forms and contents of the notice were in terms of section 4(2) of PIE authorised by the High Court, which, *inter alia*, directed that it be served “ON ALL UNLAWFUL OCCUPIERS OCCUPYING 2[...] O[...] B[...] STREET, F[...], JOHANNESBURG (And all those occupying under the First Respondent) (the First Respondent) being adult persons whose full and further particulars are to the Applicant unknown, by the Sheriff within whose area of jurisdiction the property situation 2[...] O[...] B[...] STREET, F[...] JOHANNESBURG in terms of Rule 4 of the Uniform Rules of the above Honourable Court;”

[7] On 21 June 2021 the deputy sheriff sought to serve the notice on the appellants. As to what he actually did appears more fully from his return of service which reads as follows:-

“THIS IS TO CERIFY THAT ON THE 21ST JUNE 2021 AT 09H58 AT 2[...] O[...] D[...] B[...] STREET F[...] A COPY OF THE ANNEXED DRAFT ORDER MARKED “X” DATED 7TH JUNE 2021 AND NOTICE IN TERMS OF SECTION 4(2) OF THE PREVENTION OF ILLEGAL EVICTION FROM AND UNLAWFUL OCCUPATION OF LAND ACT 19 OF 1998 WAS DULY SERVED UPON MRS FIKILE MBATHA OCCUPIER A RESPONSIBLE PERSON APPARENTLY NOT LESS THAN SIXTEEN YEARS OF AGE WHO ACCEPTED THE DOCUMENT ON BEHALF OF THE FIRST RESPONDENT ALL UNLAWFUL OCCUPIERS OCCUPYING 2[...] O[...] D[...] B[...] STREET F[...] (AND ALL THOSE OCCUPYING UNDER THE FIRST RESPONDENT) AFTER THE DOCUMENT HAD BEEN SHOWN AND THE NATURE AND CONTENTS THEREOF EXPLAINED TO THE SAID FIKILE MBATHA”

[8] On 7 July 2021 the first respondent issued the notice of set-down reflecting that the matter would be heard on 19 July 2021. The notice was addressed to the Registrar. It was not served on the appellants.

[9] The matter was heard in the absence of the appellants on 19 July 2021, on which occasion Senyatsi J in the unopposed motion court granted an order evicting them and all persons claiming occupation through and under them from the property. This order is said to have been served on 16 August 2021. The deputy sheriff's return in this regard records the following:-

“THIS IS TO CERIFY THAT ON THE 16TH AUGUST 2021 AT 11H18 AT 20 OP DE BERGEN STREET FAIRVIEW BEING THE CHOSEN DOMICILIUM CITANDI ET EXECUTANDI OF THE FIRST RESPONDENT A COPY OF THE ANNEXED FILING SHEET: COURT ORDER MARKED “X” DATED 19TH JULY 2021 WAS DULY SERVED UPON MR NELSON LUWALURA OCCUPIER A RESPONSIBLE PERSON APPARENTLY NOT LESS THEN 16 YEARS OF AGE WHO ACCEPTED THE DOCUMENT ON BEHALF OF THE FIRST RESPONDENT ALL UNLAWFUL OCCUPIERS OCCUPYING 2[...] O[...] D[...] B[...] STREET F[...] JOHANNESBURG (AND ALL THOSE OCCUPYING UNDER THE FIRST RESPONDENT) AFTER THE DOCUMENT HAD BEEN SHOWN AND THE NATURE AND CONTENTS THEREOF EXPLAINED TO THE SAID MR NELSON LUWALURA”

[10] A writ of execution was issued on 25 January 2022 and more than one and a half years later on 7 June 2023 the appellants were pursuant to it evicted from the property by members of the South African Police Services and *“other persons clothed in red overalls, the red ants ...”*. They were accompanied by the sheriff. The appellants were on that occasion furnished with the order of court authorising their eviction from the property.

[11] The appellants on that day reported what had happened to the attorneys who had represented them in prior related litigation. They immediately went to the property, apparently to attempt to restore the appellants' prior occupation of it. This was to no avail. The appellants nonetheless again took occupation of the property. A number of procedures were thereafter instituted to preserve the appellants' continued occupation of the property. This included an urgent application launched on 8 June 2023 for an order restoring them to occupation of the property. The matter was struck from the roll for want of urgency. The appellants were not daunted for on 10 June 2023 they launched a further urgent application to stay the writ of execution

and to restore their occupation of the property pending the determination of an application to rescind the judgment evicting them from it. Shepstone AJ on 12 June 2023, dismissed the application on the basis that the appellants had not sought to set aside the writ of execution which had underpinned their ejection and consequently what they now sought was not within his competence to grant. The writ had by then already been executed. The appellants thereafter instituted an urgent application for the rescission and the setting aside of the eviction order of 19 July 2021, alternatively for the variation of that order by staying the eviction pending the finalisation of a process designed to secure temporary alternative accommodation for them. The matter was opposed, and was ultimately heard by the court *a quo* which on 11 July 2023 dismissed it with costs. The court *a quo* furnished reasons for so doing on 18 July 2023.

The appellants then lodged an application for leave to appeal. Shortly thereafter the appellants launched an urgent application seeking a suspension of the eviction order pending the determination of their application for leave to appeal or the determination of any subsequent applications for leave to appeal. The first respondent on that occasion furnished an undertaking that it would not attempt to evict the appellants from the property until the rescission application had been finally determined.

[12] As I have already indicated leave to appeal to this court was granted by the court *a quo* on 4 October 2023.

The issues

[13] The appellants in the court *a quo* contended that the application for their eviction and the notice in terms of Section 4(2) was not served on them and that they were quite unaware of the institution of the proceedings and its enrolment for hearing on 19 July 2021. They further contended that had they been aware of the proceedings they would have been opposed. They in this regard assert that the eviction sought by the first respondent, if granted, would render them homeless and that their personal circumstances were such that their eviction from the property would not be equitable as required under PIE, unless some satisfactory arrangement was made in relation to the grant to them of alternative accommodation. The appellants consist of approximately 45 persons, comprising 17 households of which

16 are women, 16 are men and 13 are children. The children attend nearby schools and the residents perform their informal jobs in the vicinity.

[14] The thrust of the appellants' case for the rescission of the impugned judgment was founded on the contention that it had been erroneously sought and granted in their absence and thus fell to be set aside under the provisions of Rule 42(1)(a) of the Uniform Rules of Court, alternatively under the common law. It was contended that the service which was effected by the Sheriff was not effected on persons who were occupying the property, but on other unknown individuals. It was further argued that the issue was not *res iudicata* and the appellants were entitled to rescission of the judgment. In the alternative it was argued that the eviction order should be varied to link the order to the provision of emergency temporary accommodation by the Municipality.

[15] The rescission application was strenuously opposed. The first respondent contended that proper service of the application for eviction and the notice in terms of Section 4(2) of PIE had been effected but despite that the appellants had taken no steps to defend their position, which failure endured for a period of almost two years from 21 June 2021 to 7 June 2023. This failure, so it was urged, represented an absolute bar to the relief sought.

[16] The first respondent moreover contended that given the judgment of Shepstone AJ the appellants were on the basis of the doctrine of *res judicata* precluded from assailing their eviction from the property.

[17] The first respondent did not deliver heads of argument and its attorneys of record withdrew prior to the hearing of the appeal. Notwithstanding that the notice of set down was served on the first respondent, it did not remedy its default or give any indication that it persisted with opposing the appeal.

The Judgment of the court a quo

[18] The court *a quo* non-suited the appellants on several grounds.

[19] Firstly, it found that the appellants had been aware of the order for their eviction since 2021 and there had been inordinate delay on their part in instituting the application for its rescission. This, so it was found, constituted a bar to the relief sought by the appellants.

[20] Secondly, it held that the appellants' contention that the papers in the eviction proceedings, and the notice in terms of Section 4(2) of PIE had not been served on them constituted *"a fallacy meant to mislead the court."* It in this regard stated the following in paragraph [15]:-

"The persons whom the processes were served identified themselves to the Sheriff and even confirmed that they lived on the premises. If the people did not live there why did they accept service? It does not make sense. It would have been very easy for all the three persons to tell the sheriff that they do not live there and then walk away. The mere fact that they actually gave their names to a person they do not know gives credence to the fact that indeed they lived there."

[21] It went on to say the following in paragraph [17]:-

"... . In my view it will be foolhardy to expect such an owner to serve on each and every illegal occupier. Service on the occupiers was sufficient. The Applicants knew about this matter as early as 2021 and decided to ignore it. They can now (not) be heard to cry foul that they did not know."

[22] Thirdly, it held that as the appellants had since 2013 known that they had no title to remain on the property it was not open to them to now claim that the eviction which had been decreed at the instance of the first respondent was *"in any manner faulty"*.

[23] Fourthly, it referred to the judgment of Shepstone AJ and held *"that the writ of execution cannot be dealt separately from the application for rescission the one compliments the other."* It went on to find the following in paragraph 16 of its judgment:-

"There is also in my view a point taken by the Respondent that the matter is res judicata because Shepstone AJ has already made a ruling on the facts

even though that matter was about stay of execution. I have already indicated about that the two are interlinked. The facts in the stay application are the same as in this application. This is a typical case of the application of the English Rule of 'once and for all.' The facts relied upon in the stay application are the same in this application. In the result the point that this application is res judicata has a semblance of success and cannot be ignored. The two applications must be compared in their entirety."

An appraisal of the facts determined by the court a quo

[24] Regrettably, the seminal factual finding which led to the dismissal of appellants' application for the rescission of the judgment was misplaced.

[25] It is incorrect to suggest (as the court *a quo* did) that the appellants had been aware of the judgment for their eviction from the property. Their constant refrain under oath was that they only became aware of the judgment on 7 June 2023 when they were evicted from the property. This evidence was not gainsaid and it is by no means clear why the court *a quo* rejected it. As will presently emerge, service of the papers in the eviction application and of the notice in terms of Section 4(2) of PIE was not properly effected and did not draw the attention of the appellants that legal steps had been taken to secure their eviction from the property. The notice of set-down was moreover not served on them. It thus follows that the finding of the court *a quo* that the appellants had inordinately delayed in instituting the application for the rescission of the judgment sanctioning their eviction from the property cannot be sustained. On the contrary, the appellants took a number of procedural steps to redress the unenviable situation in which they found themselves. They did so with great promptitude.

[26] The question of delay simply does not enter the equation.

The defence of the res judicata

[27] The issues which Shepstone AJ had to determine in relation to the appellants' application to stay the writ of execution and to restore them to the property were not the same issues which arose for determination in the rescission application.

[28] Shepstone AJ was not required to determine whether the judgment for the appellants' eviction had been properly sought and properly granted within the meaning of Uniform Rule of Court 4(1)(a). He was moreover not required to determine whether under common law the appellants had made out a case for the rescission of that judgment. Shepstone AJ's sole concern related to the question whether, in light of the fact that steps had not been taken to set aside the writ, the appellants had made out a case for the stay of the eviction and the interim restoration of occupation of the property to them.

[29] The issues in both applications were disparate. It is trite that in those circumstances the doctrine of *res judicata* can have no application.¹

The regulation of service

[30] The service of process is governed by Uniform Rule of Court 4, the relevant provision of which read as follows:-

“ 4(1)(a) Service of any process of the court directed to the sheriff and subject to the provisions of paragraph (aA) any document initiating application proceedings shall be effected by the sheriff in one or other of the following manners.

(i) by delivering a copy thereof to the said person personally: Provided that where such person is a minor or a person under legal disability, service

¹ *National Sorghum Breweries v International Liquor Distributors* 2001(2) SA 233 (SCA) at para [9]

shall be effected upon the guardian, tutor, curator or the like of such minor or person under disability.

(ii) by leaving a copy thereof at the place of residence or business of the said person, guardian, tutor, curator or the like with the person apparently in charge of the premises at the time of delivery, being a person apparently not less than sixteen years of age. For the purposes of this paragraph when a building other than an hotel, boarding-house, hostel or similar residential building is occupied by more than one person or family, 'residence' or 'place of business' means that portion of the building occupied by the person upon whom service is to be effected;

(iii) ...

(iv) ...”

[31] It is manifest that the deputy sheriff chose to effect service of the notice of motion and founding affidavit in the eviction application and the notice in terms of section 4(2) of PIE pursuant to Rule 4(1)(a)(ii). Such recourse was in my judgment ill-conceived. As I have previously stated the property was the home of approximately 45 persons comprising 17 independent family units. One such unit occupied a room in the dwelling situate on the property. The remaining 16 units occupied makeshift shacks which had been erected on it.

[32] It is in this regard clear that the persons upon whom service was effected in each instance were not in charge of the separate dwellings located on the property. On this ground alone reliance on Rule 4(1)(a)(ii) must fail. The suggestion that the persons upon whom service was effected had been authorised to accept service on behalf of the appellants is no substitute for what the rule in express terms enjoins. Moreover, the suggested authority of those persons has been placed in sharp dispute by the appellants. They have on oath stated that the persons in question are not known to them and certainly did not have their authority to accept service on their behalf. This has not been gainsaid by the first respondent and there is no basis upon which that body of evidence falls to be rejected. It is thus clear that service of the three documents in question did not accord with the requirements of Rule 4(1)(a)(ii)

or for that matter any of the other Rules regulating the manner in which service is to be effected.²

[33] The appellants have been consistent in their contention that they were unaware of the issue of process in the eviction proceedings, the notice in terms of section 4(2) of PIE and the date on which those proceedings had been enrolled for hearing. Equally, they were unaware that an order for their eviction was granted on 19 July 2021. There is on the papers no reason to doubt their word on the matter. It should in this regard be remembered that once they had on 7 June 2023 become aware of the facts the appellants zealously sought to safeguard their position. I have little doubt that they would have done the same had they been aware that the first respondent had instituted proceedings for their eviction from the property and that the matter was to be dealt with in court on 19 July 2021. This represents a cogent factor indicating that the appellants' lack of knowledge was not contrived (as suggested by the court *a quo*) but real.

Uniform Rule of Court 42

[34] Under Uniform Rule of Court 42(1)(a) Court may *mero motu* or upon the application of any party affected rescind or vary an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby. It is well established that in the absence of proper notice to the absent party a judgment will be erroneously sought and erroneously granted.³ I have little doubt that had the court *a quo* been aware of the defective service it would have declined to enter judgment against the appellants authorising their eviction from the property. It accordingly seems to me that the judgment under scrutiny was erroneously sought and erroneously granted within the meaning of Rule 42(1)(a).

² On the importance of service generally see *Mntambo and others v Changing Tides 74 (Pty) Ltd* (08/39225) [2009] ZAGPJHC 17 (4 May 2009) at para [4].

³ Harms: Civil Procedure in the Superior Courts B-303; *HMT Projects (Pty) Ltd v Van der Heever NO and other* [2023] ZAGP PPHG 3 at para [20].

[35] For the application for Rule 42(1)(a) it is not necessary for an applicant who seeks relief thereunder to show the existence of a *bona fide* defence to the action.⁴ The Rule is not peremptory and this holds the implication that if it appears that the applicant for relief does not have a good defence rescission need not follow mechanically despite the fact that the judgment was erroneously sought and erroneously granted.

[36] This having been said I have little doubt that the appellants do have a *bona fide* defence.⁵ Under the provisions of section 4(7) of PIE a court needs to determine whether the eviction sought is just and equitable in all the circumstances. The appellants make out the case that the eviction will render them homeless. This factor alone will compel a court to make enquiries relating to the availability of alternative accommodation and the suitability thereof. The facts advanced by the appellants *prima facie* suggest that the order of the court *a quo* did not bring about a fair and equitable result as foreshadowed in section 4(7) of PIE, at least in the terms in which it was made.

[37] In the result I am persuaded that the appellants have, as required by Rule 42(1)(a), made good and sufficient cause for the rescission of the assailed judgment. It is consequently not necessary to consider the position under common law in any detail. I need merely record that the common law remedy which the appellants relied upon in the alternative is in my view wide enough to warrant the rescission of the judgment. All that need be demonstrated for relief on that basis is the existence of both a reasonable and acceptable explanation for the default and a *bona fide* defence.⁶ That is dispositive of the appeal and it is not necessary to consider the other issues raised in any detail.

Incidental matters

⁴ Harms: Civil Procedure in the Superior Courts B-303.

⁵ *City of Johannesburg v Charging tides 74 (Pty) Ltd and others* 2012(6) SA 294 (SCA) at para [20], *City of Johannesburg v Blue Moonlight Properties* 2012(2) SA 104 (CC).

⁶ See *De Wet v Western Bank Ltd* 1979(2) SA 1031(A) at 1042; *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 764, *Naidoo and Another v Matlala NO and Others* 2012 (1) 143 (GNP) and *Moshoeshoe and Another v Firstrand Bank Ltd and Others* [2018] 2 ALL SA 236 (GJ).

[38] As I have indicated there has not been proper service of the processes which I have identified. It is clear that Rule 42 is not sufficiently wide in its terms to allow for an efficacious service on the very many illegal occupiers of a single property which has several separate dwellings occupied by different family units located on it. In this type of case practitioners need to give serious attention to Rule 4(2) or section 4(4) of PIE which makes provision for substituted service where it is not possible to effect service in one of the manners prescribed in Rule 4(1). Provisions for the use of loud hailers by the deputy sheriff to inform occupiers of the process in question, the frequency of that use and the time of day when it should be resorted to need to be considered. It may also be necessary to affix the process in question to boards erected at prominent places on the property. The affixing of the process to the door of each of the dwellings situate on the property, postulating that each dwelling is capable of being identified, represents an available option. The list is not exhaustive and no doubt there are other methods outside the provisions of Rule 4(1) to ensure that service is efficacious.

[39] The City of Johannesburg Metropolitan Municipality (the City) was cited as the second respondent in the eviction proceedings. It did not enter the fray and did not make available to the Court a quo information which would enable it to assess whether the eviction of the appellants and the terms under which it was to occur were in all the circumstances equitable. This is to be deprecated. The owners of immovable properties and the unlawful occupiers thereof have competing interests. The owners of properties would wish to exploit their rights of ownership to them to the best possible advantage. The unlawful occupiers enjoy the right to housing and by definition their occupation occurs against the will of the respective owners thereof. The tension created in consequence of these competing rights is manifest and the City has an important and fundamental role to play in ensuring that such tension is contained and satisfactorily resolved. It needs to report to the court on a variety of matters so as to ensure that any eviction is in the circumstances equitable.

[40] It seems to me to be only proper that this judgment is to be drawn to the attention of the City's manager. Hopefully, this will put to an end the inaction of the City of the kind which occurred in this case.

[41] In the result an order in the following terms will issue:-

- A. The appeal is upheld.
- B. The order of the court *a quo* is set aside and is to be substituted with the following order:-
 - “1. The judgment of Senyatsi J evicting the applicants from the immovable property situate at 2[...] O[...] D[...] B[...] S[...], F[...] Township, Johannesburg is rescinded.
 - 2. The first respondent is to pay the costs of the application for rescission.”
- C. The Registrar is directed to furnish the manager of the City of Johannesburg Metropolitan Municipality with a copy of this judgment and to direct his attention to paragraph [39] thereof.
- D. There will be no order for costs.

G FARBER
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

APPEARANCES

FOR APPELLANT:
INSTRUCTED BY:

ADV LWAZI MTSHIYO
SERI LAW CLINIC
 Office No. 601, Nzunza House
 88 Jorissen Street
 Braamfontein
 Johannesburg
 2017
 Tel: (011) 356 5860
 E-mail nkosinathi@seri-sa.org
muano@seri-sa.org
 Ref: NK SITHOLE

For the Respondents:

No Appearance