

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: **2024-084568**

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
<u>25 June 2025</u>	
DATE	SIGNATURE

In the matter between:

GEORGE TROSKIE DE LANGE

Applicant

and

JOHANNES HENDRIK BENADE

First Respondent

LEE-ANN VERA BENADE

Second Respondent

CITY OF TSHWANE METROPOLITAN MUNICIPALITY

Third Respondent

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be **25 June 2025**.

JUDGMENT

KUBUSHI, J

[1] This is an *ex parte* application in terms of section 4(2) of the Prevention of Illegal Evictions from and the Unlawful Occupation of Land Act,¹ whereby the Applicant sought authorisation for the service of the Section 4(2) Notice on the First and Second Respondents ("the Respondents"). The matter served before me in the unopposed motion court of 17 March 2025. The application was opposed, the Respondents having filed the notice to oppose on 12 March 2025. The Respondents had not filed an answering affidavit but maintained that their entitled to argue the matter from the bar since the ground of opposition was on a point of law.

[2] The issue that was to be decided was whether the section 4(2) application complied with the provisions of section 4(5)(c) and if so, whether such non-compliance rendered the application defective.

[3] The present application is an interlocutory application in an application for eviction of the Respondents from a property alleged to be that of the Applicant. ("the eviction application"). The eviction application was opposed, and the pleadings were closed. Heads of Argument had been filed, and the Registrar had allocated the opposed hearing date for 5 May 2025. As this is an *ex parte* application, it was not served on the Respondents. The Respondents were said to have come to know about the application on 12 March 2025. A letter was written by the Respondents' attorneys to the Applicants' attorneys informing them that the application was defective and that the Applicant start the application *de novo*. The Applicant's counsel submitted that the said letter was responded to, but the response appeared not to be uploaded onto Caselines, as such, the contents thereof were not taken into consideration for purposes of this judgment.

[4] In terms of section 4(2) at least fourteen (14) days before the hearing of the proceedings contemplated in sub-section (1), the court must serve written and effective notice of the proceedings on the unlawful occupier and the municipality having jurisdiction. The section is to be read with sub-section (5) which provides for requirements that the notice of proceedings contemplated in sub-section (2) should comply with.

¹ Act 9 of 1998.

[5] The contention by the Applicant's counsel was that there was no basis or merit for the Respondents to oppose an *ex parte* application where an order is sought to get the sanction from the court to inform the Respondents of the day on which the eviction application was to be heard. Counsel argued that any defence which the Respondents might have to the eviction, must be raised on that date. There was no merit for the Respondents to convert the section 4(2) application, that was an *ex parte* application, into an opposed application, counsel argued.

[6] The gravamen of the Respondents' complaint was that the Applicant's *ex parte* application in terms of section 4(2) was defective. Counsel argued that the Respondents' opposition was not premised on the procedural aspect as argued by the Applicants' counsel, but on the substance of the application. Counsel conceded that, procedurally there was nothing wrong with the application, what was at issue was the substance of the application.

[7] The contention by the Respondents' counsel was that the section 4(2) application did not comply with the provisions of section 4(5)(c) which requires the Applicant to set out the grounds upon which the eviction is sought. The non-compliance according to the Respondents' counsel was that the cause of action set out in the section 4(2) founding affidavit was materially different from the cause of action on which the eviction application was premised.

[8] The Respondents' counsel argued that the ground for eviction in the section 4(2) application must concur with the ground for eviction in the eviction application. If they are different, a new cause of action is introduced which is contrary to the provisions of section 4(5)(c). The submission was that the Applicant was prohibited in law and in fact to introduce a new cause of action in the *ex parte* founding affidavit.

[9] Section 4(5)(c) provides that the notice of proceedings contemplated in subsection (2) must set out the grounds for the proposed eviction. It is worth noting that the word "must" is used in the said subsection which gives a connotation that compliance is peremptory. It means that the sub-section must be complied with and that failure to comply might render the application defective.

[10] It was common cause between the parties that the cause of action on which the eviction application was premised was that of breach of a lease agreement. The Applicant alleged in the founding affidavit to the eviction application that there was a

lease agreement concluded by the parties and the Respondents failed to pay rental and, as such, breached the terms of the said agreement. As a result of such breach, the Applicant cancelled the lease agreement. This is basically what was pleaded in the founding affidavit to the eviction application. The ground that is pleaded in the section 4(2) application is that the lease agreement has come to an end by effluxion of time.

[11] On the face of the two applications it is clear that these are two different grounds or causes of action set out for the eviction. However, the Applicant's counsel denied that the cause of action in the section 4(2) application was a new cause of action. He argued that the cause of action had to be changed because, as he put it, life happened, as the lease agreement had, at the time of instituting the section 4(2) application, lapsed due to effluxion of time.

[12] According to the Respondent, the cause of action raised in the section 4(2) application made its first appearance in the papers in the replying affidavit. The alleged new cause of action was said to be a subject of a legal argument in the eviction application and was raised as a point *in limine* in the heads of argument. As such, the Respondent's counsel argued that the Applicant wanted to have a tactical advantage by raising a new cause of action for the first time in the reply. This, according to counsel, was litigation by ambush. Counsel submitted that the Respondents had to oppose the section 4(2) application on this fact, otherwise, the Applicant would during argument in the eviction application, argue that the Respondents acquiesced to the new cause of action.

[13] I have to conclude without deciding the point, that, the ground for the eviction set out in the section 4(2) application is materially different from the ground for the eviction set out in the eviction application. On that basis, there is no compliance with the requirements of section 4(5)(c). I have already indicated that compliance with the provisions of sub-section 4(5)(c) is imperative. Non-compliance in this regard, is a substantial non-compliance which cannot be condoned by the court, because strict compliance is required by the provisions of section 4(5)(c).

[14] I must also add, in passing, that because the section 4(2) application was instituted *ex parte*, as is the norm, it should comply with all the requirements of an *ex parte* application. Counsel for the Applicant gave an explanation orally in court why it

was that the cause of action appeared to be different to that disclosed in the eviction application. This explanation should have formed part of the evidence in the founding affidavit of the section 4(2) application.

[15] Counsel for the Respondents in his argument referred, correctly, to the decision in *Schlesinger v Schlesinger*,² a judgment which is mostly referred to as the *locus classicus* when it comes to *ex parte* applications. The court in that judgment held that in *ex parte* applications all material facts must be disclosed which might influence a court in coming to a decision.

[16] My conclusion is that the application should in essence be dismissed. However, dismissing the application at this stage seems to be a harsh step to take for the Applicant. Notification of the Respondents is a condition precedent to the hearing of the eviction application, and I am reluctant to shut the door on the Applicant at this stage. Striking the application from the roll to allow the Applicant to institute same *de novo*, seems more appropriate under the circumstances.

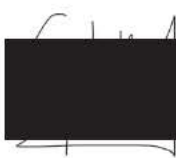
[17] This judgment is delivered terribly late. The matter was heard in March 2025, and the judgment ought to have been delivered before the hearing of the eviction application, which was on 5 May 2025. I have to apologise profusely for such lateness, which was occasioned by circumstances beyond my control. I have, during the better part of that period, been afflicted by illness.

[18] On the issue of costs, the Respondents' counsel argued that the Applicant should be held accountable for the Respondents unnecessary costs, including costs of counsel on Scale B. In the exercise of my discretion, it is my view that costs in this application should follow the successful parties. The Respondents are entitled', as the successful parties, to their costs.

[19] In the premises I make the following order

1. The application is struck from the roll.
2. The Applicant is ordered to pay the costs of the application which costs shall include the costs of counsel on scale B.

² 1979(4) SA 342 (W).



E.M KUBUSHI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES:

For the Applicant:

Instructed by:

Adv CJC NEL

Assenmacher Brandt attorneys

Tel: 011 706 1312

For the First & Second Respondents

Instructed by:

Adv Scheepers

Basson attorneys inc.

Tel: 010 020 6275

Date of the hearing:

17 March 2025

Date of judgment:

25 June 2025