

REPUBLIC OF SOUTH AFRICA



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

Case Number: 2024-139943

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES /NO
(3)	REVISED: NO
8 October 2025	
DATE	SIGNATURE

In the matter between:

MPHATSO UMNDENI ENTERPRISES

(Registration Number: 2021/803914/07)

NGOAKOANA MATILDAH MOLOTO

TSHEPO JOHANN MOLOTO

First Applicant

Second Applicant

Third Applicant

and

CGH PROPERTY 25 PROPRIETARY LIMITED

Respondent

JUDGMENT

NOKO J.

Introduction

[1] The applicants initially instituted an urgent application in terms of Rule 45A of the Uniform Rules of Court to stay the execution of the warrants of execution and ejectment issued in June 2025 by the magistrate's court, as the dispute between the parties is pending in this division. The applicants have subsequently filed supplementary papers, now contending, *inter alia*, that their application is predicated on Section 173 of the Constitution and seek to interdict the execution of the warrants referred to above.

[2] The applicants in their amended notice of motion set out the following prayers:

1. That the forms and service provided for in the rules of this Honourable Court are dispensed with as provided for in Rule 6(12) (a) of the Uniform Rules, and the matter is enrolled as an urgent application;
2. Reinstate the matter under the above case number on the urgent court roll.
3. Granting the Applicants leave to file the attached further supplementary affidavit and directing that its contents be received into evidence and considered in the adjudication of this application;
4. Granting the Applicants leave to correct the citation of the Prevention of Illegal Eviction from Unlawful Occupation of Land Act (PIE Act) to a Commercial Act.

5. That a rule nisi be issued calling upon the Respondent to show cause, if any, to this Honourable Court on a date to be arranged by the registrar, why an order in the following terms should not be made final.

Background

[3] The parties entered into a lease agreement of a business premises, *to wit*, Shop 1 Pink Peonies Pretoria Road situated at 75 Pretoria Road, Kempton Park (“*Property*”). The applicants fell into arrears, and the respondent evicted the applicant, allegedly by physically removing them on or about 18 October 2024, and locked them out without an order of court.

[4] The applicants launched an application in this division under the above case number for two orders. First, an order to set aside the illegal ejectment (“*ejectment suit*”) and reinstate the applicants in the property. Second, an application for the order directing the respondent to pay damages for the loss of profit suffered during the period when the applicants were unlawfully ejected (“*damages suit*”).

[5] The respondent alleges that the respondent opted not to challenge the ejectment suit and offered to reinstate the applicants, which was accepted by the applicants. On the version of the applicants, they were reinstated on 21 November 2024.¹

[6] On 6 February 2025 the respondent launched proceedings in the magistrate’s court for payment of the arrears rental in the sum of R 115 149.92, cancellation of the lease agreement, and ejectment from the property. The applicants defended the action. The respondent applied for summary judgment which was granted on 26 June 2025. The applicants lodged a request for reasons² which is dated 27 June 2025. The applicants allege that follow-ups were made to the clerk of the magistrate’s court to obtain the reasons and were told that they were not ready.

[7] The respondent applied on 21 August 2025 to the clerk of the magistrate’s court to issue two warrants, for attachment and ejectment, which were issued on 25 August 2025. The

¹ See para 9 of the Applicants’ supplementary Heads of Argument.

² The said request has as its heading Notice of Appeal, and it appears not to be disputed that the notice is the request for reasons and not a notice of appeal.

respondent instructed the sheriff of the court to execute the warrant, which was executed on 2 September 2025. The applicants then launched an urgent application to stay the execution of the warrants pending finalisation of the *lis* instituted for damages in this division referred to above. The other reason advanced was that the order granted by the magistrate should be stayed in terms of Rule 45 of the Uniform Rules of Court.

[8] The application was set down for hearing on 16 September 2025 before Raubenheimer AJ and which was, according to the applicants, removed from the urgent roll. On the other hand, the respondent contends that the application was argued before Raubenheimer AJ and struck off the roll for lack of urgency.

[9] The applicant re-enrolled the application and sought to amend the cause of action launched in terms of Rule 45, as the said Rule is not applicable, and sought to substitute the same with section 173 of the Constitution. The applicants further contend that there is a *lis* pending and as such it was improper for the respondent to execute in terms of the order of the magistrate's court. Furthermore, the *lis* by the respondent is subject to the principle of *res judicata* since the issue of ejectment has been adjudicated in this division when the respondent agreed to settle the ejectment suit.

[10] The respondent opposes the application on the basis that, first, the applicants incorrectly used the same case number as the one used in their damages suit. Second, it is incorrect to state that their urgent application was removed from the roll, when in fact, it was struck from the roll. Third, it is incompetent to predicate a claim based on Section 173 of the Constitution.

Issues for determination

[11] Several issues have been raised for determination, urgency; the points *in limine* of *lis pendens*, *res judicata*, issue of incorrect case numbers, point *in limine* of *res judicata*.

Urgency

[12] The warrant of ejectment of the applicants was executed on 2 September 2025. The applicants then launched urgent proceedings in terms of Rule 45 and enrol it for

16 September 2025. The said application, as indicated above, was removed according to the applicants but was struck off the roll as stated by the respondent. The applicants then enrolled the matter for 23 September 2025 and now contend that their cause of action is not Rule 45 but Section 173 of the Constitution. Though not in explicit terms, the applicants contend that they would lose business and profit if they proceed on the normal course.

[13] The respondent in opposition contends that the warrants were issued pursuant to the orders of the magistrate's court, which were granted on 26 June 2025. That if the applicants intended to challenge the said orders, they could have done so within 10 days of the order, or if so advised, within 15 days after receiving the reasons for the judgment. The request was made on 27 June 2025, and since then, no action has been taken by the applicants except to state that enquiries were made with the clerk of the court, with no result. In view of the nonchalant posture adopted by the applicants, urgency was therefore self-created.

[14] I had regard to the application and have noted that there was also non-compliance with the Practice Directives. The relevant provisions of Chapter 9.23 of the Practice Manual provide as follows:

(3) If the urgent application cannot be brought at 10h00 on the Tuesday of the motion court week, it may be brought on any other day of the motion court week at 10h00. The applicant must, in the founding affidavit, set out facts to justify the bringing of the application at a time other than 10h00 on Tuesday.

(4) If the urgent application cannot be brought at 10h00 on any day during the motion court week, it may be brought at 11h30 or 14h00 on any day during the motion court week. The applicant in the founding affidavit must set out facts which justify the bringing of the application at a time other than 10h00 on Tuesday and other than 10h00 of the relevant court day.

(6) The aforementioned requirements are in addition to the applicant's obligation to set out explicitly the circumstances that render the matter urgent. In this regard, it is

emphasised that while an application may be urgent, it may not be sufficiently urgent to be heard at the time selected by the applicant.

(9) Unless the circumstances are such that no notice of the application is given to the respondent, or unless the urgency is so great that it is impossible to comply therewith, the notice of motion must follow the form of Form 2(a) of the First Schedule of the rules of court and therefore must provide a reasonable time, place and method for the respondent to give notice of intention to oppose the application and must further provide a reasonable time within which the respondent may file an answering affidavit. The date and time selected by the applicant for the enrolment of the application must enable the applicant to file a replying affidavit if necessary.

(10) Deviation from the time periods prescribed by the rules of court must be strictly commensurate with the urgency of the matter as set out in the founding papers.

(12) If the facts and circumstances set out in the applicant's affidavits do not:

12.1 constitute sufficient urgency for the application to be brought as an urgent application; and/or (12) If the facts and circumstances set out in the applicant's affidavits do not: 12.1 constitute sufficient urgency for the application to be brought as an urgent application; and/or

12.2 justify the abrogation or curtailment of the time periods referred to in Rule 6(5); and/or

12.3 justify the failure to serve the application as required in Rule 4, the Court will decline to grant an order for the enrolment of the application as an urgent application and/or for the dispensing of the forms and services provided for in the rule.

[15] The respondent's counsel submitted that the application served before another judge in an urgent court, who listened to arguments and struck the matter from the roll for lack of urgency. In contrast, it appears to the applicants that the matter was instead just removed

from the roll. Under the circumstances, the respondent contends that the issue of urgency has been adjudicated, and this court cannot sit as a court of appeal. It appears that the crafting of the papers now under the provisions of Section 173 of the Constitution changed the profile of the application, and to this end, the matter may be adjudicated on the basis that it was never decided. That notwithstanding, the applicants should have issued a new application with a different case number. In addition, adding Section 173 is used as a ploy to avoid the implication of the striking off of the same application with the same facts.

Submissions and legal analysis

[16] The applicants' contention that the issue of ejectment has been decided when the respondent settled the *ejectment suit* with the applicants and reinstated them. The applicant argues that it was therefore improper for the magistrate's court to adjudicate over the same issue that was settled by the parties. In this regard, the applicants raised a point in limine of *res judicata*.

[17] The respondent in retort contended that the settlement between the parties in the *ejectment suit* was not made an order of the court, and the *lis* was never adjudicated upon. In the premises, the point *in limine* of *res judicata* does not find application.

[18] It is trite that a defence of *res judicata* can be sustained where there has been a final judgment and the judgment is not a subject of appeal. It was also stated in the *Bafokeng Tribe*³ that:

“... I find that the essentials of the *exceptio res judicata* are threefold, namely that the previous judgment was given in an action or application by a competent court (1) between the same parties, (2) based on the same cause of action (*ex eadem petendi causa*), (3) with respect to the same subject-matter, or thing (*de eadem petendi re*). Requirements (2) and (3)

³ *Bafokeng Tribe v Impala Platinum Ltd* 1999 (3) SA 517 (BHC). See also *The President of the Republic of South Africa and Others v Prince Mbonisi and Others* [2025] ZASCA 143 at para 76 where the court stated that “The doctrine of *res judicata* is based on the irrebuttable presumption that a final judgment on a claim submitted to a competent court is correct. It is founded on public policy, which requires that litigation should not be endless”.

are not immutable requirements of *res judicata*. The subject matter claimed in the two relevant actions does not necessarily and in all circumstances have to be the same.

However, where there is a likelihood of a litigant being denied access to the court in a second action, and to prevent injustice, it is necessary that the said essentials of the threshold test be applied. Conversely, in order to ensure overall fairness, (2) or (3) above may be relaxed.

A court must have regard to the object of the *exceptio res judicata* that it was introduced with the endeavour of putting a limit to needless litigation and in order to prevent the recapitulation of the same thing in dispute in diverse actions, with the concomitant deleterious effect of conflicting and contradictory decisions. This principle must be carefully delineated and demarcated in order to prevent hardship and actual injustice to parties.” at 566 B – F.

[19] On the facts of this case the point *in limine* of *res judicata* finds no application as the applicants failed to demonstrate that its defence is sustainable.

[20] The applicant also raised a point *in limine* of *lis pendens*, contending that the issue which served before the magistrate's court is the same issue that is pending in this division under the *damages suit*. This contention is equally unsustainable, as the damages suit launched and pending in this division is a relief different from the relief sought and granted by the Magistrate's Court. The legal principle is set out in *HI-Q Automotive (Pty) Ltd*⁴ where it was stated that “It is trite that the requirements for successful reliance of plea of *lis pendens* are: (1) that the litigation is between the same parties; (2) that the cause of action is the same; and (3) that the same relief is sought in both ”⁵

[21] In this case, the cause of action in the damages claim is for the loss suffered as a result of the unlawful ejectment, which is different from the relief for arrear rental, cancellation of the agreement, and ejectment sought before the magistrate's court. It therefore follows that this point *in limine* cannot be upheld.

⁴ *HI-Q Automotive (Pty) Ltd v Erga Investments (Pty) Ltd* (2024-011267) [2024] ZAGPJHC 1755 (21 February 2024)

⁵ Id at para 16

[22] During the argument, the applicants contended that they had appealed the magistrate court order or that they were frustrated to prosecute their appeal or review as the magistrate court failed to provide them with the reasons. They were also taken aback when the respondent attached the reasons to their answering affidavit papers on 16 September 2025 and wondered how and why the respondent got the reasons, whereas they were told that they were not ready.

[23] Though the issue of the appeal was not necessarily the gravamen of this litigation, the parties were requested to file supplementary heads of argument concerning the status of the appeal as lodged or the implications of having received the reasons for judgment only on 16 September 2025. It is clear from the said supplementary heads that the applicants requested reasons for judgment⁶ and have not appealed. The said reasons were made available by the respondent to the applicant on 16 September 2025 as attachment to the answering affidavit and were not followed by a notice of appeal. To this end, since there is no appeal pending nothing can impede this matter from being finalised.

[24] The issue of the incorrect case number has been raised by the respondent but not vigorously marshalled during the argument. The explanation advanced by the applicants is that they were advised by the registrar to use the same case number.⁷ Rule 17(3) enjoins that at the initiation of the proceedings,⁸ the registrar must sign and issue the summons. The authors of Erasmus – Superior Court Practice stated that the word *issue* is not defined in the rules, and “It has been suggested that issue by the registrar probably means the steps by the registrar which are not expressly in the rules: noting it in the records of his or her office, allocation of a number.”⁹ The authors referred to *Protea Assurance Co Ltd*,¹⁰ where it was held within this context, ‘issue’ simply means ‘to send (hand) out, publish or put in circulation. A summons which has not been ‘issued’ by the registrar in this sense would be a document to which the registrar is not a party and which does not emanate from his or her

⁶ As contemplated in terms of Rule 51(1) of the Magistrates’ Court Rules.

⁷ At a glance it appears from the notice of motion that the old case number was also typed in together with the case number of the magistrate court matter.

⁸ This Rule refers to summons and not notice of motion but is referred to on the basis of parity of reasoning.

⁹ Erasmus HJ “*Superior Court Practice*” B1-125.

¹⁰ *Protea Assurance Co Ltd v Vinger* 1970 (4) 663 (O) at 665A.

office. Such a document would not constitute a summons; it would be a ‘nullity’.¹¹ That, notwithstanding, it was held in *Jongilanga*¹² which considered the provisions of Rule 17(3) and held that though it is couched in mandatory terms, such a defect may still be condoned. Notwithstanding that the respondent has raised the issue, the applicant adopted a supine posture and did not apply for condonation to remedy the defect. Since no condonation was sought, none is granted.

[25] The applicants amended their papers without complying with the rules of court, including Rule 28 of the Uniform Rules of Court in relation to amendments and Rule 6(5)(e) of the Uniform Rules of Court in relation to the filing of further affidavits.

[26] As set out elsewhere in this judgment, the applicants invoked the provision of Section 173 of the Constitution in terms of which the courts are endowed with powers to protect and regulate their own process if it is in the interest of justice to do so. A party would have to demonstrate that the existing regulatory framework is wanting. It was stated by the Constitutional Court in the *Social Justice Coalition*¹³ that the said section does not give the courts unfettered powers to do as they wish, and the said power applies to procedural rights and not substantive rights. To the extent that the applicants have failed to identify shortcoming or weakness in the existing legal avenues the provisions of section 173 of the constitution are not triggered and the application predicated on that section is bound to fail.

Conclusion

[27] This application is fraught with insurmountable hurdles. The applicants were hellbent to ensure that almost any of applicable rules are not complied with. It is noted that the applicants are not legally qualified, however it was mentioned during the argument that they were assisted in the preparation of the application by someone who is legally qualified. Whilst it is acknowledged that the court should be slow to insist on strict application of the

¹¹ *Id.*

¹² *Minister of Prison and Another v Jongilanga* 1985 (3) SA 117 (A) at 123 I-J

¹³ *Social Justice Coalition and Others v Minister of Police and Others* (CCT 121/21) [2022] ZACC 27; 2022 (10) BCLR 1267 (CC) (19 July 2022). see also *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others* [2006] ZACC 15, referred to by the Respondent’s Counsel.

rules, such an approach should not engender the possibility of having rules for illiterates litigants and the other rules for those who are legally qualified.

[28] In the premises, the application is bound to fail.

Costs

[29] The respondent impressed the court to award costs at a higher scale on the basis that the applicant's papers are riddled with expletives without any legal basis, including accusations of deceitful and unlawful behaviour. Despite being assisted by someone who is allegedly legally qualified, the product of such a person's wits leaves much to be desired. In this instance, the costs at a higher scale are warranted.

Order

[30] In the result, I make the following order.

The application is dismissed with costs on the attorney and client scale, including costs of counsel on scale C.



M V NOKO
Judge of the High Court

DISCLAIMER: This judgment was prepared and authored by Judge Noko and is handed down electronically by circulation to the Parties /their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date for hand-down is deemed to be **8 October 2025**.

Dates

Hearing: 26 September 2025.

Judgment: 8 October 2025.

Appearances

For the applicants:

In Person.

For the Respondent:

B Bhabha, instructed by Harris Incorporated, Sandton.