

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

Case number: 34426/2014

In the matter between:

EZEKIEL PHETOLA MAENETJA N.O.

Applicant

and

MATHABATHE ROSINA MARODI

First Respondent

UNLAWFUL OCCUPIERS OF UNIT 1[...], W[...]

Second Respondent

SEBOPE SHADRACK MARODI

Third Respondent

Neutral citation:

Coram: E Botha AJ

Heard: 8 September 2025

Decided: 20 October 2025

Summary:

ORDER

1. The case is postponed *sine die* for the leading of evidence on the disputes of fact in accordance with the order of Her Ladyship Ms Justice Malopa-Sethosa J dated 20 February 2019.
2. The applicant is authorised and ordered to forthwith bring this order and that of Malopa-Sethosa J referred to in paragraph 1, to the attention of the following parties by delivering the two orders, together with copies of the

notice of motion, founding affidavit, first respondent's answering affidavit and replying affidavit, together with all their annexures, in the following manner:

- 2.1. On the second respondent, any person who is currently occupying Unit 1[...], W[...] Sectional Title Scheme, 1[...] J[...] Drive, Silverton, Gauteng, by the Sheriff of the High Court or his or her deputy (*"the Sheriff"*), by delivering it in terms of Uniform Rule 4(1)(a)(i) or, should personal service not be reasonably possible, in terms of (ii);
- 2.2. On the third respondent, by delivering it to the address of his attorney or, if he is no longer represented by an attorney, by delivery thereof by the Sheriff in terms of Uniform Rule 4(1)(a)(i) or (ii); and
- 2.3. On the City of Tshwane Metropolitan Municipality, by delivery by the Sheriff in terms of Uniform Rule 4(1)(a)(viii).
3. The order in paragraph 2 shall not replace or derogate any party's rights or obligations in terms of Section 4 of the *Prevention of Illegal Eviction and Unlawful Occupation Act*, 1998.
4. If and once the order in 2 is complied with, the applicant, or should he fail to do so any other party, may approach the office of the Deputy Judge President for a directive in respect of the hearing of the case.
5. The costs consequent upon the enrolment of the case on the opposed motion roll of 8 September 2025, together with any wasted costs occasioned by the postponement thereof, and the costs of effecting service as provided for in the order in paragraph 2, are reserved.

JUDGMENT

E BOTHA AJ:

Introduction

[1] This opposed application for eviction has a protracted history. If one considers the relative simplicity of the basis for the relief and the defences raised, the course it has taken appears needlessly complex. This is made worse by the fact that there are documents that should be before court that are missing and none of the parties appears to be able to find them, or give an explanation as to why they cannot be found.

[2] In 2019 the case was on the opposed motion roll of Molopa-Sethosa J. She held that there were disputes of fact that could not be resolved on the papers that had to be referred for evidence. Six years later, the case is no closer to being finalised than it was then. It is not surprising that when the case was before the court again on 8 September 2025, it could not be finalised.

[3] The two parties that were before court agreed with one another that the case was in the wrong court, and that it could not proceed. They provided the court with a draft interlocutory order as to how they thought the case should be dealt with going forward. They differed about what an appropriate cost order should be.

[4] The question is whether the court should at the instance of some parties vary an order referring an application for evidence in the absence of other parties whose interests may may be adversely affected by the proposed order.

Background

[5] The first and third respondents are the owners of a residential unit in respect of which the applicant seeks to make out a case for eviction. They were married in community of property, but later divorced. The applicant is an attorney. In 2011, after first and third respondents' divorce, Rabie J granted an order appointing the applicant as the liquidator to divide the joint estate. In 2014 the applicant brought this application for eviction in his capacity as liquidator.

[6] The applicant alleges that the first respondent and other persons occupy the property unlawfully. The first respondent alleges that she is in lawful occupation. There are other disputes between them that are immaterial for present purposes. Whether the first respondent's occupation of the property is lawful, or whether any occupation of the property should stand in the way of the applicant dividing the estate, are questions that have to be left for another day.

[7] Over the course of years, the case has been on a number of different rolls in this court. Sometimes orders were made. Sometimes the case was struck from the roll. Sometimes the case did not proceed because someone did not do what they

had to do to ensure that it could proceed. Much of what happened over the course of more than a decade is unclear.

[8] On 20 February 2019 the case was set down for hearing on the opposed motion roll, where it served before Malopa-Sethosa J. She made an order referring the case for oral evidence which reads as follows (*“the order”* or *“Malopa-Sethosa J’s order”*):

- “1. *This application must be referred for oral evidence.*
2. *No cost order.*
3. *There are disputes in the application.”*

The enrolment of the case

[9] About ten years after the application was launched and about five years after the order, the applicant set the case down for hearing on the trial roll of 7 June 2024. The case never proceeded. It is not apparent from the court file why the case was not heard on that day. The advocate for the applicant, Mr Baloyi, informed the court that the case was never finally enrolled, but he could not provide more detail.

[10] Despite the terms of the order and the applicant’s effort to have it heard on the trial roll, the applicant then applied for the case to be allocated for a hearing on the opposed motion court roll. This eventually led to the enrolment on the opposed motion roll of 8 September 2025.

[11] This seems not to have bothered anyone. That is until the advocate for the first respondent, Mr Trumpie, raised it in heads of argument and a practice note in the week before the hearing. Mr Baloyi says the applicant was initially intent on proceeding. This is reflected in his heads of argument practice note, where there is no reference to the order; no indication that evidence would be led; and it is indicated that the argument before this court would endure for an hour. It says nothing about the order of Molopa-Sethosa J. During the course of the hearing the court was informed that these two parties agreed that the case would have to be postponed.

The parties before this court

[12] When the case was heard, there were a number of concerns. Amongst them was the question whether all the parties had received notice that the case was set down. Although there is a notice of set down that was filed by the applicant, there is no evidence that it was served on any of the parties. Only the applicant and the first respondent were before court. There is no evidence that the order of Malopa-Sethosa J or any notice in terms of Section 4(2)¹ had been served either. Although there is more than one application for an order directing a manner of service in terms of Section 4(4), no such order can be found.

[13] There is doubt whether the City of Tshwane Metropolitan Municipality was ever joined. The application definitely commenced without the municipality being a party. The first respondent had taken the point that it ought to have been joined in her answering affidavit. At some point, the parties added a description of the municipality to the heading of the papers. The description was also included in the heading of some orders, including Malopa-Sethosa J's order. Despite this, there is no evidence before court that there was ever an order joining the municipality, nor is there any evidence of a complete copy of the papers being delivered to the municipality.

[14] The applicant and the first respondent prepared and handed up a draft order. It provided for a postponement of the case, setting a timetable for the filing of pleadings, the holding of a pre-trial conference and so forth (*"the proposed order"*). This, they submitted, was the preferable route to take in light of J's order. They could not agree on the appropriate cost order. The applicant asked for the costs to be reserved, whereas the first respondent asked for the applicant to pay the costs due to the erroneous enrolment. Mr Baloyi submitted that it was his instructions that, despite the order, and despite the applicant's prior efforts to enrol the case for a hearing on the trial roll, his attorney was advised by the Registrar that the case had to be enrolled for a hearing in the opposed motion court.²

¹ Section 4(2) of the *Prevention of Illegal Eviction and Unlawful Occupation of Land Act*, 19 of 1998 (*"PIE"*).

² It was only at the time of writing the judgment that it was realised that the court had not asked whether the reference to the attorney was a reference to the applicant or another attorney at the applicant's firm.

[15] The parties addressed the court in respect of the appropriate order in respect of the referral for evidence, the joinder of the municipality, costs, and the notice of set down. The court was not immediately satisfied that it could make any of the orders requested by these two parties. The parties were informed that judgment would have to be reserved, and they were asked whether they wished to be heard again in the event of it becoming apparent to the court that a different order ought to be made. Both Mr Baloyi and Mr Trumpie indicated that, in such an event, their clients would not want an opportunity to be heard again. Judgment was reserved.

Does the court have the power to vary the order referring the matter for evidence?

[16] Molopa-Sethosa J's order is final and enforceable.³ It is not for these two parties or this court to vary it, unless such variation is done in a recognised manner.⁴ Neither of the parties applied for a formal variation of the order.

[17] The authority that provides for a court to reconsider, rescind or vary its own interlocutory order does not apply here.⁵ Even in such a case, a court can only do so on good cause shown. There is not sufficient cause to do so now.

[18] There is authority for the proposition that a court may depart from the order, decline to hear oral evidence, and to decide the case on the papers. That it is not a step that courts take lightly,⁶ and one that was not open to the court in this case.

An interlocutory order in the absence of affected parties?

[19] The general principle is that a court cannot grant an order in the absence of a party who has a direct and substantial interest in the order, unless that party has waived its right to be heard.⁷ Whether a party has such an interest in the order sought by another is determined by the question whether the former's rights or interests may be adversely affected by the order.⁸

³ See *Department of Transport v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC) at para176 to 182 for the general principles in respect of the enforceability of orders.

⁴ In terms of Uniform Rule 42(1) or the Common Law.

⁵ See, for example, *Duncan NO v Minister of Law and Order* 1985 (4) SA 1 (T) at 2E-J and the cases cited by van Dijkhorst J.

⁶ *Wallach v Lew Geffen Estates CC* 1993 (3) SA 258 (A) at 262I and 263H.

⁷ *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 659.

⁸ *Gordon v Department of Health, Kwazulu-Natal* 2008 (6) SA 522 (SCA) at para [9].

[20] It is one thing if it can be shown that a party has proper notice and chooses not to be heard, or if it does not make a determined effort to have its case heard,⁹ but that is not the case here. Here, there is no evidence that the notice of set down was delivered. There is also no evidence that a Section 4(2) notice was served. PIE provides substantial, as well as procedural protection against eviction.¹⁰ Compliance with Section 4 is peremptory, and service of the Section 4(2) notice is intended as an additional notice of forthcoming eviction proceedings.¹¹ Here, the occupants of the property do not have this protection.

[21] Accordingly, properly posed, the question is whether the proposed order may adversely affect the rights of the second and third respondents. If so, it cannot be granted in their absence. The answer to the question requires an evaluation of the order and the proposed order.

Evaluating and comparing the order and the proposed order

[22] Where an application cannot properly be decided on affidavit, the court may dismiss the application or make an order it deems fit to ensure a just and expeditious decision.¹² Usually, the court takes one of three avenues. First, it may dismiss the application. Second, it may order the parties to go to trial. Third, it may order oral evidence in terms of the rules.

[23] The order provides for the third avenue, that of referral for oral evidence. It has been held that this is the avenue that will ordinarily be followed if one or a few disputes cannot be determined on the affidavits.¹³ The order does not contain a formulation of what those disputes are that have to be decided, or whose evidence

⁹ *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* (CCT 52/21) [2021] ZACC 28; 2021 (11) BCLR 1263 (CC) (17 September 2021) at para 61.

¹⁰ *Ndlovu v Ngcobo; Bekker v Jika* 2003 (1) SA 113 (SCA) at para 1.

¹¹ *Cape Killarney Property Inv (Pty) Ltd v Mahamba* 2001 (4) SA 1222 (SCA) at para 11 to 13.

¹² Rule 6(5)(g) provides “Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the foregoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for such deponent or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise.”

¹³ *Atlas Organic Fertilisers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1978 (4) SA 696 (T) at 698G

will have to be led to decide them.¹⁴ In the exercise of her discretion,¹⁵ Molopa-Sethosa J ordered that evidence would be led on those disputes on the papers before her at the time. It has been held that it is preferable that a court ordering a referral for evidence directs whose evidence will be required.¹⁶ However, the fact that the order does not contain such a direction does not mean that the parties may call any witness they please. The parties are bound to those witnesses who deposed to affidavits, and they may only call other witnesses with the leave of the court.¹⁷ If anything else was intended, the order would have said so. It cannot be understood in any other way. The effect of the order is that the case had to be set down for hearing; that the disputes were defined by the affidavits; that evidence would be limited to the disputes on the papers at the time; and that only those who deposed to affidavits would be able testify, unless a court ordered otherwise.

[24] Where there is a referral for trial, a court brings about what the dispute needed in the first place, by ordering an action procedure with the benefit of hindsight.¹⁸ That is the avenue that the applicant and the first respondent tried to follow before this court through the proposed order. Contrary to the path determined by the order, this would open up the possibility of supplementing the papers, broadening the issues, introducing new evidence through discovery, and calling other witnesses. This avenue has understandably been described as 'disproportionately costly and cumbersome'.¹⁹

[25] Seen in this light of the comparison, the adverse effect on the interests of the other parties becomes clear. The adverse effect is not only procedural, but it may be substantial. Expanding on or broadening the disputes, allowing for further discovery, or allowing further evidence or witnesses may lead to a different result than would have been the case if the leading of evidence was limited to the existing disputes or the deponents' evidence.

¹⁴ See, for instance, *Standard Bank of SA Ltd v Neugarten and Others* 1987 (3) SA 695 (W) (*Neugarten*) at 699E-H, with reference to *Combrinck v Rautenbach and Another* 1951 (4) SA 357 (T) (*Combrinck*).

¹⁵ *Metallurgical & Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd* 1971 (2) SA 388 (W) at 296D-E.

¹⁶ See, for instance, *Neugarten* at 699E-H, with reference to *Combrinck supra*.

¹⁷ *Combrinck supra* at 359F-H.

¹⁸ *Neugarten* at 699B-D.

¹⁹ *Ibid.*

[26] There is no assurance that the second and third respondents knew of the hearing before this court or, in fact, whether they knew of anything that happened before. They could be under the impression that the case was going to be determined on the basis of the papers before court, or they could be under the impression that the order allows for evidence to be led by the deponents on the existing disputes of fact. They may well have been satisfied with whatever the result would be in either of these scenarios. Considering the effect of the proposed order and the adverse effect on their interests, it may also be that they may have felt differently about coming to court if they had known what the proposed order was. Also, considering the time that has elapsed, they may be under the impression that the application was unsuccessful, or that it died a slow death. There may be other occupiers who know nothing of any of this. There is simply no way of knowing.

[27] In all the circumstances and for all of the aforesaid reasons, the court cannot grant the proposed order.

An appropriate order

[28] Having concluded that the proposed order cannot be granted, the question is what an appropriate order will be in the circumstances.

[29] In the circumstances of this case and on the evidence before the court, an appropriate order must address at least three points. First, it must give effect to the order of Malopa-Sethosa J. Second, it must ensure that the rights and interests of all interested parties are adequately protected. Third, it must provide for a mechanism that will ensure a just and expeditious determination of the disputes between the parties.

Costs

[30] The two parties before court were at odds about what an appropriate cost order will be. The first respondent submitted that the applicant must pay the costs, whereas the applicant submitted that the costs must be reserved. Where the issues

relating to interlocutory costs are clear, the court seized with the matter should not avoid deciding them by leaving the task to another court.²⁰

[31] The essence of the applicant's argument is that he is not to blame for the case being on the wrong roll, because the Registrar directed him to enrol it as an opposed motion. The essence of the first respondent's argument is that, whatever the reasons may be, the applicant enrolled the case on the wrong roll and that the applicant must carry the costs caused by the postponement. The first respondent's argument has some merit. The applicant is *dominus litis* and he set the matter down. Ordinarily, he will bear responsibility for any error in enrolment. Even if the Registrar did advise the applicant to proceed as he did, that advice does not automatically absolve him of liability.

[32] Whatever the explanation, the first respondent cannot be blamed for the matter being enrolled. If the applicant is found to be at fault, he should ordinarily bear the costs; if neither party is at fault, the proper order would be that costs follow the cause. If it were only for these factors, the court could have determined liability for costs and it would have been wrong if it were to avoid doing so. There are, however, a further considerations.

[33] It may become apparent that there is more to the applicant's explanation once all the facts are properly before a court, but this is not the only reason to consider reserving the costs. Ordering the applicant to pay the costs will mean that he will carry the costs in his official capacity. If regard is had to paragraph 1.14 of Rabie J's order, the result of the applicant paying the costs in his official capacity will be that the first and third respondents will each bear half of those costs. Such an order will mean that the first respondent will essentially carry half of the costs paid by the applicant under circumstances where she should not be liable for it. For the same reason, the third respondent will pay half of the costs in circumstances where the court has not heard the third respondent, and is not satisfied that he was given due notice. There is also a possibility that later revelations may require a cost order *de bonis propriis*. One simply cannot tell. For these reasons, the costs should be

²⁰ *Martin NO v Road Accident Fund* 2000 (2) SA 1023 (W) at 1026I–1027A.

reserved until such a time that a court is in a better position to receive a full explanation, to consider all the facts, and to make an appropriate cost order.

Order

[34] The following order is made:

1. The case is postponed *sine die* for the leading of evidence on the disputes of fact in accordance with the order of Her Ladyship Ms Justice Malopa-Sethosa J dated 20 February 2019.
2. The applicant is authorised and ordered to forthwith bring this order and that of Malopa-Sethosa J referred to in paragraph 1, to the attention of the following parties by delivering the two orders, together with copies of the notice of motion, founding affidavit, first respondent's answering affidavit and replying affidavit, together with all their annexures, in the following manner:
 - 2.1. On the second respondent, any person who is currently occupying Unit 1[...], W[...] Sectional Title Scheme, 1[...] J[...] Drive, Silverton, Gauteng, by the Sheriff of the High Court or his or her deputy ("*the Sheriff*"), by delivering it in terms of Uniform Rule 4(1)(a)(i) or, should personal service not be reasonably possible, in terms of (ii);
 - 2.2. On the third respondent, by delivering it to the address of his attorney or, if he is no longer represented by an attorney, by delivery thereof by the Sheriff in terms of Uniform Rule 4(1)(a)(i) or (ii); and
 - 2.3. On the City of Tshwane Metropolitan Municipality, by delivery by the Sheriff in terms of Uniform Rule 4(1)(a)(viii).
3. The order in paragraph 2 shall not replace or derogate any party's rights or obligations in terms of Section 4 of the *Prevention of Illegal Eviction and Unlawful Occupation Act*, 1998.
4. If and once the order in 2 is complied with, the applicant, or should he fail to do so any other party, may approach the office of the Deputy Judge President for a directive in respect of the hearing of the case.
5. The costs consequent upon the enrolment of the case on the opposed motion roll of 8 September 2025, together with any wasted costs occasioned by the postponement thereof, and the costs of effecting service as provided for in the order in paragraph 2, are reserved.

E BOTHA
ACTING JUDGE OF THE HIGH COURT

For the Applicant:	Mr F Baloyi on instruction of Maenetja Attorneys
For the First Respondent:	Mr B Trumpie on instruction of Roux van Vuuren Inc
For the Second Respondent:	No appearance.
For the Third Respondent:	No appearance.
For the City of Tshwane:	No appearance.