

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

Case Number: 2022/024956

- (1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED: **NO**
24 February 2026

In the matter between:

ANDRIES JULY SHONGWE

First Applicant

FIKELEPHI MOLY SHONGWE

Second Applicant

And

CS HENTIQ 1151 (PTY) LTD

First Respondent

EKURHULENI METROPOLITAN MUNICIPALITY

Second Respondent

SHERIFF OF THE COURT, GERMISTON SOUTH

Third Respondent

In re:

CS HENTIQ 1151 (PTY) LTD

Applicant

And

ANDRIES JULY SHONGWE

First Respondent

FIKELEPHI MOLY SHONGWE

Second Respondent

EKURHULENI METROPOLITAN MUNICIPALITY

Third Respondent

This judgment was handed down electronically by circulation to the parties' representatives by email and by uploading the judgment onto CourtOnline/CaseLines. The date of delivery of the judgment is deemed to be 24 February 2026.

JUDGMENT

SOUTHWOOD, AJ:

- [1] The applicants seek the rescission of a judgment granted by this Court (per Dippenaar J) in their absence on 4 May 2023¹. That judgment ordered the demolition of certain structures erected or being erected by the applicants on the property situated at 1[...] K[...] Street, E[...], Germiston ('the property'). The applicants also seek a stay of the demolition order pending the finalisation of a rezoning application which they claim is pending before the second respondent; an order setting aside the demolition order of 2 May 2023; and condonation for the late filing of this rescission application.
- [2] The application is opposed by both the first and second respondents. The first respondent, in particular, seeks a special costs order on the attorney and client scale.

The Parties

- [3] The first applicant, Mr Andries July Shongwe, and the second applicant, Ms Fikelephi Moly Shongwe, are the registered co-owners of the property. They purchased the property in 2020 with the assistance of a bond registered in favour of Nedbank Limited. Their primary

¹ Although the papers refer to an order granted on 2 May 2023, no such order is in the papers and I have assumed in the applicants' favour that they are referring to the order granted on 4 May 2023.

residence (a phrase which suggests other residences) is at [...] F[...] Street, K[...], Boksburg.

- [4] The first respondent, CS Hentiq 1151 (Pty) Ltd, is the owner of neighbouring commercial premises at 1[...] and 1[...] N[...] Streets, E[...]. It was the applicant in the main application which resulted in the demolition order and opposes this application.
- [5] The second respondent, Ekurhuleni Metropolitan Municipality, is the local authority responsible for building control and planning approvals within its area of jurisdiction. The property falls within its area of jurisdiction. It, too, opposes the application.
- [6] The third respondent, the Sheriff of the Court, Germiston South, has abided the decision of this Court.

Application not ripe for hearing

- [7] At the outset of the hearing, the applicants' counsel contended that the matter is not ripe for hearing because the applicants have applied for rezoning of the property, which application is pending. Effectively, the applicants sought a postponement of the matter without a postponement application.
- [8] The basis for counsel's contentions are averments contained in an affidavit deposed to by an unidentified person (referred to in the affidavit as '*We, Ripinda Development Planners*'), dated 20 January 2026 and uploaded onto CaseLines on 29 January 2026.
- [9] The Court was not approached for leave to upload this affidavit prior to doing so, contrary to this Court's prior directives read with the Gauteng Division's Directive 1 of 2024.
- [10] There is, furthermore, no application for leave to admit this affidavit out of time and sequence.

[11] Accordingly, I will not admit this affidavit and there is, therefore, no basis for the contention that the matter is not ripe for hearing. In any event, even if these facts had been before me, there is still no basis for the contention that the matter is not ripe for hearing. The papers constitute a founding affidavit, answering affidavits by the first and second respondents, replying affidavits in response to each answering affidavit, practice notes and heads of argument from all the parties. The applicants seek a stay pending the outcome of a rezoning application with the second respondent.

The Factual Matrix

[12] The facts are taken from the founding affidavit in the application for the demolition order ('the first application'), which the applicants have not refuted in this application as well as the affidavits in this application.

[13] Whilst many of the allegations in the respondents' affidavit are hearsay, I have decided to admit these allegations in the interest of justice in terms of section 3 of the Law of Evidence Amendment Act² for the following reasons:

- a. the applicants do not dispute the allegations and do not object to this evidence;
- b. the allegations in the first respondent's affidavit are based on information obtained from the second respondent which is consistent with what is alleged by the second respondent;
- c. the second respondent has no interest in misleading the court;
- d. the second respondent's deponent has obtained many of the facts from the second applicant's records which are recorded as a matter of course and not for the purposes of this litigation;
- e. the deponent to the second respondent's affidavit has attached what appear to be contemporaneous notes and notices which

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support the allegations even if these notes have not been authenticated. The messiness of the notes suggests that they are genuine;

- f. the allegations are made for the purpose of updating the court on the allegations made in the founding affidavit in this application; and
- g. most of the allegations are consistent with the allegations contained in the replying affidavits.

[14] The material uncontested facts may be summarised as follows.

[15] The applicants purchased the property on or around 20 May 2020.

[16] In or around 2021, the applicants built approximately thirty residential units on the property.

[17] On 25 November 2021, the second respondent issued a formal contravention notice to the first applicant. The notice recorded that an inspection conducted that day revealed that the applicant was 'proceeding/erecting a building' without approval in contravention of section 4(1) read with section 4(4) of the National Building Regulation and Building Standards Act.³ The applicant was directed to cease building operations and to submit building plans for approval within 30 days. It is worth noting that the notice was served personally on the first applicant at the property.

[18] On 17 or 18 February 2022, some three months after the expiry of the thirty-day period referred to in the contravention notice, the applicants submitted building plans to the second respondent.

[19] In or around March 2022, the application for approval was refused. The refusal was based on several fundamental non-compliances, which included:

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- a. the site plan lacked a detailed plan for the main house;
- b. fire walls were required between the units and fire safety walls for building on the boundary;
- c. wall-to-wall building was prohibited as a 2-metre servitude was required; and
- d. critically, a site inspection conducted on 22 March 2022 revealed that the structures had been erected over and had encroached upon the sewer line. The building inspector noted that this encroachment made demolition necessary.

[20] In addition, on 1 June 2022, the City Planning Division commented that '[t]he zoning does not allow dwelling units/boarding rooms'. A pre-consultation for rezoning of the erf must first be conducted with the Municipal Town Planner by a registered town planning consultant prior to submitting any application. A pre-consultation form could be obtained from the reception desk. This was communicated to the applicants.

[21] On 16 September 2022, the first respondent launched the first application. The founding affidavit alleged that the applicants resided at 1[...] K[...] Street, E[...], Germiston.

[22] Service of the notice of motion was attempted at the property, 1[...] K[...] Street, E[...] on 6 October 2022. The Sheriff's return recorded that the premises were kept locked, that two attempts to find the addressee yielded 'nobody home', and that the notice was thereafter affixed to the main entrance of the residence of the first applicant. The return further recorded that the property contained '30 rooms and occupiers' and that the occupiers 'refused to take the document'. There is no return of service for the second applicant.

[23] A further Sheriff's return records that the notice of set down was served on Miss Makhubela, caretaker, apparently a responsible person and apparently not less than 16 years of age, in control of and at the place

of residence of the first applicant in his temporary absence. There is no similar return for the second applicant.

- [24] On 4 May 2023, this Court (per Dippenaar J) granted judgment against the applicants on an unopposed basis in their absence. The learned Judge ordered the demolition of the unlawful structures, with costs.
- [25] The applicants claim that they only became aware of this order on 25 January 2024, when they were personally served with a copy thereof. The applicants do not indicate how this occurred and where such service occurred.
- [26] On 13 March 2024, some 34 court days after allegedly acquiring knowledge of the judgment, the applicants launched the present rescission application.

The Applicable Legal Principles

- [27] The applicants invoke three alternative remedies: rescission under rule 31(2)(b), rescission under rule 42(1)(a), and rescission under the common law.
- [28] Only once an applicant has met the requirements for rescission, can a court exercise a discretion to rescind its order. The discretion must be exercised judicially.⁴

Rule 31(2)(b)

- [29] Rule 31(2) provides as follows:

‘(a) Whenever in an action the claim or, if there is more than one claim, any of the claims is not for a debt or liquidated demand and a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff may set the action down as provided in subrule (4) for default judgment and the court may, after hearing evidence,

⁴ *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 (Council for the Advancement of the South African Constitution and another as amici curiae)* [2021] ZACC 28; 2021 (11) BCLR 1263 (CC) at [53].

grant judgment against the defendant or make such order as it deems fit.

- (b) A defendant may within 20 days after acquiring knowledge of such judgment apply to court upon notice to the plaintiff to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as it deems fit.’

Rule 42(1)(a)

[30] Rule 42(1)(a) provides that a court may rescind or vary ‘*an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby*’.

[31] A litigant who wants to invoke rule 42(1)(a) must show that the order sought to be rescinded was granted in his or her absence and that it was erroneously granted or sought.⁵

[32] The first ground exists to protect litigants whose presence was precluded, not those who chose to be absent.⁶

[33] Where notice of proceedings is required and judgment is granted against such a party in his absence without notice of the proceedings having been given to him, such judgment is granted erroneously.⁷

Common Law Rescission

[34] The common law test for rescission of a default judgment is well established. An applicant must show ‘good cause’ or ‘sufficient cause’, which comprises two essential elements:

- a. a reasonable and acceptable explanation for the default; and

⁵ *Zuma (supra)* at [54].

⁶ *Zuma (supra)* at [56].

⁷ *Lodhi 2 Properties Investments CC and Another v Bondev Developments (Pty) Ltd* [2007] ZASCA 85; 2007 (6) SA 87 (SCA) at [24].

- b. a *bona fide* defence which, *prima facie*, carries some prospect of success.⁸

The Application for a Stay of Execution

[35] The court may exercise its discretion in terms of rule 45A, the common law and/or section 173 of the Constitution to suspend the operation and execution of any order in the interests of justice.⁹

[36] This Court has found in applications of this type that relevant circumstances which will be considered in order to come to a just decision include:

- a. the nature and extent of the deviation from the law;
- b. the reasons for such deviation with specific reference to the culpability of the party seeking the stay;
- c. the steps taken by the party seeking demolition in relation to stopping the irregular building from progressing which has been reached;
- d. the strength of the prospects of the regularisation of the unlawful position;
- e. the time it will take to regularise the position;
- f. the effect of the order on the parties personally; and
- g. the general interests of the community.¹⁰

Analysis

Rule 31

⁸ *Zuma (supra)* at [71].

⁹ *Van Rensburg and another NNO v Naidoo and others NNO: Naidoo and others NNO v Van Rensburg NO and others* [2010] ZASCA 68; 2011 (4) SA 149 (SCA) at [51]. See also *Chief Lesapo v North West Agriculture Bank* [1999] ZACC 16; 2000 (1) SA 409 (CC); 1999 (12) BCLR 1420 at [13].

¹⁰ *Ten Napel v Ekurhuleni Metropolitan Municipality* [2021] ZAGPJHC 566 at [21].

- [37] Given the wording of rule 31, I raised with counsel whether the rule was applicable.
- [38] Both the applicants' counsel and the first respondent's counsel indicated that rule 31 applied because the order was granted in the absence of the applicants. The second respondent's counsel, in contrast, submitted that rule 31 is inapplicable, referring to *Makhomisani*,¹¹ *Kataka*¹² and, particularly to *ADB Financial Services*¹³ where the court found that rule 31(2)(a) and (b) apply to a default judgment granted in an action.
- [39] I agree with counsel for the second respondent and with these judgments which indicate that rule 31(2)(b) is not applicable to judgments which are not granted in terms of rule 31(2)(a).¹⁴
- [40] In using the phrase 'such judgment', rule 31(2)(b) is referring to judgments granted in terms of rule 31(2)(a). Accordingly, rule 31(2)(b) must be interpreted as only permitting a defendant to set aside a judgment obtained in terms of rule 31(2)(a). This subrule does not apply to a judgment not granted in terms of rule 31(2)(a). The subrule does not apply to judgment obtained on an unopposed basis in motion proceedings.
- [41] As indicated above, the order sought to be rescinded was granted in motion proceedings on an unopposed basis in the absence of the applicants. It was not granted in terms of rule 31(2)(a).
- [42] This rule is accordingly inapplicable, and the relief sought cannot be granted in terms of this rule.

11 *Makhomisani N.O. and Another v SB Guarantee Company (RF) (Pty) Ltd* [2022] ZAGPJHC 179 at [55].

12 *Kataka v Standard Bank* [2025] ZAGPPHC 512 at [39].

13 *ADB Financial Services (Pty) Ltd and another v Mercantile Bank Limited and another* [2023] ZAGPPHC 67 at [20].

14 See also *De Wet and Others v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1035F and 1038A.

[43] Condonation was sought for failing to bring this application within the time set by rule 31(2)(b). Given the inapplicability of rule 31, I decline to make a decision in this regard.

Rule 42

[44] It is common cause that the order sought to be rescinded was granted in the absence of the applicants.

[45] The first question to be determined is whether the applicants have established that they did not have prior notice of the first application and whose presence was thereby precluded, or whether they received timeous notice and chose not to oppose the application or be present in court to oppose the application.

[46] The first applicant alleges that the applicants only became aware of the application when served with a court order on 25 January 2024. The first applicant also claims that Miss Makhubela did not bring the notice of set down to the applicant's attention nor was she employed as the applicants' caretaker. Although this is not properly disputed by the respondents, uncontradicted evidence is not necessarily acceptable or sufficient to discharge an onus.¹⁵

[47] The applicants do not indicate how the order was served upon them. The first applicant attempts to support the cogency of these allegations by attempting to give the impression that the applicants did not reside at the property at the relevant time. The confirmatory affidavit deposed to by the second applicant which merely states that she confirms the contents of the founding affidavit insofar as it relates to her, does not assist in this regard at all¹⁶ and affidavits in this form have been described as a slovenly practice.¹⁷

¹⁵ *McDonald v Young* [2011] ZASCA 31; 2012 (3) SA 1 (SCA) at [6].

¹⁶ See in this regard *Drift Supersand (Pty) Ltd v Mogale City Local Municipality and Another* [2017] ZASCA 118; [2017] 4 All SA 624 (SCA) at [31].

¹⁷ See in this regard *Eskom Holdings SOC Ltd v Masinda* [2019] ZASCA 98; 2019 (5) SA 386 (SCA) at [3].

- [48] In the founding affidavit in this application, the first applicant alleges that he '*presently*' resides at 1[...] F[...] Street, K[...], Boksburg. He also alleges that the second applicant resides at this address. The first respondent's answering affidavit does not raise a genuine dispute in this regard. The second respondent's answering affidavit admits or does not dispute these allegations.
- [49] The first applicant does not allege when he and the second applicant started residing at this address.
- [50] The first applicant alleges that '*the address at which the application was served is and was not the primary residence of the Applicants*'.
- [51] It is clear that the impression that is sought to be created by this allegation is that the applicants did not reside at the property when the application was served. However, that is not what is stated. The first applicant does not expressly state that at the time when the application was served, the applicants were not residing at the property.
- [52] The absence of such a clear allegation is compounded by the reference to a '*primary*' residence, suggesting that the applicants have more than one residence, thus not excluding the possibility that the applicants were living at the property when service of the application was effected.
- [53] The applicants do not indicate where they resided when the notice of set down was served. The Sheriff's return does not state that Miss Makhubela informed the Sheriff that the applicants did not live there and/or that she would not be able to give the notice to them.
- [54] As stated above, the contravention notice was served personally on the first applicant at the property on 25 November 2021.
- [55] This failure to explain clearly and fully how the applicants became aware of the application is exacerbated by the first applicant's allegation that '*the first opportunity we had to consider the matter was September 2022*'.

- [56] The first respondent highlighted this discrepancy in its answering affidavit. In reply, the first applicant merely reiterates that the applicants became aware of the main application on 25 January 2024 and that in order to consider the matter during September 2022, the main application would necessarily have had to have been served on them. This is the first respondent's point and does not clarify the discrepancy.
- [57] Accordingly, the applicants have not discharged the onus which rests upon them to establish that they did not receive due notice of the application.
- [58] As such, the applicants have not established that the order sought to be rescinded was granted in their absence. This would have the result that the application could not be granted in terms of rule 42.
- [59] In the event that I am wrong in this regard, I consider whether the order was erroneously granted.
- [60] The applicants contend that the judgment was erroneously granted because they were not properly served because the property is and was not their primary residence.
- [61] The first respondent contends in the papers that service was good because it occurred at a property owned by the applicants.
- [62] Rule 4(1)(a)(i) provides for personal service. Rule 4(1)(a)(ii) and (iii) provide for delivery of process at the place of residence or business or employment of the person to be served, to a person, apparently in charge of the premises or in authority over the person sought to be served, respectively, and apparently not less than 16 years of age.
- [63] Only rule 4(1)(iv), which provides for service on a person at his or her *domicilium citandi*, and rule 4(1)(v), which provides for service on a corporation or company, permits affixing the process in limited circumstances.

- [64] Rule 4 does not provide for affixing of process at a property owned by the person to be served.
- [65] Accordingly, service by affixing at the property because it is owned by the applicants does not constitute good service.
- [66] In any event, even if the applicants resided at the property, service was not effected in terms of rule 4 as this was not service at a *domicilium citandi* or on a corporation or company and affixing is not otherwise permitted.
- [67] Furthermore, there is no record of service on the second applicant.
- [68] As such, on the record, the application had not been served on the applicants and the respondents were not entitled to the order. Accordingly, the order was erroneously granted.
- [69] In the event that I am wrong about whether the applicants have discharged the onus of establishing that they did not have prior notice of the application and that they were precluded from appearing, then, accordingly, the two requirements in terms of rule 42(1)(a) have been met, and this court's discretion arises. Only if it is in the interests of justice should the court exercise its discretion in favour of rescission.¹⁸
- [70] The applicants in this matter do not allege that the buildings are lawful or that they were built pursuant to approved building plans. Nor do they dispute the allegations in the founding affidavit in the first application that the buildings have caused sewage and drainage water to flow into the first respondent's property, resulting in the collapse of the boundary wall and ongoing damage to the re-built wall. The first respondent alleges in this application that the harm articulated in the first application continues. Sewage continues to seep through the boundary wall and onto the first respondent's premises. The applicants do not

¹⁸ Zuma (*supra*) n 3 at [50].

deny this. The applicants' counsel conceded that there was no defence to the first application.

[71] I have not considered whether the applicants would have applied to stay the first application pending a rezoning application as similar relief must be determined in this application.

[72] In the circumstances, insofar as I may exercise a discretion, it would not be in the interests of justice to exercise my discretion in favour of the applicants.

[73] The application based on rule 42 cannot, therefore, succeed.

Common law

[74] As is clear from what is stated above, the applicants have failed to discharge the onus which rests upon them to furnish a credible and thus reasonable and acceptable explanation for their default.

[75] Even if I am wrong in this regard, the applicants have not established a defence which, *prima facie*, carries some prospect of success. In fact, the applicants' counsel conceded that there is no defence.

[76] Accordingly, the application for rescission based on the common law must fail.

Stay of the demolition order

[77] The applicants seek an order staying the order for demolition pending the outcome of a rezoning application.

[78] The founding papers do not establish any basis for a stay.

[79] The first applicant alleges that on or around February 2020 (before the applicants allegedly owned the property), he approached an architect who drew plans and advised him to start building. No plans are attached in support of the averment. In addition, the architect's advice is, on the face of it, reckless advice and appears, for this reason, to be

improbable. The architect does not make a confirmatory affidavit. It is alleged that the architect has passed away. This is inadmissible hearsay. For all the foregoing, I do not accept that the applicants proceeded on the advice of the architect.

[80] The founding papers allege that the first applicant appointed Ripinda Development Planning Consultants to lodge a rezoning application and alleges that this was done but does not indicate when this was done. There is no evidence that a rezoning application was submitted. The second respondent denies that a rezoning application was ever submitted with the consequence that the building plans expired. The first applicant admits, in a replying affidavit, that there was communication regarding the expiration of the plans. The first applicant's allegations are consistent with the second respondent's allegations. The first respondent then alleges, in his replying affidavit, that following expiration of the plans, another application was done and refers to annexure 'AJS9' which is attached to the replying affidavit in response to the first respondent's answering affidavit. No particulars are given as to when the application was made or who made the application.

[81] AJS9 is not signed by the applicants or on their behalf nor have the particulars of the applicants been completed. AJS9 is the pre-consultation form which records the pre-consultations which the applicants' town planner must have with various officials of the second respondent prior to a rezoning application. AJS9 records one consultation which occurred on 13 February 2024. The applicant does not explain why this document was not referred to in the founding affidavit deposed to on 18 March 2024. Accordingly, I will not have regard to these allegations since the basis for the relief sought must be contained in the founding affidavit.¹⁹

¹⁹ A point made by the first respondent's counsel, referring to *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 635H-636A.

[82] The applicants' heads of argument appear to establish the basis for the stay by submitting that the applicants have:

- a. established a *prima facie* right, namely their defences which have strong prospects of success;
- b. a well-grounded apprehension of irreparable harm if the demolition proceeds. This contention was tempered by the submission that the applicants will be severely prejudiced in that they will be deprived of the opportunity to have the already submitted rezoning application determined; and
- c. they have no other alternative satisfactory remedy.

[83] The first respondent's counsel, referring to *Erasmus*,²⁰ submitted that the applicants must set out certain facts which may be similar to the factors considered by a court when determining whether interim relief should be granted, such as a clear or present right, a well-grounded apprehension of irreparable harm, the balance of convenience and whether another satisfactory remedy exists.

[84] The first respondent's counsel also submitted, referring to *Soja*,²¹ that the applicants must also show what injustice would be suffered if the stay is not granted.

[85] The first respondent's counsel submitted further that the applicants had failed to establish any of the aforesaid requirements. The applicants have failed to obtain approval for their building plans and rezoning and ask the Court to condone their non-compliant conduct and order that the structures remain in place until some unforeseen date whilst the first respondent stands to suffer irreplaceable loss and prejudice.

[86] There is no answer to these submissions.

²⁰ *Erasmus v Sentraalwes Koöperasie* [1997] 4 All SA 303 (O).

²¹ *Soja (Pty) Ltd v Tuckers Land Development Corporation (Pty) Ltd* 1981 (2) SA 407 (W) at 411E-F.

- [87] However, I do not think that the requirements for interim relief are appropriate in this context. The factors indicated above will, instead, be considered.
- [88] In my view, the deviation from the law is quite substantial. At least 30 units were built on the property without approved building plans. Subsequently, the building plans were not approved for a number of reasons including that the property had to be rezoned. On the papers, no application for rezoning has been made.
- [89] The applicants' explanation is that an architect told them that they could proceed prior to the building plans being approved. This allegation appears on the face of it to be inherently improbable. Furthermore, nowhere do the applicants allege that they were unaware of what was required in order to be able to build lawfully.
- [90] What is plain is that the applicants have not acted with alacrity in order to regularise their position once the unlawfulness of the construction of the buildings was made clear to them.
- [91] The contravention notice served on the first applicant on 25 November 2021 indicated that buildings had been erected on the property in contravention of section 4(1) read with section 4(4) of the National Building Regulation and Building Standards Act as no prior written approval for the erection of such buildings had been obtained from the second respondent. The applicants were directed to submit and have building plans approved within 30 days from the date of receipt of the notice, i.e. on or around 5 January 2022.
- [92] The applicants only lodged their application for approval of their building plans on 17/18 February 2022.
- [93] The application for approval of the building plans was refused on or about 30 March 2022. The applicants were also informed that the property had to be rezoned before the building plans could be approved.

- [94] The unlawful buildings have caused sewage and drain water to flow onto the first respondent's property, a situation which has not yet abated. In addition to the unhealthy environment this has created, this has resulted in the collapse of the boundary wall between the first respondent's property and the applicant's property and damage to the replacement boundary wall.
- [95] As a result of this harm, the first respondent complained to the applicants and the second respondent on various occasions without success and eventually brought the first application and obtained an order for demolition on 4 May 2023.
- [96] The founding affidavit in this application was deposed to on 18 March 2024. Nothing in that affidavit, read in the context of the answering and replying affidavits establishes that any steps are pending to regularise the unlawfulness of the erection of the buildings.
- [97] The relief sought is a stay pending the outcome of the rezoning application. The founding papers do not establish that a rezoning application has in fact been made. In any event, even if an application were to be made and ultimately succeed, that would not cure the unlawfulness complained of, as duly approved building plans in respect of these buildings would still be required.
- [98] The applicants do not indicate how they have remedied the flaws identified by the second respondent in refusing to approve the relevant building plans. Furthermore, it appears that the applicants' building plans can never be approved as there has been building onto the boundary wall, which is prohibited and certain structures have encroached on the sewer line and must be demolished.
- [99] Because the founding affidavit does not deal with facts in support of the stay, there are no allegations relating to the prejudice that the applicants may suffer.

[100] Accordingly, taking the above factors into consideration, it is not, in my view, in the interests of justice to stay the demolition and I cannot, therefore, exercise my discretion in the applicants' favour.

Costs

[101] The first respondent seeks a special costs order on the attorney and client scale.²² Its counsel contends that the applications for both the rescission and the stay were stillborn with no prospects of success and that this application is merely a dilatory tactic.

[102] The second respondent seeks a dismissal of the application and costs.

[103] An award of costs on the attorney and client scale is an extraordinary remedy, reserved for cases of misconduct, dishonesty, vexatious conduct, or where a party's conduct has been 'extraordinary and deserving of censure'.

[104] In my view, this application, which has been found to be baseless on all the grounds raised, save possibly in regard to rule 42, is, at the very least, vexatious in the extended meaning of the term as found in *Johannesburg City Council*²³ in that it has resulted in unnecessary trouble and expense which the respondents ought not to bear.

[105] Although the second respondent did not seek a special costs order, given the reasons above, such an order is justified in favour of the second respondent as well.

Order

[106] In the result, I make the following order:

²² Although an order for counsel's fees on scale C was sought, this is only relevant to costs orders on a party and party scale.

²³ *Johannesburg City Council v Television and Electrical Distributors* [1996] ZASCA 97; 1997 (1) SA 157 (A) at 177D-E.

1. The application to rescind and set aside the order granted on 4 May 2023 under the above case number is dismissed.
2. The application to stay the order of demolition granted on 4 May 2023 is dismissed.
3. The applicants are ordered, jointly and severally, the one paying, the other to be absolved, to pay both respondents' costs on the attorney and client scale, such costs to include the costs of counsel.

**F SOUTHWOOD
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG**

Date of hearing: 2 February 2026

Date of judgment: 24 February 2026

For the Applicants: Ms Terblanche

instructed by: Okafor MA Attorneys Inc

For the First Respondent: Mr DJ Coetzee

instructed by: Shaban Clark Coetzee Attorneys

For the Second Respondent: Ms T Poee

Instructed by: Seanego Attorneys Inc.

