

REPUBLIC OF SOUTH AFRICA



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

Case Number: 2026-078598

Delete whichever is not applicable
REPORTABLE: YES / NO
OF INTEREST TO OTHER JUDGES: YES/NO
REVISED: YES/NO

30 April 2026

DATE

SIGNATURE

In the matter between:

ELMOND KATISO THELEJANE

Applicant

and

JOHANNES MARISHANE

1st Respondent

JOEL TSHEGEDI MARISHANE

2nd Respondent

**THE CITY OF TSHWANE
METROPOLITAN MUNICIPALITY**

3rd Respondent

JUDGMENT

Mazibuko J

Introduction

- [1] The applicant seeks an order against the respondents, on an urgent basis, in the following basis:

‘1. ...

2. Declaring that the Notice of Appeal delivered by the first respondent is irregular, incompetent and of no force and effect in law;

3. Declaring that the Notice of Appeal does not suspend the operation and execution of the eviction order granted on 5 February 2026 under case number 027041;

4. Declaring that the eviction order granted on 5 February 2026 remains of full force and effect;

5. Authorising and directing the Sheriff of the High Court to execute the warrant of ejectment pursuant to the eviction order;

6. Granting the applicant such further and/or alternative relief as this Honourable Court deems appropriate.’

- [2] The application is opposed by the first and second respondents. The third respondent has not participated in the litigation and there is no relief sought against them.
- [3] The applicant is Elmond Katiso Thelejane (‘Mr Thelejane’), who is a Data analyst and owner of the immovable property, described as Erf [..., ...] Pretoria (‘the property’), leased to the first and second respondents in terms of the lease agreement between himself and the first respondents.
- [4] The first respondent is Johannes Marishane (‘Mr J Marishane’), an attorney, who is a tenant in the immovable property in terms of the lease agreement between himself and the first applicant. The second respondent is Joel Tshegedi Marishane (‘Mr T Marishane’), an advocate, who is together with Mr J Marishane, a tenant in the property in terms of the lease agreement between himself and the first applicant. Mr J Marishane and Mr T Marishane will together be referred

to as respondents. The third respondent is the City of Tshwane Metropolitan Municipality.

Factual matrix

- [5] I deem it important to give a little bit of detail regarding facts of this application due to the events subsequent to the filing of the application by Mr Thelejane which application, will be referred to as Mr Thelejane's application.
- [6] In September 2024, subsequent to the conclusion of a written lease agreement between Mr Thelejane and the respondents, the respondents took occupation of the property. Besides, the 30-days termination of the lease agreement notice on 19 December 2024 by email due to owed rental payment, the respondents continued to occupy the property to date.
- [7] On 19 August 2025, the Gauteng Rental Housing Tribunal ('the Tribunal') found in favour of Mr Thelejane and awarded him an amount of R190 180.88 for outstanding rental and utilities. An appeal was lodged against the Tribunal's order.
- [8] On 15 October 2025, an eviction application was served personally on the respondents, and on the Municipality on 14 October. The respondents filed a Rule 60 and 60A of the Magistrates' court rules.
- [9] When the opposition against the eviction did not come forth, a notice of setdown was served personally on the respondents on 12 November. The eviction order in the absence of the respondents was granted in favour of Mr Thelejane on 5 February 2026. Accedding to the respondents' request for reasons for the 5 February order, they were furnished on 2 March.
- [10] The respondents instituted an action for unjust enrichment in the amount of R350 000 on 20 March 2026. On 25 March, he lodged an appeal against the 5 February order. Same was served on Mr Thelejane on 1 April.

- [11] Subsequent to the service of this urgent application upon the respondents on 6 April 2026, the respondents, on 8 April filed a Rule 30 / 30A notice stating that the founding affidavit was non-compliant with Regulations 3 and 4 of the Regulations governing the Administering of an oath or affirmation, promulgated in terms of Act No. 16 of 1963.
- [12] In response, on the same day, 8 April, Mr Thelejane deposed to a supplementary affidavit to rectify the issue of the absence of the commissioner's certificate in his founding affidavit.
- [13] On 14 April, the respondents filed their notice to oppose the application.
- [14] During the evening of 15 April, an eve of the hearing of Mr Thelejane's matter, the respondents filed an urgent counter-application to be heard together with Mr Thelejane's application. The affidavit in support of the counter-application to a certain extent also answered to Mr Thelejane's application, contending that Mr Thelejane's application was not urgent.
- [15] The counter-application sought an order in the following terms:
- [8.1] Suspending the eviction order dated 5 February 2026 in terms of Rule 45A. ...*
- [8.2] To regard the applicant's papers as pro non scripto with regard to the fact that he filed a supplementary affidavit without leave of court. ...*
- [8.3] The respondents specifically aver that the applicant is not the owner of the property and the ownership still rests with the financing banking institution.'*
- [16] The respondents raised the following points *in limine*, that the founding affidavit was non-compliant with regulation 3 and 4 of the Regulations governing the Administering of an oath or affirmation, promulgated in terms of Act No. 16 of 1963. To regard the applicant's papers as pro non scripto with regard to the fact that he filed a supplementary affidavit without leave of court. Further, Mr Thelejane was not the owner of the property.

- [17] At the hearing of the matter, the respondents, through their legal representative, Mr J Marishane, from the bar, applied for a postponement of the matter, which was later abandoned.

Issue

- [18] The issue to be determined is whether the matter is urgent, and whether the points in limine ought to be upheld. Further, whether an order granted by default is susceptible to appeal.

Assertions by the respondents

- [19] In their condonation application for the late answer to Mr Thelejane's application the respondents, through Mr Marishane, averred that the time periods to deliver the respondents notice to oppose and answering affidavit on 7 and 9 April, respectively were too short and could not be complied with. Besides, on 8 April 2026 they started preparing a rescission application which was voluminous with annexures, in parallel to the impugned appeal process. Between 14 and 15 April, they were preparing a comprehensive answering affidavit, which they only finalise in the evening. Therefore, it was difficult to address both matters at the same time.
- [20] Mr Marishane argued that regulation 3 had been breached as the commissioner of oath did not certify that Mr Thelejane had acknowledged that he knew and understood the contents of the declaration, and were both true and correct, had no objection with taking the prescribed oath, had considered it binding on his conscience. Further, the commissioner signed the declaration but did not print his full name and business address below his signature; and did not state his designation and the area for which he held his appointment or the office held by him if he held his appointment *ex officio* either.
- [21] It was submitted that the court ought to regard the applicant's papers as *pro non scripto* as Mr Thelejane filed a supplementary affidavit without leave of court,

which was fatal to his case, and that constituted an irregular action. Further, they argued that Mr Thelejane failed to prove ownership of the property as same still rests with the banking institution.

- [22] In their counter-application, the respondents sought an order suspending the eviction order dated 5 February in terms of Rule 45A, on the basis that, they had no alternative accommodation and might be homeless. The children would be affected by removing them from school which is nearby.

Assertions by the applicant, Mr Thelejane

- [23] Mr Thelejane, appearing in person, argued that urgency arose from the respondents' obstruction of execution of a valid eviction order, culminating on the day scheduled for ejectment. He alleged that only after 12pm on 1 April did the respondents furnish him with the notice of appeal, after several failed requests for the appeal documentation. It was then that he had an opportunity to assess and determine his next step regarding the ejectment.
- [24] Responding to the Rule 30 / 30A, Mr Thelejane argued that whatever defect relating to his founding affidavit was cured by the filing of the supplementary affidavit.
- [25] He further argued that the appeal against the 5 February order lodged by the respondents constituted an irregular step as it was granted in default as the respondents did not file any opposition papers nor appeared in court on 5 February the day of the hearing. The incompetent appeal ought not suspend execution of the 5 February order. He referred the court to the case of *Lee v Road Accident Fund* [2023] ZAGPJHC 1068.¹

¹ The Court held: (a) that a rescindable order is not final and therefore not appealable; (b) that an appeal against a default judgment is conceptually incompatible with the function of an appellate court, which is to review a contested decision made on the merits; (c) that a default judgment is only susceptible to rescission; (d) that an attempt to appeal such an order constitutes an irregular step which falls to be set aside

Discussion

- [26] Rule 6(12) of the Uniform Rules requires applicants, in all affidavits filed in support of urgent applications, to set out the circumstances that render the matter urgent and why they cannot be afforded substantial redress at a hearing in due course.
- [27] When a matter is brought to court on an urgent basis, the question to be answered is whether or not the applicant will be afforded substantial redress in due course.² In the event that the applicant does not succeed to convince the court that he will not be afforded substantial redress at a hearing in due course, the matter will be struck from the roll.³ The matter may also be struck from the urgent roll where the court finds that urgency was self-created.
- [28] The threshold to establish the juristic fact of "absence of substantive redress" is lower than that of "irreparable harm" for the purposes of establishing an interim interdict.⁴
- [29] It is common cause between the parties that they have been emmeshed in litigation for sometime, including the eviction proceedings which led to the 5 February eviction order, in the absence of the respondents, where the court ordered the respondents to vacate on or before 31 March 2026, failing which from 1 April, the sheriff or their deputy with the assistance of the SAPS may carry out the eviction order against the respondents and all those who reside on the property.
- [30] I am inclined to agree with Mr Thelejane's submission that the matter is urgent and that urgency arose on 1 April when he was served with the appeal application against the 5 February order. There was no delay in launching the application considering the Easter weekend from 3 April to 6 April. The facts evinced by Mr Thelejane before the court justify the urgent attention of the court with regard to

² *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others* (11/33767) [2011] ZAGPJHC 196 (23 September 2011).

³ *SARS v Hawker Air Services (Pty) Ltd* 2006 (4) SA 292 (SCA).

⁴ *Several matters on the urgent court roll* 2013 (1) SA 549 (GSJ).

the alleged appeal against the eviction order of 5 February. He has passed the threshold prescribed by the provisions of uniform rule 6(12)(b) for the reasons already mentioned. Therefore, the application ought to be enrolled as urgent.

[31] In respect of their condonation application for the late filing of an answer to Mr Thelejane's application, the respondents, stated that it was difficult to file an answering affidavit and the rescission application papers at the same time. In my view the fact that the respondents elected not to answer Mr Thelejane's application, but, instead used that opportunity to file a rule 30 and 30A notice on 8 April to which notice was responded on the same day of 8 April, and the rescission application on 9 April, collapsed any argument raised in respect of timelines set out in Mr Thelejane's application.

[32] It was common cause that the founding affidavit did not bear the commissioner's certificate. Subsequently, the respondents filed a rule 30 / 30A notice, and afterwards Mr Thelejane filed a supplementary affidavit in an attempt to rectify the error on 8 April. It is worth noting that on 15 April the respondents took a further step by filing their opposition notice and their counter application incorporating an answer to Mr Thelejane's application. In my considered view, subsequent events had cured any irregularity. Therefore this point *in limine* stands to fail.

[33] Concerning the filing of the supplementary affidavit without leave of the court. The supplementary affidavit set out as follows:

'1. ...

2. I have previously deposed to a founding affidavit in support of the Notice of Motion filed herein. 3. To the extent that there may be any defect, irregularity, or non-compliance in the commissioning of the founding affidavit, I hereby confirm under oath the contents thereof. 4. I confirm that the contents of the founding affidavit are true and correct and within my personal knowledge, unless otherwise stated. 5. This supplementary affidavit is filed in order to cure any alleged defect in the commissioning of the founding affidavit and to place the matter beyond any technical challenge. 6. The Respondents suffer no prejudice as the

factual basis of the application remains unchanged. Applicant 7. I respectfully submit that the matter ought to be determined on its merits.'

- [34] The respondents raised the issue of the filing of the supplementary affidavit without leave of the court only in the eve of the hearing. Initially the issue according to the rule 30 was non-compliant with regulation 3 and 4, which was addressed by the filing of the supplementary affidavit. In my respectful view, I consider the timing in raising this complaint as litigation by ambush.
- [35] Considering all the papers served before me, the importance of the case to both parties and their interest in the matter, I find that the supplementary affidavit was necessary and relevant. The respondents suffered no prejudice as the notice was responded to on the same day the complaint was received. Accordingly, the point *in limine* in this regard can not be upheld.
- [36] The respondents contended that ownership had not been proven. The issue of ownership served before the Tribunal and the Magistrates' court on 5 February. Both these forums accepted that Mr Thelejane had locus standi and authorised to lease in terms of the lease agreement signed by the parties, and to receive rental payments from the leasing of the property. No facts or evidence has been placed before the court for it not to accept that Mr Thelejane was an owner of the property. Even if the property was still under a mortgage bond, he had the locus standi and authority to enter into a lease agreement and receive the rental payments. This argument has no merit and cannot be upheld.
- [37] Coming to the merit of the application. The default judgment is only susceptible to rescission and an attempt to appeal such an order constitutes an irregular step which falls to be set aside. An order that is susceptible to rescission is not final and therefore not appealable.⁵ In casu, the eviction application was not opposed, and the respondents were not in attendance on the day of the hearing, the 5 February. Therefore, the 5 February order was granted in default. Accordingly, the appeal process against the order is incompetent.

⁵ *Pitelli v Everton Gardens Projects* CC 2010 (5) SA 171 (SCA).

[38] I am inclined to agree with the argument raised by Mr Thelejane that an incompetent appeal ought not suspend execution of the 5 February order. Therefore the prayer for declaratory order as in the notice of motion stands to succeed.

[39] The respondents argued that the 5 February order ought to be suspended in terms of Rule 45A, on the basis that:

'8.1.1. there is no alternative accommodation at present with a great risk of homelessness, 8.1.2. the children will be affected by removing them from school which is nearby; 8.1.3. it is understood that the respondent intends to evict at any time as he is erratic and unpredictable. He has been threatening and attempting to evict; 8.1.4. the applicants in the counter-application are not ready for a move to another place anyway; and 8.1.5. the defences which the applicants in the counter-application have will be cancelled along with the declaratory order if not suspended with the practical effect that they are stripped off their rights and the door closed on justice indefinitely. 8.2. Accordingly, I and family will not be afforded substantial redress in future should this order of suspension not be granted in our favour.

[40] Due to the fact that the answer to Mr Thelejane's application was filed few hours before the hearing, Mr Thelejane had a little to no opportunity to respond to the argument regarding the rule 45A.

[41] I have considered the submission raised by Mr Marishane with regard to the effects of the ejectment. The two minor children living with the respondents are aged 2 years and 8 months, and 4 years and 8 months as stated. It is common cause that Mr T Marishane is above 70 years old, having born in 1954. I accept that minor children and elderly people are regarded as falling under a vulnerable group. Though, there was no school mentioned and expert report as well as the impact of the removal of the minor children from school. I accept that the move to the new place and possible removal from school would have an impact on the

minor children. However, I find that at their age the impact would, in my respectful view, be more of inconvenience than having an educational effect.

[42] Further, the respondents have been aware of the dispute and various litigation, as well as the 5 February order. Notwithstanding their knowledge of Mr Thelejane's intention to evict them and the order, the respondents stated that they were not ready for a move to another place. It remained unclear why they would not be ready or been prepared to vacate the property and move to another place. I find no facts or evidence for the 5 February order and its ancillary effects not to be executed as ordered.

[43] According to the 5 February order, the respondents ought to have vacated on or before 31 March, failing which, on 1 April, the sheriff assisted by the SAPS ought to have effected the order by causing the respondents to vacate the property. Considering that the 5 February order for practical purposes will be difficult to comply with because all the dates are in the past. I have considered the matter as a whole, and decided to grant what I think is a practicable relief for the parties to be more certain of the effect of my findings.

[44] With regard to costs, though Mr Thelejane has been successful, he is not a legal practitioner, therefore I will not award costs in his favour.

[45] For these reasons, the following declaratory order is made:

[45.1] The applicants' urgent application is hereby enrolled as urgent.

[45.2] The Notice of Appeal delivered by the respondents is irregular, incompetent and of no force and effect in law.

[45.3] The Notice of Appeal does not suspend the operation and execution of the eviction order granted on 5 February 2026 under case number 027041/2025.

[45.4] The eviction order granted on 5 February 2026 remains in full force and of effect, save for the date of 1 April 2026 which is hereby substituted by 11 May 2026.

[45.5] Authorising and directing the Sheriff of the High Court assisted by the SAPS to execute the warrant of ejectment pursuant to the eviction order, should the respondents fail or refuse to vacate the property on or before 10 May 2026.



N G M MAZIBUKO
JUDGE OF THE HIGH COURT

Heard on: 16 April 2026

Judgment delivered on: 30 April 2026

For the applicants: In person

Instructed by:

For the respondents: Mr J Marishane

Instructed by: Marishane Attorneys