IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2022-003687

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED. YES

6/6/2024
DATE

SIGNATURE

In the matter between:

ANELE KWABABA	First Applicant
ALL OTHER OCCUPIERS OF UNIT 30 DOOR A3-06 HILL OF GOOD HOPE, 29 LOOPER ROAD ERAND GARDENS EXT 106, MIDRAND	Second Applicant
and	
YANDISA INVESTMENT PROPERTIES (PTY) LTD	First Respondent
THE CITY OF JOHANNESBURG METRO MUNICIPALITY	Second Respondent
THE SHERIFF OF THE HIGH COURT (HALFWAY HOUSE ALEXANDRA)	Third Respondent

Coram: Maenetje AJ

This judgment was handed down electronically by circulation to the parties' legal representatives by email and uploading on Caselines. The date and time for hand-down is deemed to be 10h00 on 6 June 2024.

JUDGMENT

Maenetje AJ:

Introduction

[1] On 19 March 2014 this Court, per Van Aswegen AJ, granted an order against the applicants as follows:

> "1. The First to the Second Respondents and all those occupying through and/or under them in occupation of the property located at Unit 30 Door A3-06 Hill of Good Hope, 29 Looper Road, Erand Gardens Extension 106, Midrand are hereby evicted from the property.
>
> 2. The First to the Second Respondents are ordered to vacate the above mentioned property on or before 1 May 2024.
>
> 3. In the event that, the First and Second Respondents fail to vacate the property on or before 1 May 2024, the Sheriff and/or his Deputy is authorised and directed, from 2 May 2024, to evict the Respondents from the property.
>
> 4. The First Respondent is hereby directed to pay the costs of this application, such costs to include the costs of the application in terms of Section 4(2) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998."

[2] There are no written reasons or written judgment for the order granted.

[3] The applicants have brought an application for the rescission of the above order. They seek an interim interdict on an urgent basis restraining the enforcement of the above order pending the final determination of the rescission application.

[4] It is common cause that the applicants were not present in court nor represented by their legal representatives in court when the matter was heard before Van Aswegen AJ and the order granted on 19 March 2024. They had filed affidavits.

[5] The applicants provide a reasonable explanation for their failure and that of their legal representatives to attend court on 19 March 2024.

[6] The matter has a rather long history. The history relevant to the order being granted in the absence of the applicants and their legal representatives is straightforward. The first respondent applied for an opposed motion date in December 2023 for the hearing of its eviction application against the applicants. The application was enrolled on the opposed motion roll for 18 March 2024. The opposed motion roll for Van Aswegen AJ for that week was published. The eviction matter by the first respondent was allocated for hearing on 22 March 2024. The applicants and their legal representatives prepared to argue the case on 22 March 2024 as per Van Aswegen AJ's allocation. Unbeknown to the applicants and their legal representatives the matter was called and argued on 19 March 2024 in their absence. They were not notified of the change of allocation for hearing from 22 March 2024 to 19 March 2024. But the first respondent's legal representatives were fully aware that the application was opposed. They had the details of the applicants' legal representatives but did not contact them to notify them of the change when the matter was called on 19 March 2024 for hearing.

[7] It is common cause that the applicants have not yet been evicted in terms of the court order by Van Aswegen AJ. Their eviction may take place at any time if no interim interdict is granted restraining their eviction pending the final outcome of their rescission application.

[8] Two issues arise, namely, whether the matter warrants a hearing in the urgent court, and whether the applicants have made out a case for the interim interdict that they seek.

[9] I deal with the issue of urgency first.

Urgency

[10] The applicants address the issue of urgency in their founding affidavit. They say the first and third respondents seek to evict them imminently notwithstanding their pending application for rescission. The first respondent has delivered a letter to the applicants' attorneys conveying this. The letter is dated 14 May 2024 and concludes by saying that the respondents will proceed to arrange the eviction of all occupiers. The applicants say they have no remedy except the interim interdict. This is correct because they cannot appeal the order of Van Aswegen AJ since it can be reconsidered by this Court in a rescission application.[1]

[11] The respondents contend at paragraph 31 of their answering affidavit that urgency is self-created. But their contention is rather incoherent. They say:

> "Contents hereof are denied.
>
> I deny that there is any urgency in this application, if any it is self-created and designed seeing that the eviction will continue as bringing the eviction application on its own does not block

[1] *Pitelli v Everton Gardens Project CC* 2010 (5) SA 171 (SCA) para 25.

> stop and or suspend the execution of a validly obtained court order the urgency is self-created."

[12] Interpreted in context, the contention by the respondents quoted above seems to make the case for the applicants. I understand the respondents to say that the eviction will go ahead despite the application for rescission of the order of Van Aswegen AJ because a rescission application does not, on its own, stop the execution of the eviction order. That is precisely the contention for the applicants. They have no other remedy to stop the eviction pending the outcome of the rescission application other than by an interim interdict. If they do not get interim relief – assuming a case is made out for it – the rescission application will become academic.

The merits

[13] The respondents effectively argue that the case for rescission is hopeless because Van Aswegen AJ did not grant the order in the applicants' absence. They say this is so because the applicants had filed answering affidavits which Van Aswegen AJ considered. They say that where a party has filed affidavits but an order is granted in their absence and that of their legal representatives, in our law that is not an order granted in the absence of a party. They rely on two judgments. First, the SCA judgment in *Pitelli.*[2] Second, the judgment of the Limpopo High Court in *Rainbow Farms (Pty) Ltd*.[3] None of these judgments supports the respondents'

[2] *Pitelli v Everton Gardens Projects CC* 2010 (5) 171 (SCA). They rely on paragraph 22 of this judgment.

[3] *Rainbow Farms (Pty) Ltd v Crockery Gladstone* (HCA15/2017) [2017] ZALMPPHC 35 (7 November 2017). They rely on paragraph 17 of this judgment.

contention. Where both the applicants and their legal representatives were absent when the order was granted on 19 March 2024, the order was granted in their absence. It would be different if the applicants' legal representatives had been present at court when the order was granted.[4]

[14] Is there a prima facie case for rescission?

[15] The applicants raise a number of defences to the rescission application. But a key contention by the respondents is not properly answered. It is that, in the absence of the applicants the Court granting the order could not properly have considered their personal circumstances to determine whether eviction was just and equitable. This consideration also relates to the date when the order for eviction, if granted, was to be implemented. Both these inquiries are mandatory. The SCA made this clear in *Changing Tides 74 (Pty) Ltd* at paragraph 25,[5] as follows:

> "Reverting then to the relationship between sections 4(7) and (8), the position can be summarised as follows. A court hearing an application for eviction at the instance of a private person or body, owing no obligations to provide housing or achieve the gradual realisation of the right of access to housing in terms of section 26(1) of the Constitution, is faced with two separate enquiries. First, it must decide whether it is just and equitable to grant an eviction order having regard to all relevant factors. Under section 4(7) those factors include the availability of alternative land or accommodation. The weight to be attached to that factor must be assessed in the light of the property owner's protected rights under section 25 of the Constitution, and on the footing that a limitation of those rights in favour of the occupiers will ordinarily be limited in duration. Once the court decides that there is no defence to the claim for eviction and that it would be just and equitable to grant an eviction order it is obliged to grant that order. Before doing so, however, it must consider what justice and equity demands in relation to the date of implementation of that

[4] *De Allende v Dr E Baraldi t/a Embassy Drive Medical Centre* [1999] JOL 5434 (T).

[5] *City of Johannesburg v Changing Tides 74 (Pty) Ltd and others (Socio-Economic Rights Institute of South Africa as amicus curiae)* [2013] 1 All SA 8 (SCA).

> order and it must consider what conditions must be attached to that order. In that second enquiry it must consider the impact of an eviction order on the occupiers and whether they may be rendered homeless thereby or need emergency assistance to relocate elsewhere. The order that it grants as a result of these two discrete enquiries is a single order. Accordingly, it cannot be granted until both enquiries have been undertaken and the conclusion reached that the grant of an eviction order, effective from a specified date, is just and equitable. Nor can the enquiry be concluded until the court is satisfied that it is in possession of all the information necessary to make both findings based on justice and equity." (Emphasis added)

[16] The respondents contend that the Court granting the order on 19 March 2024 was obliged by law to consider their personal circumstances in order to determine whether eviction was just and equitable, and the date on which the eviction order would take effect would be just and equitable. They referred to the Constitutional Court judgment in *Occupiers of Erven 87 and 88 Berea*[6] and submitted that the inquiry to be conducted by the court is an active one. The court cannot simply rely on what the parties say. The Constitutional Court said the following in this regard at paragraph 54:

> "Although the Court was faced with a purported agreement this did not absolve it of its duties under PIE. The application of PIE is mandatory, and courts are enjoined to be "of the opinion that it is just and equitable" to order an eviction. It is clear that the opinion to be formed is that of the courts, not the respective parties. Accordingly, a court is not absolved from actively engaging with the relevant circumstances where the parties purport to consent. PIE enjoins courts to balance the interests of the parties before it and to ensure that if it is to order an eviction, it would be just and equitable to do so. Without having regard to all relevant circumstances including, but not limited to, a purported agreement, the court will not have satisfied the duties placed upon it by PIE. These duties arise even in circumstances where parties on both sides are represented and a comprehensive agreement is placed before the court. In that event, it may well be that the court is able to form the requisite opinion from perusing the agreement and the affidavits before it and, where necessary, engaging the legal representatives to clarify any remaining issues."

[6] *Occupiers of Erven 87 and 88 Berea v De Wet N.O. and Another* 2017 (5) SA 346 (CC).

[17] The respondents submit that the duty to actively engage in the obligatory inquiry was acute where the applicants were not in court and were not represented in court by their legal representatives. They contend that on 19 March 2024 the Court failed to conduct this obligatory active engagement with all the circumstances. It appears to have simply granted the order because it accepted the respondents' contentions in the absence of the applicants. The respondents' counsel contested this submission. He submitted that this Court must accept that because on 19 March 2024 the Court had all the affidavits, including those filed by the applicants, it could only grant the order if it had considered the applicants' personal circumstances and conducted the requisite enquiry.

[18] The difficulty for the respondents is that in the absence of written reasons for the order or judgment explaining the basis for the order granted on 19 March 2024, there is no plausible basis upon which I can dismiss the applicants' contentions and accept the submissions made for the respondents. At a prima facie level, I am compelled to accept the applicants' submissions on these matters.

[19] In the circumstances, the requirements for an interim interdict are met. The applicants have a prima facie right to be evicted only in accordance with the requirements of PIE to the extent that it applies. The Court evicting them has to properly conduct the inquiry and make the determinations that the SCA and the Constitutional Court say are obligatory. The applicants have made out a prima facie case that the Court granting the order on 19 March 2024 may have failed in its duties.

The Court hearing the rescission application may conduct a more in-depth inquiry in this regard. The applicants have no alternative remedy to stop their imminent eviction other than by way of the interim interdict that they seek. The balance of convenience favours them. They stand to suffer more prejudice if the eviction is carried out but their rescission application succeeds. It will be an entirely empty victory.

[20] I conclude that the applicants have made out a proper case for the interim interdict that they seek or for the suspension of the execution of the eviction order in terms of Rule 45A of the Uniform Rules of Court.

[21] In the circumstances, I grant the following order:

(1) The matter is heard as one of urgency, non-compliance with the prescribed forms, manner of service and time frames are condoned in accordance with the provisions of Rule 6(12) of the Uniform Rules of Court.

(2) The first and third respondents, or anyone acting on their behalf, are interdicted and restrained from proceeding with the execution of the order of this Court that was granted on or about 19 March 2024, per Van Aswegen AJ, under case number 003687/2022, pending the final determination of the rescission application brought by the applicants to set aside the aforesaid order.

(3) The first and third respondents are ordered to pay the applicants' costs of this application.

NH MAENETJE
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of hearing	:	05 June 2024
Date of judgment	:	06 June 2024

For the applicants: I Mureriwa

Instructed by CMS Attorneys

For the 1st respondent: L Mhlanga

Instructed by Precious Muleya Inc