Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

APPEAL NO: A5037/21

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

Date: ....

In the matter between :

AVIGOR GEFEN First Appellant

HANNAH GEFEN Second Appellant

and

GERT LOUWRENS STEYN DE WET N.O. First Respondent

OLCKERS CHOPOLOGE KOIKANYANG N.O. Second Respondent

JUDGMENT

STRYDOM J :

Introduction

[1] This is a full court appeal which came before this court pursuant to leave to appeal being granted by the Supreme Court of Appeal against the judgment and order of Bhoola AJ (the court *a quo*) sitting in this division.

[2] The appellants were the first and second respondents (hereinafter referred to as the appellants) in an eviction application brought by the two joint liquidations (the respondents) of Sehri Trading (Pty) Ltd (in liquidation) (the company) for the eviction of the appellants who were in occupation of the immovable property owned by the company, Unit 5, The Grove, 119 Linden Street, Sandton (the property)

[3] The court *a quo* granted an order striking out the defence of the appellants and proceeded to grant an eviction order against the appellants. This order was granted on 28 October 2019 in the following terms:

> "1. The defence of the first and second respondents is hereby struck out;
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> 2. That the first and second respondents and all persons occupying the property through and under the respondents, are in unlawful occupation of the property situated at […], Sandown, Sandton ('the property');
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> 3. The first and second respondents and all persons occupying the property through and under the first and second respondents are hereby evicted from the property;
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> 4. The first and second respondents and all persons occupying the property through and under the respondents are to vacate the property on or before 29 November 2019

5. Should the first and second respondents and all persons occupying the property through and under the first and second respondents fail to vacate the property on or before 2 December 2019, the Sheriff of the above Honourable Court or his duly appointed deputy together with the assistance of the South African Police Service or a private security company, is hereby authorised to evict the first and second respondents and all persons occupying the property through and under the first and second respondents;
6. The first and second respondents are to pay the costs of the interlocutory application;
7. The first and second respondents are to pay the costs of the eviction application."

[4] The appeal is aimed at setting aside the whole order which includes the striking out of the defence of the appellants, their eviction and the costs orders.

[5] The appellants' defence to the eviction application was struck pursuant to an application brought by the respondents on the basis that the appellants had not complied with the order of Fisher J granted on 14 August 2019. In terms of this order the appellants were to serve their heads of argument and practice note in the eviction application within 14 days of the order (the compelling order).

[6] The striking out application was brought by the respondents in terms of the provisions of clause 9.8.2.12 of the Practice Manual of this Division which reads as follows:

> "12. Where a party fails to deliver heads of argument and/or a practice note within the stipulated period, the complying party may enrol the application for hearing. Such party shall simultaneously bring an application on notice to the defaulting party that on the date set out therein (which shall be at least five days from such notice), he or she will apply for an order that the defaulting party delivers his or her heads of argument and practice note within three days of such order, failing which the defaulting party's claim or defence be struck out. Such application shall be set down on the interlocutory roll referred to in 9.10 below."

[7] Despite the reference to the three-day period in the Directive, Fisher J afforded the appellants 14 days to file their heads of argument and a practice note. This they failed to do and this caused the respondents to file a further application for the striking of the defence of the appellants and, if not complied with, for their eviction.

[8] When the matter was heard by the court *a quo* the appellants appeared in person seeking a further indulgence from court to afford them an opportunity to file heads of argument. The main reason advanced by appellants why this indulgence should be afforded to them was that Fisher J stated during the hearing of the matter that the respondents should provide the appellants with a full copy of the entire application which would have made it possible for the appellants to prepare heads of argument.

[9] According to the record of proceedings in the court *a quo* it was submitted on behalf of the appellants that the respondents failed to provide them with a copy of the application as directed. This caused them to be unable to prepare heads of argument. It was pointed out on behalf of the respondents that the full application was provided to the appellants previously on more than one occasion. Subsequent to the directive of Fisher J the full application was emailed to an email address previously used by the appellants. Besides this, the appellants were informed that a full copy was available in hard form to be collected from the offices of respondent's attorney. This statement was countered by an allegation that the appellants were not afforded entry to these offices. The version of appellants that they never obtain a copy of the application appears to be highly improbable, but for purposes of the order I intend to make there is no need for this court to decide this issue.

[10] Various arguments were raised why the court *a quo* should not have granted the striking out application as well as the eviction application. In the appellants' heads of argument, the following grounds were stated:

10.1 The appellants have a valid and *bona fide* defence to the eviction application, i.e. a right of occupation of the property.

10.2 The eviction of the appellants from the property is not just and equitable in light of the personal circumstances of the appellants and the first appellant's son who occupies the property with them.

10.3 The eviction application is fatally defective.

10.4 The appellants' explanation for not having served their heads of argument and practice note in accordance with the 14 August 2019 order, which explanation was given to the court *a quo* is reasonable and *bona fide*.

[11] Despite these stated grounds of appeal, the argument during the hearing of the appeal centred around the nature and extent of the discretion a court will have to exercise before a defence is struck or not. This discretion derives from the wording of Practice Directive 9.8.2.13 which provides as follows:

> "Unless condonation is granted on good cause shown by way of written application, the failure on the part of the applicant to deliver heads of argument and/or a practice note will result in the matter being struck from the roll with an appropriate order as to costs; and failure on the part of the respondent to deliver such documents will result in the Court making such order as it deems fit, including an appropriate order as to costs. The failure to timeously serve and file heads of argument shall not constitute a ground for postponement of an application."

[12] It was argued that despite a failure to comply with a compelling order, within the time limits stated in the order, to file heads of argument and a practice note, a court in a striking out of a defence application will still have to exercise a judicial discretion whether such order should be made or not.

[13] It was argued that in an eviction application there are other criteria which should be considered which would not necessarily be applicable in other applications to strike a defence as a result of non-compliance with a court order.

[14] This additional discretion derives from the terms of the Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998 ("PIE") and more specifically section 4(7) and (8).

[15] For purposes of this judgment section 4(7) should be considered, which provides as follows:

> "(7) If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by the municipality or other organ of state or other land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women."

[16] At this juncture it should be noted that it is common cause that the appellants were in occupation of the property for more than six months, rendering section 4(7) applicable.

[17] Clearly this section enjoins a court to exercise a discretion not to order an eviction despite the unlawful occupation of an occupier.

[18] It was argued on behalf of the appellants that on a perusal of the record of proceedings it becomes apparent that the court *a quo* only focused on the explanation for non-compliance with the compelling order to file heads of argument and did not appreciate that the discretion to be exercised in a striking of a defence application in eviction matters to strike entailed a much wider enquiry as section 4(7) of PIE comes into the fray.

[19] It was further argued that by striking the defence of the appellant, the answering affidavit containing essential factual averments for exercising the court's discretion whether it would be just and equitable to order an eviction was no longer available to be relied upon. It was argued that there rests a duty on a court in an eviction application to inform itself of any facts which would render a court in a position to exercise a judicial discretion as contemplated in section 4(7). The defences on the merits of the application could not be considered piecemeal but in its totality. The defences being that the appellants are not in unlawful occupation of the premises and even found to be then it would not be just and equitable to evict the appellants being elderly people with a disabled son. It was argued that these defences should at least have been considered as part of the discretion to strike the defence or not.

[20] On behalf of the respondents, it was argued that the court *a quo* considered the explanation proffered by the appellants acting in person and concluded that an insufficient explanation was provided for non-compliance with the compelling order and that entitled the court to strike the defence as contemplated directive 9.8.2.12 of the Practice Manual. Once this finding was made then the court was enjoined to consider whether an eviction order should be granted on the case made out by the respondents only i.e. without reference to the answering affidavit which became irrelevant after striking of the defence. It was argued that the discretion of the court to evict should take into consideration that the appellants, by averring that they did not receive the full copy of the record, they in fact acted with *mala fides.* Also, so the argument went, the court should bring into the equation the fact that the appellants already made use of seven different attorneys, appeared in person and pleaded poverty when it suited them, dragged out the conclusion of this matter whilst they remain in occupation and broaden their defences to avoid their inevitable eviction.

[21] It was argued that the appellants were in unlawful occupation of the premises and have no defence to avoid such finding.

[22] It was argued that the striking out application should have been granted and the court *a quo* exercised its discretion in this regard. Counsel on behalf of the respondents however conceded that a further discretion should have been exercised by the court *a quo* pursuant to the terms of section 4(7) of PIE, before the eviction order should have been granted and that there was nothing on record to indicate that the court *a quo* in fact exercised a discretion in this regard.

[23] During the hearing of this appeal, it became common cause that the court *a quo* failed to exercise the legislative ordained discretion as set out in section 4(7) before an eviction order was made. The question for decision however remained whether the court *a quo* was entitled to strike the defence of the appellants.

[24] Mr Hollander on behalf of the appellants argued that the discretion to strike out the defence should have included a consideration whether it was just an equitable to order an eviction. This would mean that the decision maker should also consider the defence of a party guilty of non-compliance with the directive. Such enquiry would entail a consideration whether a defence is hopeless and not raised *bona fides.* It would not entail a full consideration of whether the defence is good or not.

[25] I am in agreement with the argument advanced by Mr Hollander that the striking of a defence in an eviction application would mean that allegations contained in an answering affidavit pertaining to the issues stipulated in section 4(7) would deprive a court from considering these issues. These issues include the rights and needs of the elderly, children, disabled persons and households headed by women. Some of these issues are relevant in this matter.

[26] Before a striking out of a defence application is granted in an eviction application the court should not only consider whether a proper explanation has been furnished for non-compliance with a compelling order to file heads and a practice note or not. A court should broadly consider the veracity of all possible defences which will inform a court

about the possibility of a successful defence against an eviction and whether these defences are raised in a *bona fide* manner.

[27] A striking out of a defence is a drastic remedy and, accordingly, the court must be appraised of sufficient facts on the basis of which it could exercise its discretion in favour of such an order. By striking of a defence and in this case of defences contained in an affidavit, the facts upon which a court should exercise its discretion now cannot be relied upon.

[28] Some guidance in this regard can be obtained from the terms of Rule 30A of the Uniform Rules of Court which also provides that the claim or defence can be struck out where a party fails to comply with the Rules of Court. It has been found that the relevant factors when orders of this kind is considered will be (a) the reasons for non-compliance with the rules, request, notice, order or direction concerned and, in this regard, whether the defaulting party has recklessly disregarded his obligations; (b) whether the defaulting party's case appears to be hopeless; and (c) whether the defaulting party does not seriously intend to proceed. In addition, prejudice to either party is a relevant factor. See: *Smith NO v Brummer NO*[1]. In this matter the court had to consider whether a bar should be lifted. See also *Van Aswegen v MacDonald Forman & Co Ltd*[2] which dealt with setting aside a default judgment. In *Evander Caterers (Pty) Ltd v Potgieter*[3] it was decided in an application to extend the time period to apply for a rescission of judgment that it is not necessary for a party seeking an indulgence to satisfy a court that he has a good defence. It should be sufficient if he really believes that he has a good defence.

[29] Accordingly, the discretion to be exercised by a court before a defence is struck goes beyond an enquiry to only establish whether good cause has been shown for the non-compliance with the compelling order.

[30] In an eviction application, the enquiry extends even wider. A court granting an eviction application must consider whether it would be just

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1 1954 (3) SA 352 (O) at 357-358.
2 1963 (3) SA 197 (O) at 201.
3 1970 (3) SA 312 (T) at 317C.

and equitable to evict an occupier from his or her residence despite a finding that the occupier is unlawfully occupying the land or premises in question. The court must act proactively to obtain as much information as possible. More so as the prejudice a party may suffer if the order is made or not should be considered. A judicial discretion can only be exercised if it is a properly informed decision. To be in that position it would not be helpful to strike a defence and the facts supporting the defence which, in this instance, was contained in an answering affidavit.

[31] In *Occupiers of Erven 87 and 88 Berea v Christiaan Frederik De Wet NO*[4], the Constitutional Court found at paragraph [54] and [55] in a matter where the unlawful occupiers purportedly agreed to be evicted that a court should acted proactively to obtain all available facts before an eviction order is granted. The court found as follows:

> "[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.
>
> [55] … Furthermore, it failed to appreciate that the duty to conduct the enquiry is that of the court, which is obliged to be proactive in gathering information about all the relevant circumstances, considering that information and arriving at a just and equitable order in the circumstances

[4] 2017 (5) SA 346 (CC).

> of each case. The High Court thus failed to probe the matters that it was statutorily enjoined to do."

[32] There is no indication that the court *a quo* considered the impact which section 4(7) of PIE could have had on the order to strike the defence or to evict the appellants. The court did not consider the veracity of the defence of the appellant, which should have included an enquiry whether it would have been just and equitable to evict the appellants. Consequently, it is my view that the court *a quo* did not exercise its discretion judicially in granting the application to strike out the defence as well as to grant the eviction order. On this ground alone the appeal should be upheld.

[33] In light of this finding there is no reason to consider other defences raised in the heads of argument suffice to state that the explanation advanced by the appellants for their failure to file heads of argument was, in my view, correctly not accepted by the court *a quo.* This matter has been ongoing for a long period. An answering affidavit was already filed and the full application was emailed by the respondents to an address previously used by the appellants. The further explanation that the appellants were not granted access to the office of the respondent's attorneys appears to be highly improbable and is unconvincing. Moreover, the appellants would not have drafted heads of argument themselves. The entire situation was rather caused by the appellants moving from one attorney to the other apparently because of fee disputes. On a reading of the record in the court *a quo* it became apparent that the "*defence*" advanced by the appellants, i.e. that the copy of the application was not provided to them pursuant to the directive of Fischer J, was provided to them by a legal representative. In court the appellants referred to a piece of paper to state their defence. In my view this "*defence"* was not *bona fide* but in light of this my view taken on the extent of the discretion which the court *a quo* had to exercise, and failed to do, this aspect is not decisive of the matter. It will have a bearing on the cost order which I intend to make in this matter.

[34] What remains outstanding before the eviction application is decided is the filing of heads of argument, a practice note, a list of authorities and a chronology in respect of the eviction application by the appellants. There is no condonation application before court for the previous non-compliance with the directives in this regard. The reasons, however, have been fully ventilated in the appeal papers. These outstanding documents should be file to assist a court hearing the matter. The hearing of the matter will, in any event, be delayed pursuant to the order this court intends making. In such circumstances I intend to afford appellants a final opportunity to file heads of argument and the other required documents. The order of this court must be such to cater for the possibility that this may not happen. In such a case a court will have to consider the just and equitability of the eviction, and other relevant considerations, on the evidence before it as part and parcel of the striking out application.

[35] The appellants brought an application for the leading of further evidence on appeal. This application was opposed. Similarly, the need to obtain this relief has fallen by the wayside. This application should not be granted.

[36] Lastly, during the hearing of this matter, condonation was granted to the appellants for the late filing of the record of appeal and heads of argument in the appeal in contravention of Rule 49(6)9a) and 7(a) and paragraph 7.1 of the Practice manual. The appeal was reinstated

[37] This ruling was made by the full court as the degree of non-compliance was not inordinate and the court resolved that the appellants had a good prospect of success on appeal.

[38] This matter has been in the court process for far too long for various reasons. I do not intend to refer to these reasons in this judgment suffice to say that the order this court intends to make would hopefully expedite this matter to its conclusion. The appellants remain in occupation of the property without paying rental, levies, for water and electricity. The liquidation process cannot be finalized whilst this matter has not been resolved. From the perspective of the appellants they have to live with the

uncertainty of what the future holds for them as far as housing is concerned. It is about time they also get certainty.

[39] As far as costs of this appeal and the application to lead further evidence on appeal are concerned, I am of the view that these costs should be in the cause of the eviction application. In my view costs should not follow the result as I took the view that the appellants did not raise a *bona fide* defence against the striking out application in so far as their explanation for non-compliance is concerned.

[40] The following order is made:

40.1 The appellant's appeal is upheld and the decision of Bhoola AJ dated 28 October 2019 is set aside.

40.2 The order of Bhoola AJ is substituted with an order as follows:

40.2.1 The applicants' application to strike out the defence of the respondent is postponed *sine die.*

40.2.2 The respondents are afforded a final opportunity to deliver heads of argument, a practice note, a list of authorities and a chronology in respect of the eviction application within ten (10) court days.

40.2.3 The costs of the application to strike out are reserved.

40.3 The application to lead further evidence on appeal is dismissed.

40.4 The striking out and eviction applications are remitted back to the High Court before a single Judge.

40.5 The cost of the application for leave to appeal, the cost of the petition for leave to appeal, the cost of the application to lead further evidence and of the appeal are costs in the cause of the eviction application.

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R. STRYDOM

JUDGE OF THE HIGH COURT

GAUTENG DIVISION

JOHANNESBURG

I Concur,

_____

L. WINDELL

JUDGE OF THE HIGH COURT

GAUTENG DIVISION

JOHANNESBURG

I Concur,

_____

M. B. NEMAVHIDI

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION

JOHANNESBURG

Date of Hearing:	24 January 2022
Date of Judgment:	01 February 2022
Counsel for 1st and 2nd Appellants:	Adv. L. Hollander

Instructed by:	Martin Speier Attorneys
Counsel for 1st and 2nd Respondents:	Adv. S. J Mushet
Instructed by:	AJ Van Rensburg Incorporated