

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 37758/20

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

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MOOSA T AJ

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20/06/2022

In the matter between:

AREATHER NWADINOB	First Appellant
AYANDA TYABASHE MAKHATHINI	Second Appellant
THOZAMA LUTHULI	Third Appellant
ZAMATHONGA MASINGA	Fourth Appellant

and

CITIQ RESIDENTIAL (PTY) LTD	Respondent
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In re:

CITIQ RESIDENTIAL (PTY)LTD	Applicant
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and

AREATHER NWADINOB	First Respondent
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THE UNLAWFUL OCCUPIERS OF EDITH COURT	Second to Eighth Respondents
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JUDGEMENT ON APPLICATION FOR LEAVE TO APPEAL

CORAM: T MOOSA AJ**Introduction:**

1. On 4 August 2021, in terms of an ex tempore judgement, I granted the Respondent/ Applicants application viz:
 - 1.1 The First to Eighth Respondents, together with any and /or all members of their families and any other persons who are in occupation of the property ("the unlawful occupiers") are to vacate the property, known as EDITH COURT, being portion 0 of Erf 104, Bellevue East, City of Johannesburg, Registration Division I. R., Gauteng Province, situate at the 137 Muller street, Bellevue East ("the property"), within 30 days from the granting of this order.
 - 1.2 In the event that the Respondents and those holding occupation through or under the occupiers, fail to vacate the property on the date specified in the above paragraph, the Sheriff is authorised and directed to evict the Respondents from the property.
2. On 18 August 2021 the Appellants applied for leave to appeal against the whole of my judgement.
3. Save for the application for leave to appeal the Appellants conduct in this matter has been wholly opportunistic, in that despite service of the main eviction application as well as the Section 4 (2) notice on the Appellants, the Appellants failed to deliver a notice of intention to defend. or any opposing affidavits. Counsel on behalf of the Appellants appeared at the 11th hour at the hearing still without any opposing affidavits and during the course of the hearing conceded to the order being granted.¹
4. Save for the application for leave to appeal the Appellants have done absolutely nothing to further the matter. I addressed correspondence to all parties requiring them to file heads by the 31st May 2022 and the Appellants have simply failed to respond.
5. The grounds for leave to appeal having no merit, as discussed hereunder, had the effect of staying the order granted on 4 August 2022 and has afforded the Appellants an additional 9

¹ Record , page 14-7 , para 10 and page 14-9 , para 10

months to illegally occupy the property and unscrupulously exploit an already untenable situation.

Grounds of appeal

6. First ground of appeal:

6.1 In granting the order, the Appellants had no lease agreements with the Respondent, whereas the Appellants have lease agreements with the Respondent, which lease agreements are in possession of the Respondent and the Respondent having attached to his founding affidavit, the lease agreement of the 1st Appellant, marked as annexure 02-20 to 02-29, and a certified copy of the first Appellants identification marked as annexure 02-7

6.2 In the Respondents founding affidavit in the main eviction proceedings a lease agreement between the Respondent and the First Appellant is attached – annexure “TM2A”². At the time of the hearing of the application, the first Appellant’s lease agreement had been cancelled and no valid lease agreement was in place. A copy of the cancellation letter dated 14 July 2020 confirming the date upon which the First Appellant was to vacate was attached to the founding affidavit – annexure ‘TM2B’³

6.3 There were no lease agreements entered into between the Respondent and the Second, Third and Fourth Appellants as is evident from the founding affidavit. The Appellants placed no evidence before the court to legitimize their claim to occupation of the property. This was also never placed in dispute during the hearing of the main eviction proceedings.

6.4 This ground of appeal having no merit.

7. Second ground of appeal:

7.1 That no notice of intention to oppose the eviction application was submitted. That the Appellants are not familiar with court processes and proceedings and having experienced severe financial constraints during Covid due to the Covid pandemic, therefore could not afford a legal representative did in fact email such notice and intention to oppose.

7.2 On 4 August 2022 during the hearing of the eviction application proceedings Adv Hashe came on record for the First, Second and Fourth Appellants and it was not denied that no notice of intention to oppose or opposing affidavits were filed by the Appellants.

7.3 The Appellants were accordingly represented at the hearing, an appropriate course of redress for this ground would therefore be a rescission and not an application for leave to appeal.

7.4. This ground of appeal having no merit.

² Caselines section 02-7 para 12 of the founding affidavit . See also Caselines section 02-20 to 29

³ Caselines section 02-8 para 15 (Founding Affidavit), See also annexure TTM2B” section 02-45

8. Third ground of appeal:

- 8.1 The Appellants aver that the Respondent relied on a Windeed report of ownership which Windeed reports contains a disclaimer and amounts to hearsay.
- 8.2 The Appellants did not place the ownership of the immovable property in dispute at the hearing of the matter and the Respondent in its heads correctly point out that the Windeed report being the best evidence as proof of ownership in the absence of a title deed, same being in the possession of the bank, there being an endorsement in favour of a third party as is evident from the Windeed report.⁴
- 8.3 In any event Section 4 (1) of the PIE Act provides that proceedings for the eviction of an unlawful occupier may be brought by an owner or person in charge of the land.
- 8.4 This ground of appeal having no merit.

9. Fourth ground of appeal:

- 9.1 The Appellants aver that this court erred in not taking into consideration that the City of Johannesburg did not take part in the proceedings and providing the Appellants with alternative accommodation, and that such failure would render the Appellants and their children homeless.
- 9.2 This issue was not raised by the Appellants during the course of the hearing, there was no evidence that the Appellants are indigent and unable to pay for alternative accommodation.
- 9.3 The City of Johannesburg was cited as a party to the proceedings and the application for eviction, as well as the Section 4(2) notice was duly served upon the City of Johannesburg.
- 9.4 In this matter the application for eviction was at the instance of a private institution, with no obligation to provide alternative accommodation.
- 9.5 From the founding affidavit and the evidence of Mr Mzili it was corroborated that the property has been hijacked by multiple unlawful occupiers with whom the Respondent has no contractual relationship.
- 9.6 The approach in dealing with eviction is summarized by Wallis JA in the matter of **City of Johannesburg v Changing Tides**⁵

“ A court hearing an application for eviction at the instance of a private person or body owing no obligation to provide housing or achieve a gradual realisation of the right of

⁴ Sibango and Sixteen Others v PPM Plumbing (Pty) and Another [2016] ZAPGPHC 24 (20 April 2016)

⁵ 2012 (6) SA 294 (SCA)

access to housing in terms of s 26(1) of the Constitution, is faced with two separate inquiries. First, it must decide whether it is just and equitable to grant an eviction order having regard to all relevant factors. Under s 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 owners protracted rights under s 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 the order.

Before doing so, however, it must consider what justice and equity demand in relation to the date of implementation of that 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 and whether they may be rendered homeless thereby or need emergency assistance to relocate elsewhere. The order that he grants as a result of these two discreet 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 a position of all the information necessary to make both findings based on justice and equity.”

- 9.7 In the premise, having regard to the evidence placed before this court the Appellants raised no defence to the claim of eviction and made no claim to being indigent or being in need of alternative accommodation.
- 9.8 In terms of my order the Appellants were granted thirty days within which to vacate the Property, the Appellants have continued to live illegally on the property for a further nine months as a result of the filing of the application for leave to appeal.
- 9.9 This ground of appeal having no merit.
10. The Appellants raised the issue of ownership and alternative accommodation for the first time in their application for leave to appeal and this was not canvassed or placed in dispute at the time of the hearing.
11. The Appellants failed to deliver opposing affidavits and set forth any defence to the eviction and in fact has used the application for leave to appeal in an attempt to get a “second bite at the cherry”.
12. The Appellants have not set forth any defence which would allow another court to come to a different conclusion.
13. In view of the foregoing the application for leave to appeal must fail.
14. In respect of the costs of this application, the conduct of the Appellants in bringing this application has been blatantly opportunistic and have been derelict in compliance with the rules of court.

15. In the matter of ***Plastics Convertors Association of SA on behalf of Members v National Union of Metalworkers of SA and Others***⁶ (In which the Labour Appeal Court stated: 'The scale of attorney and client is an extraordinary one which should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably vexatious and reprehensible manner. Such an award is exceptional and is intended to be very punitive and indicative of extreme opprobrium.'
16. The Appellants having litigated frivolously and vexatiously at great expense to the Respondent. In so doing, without an iota of evidence in substantiation. The litigation, which was plainly vexatious, was an attempt by the application to hold onto what the Appellants misguidedly perceived to be an advantage. This is frowned upon and must attract a punitive costs order.

Order

17. In the result I make the following order:
- (a) The application for leave to appeal is dismissed.
 - (b) The costs of this application will be on the attorney and client scale.

T. MOOSA AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 20 June 2022

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⁶ 2016) 37 ILJ 2815 (LAC) at para 46,

For the First Respondent: **ADV. M ROUKE**

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DATE OF JUDGMENT: 20 June 2022