

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO:

12423/2021

(1)	<u>REPORTABLE: YES / NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES:</u> <u>YES/NO</u>
(3)	<u>REVISED.</u>
.....
DATE	

In the matter between:

**THE UNLAWFULL OCCUPIERS OCCUPYING
20 OP DE BERGEN STREET, FAIRVIEW
JOHANNESBURG**

First Applicant

And

**EMIKON AUCTIONEERING SERVICES AND
Respondent
IMPORT AND EXPORT (PTY) LTD**

First

CITY OF JOHANNESBURG MUNICIPALITY

Second Respondent

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

MAKUME, J:

[1] This is an application for leave to appeal the judgement that I granted against the Applicants on the 18th July 2023.

[2] The application before me then was one of rescission of an eviction order that had been granted by Senyatsi J on the 19th July 2021. In my judgement I ordered the Applicants to vacate the premises situated at 20 Op De Bergen Street, Fairview, Johannesburg by not later than the 30th July 2023.

[3] On the 14th July 2023 the Applicants filed this notice of application for leave to appeal that judgement and order and have set out grounds of appeal as amplified on the 31st July 2023.

[4] Briefly the grounds can be summarised under the following headings

4.1 That the Court erred in not rescinding the judgment granted by Senyatsi J on the 19th July 2021.

4.2 That the Court erred in not staying eviction of the Applicants pending the process of providing alternative accommodation to the Applicants by the second Respondent.

4.3 That this Court erred in not taking into consideration the risk of homelessness should the eviction follow.

4.4 That this Court misconstrued and failed to consider properly the decision of the High Court and Supreme Court of Appeal in **First National Bank of South Africa vs Van Rensburg N.O. 1994 (1) SA 677 T; City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others 2012 (6) SA 294 (SCA); The Occupiers of Erven 87 and 88 Berea v Christian Frederick De Wet N.O. 2017 (5) Sa 346 (CC); Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC); City of Johannesburg v Blue Moonlight Properties 2012 (2) SA 104 (CC).**

4.5 That this Court erred in ignoring its Judicial oversight to determine whether it will be just and equitable to enforce an eviction.

[5] As is custom the starting point in deciding an application for Leave to Appeal is the provisions of Section 17(1) of the Superior Courts Act number 10 of 2013 which provides as follows:

“Leave to Appeal may only be given where the judge or judges concerned are of the opinion that-

(a) ...

- (i) the appeal would have reasonable prospects of success or
- (ii) there is some other compelling reason why the appeal should be heard including conflicting judgments on the matter under consideration.”

[6] The application before me was that this Court rescind a judgement granted against them by default in their absence. Prior to me hearing that application they the Applicants had failed in their bid to stay an eviction order pending the outcome of the rescission application.

[7] It is trite law that an order of the High Court can only be set aside under Rule 42, Rule 31(2) (b) on appeal or in terms of the Common Law. In all instances the requirements set out in those statutes or Common Law must be proved by the Applicants.

[8] In their application to rescind the Applicants denied that the Notice of Motion as well as all subsequent documents that led to the judgement by Senyatsi J had been served on them. They say that the persons on whom the Court documents were served are unknown and do not live at the premises and lastly that such persons had no authority to accept documents on their behalf. The Deponent to the Applicant's affidavit does not say who of the Unlawful Occupiers has the authority to accept receipt of legal documents on behalf of the whole group.

[9] This matter has a long and chequered history which commenced in December 2009 when Mokgoatheng J in Case number 01223/2008 granted an order in an application by Onla Investments in the following terms:

“(a) The City of Johannesburg was joined as the fourth Respondent. The first, second and third Respondents being:

- Mkhwanazi Maria - First Respondent
- Mdebele Abe - Second Respondent
- The Unlawful Occupiers
Of Erf 221 Fairview
Township - Third Respondent

(b) The City being the fourth Respondent was directed to report to the Court within four weeks on what steps it has taken and in future can take to provide emergency shelter or other housing for the first, second and third Respondents in the event of their eviction.

(c) The Applicants, first, second and third Respondents may within two weeks of the delivery of such report file an affidavit dealing with the report.”

[10] On the 27th November 2013 some four years later Yacoob AJ as she then was granted the following order in that matter:

(a) Declaring that the fourth Respondent (the City) is Constitutionally and statutorily obliged within its available resources to provide temporary accommodation to those of the first, second and third Respondents (the Occupiers) who would be rendered homeless in the event of this Court ordering their eviction from Erf 221 Fairview Township, Johannesburg (the property).

(b) The City is directed forthwith to engage meaningfully with the occupiers on the following issues:

- The particulars of the occupiers and their housing situation including details as to the number of occupiers that would be rendered homeless if the eviction order were to be carried out and the needs of the children, elderly and disabled persons and homelessness headed by women who would be affected by the eviction.
- What steps can be taken to provide the occupiers with suitable alternative accommodation including temporary emergency accommodation in the event that the Applicants are granted an eviction order.
- When alternative land or accommodation can be provided.
- The effects of an eviction on occupiers and the surrounding residents if the eviction order is executed without alternative accommodation being made available.
- The steps that can be taken to alleviate the effects of the occupants of the property in question on the Applicant if the date of eviction is postponed until after alternative accommodation is made available to those occupiers who will be rendered homeless by the eviction.
- City is directed within 30 days of the date of this order to file at Court and serve on the attorneys to the Applicant and the occupiers a report under oath setting out the outcome of the engagement process and the steps that will be taken to provide the occupiers with suitable alternative accommodation.
- The Applicant and the occupiers may within two weeks of receiving the report referred to above (3) deliver a commentary on the city's response.
- The Applicants eviction application (the main application) is stayed pending the outcome of the process set out above.
- The main application to be enrolled by the Registrar in consultation with the presiding judge for the consideration of the City's report and the

replies thereto of the Applicant and the Occupiers and the determination of such further relief as may be appropriate.

[11] There is a dearth of information on the papers as to what happened or what steps were taken by either the Applicants or the Respondents after the order that was granted by Yacoob AJ in the year 2013 save to say that Miss Mkhwanazi who was the first Respondent in that case says in her affidavit filed in the rescission application said that in June 2021 a certain Emmanuel told her or them (the occupiers) that he has purchased the property and that they must vacate. Ms Mkhwanazi then tells the Court that a meeting was arranged between Emmanuel and their lawyers and at that meeting Emmanuel fled when he saw the gathering of the unlawful occupiers. It must be recalled that by June 2021 the Application for Eviction had already been issued and served on one lady who lived on the property.

[12] It is common cause that I dismissed the application to rescind the judgement of Senyatsi J on the basis that the Respondents were aware of the judgement against them as far back as August 2021 amongst others. A number of events took place before my judgement and thereafter leading to this application for leave to appeal they were as follows:

12.1 On the 7th June 2023 the Sheriff carried out the eviction order and all unlawful occupiers were evicted from the property.

12.2 On the 8th June 2023 the Applicants launched an urgent application seeking an order on an interim basis preventing the owner from evicting them. This was done despite the fact that eviction had already taken place. It is also common cause that when the Applicants launched that urgent application they had moved back into the property in defiance of a Court order. The Urgent application was struck off the roll due to lack of urgency.

12.3 In that judgement Shepstone AJ found that the warrant of ejectment authorised by Senyatsi J had been executed. The learned Judge also made a finding that the Applicants did not seek an order setting aside the warrant of eviction on any factual basis on in law and that in actual fact the warrant had been executed.

[13] It was after the dismissal of the Applicants application before Shepstone AJ that a third Urgent application was set in motion and set down for hearing before me on the 27th June 2023. It is the judgement in that application that the Applicants seek to appeal. However, in the meantime whilst awaiting a hearing of the Application for Leave to Appeal the Applicant once more approached the urgent court and on the 21st September 2023 before Moosa J an order was granted in which the first Respondent consented not to unlawfully evict the Applicants pending the outcome of the appeal process.

[14] It is against that background that I now deal with this application for leave to appeal. Section 17(1) of the Superior Court Act 10 of 2013 enjoins this Court to grant leave if I am of the opinion that there are prospects of success or there is some other compelling reason why the appeal should be heard.

[15] The Applicants concede in paragraph 18.1 of their heads that an order had been granted in their favour during the years 2009 and 2013 directing the Municipality to engage meaningfully with the Applicants in order to facilitate their moving out of the property. The Applicants have been sitting idle on that order took no steps to enforce it much to the detriment and prejudice of the owner of the property.

[16] The order granted in 2009 and 2013 did not grant the Applicants permanent stay it was temporary accommodation at the expense of the Respondent.

[17] As I have indicated Section 17(1) besides dealing with prospects of success also enjoins this Court to give consideration to whether there are any other compelling reasons why this Appeal should be heard. I have now come to the

conclusion that there are compelling reasons why I should grant leave to appeal.

[18] The facts leading up to the judgement by Senyatsi J are almost identical to the facts in Blue Moonlight as well in City of Johannesburg vs Changing Tides 74 (Pty) Ltd. In both matters eviction order had been granted by default. The Constitutional Court in both matters emphasised on the need for a Court granting an eviction order to have regard to homelessness and whether it will be just and equitable.

[19] In this matter the City of Johannesburg was directed to do certain things in order to bring evidence before this Court to enable that Court to make a determination as to what will be just and equitable in carrying out the eviction order.

[20] It is regrettable that the previous order made in 2013 which still stands has not been given effect to and on that basis I deem it fair that leave to appeal be granted with the hope that the Applicants together with the City of Johannesburg will see to it that the necessary information is made available to this Court.

[21] In the result I make the following order:

ORDER

- 1 The Application for Leave to Appeal the judgement dated the 18th July 2023 is granted.
- 2 The Appeal shall be heard by the Full Bench of this Division.
- 3 The costs of this application shall be costs in the Appeal.

Dated at Johannesburg on this day of October 2023

**M A MAKUME
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG**

Appearances:

DATE OF HEARING : 29 SEPTEMBER 2023
DATE OF JUDGMENT : 04 OCTOBER 2023

FOR APPLICANT : ADV L MTSHIYO
INSTRUCTED BY : SERI LAW CLINIC

FOR RESPONDENT : ADV L MHLANGA
INSTRUCTED BY : Nwanezi Agbugba Attorneys