

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH
AFRICA GAUTENG DIVISION,
JOHANNESBURG

(1	REPORTABLE: Yes / No
)	OF INTEREST TO OTHER JUDGES: Yes /
(2)	No
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Case No.:
2022/9714

In the matter between:

KHOZA, WINNIE

Applicant

and

MADULAMMOHO HOUSING ASSOCIATION

First Respondent

MERVYN JOEL SMITH ATTORNEYS

Second

Respondent SHERIFF ROODEPOORT SOUTH

Third

Respondent

Neutral Citation: *Khoza v Madulammoho Housing Association* (Case No: 2022/9714) [2023] ZAGPJHC 338 (12 April 2023)

JUDGMENT

This judgment is deemed to be handed down upon uploading by the Registrar to

the electronic court file.

Gilbert AJ:

1. These proceedings concern what is to be done when a warrant of eviction has already been executed and an occupier evicted from land falling within the ambit of The Prevention of Illegal Eviction From and Unlawful Occupation of Land Act, 1998 (“PIE”) and the occupier seeks to be restored occupation pending the determination of an application by the occupier to rescind the order that founds the eviction.
2. The applicant as a lessee occupied a residential flat in a government subsidised low cost housing development in Roodepoort. According to the lessor (the first respondent), the lease was cancelled because the applicant failed to pay rental and other charges.
3. On 3 February 2023, the applicant was evicted from the flat pursuant to a warrant of eviction issued on 18 January 2023. The applicant launched urgent proceedings on 14 February 2023, which were set down for hearing a week later on 21 February 2023, seeking an array of relief including a declaration that her eviction from the flat was unlawful in terms of section 26(3) of the Constitution as read with section 8(1) of PIE, that she be afforded access to the flat and that an interdict be granted restraining the respondents from evicting her from the flat. It is however clear that the primary relief that the applicant seeks is that she be restored possession of the flat that she occupied as her home.

4. The applicant cites the lessor as the first respondent, the first respondent's attorneys as the second respondent and the relevant Sheriff who effected the eviction as the third respondent.

5. At the outset, it must be stated that the applicant's papers (which consist of her notice of motion, founding affidavit and replying affidavit), are inelegantly framed. They also contain several averments which the first and second respondents (who oppose the application), with some justification, challenge as factually devoid of merit, and, in certain instances, false. Nonetheless I am cognisant that these are urgent proceedings pursuant to which the applicant seeks to vindicate what she asserts is her constitutional right not to be evicted from her home except on the authority of an order of a competent court. The applicant does not appear well resourced. Although the applicant describes herself as a law student and was employed as a part-time legal secretary, the applicant says in her founding affidavit that she lost her employment. Her attorney, I was informed during argument, acts and appears *pro bono* on her behalf. The financially vulnerable position of the applicant is also borne out by the type of accommodation, which is government subsidised housing and where the rental at the commencement of the lease in January 2019 was R2 849.00.
 6. I have therefore adopted a generous approach towards the applicant's papers and the framing of her relief, and more especially because of the constitutional right that she asserts.¹
 7. I have also, where possible, had recourse to the common cause facts.
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¹ *Ngomane and Others v Johannesburg (City) and Another* 2020 (1) SA 52 (SCA), para 23.

8. Having heard argument on 23 February 2023, I was persuaded that the applicant's occupation of the premises was to be urgently restored and so rather than delay delivering an order restoring occupation, I made the order which appears at the end of this judgment, stating that my reasons would follow. These are those reasons.
9. I first summarise the relevant factual chronology.
10. On 4 March 2022, the first respondent as lessor launched eviction proceedings against the applicant on the basis that the written lease agreement between the parties had been cancelled because of the applicant's failure as lessee to make payment of rental and other charges. In due course, and presumably after compliance with section 4(2) of PIE, the eviction application was enrolled for hearing on 2 November 2022. Although the applicant had delivered an answering affidavit, the applicant would subsequently sign a settlement agreement on 14 September 2022 which provided *inter alia* that should the applicant not settle the then arrears of R48 287.66 by 30 November 2022, and should she then fail to vacate the premises by no later than 1 December 2022, the first respondent would be entitled to cause a warrant of eviction to be issued. There is a dispute relating to the conclusion of the settlement agreement, with the applicant contending *inter alia* that she did not understand what she was signing and that she was "*tricked into signing the said settlement*". The opposing

respondents adduced persuasive countervailing evidence that this challenge to the settlement agreement

was lacking in merit but, for reasons as will appear below, this issue need not and should not be decided by this court.

11. When the eviction application was called for hearing on 2 November 2022, the first respondent sought that the settlement agreement be made an order of court. The applicant appeared, represented by her present attorneys of record. Although there is a dispute as to precisely what transpired before the court that day and what representations were made *inter alia* by the applicant's attorney, the court nonetheless made the settlement agreement an order of court.
12. There is no evidence that the court on 2 November 2022 when making the settlement agreement an order of court considered whether it would be just and equitable, after considering all the relevant circumstances, to grant an eviction order. I shall return to this.
13. On 21 November 2022, the applicant launched an application seeking that the order granted on 2 November 2022 be reconsidered and set aside and that pending finalisation of that application the first respondent is to be interdicted and restrained from executing the eviction order. Amongst the grounds relied upon by the applicant in the founding affidavit annexed to that application for rescission are that the applicant was not aware of what she was agreeing to in relation to the settlement agreement and, importantly for present purposes,

asserting reliance upon section 26 of the Constitution. It is in this affidavit that the applicant also explains that she has lost her employment as a legal secretary.

14. The first respondent did not file an answering affidavit to this rescission application. Instead, on 30 November 2022, the first respondent's attorneys wrote to the applicant's attorneys recording that although the first respondent had received the rescission application, their instructions were to persist with the issue of a warrant of eviction on 1 December 2022, as provided for in terms of the settlement agreement that had been made an order of court on 2 November 2022.
15. On 2 December 2022, the first respondent drafted and sought the issue of a warrant of eviction. On the same day, 2 December 2022, the first respondent's attorneys state they again notified the applicant's attorneys that their instructions were to proceed with the eviction.
16. The state of play then at that stage, early December, is that notwithstanding the first respondent having received the applicant's rescission application, it chose not to oppose that application, but instead to persist with execution of the eviction order.
17. The warrant of eviction was issued by the Registrar on 18 January 2023.
18. The applicant enrolled her rescission application for hearing on 23 February 2023 on the unopposed roll.
19. Accordingly, when the warrant of eviction was executed on 3 February 2023, there was a rescission

application that was pending, which the first respondent had acknowledged that it had already received

on 21 November 2022 and which by the time the warrant of eviction was executed the first respondent had not opposed.

20. The first respondent argues that any urgency is self-created as the applicant should have taken appropriate steps earlier than she did to avert the eviction and not wait until after she had been evicted on 3 February 2023. But what this overlooks, as appears from the chronology, is that the applicant had already on 21 November 2022, in the same month that the order had been granted, initiated rescission proceedings which included seeking a stay of the eviction, and which had not been opposed by the first respondent.
21. It appears that the first respondent chose to press on with eviction, rather than oppose the rescission application. It would only be on the date of hearing of this urgent application, when first called on Tuesday, 21 February 2023, that the first respondent would enter notice of intention to oppose the applicant's rescission application that had been set down by the applicant for hearing on the unopposed roll for Thursday, 23 February 2023. I was informed during argument that as this rescission application had, belatedly it appears, been opposed, the applicant had removed the application from the unopposed roll.
22. Having summarised this chronology, I can now return to the question posed at the beginning of this judgment, namely what

is to be done where an occupier has already been evicted from residential premises in

circumstances where there is a pending rescission application, and the primary relief that the occupier seeks is to be restored possession?

23. The launching of the rescission proceedings by the applicant before the warrant of eviction was executed does not suspend the order authorising the eviction, in contrast to an appeal.²
24. The applicant in her founding affidavit relies upon the *mandament van spolie* to found the declaratory relief that her eviction was unlawful and that she be restored possession of the flat. The applicant had to therefore prove that she was in peaceful and undisturbed possession of the flat, and that she was unlawfully deprived of possession by the respondents.
25. The applicant needs to establish these requirements on the standard applicable to final relief in motion proceedings. As held by the then Appellate Division in *Nienaber v Stuckey* 1946 AD 1049 at 1053 to 1054:

“Although a spoliation order does not decide what, apart from possession, the rights of the parties to the property spoliated were before the act of spoliation and merely orders that the status quo be restored, it is to that extent a final order and the same amount

² *Erstwhile Tenants of Williston Court and Others v Lewray Investments (Pty) Ltd and another* 2016 (6) SA 466 (GJ), not following the earlier decisions of *Khoza and others v Body Corporate of Ella Court* 2014 (2)

SA 112 (GSJ), which was in any event distinguished, and *Peniel Development (Pty) Ltd and Another v Pietersen and Others* 2014 (2) SA 503 (GJ), para 12. See also *Pine Glow Investments (Pty) Ltd v Brick-On-Brick Property and Others* 2019 (4) SA 75 (MN), which applied and approved of *Willison Court* and not *Khoza*. *Pine Glow* in turn was applied in *Hlumisa Technologies and another v Nedbank and Others* 2020 (4) SA 553 (ECG), paras 16 to 18.

of proof is required as for the granting of a final interdict, and not of a temporary interdict; where the proceedings are on affidavit as in this case --- no application having been made by the Court to exercise its powers under [Rule 6(5)] to hear oral evidence --- the principles which have been recently discussed in this Court in Hilleke v Levy (1946 AD 214) apply ... At this stage it is sufficient that the appellant must satisfy the Court on the admitted or undisputed facts by the same balance of probabilities as is required in every civil suit, of the facts necessary for his success in his application."

26. This Division in *Scoop Industries (Pty) Limited v Langlaagte Estate and GM Co Limited (in voluntary liquidation)* 1948 (1) SA 91 (W) held that:³

"There must be clear proof of possession and of the illicit deprivation before an order should be granted."

27. It is therefore necessary for the applicant in relying upon the *mandament van spolie* to establish the two requirements for that relief based on the usual *Plascon-Evans* approach that any *bona fide* factual disputes are to be resolved by accepting the respondents' version, save where such

³ At 98-99, and cited with approval by the Appellate Division in *Reck v Mills en 'n Ander* 1990 (1) SA 751 (A) at 755 G-I.

version is so far-fetched or clearly untenable that the court is justified in rejecting it merely on the papers. ⁴

28. There is no dispute that the applicant was in peaceful and undisturbed possession of the flat when she was evicted on 3 February 2023. What is in dispute is whether the dispossession was unlawful.

29. The eviction was executed by the sheriff pursuant to a warrant of eviction.

The applicant raises various ground why the dispossession was unlawful. This includes an averment that the warrant of eviction is a not a "*proper warrant of ejectment*", since "*it was without the court stamp, it is just a made up document*". This averment is made by the applicant in her replying affidavit after the first respondent had attached the warrant of eviction to its answering affidavit in these proceedings. I must confess difficulty in understanding this challenge as *ex facie* the warrant it is stamped by the Registrar and there is no evidence to support the averment that "*it is just a made up document*".

30. But the applicant goes further than this. Upon a holistic reading of the applicant's affidavits and in the context of the chronology of the litigation between the parties, the applicant is challenging the lawfulness of the eviction on the basis that it is predicated upon a court order, that of 2 November 2022, which is the subject of her pending rescission

⁴ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C; *Botha v Law Society, Northern Provinces* 2009 (1) SA 227 (SCA) at para 4.

proceedings and so is liable to be set aside. The first respondent argues that this is not the case that is advanced by the applicant in her papers. In my view, allowing for these proceedings being urgent proceedings relating to the eviction of a financially vulnerable person from her home, the applicant is entitled to proceed on this basis.⁵ The first respondent also cannot be said to have been taken by surprise that the efficacy of the warrant of eviction would be challenged. This should be plain from there being a pending rescission application, which rescission application had been set down for hearing, as it would turn out, in the same week that this urgent application would be heard.

31. The difficulty for the applicant is that, as described above, any *bona fide* factual dispute is to be resolved in favour of the respondent, and this includes those relating to whether her dispossession by way of the eviction was unlawful. As matters presently stand, there is an extant court order, that of 2 November 2022, which makes a settlement agreement an order of court and which settlement agreement provides for a warrant of eviction to be issued. A warrant of eviction was issued and on the evidence before me in the affidavits the applicant was evicted by the Sheriff on 3 February 2023 pursuant to that warrant.

32. As long as there is a court order that remains extant and which authorises the dispossession, it is questionable whether relief

based upon the

⁵ *Ngomane* above, para 23.

mandament van spolie can in any event be granted. In *Williston Court*⁶ the occupiers had been evicted while an application for the rescission order was still pending. The occupiers sought to rely upon the *mandament van spolie*, contending that their dispossession was unlawful as the eviction order had been suspended by the launching of a rescission application. Meyer J held that as the launching of a rescission application does not suspend the operation of a court order, the eviction was not unlawful and so the application for restoration of possession was dismissed. It should be noted that that Meyer J was not called upon to consider the issues that now feature in these proceedings.

33. In the circumstances, I am unable to find that the applicant has satisfied the requirements of the *mandament van spolie* and so am unable to find that the applicant is to be restored occupation of the flat on that basis.
34. Similarly the declaratory relief that the applicant seeks, which is to declare that her eviction was unlawful and which too is final relief, cannot be granted for as long as the court order remains extant.
35. But the matter does not end there. The applicant also sought in her founding affidavit to satisfy the requirements of interim interdictory interdict, although no such relief is sought, at least in express terms, in her notice of motion.

⁶ Above.

36. It should be immediately apparent that a fundamental difficulty with relying upon an interdict to obtain restoration of possession is that an interdict is, to use the phraseology of the Supreme Court of Appeal in *Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality* 2007 (6) SA 511 (SCA)⁷, ‘future-directed’ and cannot be used for ‘remedying a past injustice’. The primary relief sought by the applicant is to be restored possession of the flat, which is directed at remedying the past.
37. Nonetheless, for reasons that will become apparent, I borrowed, insofar as may be appropriate, from the requirements for interim interdictory relief in seeking to craft effective and suitable relief in these circumstances.
38. To succeed in obtaining interim interdictory relief, an applicant *must inter alia* establish a *prima facie* right.
39. The right that the applicant asserts is the right enjoyed under section 26(3) of the Constitution that “*no one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances*” and which is reinforced by PIE, including section 8(1) which provides that “*no person may evict an unlawful occupier except on the authority of an order of a competent court*”.

⁷ Para 18, at 5128G.

40. Moseneke J, writing for the majority of the Constitutional Court, in *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC), in the context of granting interim interdictory relief pending the review of a decision by an organ of state, held in paragraph 46 that when considering whether the requirements for interim relief have been satisfied, “[i]f the right asserted in a claim for an interim interdict is sourced from the Constitution it would be redundant to enquire whether that right exists”.

41. Moseneke J continued in paragraphs 49 and 50:

“[49] Second, there is a conceptual difficulty with the high court's holding that the applicants have shown 'a prima facie . . . right to have the decision reviewed and set aside as formulated in prayers 1 and 2'. The right to approach a court to review and set aside a decision, in the past, and even more so now, resides in everyone. The Constitution makes it plain that '(e)veryone has the right to administrative action that is lawful, reasonable and procedurally fair' and in turn PAJA regulates the review of administrative action.

[50] Under the Setlogelo test the prima facie right a claimant must establish is not merely the right to approach a court in order to review an administrative decision. It is a right to which, if not protected by an interdict, irreparable harm would ensue. An interdict is meant to prevent future conduct and not decisions already made.”

42. Adapting this to the present case, it is not enough for the applicant to demonstrate that she has the constitutional right not to be evicted from her home – as she clearly has that right

- she must go further.

43. There is a court order which authorises the eviction of the applicant, in this instance the court order of 2 November 2022 making the settlement agreement an order of court.
44. In the context of considering whether to grant interim interdictory relief pending a review of a decision of an organ of state, the court is called upon to evaluate the prospects of success of the decision being set aside in due course in the review application.⁸ I adopt an analogous approach.
45. It is necessary for the applicant in seeking to establish her *prima facie* right that she not be evicted from her home except on the authority of an order of a competent court to show that there are prospects of success of the order being set aside.
46. It is to this aspect that I now turn. I am cognisant that the applicant's rescission application must still be determined and that it is not for this urgent court to anticipate the outcome of those rescission proceedings. I am also cognisant that it is not for this urgent court to decide whether the applicant should have been evicted. What I decide is if there are sufficient

⁸ In the context of considering whether to grant interim relief pending a review, the court is called upon to evaluate the prospects of success in the review application: see, for example, *Ladychin Investments (Pty) Ltd v South African National Roads Agency Ltd and Others* 2001 (3) SA 344 (N), *Capstone 566 (Pty) Ltd and Another v Commissioner, South African Revenue Service and Another* 2011 (6) SA 65 (WCC), para 53, and Binns-Ward AJ (as he then was) in *Searle v Mossel Bay Municipality and Others* [2009] ZAWCHC 9 (12 February 2009) described the test as follows:

"That means the prospects of success in the contemplated review proceedings - as far as it is possible at this stage to assess them - represent the measure of the strength or otherwise of the alleged right that the applicant must establish prima facie in order to obtain interim relief."

prospects of success that the order granted on 2 November 2022 is assailable.

47. Section 4(7) of PIE provides that if an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated (which is common cause in this instance), 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 the land has been made available or can reasonably be made available by a 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.
48. If the court is so satisfied, then in terms of section 4(8) the court must proceed to grant the eviction order and determine both a just and equitable date on which the unlawful occupier must vacate the land, and the date on which an eviction order may be carried out if the unlawful occupier has not vacated the land on such date.
49. It is common cause in this matter that the warrant of eviction was issued consequent upon an order of court which makes a settlement agreement an order of court. It is the settlement agreement that provides that the applicant is to vacate the

premises by 1 December 2022 and that if she does not so vacate the premises the applicant can approach the registrar

for the issue of a warrant of eviction. The court order itself does not provide for the eviction of the applicant and it follows that the order does not provide for either of the dates required by section 4(8) of PIE.

50. As stated, there is no evidence that the court on 2 November 2022 when making the settlement agreement an order of court considered all the relevant circumstances and whether it was just and equitable to grant an order that in effect permitted an eviction.⁹ A court is required to act proactively to ensure that it is 'appraised of all relevant information to enable it to make a just and equitable decision'.¹⁰

51. The eviction could only in terms of the settlement agreement occur if the applicant did not pay the full outstanding arrears by 30 November 2022. That was something that still had to happen in the future. I do not see how a court could on 2 November 2022 already be in a position as required in terms of section 4(7) of PIE to form an opinion, after considering all the relevant circumstances, including whether there been compliance with the settlement agreement, that it was just and equitable to evict the applicant. Or whether if there had been non-compliance with the settlement agreement, it was nevertheless just and equitable to evict the applicant. For example, if the applicant had paid all the outstanding

⁹ A recent reminder in this Division that a court is required to consider all the relevant circumstances and that the facts must demonstrate that it would be just and equitable to grant an eviction order before it can be granted is *Madulammoho Housing Corporation NPC v Nephawe and*

another [2023] ZAGPJHC 7 (10 January 2023), para 10, per Wilson J.

¹⁰ *Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* [2010] 4 All SA 54 (SCA), para 15.

arrears, but did so one day late, then upon a strict application of the settlement agreement, the first respondent would nonetheless be entitled to proceed with the warrant of eviction, without the court considering whether it would be just and equitable to so evict the applicant. One would hardly think that if the court has been called upon in those circumstances – where all the rental arrears had been paid, but one day late – it would have formed the opinion that it was just and equitable to evict the applicant from her home.

52. This demonstrates, in my view, that what in effect is an anticipatory eviction order may be problematic.
53. The position of the court that made the settlement agreement an order of court on 2 November 2022 must be appreciated, bearing in mind that it was sitting as one of the busiest unopposed courts in the country. It does not appear from the papers before me as to what submissions were made to the court on 2 November 2022 and whether that court was precognised of the difficulties that I have raised.
54. When I put to the parties during argument whether the order that had been granted on 2 November 2022 should sustain a lawful eviction of the applicant, the proposition that an anticipatory eviction order should not be granted was not seriously challenged but rather, the first respondent argued, that this was not the case that is made out by the applicant in

her papers.

55. I accept that the applicant does not raise this challenge, at least not in these terms, but it is clear from her papers that the applicant does squarely rely upon her constitutional right not to be evicted from her home except on the authority of a competent order. The applicant expressly on several occasions in her affidavits refers to section 26(3) of the Constitution and section 8(1) of PIE.
56. Given that these proceedings are aimed at a vindication of the applicant's constitutional rights and, again, given that these are urgent proceedings, I find that the applicant, in the context of demonstrating a *prima facie* right, has shown that there are reasonable prospects of setting aside the order granted on 2 November 2022.
57. The applicant explains that because she has been evicted from her home, she fears for her safety. The applicant explains that she has not been offered any temporary emergency housing by the municipality. The applicant also explains in her affidavit that she is staying temporarily with people she does not know because although she spoke to her friends to see if they could arrange accommodation for her, she has had no success. The applicant explains that she had lost her employment as a legal secretary and is a law student, and cannot afford accommodation.
58. Although the first respondent challenges the veracity of this

evidence on the basis that the applicant has not produced sufficient detail, the first respondent has not adduced any evidence to gainsay what the applicant says. In the circumstances described in her affidavits, I find that the

applicant has suffered and will continue to suffer irreparable harm arising from her eviction from her home.

59. No other satisfactory remedy to restoration of possession is apparent.
60. When dealing with the balance of convenience the applicant reiterates that she is sleeping with strangers in an overcrowded shack. I cannot disregard the safety concerns expressed by the applicant. It is common cause that the first respondent is a low cost housing development. Such prejudice as the first respondent may suffer by being required to continue to afford the applicant accommodation whilst the rescission application is pending does not outweigh the self-evident prejudice that the applicant suffered in having been evicted from her home. What also weighs upon me in assessing the balance of convenience is that the applicant did launch rescission proceedings shortly after the order had been granted on 2 November 2022, and the first respondent's conduct in relation thereto, which was to delay opposing the rescission application until 21 February 2023 whilst pressing on with the eviction.
61. I therefore find that the applicant has established the requirements for an interim interdict, or at least would have done so had the applicant approached the court before she was evicted from her home.

62. Therein lies the rub. The applicant has already been evicted from her home and so, as appears from *Tswelopele*, jurisprudentially the grant of an interdict, which is forward-looking and does not address something

that has passed, cannot be used to restore the possession that the applicant seeks as her primary relief. Ordinarily restoration of possession would take place through the *mandament van spolie* but I have already found that the applicant has failed to establish the requirements for a *mandament*.

63. There would have been no difficulty if the court been approached before the eviction order was executed, as then interim interdictory relief could have been granted interdicting the eviction pending the determination of the rescission application or the operation and execution of the order suspended in terms of Uniform Rule 45A.^{11 12} But what is to be done now that the eviction has already been executed and there is a pending rescission application that has prospects of success, but in the meanwhile the applicant has been rendered homeless?
64. The opportunity for an urgent court, particularly in this Division, to closely consider solutions is limited.
65. Section 172(1) of the Constitution provides that “[w]hen considering a constitutional matter within its power, a court (a) must declare that any law or conduct that is consistent with the Constitution is invalid to the

¹¹ Uniform Rule 45A provides that “[t]he court may, on application, suspend the operation and execution of any order for such period as it may deem fit: Provided that in the case of an appeal, such suspension is in compliance with section 18 of the [Superior Courts] Act”.

¹² As to Uniform Rule 45A affording a suitable remedy, see *Pine Glow* above and, in this Division, *Williston Court*, para 20 and *Peach v Kudjoe* [2018] ZAGPPHC 291 (10 January 2018).

extent of its inconsistency; and (b) may make any order that is just and equitable ...”.

66. The matter before me is a constitutional matter, directly affecting the applicant’s right not to be evicted from her home without an order of court made after considering all the relevant circumstances under section 26(3) of the Constitution and under PIE.¹³ An order can be made that is just and equitable without first necessarily declaring any law or conduct invalid as being inconsistent with the Constitution.¹⁴ In the circumstances, and in crafting appropriate relief to address the situation that presents itself, I find that I am able pursuant to section 172(1) to grant relief restoring possession, albeit that the applicant has not satisfied the requirements for final relief such as pursuant to the *mandament van spolie*.

67. Crafting suitable relief to vindicate constitutional rights under section 26(3) where the *mandament van spolie* is not available has precedent. In *Tswelopele*¹⁵ the occupiers had been evicted without a court order. During the eviction, the materials used to construct their homes and many of their belongings were destroyed. The court *a quo* refused the occupiers relief on the basis that the *mandament* was unavailable as the *mandament* could not be used to restore possession of that which had been destroyed.

¹³ *Occupiers, Berea v De Wet NO and Another* 2017 (5) SA 346 (CC) at para 65.

¹⁴ *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another*

2010 (2) SA 415 (CC) at para 97; *Minister of Safety & Security v Van der Merwe and Others* 2011 (5) SA 61 (CC) at para 59.

¹⁵ Above.

Although the Supreme Court of Appeal agreed that the *mandament* was unavailable, and should not be extended to cover the restoration of destroyed property,¹⁶ the Supreme Court of Appeal held that effective relief was required to speedily address the consequence of the breach of the occupiers' constitutional rights, and that the only way to achieve this was to require the respondents to re-create the occupiers' shelters.¹⁷

68. Of course there are distinguishing factors. In *Tswelopele* there was no dispute by the time the matter reached the appeal court that the occupiers' constitutional rights had been wantonly infringed. In the present instance, there is a court order authorising an eviction. In *Tswelopele* the *mandament* was unavailable as jurisprudentially it was not a suitable remedy as it is aimed at restoration of physical control and enjoyment of specified property, and not its reconstituted equivalent.¹⁸ In the present instance the restoration of possession under the *mandament* is unavailable as the unlawfulness of the dispossession as a requirement for the remedy cannot be established as there is an extant court order. In *Tswelopele* an effective remedy required the reconstitution of destroyed property as the property had been destroyed, and not restoration of property. In the present instance, an effective remedy requires restoration of occupation of the residential flat, which has not been destroyed. But the point is that *Tswelopele* is precedent for the crafting of effective relief

¹⁶ Para 20 to 26.

¹⁷ Para 27 and 28.

¹⁸ Para 24.

to vindicate an infringement of a constitutional right, and particularly those under section 26 of the Constitution.

69. Although the Supreme Court of Appeal in *Tswelopele* granted effective relief on the basis that it was “a remedy special to the Constitution”,¹⁹ without referring to the court’s powers under section 172(1)(b), more recently, the Supreme Court of Appeal in *Ngomane v Johannesburg (City) and Another* 2020 (1) SA 52 (SCA), also for purposes of vindicating constitutional rights under section 26(3) of the Constitution, in fashioning appropriate relief, expressly relied upon section 172(1). Maya P referred²⁰ to the following from *Fose v Minister of Safety & Security* 1997 (3) SA 786 (CC):

'It is left to the courts to decide what would be appropriate relief in any particular case.

*Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights.'*²¹

'... (T)his Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the

¹⁹ Para 27, at 522F.

²⁰ At para 22.

²¹ Para 18 and 19.

*infringement of any of the rights entrenched in it. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to forge new tools and shape innovative remedies, if needs be, to achieve this goal.'*²²

70. The Supreme Court of Appeal in *Tswelopele* declined to extend the common law *mandament* to grant relief that went beyond the restoration of property, and to order pursuant to that common law remedy the respondents furnish the occupiers with substituted property. Rather than forcing the common-law remedy to perform a constitutional function, and detract from many years of jurisprudence informing the parameters of that remedy, the Supreme Court of Appeal held²³ that the relief it was granting “*is a remedy special to the Constitution, whose engraftment on the mandament would constitute an unnecessary superfluity*”.

71. Similarly, in granting an order restoring possession to the applicant of the flat, I do not seek to expand the availability of the *mandament* to include circumstances where the order authorising the dispossession may be assailable but is not finally established or to contort interdictory relief that is forward-looking so as to restore possession and so address something that has happened in the past. Rather I granted the primary relief that I

²² Para 69.

²³ Para 27, at 522F.

did in restoring possession on the basis of crafting suitable relief under section 172(1)(b) of the Constitution. But in considering whether these are appropriate circumstances in which to grant relief under section 172(1)(b) I have, as appears above, borrowed from the requirements for interim interdictory relief. This appears to me to be preferable than granting relief under section 172(1)(b) in an untethered manner, without some form of guidance from established principles.

72. In at least some sense this restoration of occupation is, in effect, final in that it restores the *status quo* and whatever the outcome of proceedings to determine whether the applicant's occupation is lawful, that occupation cannot be undone.^{24 25} But it does not follow that I have finally decided as between the parties the parties' respective rights to the flat, or whether the eviction was unlawful or that the warrant is to be set aside. The *lis* between the parties remain, and which are to be determined in due course.²⁶ The relief that I have granted does not have any final effect on the underlying, but disputed, *rights* of the parties, whatever the effect the relief has on the *object* of those rights, which is occupation of the flat.²⁷

²⁴ See *Nienaber* above, at 1053-4.

²⁵ This is also why the primary relief restoring occupation as appears in the order is not framed as interim relief.

²⁶ It is in this sense that I understand the Supreme Court of Appeal's description in *Tswelopele* at 521D-E of the restoration of physical control and enjoyment of the specified property pursuant to the *mandament* as being 'interim'.

²⁷ As to this distinction between interim and final relief, see *Andalusite Resources (Pty) Ltd v Investec Bank Ltd and Another* 2020 (1) SA 140 (GJ), particularly para 20 to 24.

73. The relief that I granted is ultimately interim relief in that it is relief crafted under section 172(1)(b) of the Constitution as a temporary, not final, solution to the position that presents itself and pending determination of the pending litigation between the parties.
74. Upon the applicant having taken re-occupation of the premises pursuant to the primary relief as granted, and so being in occupation of the premises, I further provided in the order that I made for the usual interim interdictory relief that pending the determination of the rescission application, the first respondent is restrained from evicting the applicant from the premises. I am satisfied that such relief is appropriate in the circumstances, whether upon the applicant having satisfied the usual requirements of such interim interdictory relief or under section 172(1)(b) of the Constitution as adjunctive relief to the primary relief.
75. I nonetheless provided for some protection for the first respondent in the order that I granted so as to mitigate the risk that the applicant, once being restored occupation of the flat, failed to proceed expeditiously with her rescission application. Leave is granted to the first respondent, on papers duly supplemented, to approach the court for a reconsideration of the interdictory relief should the applicant not proceed expeditiously with the prosecution of her rescission application. To some extent the prosecution of the rescission application

can also be advanced by the first respondent itself, in proceeding expeditiously to file its answering affidavit in those proceedings. As appears above, the first respondent had delayed its

opposition to those rescission proceedings, and therefore cannot be heard to overly complain at the pace of the rescission proceedings.

76. As there can be no turning back of the clock in relation to the relief that I have granted restoring occupation of the flat to the applicant, there is no point providing for that particular relief to be reconsidered. Accordingly, it is the interim interdictory relief only that is open to be so reconsidered.
77. The applicant seeks in addition that she be permitted to have two family members effectively occupy the flat with her and that she and her family members and visitors be entitled to access the housing development in which the flat is situated through their motor vehicles. The lease agreement does not appear to provide for this and there is insufficient evidence on the papers that this was the situation prevailing before the eviction took place. In restoring possession, I cannot go beyond restoring that which was dispossessed.
78. The applicant further seeks that certain household items be returned that she asserts were removed during the eviction, alternatively that she be compensated for those household items. The same applies in relation to an amount in cash that she the applicant asserts went missing during the eviction. There are substantial factual disputes relating to these issues and in the circumstances there is no scope in these

proceedings to grant that relief. To the extent that the eviction took place illegally, which still needs to be established, and a cause of action can be made out by the

applicant in respect of her missing or destroyed household contents or the missing cash, the applicant has her remedies.²⁸

79. The applicant also sought relief against the Sheriff, alleging that the Sheriff had illegally executed the warrant. The applicant has not made out a case that the Sheriff has acted unlawfully, particularly given the short affidavit filed by the Sheriff explaining that he undertook the eviction on the strength of a warrant of eviction, and as set out above, there is such a warrant of eviction. There is accordingly no basis to grant any relief against the Sheriff, at least not in these proceedings.
80. The applicant also cited the second respondent, being the attorneys of record for the applicant, and similarly sought relief against them. The applicant in framing her relief in her notice of motion does not distinguish clearly which relief is sought against which respondent. When raised during argument, the applicant's attorney indicated that the applicant would no longer be pressing for relief against the second respondent firm of attorneys, particularly as those attorneys asserted that they had been misjoined to these proceedings. Given the urgency of these proceedings, and in light of the applicant no longer pressing for any relief against the second respondent, there is no need to deal any further with its position. The second respondent argued that it had to incur costs in opposing these proceedings but in my view a separate costs order need not be

made in

²⁸ Contrast to *Tswelopele* where there was no dispute that there has been an unlawful eviction and that the occupiers' belongings and other property had been destroyed.

respect of the second respondent as the first respondent in any event opposed these proceedings and where it does not appear to me that any substantial additional costs were incurred because the second respondent was also joined.

81. In my discretion, the costs of these proceedings are appropriately reserved. It may be that the appropriate court to determine the incidence of costs in this application is the court determining the rescission application. Whether or not the rescission succeeds, and how that determines the fate of the warrant of eviction, informs the incidence of costs.

82. These then are the reasons for the order that I made on 23 February 2023 that:

82.1. The first respondent is to restore possession to the applicant of Flat H102 in Fleurhof-Views, 61 Camel Thorn Drive, Fleurhof, Roodepoort ["the premises"] forthwith and in any event before 18h00 on 23 February 2023.

82.2. Pending the determination of the applicant's rescission application, the first respondent is interdicted from:

82.2.1. evicting the applicant from the premises;

82.2.2. barring, impeding or hindering the applicant's access to the premises;

but which interdictory relief does not extend beyond the applicant personally and does not include any vehicle.

82.3. The first respondent is granted leave to approach the court, on duly supplemented papers, for a reconsideration of the relief granted in the subparagraph 2 above should the applicant not proceed expeditiously with the prosecution of her rescission application.

82.4. The costs of the urgent application dated 11 February 2023 are reserved for determination by the court in the rescission application, save that if the applicant does not proceed with the rescission application, the applicant is _____ to pay the costs of the urgent application.



Date of hearing: 23 February 2023

Date of order: 23 February 2023

Date reasons delivered: 12 April 2023

Counsel for the Applicant:	C S Mopedi (Attorney)
Instructed by:	Mopedi CS Attorneys

Counsel for the First and

Second Respondents:

N Lombard

Instructed by:

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For the Third Respondent:

No appearance