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

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

CASE NO: A5069/2021

CASE NO: 2019/31410

(1) REPORTABLE: N0
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

12 June 2023. .....
DATE
SIGNATURE

In the matter between:

JUKSKEI: BRENDAN WENTZEL Appellant

and

NTSHINGILA: DESEREE JOZINI Respondent

JUDGMENT

CRUTCHFIELD J:

[1] The appellant, Brendan Wentzel Juksei, appealed to the Full Court against an order taken by the respondent, Deseree Jozini Ntshingila, on an urgent basis in the absence of the appellant, on 10 September 2019. This appeal is with the leave of the court *a quo.*

[2] The court *a quo* ordered final relief in the following terms:

> 2.1 Interdicting the respondent from coming within a radius of 1 kilometre of the immovable property, Portion […] of Erf […], Nancefield Township, situated at […] […] Camp Street, Infill, Eldorado Park, Johannesburg (''the immovable property''); and
>
> 2.2 Directing that the appellant, his wife and children vacate the immovable property immediately alternatively be ejected from the immovable property;
>
> ("the order").

[3] A writ of ejectment executed on 6 March 2020 resulted in the appellant, his wife and children being evicted from the immovable property, pursuant to the order.

[4] The appellant was represented by counsel in this appeal whilst the respondent appeared in person, as she did before the urgent court on 10 September 2019. The appeal proceeded by way of a virtual platform.

[5] The respondent delivered her heads of argument on the day prior to the hearing of the appeal. The heads of argument contained multiple new allegations and the respondent sought to lead further evidence. The respondent did not deliver a formal application for condonation but explained the circumstances of the delay to us prior to the appeal commencing. The appellant did not object to the matter continuing notwithstanding the late delivery of the respondent's heads of argument.

[6] Given the undisputed facts of this appeal and the need for finality of this litigation. the interests of justice required that the appeal proceed before us. Accordingly, we allowed the appeal to continue but refused the respondent's request to lead further evidence.

[7] The appeal arose out of a quarrel between siblings in respect of the family home, being the immovable property. The respondent's case rested on her children's alleged right to attend a school of their choice and their supporting right to live in proximity to their school of choice, being in the immovable property occupied by the appellant, his wife and children and other family members.

[8] The respondent visited her children and her mother at the immovable property, in the evenings. The appellant disliked the respondent's children residing in the immovable property to which he allegedly held title, (although that title was disputed by the respondent). The appellant wanted the respondent's children to attend school in the vicinity of the respondent's home in Soweto and live with the respondent in her home.

[9] The respondent argued that her children were entitled as of right to attend a school of their choice and to stay in the immovable property in order to be reasonably close to their chosen school. Furthermore, that the appellant could not prevent her

children from living in the immovable property occupied by him, his family and other family members.

[10] The respondent alleged that the appellant was violent to their mother, swore at the respondent and insulted her and her husband. The appellant allegedly locked the respondent out of the immovable property when she left briefly to go to the nearby shops, resulting in the respondent alleging, (incorrectly), that the appellant spoliated her.

[11] The respondent issued the urgent application on 6 September 2019 and set it down for hearing on Tuesday 9 September 2019 at 10h00. The matter came before the urgent court on 10 September 2019.

[12] The record reflected that the respondent informed the urgent court that the sheriff served the application on the appellant but no return of service was uploaded on caselines and the respondent did not indicate the date and time of the alleged service to the urgent court.

[13] The respondent contended in her heads of argument that the sheriff served the urgent application on the respondent on 6 September 2019. We allowed the respondent to make the alleged return of service available to the court. The return reflected service of the application on the appellant's wife on 6 September 2019 at 14h36.

[14] The purported service of the application occurred subsequent to the date and time on which the application was set down for hearing. Accordingly, the service was ineffective. As a result, the appellant's right to receive service of the application and to be afforded a reasonable opportunity to oppose it prior to it being considered by the

court *a quo,* was rendered nugatory by the respondent and the court *a quo's* granting of the order in the absence of proper service on the appellant. Thus, the appellant's fundamental right to *audi alteram partem* was disregarded and the order stands to be set aside on that basis alone.

[15] The sole mechanism by which the respondent could lawfully secure the eviction of the appellant and his family from the immovable property, their primary residence, was in terms of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act, 19 of 1998 (''PIE''). The underlying premise of PIE is the preservation of the value of human dignity, equality and freedom.[1]

[16] The respondent argued that she did not invoke the provisions of PIE because of the urgent nature of the application. Section 5 of PIE, however, provides for urgent eviction applications but the respondent did not make out a case in terms thereof. The respondent did not justify her failure to utilise the provisions of PIE.

[17] It is difficult to discern from the record on what basis the court *a quo* ordered the eviction of the appellant, his wife and children from the immovable property. Moreover, the appellant's wife and their children were not cited as parties to the application. The respondent was a visitor to the immovable property and her rights comprised those of a visitor. The respondent's children resided in the immovable property pursuant to the appellant's benevolence. They did so in the absence of a right to attend a school of their choice.

[18] The court *a quo* ordered the eviction without any regard for the rights of the appellant, his wife and children to adequate housing, to human dignity, equality and freedom under the Constitution and their rights under PIE.

---

1 *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) at 225A – 229G.

[19] The appellant and his family's rights under PIE specifically include the right to proper notice of the relief being sought against them as well as the basis upon which that relief is sought, an adequate opportunity to oppose the application and to state their opposing case, if any, as well as timeous notice of the date on which the application will be heard by a court. These procedural rights are required statutorily to be afforded to an evictee, more especially where the rights of minors stand to be affected by the envisaged eviction. The appellant, his wife and children were denied all of these rights, unjustifiably so.

[20] The arbitrary process and procedure adopted by the court *a quo* in granting the order resulted in that court failing to enquire into a reasonable date for the appellant and his family to vacate the immovable property so to allow them an opportunity to obtain alternate accommodation.

[21] The appellant and his family's rights to procedural fairness, due process, human dignity, adequate housing and the right to be heard before the court prior to an order being granted against them, were overlooked by the court *a quo* and by the respondent in terms of the application. The respondent failed to make out any substantive case as to why the appellant and his family should be evicted from their home and prevented from approaching within one (1) kilometre thereof. The respondent also failed to justify the procedure invoked by her.

[22] As to the respondent's allegations that the appellant was a member of a right wing formation fermenting unrest, those allegations were not a reason for the appellant to be ordered to vacate his home together with his family. Nor were the respondent's allegations of unrest at the Bree Street taxi rank that might spill over into Eldorado Park, a justifiable reason for the appellant to vacate the immovable property.

[23] In respect of the respondent's averments that the appellant caused havoc by taking the law into his own hands, no basis was set out for those averments and they did not justify the relief granted by the court *a quo* against the appellant and his family.

[24] Whilst the notice of motion unreasonably truncated the time periods for the appellant to oppose the application and the founding papers failed to make out a case for urgency, I do not intend to dwell thereupon in the light of the appellant not receiving effective service of the application.

[25] In the circumstances, the appellant's appeal must succeed.

[26] The respondent's application constituted an egregious violation of the appellant's procedural and substantive rights, as well as those of his wife and children. The application ought not to have been granted.

[27] The appellant sought the costs of the application against the respondent. Notwithstanding that the respondent appeared in person and resisted a costs order against her, the egregious violation of the appellant and his family's rights together with the abuse of this court's process, justified a costs order against the respondent.

[28] In the circumstances the following order is granted:

1. The appeal succeeds with costs including the costs of the application for leave to appeal.

2. The order of the urgent court granted on 10 September 2019 under case number 2019/31410 is set aside.

_____

CRUTCHFIELD J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG

I agree.

_____

WINDELL J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG

I agree.

_____

FISHER J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG

Delivered: This judgment 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 of the judgment is deemed to be 12 June 2023.

COUNSEL FOR THE APPELLANT:	Mr D Brown.
INSTRUCTED BY:	CN Billings Attorneys.
APPEARANCE FOR THE RESPONDENT:	Ms D Ntshingila in person.
DATE OF THE HEARING:	1 March 2023.
DATE OF JUDGMENT:	12 June 2023.