

REPUBLIC OF SOUTH AFRICA



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

CASE NO.: 9713/2022

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED:
[1]	20/03/2024 _____
[2]	DATE SIGNATURE

In the matter between:

MADULAMMOHO HOUSING ASSOCIATION

Applicant

and

MOKHESENG MOKOTO SIMON MOSIUOA

First respondent

**THE CITY OF JOHANNESBURG METROPOLITAN
MUNICIPALITY**

Second respondent

This judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand-down is deemed to be 10:00 on _____.

JUDGMENT

MEIRING, AJ:

INTRODUCTION

- [1] This is an application under the Prevention of Illegal Eviction from and the Unlawful Occupation of Land Act, 1998 (to which I refer below as the PIE Act), for the eviction of the first respondent.
- [2] The applicant, the Madulammoho Housing Association, seeks an order directing that the first respondent, Mr Mokheseng Mokoto Simon Mosiuoa, and all those claiming occupation through and under him are evicted from Unit H206 Fleurhof Views, which is located at 61 Camel Thorn Drive, in Fleurhof, Roodepoort, and that those persons are directed to vacate Unit H206 within one month of the date of the order. (As I say below, according to the written lease, the designation of the unit appears to be HH 206.)
- [3] The applicant further seeks an order that, if the first respondent and those claiming occupation through and under him fail to vacate that unit within that period of one month, the sheriff or his deputy is authorised, directed, and empowered to carry out the eviction order on the first day after the expiration of that period of one month.

THE FACTS

- [4] On about 19 March 2012, the applicant and the first respondent concluded a written lease agreement under which the latter rented Unit HH 206 in Fleurhof Views (described on the front page or term sheet as a “*bachelor*”, presumably apartment) from the applicant, an association incorporated under section 21 of the Companies Act, 1973.
- [5] The initial term of the lease was a period of six months, during which, according to clause 1.3 of the lease, the first respondent was not entitled to cancel the lease. After that initial term of six months, the lease would continue “*until either one of us cancels the lease by giving one month written notice to the other*”.
- [6] The box on the front page or term sheet of the lease in which the commencement date was meant to be written was left blank. Yet, in the

founding affidavit, the applicant says that it commenced on 1 April 2012 and that the initial six-month term endured until 30 September 2012. In the answering affidavit, the first respondent does not deal meaningfully with the latter averment, saying of it and of other adjacent averments: “*Contents of these paragraphs are Noted and either denied nor accepted, Applicant is to put proof to that during initial hearing [sic].*” Elsewhere, the first respondent says this: “*I firstly started to reside at Fleurhof Flats on or about 2012.*” In my view, the applicant’s version can fairly be accepted.

- [7] The monthly rental due from the first respondent was R750.00. That amount was inserted in manuscript in the applicable box on the term sheet. Clause 3 of the lease set out in some particularity various aspects of the obligation of the first respondent to pay rent. Clause 3.1 provided that that rental amount did not include water, electricity, refuse and sewerage, which had to be paid separately, as stated in clause 7. On 1 March every year, the rental amount would rise.
- [8] On the term sheet, the first respondent’s employer was described as Falcon Arrow Spur. It is recorded that at that time he earned a monthly income of R2,548.55.
- [9] In clause 5 of the lease, this is said: “*Only the people names on the attached info schedule [sc. the term sheet] may live in the property with you.*” The names that appear in manuscript in the applicable box are Tshilidzi (no surname is given), who is described as the wife of the first respondent, and his son, Tomas.
- [10] Clause 17 provides that, if the first respondent does “*not keep to this agreement*”, the applicant would send to him a letter asking him to correct the matter immediately, failing which the applicant might cancel the agreement and start with the eviction process.
- [11] At the back of the lease appears a sheet headed “*Declaration of communication*”, underneath which appear nine statements concerning the contractual relationship between the parties. Alongside each is a box in which appears what seems to be the first respondent’s signature. The first of those

statements is: *“This accommodation is only rental and no ownership has been promised to me.”* The ninth is: *“I understand that if my rent is not paid in term [sic] of this agreement, this agreement will be terminated and an eviction process will be implemented.”* I repeat that the first respondent’s signature appears alongside both.

[12] For the next several years, the first respondent occupied Unit HH 206 (or H206). By January 2022, his monthly rental was an amount of R1,217.00. At some point in 2021, it would appear, the first respondent fell into arrears with his monthly rental. This arrear amount seems to have built up over a period. For instance, according to the document recording the running balance of the account enclosed with the founding affidavit, the last two payments before the founding affidavit came to be prepared was one of R800.00, on 5 October 2021, and one of R1,000.00, on 27 December 2021 (nothing in between).

[13] By the time that this application was brought, according to the founding affidavit, the arrear amount was R4,493.28. (The document recording the running balance indicates a balance due by the first respondent of just shy of double that amount.)

[14] On 17 September 2021, through its attorney, Mervyn Joel Smith Attorneys, which firm also represents it in this application, the applicant had hand-delivered to the first respondent a letter of demand. This was done by Mr John Mavundla, a house manager in the employ of the applicant.

[15] In that letter, the first respondent was apprised that he was in arrears to the tune of R4,493.28. In the penultimate paragraph, he was informed that he had twenty business days in which to remedy his breach. If he failed to do so, the applicant was entitled to cancel the lease with immediate effect.

[16] The first respondent did not remedy his breach.

[17] On 3 November 2021, Messrs Mervyn Joel Smith had delivered to the first respondent another letter, again by the hand of Mr Mavundla. In it, the applicant cancelled the lease, giving the first respondent until 31 December 2021 to vacate the unit he occupied, namely Unit H206 in Fleurhof Views.

- [18] The first respondent did not vacate the unit. He remains in occupation of it.
- [19] In early March 2022, this application for the eviction of the first respondent was brought. Cited as the second respondent is the City of Johannesburg Metropolitan Municipality.
- [20] The notice of motion contains the habitual and necessary reference to section 26(1) of the Constitution, which gives to everyone the right of access to adequate housing. It continued (still in capital letters): “*Should the first respondent claim that the order for eviction will infringe that right it is incumbent upon the first respondent to place information supporting that claim before the court.*” The notice goes on to refer to his right to place relevant circumstances as envisaged in section 26(3) of the Constitution before the court hearing the application and to the prohibition of eviction without a court order, also in section 26(3).
- [21] On 22 August 2022, this court granted an order authorising a notice under section 4(2) of the PIE Act and directing that it be served under rule 4(1) of the Uniform Rules. The hearing date in the enclosed notice was 20 September 2022. On 2 September 2022, the sheriff served both the notice and a notice of set-down by affixing a copy at the front door of Unit H206, since the premises was found locked.
- [22] The application was not heard on 20 September 2022. It came to be postponed to 9 November 2022. On the latter date, the application was removed from the roll.
- [23] The answering affidavit, deposed to by the first respondent, was delivered on 31 October 2022. The applicant’s replying affidavit was delivered on 21 December 2022.
- [24] Various further steps were taken in this application. These included the delivery, on 13 March 2023, of the applicant’s heads of argument and allied documents. The first respondent refrained from delivering his heads of argument and related documents and, on 3 May 2023, the applicant brought an application to compel him to do so. On 21 June 2023, this court directed that

the first respondent should deliver his heads of argument and allied documents, within day tens, failing which the application should be enrolled for hearing in their absence. On 21 July 2023, through his attorney Mr Mopedi of Mopedi C.S. Attorneys, the first respondent delivered his heads of argument.

[25] Oddly, on 14 June 2023, Mr Mopedi had delivered a notice of withdrawal as attorney “*due to lack of instructions*”. I have not been able to locate on CaseLines a notice by which Mr Mopedi or his firm had again come on record. It might well exist. Yet, from the delivery of the heads of argument mentioned above, it must be inferred that he soon resumed to act as the first respondent’s attorneys. I return to this below.

THE LAW

[26] An eviction application under the PIE Act comprises two enquiries.¹

[27] First, the court must decide whether it is just and equitable to grant an eviction order having regard to all relevant factors, including, on these facts, those framed in section 4(7), namely the availability of alternative accommodation and the rights of the elderly, children, disabled persons, and households headed by women. The weight to be attached to those factors must be assessed in the light of the property owner’s rights under section 25 of the Constitution, and on the footing that a hemming in of those rights in favour of the occupiers will ordinarily be limited in duration.

[28] If a court were to decide 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 that order.²

[29] The second enquiry entails what justice and equity demand in relation to the date of implementation of the order. The court must consider what conditions should be attached to the order. Under this enquiry, the court must consider the impact of an eviction order on the occupiers and whether they might thus be made homeless and whether they might need emergency assistance to be relocated elsewhere.³

[30] Both enquiries are necessary before the court can determine whether the eviction sought is just and equitable. Nor can this enquiry be concluded until the court is satisfied that it is in possession of all the information necessary to make both findings based on justice and equity.⁴ Where information is not before the court, the enquiry cannot be conducted and accordingly no order may be granted.⁵

[31] In *Berea*, the Constitutional Court held:⁶

“It deserves to be emphasised that the duty that rests on the court under section 26(3) of the Constitution and section 4 of PIE goes beyond the consideration of the lawfulness of the occupation. It is a consideration of justice and equity in which the court is required and expected to take an active role. In order to perform its duty properly the court needs to have all the necessary information.”

[32] Section 4(7) gives guidance on the considerations of which account might be taken when a court exercises its discretion to determine whether it is just and equitable to grant an eviction order:

“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 a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and household.”

[33] In *Berea*,⁷ the Constitutional Court examined section 4(7):⁸

“[W]here there is a risk that homelessness may result, the availability of alternative accommodation becomes a relevant circumstance that must be taken into account. A court will not be able to decide the justice and equity of an eviction without hearing from the local authority upon which a duty to provide temporary emergency accommodation may rest. In such an instance the local authority is a necessary party to the proceedings. Accordingly, where there is a risk of homelessness, the local authority must be joined.”

[34] On the question of how a court is to embark upon the enquiry into matters that fall uniquely in the knowledge of the respondent, in *Ndlovu v Ngcobo; Bekker v Jika*,⁹ the Supreme Court of Appeal held:¹⁰

“Provided the procedural requirements have been met, the owner is entitled to approach the court on the basis of ownership and the respondent’s unlawful occupation. Unless the occupier opposes and discloses circumstances relevant to the eviction order, the owner, in principle, will be entitled to an order for eviction. Relevant circumstances are nearly without fail facts within the exclusive knowledge of the occupier and it cannot be expected of an owner to negative in advance facts not known to him and not in issue between the parties.”

[emphasis added]

[35] As to section 4(8), in *Msibi v Occupiers of Unit 67 Cedar Creek*,¹¹ this division recently held:

“Simply put, a court must order an eviction once all procedural requirements which are those contemplated in sections 4(2) to 4(7) of the PIE Act and the findings on the lack of a defence by the unlawful occupier and justice and equity.”

[36] On what a “valid defence” under section 4(8) might be, the *Berea* court held:¹²

“[A] defence directly concerning the justice and equity of an eviction, not necessarily the lawfulness of occupation, must be taken into account when considering all relevant circumstances. To limit the enquiry under section 4(6) and (7) to the lawfulness of occupation would undermine the purpose of PIE and be a reversion to past unjust practices under the Prevention of Illegal Squatting Act. The enquiry is whether it is just and equitable to evict. This is a more expansive enquiry than simply determining rights of occupation.”

[37] In *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another*,¹³ the Constitutional Court held that “a private owner has no obligation to provide free housing” and that “[u]nlawful occupation results in a deprivation of property under [section] 25(1) of the Constitution.”¹⁴

[38] In *Grobler v Phillips*,¹⁵ the Constitutional Court held that, in eviction proceedings, “the competing interests of both parties” must be determined and

balanced. With approbation, that Court referred to its previous judgment in *Hattingh*:¹⁶

“In my view the part of [section] 6(2) that says: balanced with the rights of the owner or person in charge calls for the striking of a balance between the rights of the occupier, on the one side, and those of the owner of the land, on the other. This part enjoins that a just and equitable balance be struck between the rights of the occupier and those of the owner. The effect of this is to infuse justice and equity in the inquiry.”

[39] The reference to section 6(2) is not to the PIE Act, but to the Extension of Security of Tenure Act, 1997. Nevertheless, the Court found the balancing exercise in *Hattingh* is applicable also to the eviction enquiry under the PIE Act.

[40] It is in the light of those principles that the relief sought here is to be appraised.

[41] I add that section 4(2), read with section 4(5)(b), requires that unlawful occupiers that are facing eviction to be given at least 14 days “*written and effective notice*” of the date on which proceedings for their eviction will be heard. This notice is in addition to the ordinary service of the application papers or combined summons that institute the eviction proceedings.¹⁷ The form and manner of service of the notice must be approved by a court.¹⁸ Here, the section 4(2) notice was approved and served within the provisions of the PIE Act.

ANALYSIS

[42] Construing the terms of the lease and considering the steps that the applicant took in pursuance of terminating it in the light of the first respondent’s breach, it would seem plain to me that the first respondent has for some time been in unlawful occupation of Unit HH 206 (or H206) in Fleurhof Views.

[43] It falls to the court, then, to consider carefully what the first respondent sets out in his answering affidavit.

[44] In the first instance, the first respondent notes and accepts the averment in the founding affidavit concerning the conclusion of the lease agreement as well as the lease agreement itself, a copy of which is attached to the founding affidavit.

- [45] Oddly, in response to the narration of the terms of the lease agreement, the first respondent then says something different. While the language (quoted above) is infelicitous, he appears to convey that he neither admits, nor denies them, but puts the applicant to the proof – while having admitted the document in which those terms are recorded.
- [46] In response to the averment in the founding affidavit that the first respondent fell in arrears as far as his rental obligation is concerned, he raises a denial in these terms: *“I deny that I breached my contract of lease since I fully paid my monthly rental for 05 Years and the only thing Madulammoho must do it transfer Property into my name as Mosioua M.M.SIMON”*. He goes on to say: *“I deny that I owe Applicant the said amount since the main purpose of renting the said Unit is in a form of Rent to Buy.”*
- [47] These averments are references to what the first respondents puts up in his answering affidavit as a special plea. I quote that *in extenso*:

“SPECIAL PLEA

7.1

As the 1st Respondent in this Matter I hereby state that I firstly started to reside at Fleurhof Flats on or about 2012 when they were firstly officially opened for residential by the then Minister of Human Settlement Mr. Tokyo Sexwale.

7.2

I hereby submit that when I firstly occupied the said Unit, I was informed that after 5 Years of paying monthly rental as per contract of leave the Unit/Flat will automatically be registered/transferred into my name.

7.3

I submit that from 2012 until 2021 I have been paying my monthly rental well and the only thing that made me to stop paying my monthly rental was due to the fact that Madulammoho flats were specifically built for low income earners that do not qualify for Mortgage Bond or Government’s R.D.P. (Reconstruction Development Programme) houses and in that after 05 years the Unit will be transferred or registered into my name in which I will now be the registered owner with full Rights of Ownership.

7.4

I submit that the Madulammoho flats (Fleurhof flats) was granted Capital Grant by the Gauteng Government called Social Housing Restructuring Capital Grant which is intended to

fund a proportion of the Capital Costs of future Social housing projects undertaken by delivery agents in that means that the delivery agents which is Madulammoho must transfer the said Unit into my name since I have been a loyal tenant for more than 5 (five) years as a low income earner. (Kindly see attached copy of Social Housing Restructuring Capital Grant Agreement Marked Annexure "A001" and "A002")

7.5

I hereby submit that it would be very unfair for me for the court to grant the Applicant's an Eviction Court Order due to the fact that the Applicant are the one's to be blamed for the whole issue since me and other tenants are of a knowledge that we are on Rent-to-buy agreement in which rent payment expired after 5 (five) Years of me being a tenant."

[48] I agree with the submission of Ms Fine for the applicant that *Swissborough Diamond Mines (Pty) Ltd and others v Government of the RSA and others*¹⁹ requires that a party that seeks to rely on the contents of an enclosed document must refer to the specific part of it with enough particularity to enable the other party to understand the point the former party wishes to make and why that part of the document supports that point. The first respondent has done the opposite.

[49] While this would be an ample basis upon which to disregard the documents that the first respondent has thus put up, I have considered them and I agree, too, with Ms Fine's characterisation of them.

[50] The two documents that the first respondent has put up are first a social housing restructuring capital-grant agreement between the Social Housing Regulatory Authority, the applicant, and Aquarella Investments 265 (Pty) Ltd, which concerns a social housing project called the Jabulani Views Project, to be developed on Portion 3 of Erf 2605, Legogo Street, Jabulani, in Soweto. This has nothing whatsoever to do with the first respondent's lease. Second, there is a subsidy agreement between the Department of Housing of the Gauteng Province and the applicant. While, through the initials at the foot of the pages, it appears that it was signed by the two parties, yet I cannot be sure. The document is incomplete, and, among others, the signature page is omitted. This document relates to a project for the construction of 300 social housing units. There is no mention of Fleurhof Views, nor does it give to any third party,

let alone the first respondent, any right of the sort relied upon by the first respondent.

[51] At the back of the latter of these, the first respondent has inserted what appears to be an unrelated excerpt from a newsletter called the *Madulammoho Pulse*, in October 2012 reporting upon the former Minister Sexwale's opening Fleurhof Views. How this impinges upon the first respondent's defence is unclear.

[52] What is more, there is a fatal internal contradiction in the first respondent's version. On the hand, his case is that the agreement over his occupation of Unit HH 206 (or H206) was that, after five years, he would be entitled to become the owner. Upon the expiration of that period of five years from 1 April 2012, he would no longer be obliged to pay a monthly rental. Yet, on his own version, he carried on doing so until 2021. He does not explain why he did not stop doing so around April 2017. On his version, "*when I firstly occupied the said Unit, I was informed that after 5 Years of paying monthly rental as per contract of leave the Unit/Flat will automatically be registered/transferred into my name*".

[53] In sum, there is no basis to the defence that the first respondent seeks to muster as to the unlawful of his continued occupation. The impression is hard to avoid that, without considering their relevance, the first respondent put up documents on projects only tangentially related to Fleurhof Views, through the involvement in them by the applicant. They do not make out a defence.

[54] Then, on his personal circumstances, the first respondent says this:

"7.6

I furtherly submit that as an adult male person who is head of the family I reside with my unemployed partner and minor children whom will be vulnerable if I am evicted from the said low costs housing which are the only one's I can afford since I do not qualify for rent and Mortgage bond house.

7.7

If the Court do grant Applicant's Application, me and my family will be homeless for the mistake caused by the applicant since are on rent to buy basis."

- [55] While I take no heed of the hearsay statement in the replying affidavit that the first respondent is employed by a company called Sesli, on an appraisal of the first respondent's own version, the following appears.
- [56] The version that the first respondent puts up is extremely skeletal. All the meat that might belong on the bones of the first respondent's version are uniquely within his ken.
- [57] Even if one accepts that, contrary to the terms of lease, persons other than his wife and son Tomas live with the first respondent, he has chosen not to take this court into his confidence as to who they are, what their ages are, or the circumstances in which they as a household find themselves socio-economically.
- [58] The court does not know how many people live at Unit HH 206 (or H206). It does not know how old they are. All the first respondent does is refer to an "*unemployed partner*" and "*minor children*".
- [59] The ineluctable inference is that, unlike his partner who is explicitly said to be "*unemployed*", the first respondent is indeed employed. Surely a central tenet of a case that the persons comprising the household would become homeless is to declare the monthly income of the first respondent and any other members of the household, their monthly expenses (including sustenance and school fees).
- [60] This is a case that falls squarely within the *dictum* above from *Ndlovu v Ngcobo*, where one would have expected the first respondent to give chapter and verse on his situation. It cannot be for a respondent to remain silent on these crucial features of his case that his household would become homeless.
- [61] From the extremely sparse facts that the first respondent puts up in this regard, the court should be able fairly to infer that there exist no other facts, or the respondent would have put them up. Indeed, there is a stark difference between the defence sought to be constructed on the merits and that mounted here. However unconvincing, the former is elaborate. The latter hardly emerges from the paint.

[62] For these reasons, I find that the court does have all the necessary information before it. There is no realistic suggestion, based on any facts, that homelessness will result.

[63] On the other hand, the first respondent has occupied the unit for well-nigh two years now at the applicant's expense. He does so on a spurious and opportunistic basis. He has made claims in his answering affidavit without backing them up with facts.

[64] The applicant has made out a proper case that it is just and equitable that the eviction order sought by the applicant be granted.

[65] As to the question of the just and equitable date for the eviction, section 4(9) of the PIE Act provides:

"In determining a just and equitable date contemplated in subsection (8), the court must have regard to all relevant factors, including the period the unlawful occupier and his or her family have resided on the land in question."

[66] The applicant has asked that this court determine a date one month from the date of this order. This is no doubt in part based on the one-month termination period in the lease. The applicant has been kept out of its property, with the first respondent being in increasing arrears, for a period of over two years. The first respondent's explanation for this is inscrutable.

[67] Yet, the first respondent, who has minor children, who may or may not attend school, have been in Unit H206 (or H206) since 2012. Even though the applicant ought properly to be entitled to an order in the terms it sought, in the spirit of section 4(9) of the PIE Act and giving the first respondent considerable benefit of the doubt, I determine that the just and equitable date would be two months from the date of service on the first respondent of this order.

THE CONDUCT OF THE FIRST RESPONDENT'S ATTORNEY

[68] On the morning of 13 November 2023, Ms Fine, counsel for the applicant, met me in chambers. I asked where the representative of the first respondent was.

She indicated that, in the light of recent events, it was unlikely that he would be in attendance.

[69] I asked that the events in question to which she had referred be put on oath. This Ms Diana Swart of Messrs Mervyn Smith did later that day. The account in her affidavit reads as follows:

- “2. On or about about the 31st of August 2023, I caused to be served on C S Mopedi Attorneys, the First Respondent’s attorneys of record, the pre-hearing agenda as well as a notice calling on the First Respondent’s attorneys of record to attend a virtual pre-hearing conference, in terms of the directives, on the 27th of September 2023 at 14h00.
3. On the date of the scheduled pre-hearing conference, we called Mr. Mopedi to enquire whether he intended on attending the hearing as he did not accept the Microsoft Teams invite, nor was he online on the time suggested.
4. Mr Mopedi informed us that he is not available, but he will be available on the Friday, the 29th of September 2023 at 10h00.
5. I sent Mr. Mopedi a Microsoft Teams invite for the date and time suggested by him.
6. As he failed to attend the virtual hearing, I called his offices on the cellphone numbers provided in his documentation. The phone was answered by a certain Innocentia, who advised me that Mr. Mopedi was in Court. This after her informing my colleague, Ethan Smith, moments earlier that he went to a meeting.
7. Notwithstanding the above, we could hear Mr. Mopedi in the background talking.
8. Innocentia advised me that she would send me an email, which she failed to do, consequently, on the 2nd of October 2023 I addressed an email to him recording what transpired on the 29th of September 2023.
9. I requested that he urgently revert to me with a date and time suitable to him to attend a pre-hearing conference, failing which, I will have no option but to select a date and time suitable to me. There was no response to this email.
10. On the 11th of October 2023 I caused a second notice to attend a pre-hearing conference to be served on Mr. Mopedi calling on him to attend a virtual pre-hearing conference on the 17th of October 2023 at 14h00. Mr Mopedi failed to accept the Microsoft Teams invite, nor did he attend the pre-hearing conference on the suggested date and time.
11. When uploading the notice to attend a pre-hearing conference, I posted a widely shared note on caselines addressed to him and Innocentia referring them to the

- relevant sections on caselines and seeking confirmation of their attendance.*
12. *On the 26th of October 2023, I mailed a Joint Practice Note to Mr. Mopedi for his input.*
 13. *I requested that he provide us with his input by Thursday, the 2nd of November 2023, failing which we will upload the joint practice note as is.*
 14. *No input was forthcoming.”*

[70] No input was forthcoming. Nor was Mr Mopedi in attendance at court, either on 13 or 17 November 2023.

[71] Out of an abundance of caution, on 13 November, I stood the matter down to Friday, 17 November, making the following order:

- “1. The application is postponed to 17TH NOVEMBER 2023 at noon.*
- 2. The Applicant is ordered to serve a long form Notice of Set Down on the First Respondent by Sheriff.*
- 3. The applicant is ordered to instruct the House Manager to serve by hand on the First Respondent a copy of the long form Notice of Set Down.*
- 4. Costs of the postponement are costs in the cause.”*

[72] The sheriff served the notice of set down at 13:53 on Monday, 13 November 2023. He did so at Unit H206 in Fleurhof views, by giving it to someone called Mrs Dineo, described in the return as the fiancée of the first respondent.

[73] What is more, Mr Mavundla delivered a service affidavit, saying this:

- “2. I confirm that I personally hand delivered the court order dated 13 November 2023, together with the notices of set down to the First Respondent on Tuesday the 14th of November 2023 at approximately 19h13.*
- 3. I informed the First Respondent in Sesotho, his home language, that he must attend the Johannesburg High Court, court room 9C on Friday the 17th November 2023 at 12h00, noon.*
- 4. The First Respondent leaves the Fleurhof Complex at about 06h10 weekday mornings to go to work at Sesli (the blanket manufacturers) and returns at around 16h30.*
- 5. I waited for him at the area in the complex where I usually bump into him at 16h30 when he returns from work, however he was not there on Monday the 13th of November 2023.*

5. *Consequently, I was unable to deliver the documentation on Monday the 13th of November 2023 as the First Respondent, to the best of my knowledge, failed to return from work on that evening. As he has been residing alone in the unit for the last 2 to 3 years, there were no other occupants or individuals to serve the court order and notices of set downs on in his absence.*"

[74] Nevertheless, the first respondent did also not appear at court on Friday, 17 November 2023.

[75] While I have only the version of Ms Swart on oath before as to the conduct of Mr Mopedi – I would have asked him for a response had he attended at court – I do think that *prima facie* that version raises certain disquieting questions that I could not ignore. The matter of the notice of withdrawal that appears not to have been countermanded also remains troubling. It was largely through uncertainty over the position of Mr Mopedi *vis-à-vis* the first respondent that I was enjoined to make the order of 13 November.

[76] I emphasize that Mr Mopedi might well have an entirely innocent explanation for what emerges from Ms Swart's version and on the notice of withdrawal. To give him an opportunity to respond, I include a paragraph in the order that this judgment be referred to the Legal Practice Council for it to consider investigating.

COSTS

[77] I see no reasons why the costs should not follow the result.

ORDER

1. The first respondent and all those claiming occupation through and under him are evicted from Unit H206 (or HH 206) in Fleurhof Views, 61 Camel Thorn Drive, Fleurhof, Roodepoort;
2. The first respondent and all those claiming occupation through and under him are ordered to vacate Unit H206 (or HH 206) within one (2) months of the service of this order;

3. If the first respondent and all those claiming occupation through and under him fail to vacate Unit H206 (or HH 206) within the period set out in paragraph 2 above, the sheriff or his lawful deputy is authorised, directed, and empowered to carry out the eviction order on the first day after the period set out in paragraph 2 above;
4. This judgment is to be provided to the Legal Practice Council for them to consider the allegations concerning Mr Mopedi's professional conduct; and
5. The first respondent is directed to pay the costs of this application.

J J MEIRING
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

Date of hearing: 13 November 2023

Date of judgment: 20 March 2024

APPEARANCES

For the applicant: Advocate Vanessa Fine

Instructed by: Mervyn Joel Smith Attorneys

For the first respondent: None

- ¹ *Occupiers, Berea v De Wet N.O.* 2017 (5) SA 346 (CC).
- ² *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 (6) SA 294 (SCA), at para 25.
- ³ *Changing Tides*, at para 25.
- ⁴ *Changing Tides*, at para 25.
- ⁵ *Berea*, at para 46.
- ⁶ At para 47.
- ⁷ 2017 (5) SA 346 (CC).
- ⁸ See para 61 with reference to *Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* 2010 JDR 0300 (SCA) and *Changing Tides*, at para 38.
- ⁹ 2003 (1) SA 113 (SCA).
- ¹⁰ At para 19.
- ¹¹ 2022 JDR 3495 (GP), at para 18.
- ¹² At para 65.
- ¹³ 2012 (2) SA 104 (CC), at paras 31 and 37 consecutively.
- ¹⁴ *Grobler v Phillips* 2023 (1) SA 321 (CC), at para 37.
- ¹⁵ 2023 (1) SA 321 (CC), at para 39.
- ¹⁶ *Hattingh v Juta* 2013 (3) SA 275 (CC), at para 32.
- ¹⁷ *Cape Killarney Property Investments v Mahamba* 2001 (4) SA 1222 (SCA), at paras 13 and 14. See *PZL Properties (Pty) Limited v Unlawful Occupiers of Erf [...] Judith's Paarl Township (053569/2022)* [2023] ZAGPJHC 59 (30 January 2023).
- ¹⁸ *Cape Killarney*, at paras 11 and 16.
- ¹⁹ 1999 (2) SA 279 (T).