IN THE HIGH COURT OF SOUTH AFRICA

(SOUTH GAUTENG DIVISION JOHANNESBURG)

CASE NO: 08/39225

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED

DATE SIGNATURE

In the matter between:

MNTAMBO FLORA First Applicant

OCCUPIERS OF 50 DAVIES STREET, DOORNFONTEIN, JOHANNESBURG Additional Applicants

and

CHANGING TIDES 74 (PTY) LTD Respondent

J U D G M E N T

MATOJANE, AJ:

INTRODUCTION

[1] This is an application to rescind an eviction order granted to the respondent by this court on the 22 April 2008 in terms of the Prevention

of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) against them.

[2] The basis for the application, as I understand it, is that:

4.1 Firstly, applicants were not in wilful default

4.2 Secondly, application was erroneously sought or erroneously granted, because a necessary party to the proceedings was not joined and the Court was not furnished with the requisite information to determine whether the eviction was just and equitable, and

4.2 Lastly, applicants had a bona fide defence.

[3] The applicants raised several defences including non-service of the proceedings on them. If I deal with and dispense with the matter on that defence then, I need not deal with any other issues. The matter was not referred to oral evidence in terms of Rule 6(5)(g) of this Court. The central issue is whether there is good cause shown by the applicants for rescission.

8. Regarding "good cause" the SCA, in **Silber v Ozen Wholesalers (Pty) Ltd** 1954 (2) SA (A) at 352 said that "good cause" includes, but is not limited to the existence of a substantial defence. **Erasmus** at B203-204 states that:

"It has been held that the requirement of 'good cause' cannot be held to be satisfied unless, there is evidence not only of

the existence of a substantial defence but, in addition, of the presently held desire on the part of the applicant for relief, actually to raise the defence concerned in the event of the judgment being rescinded. The requirement that the applicant for rescission must show the existence of a substantial defence does not mean that he or she must show a probability of success: it suffices if he or she shows a *prima facie* case, or the existence of an issue which is fit for trial. The applicant need not deal fully with the merits of the case, but the grounds of defence must be set forth with sufficient detail to enable the court to conclude that there is a bona fide defence, and that the application is not made merely for the purpose of harassing the respondent."

MATERIAL FACTS

[2] The respondent, as applicant, applied for and was granted two (2) court orders, on 17 March 2008 and 3 April 2008 respectively. In terms of those orders, the respondent was authorised and directed by this Court to serve its Notice of Motion, Affidavit and Section 4(2) Notice on the applicants. The relevant portions of the orders are identical and read as follows:

"*1.2 that the Sheriff of the court be authorised and directed to affix a copy ... to the door of each and every room, partition or structure within the property that appears to be occupied, alternatively, slide copies ... under the door of such room, partition or structure;*

1.3 that the Sheriff of the court assign a number to each room, partition or structure within the property that appears to be occupied ..."

The Sheriff served the Notice of Motion and Affidavits on 17 March 2008, and the Section 4(2) Notice on 3 April 2008. The relevant portions of the returns of service are identical and read as follows:

> *"... at 48 and 50 Davies Street, Doornfontein, Johannesburg ... 40 (forty) copies ... was served in the following manner*
>
> *(1) by affixing copies to all entrances to the property*
>
> *(2) by affixing copies to the door of each and every room within the property that appeared to be occupied, alternatively by sliding copies thereof under door of such room*
>
> *(3) copies thereof served upon Mr Mavuso caretaker*
>
> *(4) there are ± 150 occupied rooms within ± 380 occupiers ..."*

[3] The applicants deny receipt of either the Notice of Motion on the Section 4(2) Notice. On 22 April 2008 the respondent obtained the order to evict the applicants from the property. The applicants did not oppose the order nor were they present in court. The applicants said that had they been properly served and notified, they would have opposed the granting of the order. The respondent contended that there was proper service in terms of the order.

LEGAL PRINCIPLES

[4] It is trite law that the contents of a return of service are *prima facie* proof of the truth of its contents. However, in this case, there are facts before this Court indicating that the returns of service were clearly inadequate or

incorrect. The PIE Act (19 of 1998) prohibits unlawful eviction and provides lawful procedures for the eviction of unlawful occupiers. Section 4 provides the following –

> "*4.* ***Eviction of Unlawful Occupiers***
>
> *(1) Notwithstanding anything to the contrary contained in any law or the common law, the provisions of this section apply to proceedings by an owner of land for the eviction of an unlawful occupier.*
>
> *(2) At least 14 days before the hearing of the proceedings contemplated in subsection (1), the court must serve written and effective notice of the proceedings on the unlawful occupier ...*
>
> *...*
>
> *(4) Subject to the provisions of subsection (2) if a court is satisfied that service cannot be effected in terms of the rules, service must be effected in the manner directed by the court.*
>
> *(5) The notice of proceedings contemplated in subsection (2) must ...*
>
> *(d) state that the unlawful occupier is entitled to appear before the court and defend the case ..."*

Whilst not every deviation from a literal prescription is fatal, the manner in which the Sheriff served the process, in this case before me, is fatally flawed and deviates substantially from the manner of service authorised and directed by this Court. The number of copies referred to in the returns was too few to effect service as required by the court order. The returns of service indicate that there were approximately 380 occupiers and 150 occupied rooms at the property, and that 40 copies of each order were affixed to, or slid under the door of each room. No numbers were assigned to each room, partition or

structure within the property that appears to be occupied. Clearly, the applicants were prejudiced and cannot be said to have been in wilful default. The object of section 4(2) is to ensure that the unlawful occupies, such as the applicants, are aware of their rights referred to in section 4(5)(d). The Constitution also provides in section 26(3) that –

> "*No one may be evicted from their home ... without an Order of Court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.*"

In the matter before this Court, the applicants have occupied the property prior to the respondent's acquisition of ownership thereof and for more than six (6) months. The court which granted the order on 22 April 2008 did not consider all the relevant circumstances including whether land can reasonably be made available by the municipality for the relocation of the applicants which include minor children and women and elderly persons. The shelter that the municipality is lawfully obliged to provide need not necessarily be located within the inner city. The applicants are clearly poor and desperate.

I am of the view that the applicants have shown sufficient cause for rescission of the court order.

[5] In the result I order the following –

1. The order of court dated 22 April 2008 is rescinded.
2. Costs be costs in the course.

MATOJANE
ACTING JUDGE OF THE HIGH COURT