

IN THE HIGH COURT OF SOUTH AFRICA



GAUTENG LOCAL DIVISION: JOHANNESBURG

CASE NUMBER: 2013/18345

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
(4)	
.....
DATE	SIGNATURE

In the matter between

THE OCCUPIERS OF 23 HIGH STREET, BEREA

APPLICANT

And

FIFE HIGH PROPERTIES (PTY) LTD

FIRST RESPONDENT

CITY OF JOHANNESBURG METROPOLITAN

MUNICIPALITY

SECOND RESPONDENT

JUDGMENT

ZULU AJ:

INTRODUCTION

1. This is an application to rescind and set aside an eviction order granted against the Applicant on 19 September 2013. The Applicant also seek an order that the property should be restored to the condition that it was in prior to the eviction being carried out on 21 of November 2013.
2. The Applicant has further sought an indulgence to be granted condonation for the late filing of this application. I deal with this application herein below.
3. The Applicant is a group of individuals who, until their eviction, used to occupy immovable property situated at Erf 980 and Erf 981 Berea Township, Gauteng. The street address of the property is 70 and 72 Fife Avenue, Berea, Johannesburg and is situated at the corner of High Street and Fife Avenue, Berea, Johannesburg (“the property”). I will at all times refer to these individuals as the “occupiers” of the property.

THE FACTS

4. The registered owner of the property is the First Respondent. The property was purchased by the First Respondent from one Dario Ernano Dernatteis on 11 May 2012. The property was purchased with a view to demolishing and reconstructing it to provide low cost rental accommodation.

5. To achieve its objective, the First Respondent sought to evict the occupiers of the property, as it would be impossible to commence with the construction work whilst the property was still being occupied.
6. In March 2013, the First Respondent initiated the process of evicting the occupiers of the property by sending notices to them. It is necessary to refer to what is stated by the First Respondent in paragraph 16 of its answering affidavit. It states as follows:

“Rashad advised me that when he delivered the notices, he was refused access to the buildings at the property by the occupiers who refused to identify themselves or engage him regarding their occupation of the property. A copy of the confirmatory affidavit by Rashad which was attached to the eviction application is attached hereto as “AA10”. The Applicants have been obstructive from the outset, yet now claim to be victims, whilst the whole process could have been conducted in a co-operative fashion, the Applicants therefore being the architects of their own predicament.”

7. In terms of the notices sent to the occupiers, the First Respondent terminated their right to occupy the property. The occupiers were requested to vacate the property on or before 30 April 2013. As mentioned above, the First Respondent states that it received no co-operation from the occupiers and attempts to get them to move out of the property were obstructed.

8. On 28 May 2013, the First Respondent initiated the eviction proceedings. On 4 June 2013, the First Respondent obtained an order for substituted service of the application for the eviction of the occupiers. In terms of the Court Order, the service of the application were to be effected as follows:

“1. The Applicant is authorised and directed to serve the Notice of Motion and Founding Affidavit herein as well as this Order and the section 4 (2) notice and any further order that may be made in terms of part B hereunder on the First Respondents occupying the premises situate at 70/72 Fife Avenue Johannesburg (“the premises”) on the property situated at Erf 980 and Erf 981 Berea Township in the following manner:

1.1. The Sheriff of the Court or his lawful deputy must:

1.1.1. assign numbers to each identifiable living unit within the dwelling house and outbuildings on the property that appears to be occupied; and

1.1.2. establish the name or names of the principal occupier of each living unit (as identified in 1.1.1 above) who are prepared to identify themselves.

2. The Sheriff of the Court or his lawful deputy must serve the documents:

2.1. by affixing a copy thereof to the front door of the premises on the property; and

2.2. by serving copies thereof on each principal occupier who has been identified as described in 1.1.2 above, in the manner set forth in rule 4(1) of the Uniform Rules of the Court; or

2.3. *in instances where the sheriff or his lawful deputy is unable to establish the name of the principal occupier of a living unit, or where there is nobody present at that living unit at the time of service, by affixing copies thereof to the principal door of such living unit, alternatively by sliding copies thereof under the door of such living unit.*

3. *The Sheriff of the Court or his lawful deputy must in his return of service, set forth in respect of each living unit that appears to be occupied:*

3.1. *the number assigned to that living unit;*

3.2. *the name of the principal occupier of that living unit, if established in terms of 1.1.2 above; and*

3.3. *the manner of service of the documents in respect of that living unit.*

4. ...

5. ...”.

9. The occupiers deny that they were ever served with the notice in terms whereof their right to occupy the property was cancelled. The occupiers further deny that they were served with any court process. The First Respondent states that it served the application on the occupiers in terms of the Court Order on 20 June 2013. According to the Sheriff’s return, the application was served as follows:

- “1. Return of service in respect of Notice of Motion, Founding Affidavit and Annexures thereto as well as Court Order dated 4 June 2013 in accordance with substituted service Order dated 4 June 2013.*
- 2. On this 20th day of June 2013 at 18:37 I served the Notice of Motion, Founding Affidavit and Annexures thereto as well as Court Order dated 4 June 2013 as follows:*
 - 2.1 I identified 7 living units at the premises and assigned the numbers 1 to 7 to the units.*
 - 2.2 The occupiers found at the premises at the time of service refused to identify themselves.*
 - 2.3 I affixed a copy of the Notice of Motion, Founding Affidavit and Annexures thereto as well as Court Order dated 4 June 2013 to the front door of the premises.*
 - 2.4 Since the occupiers refused to identify themselves I affixed copies of the Notice of Motion, Founding Affidavit and Annexures thereto as well as Court Order dated 4 June 2013 to the door of units 1 to 7.”*
- 10. The application for the approval of the section 4 (2) notices was set down for hearing on 12 July 2013. The occupiers did not oppose this application. It was accordingly granted by the court.*

11. The main eviction application was then enrolled for hearing on 13 August 2013. This application was postponed *sine die* as the presiding Judge was not satisfied that there had been proper and full compliance with the Court Order for substituted service which was granted on 4 June 2013.
12. The eviction application was again served on the occupiers on 2 September 2013. The hearing was scheduled to take place on 30 September 2013. An order directing the occupiers to vacate the property within 30 days was granted by the court on the day of the hearing of the application. There was no appearance on behalf of the occupiers.
13. In terms of the Sheriff's return of service marked "**AA 18**" attached to the First Respondent's answering affidavit, the order for the eviction of the occupiers was served on them in the following manner:

"RETURN OF SERVICE – FILING SHEET AND ORDER OF COURT

On this 18th day of October 2013 at 17:25 I served this FILING SHEET AND ORDER OF COURT upon, as follows:

- 1. By affixing a copy thereof to the front door of occupiers 70 and 72 Fife Avenue, Berea, Johannesburg.*
- 2. The occupiers refused to identify themselves and accordingly I was unable to establish the names of the principal occupiers 70 and 72 Fife Avenue, Berea, Johannesburg.*

3. *By handing copies of the Filing Sheet and Order of Court to those occupiers who refused to identify themselves.*

Note: The original return together with the original abovementioned process is despatched to the mandatory.”

14. The occupiers of the property were evicted on 21 November 2013. The process of demolishing the outbuilding commenced shortly thereafter. After the outbuildings were demolished, the First Respondent took steps to demolish the main house. As matters stand, the main house is almost completely demolished and is not in a habitable state.

15. On 14 February 2014, the occupiers were granted an interim order, pending the outcome of this application in terms whereof the First Respondent was interdicted and restrained from demolishing the property. This order was granted by agreement between the occupiers and the First Respondent.

CONDONATION

16. The factors that a court needs to consider when determining an application for condonation are trite and involve the weighing together of *inter alia*; degree of lateness, the explanation therefor, the prospects of success and the importance of the case.¹

¹ Melane vs Santam Insurance Co Ltd 1962 (4) SA at 532.

17. These factors are interrelated and not individually decisive and in the main the court maintains its inherent discretion to grant condonation as the interests of justice and the facts of each particular case may permit.
18. An Applicant who seeks condonation, seeks an indulgence and is required to give a full and satisfactory explanation for whatever delays that may have occurred.²
19. In this matter, the occupiers' case for condonation is predicated on the allegation that an ANC ward counsellor had promised to assist them to deal with their eviction. This counsellor did not live up to his promise and the occupiers later obtained assistance through the intervention of a radio station, Radio 702. The Applicants counsel submitted that condonation should be granted as the occupiers were illiterate and relied on the promise made to them by the ANC ward counsellor.
20. I am not entirely satisfied about the conduct of the occupiers and the explanation that they have provided with regards to their failure to bring this application within the time periods provided for in the Uniform Rules of Court. However, because of the view I take with regards the importance of the matter, it is not necessary to deal with the other relevant factors for deciding an application of this nature. This is obviously an important matter for the occupiers as they are seeking to protect their right to housing as provided for and protected by the Constitution. The right to housing is one of the most basic and important rights provided for by the Constitution. It is in the interests of justice that condonation should be granted.

² Ferreira vs Nthingila 1990 (4) SA 271 (A).

21. Accordingly, the Applicants application for condonation for the late filing of this application is granted. I also hold that the late filing of the First Respondent's answering affidavit is condoned.
22. I now turn to deal with the merits of the application.

MERITS

23. As mentioned above, the occupiers seek an order rescinding and setting aside the eviction order granted in favour of the First Respondent on 19 September 2013.
24. An application for rescission of judgment in the High Court is regulated by the Uniform Rules of Court as well as the common law.
25. The requirements for an application for rescission under Rule 31(2)(b) have been stated as follows:
- “(a) He (i.e. the applicant) must give a reasonable explanation of his default. If it appears that his default was wilful or that it was due to gross negligence, the court should not come to his assistance.*
- (b) His application must be bona fide and not made with the intention of merely delaying the plaintiff's claim.*

(c) *He must show that he has a bona fide defence to plaintiff's claim. It is sufficient if he makes out a prima facie defence in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case and produce evidence that probabilities are actually in his favour.*³

26. The wilful or negligent nature of the Defendant's default is one of the considerations which the court takes into account in the exercise of its discretion to determine whether or not good cause is shown. While the court may well decline to grant relief where the default has been wilful or due to gross negligence, the absence of gross negligence is not an absolute criterion, nor an absolute prerequisite, for the granting of relief – it is a factor to be considered in the overall determination whether or not good cause has been shown.⁴

27. In **Silber vs Ozen Wholesalers (Pty) Ltd**⁵ it was held that explanation for default must be sufficiently full to enable the Court to understand how it really came about,

³ See *Grant vs Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) at 476 – 7; See also *Vosal Investments (Pty) Ltd vs City of Johannesburg* 2010 (1) SA 595 (GSC) at 599 – A – B; and *Coetzee vs Nedbank Ltd* 2011 (2) SA 372 (KZD) at 373 G – I.

⁴ See *Vincolette vs Calvert* 1974 (4) SA 275 (E) at 376 H; See also *Zealand vs Marlborough* 1991 (4) SA 836 (SE) at 838 A – C and *De Witts Auto Body Repairs (Pty) Ltd vs Fedgn Insurance Co. Ltd* 1994 (4) SA 705 (E) at 709 A – E.

⁵ 1954 (2) SA 345 (A) at 353 A.

and to assess the applicant's conduct and motives. An application which fails to set out these reasons is not proper, but where the reasons appear clearly, the fact that they are not set out in so many words will not disentitle the applicant to the relief sought.⁶

28. Before a person can be said to be in wilful default, the following elements must be shown:

- (a) Knowledge that the action is being brought against him or her;
- (b) A deliberate refraining from entering appearance, though free to do so; and
- (c) Certain mental attitude towards the consequences of the default.⁷

29. The phrase "good cause" in Rule 31(2)(b) includes, but is not limited to, the existence of a substantial defence.⁸ The requirements that the applicant for rescission must show the existence of a substantial defence does, however, not mean that he or she must show a probability of success; it suffices if he or she

⁶ See Behncke vs Winter 1925 SWA 59 and the various authorities set out in Erasmus, Supreme Court Practice, Vol. 1 at page B1 – 202.

⁷ Erasmus, Supreme Court Practice at page B1 202 and various authorities cited therein.

⁸ See Silber vs Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (A) at 352.

shows a prima facie case, or the existence of an issue which is fit for trial.⁹ 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.¹⁰

30. Where the applicant has provided a poor explanation for default, a good defence may compensate.¹¹

31. A court has a wide discretion in evaluating “good cause” in order to ensure that justice is done.¹² For this reason the courts have refrained from attempting to frame an exhaustive definition of what would constitute sufficient cause to justify

⁹ See *PLJ van Rensburg en Vennote vs Den Dulk* 1971 (1) SA 112 (W); See also *Sunderson Technitool (Pty) Ltd vs Intermenua (Pty) Ltd* 1980 (4) SA 573 (W).

¹⁰ See *Brown vs Chapman* 1928 TPD 320; See also *Greenberg vs Meds Veterinary Laboratories (Pty) Ltd* 1977 (2) SA 77 (T) at 279 and *Cavasis South African Bank of Athens Ltd* 1980 (3) SA 394 D at 395; *Grant vs Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) at 476 and *Standard Bank of SA Ltd vs EL – Naddaf* 1999 (4) SA 779 (W) at 785 I – 768 B.

¹¹ See *Carolus vs Saambou Bank Ltd*; *Smith vs Saambou Bank Ltd* 2002 (6) SA 346 (SE) at 249B – C and *Creative Car Sound vs Automobile Radio Dealers Association 1989 (Pty) Ltd* 2007 (4) SA 546 D at 555 C – D.

¹² See *Wahl vs Prinswil Beleggings (Edms) Bpk* 1984 (1) SA (T).

the grant an indulgence for any attempt to do so would hamper the exercise of the discretion.¹³

32. The occupiers' case for the rescission of the default judgment is based on the allegation that they never received any notices terminating their right to occupy the property as well as the eviction application. They are alleging that had they been aware of the application for their eviction, they would probably have opposed same.

33. I am not persuaded that the occupiers have provided a reasonable explanation for their default. They attempted to create the impression that the address at which the Sheriff effected service of the notices and the various applications relating to their eviction was not the same as the address of the property they occupied. In argument before court, their counsel conceded that the address at which the Sheriff effected service of the court processes was the same place and/or property which is the subject of these proceedings. This ground, as a basis for setting aside the order granted by the court automatically falls away.

34. I am therefore satisfied that there was proper service of all the processes on the occupiers and their failure to oppose the application in court was wilful. I am further satisfied that the denial by all the occupiers that they received the court processes is a fabrication and a lie. It is highly improbable, that the occupiers did not receive

¹³ See Cairns' Executors vs Gaarn 1912 AD 181 and Abraham vs City of Cape Town 1995 (2) SA 319 (C) at 321 I – J.

any of the processes, including the notices which were served on them during March 2013.

35. In terms of the returns of service which were filed by the Sheriff; it is clear that the occupiers of the property were obstructive and uncooperative. There was no suggestion that I should not accept what is stated by the Sheriff in the various returns of service.
36. An examination of the grounds provided by the occupiers for the rescission of the judgment also reveal that this application is not *bona fide*. The occupiers have also failed to raise a *prima facie* defence to the First Respondent's claim. The occupiers allege that they entered into an oral agreement of lease with one Michel Hubedien ("Hubedien"). They state that the leases were for various periods and that they were required to pay two hundred and fifty rand per month. They suspected that their rental payments were not reaching Hubedien and they decided to stop making further payments. These are bald and unsubstantiated allegations by the occupiers and are unlikely to sustain a defence to the First Respondent's claim.
37. I am not persuaded that the Applicant had demonstrated the existence of a *bona fide* defence on the substantive merits of the First Respondent's claim. In **Chetty v Law Society, Transvaal**¹⁴ E Miller said the following about the two elementary requirements of common law, the test of sufficient cause:

"It is not sufficient if only one of these two requirements is met; for obvious reasons a party showing no prospect of success on the merits will fail in an application for

¹⁴ 1985 (2) SA 756 (A).

rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default. And ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain of the Rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits”

38. The occupiers have also failed to provide proof of the allegation made that they at some stage, decided to make direct payments to the Second Respondent, the Johannesburg Municipality. There is no explanation as to why this was not done as these records would have been readily available and obtainable from the Second Respondent. This further demonstrates that the occupiers are not genuine and *bona fide* with this application. This application is merely an attempt to delay the First Respondent’s claim and obstruct the commencement and construction of the First Respondents building project.

39. If the occupiers case for rescission is not successful, it is not necessary for me to deal with the second relief, namely that the property should be restored to the condition it was in before the eviction was carried out. Nothing further needs to be said on this point.

40. I am satisfied that the application for rescission of the order granted on 19 September 2013 should fail.

41. Accordingly, I make the following order:

1. The Applicant's application is dismissed.
2. The Applicant is ordered to pay costs, which shall include the costs of the application of 11 February 2014.

ZULU (M) AJ

Date of Hearing: 20 October 2014

Date of Judgment: 06 February 2015

Appearances

For the Applicant : Adv. Mohamed Cajee

Instructed by : Shaheed Dollie Incorporated

Auckland Park, Johannesburg

For the Respondents: Adv. C van der Merwe

Instructed by : Hooker Attorneys

Illovo, Johannesburg

