

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

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

Case No.48512/2021

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED:

26/10/2022

In the matter between

JULIUS IMALENIA

1st Applicant

THERESA OJIERAKHI EGHONGHON

2nd Applicant

And

STANLEY KHUTHA KHWELA

1st Respondent

MARIA KHWELA

2nd Respondent

MAUREEN BUYISILE MASUKU

3rd Respondent

JOHANNESBURG METROPOLITAN MUNICIPALITY

4th Respondent

JUDGMENT

MAHOMED AJ

BACKGROUND

1. This is an application for the eviction of the respondents. The eviction proceedings have ensued since 2019. The applicants are the owners of the residential property in Primrose Township, Germiston, Gauteng. The applicants hold full title to the property which they purchased at a public auction.¹ The parties, in better days were friends and the first respondent was a tenant on the property.

2. The applicants and the first respondent agreed that the first respondent would service the bond on the property which would constitute their rental on leasing the property. The respondent failed to do so, the property was attached, whereupon the applicants advanced a loan to the respondents to purchase the property.

3. Only a part of the loan was repaid, and the applicants sought to recover the balance outstanding. They obtained a judgment by default when the respondent failed to file a plea. The applicants eventually had to execute against the property to recover their monies. They purchased the property.

4. The sheriff duly transferred the property to the applicants, after they paid a municipal account of approximately R180 000, for services consumed by the respondents.

5. The respondents oppose the application. They argue that they are the owners of the property and there are material disputes of fact between the parties.

6. The respondents pray that the matter be referred to trial when all the relevant persons can testify, and the court can be fully apprised of the facts.

7. Advocate Muza appeared for the applicants and submitted that the respondents have been legally represented throughout the proceedings and they constantly change attorneys, with a result that their current attorney and counsel on brief have only recently been briefed and they have failed to sign off on a joint practise note.

¹ Caselines 009-20 and 009-25

8. Mr Muza submitted that the matter must be heard as it is in the interest of justice that the matter be finalised. The respondents have failed to present any defence to the applicants, right, title and interest in the property.

THE APPLICANT'S SUBMISSIONS

9. Advocate Muza informed the court this matter has been in litigation since 2016, as the respondents do all they can to frustrate the efforts of the applicants.

10. The parties have no lease agreement between them, and the respondents ignored an eviction letter sent by the applicants' attorneys. The respondents occupy the property unlawfully.

11. The applicants have complied with all the procedural requirements of the Prevention of Illegal Evictions from and Unlawful Occupation of Land Act 19 Of 1998 ("PIE Act").

12. Counsel submitted the respondents have abused the court system and harassed the first applicant, as they refuse to accept the orders of court granted to the applicants in this matter.

13. Since the default judgment was granted, the respondents have approached the court in five successive rescission applications and have failed to persuade the various court of their claims that the property belonged to them.

14. Counsel submitted that when one considers the protracted litigation in this matter at the behest of the respondents it is obvious, they can afford alternate accommodation to rent if they can pay legal fees.

15. The respondents have dragged the applicants through five rescission applications, and two applications to stay warrants of execution, which were eventually abandoned.

16. Weiner J dismissed a rescission application based on spurious allegations of fraud and malfeasance, the respondents failed to persuade the court that they owned the property or that the applicants obtained the property by fraudulent means.

16.1. This was followed by another rescission application, based on similar grounds and facts before Wepener J, the issue having already been decided by way of the default judgment and a rescission application, the matter had become res judicata. Wepener J dismissed this application as set out in his judgment² and held that the respondents remedy, was to launch an appeal.

16.2. Leave to appeal was dismissed by Wepener J, when the respondents incorrectly attempted to appeal his decision, when they ought to have launched an appeal of the first rescission which was dismissed.

16.3. Following the above a defective petition was launched, three further rescission applications followed, and the respondents even attempted to sell off the property in a private sale, when the applicants were forced to obtain an urgent interdict to stop any sale.³

17. The applicants thereafter obtained an order to declare the property executable and the respondents launched an application to stay, which was eventually abandoned.

18. The first applicant furthermore was arrested and interrogated by the police, who eventually closed their file in the matter for lack of evidence.

19. Advocate Muza submitted they do not present the court with proof of ownership and cannot argue that the sheriff had unlawfully transferred the property to the applicants.

20. It was further submitted that the utility bills are again accumulating, for the applicants account whilst the respondents continue to unlawfully occupy the

² Caselines 018-21

³ Caselines 018-41

property. The accounts are over R64 000 to date and the respondents have been living on the property rent free since 2016.

21. Mr Muza submitted that the facts above demonstrate the level of frustrations that the applicants have had to endure and the costs they have had to incur to defend the various applications, none of which have succeeded. A bill of costs has been taxed at R250 000 and further bills are to be drawn. The respondents cannot be indigent. They have money to litigate.

22. Mr Muza proffered that his client has also had to compel the respondents to file their heads of argument. This tardiness demonstrates the respondents' attitude to the litigation after a long history of over 5 years.

23. Counsel submitted that the respondents' argument that the matter be referred to trial is nonsensical. The issues of the outstanding debt, and executability and sale of the property have been decided and are *res judicata*.

24. Counsel referred the court to the dicta of Claasen J, in the Baphalane B Ramokoka Community,⁴

"a case or matter is decided, Because of an authority with which the public interest, judicial decisions are vested, effect must be given to a final judgment, even if it is erroneous. In regard to res judicata, the inquiry is not whether the judgment is right or wrong, but simply whether there is a judgment."

25. Mr Muza submitted that the respondents' subjective belief of their ownership is irrelevant. A court has pronounced on the matter and that is final.

26. On 6 April 2022 the sheriff filed a return of service⁵, in which is recorded that *"tenants were renting rooms on the property."*

⁴ 2011 ZACC 15, 2011 (9) BCLR 891 CC (Baphalane) par 31

⁵ Caselines 039-5

27. The respondent derives an income from the applicants' property, and this cannot be allowed to continue, the applicants have a constitutional right to protection of their property rights and must be respected.

28. The first respondent is not an indigent person, he is self-employed, he failed to take the court into his confidence and provide details of his personal circumstances.

28.1. Mr Muza submitted that the respondents bear an evidential burden and have failed to provide any information other than that there are children living on the property. The papers refer to four children, only two names are provided and no other details as to ages, the schools attended or even confirmatory affidavits from the other adult children who the respondents refer to as unemployed and living on the property.

29. Counsel argued further that the respondents' papers are defective in that the person who deposed to affidavit is not the same person who signed in the presence of a commissioner.

THE RESPONDENT'S SUBMISSIONS

30. Advocate Snyman, submitted that this is the first time through all of the litigation that the eviction is before the court. The litigation in the past has been about the rescission of judgments and stays of executions.

31. Counsel submitted that the long history of litigation demonstrates that the respondents have suffered a grave injustice.

32. They were not properly represented in the past and their papers have not set out in full their various disputes. The court must have all the facts before it to determine if it indeed it is just and equitable to grant an eviction order.

33. Counsel informed the court that he and his attorney must be allowed the opportunity to best assist these respondents. The versions of the parties are mutually destructive, for example as to the ownership of the property.

34. This court must bear in mind that evictions are taken seriously in our law and ownership is not the only point to prove.

35. Mr Snyman argued that no oral evidence has been heard and there are a multitude of disputes of facts and those can only be properly addressed through oral evidence of each of the persons on the aspects in dispute. He submitted the matter should be referred to trial.

36. He argued further that the sheriff in his return of service records, "*not much furniture could be found in the home*", this must demonstrate that the respondents are persons of straw, no furniture was found to be attached.

37. There is no information before this court on alternate accommodation and whether the respondents would be rendered homeless. The 4th respondent has not made any input into the provision of alternate accommodation and therefor, all facts are not before court.

38. In reply, Mr Muza argued that a referral to oral evidence serves only to delay finalisation of this matter. No oral evidence will result in the court orders already granted to be set aside.

39. Mr Muza submitted that this court is being asked to do the impossible, to refer the matter to oral evidence, when the issue of ownership and unlawful occupation has been decided and is *res judicata*. Counsel reminded the court that the disputes are submissions from the Bar, they are not on the pleadings and the respondents are simply trying "to bring in a rescission application from the back door."

40. Counsel argued that the history of litigation presented the *facta probanda* and the *facta probantia* for the eviction order sought.

41. It was further submitted that Mr Snyman does not argue that the dispute of fact cannot be resolved on the papers. Mr Muza submitted that any dispute raised on the relevant submissions on eviction, can be resolved on the papers.

41.1. Counsel submitted that the loan transaction is evident from the signed document at a police station, he referred to earlier.

41.2. The default judgment and subsequent orders on the rescission applications and the stay of execution applications, is proof that the respondents' have no triable case.

41.3. The general conduct of the litigation and the constant change in attorneys and a failure to file heads of arguments and a practise note timeously is a representation of the respondents' bona fides in this matter.

42. Oral evidence will not change the objective facts in this matter.

43. Counsel referred the court to the judgement in the **CITY OF JOHANNESBURG v CHANGING TIDES**, where the court held that the city does not have and cannot become embroiled in every matter of an eviction and consideration for alternate accommodation.

44. Mr Muza submitted there is no dispute of fact that cannot be resolved on the papers. The founding papers, the annexures thereto, and the reply, set out a proper case for the order sought.

45. The respondents have failed to take the court into their confidence, and he submitted the respondents have throughout been obstructive and selective with the truth in the matter.

JUDGMENT

46. It is in the interest of justice that matters are finalised and there is certainty in the law.

47. I have noted that the applicants are the owners of the property, described as ERF [...] at [...] D [...] Street Primrose Township Germiston, in the Gauteng Province under deed of transfer issued and proof of sale in execution by the Sheriff.⁶

48. The applicants have complied with all procedural requirements of the PIE Act and with proof of services on the respondents.⁷ There is no evidence of any rental agreement between the parties and no other rights were identified by the respondent to entitle their continued stay on the property.

49. Furthermore, I have noted the orders of court granted previously, in particular, the judgment by my brother Wepener J ⁸who sets out clearly the issue of the default judgment and res judicata.

50. I have also noted the sale in execution and transfer documents issued in the applicants' names.

51. In **SALOOJEE AND ANOTHER, NNO v MINISTER OF COMMUNITY DEVELOPMENT**⁹, Steyn CJ, stated,

“There is a limit beyond which a litigant cannot escape the results of his attorney’s lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of the Appellate Division. Considerations of ad misericordiam should not be allowed to become an invitation to laxity.”

52. The respondents appeared to be regularly in the courts arguing opposed matters, they ought to have been more involved in the matter to ensure that they included all the details required for a full and comprehensive answer to the applicants' papers.

⁶ Caselines 009-20 to 34

⁷ Caselines 010-1 to 4

⁸ Caselines 018-21

⁹ 1965 (2) SA 135 A

53. The questions for this court to determine is if it is just and equitable, based on the evidence before me to order the eviction of the 1st to 3rd respondents and all those who live through them. If I find in the affirmative, I am then to determine what is a just and equitable date to order the respondents to vacate the premises.¹⁰

54. I agree with Advocate Snyman that “substantial animosity has accrued between the parties” arising from the litigation that has a long history.

55. The respondents argue that they are indigent and will be rendered homeless if the order is granted.

56. However, they fail to discharge their evidential onus when they fail to set out the details of their financial circumstances. The respondents incorrectly argue that the applicants failed to set this out in their founding papers. The applicants would have no way of knowing the information which is within the respondents’ knowledge.

57. The sheriff’s report that there are persons renting rooms on the property is not disputed. I noted that Mr Snyman was unaware of this practise. It may well be that he and his attorney were not fully and properly instructed by the respondent.

58. It is common cause that the litigation was long and protracted, which must have cost the parties substantial legal fees at each opposed matter. The respondents would have had to fund each of those matters, the respondents were the applicants in each instance, including two applications on an urgent basis.

59. In the absence of any information on their financial positions and against the objective evidence of protracted litigation, I am not persuaded that the respondents are indigent and that they will be rendered homeless if the order is granted. I am of the view they can afford alternate accommodation.

60. Mr Snyman’s reference to the sheriff’s failing to find any furniture to attach in their home, is not convincing of their dire financial positions.

¹⁰ See *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 (6) SA 294 (SCA), 2013 (1) SA 583, 2003 (1) SA 113 SCA

61. There is no evidence that the respondent's even approached the 4th respondent for temporary alternate accommodation. They have been under threat of eviction for many years.

62. The applicants have had to pay off outstanding municipal accounts before the property could be transferred to them. This was approximately R180 000. Since the transfer, the respondents continued occupation of the property, the utility charges have again accumulated to approximately R64 000. The services are used by the respondents. Effectively on the objective evidence alone, there is a serious injustice that the applicants suffer.

63. Apart from the municipal debt, the long history of litigation resulted in legal costs that have run up to over R250 000.

64. I am of the view that the respondents have been obstructive all along and in fact abuse the court process. They raise disputes only in their heads of argument which cannot assist them and the critical details of their indigent status is not before this court. I am of the view that this is not simply an oversight, these respondents have had enough time in our courts to know what is expected of them.

65. On the objective facts, that is, the court orders, the sheriff's reports, the sale, and transfer documents issued by the sheriff, and the nature of the protracted litigation and related costs, this court is persuaded and finds that it is just and equitable to grant the order for eviction.

66. I agree with Mr Muza that the respondents are belligerent and refuse to recognise the orders of this court. They have taken up many court hours in hearings and with the various judges having to read their long and poorly drafted pleadings. They have in fact wasted the courts time and taken up allocations which could have been granted to more deserving matters.

67. In my view the respondents can obtain and pay for rental accommodation, and they will not be rendered homeless. The fact that they have not to date even approached the 4th respondent in respect of alternate accommodation demonstrates

that they appear to be comfortable on the property. They have lived rent free and used free services on this property since 2016.

68. They have known of their status as tenants and then unlawful occupiers for many years now and have done nothing to help themselves, if indeed they needed help. Therefore, I am of the view that it just and equitable that they vacate the property within 14 days of this order.

69. Section 26 of the Constitution Act 110 of 1983 provides protections for the rights of property owners and this must be respected. The property owner contributes to the fiscus within the area of the local authority which is a critical revenue base for local municipalities for the delivery of services to the residents.

70. Whilst the court fully appreciates Mr Snyman's submissions that our law is strict on eviction of persons from their homes, and the position of children and women in households, I have considered all the circumstances of the matter and am persuaded that the applicants hold title to the property, and it is fair and just for this court to respect their Constitutional rights as property owners. They have tread a long and winding road to realise that right.

Accordingly, I make the following order,

1. The application for eviction is granted.
2. It is ordered that **STANLEY KHUTHA KHWELA, MARIA KHWELA AND MAUREEN SIBUYISILE MASUKU** and all those living through them are to vacate the property known as **ERF [....] situated at [....] D [....] STREET PRIMROSE TOWNSHIP GERMISTON GAUTENG PROVINCE**, within 14 days of service of this order.
3. Should the respondents and all those claiming title and occupancy through the respondents fail to vacate the property within 14 days of service of this order, the sheriff is authorised to request any persons including the

South African Police Services to assist him with the eviction and removal of the respondents and all those residing on the property through them.

4. It is ordered that the 1st 2nd and 3rd respondents pay the costs of this application, including costs of the s4(2) application, as between attorney and client.

MAHOMED AJ

Acting Judge of the High Court

This judgment was prepared and authored by Acting Judge Mahomed. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 26 October 2022.

Date of hearing: 8 September 2022

Date of Judgment: 26 October 2022

Appearances:

For Applicants: Advocate Muza

Instructed by: Nandi Bulabula Inc

Email: enquiries@nandibulbulainc.co.za

Ref: bulabula/munyai/ev002/21

For Respondents: Advocate Snyman

Instructed by: Wright Rose Innes Attorneys

Email:

eleanorm@wri.co.za