REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 12205/21

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

Date: 27 October 2021 E van der Schyff

In the matter between:

MAPHUTI STEPHEN MADISHA	APPLICANT
and	
JOSEPH MATJILA N.O.	1ST RESPONDENT
THOKOZILE MATJILA N.O.	2ND RESPONDENT
WILHELMINHA MATJILA N.O.	3RD RESPONDENT
TWALA TRR ATTORNEYS	4TH RESPONDENT

JUDGMENT

Van der Schyff J

[1] This is an application for rescission of judgment. Counsel for the applicant indicated that he was only briefed on the morning that the matter was to be heard. He did, however, not request a postponement. The matter stood down to enable counsel of

the opposing parties to discuss the application since counsel for the applicant averred that the application was overcome by events and became moot.

[2] The application has its genesis in an urgent court application wherein the applicant sought relief in two parts after the respondents obtained an eviction order against him. The urgent court stayed the eviction pending the hearing of a rescission application in the opposed motion court. The applicant never proceeded to enrol the application in the ordinary motion court for Part B to be adjudicated. The application was enrolled by the respondents.

[3] The applicant submitted from the bar that the application became moot because the property he stands to be evicted from was sold in a sale of execution.[1] Transfer of the property has, however, not yet occurred. It was submitted from the bar that this is common cause between the parties. Counsel for the respondents submitted that the respondents still have an interest in the application since it (a trust) is still the owner of the property. It is trite that ownership of immovable property passes on registration. Since both counsel confirmed that the property was not yet registered in the purchaser's name, there is no reason not to proceed with this rescission application.

[4] The applicant avers that the eviction order was erroneously sought and granted in his absence and stands to be rescinded in terms of Rule 42(1)(a) of the Uniform Rules of Court. He explains that a Notice of Motion of an *ex parte* application for leave to serve him with a notice in terms of s 4(2) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998 ('PIE Act'), was served on him on 13 December 2020. The relevant case number was 63195/20 and the respondents cited were the applicant in the present application as the first respondent, 'unknown unlawful occupiers' as the second respondent and the City of Tshwane Municipality as the third respondent. The relief sought in terms of the Notice of Motion was, *inter alia*, that:

[1] This is also the reason for the application not being enrolled by the applicant.

1. The Sheriff … be authorised to serve 'Annexure X', a copy of this order and a Notice of Set-down to the first and second respondent, at the said property in accordance with the court's uniform rules of service.
2. That the Sheriff or his deputy for the jurisdiction area of the offices of the third respondent be authorised to serve Annexure X, a copy of this order and a Notice of Set-down to the third respondent by delivering same to the Municipal Manager or such person occupying the position of the Municipal Manager at the offices of the third respondent in accordance with the court's uniform rules of service.
3. That the Costs of this Part A of this application shall be:

a. Costs of the application for the relief claimed in Part B; alternatively

b. Reserved for the determination by the court adjudicating on the relief claimed in Part B hereto.'

[5] The application was set down for hearing on 1 March 2021. The applicant did not attend on 1 March 2021 because the relief sought according to the notice of motion was merely for obtaining the required notice in terms of s 4(2) of the PIE Act. However, he subsequently learned that an eviction order was granted on 1 March 2021, despite the relief sought in the Notice of Motion merely encompassing the authorisation to serve the s 4(2) notice.

[6] The respondents acknowledged in the answering affidavit that 'It is trite law that eviction applications are brought *ex parte* for the leave of the court to proceed with Part B of the eviction application which was served on the applicant.'

[7] After perusing the documents, I am of the view that the applicant's confusion was caused by the fact that the date '1 March 2021' appears on the Notice of Motion as the date on which the respondent would apply for the issue of the s 4(2) notice **and** on the s 4(2) notice as the date on which the eviction application was to be heard. Counsel for the respondent conceded that the dates of the *ex parte* application and

the eviction application coincided. He submitted, however, that the eviction order should not be rescinded because the applicant was aware that the application was proceeding in court on 1 March 2021. In addition, the applicant does not disclose a *bona fide* defence in the rescission application.

[8] The crisp issue that must be determined is whether the eviction order was erroneously sought or erroneously granted. Where an order was erroneously sought or granted, it stands to be rescinded irrespective of whether a *bona fide* defence is disclosed. It must be stated at the onset that it is insightful that Basson J, who initially granted the eviction order, granted the order on 8 March 2021 in the urgent court interdicting the Sheriff from executing the order and suspending the order pending the adjudication of the rescission application.

[9] The Constitutional Court explained in *PE Municipality v Various Occupiers*:[2]

> '… the first part of the title of the new law [PIE Act] emphasises a shift in thrust from *prevention of illegal squatting to prevention of illegal eviction*. The former objective of reinforcing common-law remedies while reducing common law-law protection was reversed so as to temper common-law remedies with strong procedural and substantive protections; …' (Emphasis added).

[10] It is trite that evictions are to be carried out in accordance with the PIE Act and the Supreme Court of Appeal's judgment in *Cape Killarney Property Investments (Pty) Ltd v Mahamba.*[3] The learned Brand AJA explained in *Cape Killarney Property Investments* that:

> '**[11]** Section 4(1) makes it clear that the provisions of the sub-section that follow are peremptory. It also defines the "proceedings" to which the section applies, namely proceedings for the eviction of an unlawful occupier. Section 4(2) requires

[2] 2005 (1) SA 217 (CC) para 12.

[3] 2001 (4) SA 1222 (SCA).

notice of such proceedings to be effected on the unlawful occupier and the municipality having jurisdiction, at least 14 days before the hearing of those proceedings. Section 4(2) further provides that this notice must be effective notice; that it must contain the information stipulated in ss (5) and that it must be served by the court. The term, "court" is defined in section 1 of the Act as the "High Court or the magistrates' court". Although s 4(2) could have been more clearly worded, it is obvious in my view that the legislature did not intend physical service of the notice by the court in the person of a judge or magistrate. On the other hand, mere issue of the notice by the registrar or clerk of the court would not suffice. **What is intended, I believe, is that the contents and the manner of service of the notice contemplated in ss (2) must be authorised and directed by an order of the court concerned**.

[13] Section 4(3) provides that notice of the proceedings must be served in accordance with the rules of the court in question. Accordingly, for purposes of an application in the High Court, such as the one under consideration, s 4(3) requires that a notice of motion as prescribed by rule 6 be served on the alleged unlawful occupier in the manner prescribed by rule 4 of the rules of court. **It is clear in my view that this notice in terms of the rules of court is required in addition to the s 4(2) notice.** Any other construction will render the requirements of section 4(3) meaningless.

[14] The fact that the s 4(2) notice is intended as an additional notice of forthcoming eviction proceedings under the Act is also borne out by s 4(4). The latter subsection provides for the possibility of substituted service where the court can be satisfied that for reasons of convenience or expedience, the notice of motion cannot be serviced in the manner prescribed by rule 4. However, even in this event, s 4(2) must still be complied with since s 4(4) is expressly made subject to the provisions of ss 4(2).

> **[15]** Section 4(5)(b) requires the s 4(2) notice to indicate the date upon which the court will hear the eviction proceedings. In High Court proceedings by way of application this date of hearing will only be determined after all the papers on both sides have been served. It follows, in my view, that it is only at that stage that the s 4(2) notice can be authorised and directed by the court. From the judgment of the learned Judge *a quo* (76 I-J) it appears that according to his understanding of s 4(2) the notice contemplated by that section is to precede service of the notice of motion in terms of the rules and that in fact the minimum period of 14 days stipulated in the section is to elapse before the eviction proceedings can be instituted. As appears from what I have already said, this interpretation cannot be supported .
> **[16]** Section 4 does not indicate how the court's directions regarding the s 4 (2) notice is to be obtained. A common sense approach to the section appears to dictate, however, that the applicant can approach the court for such directions by way of an *ex parte* application.'

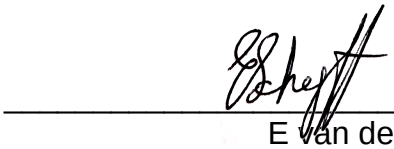
[11] The provisions of s 4 of the PIE Act are peremptory. The written notice of eviction proceedings as required in s 4(2) of the PIE Act was not authorised by way of a court order as prescribed by the Supreme Court of Appeal in *Cape Killarney Property, supra.* The applicant in this rescission application cannot be faulted for regarding the date of 1 March 2021 as the date on which the court would have been requested on an *ex parte* basis for authorising the s 4(2) notice. In the context of this factual matrix, the object of section 4 has not been achieved. In these circumstances, the judgment was erroneously sought and erroneously granted, in the absence of the applicant and the eviction order granted on 1 March 2021 stands to be rescinded.

[12] There is no reason to deviate from the principle that costs follow success.

ORDER

In the result, the following order is made:

1. The eviction order granted on 1 March 2021 in case number 63195/2020 is rescinded.
2. The first to third respondents are to pay the costs of this application.



E van der Schyff
Judge of the High Court, Gauteng, Pretoria

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email. The date for hand-down is deemed to be 27 October 2021.

Counsel for the applicant:	Adv. B Yawa
Instructed by:	Kholisile Lumka Inc
Counsel for the respondents:	Adv. P Lebea
Instructed by:	TWALA TRR Attorneys
Date of the hearing:	25 October 2021
Date of judgment:	27 October 2021