

SOUTH AFRICA / JUDGMENT

B.T.T v A.T and Others (1053/2020) [2024] ZAGPJHC 1152 (11 November 2024)

[2024] ZAGPJHC 1152

COURT

South Gauteng High Court, Johannesburg

BEFORE

Oosthuizen-Senekal CSP

CASE / FILE NUMBER

1053/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, JOHANNESBURG

CASE

NUMBER: 1053/2020

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: NO

DATE

11/11/2024

SIGNATURE

In

the matter between:

B[...]
T[...] T[...]
APPLICANT
and
A[...]
T[...]
FIRST
RESPONDENT
ZAMOKHUHLE
MONATE
SECOND RESPONDENT
PHINDOKUHLE
ZWANE
THIRD RESPONDENT
ALL
OTHER UNLAWFUL OCCUPANTS OF ERF 3[...]
O[...]
E[...] SOWETO (“THE PROPERTY”)
FOURTH
RESPONDENT
CITY
OF JOHANNESBURG MUNICIPALITY FIFTH
RESPONDENT

JUDGMENT

OOSTHUIZEN-SENEKAL CSP AJ:

Introduction

- [1] This is an application wherein the applicant seeks an order declaring the first, second, third and all occupiers as unlawful occupants of the property described as, Erf 3[...] O[...] E[...], Soweto (“the property”) and subsequently order their eviction from the property within a period to be determined by the Court.
- [2] On 25 October 2019 the applicant instituted an eviction application of the first, second, third and fourth respondents from the property. On 4 August 2022 Francis-Subbiah AJ granted an order in terms of section 4(2) of the Prevention of Illegal Eviction from Unlawful Occupation of Land, Act 1998 (“the PIE Act”) whereby the applicant was granted leave to serve a notice in terms of section 4(2) of the PIE Act upon the first, second, third and fourth respondents.
- [3] On 15 September 2022, the respondents appeared in person. Mooki AJ ordered the respondents to deliver their answering affidavit within 30 days of the order. Their rights to legal representation, including access to Legal Aid SA or legal clinics were duly explained.

- [4] The respondents failed to deliver their answering affidavit within the period set out in the order whereby the applicant proceeded to enrol the matter for hearing. The matter was set down for hearing on the 13 February 2023.
- [5] On 13 February 2023, the respondents again appeared in person and the matter stood down until 15 February 2023 by agreement between the parties. On 15 February 2023, Opperman J ordered the respondents to deliver their answering affidavit on or before 31 March 2023.
- [6] On 29 March 2023 Sebola Nchupetsang Sebola Attorneys delivered a Notice of Appointment as attorneys of record for the first respondent and on 31 March 2023 the first respondent delivered her answering affidavit. The second, third and fourth respondents elected not to oppose the application.
- [7] The fifth respondent, the City of Johannesburg Municipality has elected not to participate in the proceedings. However, on 10 June 2024 Maenetje AJ granted the following order relating to the fifth respondent:

“The Fifth Respondent is ordered to deliver within 20 days order upon it a report to this Court; the report must specify:

- 1.1 The exact conditions of the first, second, third and fourth respondent’s (hereinafter “the respondents”) occupancy and detailing their personal circumstances;
 - 1.2 Whether an eviction order is likely to result in all or any of the respondents becoming homeless; if so what steps fifth respondent proposes to put in place to address and alleviate such homelessness by way of the provision of emergency accommodation.
 - 1.3 All the information available to the Fifth Respondent in regard to the immovable property.
2. The parties are granted leave to supplement their papers within 10 days after receipt of the report.
 3. The return date for the hearing of the matter is 4 November 2024.”

- [8] On 11 September 2024 the fifth respondent filed its report as ordered by Court. In paragraph [17] of the said report the following is stated:

“I am advised by Mirriam Ramphele of TP Khoza Attorneys as follows:

- 17.1. That on the 6th of August 2024 she, together with her colleague, conducted an occupancy audit wherein they met with the 1st to 3rd respondents at the property in question. The 1st and 2nd Respondents confirmed indeed their occupation on the aforesaid property. However, the 3rd respondent has since moved out of the property.
- 17.2. The 1st Respondent further confirmed that she is in occupation with her two children; Z[...], who is the 2nd respondent, her son K[...] as well as two of her grandchildren, namely M[...] Z[...] who is 12 years of age and 1 year old N[...] Z[...].

17.3. The 1st Respondent was born on the 27th of November 1952 and is currently 62 years of age.

17.4. The 1st Respondent is unemployed and a recipient of the government old age pension grant, which is R2 100.00 while her two children are both unemployed.

17.5. The 2nd respondent is 32 years of age and her brother, K[...], is 36 years of age and allegedly suffers from bipolar and Schizophrenia. K[...] is said to receive the Social Relief of Distress (RDD) grant of R350.00.

17.6. M[...] is a grade 6 learner enrolled at Risidale Primary School, in Northcliff. N[...] goes to a day care called Lulu Day Care.

17.7. The 2nd respondent advised that her minor children both receive social grants, which are R510 for each child.

17.8. The 1st Respondent advised that she and her children all survive on the both the older persons grant of the 1st respondent as well as the children's grants and K[...]’s SRD grant, all of which amounts to a total of R3 470.00

17.9. The 1st Respondent did not deny that the property is now owned by the Applicant, however, she alleged that the property previously belonged

to their mother and was regarded as their family home. Moreover, the 1st Respondent indicated that she and her children do not have any other place to relocate to as the property has been their home.

[9] The conclusion and recommendation in the report is as follows:

“21. Based on the findings gathered during the occupancy audit, the City submits that should the eviction order be granted, the 1st, 2nd and 3rd respondents would face homelessness.

22. Moreover, the household income is below the R3500.00 threshold that the policy has set.

23. A recommendation is made for the court to enquire into the purpose of the acquisition of the property in question by the Applicant, her immediate plans for the property so as to determine the possible competing risk of homelessness as the property was regarded as the family home of the Applicant and the 1st to 4th respondents.

24. Should the eviction order be granted, the 1st, 2nd 3rd and 4th Respondents would qualify for TEA. However, it is our submission that due to the rapid increase of people being evicted, the City has run out of facilities to accommodate more people and thus sufficient time to source alternative shelter for the 1st to 4th Respondents would be needed.

25. As such, we request the court to grant the City a period of 2-3 years in order to identify and prepare the property for TEA”.

[my emphasis]

[10] The applicant filed her replying affidavit on 10 July 2023.

[11] The matter was set down on the opposed roll for 5 November 2024 at 10h00.

Factual Background

[12] The property in question, a family home, was granted to the Thangelane family in 1985 under a leasehold agreement. On 1 September 1991, in accordance with section 2(1)(a) of the Conversion Act 81 of 1981, all leaseholds were automatically converted to ownership, and the property was registered in the applicant's name. The first respondent became aware that the applicant had obtained ownership of the property on 28 February 2011. Neither the first respondent, their late mother, nor any other affected party lodged an appeal within the required period.

Condonation for the late filing of the Replying Affidavit

[13] The applicant conceded that her replying affidavit was filed late and therefore requests the Court to condone the late filing.

[14] She provided an explanation for the delayed filing of her replying affidavit. The respondents did not oppose the request for condonation, and it is clear that they suffered no prejudice as a result.

[15] Consequently, I am inclined to grant condonation for the late filing of the replying affidavit, as the explanation given is reasonable. Furthermore, granting condonation does not prejudice the respondents. I therefore condone the applicant's late filing of the replying affidavit.

Issues

for Determination

[16] It is undisputed that the first, second, and third respondents reside on the property, and that the applicant is its registered owner. The issues before this Court are, first, whether the first, second, and third respondents, along with those occupying the property by association, are unlawful occupiers; and second, whether it is just and equitable to order their eviction from the property.

Applicable Legal Principles

The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, Act 19 of 1998 ('PIE')

[17] Erasmus Superior Court Practice, Eviction under PIE[1] sets out the purpose and effect of PIE relevant to this matter as follows:

“The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, Act 19 of 1998 (‘PIE’), which came into operation on 5 June 1998, provides for procedures for the eviction of unlawful occupiers of land.[2] In Ndlovu v Ngcobo; Bekker and Bosch v Jika[3] the Supreme Court of Appeal, in a majority judgment, held that PIE disposed of certain common-law rights relating to eviction. The majority judgment can be summarized as follows:

- (a) PIE has its roots, inter alia, in s 26(3) of the Constitution of the Republic of South Africa, 1996.
- (b) The definition of an unlawful occupier in s 1 of PIE relates to a person who occupies land without the express or tacit consent of the owner or person in charge of such land. In its ordinary meaning the definition of an unlawful occupier means that PIE applies to all unlawful occupiers, irrespective of whether their occupation of such land was previously lawful.
- (c) PIE does not protect buildings and structures that do not perform the function of a form of dwelling of shelter for humans (e.g.,

commercial properties) or that are occupied by juristic persons.

- (c) The effect of PIE is not to expropriate private property. What PIE does is to delay or suspend the exercise of a landowner’s full proprietary rights until a determination has been made whether it is just and equitable to evict the unlawful occupier and under what conditions.
- (e) PIE invests in the courts the right and duty to make the order which, in the circumstances of the case, would be just and equitable, and it prescribes some circumstances that have to be taken into account in determining the terms of the eviction. In other words, the court, in determining whether or not to grant an order or in determining the date on which the property has to be vacated, has to exercise a discretion as to what is just and equitable. The discretion is one in the wide, and not the narrow sense.

Consequently, the court does not have a free hand to do whatever it wishes.

- (f) Provided the procedural requirements laid down in PIE have been met, a landowner is entitled to approach the court on the basis of ownership and the occupier’s unlawful occupation. In this regard the occupier bears an evidential onus (‘weerleggingslas’).

A draft Bill to amend certain definitions and to qualify the application of PIE was published under GN2276 of 27 August 2003.

In s 1 of PIE the word ‘court’ is defined as ‘any division of the High Court or the magistrate’s court in whose area of jurisdiction the land in question is situated’.

Section 4(1) of PIE provides that, notwithstanding anything to the contrary contained in any law or the common law, the provisions of that section apply to proceedings by an owner or person in charge of land for the eviction of an unlawful occupier. The word 'proceedings' may, of course, bear different meanings in different statutory provisions. It is submitted that in the context of PIE it includes action as well as application proceedings.

If the defendant is an unlawful occupier of land, as defined in PIE, written and effective notice of the proceedings must be served on both the unlawful occupier and the municipality having jurisdiction at least fourteen days before the hearing of the proceedings for the eviction of the defendant. The purpose of this requirement is to provide protection to occupants by alerting them to the threat to their occupation and the basis thereof; alerting them to the provisions of and the protections and defences afforded to them by PIE; advising them of their rights to legal representation; and informing them of the date and place of the hearing and 'to afford the respondents in an application under PIE an additional opportunity, apart from the opportunity they have already had under the Rules of Court, to put all the circumstances they allege to be relevant before the court. In addition, the period of notice provided for permits the municipality and the occupants concerned to investigate the availability of alternative accommodation or land and to explore the possibility of mediation in terms of s 7 of PIE. The notice requirement applies even to proceedings leading to the grant of a rule nisi against occupants.

....

If the defendant has been in occupation of the land for less than six months, the 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 the rights and needs of the elderly, children, disabled persons and households headed by women. In addition to these requirements the court is required to consider whether land has been made available or can reasonably be made available by a municipality or other organ of state or another landowner for the relocation of the defendant, if the latter has been in unlawful occupation for longer than six months. The period of occupation is calculated from the date that the occupation becomes unlawful.

If the requirement of s 4 of PIE are satisfied and no valid defence to an eviction order has been raised, the court 'must', in terms of s 4(8), grant an eviction order. When granting such an order the court must, in terms of s 4(8)(a) of PIE, determine a just and equitable date on which the unlawful occupier or occupiers must vacate the premises. The court is empowered, in terms of s 4(12) of PIE, to attach reasonable conditions to an eviction order. The date that the court determines must be one that is just and equitable to all parties.

... The order that it grants as a result of those two discrete enquiries is a single order. Accordingly, it cannot be granted until both enquiries have been undertaken and the conclusion reached that the grant of eviction order, effective from a specified date, is just and equitable. Nor can the 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."

Upgrading of Land Tenure Rights Act 112 of 1991 (“ULTRA”)

[18] The Upgrading of Land Tenure Rights Act 112 of 1991 (“ULTRA”) was enacted in South Africa to address historical inequalities in land ownership, specifically by upgrading insecure land tenure rights in former “homelands” and other areas designated for Black South Africans under apartheid. This act is part of the broader post-apartheid legislative effort to redress injustices by providing legal ownership and formal titles to people who held lesser, insecure land rights.

[19] The key provisions of ULTRA are the following:

[19.1] Under ULTRA, rights previously held as leaseholds or lesser forms of tenure were eligible for conversion to full ownership. This was a major shift, as many individuals in these areas only held tenure rights but lacked formal ownership, making it difficult to secure housing stability or obtain financing.

[19.2] The Act allows for the automatic conversion of leasehold or similar tenure rights into ownership for qualifying individuals. This was intended to streamline the ownership process and reduce administrative barriers to land ownership. Section 2(1)(a) of the Act, for instance, facilitated the conversion by allowing individuals with long-term lease rights to automatically receive ownership.

[19.3] ULTRA also seeks to secure family land by allowing communal and family-held land rights to be upgraded to formal ownership, allowing individuals and families to protect their property against dispossession or claims by external parties.

[19.4] If individuals felt aggrieved by the conversion of tenure rights (e.g., if they had an existing or competing claim to the land), the Act provided a process for appeals. However, appeals had to be filed within a prescribed period to be considered.

[19.5] Municipalities play a role in helping with the registration and formalization of rights, especially by overseeing the transfer

process, maintaining accurate land records, and addressing disputes. This has allowed municipalities to promote land security and ensure more equitable property distribution.

Evaluation

[20] It is clear that the applicant has provided incontrovertible evidential proof of her ownership of the property, to the extent that the Title Deed was made available and attached to the founding affidavit.

[21] It is clear that the first respondent and her family are unlawful occupiers of the property as they have no legal right to occupy the property and do so without the consent of the applicant, the owner. The first respondent and her family have been in unlawful occupation of the property for years when the property was transferred to the applicant.

- [22] The first respondent contended that the applicant acquired ownership of the property through fraud or misrepresentation. However, this allegation of fraud is insufficiently supported by evidence, and therefore, the Court cannot conclude that the property's registration in the applicant's name involved any irregularities. The facts show that after the applicant obtained ownership, the respondents did not file an appeal as outlined under ULTRA, and there is no doubt that the first respondent was aware of this. Her claim of being unaware of the applicant's whereabouts appears to be contrived and untrue. By her own admission, she knew of the applicant's ownership shortly before her mother's passing on 28 September 2011, though she claimed this contradicted the family's agreement that the property would remain their family home. The first respondent also alleged that her late mother attempted to challenge the applicant's ownership, but no evidence was submitted to substantiate this claim. The applicant left the property in 2016 after feeling threatened by the respondents. Additionally, she had requested the first respondent to vacate the property as early as February 2019. Since acquiring ownership, the applicant has also been responsible for paying both the property's municipal account and the Standard Bank bond registered against it.
- [23] In conclusion, the respondent's claim that the transfer of the property to the applicant involved alleged fraud is, with respect, without merit.
- [24] It is trite that the applicant has no obligation to provide alternative accommodation to the respondents under the common law. As such she should be entitled to evict the respondents.
- [25] As referred to above, the PIE Act gives effect to section 26(3) of the Constitution of the Republic of South Africa[4] in that it enjoins a Court to grant an eviction order only, if it is "just and equitable to do so", after considering all of the relevant circumstances as contemplated in sections 4(6) and (7) and section 6(1).
- [26] The Constitutional Court in *Port Elizabeth Municipality v Various Occupiers*[5] emphasized that the Court must take an active role, that it is "called upon to go beyond its normal functions and to engage in active judicial management according to equitable principles" and that "in addition to lawfulness of the occupation the court must have regard to the interests and circumstances of the occupier and pay due regard to broader considerations of fairness and other constitutional values, so as to produce a just and equitable result".
- [27] The Supreme Court of Appeal in *Ndlovu v Ngcobo; Bekker and Another v Jika* supra, said the following:
- "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 an issue between the parties."* [my emphasis]

[28] This sentiment appears to have met with approval of the Constitutional Court, as Willis J explains in *Johannesburg Housing Corporation (Pty) Ltd v Unlawful Occupiers, Newtown Urban Village*.^[6]

[29] The Court considering what is just and equitable exercises a wide discretion. What is just and equitable will vary from case to case. The following aspects should be considered;

[29.1] The unlawful occupier must have occupied the land for more than six months;

[29.2] The Court may grant an eviction once it formulates an opinion that it is just and equitable

[29.3] The Court to consider whether the 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;

[29.4] The Court to consider the rights and needs of the elderly, children, disabled person or households headed by women.

[30] Section 4(7) of the PIE Act must be considered together with section 4(8) which is the empowering section as indicated supra. Section 4(8) provides:

“If the court is satisfied that all the requirements of this section have been complied with and that no valid defence has been raised by the unlawful occupier, it must grant an order for the eviction of the unlawful occupier, and determine –

- (a) a just and equitable date on which the unlawful occupier must vacate the land under the circumstances; and
- (b) the date on which an eviction order may be carried out if the unlawful occupier has not vacated the land on the date contemplated in paragraph (a)”

[31] It is undisputed that the respondents have occupied the property for over six months. As the rightful owner, the applicant requested that the respondents vacate the property as early as February 2019, but they did not comply. The applicant has been denied access to the property since she vacated it in 2016, resulting in at least eight years of restricted access. Additionally, the respondents have not paid rent since they moved onto the property prior to 2011, benefiting from its use without compensating the lawful owner. The applicant has also been solely responsible for the property’s municipal account and bond payments for a significant period.

[32] Counsel for the respondents argued that the first respondent is a pensioner reliant on government grants to support herself, the second respondent, and the minor children residing on the property. This is corroborated by the fifth respondent’s report. Moreover, it is clear that an eviction order would leave the respondents homeless. However, the respondents are eligible for temporary emergency housing, as confirmed by the fifth respondent, who stated that providing such housing would take approximately 2–3 years, this is due to the rapid increase in the number of people being evicted, the City has

exhausted its facilities and can no longer accommodate additional individuals.

- [33] The decision on whether the eviction in this matter is just and equitable must be based on the information provided in the answering affidavit and the report from the City.
- [34] The inability of municipalities to provide emergency temporary housing to individuals in South Africa is a significant issue with complex causes and widespread social implications. This challenge impacts many vulnerable individuals and families facing eviction or displacement. Furthermore, when municipalities cannot offer alternative accommodations for those facing eviction or displacement, it can result in prolonged occupation of private properties by occupants who have no legal right to remain. Municipalities face a difficult balance between protecting vulnerable individuals from homelessness and upholding the property rights of owners.
- [35] While municipalities have a responsibility to protect individuals from homelessness, failure to provide emergency housing solutions places an unfair burden on property owners, undermining their property rights and causing financial hardship. A balanced approach that considers the needs of both vulnerable occupants and property owners is crucial to promoting social justice, economic stability, and effective housing policy. Without concerted efforts to improve emergency housing availability, property owners will continue to bear the cost of systemic shortfalls in housing provision, impacting their livelihoods and diminishing confidence in property investment.
- [36] In cases where a municipality is tasked with providing emergency temporary housing for a small family, as in the case of a respondent who is not part of an extended family but a smaller family unit, it may be more feasible for the municipality to meet this need effectively. A smaller family's housing needs are generally less resource-intensive compared to larger families, which can simplify the logistics and reduce the strain on municipal resources. The respondents require less living space, making it easier for the municipality to identify suitable accommodations within existing housing stock or temporary shelters. In the present matter the respondents require fewer amenities, utilities, and resources. This can be more cost-effective for the municipality, as the unit would need fewer rooms, lower utility usage, and minimal adjustments compared to housing larger families, smaller units may be more readily available.
- [37] Since the requirements in the matter are lower, the fifth respondent might be able to place the respondents in temporary housing more quickly. This can reduce delays in providing housing and prevent prolonged occupation of private properties, benefiting both the respondents and the applicant.

[38] However, I have to consider the fact that the respondents occupied the property for a period longer than six months. The first respondent's children as well as their minor children reside at the property and it is of the utmost importance that I consider the rights of children as provided for in section 26 (3) of the Constitution, which are weighty considerations in deciding on what would be fair, just, equitable and humane in the circumstances.

[39] After considering all relevant factors, I find it just and equitable to grant the eviction of the respondents. I am of the view that the applicant is entitled to exercise her rights in relation to the property she lawfully own, and that the first, second, third respondents and those occupying the property by virtue of their occupation are unlawful occupiers.

Costs

[40] The last aspect to be addressed is the issue of costs. Awarding of costs is at the discretion of the court which must be exercised judicially. Legal Aid South Africa appeared on behalf of both the applicant as well as the first respondent, therefore, no order to costs is made.

Order

[41] In the circumstances the following order is made:

1. The late filing of the replying affidavit by the applicant is condoned.
2. The first, second, third respondents and all those who occupy the premises known as Erf 3[...], O[...] E[...], Soweto by virtue of the respondent's occupancy are declared unlawful occupiers.
3. The first, second, third respondents and all those who occupy the property by virtue of the respondent's occupancy are ordered to vacate the property on or before Friday, 28 March 2025.
4. The fifth respondent is ordered to provide the first, second and third respondents with temporary emergency housing on or before Friday, 28 March 2025.
5. It is further ordered that in the event that the first and/or second and/or third respondents do not vacate the property on or before Friday, 28 March 2025, the Sheriff alternatively his duly appointed deputy together with such assistance as he deems appropriate is authorised and directed to evict the first, second, third respondents and all those who occupies the property by virtue of the respondents from the property.
6. No cost order.

CSP OOSTHUIZEN-SENEKAL

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, JOHANNESBURG

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5 November 2024

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Adv Matswiki

[1] Second Edition Volume 2, D9-1 to D9-9.

[2] PIE has to be interpreted, and its governing concepts of justice and equity have to be applied, within a defined and carefully calibrated constitutional matrix. The starting and ending point of the analysis of PIE must be to affirm the values of human dignity, equality and freedom (Port Elizabeth Municipality v Various Occupiers [2004] ZACC 7; 2005

(1) SA 217 (CC) at 225A-229G). See also Machele v Mailula 2010

(2) SA 257 (CC) at 262A-B.

[3] 2003

(1) SA 113 (SCA). See further 2003 (March) De Rebus 14-17, 18-20 and 22-24; 2003 (July) De Rebus 44; 2004 (July) De Rebus 57-60 and 2016 (October) De Rebus 24-26.

[4] Act 108 of 1996.

[5]

[2004] ZACC 7; 2005

(1) SA 217 (CC) at para [36].

[6] 2013 (1) SA 583 (GSJ) (Johannesburg Housing Corporation) at para [70]-[71]..

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