

SOUTH AFRICA / JUDGMENT

Finbond Mutual Bank v Kgosana and Others (100207/2023) [2025] ZAGPPHC 96 (30 January 2025)

[2025] ZAGPPHC 96

COURT

North Gauteng High Court, Pretoria

BEFORE

T E Joyini

CASE / FILE NUMBER

100207/2023

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Policy

REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

Case

Number: 100207/2023

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: YES/NO

DATE

30/01/25

SIGNATURE

In

the matter between: FINBOND
 MUTUAL
 BANK
 Applicant
 and
 FANAHA
 KGOSANA
 First Respondent
 ALL
 OCCUPIERS OF 2[...] H[...] STREET
 Second Respondent
 CITY
 OF TSWANE METROPOLITAN MUNICIPALITY
 Third Respondent

JUDGMENT

Joyini J

INTRODUCTION

[1] This is an application launched by the applicant for the eviction of the first and second respondents (“the respondents”) from the property known as Portion 1 of Erf 6[...], and the remaining Extent of Erf 6[...], H[...] Township: Registration Division JR: Gauteng Province. The applicant seeks an order that is as follows:

[1.1] The first and second respondents and all those occupying under or through them, including their family, servants and/or employees (“the occupiers”), are evicted from the property being: Portion 1 of Erf 6[...], and the remaining Extent of Erf 6[...], H[...] Township: Registration Division JR: Gauteng Province (“the property”);

[1.2] The occupiers are to vacate the property within 14 days from date of service of this order, failing which, the eviction may be carried out by the sheriff and his/her duly authorised deputy (“sheriff”), on the first day following thereafter, and in pursuance of executing this order, the sheriff is authorised to enlist the services of the South African Police Service and/or locksmith to give effect to this order, should it be necessary;

[1.3] Should the occupiers succeed or attempt to regain access or possession to/of the property after the eviction order has been executed, the sheriff is authorised to carry same out in accordance with paragraph 1.2 above, without the applicant having to approach the court, for further relief;

[1.4] The occupiers are to pay the costs of this application, jointly and severally, the one paying, the other to be absolved.

[2] The application is opposed by the respondents.

- [3] The court appreciates the insightful and engaging submissions from both parties' legal representatives, which greatly assisted in adjudicating this matter.

APPLICATION FOR CONDONATION FOR LATE FILING OF THE FIRST RESPONDENT'S ANSWERING AFFIDAVIT

- [4] With regard to the application for condonation, counsel for the respondents argues that the first respondent has a bona fide defence which is triable in nature and sufficient to guarantee prospects of success. It is further argued that the applicant's eviction application is in retaliation to the first respondent's demand for remuneration which is good enough to oppose the application.[1]
- [5] Counsel for the applicant did not argue against granting the condonation application for late filing of the first respondent's answering affidavit.
- [6] In weighing up the prejudice of condoning the late filing of the first respondent's answering affidavit on the applicant versus the prejudice on the first respondent, the balance tips in favour of the first respondent.
- [7] It is my considered view that condoning the late filing of the first respondent's answering affidavit does not significantly prejudice the applicant in any way and it will in fact assist the court in reaching a decision. It should thus be allowed.

BACKGROUND

FACTS

- [8] On or about December 2018, a verbal agreement was concluded between the previous owner of the property and the first respondent ("agreement"). The relevant material terms of the agreement were that the first respondent would reside at the property on a rent-free arrangement in exchange for him keeping the premises neat, clean and secure.
- [9] The first respondent failed and refused to comply with the obligations in terms of the agreement in that inter alia he has permitted persons who are not permitted to reside at the property to reside at the property and has failed to vacate them from the property. Counsel for the applicant alleges that the said people are subletting and as such, paying rent to the first respondent.
- [10] On or about 22 August 2023, a Termination and Eviction Notice was dispatched to the first respondent, in respect of which the first and second respondents were given 1 month to vacate the property before or on 22 September 2023. It is important to note that, according to the counsel for the applicant, the said Termination and Eviction Notice gave notice of termination of any and all agreements that may have given the occupiers the right to occupy the property.

[11] The first respondent, on 25 August 2023, responded as follows: “The other points we will dispute them in court, this is just a formal letter to oppose your termination and notice and to further advise that we will not evacuate the premises until Christian compensates me the Caretaker salary from September 2016 to date. The average salary of a caretaker in Pretoria is R6000, which means I need to be compensated an amount of R505 000 and this amount doesn’t include other costs such as all the expenses incurred in fixing the place and other costs. Also not including all other duties done in the house.”[2] He is claiming to be an employee since September 2016 and the question is why he did not declare a dispute against the applicant

for non-payment of his remuneration for all these years?

[12] The first and second respondents failed and refused to vacate the property. Consequently, they became unlawful occupiers, as contemplated in the PIE. In the said Termination and Eviction Notice, they were also advised to secure alternative accommodation,[3] including approaching the City of Tshwane Municipality for assistance with the provision of temporary emergency accommodation. Moreover, it is also indicated in the founding affidavit that there is an alternative accommodation within the area of the property.[4]

[13] Counsel for the applicant made reference to the report that is uploaded on Caselines,[5] dated 25 January 2024, on the provisioning of alternative accommodation by the City of Tshwane Metropolitan Municipality which reads as follows:

“The City of Tshwane officials visited the property Portion 1 of Erf 6[...] Hatfield Township situated at 2[...] H[...] Street, Hatfield

Pretoria on 17th of January 2024. The first respondent Mr Fanah Kgosana was found in the property. He indicated that he was employed by Finbond Mutual Bank as a caretaker of the said property. Mr Fanah Kgosana further stated that Finbond couldn’t pay his salary since the employment in 2016 to date.

Mr Kgosana’s family consists of his wife, and five children. There are no elderly nor disabled person in his family household. He also mentioned that he is subletting tenants in the property. The City officials conducted affordability assessments to see how they can assist Mr Kgosana and his family with temporary alternative accommodation. He managed to complete the forms. The outcome of the assessments is as follows:

1. Mr Kgosana is self-employed and his wife is employed by Standard Bank.
2. Both combined household income is R50, 000.00.

Further searches were done on Housing Subsidy Systems (HSS), Deeds Register and National Needs register and the results are as follows:

There is no record found on HSS, with the deed search done no results was found on Mr Fanah Kgosana, this shows that he is not registered on the national needs register.

Conclusion

Based on the findings, Mr Fanah Kgosana does not need temporary alternative accommodation and he also mentioned that he will vacate the premises as soon as Finbond Mutual Bank pays what is due to him. Therefore, it is recommended that Mr Kgosana to apply for private rental accommodation within the City as he qualifies according to combined household income.

I trust you find the above in order.”

[14] Counsel for the applicant submits that the applicant is losing a substantial amount of money every day as the applicant is unable to lease the property or develop it. This is thus causing a severe financial strain on the applicant.

LEGAL FRAMEWORK

[15] The application is brought in accordance with the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (“PIE”). The notice required in terms of section 4(2) of PIE was duly served. At this stage, it is opportune to restate the provisions of PIE which are relevant in this case which are as follows:

“Section 1 (ix)

Unlawful occupier means a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land, excluding a person who is an occupier in terms of Extension of Security of Tenure Act, 1997, and excluding a person whose informal right to land, but for the provisions of this Act, would be protected by the provisions of the Interim Protection of Informal Land Rights Act, 1996 (Act No.31 of 1996).

Section 4

Eviction of unlawful Occupiers

4(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 or person in charge 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 and the municipality having jurisdiction....
- (7) If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated a 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, except where the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women.”

- [16] “Owner”, insofar as is relevant, is defined in PIE as “the registered owner of land”. “Person in charge”, in turn, means “a person who has or at the relevant time had legal authority to give permission to a person to enter or reside upon the land in question”.

APPLICANT’S LOCUS STANDI

- [17] The onus to prove locus standi for the institution of these proceedings is on the applicant (see *Kommissaris van Binnelandse Inkomste v Van der Heeve*.^[6])
- [18] It is common cause between the parties that the applicant is the registered owner of the property as contemplated in section 1 (the definition’s section) of PIE. The applicant’s locus standi is therefore beyond question.

ARE THE RESPONDENTS UNLAWFUL OCCUPIERS?

- [19] The question (as is clear from section 4(1)) is whether the respondents are in fact “unlawful occupiers” in terms of PIE. In other words, persons “who occup[y] land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land, ...”
- [20] In *Davidan v Polovin N O and Others*,^[7] the Supreme Court of Appeal held: “[12] The starting point is whether the appellant is an unlawful occupier under PIE. The key question is whether the appellant enjoyed a right of occupation? PIE applies not only to occupants who occupied land without the initial consent of the owner or person in charge, it also applies to occupants who had consent to occupy but such consent was subsequently terminated. In both instances the occupants would be unlawful occupiers within the meaning of PIE. Consent in eviction applications is a valid defence.”
- [21] In *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others (SCA)*,^[8] the Supreme Court of Appeal held: “[11] In terms of s 4(7) of PIE an eviction order may only be granted if it is just and equitable to do so, after the court has had regard to all the relevant circumstances, including the availability of land for the relocation of the occupiers and the rights and needs of the elderly, children, disabled persons and households headed by women. If the requirements of s 4 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) to attach reasonable conditions to an eviction order.”
- [22] In *Ndlovu v Ngcobo, Bekker and Another v Jika*,^[9] the Appeal Court held: “[19] Another material consideration is that of the evidential onus. Provided the procedural requirements have been met, the owner is entitled to approach the court on the basis of ownership and the respondent’s unlawful occupation. 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 in issue between the parties. Whether the ultimate onus will be on the owner or the occupier we need not now decide.”

[23] In *Wormald NO and others v Kambule*, [10] the Supreme Court of Appeal held at para [11] that an “owner is in law entitled to possession of his or her property and to an ejectment order against a person who unlawfully occupies the property except if that right is limited by the Constitution, another statute, a contract or on some or other legal basis. In terms of s 26(3) of the Constitution, from which PIE partly derives (*Cape Killarney Property Investments (Pty) Ltd v Mahamba and*

Others, [11] ‘no one may be evicted from their home without an order of court made after consideration of all the relevant circumstances’. PIE therefore requires a party seeking to evict another from land to prove not only that he or she owns such land and that the other party occupies it unlawfully, but also that he or she has complied with the procedural provisions and that on a consideration of all the relevant circumstances (and, according to *Brisley v Drotsky*, [12] to qualify as relevant the circumstances must be legally relevant), an eviction order is ‘just and equitable’.”

IS IT JUST AND EQUITABLE THAT THE RESPONDENTS BE EVICTED?

[24] The pertinent question that the court must consider in the circumstances of this case is whether it is just and equitable for the respondents to be evicted from the property of the applicant. It has been decided in a number of cases that the effect of PIE is not to expropriate private landowners of their land, but that it delays or suspends the owner’s rights to exercise control over their property until a determination has been made as to whether an eviction will be just and equitable and if so under what circumstances.

[25] Arguing against eviction, counsel for the respondents referred the court to *Lauren Chelsea Van Der Valk N.O and Others v Johnson and Others* [13] where it was held: “The grant or refusal of an application for eviction in terms of PIE (once the applicant’s locus standi has been determined) is predicated on a threefold enquiry: First, it is determined whether the occupier has any extant right in law to occupy the property, that is, is the occupier an unlawful occupier or not. If he or she has such a right, then the matter is finalised and the application must be refused. Second, it is determined whether it is just and equitable that the occupier be evicted. Third, and if it is held that it is just and equitable that the occupier be evicted, the terms and conditions of such eviction fall to be determined (*Transcend Residential Property Fund Ltd v Mati and Others*.” [14]

[26] PIE enjoins the Court to order an eviction only if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances as contemplated in section 4(6) and (7), and section 6(1).

- [27] In terms of section 4(7) of PIE (which applies because the respondents have been in unlawful occupation for a long time) the Court has to have regard to a number of factors including, but not limited to, whether the occupants include vulnerable categories of persons such as the elderly, children and female-headed households, the duration of occupation; and the availability of alternative accommodation by a municipality or other organ of State instances where occupiers are able to obtain accommodation for themselves.
- [28] Section 4(8) of PIE provides further that 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)”.
- [29] Although the Courts, in determining whether to grant an eviction order, must exercise a discretion based on what is just and equitable, and although special consideration must be given to the rights and needs of vulnerable occupants, this cannot operate to deprive a private owner of its property arbitrarily or indefinitely. If it did, it would mean that occupants are recognised as having stronger title to the property, despite the unlawfulness of their conduct. An owner would in effect be deprived of his property by a disguised form of expropriation. As was highlighted in the case of *Mainik CC v Ntuli and others*:^[15] “If the rental is not being paid, such ‘expropriation’ will also be without compensation. The result would be not a balance of the rights of the respective parties, but an annihilation of the owner’s rights”.
- [30] The fact, therefore, that the occupants are vulnerable cannot prevent the eviction indefinitely. At best, it can delay or postpone it.
- [31] The respondents have placed scant information in relation to their personal circumstances before the Court to justify their ongoing unlawful occupation of the property. Counsel for the first respondent had stated in Court that the first respondent has 4 minor children and he would be rendered homeless if evicted from the property. Counsel for the applicant argued that the issue of “homelessness” is not before court as it has been raised for the first time from the bar.
- [32] It cannot be expected of private persons indefinitely to accommodate unlawful occupiers. The Supreme Court of Appeal held as follows in *Modderfontein Squatters, Greater Benoni CC v Modderklip Boerdery (Pty) Ltd (Agri SA & Legal Resources Centre, Amici Curiae); President of the RSA v Modderklip Boerdery (Pty) Ltd*:^[16] “Section 9(1) provides that everyone is equal before the law and has the right to equal protection and benefit of the law, while s 9(2) states that equality includes the full and equal enjoyment of all rights and freedoms. As appears from para 1.6.4 of the order, De Villiers J found that Modderklip was not treated equally because, as an individual, it has to bear the heavy burden, which rests on the State, to provide land to some 40 000 people. That this finding is correct cannot be

doubted. Marais J, in the eviction case, said that the 'right' of access to adequate housing is not one enforceable at common law or in terms of the Constitution against an individual land owner and in no legislation has the State transferred this obligation to such owner.”

- [33] The rule is subject to minor qualifications depending on the circumstances. In *City of Johannesburg v Changing Tides 74 (Pty) Ltd*: [17] “[18] The position is otherwise when the party seeking the eviction is a private person or entity bearing no constitutional obligation to provide housing. The Constitutional Court has said that private entities are not obliged to provide free housing for other members of the community indefinitely, but their rights of occupation may be restricted, and they can be expected to submit to some delay in exercising, or some suspension of, their right to possession of their property in order to accommodate the immediate needs of the occupiers.”
- [34] The Supreme Court of Appeal in *Changing Tides supra* specified, at paragraph [16], that only in what could be deemed exceptional circumstances would a court interfere with a party’s proprietary rights.
- [35] Counsel for the applicant argues that, as the respondents to date remain in unlawful occupation of the property as defined in PIE, and as there are no factors justifying their ongoing occupation, it is just and equitable for the Court to order the eviction from the property. No circumstances have been alleged that would render an eviction order inequitable, and none appear from the affidavits filed of record or from what was stated in the respondents’ oral submissions in Court. Having considered all the evidence before court, I am persuaded by the argument.

CONCLUSION

- [36] It has long been established that the jurisdictional requirement which trigger an eviction under PIE is that the person sought to be evicted must be in unlawful occupation of the property within the meaning of PIE at the time when the eviction proceedings are launched.
- [37] Therefore, for an applicant to be successful in evicting a person from its property it should be able to prove that it is the owner to the land or the property; that the occupier is in unlawful occupation of the property and that it is just and equitable that the occupier be evicted from the property.
- [38] In casu, the applicant has proven that it is the owner to the property; that the respondents are in unlawful occupation of the property and that it is just and equitable that the respondents be evicted from the property.
- [39] Counsel for the first respondent argues that it will not be just and equitable for first respondent’s family and their minor children to be evicted from the property.

- [40] I hold the view that the first respondent has failed to take the Court into his confidence in that he has not proffered any or sufficient facts as to why it will not be just and equitable to grant the eviction order. There is no evidentiary burden on the applicant to state the facts that are unknown to him about the respondents but it is for the respondents to show to the satisfaction of this Court that his personal circumstances and that of his household are of such a nature that warrants the eviction order not to be granted.
- [41] He has not provided any defence to the claim of the applicant. It is my respectful view therefore that the eviction proceedings are within the parameters of PIE and that it is just and equitable to grant the order evicting the first and the second respondents from the property of the applicant.
- [42] There is evidence to the effect that the first respondent and/or his household has the means to procure and secure alternative accommodation.
- [43] In all of these circumstances, the procedural and substantive provisions of section 4 of PIE have been complied with, and there is no reason why the eviction of the respondents should not be ordered.
- [44] The conclusion is therefore that the applicant has succeeded in making out a case for eviction and is therefore entitled to the order as prayed for in the notice of motion.

COSTS

- [45] It is clear from what is set out above that the respondents have not made out any case that would justify the refusal of the relief sought or that should delay the applicant's vindication of its property. In my view costs should follow the event.
- [46] The applicant and the respondents in casu have both asked for costs. One of the fundamental principles of costs is to indemnify a successful litigant for the expense put through in unjustly having to initiate or defend litigation. The successful party should be awarded costs.[18] The last thing that our already congested court rolls require is further congestion by an unwarranted proliferation of litigation.[19]
- [47] It is so that when awarding costs, a court has a discretion, which it must exercise after a due consideration of the salient facts of each case at that moment. The court is expected to take into consideration the peculiar circumstances of each case, carefully weighing the issues in each case, the conduct of the parties as well as any other circumstances which may have a bearing on the issue of costs and then make such order as to costs as would be fair in the discretion of the court.
- [48] In light of these considerations and both parties' argument relating to the costs of this application, I am accordingly inclined to grant costs in favour of the applicant. The first and second respondents shall pay the costs of the application jointly and severally, the one paying, the other to be absolved, on the scale as between party and party.

ORDER

[49] In the circumstances, I make the following order:

[49.1] The first respondent's application for condonation for the late filing of his answering affidavit is hereby granted.

[49.2] The first and second respondents and all those occupying under or through them, including their family, servants and/or employees ("the occupiers"), are evicted from the property being: Portion 1 of Erf 6[...], and the remaining Extent of Erf 6[...], H[...] Township: Registration Division JR: Gauteng Province ("the property");

[49.3] The occupiers shall vacate the property within 14 days from date of service of this order, failing which, the eviction may be carried out by the sheriff and his/her duly authorised deputy ("sheriff"), on the first day following thereafter, and in pursuance of executing this order, the sheriff is authorised to enlist the services of the South African Police Service and/or locksmith to give effect to this order, should it be necessary;

[49.4] Should the occupiers succeed or attempt to regain access or possession to/of the property after the eviction order has been

executed, the sheriff is authorised to carry same out in accordance with paragraph 1.2 above, without the applicant having to approach

the court, for further relief;

[49.5] The first and second respondents shall pay the costs of the application jointly and severally, the one paying, the other to be absolved, on the scale as between party and party.

T E JOYINI

JUDGE OF THE HIGH COURT, PRETORIA

APPEARANCES:

For the applicant: Adv Christo van der Merwe Instructed by: Bruno Simao Attorneys Email: litigation3@brunosimaolaw.co.za / bruce@brunosimaolaw.co.za / dominus.cvd@gmail.com For the respondents: Adv Matemba Mashaba Instructed by: Khoza C Attorneys Email: khozaattorneysinc@gmail.com / advmmashaba@gmail.com Date of Hearing: 21 January 2025 Date of Judgment: 30 January 2025

This Judgment has been delivered by uploading it to the Court online digital data base of the Gauteng Division, Pretoria and by e-mail to the Attorneys of record of the parties. The deemed date and time for the delivery is 30 January 2025 at 10h00.

[1] Caselines 00-50.

[2] Caselines 00-63 to 00-64.

- [3] Caselines 00-18.
- [4] Caselines 00-19.
- [5] Caselines 08-1 to 08-3.
- [6] 1999
- (3) SA 1051 (SCA) at para [10].
- [7] (167/2020) [2021] ZASCA 109 (5 August 2021).
- [8] [2012] ZASCA 116; 2012
- (6) SA 294 (SCA) (14 September 2012).
- [9] (1) (240/2001. 136/2002) [2002] ZASCA] 87; 4 All SA 384 (SCA) (30 August 2002).
- [10] 2006
- (3) SA 563 (SCA).
- [11] 2001
- (4) SA 1222 (SCA) at 1229E.
- [12] 2002
- (4) SA 1 (SCA).
- [13] (20449/2021)
- [2023] ZAWCHC 20 (30 January 2023).
- [14] 2018
- (4) SA 515 (WCC) at para [3]).
- [15] [2005] ZAKZHC 10 (25 August 2005).
- [16] 2004
- (6) SA 40(SCA) at 57C-E.
- [17] 2012
- (6) SA 294 (SCA).
- [18] Union Government v Gass 1959 4 SA 401 (A) 413.
- [19] Socratous v Grindstone Investments (149/10) [2011] ZASCA 8 (10 March 2011) at [16].

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