

SOUTH AFRICA / JUDGMENT

Iliad Trading (Pty) Ltd v Sibane and Others (36719/2017) [2019] ZAGPJHC 401 (30 September 2019)

[2019] ZAGPJHC 401

COURT

South Gauteng High Court, Johannesburg

BEFORE

Levenberg

CASE / FILE NUMBER

36719/2017

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG LOCAL DIVISION,

JOHANNESBURG

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED.

CASE NO: 36719/2017

30/9/2019

In the matter between ILIAD TRADING (PTY) LTD Applicant And MA SIBANE First Respondent
NS DAVHULA Second Respondent S DE VOS Third Respondent MS MAKOTI Fourth Respondent
SD MATHEBULA Fifth Respondent N MATSILA Sixth Respondent G MOTSHWANE Seventh
Respondent AF NDEVE Eighth Respondent N NEMAKONDE Ninth Respondent JS NYONI Tenth
Respondent A PHASWANE Eleventh Respondent NE RAMMBUDA Twelfth Respondent RS
TSHISEVHE Thirteenth Respondent FJ TSHIPHONGO Fourteenth Respondent CITY OF
JOHANNESBURG METROPOLITAN MUNICIPALITY Fifteenth Respondent

JUDGMENT

LEVENBERG AJ

[1] The Applicant seeks the ejectment of 11 Respondents and all those claiming occupation by, through or under them from the premises

situated at the corner of Beyers Naude and Juice Streets, Honeydew (“the Premises”). The Fourth, Ninth and Tenth Respondents

have, since the commencement of the Application, vacated the premises. The Applicant therefore seeks no order against the Fourth,

Ninth and Tenth Respondents at this stage.

[2] For the sake of convenience, the remaining Respondents will be referred to in this judgment collectively as “the Respondents”.

The primary issue in this application is whether the eviction of the Respondents is permissible in terms of section 4 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (“PIE”).

I. FACTUAL

BACKGROUND

[3] The Applicant leases the Premises in issue from Redefine Properties Limited (“Redefine”) in terms of a lease agreement dated 11 May 2015 (“the Lease Agreement”).

[4] The Applicant is a retailer of general building materials and supplies from the 48 stores within its general building materials division which are located across the Republic of South Africa, including a large store located at the Premises. Prior to 2012, the Applicant traded under the trade name Ferreiras, amongst others.

[5] The Applicant has occupied the premises for some time. It is not clear from the papers the basis upon which the Applicant occupied the premises prior to the conclusion of the Lease Agreement.

[6] It is a material term of the written Lease Agreement that the Applicant is precluded from using the Premises from any purpose other than manufacturing, wholesaling and retailing of building supplies and hardware, in the absence of the landlord’s prior written consent.

[7] The written Lease Agreement further prohibits the Applicant from subletting the premises or any part thereof without the prior written consent of the landlord.

[8] The Applicant is also prohibited from contravening or permitting the contravention of any law, bylaw, ordinance, proclamation or statutory regulation or the conditions of any license relating to or affecting the occupation of the premises or the carrying on of the Applicant’s business on the premises.

- [9] Breach of any of the above terms entitles Redefine to cancel.
- [10] An area of the premises consists of rudimentary one bedroom rooms, constructed with bricks and plaster, cement floors and corrugated iron roofing. There are shared ablution facilities in the form of outbuildings.
- [11] The Respondents are all employed by the Applicant at the premises and occupy some of the one bedroomed units. They took occupation pursuant to oral lease agreements ("the Oral Leases") concluded between the Applicant and each of the Respondents. Some of those Oral Leases were concluded prior to the conclusion of the Lease Agreement. In terms of the Oral Leases, the Respondents were permitted to occupy rooms on the Premises. They paid an agreed monthly rental amount. The Applicant would deduct the monthly rental from the monthly remuneration payable by the Applicant to each Respondent. The Oral Leases were not for a definite period. They were month to month tenancies that could be terminated by either party on one month's notice.
- [12] The occupation of some of the Respondents goes as far back as May 2006. However, the Applicant now finds itself in a position where the Oral Lease Agreements are in breach of the written Lease Agreement with Redefine. In addition, the occupation of the premises by the Respondents contravenes the applicable bylaws and regulations of the Johannesburg Municipality because the premises are zoned for commercial use rather than for residential purposes.
- [13] In an attempt to remedy the breach of the terms of the written Lease Agreement (and also to comply with the applicable bylaws and regulations) the Applicant invited the Respondents to attend a meeting during October 2015. At that meeting, the Applicant indicated that the Respondents ongoing occupation was in contravention of the terms of the written Lease Agreement. The Respondents were advised that the Oral Leases would have to come to an end and that the Respondents would be advised of the Applicant's next steps in due course.
- [14] On 1 December 2015 the Applicant delivered notice to all tenants (including the Respondents) inviting them to attend a meeting on 7 December 2015 for further talks. At that meeting, the Applicant informed the Respondents that it intended terminating the oral lease agreements in due course.
- [15] On 15 December 2015, the Applicant issued notices to the Respondents informing them that the oral lease agreements would terminate on Thursday, 31 March 2016, a period in excess of three months from the date of the notice.
- [16] Notwithstanding the termination of the Oral Lease agreements till the end of March 2016, the Respondents remained in occupation.

- [17] The Applicant did not immediately launch an eviction application. Instead it delivered further notices to terminate the Oral Lease Agreements more than a year later. The Applicant maintains that these further notices were a form of indulgence as the Oral Lease Agreements had already come to an end. The practical reality was that the date for the Respondents to vacate the premises was extended to 31 August 2017 (i.e. more than two years before this hearing). Further notices were delivered by hand to each of the Respondents.
- [18] In summary, the Respondents first received notice that the Applicants required them to vacate the premises on 7 December 2015, nearly four years ago. Nearly 3 ½ years have expired since the original termination date of 31 March 2016. The Respondents have accordingly been afforded a significant period of time to vacate the premises and find alternative accommodation.
- [19] All of the above facts are largely common cause. There is no dispute between the parties that the Oral Lease Agreements between them are at an end and that, but for the provisions of PIE, the Applicant would be entitled to evict them under common law.[1]
- [20] It therefore remains to be seen whether the provisions of PIE permit the court to grant an order evicting the Respondents.

II. THE PIE ANALYSIS

A. Notice of the proceedings

- [21] In terms of section 4(2) read with section 4(5) of PIE, at least 14 calendar days before the hearing of the proceedings, the Court must serve written and effective notice of the proceedings on the unlawful occupiers and the municipality having jurisdiction containing the information specified in section 4(5). It is common cause that proper notice was given under these sections.

B. Legal requirements of Pie

- [22] In terms of section 1 of PIE, an unlawful occupier is defined as “a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right to in law to occupy such land ...”
- [23] Section 4 of Pie provides, inter alia, as follows:

“(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 land is sold in a sale of execution pursuant to a mortgage, where the land has been made available or can reasonably be made available by the municipality or other organ of state 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.

- (8) 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).
- (9) In determining a just and equitable date contemplated in subsection (8), the court must have regard to all the relevant factors, including the period the unlawful occupier and his or her family have resided on the land in question.”

[24] It is common cause that the Respondents are all “unlawful occupiers” who have occupied the land in question for more than six months. The statute therefore mandates a three stage enquiry:

- (a) whether it is just and equitable to grant an eviction order;
- (b) if so, what would be a just and equitable date for the unlawful occupier to vacate the premises; and
- (c) what would be the appropriate date for the eviction order to be carried out if the unlawful occupier has not vacated the land on the date contemplated in the previous subparagraph.

[25] The Applicant’s heads of argument were prepared by Advocate J Lourens and the Applicant was represented at the hearing by Advocate B Manning. The Respondents were also represented by their attorney, HR Munyai. I am indebted to the parties’ legal representatives for their able and comprehensive arguments and for the helpful way in which they addressed the issues at the hearing. All of their clients will benefit from their professionalism.

[26] In *City of Johannesburg v Changing Tides* 74 2012 (6) SA 294 (SCA), Wallis JA held:

*“[16] The issue of the availability of alternative accommodation is more difficult in the context of an eviction at the instance of an owner of property that is not an organ of state. There another constitutionally protected right, the right to property, comes into play. As pointed out in this court in *Ndlovu v Ngcobo*; *Bekker & Another v Jika*;^[2] the effect of PIE is not to expropriate private property. What it does is delay or suspend the exercise of the owner’s right*

until a determination has been made whether an eviction will be just and equitable and under what conditions. The Constitutional Court endorsed that approach in *Blue Moonlight*^[3]...

[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. That approach makes it difficult to see on what basis the availability of alternative land or accommodation bears on the question whether an eviction order should be granted, as opposed to the date of eviction and the conditions attaching to such an order. One can readily appreciate that the date of eviction may be more immediate if alternative accommodation is available, either because the circumstances of the occupiers are such that they can arrange such accommodation themselves, or because the local authority has in place appropriate emergency or alternative accommodation. Conversely, justice and equity may require the date of implementation of an eviction order to be delayed if alternative accommodation is not immediately available. It is, however, difficult to see on what basis it affects the question of whether it is just and equitable to make such an order. Perhaps, in the case where the occupiers will be entitled to a lengthy period of notice before being required to vacate, the unavailability of alternative land or accommodation might operate as a factor to persuade the court that the issue of eviction order, at the stage that the application came before it, would not be just and equitable, but such cases are likely to be rare. This does not mean that courts may disregard the question of the availability

of alternative land or accommodation – that would ignore the express requirements of s4(7) – but the weight this factor will carry in making the initial decision whether an eviction is just and equitable may not be great.

[19] In most instances where the owner of property seeks the eviction of unlawful occupiers, whether from land or the building situated on the land, and demonstrates a need for possession and that there is no valid defence to that claim, it will be just and equitable to grant an eviction order. This is consistent with the jurisprudence that is developed around this topic. In *Ndlovu v Ngcobo*, Harms JA made the point that ownership and lack of any lawful reason to be in occupation are important factors in the exercise of the court's discretion ..."

[27] Accordingly, there is an overlap between the enquiries contemplated by sections 4(7) and 4(8) of PIE. In the case of private ownership, the question is more one of what would constitute a just and equitable date for eviction rather than whether it is just and equitable to evict at all. However, there are cases where the Court might be justified in refusing an eviction order to a private landowner.

III. APPLICATION OF THE FACTS TO THE PRESENT CASE

[28] I must take into account that some of the Respondents have occupied the premises for significant periods of time, going back as far as 2006 (i.e. 13 years). This lengthy occupation must be weighed against the other factors.

[29] As against this, I must take into account the fact that the Applicant is a private commercial enterprise with no obligation to provide

alternative housing for the Respondents. In this context, the Respondents received notice that the occupation was to come to an end nearly four years ago. They have accordingly had four years to find alternative accommodation. While I sympathise with the Respondents this is, in my opinion, ample time.

[30] There are additional factors that would assist the Respondents in finding accommodation. First, they are all employed, earning sufficient

salaries to afford the type of accommodation that they are currently occupying.

[31] Second, all of the Respondents have pension funds against which they can borrow if necessary in order to provide accommodation.[4] With the exception of the Eighth Respondent (who has only R938.27 in his pension fund) all of the other Respondents have pension funds in excess of approximately R50,000. The Third Respondent has a pension fund of R131,109.80.

[32] Third, the Applicant indicated in its affidavit that it would be willing to provide financial assistance in the form of interest free loans to the Respondents (who are after all the Applicant's employees) to enable them to vacate the premises. I sought specificity from the Applicant's counsel on the type of loan that the Applicant was willing to make. There was discussion with the Applicant's counsel about an interest free loan of R2,000 which would be repayable over a period of 14 months from the various Respondents' salaries.

[33] In his answering argument, the Respondents' counsel indicated that he felt an amount of R3,000 would be more appropriate. The Applicant has agreed to this.

[34] At the Court's suggestion, the Applicant's attorneys voluntarily provided a letter dated 9 September 2019 which contains

an unequivocal undertaking to the Respondents as follows:

"1. This serves to confirm that our client, Iliad Africa Trading (Pty) Ltd, the Applicant in this matter – as foreshadowed by paragraph 8.12 of the replying affidavit – to grant each of the respondents as are employed by it, a loan in an amount not exceeding R3 000.00, for the purposes of assisting such respondents to vacate the premises, upon the following terms and conditions:

1.1 the loan will be interest free (sic);

1.2 the loan will be repayable in a maximum of 14 monthly instalments or upon the employee leaving the employ of Iliad Africa Trading (Pty) Ltd, whichever occurs first;

1.3 the loan will be paid to the employee a week prior to the employee vacating the premises;

1.4 the loan is subject to the signature of a loan agreement by the employee in terms of which he or she authorises Iliad Trading (Pty) Ltd to deduct the repayments from his or her monthly remuneration."

[35] The Respondents cite to the difficulties in obtaining alternative accommodation as their principal ground for their refusal to vacate.

This generalised statement is not supported by any facts demonstrating efforts that the Respondents have made to find alternative accommodation.

[36] According to the Applicant, there is an informal settlement very close to the Applicant's premises which offers accommodation of a similar quality to what it is currently offering the Respondents. Relocation to the informal settlement would enable the Respondents to keep their children in the same school and cause minimum disruption in their lives.

[37] I am sensitive to the difficulties in obtaining suitable accommodation for the Respondents. However, they are all employed. They have all held their positions for some time. They have accumulated pension funds in the employment of the Applicant on which they can borrow if necessary in order to provide themselves with accommodation. To add to this, the Applicant has offered them a very generous interest free loan of R3,000 each to facilitate their relocation. They are therefore in a better position than many other unlawful occupiers who are evicted under PIE.

[38] I also take into account the fact that occupation by the Respondents constitute a violation of the Applicant's lease with Redefine. It seems unlikely that Redefine would actually terminate the lease over this issue. However, it is not impossible and it is an undesirable situation for the Applicant to be in. One can understand how a tenant operating a large business on the premises would be uncomfortable with the risk of eviction arising out of the Respondents' occupation.

[39] A further factor is that the Respondents' occupation is not in accordance with the City of Johannesburg's bylaws. The Premises are commercial premises. It is both unlawful and undesirable for the premises to be used for residential purposes.

[40] In the present context, it is particularly undesirable that children should be living on the Premises. This is a large property in which the Applicant is engaged in the business of selling building materials. There are delivery vehicles driving on and off the property and heavy machinery is also present and in use. It is not an environment for children or families.

[41] In all the circumstances, I conclude that it is just and equitable to grant an order of eviction. It remains to enquire what the just and equitable date of vacation and/or eviction should be.

C. Date of eviction

[42] I suggested to the parties that 1 January 2020 (in excess of 3.5 months after the date of hearing) would be a suitable date for the Respondents to vacate the premises. The Respondents' counsel agreed with me that that would be a reasonable date. On the basis of that concession, I order that the Respondents should vacate the premises by 1 January 2020. I believe that this concession is the end of the matter.

- [43] In any event, I note that an eviction date of 1 January 2020 will mean that the Respondents will have had a full four years in order to vacate the property. Throughout most of that time, they have stayed on the property rent free. The Applicant is affording them an interest free credit facility to facilitate the move. The Respondents are in fact being afforded more time to vacate the property than many lessees who are on month to month tenancies receive from their landlords.
- [44] If the Respondents fail to vacate the premises by 1 January 2020, I believe it would be just and equitable to allow the Applicant to engage the sheriff in order to effect an eviction on and after 6 January 2020.

IV. COSTS

- [45] In accordance with the agreement of the parties, I make no order as to costs.

V.

CONCLUSION

- [46] Accordingly, I make the following order:

IT IS ORDERED THAT:

1. The First Respondent, and all others claiming by, through or under him, be evicted from the premises described as Erven Ptn 359, 360, 363 (all of Ptn 105 of the Farm Welges in the Township of Honeydew) situated at the corner of Beyers Naude and Juice Streets, Honeydew, Gauteng, 2000;
2. The Second Respondent, and all others claiming by, through or under her, be evicted from the premises described as Erven Ptn 359, 360, 363 (all of Ptn 105 of the Farm Welges in the Township of Honeydew) situated at the corner of Beyers Naude and Juice Streets, Honeydew, Gauteng, 2000;
3. The Third Respondent, and all others claiming by, through or under her, be evicted from the premises described as Erven Ptn 359, 360, 363 (all of Ptn 105 of the Farm Welges in the Township of Honeydew) situated at the corner of Beyers Naude and Juice Streets, Honeydew, Gauteng, 2000;
4. The Fifth Respondent, and all others claiming by, through or under her, be evicted from the premises described as Erven Ptn 359, 360, 363 (all of Ptn 105 of the Farm Welges in the Township of Honeydew) situated at the corner of Beyers Naude and Juice Streets, Honeydew, Gauteng, 2000;
5. The Sixth Respondent, and all others claiming by, through or under her, be evicted from the premises described as Erven Ptn 359, 360, 363 (all of Ptn 105 of the Farm Welges in the Township of Honeydew) situated at the corner of Beyers Naude and Juice Streets, Honeydew, Gauteng, 2000;

6. The Seventh Respondent, and all others claiming by, through or under her, be evicted from the premises described as Erven Ptn 359, 360, 363 (all of Ptn 105 of the Farm Welges in the Township of Honeydew) situated at the corner of Beyers Naude and Juice Streets, Honeydew, Gauteng, 2000;
7. The Eighth Respondent, and all others claiming by, through or under her, be evicted from the premises described as Erven Ptn 359, 360, 363 (all of Ptn 105 of the Farm Welges in the Township of Honeydew) situated at the corner of Beyers Naude and Juice Streets, Honeydew, Gauteng, 2000;
8. The Eleventh Respondent, and all others claiming by, through or under her, be evicted from the premises described as Erven Ptn 359, 360, 363 (all of Ptn 105 of the Farm Welges in the Township of Honeydew) situated at the corner of Beyers Naude and Juice Streets, Honeydew, Gauteng, 2000;
9. The Twelfth Respondent, and all others claiming by, through or under her, be evicted from the premises described as Erven Ptn 359, 360, 363 (all of Ptn 105 of the Farm Welges in the Township of Honeydew) situated at the corner of Beyers Naude and Juice Streets, Honeydew, Gauteng, 2000;
10. The Thirteenth Respondent, and all others claiming by, through or under her, be evicted from the premises described as Erven Ptn 359, 360, 363 (all of Ptn 105 of the Farm Welges in the Township of Honeydew) situated at the corner of Beyers Naude and Juice Streets, Honeydew, Gauteng, 2000;
11. The Fourteenth Respondent, and all others claiming by, through or under her, be evicted from the premises described as Erven Ptn 359, 360, 363 (all of Ptn 105 of the Farm Welges in the Township of Honeydew) situated at the corner of Beyers Naude and Juice Streets, Honeydew, Gauteng, 2000;
12. The First, Second, Third, Fifth, Sixth, Seventh, Eighth, Eleventh, Twelfth, Thirteenth and Fourteenth Respondents, and all others

claiming by, through or under them are ordered to vacate the Premises on or before 1 January 2020.

13. Should the First, Second, Third, Fifth, Sixth, Seventh, Eighth, Eleventh, Twelfth, Thirteenth and Fourteenth Respondents fail to vacate the premises by 1 January 2020, the eviction order may be carried out on 6 January 2020, in which event the Sheriff of the Court is hereby authorised and directed to forthwith evict the First, Second, Third, Fifth, Sixth, Seventh, Eighth, Eleventh, Twelfth, Thirteenth and Fourteenth Respondents, and all others claiming by, through or under them, from the premises.
14. There will be no order as to costs.

P.N. LEVENBERG, AJ

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA,

Appearances:

Date of hearing

: 10 September 2019

Date of Judgment : 30 September 2019

For the Applicant : Advocate B Manning

Heads of argument prepared by Advocate J Lourens

Instructed by

: Fullard Mayer Morrison Inc.

For the Respondents : HR Munyai from HR Munyai Attorneys

- [1] See *Mighty Solutions t/a Orlando Service Station v Engen Petroleum Ltd* 2016 (1) SA 621 para 28-33 and para 51-56. (The sublessor has the right to evict the sublessee, regardless of whether the sublessor has title to the premises); *Boomporet Investments (Pty) Ltd & Another v Paardekraal Concession Store (Pty) Ltd* 1990 (1) SA 347 (A).
- [2] 2003 (1) SA 113 (SCA) para 17.
- [3] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC) para 40.
- [4] RA: p158 para 8.14.

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