

SOUTH AFRICA / JUDGMENT

Saloojee and Another v The Unlawful Occupiers of Erf 10742 (10410/2019) [2021] ZAGPJHC 730 (8 June 2021)

[2021] ZAGPJHC 730

COURT

South Gauteng High Court, Johannesburg

BEFORE

Kuny

CASE / FILE NUMBER

10410/2019

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, JOHANNESBURG

CASE

NO: 10410/2019

REPORTABLE:

NO

OF

INTEREST TO OTHER JUDGES: NO

REVISED.

08

JUNE 2021

FAROUK

SALOOJEE

First Applicant

FATIMA

RASHID SALOOJEE

Second Applicant

And

THE

UNLAWFUL OCCUPIERS OF

ERF

10742 LENASIA EXTENSION 13 TOWNSHIP

SITUATED

AT 5 TOPAZ ROAD

EXTENSION

13
LENASIA
First Respondent
CITY
OF JOHANNESBURG
METROPOLITAN
MUNICIPALITY
Second Respondent

JUDGMENT

KUNY AJ

Introduction

- 1) The applicants seek an eviction order against the occupiers of Erf 10742, Lenasia, Extension 13, Township (“the property”). The property is situated at 5 Topaz Road Extension 13, Lenasia. They also seek an order for the demolition of the structures on the property erected by the alleged unlawful occupiers.
- 2) The second respondent has been cited in the application in accordance with the statutory requirements of the Prevention of Illegal Eviction Act, No 19 of 1998 (“PIE Act”). It conducted an investigation pursuant to an order of this court and has filed an affidavit that will be dealt with below.
- 3) Mr Victor Maluleke, one of the occupiers, appeared on his own behalf at the hearing on 26 April 2021. Another occupier, Ms Phumzile Elizabeth Twala, filed an affidavit. However, she did not appear when the matter was argued. The applicants were represented by

Adv C Malan. Mr SG Lusenga appeared for the second respondent.

- 4) Mr Maluleke applied for a postponement at the hearing on the grounds that he wanted to obtain legal assistance. He stated that he had tried to obtain the assistance of an attorney. However, they complained about a lack of communication and rejected his plea for assistance. As will appear below all the facts and issues relevant to the order sought by the applicant were placed before the court. Heads of argument were filed on behalf of Mr Maluleke and he was able to state his case in argument. I did not consider it in the interests of justice that the hearing of the matter be delayed any further and I refused the postponement.

- 5) The first and second applicant allege that the property was registered in their names jointly on 20 December 2018. In support of this averment, they annex to their founding affidavit a copy of their title deed. They purchased the property from the Department of Housing in 2001 as appears from a copy of an offer to purchase also annexed to their founding papers. For reasons not explained, it took some 17 years for the property to be registered in their names. According to the applicants the property has been zoned

for institutional purposes and they intend to establish a school on the site.

- 6) The applicants allege that after they had acquired registration of the property, they became aware that a group of individuals had unlawfully occupied the site and erected dwellings thereon. This was in or about December 2018. They gave the occupiers a reasonable period to vacate. Their demand was to no avail and they sought the intervention of the South African Police Services. In addition, they sought the assistance from a senior administrator from the Department of Human Settlements. This also did not help and at the end of January 2019 they engaged the services of a lawyer. The application was issued on 19 March 2019.

- 7) On 14 April 2019, after service of the application, Mr Maluleke, designating himself as the first respondent, personally filed a notice of intention to oppose. He thereafter filed an answering affidavit. In summary he states as follows:

7.1. He is an unemployed 41-year-old married male. He and his wife have a natural child and an adopted child. Both children are minors.

7.2. On 7 June 2017, community leaders at Lenasia held a meeting with community members to address concerns regarding a shortage of land and a perceived unwillingness on the part of the Government to identify residential land for community members.

7.3. Suggestions were made that a list of names of persons requiring land be drawn up and submitted to the MEC for Housing. It was proposed that land be purchased by the Government for occupation by such persons. The community identified empty land. There appears to have been a proposal that people build on such land while waiting “for approval” (Caselines 009-3, para 4 and 5).

7.4. It is clear that at some point, probably after the meeting in June 2017, Mr Maluleke and his family took up occupation on the property.

7.5. Mr Maluleke’s wife approached Nedbank and obtained a loan of R37 000. A credit card with a limit of R7 000 was also approved. The money obtained from the bank was used to build a five roomed house on the property. Mr Maluleke states that there was no attempt by the applicants or anyone else to prevent him and his wife from doing so.

7.6. Mr Maluleke complains that he and his family have nowhere else to go. He states that the applicants approached him and his wife and offered to buy the property from him and the other occupiers at the property. They rejected this offer.

- 8) An unsigned answering affidavit was filed by Ms Phumzile Elizabeth Twala. She identifies herself as a single mother who is taking care of minor children on the property in question. She occupies a second dwelling on the property. She says that if she is evicted, she will be without alternative accommodation and will be rendered completely homeless.
- 9) It appears that in August 2018 Ms Twala was assisted by an organisation calling itself “Lawyers for Black People (NPC)”. They helped her to file the unsigned affidavit referred to above. A signed version of the above document was later filed.
- 10) In her affidavit Ms Twala disputes that applicants are the owners. Reference is made to a document headed City of Johannesburg “Corporate Geo-Informatics Parcel information”. However, this document indicates that the applicants are the owners of Erf 10742, Lenasia Ext 13. It further indicates that the property is some 3696 square meters in extent and is valued at R1 772 000 (Caselines 010-33).
- 11) Ms Twala states that she applied for a housing subsidy with the Department of Human Settlements in 2008. She identifies herself as a homeless indigent member of society, in desperate need of housing. She complains that she had not been given an opportunity to purchase land. In paragraph 1.11 of her affidavit she further states:

“The issue here for the Honourable Court to decided is landlessness of the people of Lenasia and the country at large. This is of course not a suggestion for the Honourable Court to condone unlawfulness but rather interrogate and negate the true reasons as to why many of South Africans are in desperate need to land and housing. Housing is a form of installing dignity to many of us and since the Department of Human Settlements has failed on its mandate to provide adequate housing as envisaged in Section 26 of the Constitution, it should therefore not be an unreasonable act for many indigent people such as myself to resort to selfhelp in an attempt to provide accommodating for their families. To further put emphasis on this matter the Honourable Court is drawn to the Rapid Land Release Program which was adopted by the Provincial Government last year which has not been implemented to this time, such is indicative of the lack and will for those in charge to assist the poor.”
- 12) Ms Twala asks in her affidavit that if the court is inclined to grant an eviction order, it consider the provisions of section 4(7) and 7(1) of the PIE Act as well as section 26(3) of the Constitution.
- 13) The applicants raised technical objections to the affidavit filed by Mr Maluleke and the unsigned affidavit of Ms Twala. The oath clause in Mr Maluleke’s affidavit clearly does not comply with the regulations relating to the deposition of affidavits. The alleged defect in Ms Twala’s affidavit was cured as it was subsequently signed. In the interests of justice, I am prepared to permit their affidavits to stand and to take cognisance of their contents.
- 14) On 11 August 2020, Maier-Crawley J granted an order directing the second respondent to conduct an inspection of the property and to deliver a report setting out:

2.1 Which, if any of the First Respondents qualify for the provision of temporary emergency accommodation ('TEA') and the reasons therefore, having regard particularly, but not limited to, their personal, familial, occupational and socio economic

circumstances, including the living conditions under which they subsist at Erf 10742 Extension 13 Lenasia, situated at 5 Topaz Road. Extension 13, Lenasia and the period of their habitation thereat;

2.2 The TEA that will be made available to the First Respondents, its location, and when such TEA will be made available, and including a positive undertaking that this TEA will be made available;

2.3 Why the particular location and form of accommodation has been identified;

2.4 The steps taken by the 2nd Respondent to engage with the First Respondents in relation to the facts specific to this case, as set out in the affidavit and/or documents filed of record, including the facts in relation to and outcome of any prior engagement between the Department of Human Settlements, represented by its senior administration officer, Inspector Mukhesi Moss Maponya and the First Respondents;

2.5 The steps that have been, and will be taken by the Second Respondent to secure the TEA referred to in 2.1 above, and to relocate First Respondent to such TEA.

- 15) On 12 November 2020 the second respondent filed a report in the form of an affidavit deposed to by Mr P Phophi. He identifies himself as the Acting Executive Director: Housing, in the employ of the City of Johannesburg.
- 16) Mr Phophi outlines the second respondent's obligations in relation to the investigation and provision of Temporary Emergency Accommodation ("TEA"). He states that the Municipality's legitimate interest in eviction cases is mostly triggered where there is a risk of homelessness. He further points out in this regard that the second respondent depends heavily on information made available to it by the persons facing a threat of eviction in order to assess this risk and such persons' eligibility for the allocation of TEA.
- 17) Mr Phophi states that where appropriate and justified, TEA will be provided to affected persons inter alia in the following categories:
 - 17.1. Households whose monthly income is below R 3 500,00;
 - 17.2. Minor-headed households;
 - 17.3. Elderly persons;
 - 17.4. Persons without dependants;
 - 17.5. Persons who do not own any immovable property in the Republic;
 - 17.6. Persons who have not previously received assistance;

18) On 13 October 2020 the second respondent conducted an assessment of the properties and investigated the occupiers' personal circumstances. The following emerged from this assessment:

18.1. The property is a large open space with two houses erected thereon. One of the houses was built by Ms Twala in 2018. Ms Twala is a 33-year-old South African national. She built the house as she wanted to have a private place away from her family home. The house is not occupied on a permanent basis. She has no disability and resides with her parents in a family house nearby. Her brother temporarily visits or sleeps in the house.

18.2. The second house on the property is occupied by Mr Maluleke and his family. It is a two-bedroom house with a kitchen and living room.

18.3. Mr Maluleke is originally from Chawelo in Soweto where his family has a home. He has a good relationship with his siblings who reside in the family house.

18.4. The family of Mr Maluleke's wife has a house in Protea Glen, Soweto. She has a strong relationship with her family, visits often and on occasion when she goes to work, leaves one of her children with her mother.

18.5. The couple originally resided with Mr Maluleke's family in Chawelo. They moved from the family home into rented accommodation. In 2018 they moved onto the property in issue and built the house where they currently live because they wanted a private space to live in as a family.

18.6. During the assessment, Mr Maluleke indicated that he is employed at Nielsen Omonde, a company based in Johannesburg, as an interviewer. He reported that he earns a salary of R1 500 per month. His wife indicated that she was working as a nail technician at Sorbet, a salon company in Protea Glen, Soweto. She earned a salary of R5 000 per month. The couple obtain a child support grant of R440 per month.

19) In the second respondent's assessment there is no likelihood that homelessness will arise in the case of either Mr Maluleke and his family or Ms Twala. It is reasoned that the parents of the occupiers will be in a position to assist with alternative accommodation. The second respondent also points out that Mr Maluleke and his partner were previously renting accommodation before they occupied the property. Their combined household income is assessed at R6 500 per month. They ought therefore, if their respective families cannot assist them, to be in a position to obtain alternative rental accommodation.

20) The second respondent describes in its report its constitutional obligation to provide housing. It states that Johannesburg is a "migrant city" due to the high rate of urbanization. Migrants are generally unable to afford accommodation in the formal housing sector. Their housing needs are catered for in the "informal market" such as informal settlements and overcrowded rental accommodation. The second respondent notes that there is a desperate shortage of housing in the inner city. As a result, unlawful occupation and the need for TEA has increased tremendously. There is a backlog of at least four years in the provision of accommodation to those in need. There are no TEA facilities currently available in Region

D, being the region under which the occupiers fall.

- 21) The second respondent concludes that given the circumstances established during its assessment, it does not have a constitutional obligation to provide TEA to the occupiers of the property. In any event, says the second respondent, it currently does not have any TEA available in the event that the court grants an eviction order. It blames this state of affairs on the Covid-19 pandemic.
- 22) In a somewhat ambiguous statement, the second respondent requests that if the court were to grant an eviction order, such order be suspended for a period of three years (beginning from the last day of the National Lockdown) to enable it to comply with its constitutional duty to provide TEA to the occupiers.
- 23) In my view, there is no merit to the defence raised by the occupiers that the applicants have not established that they are owners of the property and therefore do not have a right to an eviction order. The so-called Corporate Geo-Informatics Parcel information that Ms Twala relies upon actually substantiates the allegation that the applicants are the owners of the property.
- 24) A telling aspect is that the occupiers reveal in their affidavits that they decided to occupy land, regardless of who the owners of such land were. Their rationale for doing so was that the Government had failed to fulfill its constitutional duty to provide land and this justified self-help measures. I accept the applicants' contention that Mr Maluleke and his family and Ms Twala are unlawful occupiers. The dire shortage of land and the second respondent's constitutional obligation to provide land so as to ensure that people are not homeless did not render their occupation of the property lawful. They also did not have permission

and were not entitled to erect dwellings on the property. These structures were built illegally.

- 25) Section 4(7) of the PIE Act is applicable. This section provides as follows:

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 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.

[underlining added]

- 26) The applicant bears the onus of proving that it would be just and equitable to grant an eviction order.[1] The Constitutional Court has ruled that in considering evictions under the PIE Act a court must endeavour to balance and reconcile

opposing claims taking into account all the interests involved. Consideration must be given to the particular circumstances of each case.[2] An order that gives rise to homelessness cannot be just and equitable unless provision is made for alternative or temporary accommodation.[3]

27) The factors that I find to be relevant in considering whether it would be just and equitable to grant an eviction order are as follows:

27.1. The information obtained by second respondent concerning the personal circumstances of Mr Maluleke and Ms Twala was obtained from personal interviews. This evidence has not been rebutted and there is no reason to believe that it is untruthful or inaccurate.

27.2. Both Mr Maluleke and his wife are employed. They were able to demonstrate sufficient earning capacity to persuade the bank to grant them a loan and credit card facilities. Whilst I accept that the COVID-19 pandemic may have affected their income earning potential, I cannot find on these facts that they do not have the financial means to obtain other accommodation.

27.3. The dwelling occupied by Ms Twala on the information obtained by the second respondent is not a primary residence. She has alternative accommodation and it does not seem that order evicting her will result in her being homeless. The second respondent states that Ms Twala works as a vendor and earns R800 per month.

27.4. Neither Mr Maluleke nor Ms Twala sought permission to occupy the property and erect dwellings thereon. Evidently, their rational for occupying the property was that they were entitled to help themselves because the Government had not provided land on which they could establish their homes.

27.5. Mr Maluleke has an extended family and a family home in Chawelo, Soweto. His wife's family also has a home in Soweto. Their families could potentially be prevailed upon to provide temporary accommodation should the urgent need arise. According to the second respondent Ms Twala has alternative accommodation, in the form of a family house in the vicinity of the property.

27.6. The second respondent is unable within any short period of time to provide TEA to Mr Maluleke and his family. They would have to wait their turn in a long queue.

28) The question as to when and in what circumstances a court can compel the State to provide housing is a difficult issue. I am not unsympathetic to the plight of Mr Maluleke and Ms Twala and their strong desire to have their own homes. I agree with the statement in Ms Twala's affidavit that providing housing to poor people is essential in enabling them to live with dignity. There are clearly enormous societal problems relating to lack of access to land and housing that the Government must urgently address.

29) However, on these facts, balancing the respective interests of the applicant and the occupiers, I am of the view that it would be just and equitable to grant an order for the eviction of Mr Maluleke and Ms Twala and all other persons who live on and occupy the property.

30) The question arises as to when the eviction order should take effect. More than two years have elapsed since the applicants instituted their application. Some of these delays were caused by the inertia of the unlawful occupiers. They have had the benefit and use of the property for a period of almost three years. Conversely the applicants, having taken transfer of the property in the latter part of 2018, have been deprived of the use and enjoyment of the property for at least this period of time. Given all the circumstances I believe that it would be just and equitable to afford the unlawful occupiers a period of six weeks within which to vacate. I do not consider this to be a matter where the court should suspend its order as requested by the second respondent.

31) In the circumstances I make the following order:

1 Victor Maluleke and Phumzile Elizabeth Twala and all other persons who occupy Erf 10742 Extension 13, Lenasia, situated at 5 Topaz Road, Extension 13, Lenasia (“the property”) in their own capacity or by virtue of and through Mr Maluleke and Ms Twala (“the unlawful occupiers”) are ordered to vacate the property on or before 16 July 2021.

2 In the event that the unlawful occupiers do not vacate the property by the aforesaid date, the Sheriff of the Court or his lawfully appointed Deputy is authorised and directed to evict the unlawful occupiers from the property.

3 The unlawful occupiers are ordered to pay the costs of this application, including the costs of the application for approval of and leave to serve a Notice in terms of Section 4(2) of the Prevention of illegal Eviction and Unlawful Occupation of Land Act, 1998 and the application to compel the filing of heads of argument.

ACTING JUDGE OF THE

HIGH COURT OF SOUTH

AFRICA GAUTENG LOCAL

DIVISION, JOHANNESBURG

Appearances

Counsel for Applicants: Adv C Malan

Attorneys for Applicants: NM Aboo Attorneys

Respondents:

Mr Victor Maluleke appeared in person

Date heard:

26 April 2021

Date of Judgement: 08 June 2021

- [1] City of Johannesburg v Changing Tides 74 (Pty) Ltd_2012 (6) SA 294 (SCA) at [28] - [34]
- [2] Port Elizabeth Municipality v Various Occupiers [2004] ZACC 7; 2005 (1) SA 217 (CC) at para [23]
- [3] Occupiers of erven 87 & 88 Berea v Christiaan Frederick De Wet N.O. [2017] ZACC 18, para [57]
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