

SOUTH AFRICA / JUDGMENT

Telkom SA (Soc) Ltd v Moeletsi and Others (40530/2023) [2023] ZAGPJHC 590 (30 May 2023)

[2023] ZAGPJHC 590

COURT

South Gauteng High Court, Johannesburg

BEFORE

S D J Wilson

CASE / FILE NUMBER

40530/2023

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FLYNOTES:

EVICTION – Imminent danger – Dolomitic ground instability – Entire property not requiring immediate evacuation – No imminent risk – Balance of hardship and alternative remedy – Whether eviction would cause substantial injury to those to be evicted – In this case eviction of residents would do nothing to enhance their safety and may even make them less safe – Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, s 5.

IN
THE HIGH COURT OF SOUTH AFRICA
(GAUTENG
LOCAL DIVISION, JOHANNESBURG)
Case No. 40530/2023
REPORTABLE
OF INTEREST TO OTHER
JUDGES
REVISED
30.05.23

In the matter between:

TELKOM
SA (SOC)
LTD
Applicant
and
MATADINGWANA ELIAS
MOELETSI AND SIX
OTHERS LISTED IN
ANNEXURE “B” TO THE
NOTICE
OF
MOTION
First Respondent
FURTHER
OCCUPIERS
Eighth Respondents
EKURHULENI
METROPOLITAN MUNICIPALITY
Ninth Respondent
Neutral citation: Telkom
SA (Soc) Ltd v Moeletsi (40530/2023) [2023] ZAGPJHC 590 (30 May
2023).
Summary
Eviction under section 5
of the Prevention of Illegal Eviction from, and Unlawful Occupation
of, Land Act 19 of 1998 (“PIE”)
– although the
court in such a case is not concerned with the justice and equity of
an eviction order, the question of whether
the occupiers would be
left homeless on eviction remains relevant to whether the
jurisdictional requirements set out section 5
(1) and 5 (2) of PIE
have been established.

JUDGMENT

WILSON J:

1 The applicant, Telkom, owns a substantial property in Olifantsfontein, to the northwest of Midrand. There is a large training centre on the property, and a number of houses that were once used to accommodate lecturers who taught at the training centre. The property is at least forty hectares in extent.

2 The respondents are between 60 and 100 people (it is not possible to be more precise) living in 16 of the houses. It seems from the papers that at least some of the residents once rented the houses, but Telkom says that any right that the residents had to

occupy the property has now been terminated.

3 Telkom approached me on an urgent basis for an order evicting the residents under section 5 of the Prevention of Illegal Eviction

from, and Unlawful Occupation of Land Act 19 of 1998 (“PIE”). Section 5 of PIE permits a court to make an urgent and interim order for the eviction of unlawful occupiers if the jurisdictional requirements set out in the section are met. Such an order amounts to a direction that the unlawful occupiers vacate the property to which it applies, pending the outcome of an application for final relief under section 4 of PIE. An eviction order under section 4 of the Act can only be granted if and to the extent that the permanent vacation of the property would be just and equitable.

4 Telkom’s notice of motion makes clear that this is indeed what it envisages. I am asked to decide Part A of its application, in which the urgent interim relief under section 5 is sought. The final relief under section 4 is prayed for under Part B, which will proceed in due course however I dispose of Part A of the application. Telkom says that the Part A relief is urgent because the land on which the residents live is dolomitic, and there is an imminent threat of ground instability and sinkhole formation that presents a serious risk to the residents’ safety, and to Telkom’s property.

5 Although the application was not formally opposed, approximately 25 of the residents of the property appeared at the hearing. Two of them addressed me. I had careful regard to what they had to say. Ultimately, however, I came to the conclusion that Telkom has failed, on its own papers, to make out a case in terms of section 5, and that Part A of its application must be dismissed.

6 In giving my reasons for reaching this conclusion, I shall first address the meaning and application of section 5 of the PIE Act. I will then deal with the factual basis on which Telkom sought to persuade me that the requirements of section 5 have been met.

Section 5 of PIE

7 Section 5 of the PIE Act states that applications for urgent interim eviction orders may be granted if (a) there is a real and imminent danger of substantial injury to persons or property unless an unlawful occupier is immediately evicted; and if (b) the hardship

caused to the applicant if the eviction order is not granted exceeds the likely hardship to the unlawful occupier if it is; and if (c) the applicant has no other effective remedy.

8 As I have said, any order granted under section 5 is both urgent and interim in nature, and it persists only for so long as it takes to decide an application for final relief. It follows that, read together, sections 4 and 5 of PIE mean that (a) final eviction

orders may not be granted on an urgent basis; and that (b) an interim eviction order may only be granted urgently pending the outcome of proceedings for a final order under section 4 if the test set out in section 5 is met; and that (c) proceedings for a final eviction order must always follow the notice procedure and adhere to the substantive requirements set out in section 4 of the Act.

9 Judgments of this court that have suggested otherwise, and have held that urgent eviction orders are available under section 4 of PIE, are wrongly decided (see, for example, *G M J Property Trading (Pty) Limited v Molenge*

[2019] ZAGPJHC 403 (13 September 2019)). If urgent eviction proceedings under section 4 were available, there would be little point to section 5 of PIE. No reasonable applicant for an eviction order would bother to satisfy the stringent section 5 test for an urgent interim eviction order if an urgent final eviction order could be obtained under section 4 by satisfying the far less exacting standard of urgency set out in section 6 (12) of the Uniform Rules of Court: viz. that the applicant would not achieve substantial redress in the ordinary course.

10 Eviction orders under section 4 of PIE may only be granted if they are “just and equitable”. It has been held, correctly I think, that this test need not be met before an urgent interim eviction order under section 5 is made. Once the jurisdictional requirements set out in section 5 itself have been met on the facts, an eviction order may follow whether or not it is “just

and equitable” (*Residents of the Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 454 (CC), paragraph 90). Mr. Kutumela, who appeared for Telkom, submitted that this means that the question of whether an eviction would lead to homelessness – which is normally associated with the question of justice and equity – is also irrelevant to whether an urgent interim eviction order under section 5 of PIE should be granted.

11 However, that does not follow. The question of whether, and to what extent, an urgent interim eviction order would lead to homelessness is clearly relevant to the jurisdictional requirements of section 5. In assessing, for example, whether there is a real and imminent danger of substantial injury to persons or property unless an unlawful occupier is immediately evicted, consideration must obviously be given to whether an eviction would cause substantial injury to those to be evicted. In considering whether the hardship caused to the applicant if the eviction order is not granted exceeds the likely hardship to the unlawful occupier if it is, the hardship of likely homelessness is plainly a relevant factor.

12 That does not mean that an urgent interim eviction order can never be granted if homelessness would follow. In the type of situation which the framers of section 5 no doubt had in mind – a single violent unlawful occupier who is causing harm to persons or property around them – it is conceivable that an unlawful occupier’s likely homelessness may not tip the balance against evicting them pending the outcome of the application for final relief. But where, as in this case, there are whole communities of people sought to be removed for the sake of their own safety, a court must, in my view, have careful and detailed regard to whether

the eviction of the unlawful occupiers will in fact make them more safe. If the eviction would leave a large number of unlawful

occupiers homeless, then an inference that an eviction is necessary for their own safety will not easily be drawn.

13 Applications under section 5 of PIE, especially those which rest on claims of the nature Telkom makes in this case, warrant close scrutiny. Any substantiated claim of imminent risk to a person's safety and property obviously demands serious consideration. It is equally obvious, though, that an applicant in a section 5 case has an interest in emphasising the imminence of any potential risks to life and limb in order to obtain an urgent interim eviction order.

14 This difficulty is compounded by the fact that many, perhaps most, eviction applications under section 5 of PIE will be heard without formal opposition. They will generally be brought on a very short notice by people with the resources necessary to engage the urgent mechanisms PIE provides. Unlawful occupiers faced with a section 5 eviction claim will seldom have the wherewithal to obtain the representation necessary to contest the applicant's version, especially when that version rests on expert evidence.

15 It is accordingly incumbent on a court to evaluate the applicant's factual claims carefully. Counsel for the applicant is also under a heightened duty to present the case fairly, by making arguments that go no further than are reasonably justified by the facts alleged, and by drawing the court's attention to any fact that might count against an urgent interim eviction order.

16 I now turn to whether the requirements of section 5 have been met on the facts of this case.

The dolomite instability claim

17 Telkom's case rests squarely on the outcome of a series of expert studies done on dolomite instability at the property. Large

swathes the Witwatersrand are underlain by dolomite. Dolomite is a type of rock that dissolves in water. If water seeps into the ground, it may, over time, dissolve dolomite under the surface. If enough dolomite close enough to the surface is dissolved, the ground can fall away. Sinkholes can form. Sinkholes that form under buildings and roads can obviously lead to the collapse of those structures. There is a concomitant risk of injury and, in extreme cases, loss of life. A Council for Geoscience Report annexed to the papers says that 39 deaths have been caused by sinkholes in South Africa over the sixty years to 2011.

18 This is obviously cause for concern. However, it appears from the papers before me that 52% of Ekurhuleni Municipality's surface area is underlain by dolomite. The Council for Geoscience Report says that a quarter of land in Gauteng is dolomitic. Dolomitic

land may be perfectly safe to build on, provided that surface water is properly managed, and that the structure of the dolomitic

substrate is carefully investigated and mitigated for. I can only assume that this is what was done when the decision to build on the property was made in the first place.

19 Accordingly, dolomitic ground is not necessarily unsafe ground. In this case, however, Telkom says that the ground on which the residents' houses are constructed has become unsafe. There are three sinkholes on the property. Two appear to have formed at some unspecified date before June 2022. The third formed in November

2022. One of the sinkholes is two metres across. It is not clear from the papers how big the other two are. There is a risk that more may form in future, unless prompt action is taken to manage surface water on the site, and to refill the existing sinkholes.

20 These conclusions emerge from the latest of the reports compiled about the property. The report, produced by ARQ Engineers, recommends that any inhabited structures immediately around the existing sinkholes be evacuated, but also makes clear that at least some mitigation measures can be taken while the land is occupied. Indeed, the report sets out measures to manage ground water flow in the event that the site is not evacuated. These appear at section 4.1 of the report, where it is said that “[s]hould [Telkom] allow

the continued habitation of the residential units, ARQ strongly recommends that a detailed services inspection be conducted as soon as possible, and any leaks/broken services be repaired with due haste”.

21 The report does not support the conclusion that the entire property requires immediate evacuation. What the report says is that “the residential buildings that are currently occupied in the areas surrounding the existing sinkholes/subsidences [sic]”

ought ideally to be evacuated. The portions of the property the report marks as “areas of concern” around the existing

sinkholes make up a fraction of the occupied land. Telkom has made no effort on the papers to differentiate between the residents who might live in these “areas of concern” and those who live outside them. During the hearing, Mr. Moraba, one of the residents who appeared in person, said that there were in fact no occupied houses in the immediate vicinity of any of the sinkholes. He also said that the training centre on the property, which is adjacent to the houses, remains in use, with no sign that Telkom intends to evacuate it.

22 However, I do not have to accept what Mr. Moraba says in order to reject the claims Telkom makes on the strength of ARQ's report. Nor am I bound to accept ARQ's conclusions on their face. I must instead consider what conclusions can reasonably be drawn on the basis of the facts set out in ARQ's report. In other words, I must examine ARQ's reasoning and determine whether it is logical in the light of the facts set out in the report. If I conclude that ARQ's opinion is one that can reasonably be held on the facts, then I may accept it. However, if I am not satisfied that the expert conclusions drawn in the report are reasonably related to the facts proffered in support of them, I cannot rely on them (see, in this regard, *MV Pasquale Della Gatta* 2012 (1) SA 58 (SCA), paragraph 26). I must then consider whether those of ARQ's conclusions that I can accept support

the case Telkom seeks to rest on them.

23 It seems to me that the facts established on the papers are reasonably related to the expert conclusion that there is a risk to some residents of the property posed by the dolomitic ground and the potential for sinkhole formation. However, the facts do not provide a reasonable basis on which to assess the precise nature or imminence of that risk, or precisely to which of the residents that risk applies. Nor do the facts establish that the urgent evacuation of the whole property is necessary to address that risk – and that is, in any event, not what ARQ says. Nor do the facts establish that mitigation measures cannot be taken to address the risk while the residents remain in occupation.

24 These conclusions are consistent, in my view, with three further facts. The first is that the ARQ report describes its conclusions and recommendations as “preliminary only” and warns that its report is based on “limited information”. The second fact is that the ARQ report is dated 17 January 2023. This application was enrolled before me on 18 May 2023, fully four months later. It was served on the respondents on 11 May 2023, seven calendar days before the hearing, and almost a year since ARQ first set foot on the property. The third fact is that the ARQ report records that the property “has experience[d] numerous sinkholes over the years” since Telkom’s acquisition of the property. This information came from Telkom itself. Nothing is said in the papers about how, if at all, this particular instance of sinkhole formation is different, or whether prior instances of sinkhole formation resulted in evictions or evacuations from the property.

No imminent risk requiring an eviction

25 In these circumstances, it cannot be said that the first jurisdictional requirement of section 5 – that there is an imminent danger to persons or property if the residents are not forthwith evicted – has been established. I can accept that there is a danger, but the degree of risk to the residents and the imminence of that risk have not been established on the papers.

26 Even were I to accept that there is an acute risk, and that the risk is imminent, it has not been established that the residents would be made any safer by being evicted from the property. It is clear on the papers that the property has been occupied for some time. Ms. Mkhathswa, who spoke for the residents before me, stated that the residents had lived on the property for many years, that there were many children among them, and that they would have nowhere else to go if they were evicted. She did not think that there were as many as 100 people living on the property. She accepted my suggestion that there were perhaps closer to 60 or 70 people living in 16 houses. But even without regard what Ms. Mkhathswa told me, on the facts Telkom alleges, there is a community of people on the property who are living in disused houses without paying rent. Despite having been warned of what Telkom says is a serious risk to their well-being, they have not moved. These facts are in themselves a clear indication that there is a real risk of homelessness on eviction.

27 On the papers, I cannot accept that putting a community of between 60 to 100 people out on the streets – children included – in the middle of winter is necessary to ensure their safety. But that is precisely what I must be satisfied of if I am to

accept – as section 5 of PIE requires – that there is an imminent risk to the residents that requires their eviction

forthwith. In other words, the residents' eviction, on the facts as pleaded, would do nothing to enhance their safety, and may even make them less safe.

28 In these circumstances, I cannot accept that the jurisdictional requirement entrenched in section 5 (1) (a) of PIE has been established.

Balance of hardship and alternative remedy

29 That conclusion renders it strictly unnecessary to consider whether the other two requirements set out in section 5 of PIE have been established, but it is as well to point out that they have not. Telkom has not established on the papers that the likely hardship to it if an urgent interim eviction order is not granted exceeds the likely hardship to the residents if they are allowed to remain in occupation pending the outcome of an application under section 4. As I have already said, there are indications that the residents face a real risk of homelessness if they are evicted. Telkom faces no comparable hardship.

30 Mr. Kutumela argued that there is a possibility that some of the structures Telkom still uses on the property – such as a mast and the training centre – might be damaged or destroyed by sinkholes. However, Telkom's papers make no more than very general allegations about the risk to Telkom's property beyond the risk to the houses in which the residents live. As I have already found, Telkom has not established that mitigation measures are impossible to implement while the residents are still in occupation. In these circumstances, I cannot conclude that the potential damage to Telkom's property is enough to balance out the likely hardship to the residents and their children on eviction.

31 I have already pointed out that the nature and likelihood of the hardship that might ensue to the residents from further sinkhole formation cannot be assessed on the papers. All I know is that sinkholes and dolomite instability have been a known risk for as long as Telkom has owned the property, and that this did not prevent Telkom from using the property for residential and educational purposes. In light of those facts, it seems to me that the risk of hardship to the residents from an eviction is greater than the risk to them of remaining at the property. Neither situation is, of course, without risk, and I do not wish to be understood as playing down the risk the residents face from dolomite instability. I have found only that, on the facts presented to me, an eviction from the property would place the residents at a substantially greater risk than remaining on it until Telkom's application under section 4 of PIE can be heard.

32 Mr. Kutumela also relied on the decision of this court in *Tshwane North Technical and Vocational Education and Training College v Madisha* 2019 JDR 0065 (GP) to advance the proposition that the hardship that might be done to Telkom's property if there were no eviction

outweighs the hardship that the residents will likely endure if they are evicted. In that case, the applicant sought and was granted a section 5 eviction order because it said that one of its student hostels was an irredeemable fire risk. But Mr. Kutumela's reliance on that case overlooks the fact that, in the court's opinion in that case, the students in occupation of the hostel did not face homelessness on eviction. The Judge held that the students in that case were "likely to leave the hostel for family homes during the festive season and can upon their return make alternative arrangements" (paragraph 40). The facts of this case are obviously very different.

33 Finally, I cannot accept that Telkom has no effective remedy other than the residents' eviction. There is obviously the substantially unexplored option of mitigating the risk arising from dolomite instability while the residents remain in situ. Even if the enquiry were confined to legal remedies, Telkom itself asked, in the alternative, for an order directing the ninth

respondent, the Municipality, to provide accommodation off-site to the residents. That alternative prayer is nothing less than a concession that Telkom has alternative legal remedies. The alternative relief, as Telkom framed it, would have been to order the Municipality to provide accommodation to the occupiers within seven days, before an eviction order takes effect.

34 Shortly before the hearing, the Municipality filed a document it called a "notice to abide". It was really no such thing. Despite evincing an intention "to abide by the decision of the court", the notice also records a request "to extend and/or relax the time frames to allow [the Municipality] a reasonable time for compliance". That clearly does not abide the court's decision. I do not know what to make of the Municipality's cryptic stance, but I do not think that

an order to provide accommodation can be made in the absence of an indication from the Municipality that it is able to provide

accommodation within a definite period. All I really know from the Municipality's notice is that the Municipality probably does not think it can comply with the alternative order Telkom proposes.

35 However, I would only need to confront that difficulty if the first two requirements – the need for an immediate eviction and a balance of hardship in Telkom's favour – had been established. They have not been established, so the Municipality's capabilities need not be explored at this stage.

Relief

36 It follows from all this that relief under section 5 of PIE cannot be granted, and that Part A of Telkom's application must be dismissed. I invited Mr. Kutumela to address me on whether I should make an order expediting the hearing of Part B and giving directions requiring engagement with the residents and the Municipality, and the production of reports on the availability of alternative accommodation and measures that could be taken to address the dolomite instability hazard in the interim. Mr. Kutumela's response clearly indicated that his instructions went no further than obtaining an urgent interim eviction order. He declined to motivate for any relief beyond that set out in Telkom's notice of motion. I think that was

unfortunate. That attitude, together with the fact that Telkom chose to wait four months after the ARQ report was produced before bringing this application on a week's

notice, raises some doubt about the extent to which Telkom is genuinely concerned about the residents' safety.

37 Be that as it may, the choice Mr. Kutumela placed before me was either to make a section 5 eviction order under PIE, or to grant no relief at all. For the reasons I have given, in that binary world, the outcome must be that Telkom can have no relief at all. I indicated to the residents present at the hearing that I would see to it that my judgment is brought promptly to their attention. I will make an order that will ensure this.

38 For all these reasons -

38.1 Part A of the application is dismissed, with each party paying their own costs.

38.2 The applicant is directed to serve 5 copies of this judgment on each inhabited structure at the property, by no later than 15 June 2023.

S D J WILSON

Judge of the High Court

HEARD ON:

18 May 2023

DECIDED ON:

30 May 2023

For the Applicant:

L Kutumela with S Mlangeni

Instructed by Motseoneng Bill Attorneys Inc

For the First to

Approximately 25 of the residents in person,

Eighth Respondents:

including Magdeline Nomsa Mkhathshwa and Tshililo Dorian Moraba

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