

SOUTH AFRICA / JUDGMENT

Van Der Valk N.O and Others v Johnson and Others (20449/2021) [2023] ZAWCHC 20 (30 January 2023) [2023] ZAWCHC 20

COURT

Western Cape High Court, Cape Town

BEFORE

P. S. Van Zyl

CASE / FILE NUMBER

20449/2021

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IN THE HIGH COURT OF

SOUTH AFRICA

WESTERN CAPE DIVISION,

CAPE TOWN

Case

number: 20449/2021

In

the matter between:

LAUREN
CHELSEA VAN DER VALK N.O.
First applicant
PIETER
JOHAN BLANCKENBERG N.O.
Second applicant
BRENDAN
MARK NIELSEN
N.O.
Third applicant
CORNELIS
VAN DER VALK N.O.
Fourth
applicant

(in
their capacities as the duly appointed trustees
of
the Falcon Trust IT[...])
and
SHANE JOHNSON
(and
all those holding under him)
First respondent
DIDIER BETUMANGA ILANGA
(and
all those holding under him)
Second
respondent
DIDIER KUASA
(and
all those holding under
him)
Third respondent

JUDGMENT

DELIVERED ON 30 JANUARY 2023

VAN ZYL AJ:

Introduction

1. This is an application for the eviction of the first to third respondents from the property situated at 1[...] V[...] Road, Southfield, Cape Town, also known as erf 7[...] Southfield, Cape Town (“the property”). The application was 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.
2. The respondents appeared in person. The second and third respondent had both delivered answering affidavits in opposition to the application. The first respondent, although opposing the application, has not delivered any affidavits, despite the application previously (on 25 July 2022) having been postponed so as to afford him the opportunity to deliver papers by 31 August 2022. The respondents were all initially represented by attorneys, who have subsequently withdrawn from the matter.
3. Although the Court did not have opposing papers from the first

respondent he was granted an opportunity to state his case (as the other respondents did) and the Court questioned him about his

personal circumstances.

4. 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:

4.1. 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.

4.2. Second, it is determined whether it is just and equitable that the occupier be evicted.

4.3. 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* 2018 (4) SA 515 (WCC) at para [3]).

The applicants' locus standi

5. The onus to prove locus standi for the institution of these proceedings is on the applicants (see *Kommissaris van Binnelandse Inkomste v Van der Heever* 1999 (3) SA 1051 (SCA) at para [10]).
6. Section 4(1) of PIE provides that "[n]otwithstanding 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". "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".
7. It is common cause between the parties that the Falcon Trust ("the Trust"), represented by the applicants as trustees, is the registered owner of the property as contemplated in section 1 (the definitions section) of PIE. The applicants' locus standi is therefore beyond question.

Are the respondents unlawful occupiers?

8. Coupled with the first issue (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, ..."
9. In *Wormald NO and others v Kambule* 2006 (3) SA 563 (SCA) 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. *Brisley v Drotsky* 2002

- (4) SA 1 (SCA) In terms of s 26(3) of the Constitution, from which PIE partly derives (Cape Killarney Property Investments (Pty) Ltd v Mahamba and

Others 2001

- (4) SA 1222 (SCA) ... at 1229E ..), '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 the Brisley case, to qualify as relevant the circumstances must be legally relevant), an eviction order is 'just and equitable'."

The termination of the respondents' lease agreements

10. According to the Trust, the property had previously been informally divided into three portions. Each of the respondents concluded the lease agreement with the Trust in respect of one of the portions.

The leases, after their termination due to the effluxion of time, continued on a month-to-month basis.

11. The first respondent concluded his lease agreement in June 2007. The terms included that the rental payable would be R 3 300,00 per month, escalating at the rate of 10% per year as from 30 June 2008 until the expiry of the lease. The first respondent would not be entitled to sublet the property without the Trust's written

consent. He would also be liable for the upkeep of the mainly the interior of the property (fair wear and tear excepted). If the first respondent failed to pay the rent, then the Trust would be entitled to cancel the lease immediately.

12. The second respondent concluded his lease agreement with the Trust in March

2011. The rental would be R4 100,00 per month, escalating at a rate of 10% per year from May 2012 onwards. The further

terms of the lease were substantially similar to those of the first respondent's lease.

13. The third respondent concluded a lease agreement with the Trust in July 2010. The rental would be R4 200,00 per month, subject to escalation at the rate of 10% per year from September 2011. The further terms of the lease were substantially similar to those of the first and second respondents' leases.

14. The Trust avers that the respondents have not paid rental since about 2019, using a dispute about the availability of water on the premises as an excuse not to pay any rental whatsoever. All of the respondents are in arrears with their rental payments, the first respondent, for example, having accumulated arrears of about R171 000,00.

15. The Trust has in the meantime decided to develop the property by formally subdividing it into three sectional title units, which will entail a substantial demolition of the existing dwelling (which is in a state of significant disrepair and constitutes a health hazard to the occupants), and further construction. As a result, the respondents have on several occasions been advised that the leases would be terminated and that they would have to find alternative accommodation. Despite these warnings the respondents have remained in occupation.
16. On 20 August 2021 the Trust's attorneys handed a letter to the first respondent at his place of employment at the time, stating that the Trust, as lawful owner of the property, has decided to demolish part of the property for redevelopment purposes. The third first respondent was afforded until 1 November 2020 to vacate the property. Should he fail to do so he would become an illegal occupier as contemplated in PIE.
17. On 14 September 2021 the Trust's attorneys addressed further correspondence to the first respondent in which an extended period to vacate was granted. The first respondent was pertinently informed that the letter constituted formal termination of the lease agreement. The termination was on a month's notice, as –

as previously mentioned – by that time the respondents were occupying the property on the basis of a month-to-month lease.

18. The same correspondence was given to the second and the third respondents. The correspondence clearly alerted the respondents that they had no right of continued occupation of the property after the date referred to in the correspondence.
19. Also on 14 September 2021 the second and third respondent attended a meeting with the Trust's attorneys during which they were once again given copies of the correspondence. As a result of the

meeting, those respondents agreed to vacate the property, the third respondent in particular confirming in writing his intention to vacate by April 2022.

20. All three of the respondents' defence to the eviction application is effectively a damages claim against the Trust as landlord, arising from the dispute concerning the insufficient delivery of water to the property resulting in "all of tenants deciding not to pay rent because of the situation we were in for three years". The second respondent proposes, for example, that the amount of water available to tenants be increased by the landlord. If this is not an option, he requests that the landlord repay the money that he (the second respondent) has paid in respect of the purchase of additional water for his household.
21. It is clear that the water dispute is not a defence to the application for eviction. This application is for the eviction of the respondents from the trust property and does not require any investigation into any damages claim which any of the parties may enjoy against the other. In any event, as a damages claim in respect of rental owing to the Trust is currently being prosecuted against the respondents in the magistrate's court, that court

would be the appropriate forum for the proper ventilation of the water dispute between the parties. There is no impediment to the respondents instituting a counterclaim in respect thereof.

22. In the circumstances, the Trust has lawfully cancelled the lease agreements, and the respondents have no contractual right to continue to occupy the property.

It is just and equitable that the respondents be evicted?

23. 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).
24. In terms of section 4(7) of PIE (which applies because the respondents have been in unlawful occupation for more than 6 months) 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.
25. 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)”.

26. 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* [2005] ZAKZHC 10 (25 August 2005): “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”. (The paragraphs of the judgment are unfortunately unnumbered.)
27. The fact, therefore, that the occupants are vulnerable cannot prevent the infection in definitely. At best, it can delay or postpone it.
28. The respondents have placed scant information in relation to their personal circumstances before the Court to justify their ongoing unlawful occupation of the property.

29. The first respondent, who did not deliver any affidavits, stated in Court in that he had minor children of school-going age. He, and his wife who had accompanied him to Court, emphasised their concern about the fact that they might not find alternative accommodation near their children's school. Notably, apart from his formal employment, the first respondent has erected a Wendy house and caravan on his portion (the northern portion) of the property, from which he derives a monthly rental income.
30. The City (as fourth respondent) delivered an affidavit and which it was pointed out that in order to qualify for assistance, the personal circumstances of the unlawful occupier had to be disclosed. The first

respondent did not complete the requisite form, although this application had previously been postponed to provide the respondents

with the opportunity fully to comply with their obligations in relation to the City's requirements. The second and third respondents provided incomplete information on their forms, so the City was unable to provide a comprehensive report.

31. From the forms completed the by the second and third respondents, the following becomes apparent:

31.1 The second respondent lives on the property with his spouse and four dependents he has lived there for the past 11 years. There are no minors, disabled or elderly persons living on the property. The second respondent did not disclose this income or whether he is employed or not, but indicated in Court that he is employed. He indicated on the City's form that he would be rendered homeless if evicted from the property, but concentrated his address to the Court mainly on the water dispute.

31.2 The third respondent lives on the property with his spouse and three dependents. He has lived there for the past 12 years. Apart from two minors living on the property, there are no disabled or elderly persons living there. The third respondent indicated that he was self-employed but did not disclose his earnings. He did not indicate that he would be rendered homeless if evicted from the property.

31.3 The garage on the southern side of the property has been divided into two parts and is rented out by the second and third respondents, who receive the income.

32. In the opposing papers (received by the applicants in March 2022, some to 10 months ago) the third respondent acknowledges that during the 2020 lockdown he only paid half his rental, and occasionally more

than half. He proposed that his deposit to be repaid and that he be afforded a few months to look for a new house close to his son's school in Plumstead. The second and third respondents had therefore previously indicated their willingness to vacate the property following service of the termination letter.

33. The Trust has not received rental (or full rental) from the respondents since 2019, and the effects of COVID-19 further escalated the arrear rental due and payable to it. The Trust submits that it can no longer subsidise the respondents, and the trustees have a duty to act in the best interest of the Trust and its beneficiaries.

It has the intention to develop property in order to generate an income for the benefit of its beneficiaries. Unless the respondents

are evicted, it is going to be prevented from doing so indefinitely. The respondents have been aware of the Trust's intention to redevelop the property for more than a year.

34. Despite their intention to vacate the property and despite having had months to find alternative accommodation, the respondents have to date failed to do so.
35. The basis upon which the respondents rely for their contention that it would not be just and equitable that they be evicted from the property is, apart from the water dispute, the fact that the first and third respondents have children who go to nearby schools. Evicting them from the property would mean that the children would

have to change schools, and might have to travel for longer distances. Apart from broad allegations, however, the respondents do not provide any useful detail of their financial circumstances, their health and their ability to rely on family and friends for assistance. Given the paucity of information provided, it appears that the essential question that must be asked is whether

they might be rendered homeless should they be evicted.

36. 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* 2004
- (6) SA 40 (SCA) at 57C-E: "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."
37. The rule is subject to minor qualifications depending on the circumstances. In *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 (6) SA 294 (SCA) at paragraph [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.”

38. The Supreme Court of Appeal in *Changing Tides 74* specified, at paragraph [16], that only in what could be deemed exceptional circumstances would a court interfere with a party’s proprietary rights.
39. The Trust submitted 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 an equitable for the Court to order the eviction from the property. I agree. 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.
40. The respondents do not say what steps they have taken to source or investigate the availability of alternative accommodation. In *Patel N.O. And Others v Mayekiso and Others* (WCC 3680/16, delivered on 23 September 2016) the court recognised the obligation of an occupier alleging potential homelessness, and by extension any further prejudice, to place the necessary information before the court, noting at paragraph [33]: “But the Mayekisos have not attempted to show how their eviction would render them homeless save to say that all the assets were tied up in the insolvent estate. This is not sufficient. What they had to show was how they have tried and failed to find alternative accommodation within their available resources.”
41. The City has set out in its affidavit the various options available in relation to emergency accommodation. The respondents will, however, have to inform the City that such accommodation is required. None of them has done so.

Conclusion

42. 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.
43. I intend to provide the respondents with more time to vacate than the Trust argued for. This is because of the respondents’ expressed concern about their children’s schooling, and the fact that they have all occupied the property unlawfully for a period of more than a year (having regard to section 4(9) of PIE). I hope

that the additional time will assist them in investigating the possibilities in relation to other accommodation in the vicinity of the children's present school, or to find another school that is accessible.

Costs

44. 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 Trust's vindication of its property.

In my view costs should follow the event.

45. Order

46. I accordingly grant an order in the following terms:

46.1. The first, second and third respondents ("the respondents"), and all those holding under each of them, are to vacate the property known as 1[...] V[...] Road (Erf 7[...]) Southfield, Cape Town ("the premises") by no later than Friday, 31 March 2023.

46.2. In the event of the any of the respondents (or any of those holding under each of them) failing to vacate the premises by Friday, 31 March 2023, then the Sheriff of this Court is directed and authorized to evict such respondents or other persons from the premises.

46.3. The Sheriff is authorized and directed to employ the services of the South African Police Service to assist him, if it is necessary to do so, to remove the respondents and those holding under each of them from the premises.

46.4. The respondents are to 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.

P. S. VAN ZYL

Acting judge of the High Court

Appearances:

For the applicant: P. Torrington,

instructed by Butler Blanckenberg Nielsen Safodien

The first, second and third respondents in person

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