

SOUTH AFRICA / JUDGMENT

## White Wall Trading (CC) and Another v Biyela and Others (090403/2023) [2024] ZAGPJHC 54 (26 January 2024) [2024] ZAGPJHC 54

COURT

South Gauteng High Court, Johannesburg

BEFORE

MIA

CASE / FILE NUMBER

090403/2023

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

Case Number: 090403/2023

1.

Reportable: No

2.

Of interest to other judges: No

26

January 2024

In

the matter between:

WHITE WALL TRADING  
(CC)  
(REGISTRATION  
NUMBER: 2009/203783/23)  
First Applicant  
OPAL WALL TRADING CC  
(REGISTRATION  
NUMBER: 2009/203807/23)  
Second Applicant  
and  
NONDUMISO BRONHILDA  
BIYELA &  
THOSE LISTED IN  
ANNEXURE “A”  
TO  
THE NOTICE OF MOTION  
First to Thirty-Third Respondents  
THE FURTHER UNLAWFUL  
OCCUPIERS  
OF ERVEN  
142,143,144,145,146  
AND 198 DOORNFONTEIN  
TOWNSHIP,  
REGISTRATION  
DIVISION I.R  
Thirty-Fourth Respondent  
THE  
CITY OF JOHANNESBURG  
Thirty-Fifth Respondent  
BRINK  
N.O FLOYD  
Thirty-Sixth Respondent (in his capacity as the  
municipal manager of The City of Johannesburg)  
THE GAUTENG DEPARTMENT  
OF  
HUMAN  
SETTLEMENTS  
Thirty-Seventh Respondent  
MAILE NO LEBOGANG  
ISAAC  
(in his capacity as the  
Member of the

Executive Council: Gauteng Department  
of Human Settlements)  
Thirty-Eighth Respondent  
THE NATIONAL  
DEPARTMENT OF  
HUMAN  
SETTLEMENTS  
Thirty-Ninth Respondent  
THE  
CITY OF JOHANNESBURG  
Fortieth Respondent

## JUDGMENT

MIA, J

- [1] This is an application for the eviction of the first to 33rd respondents (the occupiers) in terms of the provisions of the Prevention of Illegal Occupation and the Unlawful Occupation of Land Act 19 of 1998 (PIE) on an urgent basis. The applicant also seeks relief against the 35th and 36th respondents (the City), namely that the City relocate the occupiers to alternative accommodation as it is obliged to in terms of PIE. The application is opposed by the occupiers as well as the City. The occupiers lodged a counterapplication in which they requested that the City provide them with accommodation in terms of the National Housing Code and specify the parameters of the accommodation.
- [2] The applicants are the owners of the registered properties'. It is not in dispute that the occupiers occupied the properties without the applicants' consent. What is in dispute, however, is the basis of the urgent relief. The occupiers and the City dispute the applicants' claims that there is "real or imminent danger of injury to a person or danger of harm and or loss of properties if the occupiers are not forthwith evicted from the property." They also deny that the likely hardship to the applicants is more significant than to the occupiers and any other person if an order for eviction is not granted.
- [3] The context in which the urgent application was lodged was on the heels of two fires that occurred in the Johannesburg CBD on 31 August 2023 and 15 September 2023. The applicants rely on these fires in the CBD, their lack of access to their own properties and the lack of maintenance of the buildings to make out a case that the conditions at the buildings are dangerous and pose a risk to the lives of occupiers with devastating consequences. They allege that another fire will be a devastating loss for the owners of the commercial buildings if an order for eviction is not granted.

[4] The applicants previously applied to evict the occupiers from the premises in 2011. The applications were lodged under case numbers 2011/27627 and 2011/2768[1] (the 2011 eviction applications). These 2011 eviction applications are pending in this court. The applicants did not join the City in the 2011 eviction applications at the outset. During the prosecution of the eviction, they launched an urgent application in terms of section 5 of PIE when a fire broke out in another building, relying on imminent danger. The urgent application for an interim order for eviction was dismissed on that occasion. The 2011 eviction

application was referred for case management. The application was case-managed, and the City's report was awaited. There appeared to be dissatisfaction with the report regarding the provision of temporary emergency accommodation (TEA). This delayed the prosecution of the 2011 eviction applications, which came to a halt after the case management procedure was terminated.

[5] The occupiers maintain they have been in occupation of the properties since 2001. If an eviction is granted, they seek in their counterclaim TEA from the City in units that comply with the standards set out in the National Housing Code. While the occupiers have not paid rent, they state they do what they can to maintain the properties. It is common cause the applicants have not had access to the properties and consequently have been unable to maintain the property. The property, intended for commercial purposes, has been used for residential purposes by many occupiers. The lack of proper maintenance is reflected in the report attached to the affidavit filed by the occupiers. They deny they are paying rent to a slumlord and assert the properties are the only option they have. Alternately, they seek TEA from the City. They do not, however, wish to be moved into tents and anticipate this by requesting in the counterclaim seeking TEA in units with running water and flushing lavatories.

[6] They note the accommodation they currently reside in, namely the five-story and three-storey commercial properties, has been divided with partitioning. They dispute it is unsafe as iterated by the applicants. They maintain they have lived in the property since 2001. The applicants have been aware of their existence and occupation since they became the owners of the properties. They refer to the previous urgent application to evict them that did not succeed. They rely on an architectural engineer's report to rebut the applicant's case. According to the report, there are informal and unsafe electrical connections[2]. The water connection is present but is not sufficient for communal use. The sewer inspection indicates an absence of maintenance of pipes and leaks.[3]

[7] The recommendations for improvements made in the report are removing fire hazards, namely, piles of debris that collect and removing flammable material that forms part of the partitioning. It is also recommended that fire suppression equipment be installed and a second escape route be established. The cleaning of the waste and debris requires an account of the hazardous waste that may have accumulated. It is also recommended that informal electrical connections are formalised to prevent electrocution.

- [8] The issues for determination are urgency and whether the applicants are entitled to relief in terms of section 5 of PIE. If an order for eviction is granted, whether the relief in the counter application should be granted as sought by the occupiers.

#### URGENCY

- [9] The application is brought in terms of section 5 of PIE. Both the occupiers and the City disputed the issue of urgency. Counsel argued that Rule 6(12) is not simply there to be taken, and a party must make a case for urgent relief. Counsel referred to the notice informing practitioners that due to the increasing number of urgent matters enrolled in this Division, a more disciplined approach to dealing with urgent matters has been directed by the Deputy Judge President of this Division[4] to ensure that parties do not lodge urgent matters 'to see what the judge thinks'.
- [10] Counsel for the occupiers and the City submitted that the matter did not meet the criteria for urgency. Both counsel for the occupiers and the City argued that on the applicant's version, the properties have been occupied since 2010, and on the occupier's version, the properties have been occupied since 2001. On this basis, Counsel submitted that the applicants have not proved there is a risk of imminent danger or harm to the occupiers. To support this view, they referred to the previous urgent application launched by the applicants in this court in 2017, where the applicant similarly relied on urgency and imminent danger in terms of section 5 of PIE. The application was dismissed by Makume J.
- [11] Counsel for the applicants argued that the 2011 and the current applications differed and that the court had erred in 2017. It is noteworthy that the 2011 applications are still pending. The current application is brought under a new case number. Still, the occupiers maintain they are the same respondents as cited in the 2011 application and the urgent application that was dismissed in 2017.
- [12] The consideration in terms of section 5 of PIE, that an eviction may be granted if there is a)
- a) real and imminent danger or substantial injury or damage to any person or property if the unlawful occupier is not forthwith evicted from the land;
  - b) the likely hardship to the owner or any other affected person if an order for eviction is not granted, exceeds the likely hardship to the unlawful occupier against whom the order is sought, if an order for eviction is granted, and c) there is no other effective remedy available.
- [13] Counsel submitted that the applicants had only gained access to the premises shortly before they launched the application through the efforts of SERI. They rely on the historical information provided after the City's raid on the premises in 2017 after the application to move the occupiers was dismissed by Makume J. Then the City found the property unsuitable for occupation. The applicants also rely on the report filed by the occupiers, which records several items that require attention to ensure the property is safe for the occupation. Among the issues raised are the debris and piles of accumulated dirt, which pose a problem. Informal electrical connections which can potentially be hazardous for the

occupiers. The shortage of water taps, ablution facilities and toilets intended for commercial use and now being utilised by the occupiers for residential purposes places a strain on the system resulting blockages.

- [14] The applicants rely on imminent danger and reference the fires occurring in the city. That a fire occurred elsewhere is insufficient to satisfy the test of imminent danger or harm. A fire could occur anywhere in the city. In these buildings, however the report shows no evidence other than the normal disintegration and crumbling of a building neglected over time and subjected to inappropriate use. This is no indication of imminent danger. The report recommends that informal connections be formalised. This does not suggest an imminent fire risk. The occupiers indicate there are 80 women, 102 children and 149 unemployed in 324 households. The properties have been their shelter against the elements, and they have come together to maintain it as best they can.
- [15] In the seven years they have resided in the properties since the last application was dismissed in 2017, there has been no incident at the properties. They note that they have been awaiting accommodation from the City. They point out that in other matters unlawful occupiers have only been accommodated by the City when they have been compelled to do so in terms of a court order. Hence their counter-application against the City. They referred to the decision in *City of Johannesburg Metropolitan Municipality and Others v Hlophe and others* noting this decision and *Changing Tides Investments v Occupiers of Chung Hua Mansions* where the court ordered the City to provide occupiers with TEA. In the *Hlophe* decision, the City appealed the decision, it went to the Constitutional Court where the matter was summarily refused by the Constitutional Court in May 2015. This did not secure the occupier's accommodation forthwith, and the occupiers fear a similar delay.
- [16] The danger or substantial injury or damage to any person or property if the unlawful occupier is not evicted must be weighed against the likely hardship to the owner or any other affected person if an order for eviction is not granted. Whether this exceeds the likely hardship to the unlawful occupier against whom the order is sought if an order for eviction is granted. It was argued that the applicants had no access to the building and had only recently commenced building work on the properties. The applicants did not continue prosecuting the 2011 applications which are still pending. This must be contrasted with the occupiers living in the premises since 2001. They have withstood the degenerating conditions and state that they have attempted to maintain the property according to their means. The crumbling building reflects their limited means spread between what they would require for sustenance and other requirements. It is evident they would be homeless if an eviction order is granted. The counter-application for TEA suggests they anticipate that their stay is overdue on the premises and are pre-empting the request for alternative accommodation. Among this group of 324 households, there are a significant number of women and children and unemployed persons.

- [17] The City submitted that they require time to assess whether the occupiers qualify for TEA or whether occupiers can afford accommodation elsewhere in the city. The assessment requires more than four weeks, and in the interim, the City only has tents to provide as TEA. The occupiers' application was specifically launched to avoid this type of temporary accommodation. If the order for eviction is granted, then the City, in the short space of time afforded, would only be able to relocate the occupiers to tented TEA. In considering the time required to assess the occupiers and to allocate them to alternate accommodation, this hardship exceeds the hardship the owners would endure if an order for eviction were not granted forthwith.
- [18] I am of the view that there is no imminent danger to the property if the unlawful occupiers are not forthwith evicted. The likely hardship to the owners of the properties does not exceed the hardship to the occupiers if the court were not to grant an order for eviction. The City is not able to offer TEA immediately. The applicants have not pursued the eviction 2011 applications against the occupiers since 2017. Thus, the current circumstances at the properties are not new instances but have arisen over a period of time and as a result of the commercial property being overburdened as well as the applicants' decision not to pursue the 2011 applications. The reference to the recent fires, loss of lives and damage in other premises is merely convenient; however, without any indication of the cause of the fire in those buildings, it cannot be extrapolated to the present properties, is speculative and cannot be taken into account in making out a case for imminent danger in the present application.
- [19] The applicants have not satisfied the stringent test for urgency required in terms of section 5.

#### POINTS IN LIMINE

- [20] Counsel for the City raised further issues in addition to the urgency. It was argued in limine that the application for an eviction order forthwith was defective on two grounds. The first ground was because the applicants seek the same relief namely an eviction of the occupiers in this court under case numbers 2011/27627 and 2011/2768[5] as referred to above the 2011 eviction applications. Those applications were in terms of section 4 of PIE. Nonetheless, it was

submitted that if an interim order for eviction was granted, there would be two cases with the same parties seeking the same relief. In the circumstances where the applicants did not withdraw the 2011 applications they remain in abeyance and the City's point in limine is upheld on this aspect.

- [21] As indicated above the applicants did not make out a case for urgency in terms of section 5(1) of PIE and on the first point in limine there is a similar matter pending and the application cannot be dealt with whilst there is a matter pending between the same parties. I am also of the view that section 5(2) is peremptory and there has been no compliance.

[22] The applicant sought an interim eviction order pending an order to be determined in terms of section 4 of PIE with costs to be reserved. Counsel for the City sought an order dismissing alternately striking the application with an order for costs of three counsel. The occupiers sought an order striking the application or an alternate order in the event an eviction order is granted.

[23] On the issue of cost the City requested the costs of three counsel. I am of the view that the matter did not merit three counsel.

#### ORDER

[24] For the reasons above:

1. The application is dismissed with costs.
2. The counterclaim is dismissed, no order as to costs.

SC Mia

JUDGE OF THE HIGH COURT

JOHANNESBURG

For the Applicant: L Hollander

Instructed by Vermaak Marshall Wellbeloved Inc

For the 1st to 34th Respondents: O Motlhasedi

Instructed by Seri Law Clinic

For the 35th and 36th Respondents: A Milovanovic-Bitter, L Mokwena &

Z Ngakane

Instructed by Edward Nathan Sonnenberg Attorneys

Heard: 20 September 2023

Delivered: 26 January 2024

[1] Answering Affidavit Caselines 04 – 93 and 04 – 100

[2] Answering Affidavit, Caselines 04-41, Electricity

[3] Ibid, Water and Sewer

[4] Notice to [all legal] practitioners about the Urgent Motion Court, Johannesburg (4 October 2021) at para 2

[5] Answering Affidavit Caselines 04 – 93 and 04 – 100

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