

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.
.....
DATE	SIGNATURE

Case No: 7395/18

In the matter between:

ANGELENE POOLE N.O.	First Applicant
YUSUF EBRAHIM N.O. (in their capacities as the duly appointed joint liquidators of BUSTQUE 330 (PTY) LTD (in liquidation))	Second Applicant
and	
NATALIE-ANNE POWELL	First Respondent
THE OCCUPANTS OF ERF [...] JUKSKEI PARK, EXT 5 TOWNSHIP situated at [...] S Street, Jukskei Park, Johannesburg	Second Respondent
THE CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY	Third Respondent

JUDGMENT

ANDRÉ GAUTSCHI AJ:

- 1 This is an application for the eviction of the first respondent and the other occupants of a property situated in Jukskei Park, Johannesburg described in the heading (“the property”). The application is brought by the liquidators of a company (Bustque 330 (Pty) Ltd) which is in liquidation and which is the owner of the property.
- 2 The application is governed by the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, No 19 of 1998 (“the PIE Act”).
- 3 The material facts are not in dispute. Bustque 330 (Pty) Ltd (“Bustque”) purchased the property during 2008 with funds borrowed largely from Nedbank and secured by a mortgage bond. It was unable to meet its monthly commitments to Nedbank and borrowed an amount of money from one of its two shareholders, Ms Brown (the other shareholder being the first respondent) to enable it to do so. When it subsequently appeared that Bustque could also not repay the monies it had borrowed from Ms Brown, she brought an application and obtained a final winding-up order against Bustque on 9 February 2016.
- 4 The applicants were then appointed as Bustque’s liquidators and received instructions from Nedbank to sell the property in settlement of the bond. During the course of making their preparations to sell the property, it came to their

attention that it was occupied by the first respondent, allegedly in terms of a lease concluded between herself and Bustque on 1 September 2009.

5 The lease provided for occupation for five years and thereafter an automatic renewal for 12 months at a time, with the ability to cancel the lease on three months' written notice. Such notice was given on behalf of the applicants, and the lease was cancelled with effect from 31 January 2018. The first respondent, and her partner, failed to vacate the premises thereafter.

6 On the papers, the following is not in dispute:

6.1 That Bustque is the lawful owner of the property and that the applicants, who are its duly appointed liquidators, have the necessary *locus standi* to bring and prosecute this application.

6.2 That the lease was validly cancelled and that the first respondent and any other occupants of the property are accordingly in unlawful occupation thereof.

6.3 That the applicants have complied with all the procedural formalities in terms of the PIE Act which are required to prosecute this application.

7 Sections 4(6) and (7) of the PIE Act provide as follows:

“(6) If an unlawful occupier has occupied the land in question for less 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 the rights and needs of the elderly, children, disabled persons and households headed by women.

- (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 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.

8 It will be seen that the test to be applied in the eviction depends on a cut-off period of six months. The applicants contended that the six month period related to unlawful occupation and not simply occupation, whereas the third respondent (the City of Johannesburg) in its heads submitted that it related to occupation, whether unlawful or not. The occupation referred to in sections 4(6) and (7) relates to unlawful occupation (see Ndlovu v Ngcobo; Bekker and Another v Jika 2003 (1) SA 113 (SCA) at para [17]) and this was conceded by the third respondent during argument. However, in my view, on the facts of this case, it does not matter which I apply. The difference is whether, where occupation (or unlawful occupation) has been for more than six months when the proceedings were initiated, land has been or can reasonably be made available by a municipality or the State for the relocation of the unlawful occupier. This latter requirement in my view is relevant only where the person

evicted requires such assistance. As will be seen, the first and second respondents do not require such assistance.

- 9 The first respondent has no children, but has pets in the forms of dogs and cats. She earns money as a Reiki practitioner of between R5 000 and R8 000 per month, and has stated on oath that from the end of June 2018 her partner would be earning enough money to be able to obtain a bond with a view to purchasing the property. They are not destitute and, objectively, it seems to me, do not require the assistance of the municipality or the State to afford them alternative accommodation. In any event it appears from the affidavit and report filed by the City of Johannesburg that it is faced with enormous challenges in providing temporary emergency accommodation for persons being evicted within its jurisdiction, that the demand for such accommodation far outstrips the supply thereof, and there are evicted persons who are much more needy than the first respondent and her partner.
- 10 In her answering affidavit, the first respondent referred only to her partner, her four cats and her three dogs that occupied the property. In addressing me in the hearing, she advised me that there are two other families living on the property. The first, Frank and Ester Nkoma and their three children, have been living on the property, she said, for a long time. The other family, Ms Charmaine Nkosi and her four children, moved in in December 2018 as a result of a tragedy which left them destitute. Nowhere in the answering affidavit are these other persons mentioned. Whilst failure to mention the second family is

understandable, because they only moved in after the answering affidavit was filed, the absence of any mention of the first family is surprising. However, the first respondent stated unequivocally that these two families held their occupancy through and under her, and that, when she moved, she intended to take them with her and to look after them. In those circumstances, I am of the view that I do not have to be concerned for their welfare if I evict the first respondent.

- 11 The first respondent's partner was identified by name for the first time in court, as being Kevin Vahid Fitzpatrick. Now that his name is known, he becomes the named second respondent in the application. The other persons on the property hold through or under the first respondent, and need not be joined (Sheshe v Vereeniging Municipality 1951 (3) SA 661 (A) at 666G-667B).
- 12 The first respondent has not put up any defence other than to plead for more time. Since filing her answering affidavit in April 2018, she has had ample opportunity to arrange her affairs in anticipation of an eviction. She confirmed when addressing me orally in the hearing that Mr Fitzpatrick now has the financial wherewithal to obtain a bond of up to R2 million and that they had in fact put in an offer on the property to the liquidators. It is clear that the first respondent and her partner are not destitute, and have the financial means to obtain alternative accommodation, either in the form of purchasing a property (which they intend to do, whether the property or another property), or of renting accommodation.

- 13 I have given careful consideration to whether it is just and equitable to grant an order for eviction in the circumstances of this case and, if section 4(7) is applicable, the question of whether land should be made available by the City of Johannesburg (which I have considered above). I have come to the conclusion that it is just and equitable that an order for eviction of the first and second respondents should be ordered. A second enquiry is then to determine a just and equitable date on which the first and second respondents must vacate the property. The first respondent asked for three calendar months, which she said was the time she had been advised by various estate agents transfer of any other property they purchased would take, and before they could be expected to obtain occupation of a new property. Given the circumstances set out above, I am of the view that a period of just short of three months is just and equitable.
- 14 After the conclusion of the hearing and after preparing this judgment, I received, irregularly, a “clarifying memo” from the first respondent. It deals with the question of who the second respondent is, and in essence attempts to explain the absence of any mention of the other occupants of the property. I have had regard to the contents of that memorandum despite it being in my view irregular, and it does not affect the conclusion that I have come to.
- 15 In the circumstances I make the following order:
- 1 The first and second respondents and all those claiming occupation through and under them are ordered to be evicted from the property described as Erf [...] Jukskei Park, Ext

5 Township, situated at [...] S Street, Jukskei Park, Johannesburg (hereinafter “the property”).

- 2 Directing that the first and second respondents and all those claiming occupation through and under them vacate the property on or before 30 April 2019.
- 3 In the event that the first and second respondents and those claiming occupation through and under them should fail to vacate the property by 30 April 2019, the sheriff (or his/her deputy) is hereby authorised and directed to evict the first and second respondents and all those claiming occupation through and under them from the property on 1 May 2019.
- 4 Directing the first and second respondents to pay the applicants’ and the third respondent’s costs of this application jointly and severally.

ANDRÉ GAUTSCHI
ACTING JUDGE OF THE HIGH COURT

Date of Hearing: 5 February 2019

Judgment Delivered: 7 February 2019

APPEARANCES

For the Applicants: Adv AR Newton

Instructed By: Lamprecht and Associates (Cape Town);
De Vries Inc (Sandton)

For the First Respondent: In person

For the Second Respondent: In person

For the Third Respondent: Mr G McMaster (attorney with right of appearance)

Instructed By: Kunene Rampale Inc (Johannesburg)