

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG



Case number: 28781/2021
Date of hearing: 22/11/2022
Date delivered: 13/12/2022

(1) DELETE WHICHEVER IS NOT APPLICABLE
(2) REPORTABLE: ~~YES~~/NO
(3) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
REVISED

.....
DATE SIGNATURE

In the matter between:

WINGPROP (PTY) LTD
(REGISTRATION NUMBER: 2002/000246/07)

Applicant

and

BAHLEKAZI, APOLLO PEPSI

1st Respondent

NYEMBE, PHINDILE CAROLINE

2nd Respondent

NCAMBACHA, NOMKHANGO

3rd Respondent

SHEVERI, AGNES

4th Respondent

MOKOBE, AGNES MANGWATO 5th Respondent

VUMASE, LINDIWE GOODNESS 6th Respondent

CHARLIE, LESIBA PIET 7th Respondent

VISAGIE, JOHNNY 8th Respondent

KELEMBE, VUSUMZI 9th Respondent

MASOKO, DAVID MOSETE 10th Respondent

MTHETHWA, JANE ZETHU 11th Respondent

KOTANE, LESLEY JOSEPH 12th Respondent

ZIKHALI, SIPHO MAHLABANE 13th Respondent

MLANGENI, VUSANI JOHN 14th Respondent

NGCOBO, LINDIWE BEAUTY 15th Respondent

MOHLABE, REPHEDILE GRACE 16th Respondent

NGCOBO, PHYLLIS BUSISIWE 17th Respondent

MASHIANE, LESET JA JERRY 18th Respondent

THE FURTHER UNLAWFUL OCCUPIERS OF
UNITS 1801, 2803, 1907, 501, 602, 806, 1108,
1308, 1402, 1410, 1707, 1911, 2004, 2207,

2210, 2311, 2503 AND 2603 OF THE
HIGHPOINT BUILDING

19th Respondent

CITY OF JOHANNESBURG

20th Respondent

JUDGMENT

KEMACK AJ:

1. The applicant is a company named Wingprop (Pty) Ltd, the owner of the Highpoint building situated at the corner of Klein and Kotze Streets in Hillbrow, Johannesburg. The property is registered as Erf 5219 Township, Registration Division I.R., Johannesburg, Gauteng. As owner of the Highpoint building, the applicant is the landlord for 333 residential apartment units situated on twenty-eight stories of the Highpoint building.
2. The 1st to 18th respondents (“the named respondents”) are the known or presumed occupiers of eighteen units in the Highpoint building. They are known because they previously concluded written leases with the applicant for those units. Paragraphs 8 to 25 of the founding affidavit individually identify the named respondents, and the numbers of the residential units for which they signed leases and which they occupy. They are units 1801, 2803,

1907, 501, 602, 806, 1108, 1308, 1402, 1410, 1707, 1911, 2004, 2207, 2210, 2311, 2503 and 2603.

3. The “19th respondent” is a group of unnamed persons who may be occupying the units attributed to the named respondents, presumably as tenants or dependants of the named respondents. They are collectively cited with reference to the unit numbers applicable to the named respondents.
4. The 20th respondent is the City of Johannesburg, an interested party which has neither opposed nor participated in this application.
5. The 1st to 18th respondents fall into two broad categories: those who have entered appearance to oppose or delivered answering affidavits; and those who have neither opposed nor participated in the hearing of the application.
6. The first broad category can be further subdivided into three sub-categories. The first sub-category comprises the 1st and 3rd respondents, both of whom delivered similar answering affidavits. Although some confusion is created by the applicable notice of intention to oppose, which states that the 1st respondent tenders notice of intention to oppose but is signed by 3rd respondent, the 1st respondent appeared in person and addressed the court in opposition to the application. The 3rd respondent did not do so.

7. The second sub-category comprises the 2nd, 4th to 8th, 10th, 11th and 13th to 18th respondents, whose attorney entered a notice of intention to oppose on 29 June 2021. Sudeshnee Naidoo Attorneys delivered an answering affidavit for these respondents on 20 July 2021, and they were represented in court by Mr Gaju.
8. The third sub-category comprises the 9th and 12th respondents, who neither entered appearance to oppose nor appeared at the opposed application hearing. The application against them is effectively unopposed.
9. Nevertheless, owing to the nature of this application and the consequences of the applicant succeeding, in considering the position of the 9th and 12th and 19th respondents, the court takes into account all the defences collectively raised by those respondents who have opposed this application. In so doing, the court deals with all defences raised as applicable to all respondents, and does not limit defences to only those respondents who expressly raised them.
10. The applicant's case reduces to the following propositions: the applicant is the owner of and landlord for the Highpoint building; the 1st to 18th respondents are former tenants and current occupiers of apartments ("the affected apartments") in the Highpoint building; as a consequence of a so-

called rent boycott, the tenants and occupants of the affected apartments have not paid rentals since dates varying from 2011 to 2017; the applicant treated this as a repudiation and terminated the lease agreements for the affected apartments on 4 June 2021; the tenants or occupants of the affected apartments remain in occupation, but continue not paying rentals; the applicant instituted this application on 21 June 2021 within two weeks of the cancellation, and seeks the ejection from the affected apartments of the named respondents and any unnamed persons holding occupation of the affected apartments through them (i.e. the “19th respondent”).

11. *Prima facie* the applicant makes out a valid case for ejection of the 1st to 18th respondents and any other occupiers, from the affected units. It is necessary, however, to consider the defences raised by the respondents. This judgment proceeds to do so.

That the applicant is obliged to comply with a subsidy agreement between the applicant and the Gauteng Provincial Department of Housing

12. The founding affidavit discloses that during June 2003, the applicant applied for an institutional subsidy in terms of chapter 6 of the National Housing Code, a copy of the then current version of which is annexure “FA-3” to the founding affidavit.

13. The application was successful, and the applicant concluded a written subsidy agreement with Provincial Housing Department on 25 October 2005. The agreement is annexure “FA-5” to the founding affidavit.
14. Despite the subsidy agreement’s five-year term, the Department repudiated the subsidy agreement during 2008 and the applicant cancelled the subsidy agreement in 2008 before the end of its five-year term.
15. The respondents admit their rent boycott, but state that they were entitled to stop paying rentals, *inter alia* because they either did not get ongoing subsidised rentals or an option to purchase their units after four years, in accordance with their perception of the National Housing Code and the subsidy agreement.
16. Chapter 6 of the National Housing Code, however, neither obliges the applicant to charge subsidised rentals in perpetuity, nor to provide occupiers of subsidised properties with options to purchase the properties.
17. As appears from section 6.2.4.2. of the Code, the subsidised institution must grant beneficiaries secure rights of tenure, which may include lease, instalment sale, share block or individual ownership after four years.

18. Section 6.2.4.3 of the Code confirms that “*tenure in the form of lease shall be with or without an option to the beneficiary to purchase the property*”. Such an option is clearly not compulsory. As pointed out by the applicant, such an option was not possible in respect of units in the Highpoint building, because those units are neither subdivided nor part of a sectional title scheme, and therefore could not be sold individually to their occupiers.
19. It is sufficient for compliance with these sections if the applicant grants subsidised leases without an option to purchase after four years, which the applicant did during the period up to termination of the subsidy agreement.
20. While section 3.4 of the agreement states rentals applicable to bachelor and two-bedroomed units, section 3.5 expressly provides that those rentals may escalate annually by no more than the applicable inflation rate.
21. On the basis that the applicant terminated its agreement with the department following repudiation by the department, there is no basis for treating the National Housing Code and subsidy agreement as applying to the Highpoint building after the date of cancellation.

22. Thus, the agreement between the applicant and the department contains no terms which support the respondents' contentions.
23. Moreover, it is apparent that the Highpoint building as a whole provided accommodation for tenants in two broad categories: those who were entitled to subsidised rentals and those who were not so entitled. The named respondents have not produced evidence that they were ever registered as beneficiaries of the subsidy scheme, or entitled to insist on subsidised rentals.
24. It follows that the named respondents have no justifiable cause for complaining that the applicant has deprived them of any entitlement to either subsidised rentals or options to purchase their units after four years.
25. Even if that were the case, the named respondents' individual lease agreements do not contain any terms to that effect, and there can be no contractual basis for the named respondents to lawfully cease paying rentals on the basis of an alleged breach of a contract between the applicant and a third party in the form of the department, rather than between the applicant and the individual tenants.

26. It must follow, therefore, that the named respondents repudiated their lease agreements by embarking on a rent boycott and refusing to pay rentals, and the applicant was entitled to terminate their lease agreements, as it did.
27. As the Code and the subsidy agreement do not oblige the applicant to grant subsidised rentals in perpetuity, or sell individual units after four years, the defence that the named respondents are contractually entitled to such benefits as beneficiaries under a *stipulatio alteri*, is inherently without merit. The named respondents cannot accept non-existent rights under the agreement between the applicant and the department, and there is in any event no evidence supporting the named respondents' acceptance of benefits as third parties to a contract between the applicant and the department.

That the prior pending litigation between the parties renders this application vexatious and gives rise to the defence of *lis alibi pendens*

28. The respondents allege that there has been prior litigation between the same parties, with the same subject matter, and in particular that the applicant instituted a pending 2016 application for ejection.
29. The 1st respondent alleges a 17 October 2012 application initiated by the respondents against the applicant, before the Rental Housing Tribunal. The 1st

respondent also alleges two applications by the applicant before this court, commencing in 2014 and 2016.

30. Case number 40562/2014 was between the applicant and the Gauteng Provincial Department of Housing, in which the disputed issue was the validity of the subsidy agreement. This clearly does not give rise to a defence of *lis pendens* in this matter, as the subject matter was not the same.

31. In case number 35016/2016, the applicant applied for the eviction of the respondents' and other residents. On 22 May 2017 the 2016 and 2014 applications were consolidated, and the respondent took the stance that the applicant is precluded from proceeding with this ejection application because the 2016 ejection application remains unfinished.

32. As stated by the Western Cape High Court Full Bench in Belmont House (Pty) Ltd v Gore and Another NNO 2011 (6) SA 173 (WCC), a court will only stay proceedings which are vexatious or an abuse of the process of the court; even then the court has a discretion; and in the absence of vexatiousness a court will not suspend an eviction order on equitable grounds pending the finalisation of related matters.

33. The only prior pending matter which arguably satisfies the requirements for *lis pendens* is the pre-consolidation 2016 application for ejectment. It is not necessary for this court to consider matters relevant to vexatiousness and a discretionary stay of proceedings, however, because during argument of the present application on 22 November 2022, the applicant delivered a notice of withdrawal of its 2016 ejectment application against all eighteen of the present named respondents.

34. Since the notice of withdrawal put an end to any prior litigation that may have given rise to a valid defence *lis alibi pendens*, that defence cannot succeed.

That the applicant has failed to join the Gauteng MEC for the Department of Human Settlements, and the Social Housing Regulatory Authority

35. The respondents raise this defence on the basis that the ongoing application of the subsidy agreement and the Social Housing Regulations, necessitate the joining of the Social Housing Regulatory Authority (“SHRA”) and the Gauteng MEC.

36. The applicable test is whether the MEC and the SHRA have direct and substantial interests in the subject matter of this application, in the sense of a legal interest in the subject matter which may be prejudicially affected by the

judgment of the court. See in this regard South African History Archive Trust v South African Reserve Bank 2020 (6) SA 127 (SCA) at para 30.

37. Any interest that the MEC or the SHRA may have had in the outcome of this application would only have arisen from the existence of the subsidy agreement. The subsidy agreement, however, was cancelled approximately fourteen years ago in 2008, and there is no basis on which the MEC and the SHRA can be considered to have had a direct and substantial interest since then.

38. There is accordingly no merit in the non-joinder defence.

That the applicant is not the owner of the property

39. The applicant alleges that it is the registered owner of the property, and annexure “FA-2” to the founding affidavit is a WinDeed Deeds Office property search for the property – Erf 5219, Johannesburg Township, Registration Division IR - showing that Wingprop (Pty) Ltd purchased the property on 2 August 1993 for a purchase price of R16 900 000 and was registered as the owner on 24 October 1996.

40. The respondents raise the objection that the applicant's 2002 company registration number disproves the applicant's ownership, because a company with a 2002 registration number could not have purchased a property in 1993 or become the registered owner in 1996.

41. In its replying affidavit to the 2nd and 4th - 18th respondents, however, the applicant refers to a company report showing that it was registered as a close corporation in 1988, and converted to a private company in January 2002, for which reason its company registration number contains the year 2002. Annexure "RA-3" to this replying affidavit is a WinDeed Company report which confirms that the applicant company was previously a close corporation with registration number 1988/023485/23, which is consistent with the applicant's evidence.

42. Annexure "RA-1" to the replying affidavit is a copy of the title deed for Erf 5219, showing that the property was transferred to Wingprop CC CK88/023485/23 on 24 October 1996.

43. Accordingly, there is no merit to the defence that the applicant is not the owner of the Highpoint building.

That the applicant fails to comply with its obligations as landlord to provide maintenance and services in the building

44. The respondents allege that the building is in a state of disrepair, and that this entitles them to not pay rentals.
45. In paragraph 88 of the founding affidavit, the applicant states that about 60% of the units at the Highpoint building are in default of rental payments. In paragraph 87, the applicant states that it has sustained a loss of close to R38 million as a consequence of these non-payments.
46. The applicants' inability to satisfactorily maintain the building is unsurprising, considering this default in rent payments.
47. Up to the cancellation of their leases, the named respondents were obliged to pay rent in advance every month, but failed to do so. On this basis, they are not entitled to raise the defence that the applicant has failed to comply with any contractual obligation to provide maintenance and services in return for rental. Such a contractual defence is in any event inherently inapplicable after the cancellation of the leases.
48. Under the circumstances, this defence cannot succeed.

That the application is subject to irresolvable disputes of fact

49. There are no material disputes of fact. The evidence shows that the applicant is the owner of the Highpoint building, that the named respondents were previously lessees of their units in the building, and that they individually stopped paying rentals between 2011 and 2017 under a so-called rent boycott. The respondents do not dispute the rent boycott, but state that their substantive defences mentioned above give them a right not to pay rental.
50. As the rent boycott led to a lawful cancellation of the eighteen leases by the applicant, the eighteen respondents and any persons occupying their formerly leased units through or under them, are not entitled to retain occupation and are unlawful occupiers as defined in the PIE Act: “*A person who occupies 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 ...*”.

The Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998 (“the PIE Act”)

51. As stated in paragraph 1 of the judgment in Ndlovu v Ngcobo; Bekker and Another v Jika 2003 (1) SA 113 (SCA), the PIE Act “*gives ‘unlawful*

occupiers’ some procedural and substantive protection against eviction from land.” The Act defines “*land*” as including a portion of land.

52. Section 4(2) of the PIE Act requires that “*At least 14 days before the hearing of the proceedings contemplated in subsection (1), the court must serve written and effective notice of the proceedings on the unlawful occupier and the municipality having jurisdiction.*” Subsection 4(1) states that the provisions of section 4 “*apply to proceedings by an owner or person in charge of land for the eviction of an unlawful occupier*”. Section 4 is accordingly applicable to this application.

53. On 22 March 2022, this court granted the applicant an order under section 4(2). The order authorises service of the applicant’s notice under section 4(2). Such service was duly effected.

54. Section 4(6) of the PIE Act states that “*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, disable persons and households headed by women*”.

55. In paragraph 17 of the Ndlovu judgment, the Supreme Court of Appeal clarified the meaning of section 4(6) of the Act, and of section 4(7) which applies if an unlawful occupier has been in occupation for more than six months when the proceedings are initiated. Simply put, “*the period of the occupation is calculated from the date the occupation becomes unlawful*”.
56. The applicant’s demands for payment from the eighteen named respondents on 22 February 2021, did not elicit payment from the respondents and the applicant terminated the eighteen named respondents’ leases on 7 June 2021 as it was entitled to do.
57. 7 June 2021 is accordingly the date on which the eighteen named respondents’ occupation became unlawful, and the same applies to any persons occupying their units through or under them. The application was served on 21 June 2021, less than six months later, and section 4(6) of the PIE Act is applicable.
58. In Teaca Properties (Pty) Ltd and Others v Banza and Others [2018] JOL 39867 (GJ), the facts before Kathree-Setiloane J were similar to the facts of this matter in that the unlawful occupants had deliberately embarked on a rent boycott. Kathree-Setiloane J found those occupants to have organised

themselves into a militant body that took the law into its own hands, and applied Ngqykumba v Minister of Safety and Security 2014 (5) SA 112 (CC) [at 21] in finding this sort of conduct repugnant to constitutional values and the rule of law. The same finding is unavoidable in this application.

59. The court in Teaca Properties applied section 4(6) of PIE. Kathree-Setiloane J took into account that the boycotters' conduct had deprived their property owner of a revenue stream, that they were on their own admission people who were able to pay rent but had deliberately not done so after embarking on their rent boycott, and that the question of homelessness did not arise.

60. In this application, none of the respondents have alleged that eviction will render them homeless, and there is therefore no obligation on the 20th respondent to provide temporary shelter or alternative housing. In any event, that obligation only arises in respect of persons who find themselves in an emergency housing situation that they are unable to address, for reasons beyond their control. In this instance, the reasons are within the named respondents' control as they deliberately embarked on a rent boycott. See City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another 2012 (2) SA 104 (CC) para 27; and City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others 2012 (6) SA 294 (SCA) para 47

61. The respondents in this matter have not made out any case that they or their dependants are women, children, the elderly or disabled persons whose rights to shelter would be violated if evicted.
62. The conduct of the named respondents in refusing to pay rent for many years, together with similar conduct from other rent boycotters in the Highpoint building who are not respondents in this application, has obviously severely reduced the applicant's ability to maintain the building, leading to a deterioration of conditions in the building. That inevitably has an adverse effect on conditions for those tenants who have not joined the rent boycott but continue paying their rentals.
63. Taking all these factors into account, it is just and equitable that an eviction order be granted.
64. The court also needs to consider what constitutes a just and equitable time for the eviction order to take effect. The court is mindful that at this time of the year, Christmas and New Year public holidays occur and many potential providers of alternative accommodation may be taking their end of year holidays. For this reason, the 30-day period requested by the applicant is insufficient. The court considers it just and equitable that the eviction order

take effect on 31 January 2023, and the applicant's counsel has sensibly agreed to this.

65. Under these circumstances, the court's order is as follows:

65.1. The 1st to 18th respondents and any persons in occupation by, through or under them are evicted from the property situated at Units 1801, 2803, 1907, 501, 602, 806, 1108, 1308, 1402, 1410, 1707, 1911, 2004, 2207, 2210, 2311, 2503 and 2603 of the Highpoint Building, corner Klein and Kotze Streets, Hillbrow, Johannesburg, described as Erf 5219 Johannesburg Township, Registration Division I.R., Johannesburg, Gauteng;

65.2. The 1st to 18th respondents and all persons in occupation by, through or under them are ordered to vacate these units on or before Tuesday 31 January 2023;

65.3. In the event that the 1st to 18th respondents and all those occupying the units by, though or under them do not vacate the property by 31 January 2023, the Sheriff of the Court or his lawfully appointed deputy is authorised and directed to evict them from the units;

- 65.4. The 1st to 18th respondents and all those occupying the property by, through or under them are interdicted and restrained from reoccupying the Highpoint building upon their eviction therefrom;
- 65.5. The 1st to 8th, 10th and 11th, and 13th to 18th respondents are ordered to pay the applicant's costs of the opposed application, jointly and severally;
- 65.6. The 9th and 12th respondents are ordered to pay the applicant's unopposed costs, jointly and severally;
- 65.7. The applicant's attorneys are to forthwith serve this judgement and order on the 1st, 3rd, 9th and 12th respondents either personally or by delivery to the units occupied by them.

KEMACK AJ

ACTING JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION OF THE HIGH COURT,

JOHANNESBURG

COUNSEL FOR APPLICANT: Adv C van Der Merwe

ATTORNEY FOR APPLICANT: Vermaak Marshall Wellbeloved
Inc.

1ST RESPONDENT: In person

COUNSEL FOR 2ND & 4TH - 18TH RESPONDENTS: Mr Gaju

ATTORNEY FOR 2ND & 4TH - 18TH RESPONDENTS: Sudeshnee
Naidoo Attorneys

DATE HEARD: 22 November 2022

DATE OF JUDGMENT: 12 December 2022