IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 22/15178

Date of hearing: 24 October 2022

Date delivered: 28 October 2022

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO

(3) REVISED

…… ……

DATE SIGNATURE

In the matter between:

MBALI PHIRI	First Applicant
HEAVY CHUKWU	Second Applicant
KABAMBA KANYIANDA	Third Applicant
MOSES MWAPE	Fourth Applicant
And	
NATIONAL SAVINGS AND INVESTMENTS (PTY) LTD	First Respondent
THE SHERIFF OF THE COURT, BOKSBURG	Second Respondent

JUDGEMENT

Coram: Bekker, AJ:

INTRODUCTION

1. This application serves before me on the extended return date of a *rule nisi* order that was issued by this court on 26 April 2022 by my brother Wright, J, pursuant to an urgent application brought by the first applicant on the same date. The urgent application, for the granting of a spoliation order and a temporary interdict, was obtained by the applicants in this court in the absence and without the knowledge of the first respondent.

2. The first applicant in this application was the only applicant who was cited by name in the notice of motion, while the words "OTHER APPLICANTS" appear below the first applicant's name thereon. The order reads as follows:

> *"1. A rule nisi is issued, returnable on 8 August 2022, calling upon the Respondents to show cause why the following order should not be made final:*
>
> *"1.1 The Respondents are ordered immediately to restore the Applicants, Mbali Phiri, Heavy Chukwu, Moses Mwape and the children of the aforegoing immediately to unit 150, unit 237, unit 213 Eveleigh Estate, Edgar Road, Boksburg respectively.*

1.2 The Respondents are ordered not to disconnect the electricity at any of these units.

2 Pending the return day, the contents of paragraph 1.1 and 1.2 above operate with immediate effect.

3 Costs reserved."

3. On 8 August 2022 the return date of the *rule nisi* was extended by agreement between the parties to 24 October 2022, and the matter was set down on the opposed interlocutory roll for this week.

Background and context

4. The history of this matter is that the first respondent purchased units 150, 213 and 237, Eveleigh Estates, during 2016, being three separate residential units in a housing estate in Boksburg. At the time of the relevant sales the applicants were residing in these units, albeit without valid leases or consent entitling them to occupation in the respective units.

5. During 2017 registration of transfer of all three units was effected into the first Respondent's name, in consequence of which the first respondent became the registered owner of the three properties. Despite the first respondent's right as owner to the full use and enjoyment of its properties, the first respondent was, and remains, unable to obtain occupation and possession of any of the three

units by reason of the applicants and those residing with them remaining in unlawful occupation of the respective units.

6. None of the applicants were able to advance any valid right, entitlement or reason for finding themselves in occupation of the premises. The first applicant annexed a document to her founding affidavit bearing the name of a known estate agency, but the document appears to have been falsified.

7. In this regard, a rental manager of the particular agency stated convincingly in her confirmatory affidavit to the first respondent's answering affidavit that it was not that agency's lease agreement, that the purported agent did not work for the agency, that any enquiries for rentals in Boksburg would not have been dealt with by the agency's Pinetown office. She also advanced other reasons to show the falsity of the document produced by the first applicant by means of her founding affidavit.

8. The applicants have accordingly been unable to show any right or entitlement that would entitle them to lawfully occupy the units to the exclusion of the first respondent's right to the use and enjoyment thereof as owner of these units. The applicants' respective occupation of the said three units was therefore unlawful, as the first respondent had become entitled in law to the occupation, use and enjoyment of the three units, subject, in principle, to any earlier or stronger rights of possession that the occupants may be able to show.

9. During 2017 and 2018 the first respondent launched three separate eviction applications in this Court under case numbers 2018/11666, 2017/27841 and 2017/27767, seeking the granting of eviction orders against the unlawful occupiers of units 150, 213 and 237. The first respondent (as applicant) cited named the individual persons as respondents in the respective applications, while the last respondent in each such application was cited as "*The Unlawful Occupants of Unit … Eveleigh Estates*."

10. On 1 August 2019 this Court granted three eviction orders under the above-mentioned case numbers in relation to each of the three units, granting the unlawful occupiers until 1 October 2019 to vacate the units. All three eviction applications were opposed by the applicants through their legal representatives at the time.

11. The eviction orders that were granted on 1 August 2019 were issued against the applicants as well as against "*The Unlawful Occupants of Unit* [_] *Eveleigh Estates*". The similarly-worded worded orders read as follows (the respective unit numbers and the names of the respondents cited being omitted, for practicality):

> *"1. The* […] *respondents, and all persons holding under them, being the Unlawful Occupants at Unit* […] *… are evicted from the property.*
>
> *2. The* […] *respondents vacate the property on/or before 1 October 2019, failing which, the Sheriff, or his lawful deputy, for the area within which the property is*

situated is authorised to evict the […] *respondents and all persons holding under them.*

3. […] *respondents to pay the costs of this application."*

12. During October 2019 the applicants launched three separate applications, seeking the rescission of the eviction orders that were granted against them on 1 August 2019. The first respondent opposed these applications, and as a result all three these applications were dismissed on 15 June 2020, on 2 September 2020 and on 17 February 2021 respectively. According to the first respondent, the COVID-19 regulations prevented it from executing upon the warrant, the first respondent was only able to execute the eviction orders granted in its favour as from April 2022.

13. The eviction order that was granted against the third and fourth applicants in this application, relating to unit 213, was executed during April 2022. At the time of executing the order the sheriff found the premises to be unoccupied and empty, evidently having been vacated by the third and fourth applicants who previously resided there. The state of the rooms inside the unit, as appears from photographs that were taken at the time of executing the warrant, show that the unit had been vacated by its occupants and that it was empty at the time, with no sign that anybody lived there.

14. When the eviction order was served on the unlawful occupants of unit 150, the first applicant was also not present at the unit. The sheriff similarly found the

premises to be unoccupied and empty, having been fully vacated. This is also borne out by a set of photographs which is accompanied by a confirmatory affidavit from the photographer that is annexed to the first respondent's answering affidavit.

15. Regarding the execution of the warrant of eviction relating to unit 237, the Sheriff sought to serve the warrant on the unlawful occupier of that unit, being the second applicant. The second applicant was however also not present at the time, and the sheriff duly served the warrant on one Mr Stanley Onyibor, as he was entitled to do in the circumstances.

16. I am satisfied that the service of the warrant on him constituted valid service of the warrant for eviction. Mr Onyibor was the first respondent in the original eviction application relating to unit 237 that was brought under case number 2017/27767, and he would accordingly have been well aware of the eviction order that was granted under that case number on 1 August 2019.

17. Anticipating the impending execution of the warrant of eviction, and on 22 April 2022 (being a few days before the present application was launched on 26 April 2022), the four applicants cited in this application simultaneously launched three urgent applications in this Court relating to units 237, 213 and 150, under case numbers 2022/15255, 2022/15256 and 2022/15257, in which they sought urgent orders from this Court to prevent their eviction from these units.

18. The applicant in the first urgent application in case number 2022/15255, being the first applicant in this application, sought an order to interdict and restrain the first respondent from evicting her from unit 150. The applicant in the second urgent application in case number 2022/15256 is the second applicant herein, while the fourth applicant in this application was the applicant in the third urgent application under case number 2022/15257, in which a similar order was sought.

19. The applicants' three urgent applications were served on the first respondent's attorneys of record on 22 April 2022, and the applications were opposed. The urgent applications last appeared on the urgent roll of this court on 24 May 2022, where it was not entertained by the court. The three urgent applications have however also not been withdrawn by the applicants, and those proceedings are therefore still pending between the parties.

Granting of the rule *nisi*

20. On 26 April 2022 the applicants brought this application as an urgent application in this court under the above case number. As mentioned, the notice of motion falsely purports to have been served on the first respondent, but it was in fact not served on the first respondent nor on its attorneys of record.

21. The urgent court that granted the *rule nisi* order was therefore misled about the notice of motion having been served on the first respondent, and by non-disclosure of the fact that there were other pending legal proceedings between

the parties, in the form of three urgent applications in which substantially similar relief was being claimed by the applicants from the first respondent.

22. The urgent spoliation application proceeded in the absence of opposition by the first respondent, and a rule *nisi* order was granted by the urgent court against the first respondent on the same day, on an unopposed basis.

23. The first respondent's attorneys only became aware that an order had been granted against their client some two days later and they struggled for another day to obtain a copy of the application and of the order. In terms this order the first respondent was ordered to show cause on 8 August 2022 why the *interim* order should not be made final, as appears more fully from the wording of the order referred to above. That is what serves before this court.

24. It is to be noted from the terms of the rule *nisi* order that, unless discharged, it would have a permanent and enduring effect. If the order were to be confirmed, it would of necessity mean that the first respondent is forever deprived of its right to possession and occupation of the respective units. In addition, confirmation of the order will result therein that the applicants, who are unlawful occupiers of the units, may continue to reside permanently in these units free of charge, whilst the first respondent remains obliged by order of court to continue paying their electricity bills. This is the factual situation has prevailed for the past few years.

25. Subsequent to the eviction order being granted against the Applicants on 1 August 2019 they unsuccessfully attempted to rescind the order, but their rescission applications were dismissed. The eviction order of 1 August 2019 therefore stands and it should be given full effect to. In terms thereof, the unlawful occupiers, which include the applicants, had to vacate the respective units on or before 1 October 2019.

26. In my view, the doctrine of effectiveness and the proper administration of justice will best be served by enforcing the provisions of the eviction order. The series of urgent applications were evidently brought by the applicants simply with a view to frustrating the first respondent's valid and lawful attempts to execute upon an order of this court, thereby prolonging their sponsored stay.

27. For various reasons as mentioned herein, it appears to me that the applicants have resorted to improper measures in their collective endeavours, which were designed to ensure that their unlawful rent-free occupation of the units with free electricity being provided continues for as long as possible, if not indefinitely.

28. The rule *nisi* order can clearly not be confirmed, and I do not intend doing so. It is a trite principle of our law that a person is not allowed to benefit from his own unlawful conduct, and it will in my view be incongruous to allow the current situation to continue. It would make a mockery of justice and would operate to unjustly deny the first respondent, as owner, of its right to full possession,

occupation and enjoyment of its property, whether for the owner's own use or to rent it out to the market in order to earn income therefrom.

Lis alibi pendens

29. The three urgent applications launched by the Applicants comprise pending litigation between the same parties, being based on the same cause of action and in respect of the same subject matter - namely the eviction orders against them that were granted on 1 August 2019. The first respondent raised a special plea *in limine*, contending that this application and the three urgent applications are *lis alibi pendens*.

30. I find that the institution of the present application by the Applicants, in circumstances where three urgent applications for essentially the same relief are pending in this court in fact renders this application *lis pendens*. (see: Caesarstone Sdot-Yam v The World of Marble and Granite 2000 CC and others [2013] 4 All SA 509 (SCA)).

31. The required elements are indeed present. Accordingly, a factual presumption arises in law that the second proceedings are *prima facie* vexatious. The three urgent applications were instituted earlier in time, and taking into account certain peculiar and disturbing features of this matter, I find that the present application by the Applicants is in fact vexatious. No request was made during argument by either counsel for this application to be stayed.

32. Notably, the fourth applicant's affidavit that is annexed to the first applicant's founding affidavit in this application has not been signed or deposed to in front of a commissioner of oaths. The fourth applicant has therefore not placed any affidavit or case before this court, and it appears to me that the fourth applicant is properly before this court as a co-applicant.

33. Apart from the falsified lease agreement that the first Respondent relies on, a further peculiarity in the founding affidavit of the first applicant is the allegation made by her to the effect that on 25 April 2022 she received from the registrar of this court a document (designated as annexure "EV2" to the founding affidavit, but not annexed thereto or uploaded onto Caselines) "*to explain the invalidity of the order on behalf of the Applicant*". In addition, the copy of the court order that is attached to the first applicants' founding affidavit appears to have been partially obfuscated.

PIE

34. The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998 ("PIE") is regulatory in nature, it does not divest an owner of its property. Instead, it provides a basis upon which the judiciary can and must regulate the exercise of the owner's proprietary right to possession against an unlawful occupier in a manner that, as far as practically achievable, remains consistent

with the Bill of Rights and the Constitution. (see: Standard Bank Ltd v Hunkydory Investments 188 (Pty) Ltd and Others [2009] 4 All SA 448 (WCC).)

35. Considering that a court may, in appropriate circumstances, stay or suspend an eviction order so as to give a tenant a reasonable time to vacate the premises. (see Lan v OR Tambo International Airport Department of Home Affairs Immigration Admissions and Another 2011 (3) SA 641 (GNP)) I am enjoined to exercise this discretion by taking into account the commercial realities underlying the balancing of the parties' competing interests. If the immediate execution of an eviction order will result in the particular occupants' financial ruin, the interest of justice will demand that the eviction order be stayed for a suitable period of time to afford the occupant an opportunity of finding suitable alternative premises.

36. Section 4(8) of the PIE Act provides for the order that the court must grant if it is satisfied that all the requirements of section 4(8) have been complied with and that no valid defence has been raised by the unlawful occupier. The court is then obliged to make an order for the eviction of the unlawful occupier and to determine a just and equitable date on which the unlawful occupier must vacate the land under the circumstances, and the date on which an eviction order may be carried out if the unlawful occupier has not vacated the land on the said date.

37. Section 4(9) provides that, in determining a just and equitable date contemplated in subsection (8), the court must have regard to all relevant factors, including the period the unlawful occupier and his or her family have resided on the land in

question. The court is enjoined by the PIE Act to determine a just and equitable date on which the unlawful occupier must vacate the land, and the date on which the order may be executed if the property is not vacated timeously. In exercising its discretion, a court should have regard to all relevant factors, including the time that the unlawful occupier and his or her family have resided on the land in question.

38. These considerations were presumably taken into account by the court when the eviction order was made, when a period of two months was granted to the applicants and other unlawful occupiers to vacate the units. The applicants failed to comply with that court order and have failed to permanently vacate the units. At some stage before the sheriff arrived to evict the applicants from the units they evidently vacated the units. None of them were to be found at the units when the warrants were served by the sheriff.

39. At some stage after service of the warrant for eviction the applicants and those living with them must have moved back into the respective units, thereby re-taking occupation and possession of the respective units afresh. Such conduct was again unlawful, save that this time it also occurred in direct contravention and flagrant disregard of the eviction orders that were made against the applicants.

40. Since the present application was launched on 26 April 2022 for a rule *nisi,* and with the return date of 8 August 2022 pending, the applicants have had several

months in order to organise their affairs. However, they have remained rent-free in unlawful occupation of the units and have evidently been focusing their efforts on frustrating the first applicant's eviction orders in concerted fashion, while both obstructing and abusing the processes of this court.

41. Counsel for the first respondent contended, on the strength of Occupiers of Erven 87 and 88 Berea v De Wet NO and Another (Poor Flat Dwellers Association as Amicus Curiae) [2017] JOL 38039 (CC), at [63] – [67], that the effect of PIE is not and should not be to effectively expropriate the rights of the landowner in favour of unlawful occupiers. The landowner retains the protection against arbitrary deprivation of property. PIE should serve merely to delay or suspend the exercise of the landowner's full property rights until a determination has been made whether it is just and equitable to evict the unlawful occupiers and, if so, under what conditions.

Spoliation

42. Turning now to a consideration of the applicants' allegation that they were unlawfully deprived of their peaceful and undisturbed possession of the respective units, it is at the outset clear that the execution of the warrant for eviction was performed lawfully, being pursuant to and in accordance with the eviction order that was granted on 1 August 2019. These

43. The eviction having been performed in pursuance of due legal process and in a lawful fashion, the applicants must fail in their reliance on the *mandament* as a

cause of action. (see: George Municipality v Vena 1989 (2) SA 263 (A).) Moreover, the *mandament* does not protect contractual rights and cannot be used to enforce specific performance of a contract. (see: First Rand Ltd t/a Rand Merchant Bank v Scholtz NO 2008 (2) SA 503 (SCA), and ATM Solutions (Pty) Ltd v Olkru Handelaars CC 2009 (4) SA 337 (SCA).)

44. I agree with the submission of the first respondent's counsel that the first applicants' allegation that she, the third applicant and the fourth applicant were in peaceful and undisturbed possession of the relevant units at the time when the warrant for eviction was served, constitutes an admission that they were in fact unlawful occupiers of the units, as specifically contemplated and provided for in the eviction order.

45. It is further trite law that an eviction order made against and occupier includes all his family members, or persons occupying through him, and that separate orders for the ejectment of such persons are not required. Nevertheless, evictions that are undertaken in terms of statutes, such as PIE, require that all unlawful occupiers be cited. (see: Ntai and others v Vereeniging Town Council and Another 1953 (4) SA 579 (A) at 584 and 590.)

46. There is a further reason to distrust the applicants' version – according to an affidavit by a trustee of the Eveleigh Estate Body Corporate, no "movement control form", which all new occupants are required to complete when they take occupation of the property, were submitted to the Body Corporate, either by any

of the applicants or by anybody else in relation to units 150 and 213. The second applicant resides unlawfully in unit 237, together with the said Mr Onyibor.

47. I have referred above to the falsified purported lease agreement pertaining to unit 150 that the first applicant produced in an endeavour to show the existence of a valid lease that would entitle her to occupation of unit 150. In any event, and even if the lease had been valid and genuine, the lease would, according to its own terms, have terminated due to effluxion of time on 1 April 2022 already. It therefore does not assist the first respondent, instead it demonstrates her lack of *bona fides.*

48. I therefore find that the applicants have not succeeded in discharging their *onus* of establishing any right or entitlement to their continued occupation of the relevant units. I further find that the applicants have not established *bona fide* defences, by advancing grounds evidencing that it would not be just and equitable to evict them from the units, as required by the relevant provisions of the PIE Act. The personal circumstances of the first applicant can hardly be described as remarkable, whilst there is no evidence before me regarding the personal circumstances of any of the other applicants.

49. It was, in my view, incumbent upon the applicants to adduce facts relating to the ages, gender, relationship of the persons occupying the property, the extent to which they are financially dependent on one another, their respective financial positions, sources of income and income and expense statements, full particulars

of their assets and liabilities, full details of their health situation and disabilities (and how these factors may have a bearing on their ability to relocate) and facts relating to the availability of alternative accommodation.

50. Moreover, the applicants were required to furnish the date from which they unlawfully occupied the units and all surrounding facts regarding the manner and the period of occupation, as well as all other facts that may have a bearing on their ability to find alternative accommodation. (see: Chetty v Naidoo 1974 (3) SA 13 at 20 (C).)

51. It was held by the Supreme Court of Appeal in the matter of City of Johannesburg v Changing Tides 74 (Pty) Ltd 2012 (6) SA 294 (SCA) that the availability of alternative accommodation is less relevant where the eviction is sought at the instance of a private landowner, than when an organ of state is the applicant. In an eviction at the instance of a private landowner, the right to property comes into play as private entities cannot be expected to provide free housing for other members of the community indefinitely.

52. As aforementioned, the first applicant failed to place any facts before me in respect of the personal circumstances of the second, third and fourth applicants, specifically regarding the period of time that they would require to find alternative accommodation. On the first applicant's own version, she had paid a deposit of R5,500, and is in a position to pay a monthly rental of R5,500 per month.

Therefore, on her own version, she has the means to obtain suitable alternative accommodation – there are hundreds of similar units.

53. The inference that I draw from the applicant's failure to place their personal circumstances properly before this court is that they are in fact able to afford alternative accommodation of a similar standard, even in the same housing estate. All four of the applicants have enjoyed legal representation throughout the aforementioned legal proceedings, and I am of the view they are in all probability not destitute, nor unable to afford alternative accommodation for themselves and for those residing with them.

Determination of a date

54. Counsel for the first respondent also relied on the Occupiers decision (supra) in contending that while a court should, when considering whether it is just and equitable to grant an eviction order, be guided by the spirit of *ubuntu*, grace and compassion, but that this does not mean that "just and equitable" trumps illegality.

55. In my view, the applicants and those residing with them have been afforded ample time and opportunity to find alternative accommodation. Mindful of their poor prospects of the order being made final on the return day, they should have acted reasonably by finding alternative accommodation in the time available to

them. This they failed to do, instead they appear to be taking their chances on the outcome of this application.

56. I consider that, having regard to the history of this matter, a period of one month would constitute a just and equitable notice period for the applicants and all other unlawful occupiers residing with them to vacate the relevant units.

Costs

57. For reasons mentioned above, I am of the view that the Applicants have not acted in a *bona fide* manner and that their conduct amounts to an abuse of the process of this court. I have already found that the institution of this application was *prima facie* vexatious, in light of the three urgent applications that the applicants instituted days earlier, and which are currently pending in this court.

58. It is further to be noted that the Applicant's attorney, one Ms Mirriam Bareki, sent an email to the first Respondent's attorneys on 23 September 2022, being approximately one month before the hearing, advising that "our office" was no longer acting on behalf of the applicants. The applicants' present attorneys of record came on record on 5 August 2022. It appears from the record that they failed to respond to requests from the first respondent's attorneys to attend a meeting to prepare a joint practice note, and no practice note or heads of argument were filed in this application on behalf of the applicants.

59. In my view, the respondents have shown ample cause why the rule *nisi* order should not be made final, that the applicants and the other unlawful occupiers of the relevant units should restore occupation and possession of the units to the first respondent, and that there is no reason or basis for the first respondent to be paying the electricity accounts for the electricity usage of these unlawful occupiers. The first respondent is further entitled my view to disconnect the electricity at any of these units with effect from 1 December 2022, whether or not such units are occupied at the time, or not.

60. It was contended by the first respondent's counsel, relying upon the decision in Mahomed & Son v Mahomed 1959 (2) SA 688 (T), that the applicants' application is so lacking in arguable merit that its merits an attorney-and-client costs order. For the various reasons mentioned above, I agree therewith.

ORDER:

In the result, I order as follows:

(a) The rule *nisi* order that was issued in this matter on 26 April 2022, returnable on 8 August 2022, is not made final and is hereby discharged;

(b) The applicants and all other unlawful occupiers occupying Units 237, 213 and 150 Eveleigh Estates, Edgar Road, Boksburg, ("the units") are ordered to vacate the units that they are occupying on or before 30 November 2022;

(c) The date on which the eviction orders may be carried out if the applicants and/or other unlawful occupiers of the units have not vacated the relevant units is 1 December 2022, upon which date full and undisturbed possession and occupation of the units must be restored to the first respondent;

(d) The first, second, third and fourth applicants are ordered to pay the first respondent's costs of this application, inclusive of the reserved costs of 26 April 2022, on the attorney-and-client scale.

_____

BEKKER AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION OF THE HIGH COURT,
JOHANNESBURG

ATTORNEYS FOR APPLICANTS:
KAGISO RAKHUBA ATTORNEYS
PRECIOUS MULEYA ATTORNEYS

COUNSEL FOR APPLICANTS: ADV MHLANGA

COUNSEL FOR RESPONDENT: ADV S SCHULENBURG

ATTORNEYS FOR RESPONDENT: LEVINE AND FREEDMAN ATTORNEYS

DATE HEARD: 24 OCTOBER 2022

DATE OF JUDGMENT: 28 OCTOBER 2022