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

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
SIGNATURE	DATE: 4 April 2023

Case No. 52/2023

In the matter between:

JEROME BADENHORST	First Applicant
THE UNLAWFUL OCCUPIERS OF IMMOVABLE PROPERTIES AT PORTION 102 HOLGATFONTEIN 36 IR NIGEL, also known as MACKENZIEVILLE EXTENSION	Further Applicants
and	
CITY OF EKURHULENI METROPOLITAN MUNICIPALITY	First Respondent
THE SHERIFF OF THE HIGH COURT, NIGEL	Second Respondent
SOUTH AFRICAN POLICE SERVICE, NIGEL	Third Respondent
CITY OF EKURHULENI METROPOLITAN POLICE DEPT	Fourth Respondent

---

JUDGMENT

WILSON J:

1 The applicants are the residents of 484 households who took occupation of incomplete state subsidised housing units without the permission of the first

respondent, the City of Ekurhuleni Municipality. The Municipality had developed the units as part of its low cost housing programme. The residents moved in to the units during March 2020. They say that they did so because they had been evicted from backyard dwellings nearby, and they had nowhere else to go.

2 The Municipality applied to this court to evict the residents. On 9 June 2021, my brother Molahlehi J granted an order for the residents' eviction. On 7 December 2021, Molahleli J refused leave to appeal. The residents did not petition the Supreme Court of Appeal, apparently because they lacked the resources necessary to pay for legal representation. In their founding papers, however, they say that they are on the verge of lodging a petition. It is not clear whether they have actually done so.

3 For reasons that are not explained on the papers placed before me, the Municipality sat on the eviction order for over a year after Molahlehi J refused leave to appeal. It took no steps to remove the residents until it sent each of the residents' households a letter, dated 12 December 2022, in which it warned the residents to vacate their homes failing which the eviction order would be executed "at any time" after 31 January 2023.

4 At around 5am on Tuesday 28 February 2023, the Municipality began to execute the eviction order. The residents then applied urgently to me for an interim order staying the eviction pending the determination of final relief declaring that the residents are entitled to alternative accommodation, directing that the Municipality provide such accommodation, and setting out

a process for determining where that accommodation will be situated, and when it will be provided.

5 I was first alerted to the urgent application at around 6am, but the papers did not reach me until 9am. Those papers enrolled the matter for 10am. The Municipality had filed a notice of intention to oppose, but had not filed any answering papers at that stage.

6 When the matter was called at 10am, I asked Mr. Brown, who appeared for the applicants, to establish whether the Municipality had instructed anyone to appear. I stood the matter down to allow Mr. Brown to make enquires. When the matter was called again, Mr. Brown appeared together with Mr. Sithole. Mr. Sithole was not entirely clear on whether or not he had a mandate to act for the Municipality, so I stood the matter down again to allow him to clarify his instructions. After some back and forth, Mr. Sithole confirmed that he acted for the Municipality, and that the Municipality would require until Thursday 2 March 2023 to file an answering affidavit. Accordingly, I stood the matter down until Friday 3 March 2023, and I stayed the execution of the eviction order until then.

7 The parties then exchanged answering and replying papers. It emerged from those papers that the execution of the eviction order had commenced in the absence of the second respondent, the Sheriff. Whatever the merits of the residents' application for interim relief, that in itself rendered unlawful the removals that took place prior to my order staying the execution of the eviction order. I declared as much, and directed that all those who had already been evicted before I stayed the execution of the eviction order be

restored to possession of their homes. My reasons for making that order are embodied in my judgment *Badenhorst v City of Ekurhuleni Metropolitan Municipality* [2023] ZAGPJHC 205 (8 March 2023).

8 I heard argument on Part A of the residents' application, but, having reversed the illegal eviction on the narrow ground of the absence of the Sheriff, I reserved judgment on the application for interim relief, and suspended the execution of the eviction order until I had an opportunity to consider the matter at greater length.

9 Having considered the merits of the application for interim relief, I have come to the conclusion that the application cannot succeed. I say so for the following reasons.

Issues raised in Part B are *res judicata*

10 The residents have brought their application in two parts. The interim relief is sought in Part A. The order declaring that the residents are entitled to alternative accommodation and the associated reporting orders are sought in Part B. It is trite that the Part A relief can only be granted if the residents can show a *prima facie* right to the orders sought in Part B.

11 The problem is that the residents can show no such right. The issue of whether the residents are entitled to alternative accommodation on eviction was placed before Molahlehi J in the main eviction application. Molahlehi J made an order evicting the residents. The Judge chose not to direct that the residents be given alternative accommodation. It appears from his judgment that he considered that this would encourage the unlawful occupation of

other properties in similar circumstances, and that this would imperil the rule of law.

12 It is beyond the scope of the issues I am seized with to express any view on the correctness or otherwise of these sentiments. What matters is that there is a final order against the residents which requires their eviction *simpliciter*. The issue of whether the residents are entitled to alternative accommodation, on the facts as they stood at the time Molahlehi J made his order, has already been settled. It is not open to me to revisit that issue. But that is precisely what the residents now invite me to do.

13 The residents are alive to these difficulties. It was suggested, in reply, that it is open to me to develop the common law to allow for the variation of an eviction order to provide alternative accommodation where another Judge had declined to do so. This would be a far-reaching development, for which no justification – other than that it would assist the residents in this case – has been provided. In addition, there is already a statutory mechanism through which an eviction order may be varied. I address that mechanism below. The residents do not explain why a development of the common law, which would effectively entail my assumption of appellate jurisdiction over Molahlehi J's order, is justified in circumstances where they have not as yet sought to engage that mechanism.

Variation or appeal

14 The residents' true remedies, such as they are, lie in seeking leave to appeal against Molahlehi J's order, or in seeking to vary the terms of the order on good cause shown under section 4 (12) of the Prevention of Illegal Eviction

from, and Unlawful Occupation of, Land Act 19 of 1998 (“the PIE Act”). It appears that an appeal has not yet been pursued, and I obviously lack the jurisdiction to entertain an appeal against the eviction order.

15 It seemed to me that the possibility of a variation of the order under section 4 (12) of the PIE Act had not been adequately explored in the context of the parties’ necessarily rushed preparations for an urgent hearing. I asked the parties to address me on whether the eviction order ought not to be varied under the PIE Act in light of changed circumstances, given the lengthy and unexplained delay in executing the eviction order.

16 Mr. Sithole argued that section 4 (12) of the PIE Act is not engaged on the facts of this case, since that section only permits the variation of a condition attached to an eviction order. Here, it was argued, the eviction order is unconditional. I put to Mr. Sithole that the date on which the order had to be executed constitutes a condition capable of variation. Mr. Sithole argued that it does not.

17 Whatever the merits of that position, the residents have not applied for a variation under section 4 (12), and their application does not address the question of whether circumstances have changed such that the eviction order should be varied to make provision for alternative accommodation. Nor does the application show “good cause” for such a variation, which is a requirement of section 4 (12). In those circumstances, there is presently no case made out to vary the eviction order under section 4 (12) of the PIE Act in the manner envisaged in Part B of the residents’ application.

18 It follows that the residents have not demonstrated a *prima facie* right to the relief they seek in Part B of their application, and their application for interim relief must fail.

The appropriate relief

19 The fact remains that there is a substantial likelihood that circumstances have changed in the year it has taken the Municipality to execute the eviction order, and that the residents and their legal representatives ought to be given an opportunity to consider whether any new circumstances might justify a variation in the eviction order. Accordingly, although I will dismiss the application for interim relief, it is plainly in the interests of justice that the execution of the eviction order be suspended for a further month, during which the residents, if so advised, will have an opportunity to investigate and consider whether a case under section 4 (12) can be made out, and to take such further steps as they may be advised to take.

20 I also intend to place conditions on the execution of the eviction order once the suspension is lifted. This is necessary to avoid a repeat of the wholly unacceptable conduct of the Municipality after Molahlehi J refused the residents' application for leave to appeal. The Municipality advanced no acceptable reason for its delay in executing the eviction order, or for its failure to inform the residents of the day on which the order would be executed. Section 26 of the Constitution, 1996 requires that eviction orders be executed humanely (*Modder East Squatters and Another v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* [2004] 3 All SA 169 (SCA), paragraph 26). The very least

that requires is due notification of the date and time on which the eviction order is to be executed. The pre-dawn commencement of the eviction on 28 February 2023 was also inhumane and unacceptable. That conduct must not be repeated.

21 My power to further suspend the execution of the eviction order and to impose conditions on the Municipality's conduct in executing it arises from Rule 45A of the Rules of this court, and from section 38 of the Constitution, 1996. The eviction of the residents is a constitutional matter (*Machele v Mailula* 2010 (2) SA 257 (CC), paragraph 25), and the residents have approached me in order to address a threat to their rights to housing and to dignity.

22 Section 4 (12) of the PIE Act also permits a court to place reasonable conditions on the execution of an eviction order. While the applicants have not been successful in obtaining the orders they originally sought, the suspension of the eviction order and the conditions I will place on its execution are plainly reasonable, in that they constitute appropriate relief necessary to protect the residents' constitutional rights on the facts currently disclosed on the papers. Whether the residents are entitled to further relief, and what that relief is, depends on the further facts that may be adduced in an application to vary the eviction order under section 4 (12) of the PIE Act, if such an application is brought.

Costs

23 I have already observed that this application, being concerned with evictions from homes, is a constitutional matter. That in itself would render a costs

order against the residents inappropriate. But I would in any event have deprived the Municipality of its costs as a mark of my displeasure at the wholly unlawful and inappropriate manner in which it went about executing the eviction order, after such a long, unexplained delay.

Order

24 For all these reasons, I make the following order –

24.1 The relief sought in Part A of the application is refused.

24.2 The execution of the eviction order of Molahlehi J, dated 9 June 2021, is suspended until 5 May 2023.

24.3 The eviction order may not be executed thereafter unless and until the applicants have been given at least two weeks' notice of the date on which execution of the order is to commence. That notice may be given, at the earliest, on 5 May 2023.

24.4 The eviction order may not be executed before 8am or after 4pm.

24.5 Each party will pay their own costs.

.

S D J WILSON
Judge of the High Court

This judgment was prepared and authored by Judge Wilson. It is handed down electronically by circulation to the parties or their legal representatives by email, by

uploading it to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 4 April 2023.

HEARD ON:	3 March 2023
DECIDED ON:	4 April 2023
For the Applicants:	D Brown Chris Billings Attorneys
For the First and Second Respondents:	E Sithole Instructed by Lebea Inc