REPUBLIC OF SOUTH AFRICA

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

CASE NO: 2018/31110

[1] REPORTABLE: NO

[2] OF INTEREST TO OTHER JUDGES: NO

Date: 19 June 2019 **JUDGE L T MODIBA**

In the matter between:

10 & 10a Kenmere CC

(Registration Number: 1991/030784/23) Applicant

and

Ndebele, Zandile P First Respondent

Ntozini, S Second Respondent

Khumalo, M Third Respondent

Msani, C T Fourth Respondent

Majola, N S Fifth Respondent

Ngwenya, S Sixth Respondent

Ntombiyosizi Nkomo First Intervening Party

Sandile Jaca	Second Intervening Party
Liberty Fighters Network	Third Intervening Party

J U D G M E N T

Modiba, J:

INTRODUCTION

[1] The applicant seeks an order for the eviction of the 1st to 6th respondents from units respectively occupied by these parties at […] Flats, Belleview, Johannesburg ("*the property*").

[2] Initially, the applicant brought the application in the ordinary course. On 1 March 2019, the applicant supplemented its papers to bring the application on an urgent basis.

[3] Three interveners Ntombiyosizi Nkomo, Sandile Jaca and Liberty Fighters Network ("LFN") seek to intervene. They contend that the 4th and 6th respondents do not occupy units 1 and 3 as alleged by the applicant. These units are occupied by the 1st and 2nd intervening party.

[4] The applicant does not oppose the intervention application. The intervention of the 1st and 2nd intervening party on the basis of their occupation of the aforesaid units is proper. It stands to be granted.

[5] In an answering affidavit deposed to by De Beer, LFN is described as a voluntary tenant's association as envisaged in the Rental Housing Act.[1] With the exception of the 4th and 6th respondent, the rest of the respondents and the intervening parties are its members. The LFN seeks to intervene in these proceedings in a representative capacity. It also seeks leave of the court to be represented by its President, De Beer, in these proceedings. The applicant does not oppose this request. The intervention application stands to be granted. So is the request that De Beer represents LFN.

[6] The application is only opposed by the cited LFN members. For convenience, I refer to these parties as the opposing respondents.

[7] The 4th and 6th respondent are not opposing the application. I refer to them jointly as the non-opposing respondents and individually as the 4th and 6th respondent. On the applicant's version the non-opposing respondents are still in occupation of the property according to the rental schedule. They were duly served with the application as well as the section 4 (2) notice. The opposing respondents have not established their authority to make submissions on behalf of the non-opposing respondents. If the opposing respondents' version is true, I see no reason why the non-opposing respondents did not oppose their eviction on the sole basis that they are no longer in occupation of the property. Therefore application stands to be determined on the applicant's version in respect of the status of the non-opposing respondents.

[8] The applicant seeks the joinder of the 4th intervening party ("*De Beer*") due to his alleged contravention of the Legal Practice Act 28 of 2014 ("*the LPA*").

[1] Act 50 of 1999.

De Beer is an official of the LFN. He drafted the opposing papers on behalf of opposing respondents. He also argued this application in court. It is not the applicant's case that De Beer acted, as aforesaid, in his personal capacity. Therefore, on this issues, a dispute arises from the facts. However, it does not render the application irresolvable on the papers because the applicant's eviction claim does not turn on it. The applicant may refer the matter to the LPC should it wish to persist with these allegations. The Legal Practice Council is in a better position to investigate these allegations.

[9] The applicant has failed to establish that De Beer has a personal interest in the outcome of these proceedings. Therefore the application for his joinder stands to be dismissed.

[10] The basis on which the applicant seeks to evict the occupiers, is its alleged ownership of the property, the occupiers' refusal to pay rental despite demand and their refusal to vacate the property despite notice, as a result of which their occupation has allegedly become unlawful.

[11] The opposing respondents dispute that the applicant is the owner of the property. They contend that they have not entered into lease agreements with the applicant, hence they refuse to pay rental to it. They tender to pay rental to an administrator of the property, if appointed.

[12] The opposing respondents have also raised several points *in limine*. I address these first.

URGENCY

[13] The opposing respondents contend that the application is not urgent.

[14] The applicant contends that the application is commercially urgent. It is a small business entity enduring severe financial losses as a result of the rental boycott and attempted hijacking of the property by the occupiers. It owns only one property and has not yielded a profit for almost a year. It is sustained on its sole member's personal funds. It only receives R8 000,00 per month in rental income from tenants in good standing. The monthly bond repayment on the property is R24 000,00. Rates and services cost R19 000,00 per month. Employees' salaries cost R15 000,00 per month. Consequently, it experiences a monthly shortfall in excess of R50 000,00. It cannot afford to maintain the property. As a result, the property faces the risk of foreclosure or termination of municipal services. It has no access to funding, to finance the monthly shortfall pending the determination of this application in the ordinary course.

[15] Additionally, the applicant complains that the occupiers threatened and harassed its contractors and employees. They also detained the applicant's caretaker at the property for a few hours, insulted, harassed and threatened him. There are illegal electricity connections established at each of the occupiers' units. This places the entire property as well as the occupiers and other tenants' lives at risk. The 3rd, 4th and 5th respondents have denied the applicant or any of its contractor's access to the units.

[16] The opposing respondents barely deny these allegations. Such a response does not constitute a *bona fide* factual dispute.[2] Therefore urgency stands to be determined on the applicant's version.

[17] The applicant has been dilatory in its conduct of the application. The opposing respondents filed their answering affidavit on 28 October 2018. It appears that for a period of almost four months, the applicant took no further steps to advance this matter further. It fails to explain why it delayed to bring this application. This, the court frowns upon. Be that as it may, it is trite that an applicant is not denied an urgent hearing solely because it delayed to bring the application. The ultimate test in respect of urgency is whether the applicant will be denied substantive redress in due course if the application is not heard on an urgent basis.[3]

[18] Commercial urgency has been held to constitute urgency as contemplated by Rule 6 (12).[4] The basis for urgency relied upon by the applicant was successfully relied upon in *Teaca*[5] and *Nyathi*[6]. On these authorities, the financial predicament that the occupiers have placed the applicant in by refusing to pay rental to it and their continued occupation without any financial consideration, renders this matter commercially urgent. Hearing the application in the ordinary course is likely to result in the applicant's financial ruin, thereby denying it substantial redress in due course.

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[2] *Soffiantini v Mould* 1956 (4) SA 150 at 154H, *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634-635 and *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA)

[3] Rule 6 (12), *Luna Meubels Vervaardigers (Edms) Bpk v Makin and Another (t/a Makins Furniture Manufacturers)* 1977 (4) SA 135 (W)

[4] *20th Century Fox Film Corp v Black Films* 1982 (3) 582 (W) at 586

[5] *Teaca Properties (Pty) Ltd and Others v John Banza and Others* (2017/36741) [2018] ZAGPJHC 72 (9 February 2018)

[6] *Nyathi and Others v Tenitor Properties (Pty) Ltd and Others* 2015 JDR 1296 (GJ)

[19] In the premises, I find that the application is urgent.

THE DECISION OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLE'S RIGHTS OF THE AFRICAN UNION

[20] The opposing respondent's reliance on a communication by the African Commission on Human and People's Rights of the African Union ("the ACHPR") to dispute the applicant's allegations regarding the rental boycott as well as the hijacking of the property is misplaced. The ACHPR has not made any determination regarding the LFN's complaint. The ACHPR seems to have accepted the LFN's complaints and gave it two months to submit evidence in substantiation of the complaint.

[21] Further, the proceedings pending before the ACHPR are not an impediment to the determination of this application. The ACHPR decision does not reflect this matter as subject to the LFN complaint to it.

[22] Therefore this point *in limine* stands to be dismissed.

THE RESPONDENT'S RULE 30 NOTICE

[23] On 22 February 2019, the applicant issued Rule 35 (12) and 14(9) notices, calling on the opposing respondents to produce for inspection documents listed in these notices. On the same date, the applicant filed its replying affidavit. The opposing respondents filed their answering affidavit on 28 October 2018. It is

common cause that the replying affidavit was due on or about 12 November 2018.

[24] On 7 March 2019, the respondents issued a notice in terms of Rule 30 objecting to the late filing of the replying affidavit as well as the filing of the Rule 35 (12) and 14(9) notices. The applicant has not complied with the notice in terms of Rule 30. It had to do so on or about 22 March 2019. In terms of Rule 30 (2) (c), the respondents were entitled to bring a Rule 30 application within 15 days of 22 March 2019. The applicant enrolled the urgent application for hearing on 19 March 2019. This court heard it on 22 March 2019 and reserved judgment.

[25] The opposing respondents contend that they are entitled to a determination of the Rule 30 application before this application is heard. I disagree. Nothing precluded them from bringing a Rule 30 application on an urgent basis and set it down for hearing simultaneously with this application. They failed to do so. The opposing respondents are not entitled to a postponement of this application in order to bring an application in terms of Rule 30. Further, for the reasons set out below, the opposing respondents will not suffer prejudice if they are not given time to pursue the Rule 30 application.

[26] The opposing respondents did not comply with the Rule 35 (12) and 14(9) notices. The applicant did not bring an application to compel such compliance. Therefore for the purpose of the eviction application, these notices are irrelevant.

[27] The court takes note of the opposing respondents' objection for the late filing of the replying affidavit. The applicant has not applied for condonation. Its flagrant disregard for court rules cannot be ignored, particularly because it had an

opportunity when it filed a supplementary affidavit as well as an amended notice of motion seeking to be heard urgently, to seek condonation. Under these circumstances, the replying affidavit is disallowed as it was filed out of time.

[28] Therefore the opposing respondent's point *in limine* regarding the Rule 30 application stands to be dismissed.

COMPLIANCE WITH SECTION 4 (2) OF THE PIE ACT

[29] The opposing respondents contend that the applicant has failed to comply with section 4 (2) of the PIE Act. This section provides:

> ***"Eviction of unlawful occupiers***
>
> *4 (2) 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."*

[30] On 18 September 2018, Mohlala AJ authorised a notice in terms of section 4(2) to be served on the 1st to 6th respondents. According to a return of service filed in this application, the notice was duly served on these respondents as well as the City of Johannesburg Metropolitan Municipality in terms of the court rules. As already stated, the 1st and 2nd intervening party have sought and stand to be granted leave to intervene. Together with the initially cited respondents, with the exception of the non-opposing respondents, they are not only opposing the application, they have filed a counter application. Under these circumstances, the purpose of section 4(2) has been achieved.[7]

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[7] *Theart and Another v Minnaar NO; Senekal v Winskor 174 (Pty) Ltd* 2010 (3) SA 327 (SCA) at para 12. See also *Unlawful Occupiers, School Site v City of Johannesburg 2005 (4) SA 199 (SCA) ([2005] 2 All SA 108) para 24*

[31] Therefore this point *in limine* stands to be dismissed.

NON-JOINDER OF THE MUNICIPALITY

[32] The opposing respondents complain that the applicant has failed to join the municipality. As already stated, the applicant has notified the municipality of these proceedings. The municipality has elected not to file a report in the PIE Act.

[33] The opposing respondents have not established that the municipality has an interest in the outcome of these proceedings. Such an interest arises in terms of section 12 of the Housing Act read with section 26 of the Constitution,[8] where an occupier requires emergency accommodation. The occupiers previously paid the rental in excess of R5 000,00 per month (excluding electricity and water charges). The occupiers' tender to make payments of the monthly rental to an administrator, if appointed. It is not their case that they are unable to find alternative rental accommodation in an approximate amount and in the same area. It is probable that the occupiers can afford to pay rental, but elect not to do so due to a rental boycott, which they do not deny. Under these circumstances, it is improbable that the occupiers would qualify for emergency accommodation.[9] It also is improbable that they have requested such assistance from the municipality. They have not placed information in this regard before the court.

[34] Therefore this point *in limine* stands to be dismissed.

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[8] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC) at para 27.
[9] See *Teaca* at paras 25 and 33.

PRIVILEGE AND THE LPA

[35] To the founding and replying affidavits, the applicant annexed Whatsapp messages, demanding payment from the occupiers before the 4th intervening party renders legal services to them. The opposing respondents object to the inclusion of the messages to the applicant's papers on the basis that it is privileged information. The applicant contends that the message does not constitute privileged information.

[36] The basis for the privilege sought to be relied on by LFN is unclear. LFN is not a legal service provider. The message demanded payment for legal services. It did not communicate legal advice. The opposing respondents do not dispute the content of the messages and its source. The filed papers in opposition to the eviction application were drafted by De Beer, a representative of the LFN. The LFN denies that De Beer and it provides legal services to the opposing respondents. The applicant's allegation against the LFN and De Beer gives rise to a suspicion that these parties may have contravened the LPA, which is a criminal offence. Hence the applicant is urged to report the matter to the LPA for investigation, should it wish to pursue these allegations.

THE AUTHORITY OF THE DEPONENT TO THE APPLICANT'S AFFIDAVITS

[37] The opposing respondents dispute the authority of the deponent to the applicant's affidavits. It is trite that a deponent need not be authorised to depose to an affidavit. He is only required to have personal knowledge of the facts set out therein. The authority to institute legal proceedings ought to be challenged in terms of Rule 7[10]. The opposing respondents have not followed the procedure prescribed in this rule.

[38] Therefore this point *in limine* stands to be dismissed.

THE DISPUTE BEFORE THE RENTAL HOUSING TRIBUNAL

[39] The opposing respondents' complaint that this court lacks jurisdiction because there is a dispute between some of the opposing respondents and the applicant, pending before the Rental Housing Tribunal ("RHT"), lacks merit. The RHT tribunal does not have jurisdiction in respect of the relief the applicant seeks in this application. Further, any pending proceedings before the RHT do not impede the determination of this application.

OWNERSHIP OF THE PROPERTY

[10] *Ganes and Another v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA) at para 19. Also see *Eskom v Soweto City Council* 1992 (2) SA 703 (W) at 705C-J).

[40] As mentioned, the opposing respondents challenge the applicant's contended ownership of the property. They would not accept a printout from the Deeds Office website, obtained by the applicant's attorney to prove the applicant's ownership of the property. They also refuse to accept the applicant's identity as set out in a certificate issued by the Companies and Intellectual Property Commission ("CIPC").

[41] The CIPC certificate is a public document, admissible on mere production.[11] It proves the applicant's identity. The deed of transfer of the property confirming ownership is the best evidence of ownership.[12] It confirms the applicant's ownership of the property. The opposing respondents have not provided any basis for disputing these forms of proof.

[42] In the premises, I am satisfied that the applicant is an owner of the property as envisaged in terms of section 4(1). This section provides:

"Eviction of unlawful occupiers

4 (1) Notwithstanding anything to the contrary contained in any law or the common law, the provisions of this section apply to proceedings by an owner or person in charge of land for the eviction of an unlawful occupier."

UNLAWFUL OCCUPATION

[11]Section 221 (1) and (2), Companies Act 71 of 2008. See also section 18 (1), Civil Proceedings Evidence Act 25 of 1965.

[12] *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd* 1993 (1) SA 77 (A) at 82. See also *R v Nhlanhla 1960 (3) SA 568 (T) at 570D-H.*

[43] The occupiers occupy the property in terms of leases entered into with the applicant's predecessor in title. The applicant took transfer of the property on 1 July 2016, after which the trite *huur gaat voor koop* doctrine applied in respect of these leases. The leases have expired with the effluxion of time. The occupiers remained in occupation on the basis of monthly tenancies.

[44] The occupiers have failed to pay rental to the applicant, payable monthly in advance. Instead, the occupiers have engaged in a rental boycott. They failed to meet a demand to pay and were given notice to vacate the property. Despite these measures, the occupiers remain in occupation. Their tender to pay rental to an administrator, if appointed, lacks merit. They are not entitled to the appointment of an administrator under circumstances were the applicant is the owner of the property and is in terms of monthly leases, entitled to receive rental from the occupiers.

[45] On the occupiers' own version they are unlawful occupiers. They contend that there is no lease agreement between the parties. The occupiers have no right in law to occupy the applicant's property. This renders their occupation unlawful as envisaged by section 4(1) of the PIE Act.

[46] In the premises, I find that:

[46.1] the applicant is the owner of the property.

[46.2] the occupiers are unlawful occupiers. Therefore the applicant has complied with section 4 (1).

[46.3] the occupiers do not face the risk of homelessness. Therefore it is not necessary for the applicant to join the municipality to these proceedings.

THE APPLICANT'S EVICTION CLAIM

[47] Given that the occupiers have occupied the property for more than six months, section 4 (6) of the PIE Act is applicable. This section provides:

"Eviction of unlawful occupiers

4 (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."

[48] Our courts have repeatedly found on circumstances similar to those under which the occupiers occupy the property, that it is just and equitable to grant an order, evicting them from the property.[13]

[49] I also find on the same basis that, it would be just and equitable to grant the eviction order as prayed for by the applicant.

[50] The occupiers have been aware since the applicant served termination letters on them on 6 February 2018 that the applicant intends evicting them from the property. They had more than sixteen months to find alternative accommodation. They only have themselves to blame for choosing not to find alternative accommodation. They have benefited from free occupation under circumstances

[13] *Ndlovu v Ngcobo; Bekker and another v Jika 2003 (1) 113 (SCA) AT [19], Nyathi (supra) and Teaca (supra).*

were they took the law into their own hands by embarking on a rental boycott, to the applicant's financial peril. In the premises, the court consider a shorted eviction date to be just and equitable.

COSTS

[51] The applicant seeks punitive costs *de bonis propriis* against both LFN and De Beer. De Beer has not been admitted as a party. Therefore a cost order against him is incompetent.

[52] The applicant seeks punitive costs on the basis that the opposition was frivolous, placed reliance on what it considers to be abusive interlocutory issues as well as technical points *in limine* aimed at causing frustration and delay. It further contends that there is no reason why the opposing respondents should be liable for costs, when being presented by the LFN and De Beer, allegedly in contravention of the LPA. As already stated, there is a dispute of facts on the papers regarding the LFN and De Beer's alleged contravention of the LPA. Having made no finding regarding, the LFN and De Beer's alleged unlawful conduct, the applicant's mere allegations do not justify mulcting LFN and De Beer with costs *de bonis propriis*. Conversely, the respondent's lack of respect for the rule of law, as well as their unlawful occupation found in this application does not justify their absolution from costs.

[53] The applicant's dilatory conduct as found in this application, also does not justify such a cost order in their favour. Costs are the only way the court is able to express its displeasure against such conduct. In the premises, the applicant stands to only be allowed costs on the ordinary scale.

[54] Costs stand to be granted against all the respondents on the basis of the trite principle that costs follow the course. The non-opposing respondents' costs ought to be limited to the costs of an unopposed application.

EXECUTION OF THE EVICTION ORDER PENDING APPEAL

[55] In his heads of argument, counsel for the applicant seeks an order authorising the execution of the eviction order pending appeal processes. Such an order is normally granted on the basis of section 18 of the Superior Courts Act.[14] Stringent requirements for such an order are set out therein. An order permitting execution pending appeal is extra-ordinary because an application for leave to appeal ordinarily suspends the execution of an order until the application for leave to appeal is determined.

[56] I do not deem it appropriate to consider such an order as requested by the applicant. The order is not prayed for in the two notice of motions. The respondents were not given prior notice that it will be sought. Therefore they have not been afforded an opportunity to address the court in this regard. Under these circumstances, the request stands to be refused.

COUNTER APPLICATION

[14] Act 10 of 2013.

[57] Having disallowed the applicant's replying affidavit where it answers to the opposing respondents' counterclaim, the counterclaim is determined on an unopposed basis. It does not stand to be granted merely because it has been instituted. The opposing respondents ought to make a proper case for the relief set out therein. This, they failed to do.

[58] In the counter-application, the respondents seek an order in the following terms:

"1. That the Court declares that the first, second, third, and fifth respondents to the main application, together with the second and third intervening parties have not been declared as unlawful occupiers by any court or other competent body and therefore the proceedings in terms of the PIE Act may not be followed against them until they have been declared as unlawful occupiers;

2. That the second respondent in the counter-application is ordered to investigate the property situated at […] A. Street, Danhella Court, Rosettenville, Johannesburg as a potential "*problem property*" and to follow the necessary processes in terms of the Problem Property By Laws, 2014;

3. That the main application be dismissed;

4. In the alternative to paragraph 3 *supra*, that the matter be referred to trial and that the Notice of Motion in the main application stand as a simple

summons, that founding affidavit stands as the first respondent's (as plaintiff) declaration, that the answering affidavit stand as the first, second, third, and fifth respondents to the main application, together with the second and third intervening parties', plea and the court to make any order as to the proceedings of the trial it deems necessary;

5. Costs against the first respondent in this counter-application.

[59] The counter-application is spurious and has no basis in law. It stands to be dismissed for that reason. There is no legal requirement that occupiers ought to be declared to be unlawful occupiers before eviction proceedings may be brought against them. The respondents have not set out any cogent basis for the investigation of the applicant's property as a problem property in terms of the Problem Property by Laws, 2014. Neither have they set out a basis for the referral of the application to trial.

[60] In the premises, it is ordered that:

ORDER

1. The 1st to 3rd intervening parties are allowed to intervene.

2. The 1st to 6th respondent, the 1st and 2nd intervening parties and all those occupying the property by, through or under them, are evicted from the

property situated at […] F. Street, Bellevue, Johannesburg more fully described as Erven […] and […] Bellevue, Registration Division I.R. Gauteng (hereinafter referred to as the "*property*").

3. The 1st to 6th respondent, the 1st and 2nd intervening parties and all those occupying the property by, through or under them are ordered to vacate the property on or before 30 June 2019.

4. In the event that the 1st to 6th respondent, the 1st and 2nd intervening parties and all those occupying the property by, through or under them do not vacate the property on 30 June 2019 the Sheriff of the Court or his lawfully appointed Deputy is authorised and directed to evict them from the property on 2 July 2019.

5. All the respondents and the intervening parties shall pay the costs of the application, including the costs of the application in terms of section 4(2) of the Prevention of Illegal Eviction from Unlawful Occupation of Land Act 19 of 1998, jointly and severally, the one paying the other to be absolved, provided that the liability of the 4th and 6th respondents is only limited to the unopposed costs.

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L.T. MODIBA
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEARANCES

Counsel for the Applicant:	C Van der Merwe
Instructed by:	Vermaak & Partners Inc
For the 1st, 2nd, 3rd, 5th Respondents and the Intervening Parties:	R D De Beer (Liberty Fighters Network official)