IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: yes

(2) OF INTEREST TO OTHER JUDGES: yes

(3) NOT REVISED.

30/11/2021
DATE

SIGNATURE

CASE NO: **1617/2020**

In the matter the matter between

TOPROOT PROPERTY MANAGEMENT (RF) (PTY) (LTD)	Applicant
and	
MBANGO: NOBATHEMBU	First Respondent
JORDAAN: RUBY THERESA	Second Respondent
PETERSON: MONELL ZADRA ROBIN	Third Respondent
THE FURTHER UNLWAFUL OCCUPIERS OF UNITS AG004, AG005, AND AG006 OF THE PENNYVILLE SOCIAL HOUSING COMPLEX	Fourth Respondent
THE CITY OF JOHANNESBURG	Fifth Respondent

JUDGMENT

YACOOB J:

INTRODUCTION

1. The applicant (Toproot) is an accredited social housing institution in terms of the Social Housing Act, 16 of 2008 ("the SHA") and the registered owner of property on which there is a housing complex known as Pennyville Social Housing ("Pennyville"). It seeks the eviction of the first to fourth respondents in terms of section 4(6) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 1998 ("PIE").

2. For purposes of this judgment, where I refer to "the respondents", that will mean the first to fourth respondents collectively.

3. The respondents are occupiers of units in Pennyville. They are people with low incomes and have qualified for social housing. It is common cause that the respondents have not paid rent to the applicant since September or October 2019, and that Toproot has notified them that it has terminated their lease agreements. According to Toproot the respondents became unlawful occupiers of Pennyville on 28 November 2019. This application was instituted in January 2020. Toproot relies on section 4(6) of PIE, which it submits applies to people who have been unlawful occupiers for six months or less.

FACTUAL BACKGROUND

4. Toproot contends that the respondents embarked on a rental boycott and that this amounted to a repudiation of the lease agreement, which repudiation Toproot accepts. It contends that it is in the interests of justice to evict the respondents because the respondents have not paid rent in over a year, and therefore Toproot is entitled to an eviction order. Later it was added that the respondents are taking up social housing and preventing other families who will pay rent from obtaining social housing. There was no evidence provided of any people waiting for a social housing allocation, although it was contended that there is an application and waiting procedure.

5. The respondents, on the other hand, contend that Toproot has not been complying with its obligations as a social housing institution, and has been non-responsive to their complaints. According to them they have tried other ways of getting redress, including approaching the Social Housing Regulatory Authority ("the SHRA"), but unsuccessfully, and that is why they stopped paying rent. They contend they are willing to pay rent, but that it must be the correct amount, and that they must be given a reconciliation which Toproot has failed to do. They contend that Toproot's failure to give them a reconciliation is part of the reason that they have complained and have stopped paying. According to them Toproot is overcharging them and charging them for things it ought not to charge for, such as parking. Rental was also increased with no justification. They contend in the answering affidavit that numerous payments were made which were not accounted for.

6. Toproot did not furnish the respondents with a reconciliation despite the respondents' notices in terms of Rule 35(12) and (14), and despite making the "erroneous" allegation in the founding affidavit that reconciliations were attached. Instead, it annexed reconciliations to the replying affidavit. The respondents were not able to respond to the reconciliations nor did they make application to do so. The reconciliations amount to simply a list of charges and payments. Toproot does not attempt to explain the charges such as parking which appear not to be appropriate. Instead, Toproot contends simply that the respondents signed leases and are liable to pay all charges. It contends that only the leases govern Toproots obligations to its tenants. Toproot meets the allegations that the accounts are not properly kept with a bare denial.

7. As far as overcharging is concerned, again, Toproot does not deal with the substance of the respondents' allegations. It simply makes the bald allegation that the rental charged has been assess and approved by the SHRA and that the Applicant was issued a certificate of accreditation. It annexes a certificate valid from 10 May 2019 to 09 May 2021. This is clearly insufficient. Toproot has not disclosed to the court what was assessed by the SHRA, whether it submitted lists of what the household income of its tenants was and what percentage it was

charging, whether it in fact keeps lists of what household income is in order to determine what it would charge tenants, and so on. Taking Toproot's attitude in this litigation in this account, I consider it is highly unlikely that Toproot is in fact doing those things, despite being obliged to in terms of the Social Housing Act, which I deal with below.

8. Toproot also, oddly, makes the allegation that the respondents have failed to pay the regulated amounts it has levied on them, despite making absolutely no effort to demonstrate that the charges are in fact in accordance with regulation, or to rebut the respondents' allegations and evidence that they are not consistent with regulation. Toproot's position is that compliance with regulation is not relevant to the case, and that the respondents' failure to pay is the only issue that needs to be considered. According to Toproot, the SHA has absolutely nothing to do with the relationship between the respondents and Toproot.

9. In addition, the respondents contend that Toproot ought to have gone to the Rental Housing Tribunal (as provided for in their lease agreements) or the Magistrate's Court for relief, since by litigating in the High Court the applicant is litigating at a level the respondents cannot afford. Toproot's response to this was simply that they have come to the High Court because they are entitled to do so.

10. In its replying affidavit Toproot also criticised the respondents for not substantiating their submission that they would be rendered homeless by an eviction, and for not placing their household incomes before the court, despite Toproot being obliged to have that information and also not having placed it before the court.

11. When the matter was first heard the respondents contended that they had not had sufficient opportunity to place their circumstances before the court, because the section 4(2) notice had not been delivered and was defective. The affidavit they had filed had been drafted in haste and under hard lockdown conditions, as they were under the impression that it had to be produced at the unopposed motion court in order to stave off an eviction order.

12. I considered it to be in the interests of justice to postpone the matter and allow the respondents to place the relevant information before court, so I postponed it to a date three weeks later to allow the issues to be properly ventilated.

13. At the second hearing, Ms Dittberner, the respondents' counsel, did not appear. Instead they were ably represented by their attorney, Mr van Jaarsveld. Mr van Jaarsveld informed me that Ms Dittberner was no longer in the matter due to a lack of funds on the part of the respondents.

14. The respondents filed their affidavits setting out their circumstances, and submitted that this was not, despite Toproot's contentions, a straightforward eviction case with no dispute. The respondents are already people in need of assistance in view of the fact that they qualify for social housing, and this had to be taken account in determining what is just and equitable, as had the circumstances of their alleged breach. The respondents contend that it is not sufficient for Toproot to simply evict occupiers in their position when they do not comply with their obligations, especially if Toproot has not, as they contend, complied with its own obligations as a social housing institution.

15. Toproot took issue with the fact that, when placing before the court their circumstances, the respondents did not provide bank statements. This is, in my view, disingenuous. It is clear that the respondents operate primarily in the cash economy. Bank statements are not the only way in which an occupier's financial means can be made known, particularly when the occupier household is by definition low-income, which is common cause in this case.

16. Toproot suggests in supplementary replying affidavit that the respondents were ordered to provide bank statements. This is not the case. The respondents were directed to place relevant facts about their circumstances before the court, including their financial position. There was no mention of bank statements by the court and Toproot is seeking to impose its own interpretation of what is necessary.

As I have already said, in the circumstances of this case Toproot's contention that bank statements are required from the respondents is incorrect.

17. Toproot does not directly respond to the allegations that it is not complying with its obligations as a social housing institution. It simply contends that this is irrelevant because the respondents have not been paying rent, as well as the allegations referred to above that it has no allegations outside of the lease agreement.

18. I will examine first the relevant provisions of the SHA, then those of PIE. It is necessary for me to determine in the context of this case firstly which provisions of PIE are applicable, and secondly to what extent the provisions of the SHA must be taken into account when determining whether an eviction is just and equitable under PIE. I will finally determine what, on the facts before me, is a just and equitable outcome.

THE SOCIAL HOUSING ACT

19. According to its long title, the SHA is intended

> To establish and promote a sustainable social housing environment; to define the functions of national, provincial and local governments in respect of social housing; to provide for the establishment of the Social Housing Regulatory Authority in order to regulate all social housing institutions obtaining or having obtained public funds; to allow for the undertaking of approved projects by other delivery agents with the benefit of public money; to give statutory recognition to social housing institutions; and to provide for matters connected therewith.

20. The Preamble acknowledges that the legislation is a part of the legislative and other measures the State is obliged to take in terms of section 26(2) of the Constitution of the Republic of South Africa, 1996 ("the Constitution") to achieve the progressive realisation of the right to access to adequate housing encapsulated in section 26(1) of the Constitution, and that the housing the SHA seeks to facilitate

access to rental housing for households "which cannot access rental housing in the open market".

21. While the SHA places some emphasis on the functions of organs of state in the provision of social housing, it also deals with social housing institutions.

22. When a social housing institution is accredited, this allows it to access grants under the social housing programme. It is significant that "maladministration" is defined in the SHA as including failure to comply with the SHA.

23. Section 2 of the SHA sets out the obligations the three spheres of government and social housing institutions have. These include:

23.1. ensuring housing programmes are responsive to local housing demands and prioritising the needs of especially vulnerable people;

23.2. affording residents dignity and privacy by providing a safe, clean and healthy environment;

23.3. not discriminate against residents on grounds set out in section 9 of the Constitution;

23.4. facilitate the involvement of and empowerment residents through, consultation, information sharing, education, training and skills transfer;

23.5. ensure secure tenure for residents, on the basis of the general provisions set out in the Rental Housing Act, 50 of 1999 ("the Rental Housing Act");

23.6. promote values and practices, including:

23.6.1. an environment conducive to the realisation of the roles, responsibilities and obligations of all role-players;

23.6.2. establishment, development and maintenance of socially economical and viable communities to ensure the elimination and prevention of slums and slum conditions;

23.6.3. an understanding and awareness of social housing processes, and

23.6.4. transparency, accountability and efficiency in the administration and management of social housing stock;

24. The responsible Minister has the power to prescribe additional principles to be adhered to.

25. The SHA creates the SHRA which has functions including accrediting social housing institutions, providing grants to social housing institutions, monitoring and enforcing compliance, intervening in the affairs of a social housing institution where there is maladministration, ensure that lease agreements are compliant, and make rules.

26. Section 12 of the SHA sets out the powers of the SHRA to intervene where a social housing institution is non-compliant.

27. Section 13(8) obliges a social housing institution to comply with all applicable law, and failure to do say may result in accreditation being withdrawn.

28. In terms of section 14 social housing institutions must, inter alia,

    28.1. continue to comply with the qualifying criteria;

    28.2. inform residents on consumer rights and obligations in respect of social housing;

    28.3. function in terms of the SHA, the relevant social housing programme and guidelines, regulations, and any other applicable law, and

    28.4. annually submit its lease agreement and any other prescribed documents for approval to the SHRA.

29. The SHA also provides for regulations to be promulgated.

30. The Social Housing Regulations[1] ("the Regulations"), contain the following that is relevant in the context of this case.

[1] GNR.51 of 26 January 2012: Social Housing Regulations, published in *Government Gazette* No 34970.

31. A corporate entity that is not a municipal entity or a housing co-operative must conduct its affairs on a non-profit basis in order to qualify for accreditation,[2] and any profits must only be used to further social housing.[3]

32. The social housing institution must have as its main objective the provision of rental housing for low to medium income households on an affordable benefits, ensuring quality and maximum benefit for residents, and the management of housing stock over the long term.[4] It must have an effective governance system that is effective, transparent and accountable.[5] It must have a business plan that ensures it is viable and financially sustainable.[6]

33. For effective tenant management, the social housing institution must have arrangements to deliver excellent tenant management service,[7] there must be a full range of policies to support tenancy management including dispute resolution and termination,[8] a system to manage complaints effectively,[9] provide information about standards of housing services and how to access them,[10] let properties fairly and in accordance with the basis on which the grant for their development was awarded,[11] enter into leases which are fair,[12] have a tenant roll that collates information including income, family sizes, age of residents, and residents with special needs,[13] have a termination system in place that makes provision for dealing with co-ordinated boycotts of rental,[14] and so on.

34. It can be seen that there is a high burden placed on the social housing institution so that it fulfils the functions for which it exists. It is, however, entitled to protect

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[2] Regulation 3(1)(a)
[3] Regulation 3(1)(b)
[4] Regulation 3(5)(a)
[5] Regulation 3(5)(h)
[6] Regulation 3(6)(a)
[7] Regulation 3(7)(a)
[8] Regulation 3(7)(c)(i)
[9] Regulation 3(7)(c)(ii)
[10] Regulation 3(7)(d)(i)
[11] Regulation 3(7)(e)(i) and (ii)
[12] Regulation 3(7)(e)(iii)
[13] Regulation 3(7)(f)
[14] Regulation 3(7)(j)

itself from co-ordinate rental boycotts. It also has the rights and obligations of a landlord as set out in the Rental Housing Act, as mention in section 2 of the SHA. It is evident that the obligations imposed on a social housing institution are also relevant to the relationship between the social housing institution and its tenants, Toproot's assertions to the contrary.

35. Although Regulation 3 sets out qualifying criteria for accreditation, the institution is obliged to continue to meet those criteria to maintain its accreditation.

36. In terms of Regulation 23(2), the gross rentals/levies must not exceed 33.3% of household income, while Regulation 23(3) sets out the levels of household income that the units offered by a social housing institution must be made available for. No housing may be offered to households earning more than R7500 per month, and at least 30% of units are to be reserved for households with income of less than R3500 per month.

37. According to the information procured by the respondents and annexed to their supplementary replying affidavit, the formula by which maximum charges should be calculated is different for social housing rental stock constructed and occupied from 2018 onwards, but the formula applicable to this case is 33.3% of total household income.

The Rental Housing Act

38. The Rental Housing Act sets out rights and obligations of both tenants and landlord, and establishes the Rental Housing Tribunal as a dispute resolution body. In terms of section 4(5) of the Rental Housing Act in its current form, the landlord has the right to prompt and regular payment of rental, and to recover unpaid rental after obtaining a ruling from the Tribunal or a court.

39. In terms of s5(3), a lease between landlord and tenant is deemed to include, amongst others, a term that the landlord must provide written receipts to tenants for all payments received.

40. Section 13 of the Rental Housing Act provides that tenants or landlords lodge complaints with the Tribunal concerning an unfair practice. The Tribunal is empowered to refer non-compliance with the law to the appropriate body, and to rule that unfair practices be discontinued, including exploitative rentals,[15] and what rental ought to be paid.[16] A tenant may not be evicted while a complaint is pending, or for a period of three months,[17] as long as the tenant pays the rental payable as it was prior to the complaint, or prior to any escalation imposed prior to the complaint.[18]

41. A dispute regarding an unfair practice must be determined by the Tribunal,[19] and a court may be approached for an eviction if there is no dispute regarding an unfair practice.[20]

42. An "unfair practice" is defined as

    (a) any act or omission by a landlord or tenant in contravention of this Act; or

    (b) a practice prescribed as a practice unreasonable prejudicing the rights or interests of a tenant or a landlord.[21]

43. It is clear from the fact that the Tribunal has the power to determine that rentals are exploitative, that charging exploitative rentals would be an unfair practice. Toproot, on the other hand, submits that withholding rent is an unfair practice in terms of the Rental Housing Act.

44. Although draft Regulations on Unfair Practice were published, no Regulations have been promulgated yet.

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[15] Section 13(4)(c)(iii)
[16] Section 13(5)
[17] Section 13(7)(a)
[18] Section 13(7)(b)
[19] Section 13(9)
[20] Section 13(10)
[21] Section 1

PIE

45. PIE regulates evictions of residential occupiers who are not occupiers in terms of the Extension of Security of Tenure Act, 62 of 1997. It sets out procedures that are to be followed, to ensure that an eviction is fair,[22] and the court must be satisfied that it is just and equitable to evict someone taking all relevant circumstances into account, in order to grant an eviction order. While some circumstances are required to be taken into account, naturally PIE cannot make a complete list of what is relevant. Relevant circumstances will be specific to the context of each case.

46. Section 4(1) specifies that section 4 applies to proceedings by an owner or person in charge for eviction of an unlawful occupier.

47. In addition, PIE differentiates between unlawful occupiers who have occupied the land in question for less than six months at the time when proceedings for eviction are initiated, to whom section 4(6) applies, and those who have done so for more than six months at the time when proceedings for eviction are initiated, to whom section 4(7) applies.

48. Both categories of unlawful occupiers require that the court be satisfied that an eviction is just and equitable, taking into account the relevant circumstances.

49. Under section 4(6), the court is specifically required to take into account, as part of the relevant circumstances, "the rights and needs of the elderly, children, disabled persons and households headed by women".

50. Where section 4(7) applies, the court must, in addition to the rights and needs of vulnerable people listed in section 4(6), consider whether "land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier". If the land

[22] Sections 4(2)-4(5)

concerned is sold in a sale of execution pursuant to a mortgage, then the question of suitable alternative accommodation need not be considered.

51. A person who has occupied the land or property in question for more than six months therefore has slightly more protection, in that a court has to also take into account the availability of alternative accommodation to that person. This does not mean that the availability of alternative accommodation is not something that may be considered under section 4(6), but simply that it always must be considered under section 4(7).

52. Once a court is satisfied that the requirements of section 4 are complied with, including that an eviction would be just and equitable in the circumstances, and that there is no valid defence raised by the unlawful occupier, it must grant the eviction order,[23] but must also determine a just and equitable date for the eviction, which also requires the court to consider all relevant factors, including the amount of time the occupier and their family have resided on the property.[24]

Application of PIE in this case

53. Toproot submits that section 4(6) applies to the respondents in this case because it instituted proceedings less than six months after the respondents became, according to Toproot, unlawful occupiers. In support of this submission Toproot refers me to the case of *Ndlovu v Ngcobo; Bekker and Another v Jika*[25] where the court held that "(t)he period of occupation is calculated from the date the occupation becomes unlawful".[26] The SCA points out that this means that the landlord who is slower to act will be prejudiced by having suitable alternative accommodation considered. This court is bound by the decision of the SCA, and the application must be considered in terms of section 4(6).

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[23] Section 4(8)
[24] Section 4(9)
[25] 2003 (1) SA 113 (SCA)
[26] [17]

54. Toproot submits that it has fulfilled the procedural requirements of PIE and that it has shown sufficiently that an eviction order is just and equitable. It criticises the respondents for not placing sufficient evidence before the court (even when that information is particularly in Toproot's possession) and submits that the respondents have not shown that an eviction would not be just and equitable.

55. It is clear that the section 4(2) notice, which has to inform the respondents of the grounds on which the eviction is sought and of their rights in opposing the matter, that was apparently initially served on the respondents, was defective. It was sought for an application with a different case number, to which neither the court nor the respondents were privy. In fact, that notice was not even uploaded on the Caselines file of the case, although the application for its authorisation was uploaded.

56. Toproot served a fresh notice in terms of section 4(2) to attempt to remedy the problem, but that too was, in my view, wanting. It is supposed to properly set out the basis on which the eviction is sought so that the respondents can respond. It does not do so, merely stating that Toproot is the registered owner or person in charge and entitled to possession, that the respondents are in unlawful occupation, and that they have failed to vacate on demand. This is insufficient. PIE does not permit eviction simply on the basis of a bald allegation of ownership and unlawful occupation. At least the basis of the alleged unlawfulness ought to have been included.

57. Nevertheless, the reason that the matter was postponed and further affidavits permitted to be filed was to remedy the inherent unfairness in the confusion around the notices. In the specific circumstances of this case, the defective notices are not in themselves a bar to the success of the application.

58. I will, therefore, proceed to the section 4(6) enquiry.

59. Toproot submits that all it has to do is show that the respondents are in unlawful occupation, and that it is the duty of the respondents to place the necessary facts regarding all the relevant circumstances, including the rights and needs of the minor children referred to who will be prejudiced by virtue of the granting of the eviction order before the court, and any relevant personal circumstances. Toproot sees itself as in the same position as any landlord, with no specific obligations arising out of the fact that it is a social housing institution which provides housing to vulnerable people.

60. This is unfortunate. The fact the Toproot is a social housing institution and that the respondents are, by the mere fact of qualifying for social housing, vulnerable members of society, are undoubtedly relevant circumstances which are to be considered in making the decision whether an eviction would be just and equitable.

61. It is so that section 13(7) of the Rental Housing Act provides that a failure to pay rent means that a tenant loses the protection the Rental Housing Act provides. But Toproot cannot, where its own non-compliance with the applicable regulations and legislation is being complained of, rely on the respondents' non-compliance as the overriding factor which does not allow anything else to be examined. This approach would be both unjust and inequitable.

62. In my view the respondents have to be given an opportunity to have their grievances dealt with, and Toproot's non-compliance with its obligations in terms of the SHA and regulations dealt with. Toproot's contentions that its compliance has nothing to do with the respondents are clearly without basis.

63. That said, the respondents cannot continue to occupy social housing without paying at least what the Regulations require them to pay.

64. It is also relevant that, despite the availability of more accessible fora in which the dispute may have been resolved, Toproot elected to come to the High Court. This is consistent with Toproot's attitude throughout these proceedings, which is of its

own rights being the only thing that is worthy of consideration. This is unfortunate. Toproot has in the manner in which it has dealt with these issues attempted to intimidate the respondents and suggest that their concerns and in fact their dignity are worthy of nothing but contempt. Neither the applicable law nor the values to which the law seeks to give life are supportive of the way in which Toproot has proceeded.

CONCLUSION

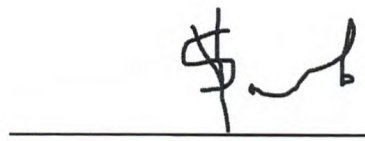
65. I am not satisfied that the eviction of the respondents at this point is just and equitable. The apparent overcharging by Toproot, and the respondents' inability to do anything about it and their associated frustration, coupled with the failure of Toproot to engage with any of the respodents' concerns, even in this court, are the primary reasons for this conclusion.

66. However, as I have previously said, the respondents are not entitled to continue not to pay rent. They must pay the 33.3% of total household income that they are required to pay. Should they not do so, they would be subject to further eviction proceedings.

67. In addition, both parties must take steps to facilitate the resolution of the dispute regarding the amount that Toproot contends it is entitled to levy.

68. For these reasons I make the following order

a) The application is dismissed with costs.
b) The first to third respondents are to pay to the applicant rental and levies of a total of 33.3% of their respective household incomes as disclosed to the court.
c) The first to third respondents and the applicant are to take steps to facilitate the resolution of the question of the amounts the applicant is entitled to levy, as rental and/or additional charges.



S. YACOOB

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances

Counsel for the applicant:	Mr BR Edwards
Instructed by:	Vermaak Marshall Wellbeloved Inc

Counsel for the first to fourth respondents (on 10 March 2021):

Ms C Dittberner

Instructed by:	Marinus Van Jaarsveld Attorneys

First to fourth respondents' representative (on 31 March 2021):

Mr M van Jaarsveld (attorney)

Dates of hearing:	10 March 2021; 31 March 2021
Date of judgment:	30 November 2021