IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 28472/2020

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED.
DATE: 26/7/21

In the matter between: -

PETER DODSON N.O.
(in his capacity as trustee for the time being of
THE GRIFFON RESIDENTS TRUST) First applicant

THE BEST TRUST COMPANY (JHB) (PTY) LTD N.O.
(in its capacity as trustee for the time being of
THE GRIFFON RESIDENTS TRUST) Second applicant

and

QUATTRO L CONSORTIUM (PTY) LTD First respondent
GILHAR, ADRIANA BERTHEIL Second respondent
CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY Third respondent

J U D G M E N T

DELIVERED: This judgment was handed down electronically by circulation to the

parties' legal representatives by e-mail and publication on CaseLines. The date and time for hand-down is deemed to be 10h00 on 26 July 2021.

F. BEZUIDENHOUT AJ:

INTRODUCTION

[1] The applicants (*"the Trust"*) seek an order for the eviction of the second respondent (*"Ms Gilhar"*) in terms of section 4(1) of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act, 19 of 1998 (*"PIE"*) from the residential property situated at Portion 4 of Erf [....], Morningside Extension 21 Township, more commonly described as 4, [....] C[....] Road, Morningside (*"the property"*).

[2] In addition to the eviction order, the Trust claims monetary relief from both Ms Gilhar and the first respondent, formulated at prayer 4 of the notice of motion as follows: -

> *"4. That the first and second respondent, being jointly and severally liable, be ordered to pay the applicants the amount of:*
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> *4.1 R69,987.99 for the water and electricity consumption for the period 11 December 2019 to 31 August 2020;*
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> *4.2 R22,500.00 for the levies for the period 11 December 2019 to 31 August 2020; and*
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> *4.3 R420,000.00 for the rental period of 18 August 2019 to 31 August 2020;*
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> *4.4 R35,000.00 per month for rental for the period 1 September 2020 until the date that the second respondent and all those occupying the property through her vacate the Property;*
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> *4.5 All the water and electricity consumption accounts for the Property for the period 1 September 2020 until the date that the second respondent and all those occupying the Property through her vacate the Property; and*

4.6 The levy amount of R2,500.00 per month for the levies for the property for the period 1 September 2020 until the date that the second respondent and all those occupying the Property through her vacate the Property."[1]

[3] Ms Gilhar does not oppose an order for her eviction. In fact, she states that she tendered to vacate the property on the 28th of February 2021 *"and will do so in terms of the directives issued by the above Honourable Court"*.[2]

[4] However, Ms Gilhar, together with the first respondent, oppose the monetary claims.[3]

THE EVICTION

[5] At paragraph 1 of her heads of argument, Ms Gilhar states that the application is defective as it has not been served on the City of Johannesburg (*"the City*") in terms of section 4(2) of PIE.

[6] Section 4(2) of PIE provides that at least 14 days before the hearing of the eviction proceedings, the Court must serve written and effective notice of the proceedings on the unlawful occupier and the municipality having jurisdiction. Service of the application itself is therefore not required, but rather the service of notice of the proceedings. Notice of the proceedings must, in compliance with section 4(5) of PIE: -

> [a] state that proceedings are being instituted in terms of section 4(1) for an order for the eviction of the unlawful occupier;
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> [b] indicate on what date and at what time the Court will hear the proceedings;
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> [c] set out the grounds for the proposed eviction; and

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1 CaseLines: pp 001-2 to 001-3.
2 CaseLines: Respondents' heads of argument, paragraph 2, p 006-25.
3 CaseLines: Respondents' heads of argument, paragraph 2, p 006-25.

[d] state that the unlawful occupier is entitled to appear before the Court and defend the case and, where necessary, has the right to apply or legal aid.

[7] The Supreme Court of Appeal in Cape Killarney Property Investments (Pty) Ltd v Mahamba[4] held that the aforementioned provisions are peremptory. In respect of the notice required by section 4(2) it held that it must be effective notice; that it must contain the information stipulated in section 4(5); and that it must be served *"by the Court*". The latter requirement it interpreted to mean that the contents and the manner of service of the notice must be authorised and directed by an order of the Court.

[8] In the present application the section 4(2) notice was not authorised by the Court. However, it was served by way of sheriff on the City on 6 April 2021.[5] The fact that the notice was not issued by the Court prior to its service is not fatal. In Moela v Shoniwe[6] the Supreme Court of Appeal reaffirmed what it found in Unlawful Occupiers of the School Site v City of Johannesburg[7] where Brand JA said the following regarding the peremptory requirements of section 4(2): -

> *"Nevertheless, it is clear from the authorities that even where the formalities required by statute are peremptory it is not every deviation from the literal prescription that is fatal. Even in that event, the question remains whether, in spite of the defect, the object of the statutory provision had been achieved (see, for example, Nkisimane and Others v Santam Insurance Co Ltd 1978 (2) SA 430 (A) at 433H – 434B; Weenen Transitional Local Council v Van Dyk 2002 (4) SA 653 (SCA) para [13]).*"[8]

[9] In Moela the content and manner of service of the notice had also not been authorised and directed by an order of Court. Notwithstanding, the Supreme Court of Appeal found that: -

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4 2001 (4) SA 1222 (SCA).
5 CaseLines: return of service, p 002-5.
6 2005 (4) SA 357 (SCA).
7 2005 (4) SA 199 (SCA).
8 Paragraph [22].

> *"[9] … The object of section 4(2) is clearly to ensure that the unlawful occupier and municipality are fully aware of the proceedings and that the unlawful occupier is aware of his rights referred to in section 4(5)(d). It may well be that that object, in appropriate circumstances, may be achieved notwithstanding the fact that service of the notice required by section 4(2) had not been authorised by the Court. That may, for example, be the case if at the hearing it is clear that written and effective notice of the proceedings contained in the information required in terms of section 4(5) had in fact been served on the unlawful occupier and municipality 14 days before the hearing."*

[10] When considering the content of the section 4(2) notice in this matter, it clearly states that proceedings have been instituted for an order for the eviction of the second respondent, it indicates the date and time of the court proceedings, it sets out the grounds for the proposed eviction and states that the second respondent is entitled to appear before Court and defend the case. Quite evidently, the notice complies in all respects with section 4(5) of PIE.

[11] Moreover, the Trust served the application for eviction on the City on 2 October 2020.[9] As far as notification is concerned, the Trust did more than it was statutorily required to do. I therefore find no merit in Ms Gilhar's argument that there has not been compliance with section 4(2) of PIE.

[12] In any event, the entitlement of the Trust to seek an order for the eviction of Ms Gilhar is not disputed as already stated. It is most certainly also not suggested that Ms Gilhar is homeless and has in fact during argument voiced her intention of returning to Israel. The only consideration is what period of time would be regarded as just and equitable to afford Ms Gilhar to vacate the property.

[13] In determining a just and equitable date contemplated in section 4(8) of PIE, the Court must have regard to all relevant factors, including the period the unlawful

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9 CaseLines: return of service, p 002-1.

occupier has resided on the land in question.[10]

[14] The legislature did not limit those circumstances the Court should consider and neither did it arrange the circumstances in order of priority. It referred to *"all the relevant circumstances"* and left it to the Court to determine which circumstances are relevant and to consider all those in conjunction. The fact that the legislature referred specifically to the rights and needs of the elderly, children, the disabled and households headed by women and, in certain instances, also the availability of alternative land, does not mean that the legislature intended to elevate these circumstances to absolute prerequisites which have to be met before an order may be granted. If the legislature intended such a consequence, it would have said so specifically.[11]

[15] In arriving at a just and equitable date on which Ms Gilhar is required to vacate the property, I have taken the following facts into consideration: -

[a] Ms Gilhar occupied the property on 18 August 2019;

[b] The agreement of sale which gave rise to Ms Gilhar's occupation of the property, was cancelled by mutual consent on 27 February 2020;[12]

[c] The parties agreed that Ms Gilhar would vacate the property on 30 March 2020;[13]

[d] On the 26th of March 2020 a moratorium was placed on evictions during the national state of lockdown as a result of the Covid-19 pandemic;[14]

[e] The movement of persons was relaxed as of the 1st of June 2020, but notwithstanding, Ms Gilhar failed to vacate the property;[15]

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10 Groen Gras Eiendomme (Pty) Ltd and Others v Elandsfontein Unlawful Occupants and Others 2002 (1) SA 125 (T).
11 Groen Gras Eiendomme (Pty) Ltd and Others v Elandsfontein Unlawful Occupants and Others 2002 (1) SA 125 (T), paragraph [32].
12 CaseLines: founding affidavit, annexure "PD25", p 001-106.
13 CaseLines: founding affidavit, annexure "PD25", p 001-106.
14 CaseLines: founding affidavit, paragraph 52, p 001-20.
15 CaseLines: founding affidavit, paragraph 55, p 001-21.

[f] The Trust procured a new tenant during June/July 2020 and therefore informed Ms Gilhar that she was required to vacate the property by the end of July 2020;[16]

[g] Ms Gilhar informed the Trust that she was planning to relocate to Israel and that she would only move out of the property once she has removed her furniture from the property so that she could relocate in one go;[17]

[h] On 22 July 2020, the Trust and the new tenant concluded a lease agreement commencing on the 1st of September 2020;[18]

[i] Ms Gilhar was informed of the concluded lease and agreed to vacate the property on or before the 30th of August 2020;[19]

[j] A day after the agreement to vacate was recorded in a letter, Ms Gilhar informed the Trust that she was *"going nowhere without a Court Order*";[20]

[k] The first respondent and Ms Gilhar failed to make payment of the water and electricity and levies since December 2019, notwithstanding her continued occupation of the property;[21]

[l] The property is occupied by Ms Gilhar and her adult son;[22]

[m] Ms Gilhar is an elderly person and approximately 69 years of age;[23]

[n] Ms Gilhar is not disabled and she is the head of the household;[24]

[o] No rental is being paid to the Trust, despite Ms Gilhar's continued

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16 CaseLines: founding affidavit, paragraphs 56 and 57, p 001-21.
17 CaseLines: founding affidavit, paragraph 58, p 001-21.
18 CaseLines: founding affidavit, paragraph 61, p 001-22.
19 CaseLines: founding affidavit, paragraph 65, p 001-22.
20 CaseLines: founding affidavit, paragraph 67, p 001-23; annexure "PD28", p 001-118.
21 CaseLines: founding affidavit, paragraph 72, p 001-24.
22 CaseLines: founding affidavit, paragraph 110.1, p 001-31.
23 CaseLines: founding affidavit, paragraph 110.2, p 001-31.
24 CaseLines: founding affidavit, paragraphs 110.3 and 110.4, p 001-31.

occupation;[25]

[p] The Trust continues to suffer damages as a result of the unlawful occupation, the non-payment of rental and the increase in consumption charges which similarly remain unpaid, as well as its inability to fulfil its obligations in terms of the lease agreement concluded with the new tenant;[26]

[q] There is suitable alternative accommodation for rental in the same area which can be readily provided to Ms Gilhar at a suitable rental fee;[27]

[16] In the circumstances, the Trust contends that a period of 30 calendar days to vacate the property would be more than reasonable in the circumstances.[28]

[17] It is apposite that Ms Gilhar states in her answering affidavit that she has been burdened with severe health issues *"for the best part of the last several years"*.[29] She states that she attempted to obtain medical reports to prove her condition from Edenvale Hospital, which she attended on 30 October 2020.

[18] On the 1st of December 2020, after the filing of her answering affidavit, Ms Gilhar filed a supplementary answering affidavit. In this affidavit she refers to medical reports.[30]

[19] The medical reports referred to are in the form of mostly illegible handwritten notes. It is not clear from these notes who the healthcare practitioner is who examined and treated Ms Gilhar. A confirmatory affidavit by this healthcare practitioner is not attached either. From what I am able to decipher from these notes, it would appear that Ms Gilhar suffers from lower back ailments and requires ongoing physiotherapy. It also states that she is not fit to work.

[20] Ms Gilhar also suffers from chronic obstructive pulmonary disease, but appears to be medicated for this condition and she does not require supplementary

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25 CaseLines: founding affidavit, paragraph 111.1, p 001-31.
26 CaseLines: founding affidavit, paragraphs 111.2 and 111.3, pp 001-31 and 001-32.
27 CaseLines: founding affidavit, paragraph 114.3, p 001-33.
28 CaseLines: founding affidavit, paragraph 130, p 001-36.
29 CaseLines: answering affidavit, paragraph 9, p 004-4.
30 CaseLines: supplementary answering affidavit, paragraph 2, p 016-1.

oxygen.[31]

[21] Ms Gilhar's general medical practitioner, Dr Grant Dalziel, in a short note dated the 24th of October 2019, states that Ms Gilhar is a severe diabetic for many years and that she is medicated with insulin.[32] Again, there are no confirmatory affidavits attached to the supplementary answer and as a result, very little weight can be attached to this evidence in my view.

[22] At best for Ms Gilhar, these medical notes reveal that she does indeed suffer from certain medical conditions, but that she is receiving proper care and medication. Her conditions are therefore managed and do not pose a deterrent to an order for her eviction. In fact, it does not appear to be Ms Gilhar's case that her medical conditions are such that she should not be evicted. I understand her case to be that she simply requires a reasonable period within which to vacate the property.[33]

[23] In the premises, having considered the factors advanced by both parties, I find that a period of 30 calendar days afforded to Ms Gilhar to vacate the property, would be just and equitable.

THE DISASTER MANAGEMENT ACT, 2002

[24] Ordinarily, and having considered all the relevant factors, the determination of a just and equitable date upon which upon which Ms Gilhar is to vacate the property, would be the end of the matter. Nowadays, the position has been complicated by the onset of the worldwide COVID-19 pandemic. Various restrictions have been imposed upon residential evictions in terms of the Regulations issued under the Disaster Management Act, 2002.

[25] Since the hearing of this application, and due to a surge in infections, the country was moved to adjusted alert level 4 on 25 June 2021 and thereafter to adjusted alert level 3 on 25 July 2021.

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31 CaseLines: supplementary answering affidavit, p 016-6.
32 CaseLines: supplementary answering affidavit, p 016-7.
33 CaseLines: answering affidavit, paragraph 15, p 004-5.

[26] In Rathabeng Properties (Pty) Limited v Mohlaoli[34] this Court had occasion to consider the impact of the lockdown regulations on evictions. I agree with the Court's reasoning and therefore consider this judgment as binding on me.

[27] Under the present Regulations for adjusted level 3 a curfew is in place which requires persons to return to their residence by a specific time, otherwise risk being arrested.[35]

[28] Some assistance can be gleaned from a comparison of the Regulations in relation to each alert level provided for in the Regulations that were published on 29 April 2020[36] and which have been amended from time to time, the most recent amendment in relation to the hearing date being on 25 July 2021 which substituted Chapter 4 to provide for an "*Adjusted Alert Level 3*".

[29] Chapter 3 of the Regulations provides for alert level 4 and in regulation 19 provides for a *'prohibition on evictions'* as follows:

> *"A competent court may grant an order for the eviction of any person from land or a home in terms of the provisions of the Extension of Security of Tenure Act, 62 of 1997 and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998: Provided that any order of eviction shall be stayed and suspended until the last day [sic] Alert Level 4, unless a court decides that it is not just and equitable to stay and suspend the order until the last day of the Alert Level 4 period.*" (my emphasis)

[30] This prohibition, as also found in Rathabeng, is clear enough in providing that such order of eviction as may be granted by a court shall be stayed and suspended until the end of Alert Level 4, unless the court decides that it is not just and equitable to so stay and suspend the order. The stay and suspension are linked to the end of

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34 2021 JDR 0275 (GJ)

35 Regulation 33; GN 650 and 651 of GG 44895

36 GNR 480 of GG43258, 29 April 2020.

Alert Level 4.[37] The severity of COVID-19 was sufficient that the Minister of Cooperative Governance and Traditional Affairs, in consultation with the relevant Cabinet members, promulgated a stay and suspension of an eviction order as the default position i.e. unless the court ordered otherwise.

[31] Chapter 4 of the Regulations, which introduced alert level 3 with effect from 1 June 2020 provided in regulation 36 that a person may not be evicted from his or her land or home during the period of Alert Level 3 period, however a competent court may grant an order for the eviction of a person from his or her land or home in terms of the provisions of the Extension of Security of Tenure Act, 1997 (Act 62 of 1997) and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 1998 (Act 19 of 1998), provided that an order of eviction may be stayed and suspended until the last day of Alert Level 3 period, unless a court decides that it is not just and equitable to stay and suspend the order until the last day of the Alert Level 3 period.

[32] The default position under adjusted alert level 3 appears to be that a person person may not be evicted from her home during the period of adjusted alert level 3, unless the court decides that it is not just and equitable to so stay and suspend the order.

[33] The introduction of Chapter 5 into the regulations providing for Alert Level 2, provides for more extensive regulations. The relevant regulation, Regulation 53, is no longer headed *"Prohibition on evictions"* but rather *"Eviction and demolition of places of residence"* and reads:

> *"53. Eviction and demolition of places of residence.— (1) A person may not be evicted from his or her land or home or have his or her place of residence demolished for the duration of the national state of disaster unless a competent court has granted an order authorising the eviction or demolition.*

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[37] See *Anchorprops 31 (Pty) Ltd v Levin* [2020] ZAGPJHC 183 (28 May 2020), para 40 as an example of the application of regulation 19.

*(2) A competent court **may** suspend or stay any order for eviction or demolition contemplated in subregulation (1) until after the lapse or termination of the national state of disaster unless the court is of the opinion that it is not just or equitable to suspend or stay the order having regard, in addition to any other relevant consideration, to—*

(a) the need, in the public interest for all persons to have access to a place of residence and basic services to protect their health and the health of others and to avoid unnecessary movement and gathering with other persons;

(b) any restrictions on movement or other relevant restrictions in place at the relevant time in terms of these regulations;

(c) the impact of the disaster on the parties;

(d) the prejudice to any party of a delay in executing the order and whether such prejudice outweighs the prejudice of the person who will be subject to the order;

(e) whether any affected person has been prejudiced in his or her ability to access legal services as a result of the disaster;

(f) whether affected persons will have immediate access to an alternative place of residence and basic services;

(g) whether adequate measures are in place to protect the health of any person in the process of a relocation;

(h) whether any occupier is causing harm to others or there is a threat to life; and

(i) whether the party applying for such an order has taken reasonable steps in good faith, to make alternative arrangements with all affected persons, including, but not limited to, payment

arrangements that would preclude the need for any relocation during the national state of disaster.

(3) A court hearing any application to authorise an eviction or demolition may, where appropriate and in addition to any other report that is required by law, request a report from the responsible member of the executive regarding the availability of any emergency accommodation or quarantine or isolation facilities pursuant to these Regulations." (my emphasis)

[34] Ultimately the power whether to suspend or stay the eviction order remains discretionary.

[35] As the court stated in Rathabeng common sense should compel the conclusion that the restrictions provided for in Levels 1 and 2 should be less onerous than those for Level 3 and 4 where the risks posed by the COVID-19 pandemic are less than they would be under Level 3.

[36] Judicial notice in my view can be taken of the fact that since the 'third wave' of the pandemic arrived in South Africa, there has been some decline in new infections and that Government is making every effort to ensure that vaccinations are administered at a rapid pace. Nonetheless one cannot ignore the highly infectious Delta variant of the corona virus either.

[37] Based upon such relevant factors I am of the view that it would be just and equitable to stay or suspend the eviction order until after the end of adjusted level 3. This means that Ms Gilhar and other occupants of the property will have two weeks after the end of adjusted level 3 to vacate the property, failing which the eviction order may be carried out a further two weeks thereafter. This effectively affords Ms Gilhar and other occupants a month to vacate the property once the present adjusted level 3 ends.

[38] The stay of the eviction order shall be a condition as envisaged in terms of section 4(12) of PIE, which will enable either of the parties to approach the court in terms of that subsection, on good cause shown, for a variation of the eviction order. This allows for the exigencies that may arise, such as a resurgence in the spread of

the COVID-19 virus. "*The regulations themselves are in a state of flux and therefore too an order of suspension cannot be so cast in stone that it cannot be revisited should it be necessary to do so if a change in circumstances so requires.*"[38]

THE MONEY CLAIMS

[39] As alluded, the Trust, simultaneously with the eviction proceedings, claims payment of rental, levies and water and electricity.

Rental

[40] On the 12th of August 2019 the Trust and the first respondent, represented by Ms Gilhar, concluded a written agreement of sale in respect of the property.[39] The material terms of the agreement were as follows: -

[a] The purchase price for the property was R7 million;

[b] The full purchase price would be paid by way of an irrevocable bank guarantee provided to the attorneys within three days of acceptance of the offer;

[c] Transfer of the property would be effected by the 15th of February 2020 of earlier by mutual agreement;

[d] Occupation of the property would be given on satisfaction of an irrevocable bank guarantee drawn in favour of the Trust or its nominee;

[e] The first respondent would be liable for payment of all utilities from date of occupation, which would include water and electricity and levies in the amount of R2,500.00 per month;

[f] If requested by the Trust, the first respondent would be obliged to vacate the property immediately upon cancellation of the sale for any reason whatsoever, it being agreed that no tenancy would be created by any such

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38 Rhatabeng par. 62

39 CaseLines: founding affidavit, annexure "PD5", p 001-43.

prior occupation (clause 3.2).

[41] It is apposite that the occupational rental payable was not stipulated in clause 3.1.[40]

[42] The original guarantee was delivered to the estate agents by Ms Gilhar on 15 August 2019.[41] On the face of it, the guarantee appeared to be legitimate and as a result, Ms Gilhar was afforded occupation to the property on 18 August 2019.[42] However, on closer inspection of the guarantee the conveyancing attorneys expressed concern that it did not provide for the immediate transfer of the purchase price upon registration of the property into the name of the first respondent. Therefore, in an effort to obtain clarity, the conveyancing attorney contacted the bank that issued the guarantee and requested verification that the guarantee was true and proper and that the funds stipulated in the guarantee would be paid out on the date of transfer of the property. The bank was requested to confirm how payment would be effected since it did not have a local bank in South Africa.[43]

[43] On 27 September 2019 Ms Gilhar informed the conveyancing attorney that her communications with the bank who granted the guarantee were unacceptable. The bank who granted the guarantee never replied to the e-mail of the conveyancing attorneys.[44]

[44] In an effort to resolve the issue regarding the guarantee, the Trust and the first respondent concluded an addendum on the 25th of October 2019 in terms whereof the full purchase price would be paid into the conveyancer's trust account on written demand, but in any event at least 10 working days prior to the lodgement of the transfer in the Deeds Office. It was further agreed that all water and electricity consumption charges, together with the levy in the amount of R2,500.00 would be paid on the first day of each month and that the first respondent would vacate the property within 30 days after cancellation of the agreement for any reason

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40 CaseLines: founding affidavit, offer to purchase, p 001-45.
41 CaseLines: founding affidavit, paragraph 24, p 001-14.
42 CaseLines: founding affidavit, paragraph 25, p 001-14.
43 CaseLines: founding affidavit, paragraph 27, p 001-15.
44 CaseLines: founding affidavit, paragraph 30, p 001-15.

whatsoever.[45]

[45] On 20 January 2020 the conveyancing attorneys informed the first respondent and Ms Gilhar that the guarantee of R7 million was required by the 3rd of February 2020.[46]

[46] On the 31st of January 2020 the conveyancing attorneys followed up again with the first respondent and Ms Gilhar and enquired when payment of the purchase price and transfer costs could be expected. Ms Gilhar replied on the 31st of January 2020 and advised that the conveyancing attorneys would not be *"receiving a guarantee but an eft directly into [their] account."*[47]

[47] Notwithstanding the undertaking, payment was not made on the 3rd of February 2020 and Ms Gilhar was afforded a further opportunity to pay the full purchase price by the 15th of February 2020.[48] Notwithstanding the commitment to make payment by the 15th of February 2020, the purchase price remained unpaid. As a result, the agreement was cancelled by mutual consent and Ms Gilhar agreed to vacate the property by the 30th of March 2020, which she failed to do.

[48] In support of its claim for monthly rental in the amount of R35,000.00, the Trust relies on the lease agreement that it concluded with one Yehuda Schaverin during the month of June/July 2020. I emphasize that neither the agreement of sale, nor the addendum specifies a particular monthly rental amount. This omission does not necessarily pose a difficulty for the Trust. The rental provided for in an agreement is no more than evidential material as to market-related rental.[49] Therefore, what is of importance is what the occupier states or pleads in response to an allegation of a market rental value.[50]

[49] If there is no legally effective challenge to the landlord's allegations that the

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45 CaseLines: founding affidavit, paragraph 32, p 001-16; annexure "PD12", pp 001-61 to 001-62.
46 CaseLines: founding affidavit, paragraph 43, p 001-19.
47 CaseLines: founding affidavit, paragraph 46, p 001-19; annexure "PD23", p 001-103.
48 CaseLines: founding affidavit, paragraph 48, p 001-20.
49 Hyprop Investments Ltd and Another v NCS Carriers and Forwarding CC and Another 2013 (4) SA 607 (GSJ), paragraph [66].
50 Hyprop Investments Ltd and Another v NCS Carriers and Forwarding CC and Another 2013 (4) SA 607 (GSJ), paragraph [67].

rental provided for in the lease is the market rental value, then the damages are readily ascertainable and therefore liquidated. This Court has found previously that: -

> *"This appears to be the most sensible approach because without countervailing evidence the agreement struck by the parties reflects the amount at which willing and able parties are prepared to conclude their transaction. It also enables a landlord to use the expedited process of motion proceedings and summary judgment to pursue a damages claim based on holding over."*[51]

[50] Where however there is a legitimate challenge to the rental provided for in the lease being equivalent to the market rental value, then the basis for relying on the lease to render the damages claim liquidated fails, thereby rendering the claim illiquid. However, the respondents must still be able to challenge the legal assumption that the rental provided for in the lease agreement is not market-related. In this regard it would become necessary to examine how the principles enunciated in Sandown Park (Pty) Ltd v Hunter Your Wine & Spirit Merchant (Pty) Ltd[52] is to be applied to motion proceedings which require a real, genuine or *bona fide* defence to be raised in order to defeat a claim for final relief.[53]

[51] It therefore appears that in this instance the rental dilemma is to be resolved as follows: If the respondents did not set out a *bona fide* defence, then there is no countervailing evidence regarding market-related rental and the actual rental charged or agreed to between the Trust and the respective tenant would be the only acceptable evidence. If that is so, then the amount is liquidated, otherwise it is illiquid and incapable of supporting motion proceedings.[54]

[52] Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd[55] is the *locus classicus* on what constitutes a *bona fide* defence. In Hyprop the Full Bench of this Court broadly summarised the principal ways in which a dispute of fact arises as

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51 Hyprop Investments Ltd and Another v NCS Carriers and Forwarding CC and Another 2013 (4) SA 607 (GSJ), paragraph [68].
52 1985 (1) SA 248 (W).
53 See Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634I.
54 Hyprop Investments Ltd and Another v NCS Carriers and Forwarding CC and Another 2013 (4) SA 607 (GSJ), paragraph [71].
55 1949 (3) SA 1155 (T).

enunciated in Room Hire as follows: -

> *"(a) Where the respondent denies all material allegations 'and produces or will produce, positive evidence by deponents or witnesses to the contrary';*
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> *(b) Although admitting the applicant's evidence, the respondent may allege other facts which the former disputes;*
>
> *(c) Where the respondent claims lack of knowledge and puts the applicant to the proof, but produces evidence, or indicate that he intends leading evidence to demonstrate the unreliability of the applicant's averments and that certain essential facts are untrue."*

[53] In Plascon-Evans[56] the then Appellate Division considered the circumstances where a dispute would not be considered *bona fide*: -

> *"It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact (see in this regard Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T) at 1163-5; Da Matta v Otto N.O. 1972 (3) SA 858 (A) at 882D - H). If in such a case the respondent has not availed himself of his right to apply for the deponent's concern to be called for cross-examination under rule 6(5)(g) of the Uniform Rules of Court (cf. Peterson v Cuthbert & Co Ltd 1945 AD 420 at 428; Room Hire case supra at 1164) and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether*

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[56] Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A).

the applicant is entitled to the final relief which he seeks (see example Rikhoto v East Rand Administration Board and Another 1983 (4) SA [....] (W) at 283E - H). Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers (see the remarks of Botha AJA in the Associated South African Bakeries case, supra at 924A)."[57]

[54] Applying these principles to the answering affidavit, I find that Ms Gilhar and the first respondent have failed to establish a real, genuine and *bona fide* factual dispute, for the following reasons: -

[a] Ms Gilhar baldly states at paragraph 6 of the answering affidavit that: -

"None of these amounts claimed is based on an agreement and there are obvious disputes of fact, which necessarily ought to be resolved by way of action (and trial) and not by way of application."[58]

[b] Ms Gilhar states further at paragraph 7 that evidence would be required to be led substantiating the claims and that such evidence would require expert testimony *"for example the reasonableness of the rental claimed of R35,000.00 per month"*;[59]

[c] Ms Gilhar baldly denies that the relief sought is appropriate in motion proceedings and she denies any liability for the amounts claimed by the applicants.[60]

[55] Significantly, Ms Gilhar does not respond to the allegation contained in the founding affidavit that a lease agreement for a monthly rental amount of R35,000.00 was concluded. Although she states that no evidence is before Court that the rental amount is reasonable, she most certainly made no effort to advance any facts before this Court proving that the rental amount is unreasonable. As a result, there is no

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57 At 634H – 635C.
58 CaseLines: answering affidavit, paragraph 6, p 004-4.
59 CaseLines: answering affidavit, paragraph 7, p 004-4.
60 CaseLines: answering affidavit, paragraph 8, p 004-4.

challenge to the Trust's allegation that the reasonable monthly rental amount whilst in occupation of the property would be R35,000.00 per month.

[56] In the premises, I find that the Trust discharged its onus of proving the rental amount and rental period claimed.

Levies, water and electricity

[57] In its founding affidavit the Trust provides evidence by way of municipal accounts and schedules with a breakdown of the amount paid for water and electricity and levies for the period of September to November 2019. This amount totals R27,094.59 and was paid by the Trust.[61]

[58] Significantly, when the conveyancing attorneys furnished Ms Gilhar with proof of payment of the aforesaid amount, the first respondent made payment of R27,094.59 on 28 December 2019 and made a further payment of R3,129.14 in December 2019.[62]

[59] The Trust asserts that at some stage Ms Gilhar questioned the water consumption as she believed there was a leak on the property. The Trust promptly employed the services of plumbers to check for any leaks on the property and received confirmation that no leak was detected.[63]

[60] The Trust made further payments of water and electricity costs for the period December 2019 to August 2020 in the amount of R69,987.99 and attaches municipal accounts, together with proof of payment in support.[64] It also attaches a statement reflecting the payments in respect of levies for the period December 2019 to August 2020.[65]

[61] The fact that the first respondent made payment of the water and electricity and levies for the period September to November 2019 indicates an admission of liability for these amounts. In Ms Gilhar's answering affidavit, she does not dispute

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61 CaseLines: founding affidavit, paragraph 33, p 001-17.
62 CaseLines: founding affidavit, paragraphs 36 and 37, p 001-17.
63 CaseLines: founding affidavit, paragraphs 38 and 39, p 001-18.
64 CaseLines: founding affidavit, paragraph 41, p 001-18.
65 CaseLines: founding affidavit, paragraph 42, p 001-18.

the schedules or the amounts claimed. Accordingly, I find that the Trust is entitled to payment of the water, electricity and levies as claimed for in its notice of motion.

COSTS

[62] The Trust seeks an order for costs against the first respondent and Ms Gilhar jointly and severally. Ms Gilhar does not ask for a dismissal of the application, nor does she claim an order for costs. However, it must be borne in mind that Ms Gilhar did represent herself throughout the proceedings, although it is apparent from the issues raised in her answering affidavit as well as in her heads of argument that she may have received some legal advice, albeit on an informal basis. In fact, Ms Gilhar conceded that much during the hearing.

[63] It is trite that the issue of costs falls within the judicial discretion. The basic principle in awarding costs is that a party who is substantially successful is entitled to be awarded costs in the absence of special circumstances.[66]

[64] In Fleming v Johnson & Richardson[67] the principle was explained as follows: -

> *"It is a sound rule that where a plaintiff [applicant] is compelled to come to Court and recovers a substantial sum which he would not have recovered had he not come to Court, then he should be awarded his costs."*

[65] Ms Gilhar made it abundantly clear in correspondence which preceded the present litigation, that she would not vacate the property unless a Court issued directives in this regard. She repeated this statement in her heads of argument. The Trust therefore had no alternative but to approach the Court in these circumstances.

[66] I therefore find no special circumstances urging me to deviate from the normal principle that costs should follow the result.

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[66] Kathrada v Arbitration Tribunal 1975 (2) SA 673 (A) at 680C; Fleming v Johnson & Richardson 1903 TS 319 at 325.

[67] 1903 TS 319 at 325.

ORDER

I therefore make the following order: -

[1] The second respondent, and all those claiming occupation through, by or under her are evicted from Portion 4 of Erf [....], Morningside Extension 21 Township, situated at 4, [....] C[....] Road, Morningside ["the property"].

[2] On condition, as envisaged in section 4(12) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 1998, that the present adjusted level 3 under the Regulations issued in terms of section 27(2) of the Disaster Management Act, 2002 ("the Regulations") has ended, the first and second respondents, and all those that occupy through, by or under them are ordered to vacate the property within fourteen days on the condition being fulfilled.

[3] The sheriff and/or deputy sheriff, assisted by such persons as he or she requires including the South African Police Services, are authorised and directed to give effect to paragraphs 1 and 2 above, including removing from the property the respondents and any other occupants and/or their belongings, no earlier after the fourteen days after the period specified in paragraph 2 above in the event the property is not vacated within the period specified in paragraph 2 above.

[4] The first and second respondents shall, jointly and severally, the one paying the other to be absolved, make payment to the applicants of the following amounts: -

> [a] R69,987.99 for the water and electricity consumption for the period 11 December 2019 to 31 August 2020;
>
> [b] R22,500.00 for the levies for the period 11 December 2019 to 31 August 2020;
>
> [c] R420,000.00 for the rental period of 18 August 2019 to 31 August 2020;
>
> [d] R35,000.00 per month for rental for the period 1 September 2020 until the date that the second respondent and all those occupying the property

through her, vacate the property;

[5] All amounts in relation to the water and electricity consumption for the property for the period 1 September 2020 until the date that the second respondent and all those occupying the property through her, vacate the property;

[6] The monthly levy amount of R2,500.00 in respect of levies raised over the property for the period 1 September 2020 until the date that the second respondent and all those occupying the property through her, vacate the property;

[7] The first and second respondents shall pay the costs of the application, jointly and severally, the one paying the other to be absolved.

F BEZUIDENHOUT

ACTING JUDGE OF
THE HIGH COURT

Date of hearing:	30 April 2021
Date of judgment:	26 July 2021

APPEARANCES:

On behalf of applicants:	Adv O Mokgotho o.mokgotho@group621.co.za
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On behalf second respondent:	Appearance in person. adriana1st@icloud.com