



THE REPUBLIC OF SOUTH AFRICA  
**IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE DIVISION, CAPE TOWN)**

**Case No.: A156/2020**

**In the matter between:**

**PASSENGER RAIL AGENCY OF SOUTH AFRICA**

**Appellant**

**and**

**FREDERICK DANIEL NEFDT  
MARILYN NEFDT  
AVERIL CHARMAINE DAVIDS  
NEFDT & ASSOCIATES  
UNLAWFUL OCCUPIERS OF PORTION OF ERF 1348  
KLEINVLEI, CAPE TOWN, WESTERN CAPE**

**1st Respondent  
2nd Respondent  
3rd Respondent  
4th Respondent  
  
5th Respondent**

**Coram: Bozalek J et Steyn J et Mantame J**

**Heard: 19 March 2021**

**Delivered: 30 March 2021**

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**JUDGMENT**

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**BOZALEK J**

[1] This is an appeal against part of the judgment of Goliath DJP, delivered on 7 June 2019 when the Court ordered the first, second, third and fourth respondent to vacate certain structures in Kleinvlei but dismissed the application for the same relief against the fifth respondent. The Court made no order as to costs and the appellant seeks a reversal of that order as well.

[2] The Court's decision arose out of certain motion proceedings initiated by the appellant, the Passenger Rail Agency of South Africa (PRASA), against Mr Frederick Nefdt, Ms Marilyn Nefdt, Ms A Davids and Nefdt and Associates CC, being the first to fourth respondents, and the fifth respondent being a class described as '*the unlawful occupiers of portion of Erf 1348 Kleinvlei, Cape Town, Western Cape*'.

[3] The background to the application was that for many years the first respondent leased a portion of land from PRASA in a parking area to the west of Melton Rose railway station on which a number of small businesses were conducted by various traders from five movable structures, namely, one cargo container, two prefabricated concrete garages and two prefabricated storage structures.

[4] The first respondent's lease was terminated in 2010 and the appellant obtained an eviction order against him. Notwithstanding this the first respondent not only retained control and possession over the structures in question but rented them out to various shopkeepers. By the time the present proceedings were initiated in 2017 those shopkeepers, the members of the fifth respondent, traded and were represented as follows: the Tyre Shop (Mr Elias Mkaiplana), the Tuck Shop; JA Cellphone Repairs (Mr Jude Adama), GM Hairsalon (Ms Nosipho Maxanyana), Quality Shoes, Repairs, Fridges, Microwaves, TV, DVD's (Mr John Antwi) and a fruit and vegetable trader.

[5] The appellant's case as set out in its founding affidavit was that the property, on which the Melton Rose railway station and the five structures stood, was owned by it. To the west of the main station building was a parking area containing the five temporary shops. Since 2010 the appellant had received no rental income in respect of those structures at all and the area was earmarked for redevelopment. It required vacant

possession of the area in order to commence redevelopment.

[6] In its own founding affidavit the appellant stated that the fifth respondent was comprised of unsophisticated business persons who appeared to have been taken advantage of by the first and second respondents and possibly also the third and fourth respondents.

[7] The application was opposed by the first respondent who filed an opposing affidavit which consisted mainly of bare denials of the key allegations made by the appellant and the taking of insubstantial technical points. In support of his opposition the first respondent obtained confirmatory affidavits from the second and third respondents as well as from various members of the fifth respondent. The only possible defence to the relief claimed, or point of any substance, was the allegation by the first respondent that the proprietors of the Tuck Shop also resided therein, an allegation supported by confirmatory affidavits from the alleged occupants *viz* Mr Syleman Mohamed, Mr Salah Yusuf Mohamed and Mr Allie Osman Omar.

[8] The Court *a quo* stated that the only issue to be determined was how to address the issue regarding the abovementioned three traders/occupants who claimed to currently reside on the property. It held that it would not order their ejectment from the premises for commercial purposes since their right to housing and their ability to trade was intertwined and further that, short of an agreement, the only mechanism available to the appellant to obtain their eviction was to invoke the provisions of the Prevention of Illegal Eviction from an Unlawful Occupation of Land Act, 19 of 1998 ('PIE'). The Court also expressed the view that the matter was an appropriate one for the parties to engage in efforts to find an amicable solution.

[9] As far as the costs order was concerned, in its reasons for refusing leave to appeal the Court stated that the first respondent did not oppose the relief sought against him but merely filed papers to enlighten the Court of the plight of the fifth respondent. On that basis, the Court stated, it was unable to discern why a costs order should be granted against the first and third respondents.

[10] Dealing firstly with the substantive order, the difficulty with the Court's reasoning is that PIE procedures apply only to property insofar as it is used for residential purposes. It was authoritatively held in *Ndlovu v Ngcobo, Bekker and Another v Jika (1)*<sup>1</sup> that buildings or structures that did not perform the function of a form of dwelling or shelter for humans did not fall under PIE and therefore disputes concerning the lease of commercial properties fell outside its purview. The consequence of this distinction is that even should the appellant be successful in obtaining a PIE order against members of the fifth respondent it would not afford it the relief of evicting the occupants as commercial tenants or, put differently, prevent them from using the structures for commercial purposes.

[11] It follows that the Court erred in not granting any relief against the fifth respondent save to the extent that any member therefor asserted that they used a structure as a residence as well. In that event the appropriate relief would be to evict such members of the fifth respondent as commercial tenants or occupants of the relevant structure (and grant the appropriate ancillary relief) but require of the appellant to initiate PIE procedures against such individuals who had asserted and continue to assert that they reside in a structure.

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<sup>1</sup> 2003 (1) SA 113 (SCA) at para 20.

[12] Counsel for the appellant conceded that, to the extent that three persons connected to the Tuck Shop business claimed to reside in the premises, their eviction from the premises as residents could only be secured by following the processes in PIE. Accordingly, the order which the Court will issue in this regard will provide that, to the extent that such persons identify themselves to the Sheriff and continue to assert that they reside in the premises (and before the structure can be removed by the appellant), the appellant will be required to commence a PIE application for their eviction as residents.

[13] Turning to the question of costs, the notices of opposition and representation were ambiguous as to which respondents were opposing the relief sought. After enquiring into the authority of the respondent's attorney to act in terms of Rule 7, the appellant sought costs orders only against the first, third and fifth respondents.

[14] It is in my view incorrect that the first respondent (and the third respondent for that matter) did not oppose the relief sought. The opposing and confirmatory affidavit makes it quite clear that the first respondent and his sister, the third respondent, were opposing the relief sought on any number of technical points and in the course of doing so contended that the occupants of the Tuck Shop were also residing in that structure. When an overview is taken of the matter it is also quite clear why the first respondent was opposing the relief sought, namely, because he was letting the premises to the fifth respondent and had been doing so for years and in the event that the fifth respondent was evicted this income stream would cease. It is also clear that the first respondent had enjoyed this rental income even though he had no lease over the premises and was paying no rental to the appellant.

[15] The notice of opposition filed on behalf of the respondents does not make it

entirely clear whether the members of the class constituted by the fifth respondent were opposing the relief sought. However, all of them filed confirmatory affidavits and many of them signed powers of attorney instructing the first respondent's attorney to act on their behalf in the proceedings. When the appellant's application for leave to appeal was heard they were represented by a representative from the Legal Aid Board but that is where such representation ended

[16] Given that the first and third respondents established no defence to the application but nonetheless opposed it I consider that the trial Court erred in not awarding costs against them. The opposing affidavit and a confirmatory affidavit were filed on their behalf respectively and they were both legally represented throughout the proceedings before the Court a quo. As counsel for the appellant pointed out, if the first and third respondents' interest genuinely was only protection of the fifth respondent rather than their own self-interest they could easily have withdrawn their opposition before the hearing, leaving only the fifth respondent formally engaged in the matter.

[17] The appellant also sought a costs order in relation to the original proceedings against those members of the fifth respondent who appeared to oppose them, as well as the costs of the appeal.

[18] The appeal itself has followed a long and winding course. It was originally set down for hearing on 20 January 2021 but was postponed on that day when members of the fifth respondent appeared in court and advised that they wish to oppose the appeal but were still seeking legal representation. On that same day an attorney acting for the first to fourth respondents advised that they would no longer be opposing the appeal but would abide the Court's decision. In the result the first and third respondents cannot be held

liable for the costs of appeal beyond the date of the first hearing.

[19] For a variety of reasons a first appeal record was hastily put together in an attempt to meet the deadlines created by the Registrar in assigning an appeal hearing date prematurely. In due course that record was replaced with a proper record. All this however, together with the fact that the members of the fifth respondent were no longer legally represented and the first to fourth respondents had also not made their position clear, necessitated the service of documents, orders and copies of record on the respondents. This in turn led to two condonation applications: one for the late filing for the notice of appeal and second for the late filing of record. These applications for condonation were well-founded and were granted at the hearing of the appeal.

[20] Members of the fifth respondent were once again present on the resumed date but were not legally represented and advised that they had received legal advice to the effect that they stood little prospect of success in opposing the appeal. They confined their submissions to the question of costs and the period of notice before any eviction order would take effect.

[21] As indicated the fifth respondent's involvement in the initial proceedings were limited to signing brief confirmatory affidavits and in some instances powers of attorney in favour of the first respondent's attorney. Seen in proper perspective, however, the members of the fifth respondent were merely adjuncts to the case made by the first and third respondents who, as explained above, were serving their own interests. The fifth respondent's members were caught in the middle of a dispute between the appellant and the first respondent – paying rental to him in the belief that he had a lawful basis to enter into lease agreements with them. An important factor to be taken into account is that the

first respondent was able to exploit the situation because the appellant failed to take any effective action against him for many years i.e. between approximately 2010 and 2017. Nothing approaching an adequate explanation was forthcoming from the appellant for its failure to take action to deal with the problem for some seven years.

[22] At best for the appellant, the second appeal hearing i.e. on 19 March 2021 may have been avoided had the relevant members of the fifth respondent indicated on 20 January 2021 that they did not intend to oppose the appeal. On that date, however, they had yet to obtain independent legal advice. Taking all these factors into account I do not consider that any costs order against the fifth respondent would be justified or would be fair.

[23] Finally, as far as notice is concerned, taking into account that the members of the fifth respondent utilised the premises to earn a living and have done so for several years pursuant to rental arrangements with the first respondent, it will obviously cause them severe disruption to be evicted from the premises. From the bar all advised that they had attempted, without success, to obtain alternative premises. It is therefore appropriate that they be given a period of notice before being required to vacate the premises. Members of the fifth respondent requested a period of three to four months but this is too long given the length of time that these proceedings have taken thus far and given the appellant's need to redevelop the area sooner rather than later.

[24] I consider that a period of two months from date of this order would be an adequate period of notice. Thereafter, in the event that the fifth respondent members do not vacate the premises, the Sheriff will be authorised to evict them.



[25] The order which this Court will make will also make provision for a month's notice to be given to the first respondent to remove the structures on the property failing which these may be removed by the appellant at the cost of the first respondent.

[26] For these reasons the appeal succeeds and an Order as per Annexure A to this judgment is made.

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**BOZALEK J**

**I agree.**

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**STEYN J**

**I agree.**

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**MANTAME J**

For the Applicant	:	Adv S e Câmara
As instructed by		Philander Attorneys

For the 5 <sup>th</sup> Respondents	:	In person
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