

Case No.:A41/2023

In the matter between:

THE CITY OF CAPE TOWN

Appellant

and

Y[...] H[...]

First Respondent

(Identity Number: 68[...])

S[...] P[...]

Second Respondent

(Identity Number: 77[...])

MUNADIYA HAFFAJEE

Third Respondent

(Identity Number: 75[...])

AZRAA HAFFAJEE

Fourth Respondent

(Identity Number: 99[...])

**ALL OTHER UNLAWFUL OCCUPIERS HOLDING
OCCUPATION AGAINST THE FIRST RESPONDENT**

Fifth Respondent

JUDGMENT DELIVERED ELECTRONICALLY ON 22 MAY 2023

A. INTRODUCTION

[1] This is an appeal by the City of Cape Town (*“the City”*) against the judgment and order of Magistrate Kgorane, in which she dismissed the City’s eviction application against the respondents with costs. The eviction proceedings were

brought in terms of section 4 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (*PIE Act*).

B. THE FACTS

[2] The property that is the subject of these proceedings is registered in the name of the City. The first and second respondents occupied it in terms of a lease agreement which was entered into between the first respondent and the City on 30 June 2004. The initial lease period was for five years, from 1 July 2004 to 30 June 2009, after which it was extended indefinitely on the same terms and conditions.

[3] In terms of the lease agreement the property was to be used for both residential and commercial purposes. The first and second respondents resided on the first floor of the property, and ran a small food business on the ground floor which is described in the lease as “*café/take-aways*”.

[4] In November 2014, the first and second respondents were divorced, and the first respondent relocated to Durban. Since then, the second respondent has remained at the property where she resides together with her twelve-year old son and continues to run the business. The lease, however, has continued to be in the name of the first respondent.

[5] By 2018, the rental payable in terms of the lease was R5 892. It is common cause that, although there were discussions and agreement with the second respondent to increase the rental from R5 892.60 to R19,000 per month with effect from 2018, that agreement was not effected. The City simply continued to bill the second respondent exactly what she been paying previously.

[6] In 2019 the City caused a valuation assessment of the property to be conducted, which concluded that the monthly rental paid by the respondents was well-below the market rental for the property, and recommended that a rental of R24 900 was payable in respect of the property.

[7] On 22 November 2019 the City addressed a letter to the first respondent advising him of the findings of the valuation and of its intention to conclude a new lease in accordance with the outcome of the valuation. The first respondent failed to respond to the letter of 22 November 2019. On 11 December 2019 the City addressed a further letter giving notice that if no written response was received to the letter of 22 November 2019 by 19 December 2019, the lease would effectively be cancelled.

[8] On 17 December 2019 the first respondent responded to the letter of 11 December 2019 *via* his attorneys. He made a counter-proposal of R6 481.20 rental per month. On 13 January 2020, the City rejected the counter-proposal and confirmed that it would proceed to cancel the lease.

[9] On 6 February 2020 the City issued to the respondents notice of cancellation of the lease based on “*non-acceptance of the new proposed market rental*”, and requested the respondents and all those holding title under them to vacate by no later than 6 April 2020.

[10] On 23 March 2022 the eviction application was served upon the respondents, and on 19 May 2022 a notice in terms of section 4(2) of PIE was served upon them.

C. THE MAGISTRATE’S COURT PROCEEDINGS

[11] In the Magistrate’s Court the first respondent filed an affidavit explaining his position that he has had no involvement in the property since relocating to Durban. According to him, he ceded all rights in the lease to the second respondent. The alleged cession was disputed by the City since it was not informed thereof, and no permission was sought from it as required in the terms of the lease.

[12] The second respondent was the only respondent who opposed the application in the Magistrate’s Court. She raised a point *in limine* that, since the City is an organ of state, the eviction proceedings ought to have been instituted in terms of section 6 instead of section 4 of PIE.

[13] The second respondent also stated that an eviction order would render her and her minor son homeless and without an income since she derives her entire income from the business. Further, that she employs two assistants at the business, and also leases the property to tenants from time to time.

[14] The second respondent emphasized that she was not in breach of the lease, and that there was accordingly no reason to cancel the lease. She stated that she was desirous of entering into further negotiations with the City and of entering into a new lease agreement. By the time she deposed to her answering affidavit she had made an offer, through her attorneys to purchase the property and had caused her own valuation of the property to be conducted.

[15] In respect of the point *in limine* the Magistrate held that the City was not precluded from proceeding in terms of Section 4, as opposed to section 6 of PIE. She also dismissed the eviction application, holding that the lease was not validly terminated. To quote paragraph 45 which encapsulates the judgment:

“The respondents raised enough issues for consideration with regards to the cancellation, the reasons for cancellation in comparison with what is contained in the affidavits; the lapse of time between cancellation and the institution of these proceedings; the further negotiations which carried on up until June 2022. The evidence as weighed in its totality leads this court to uphold the respondents’ argument that the lease has not been validly cancelled. Therefore, the respondents are found not to be unlawful occupiers.”

D. THE APPEAL

[16] The appeal is against the whole judgment and order of the Magistrate, and in particular her conclusion that the lease was not validly terminated. The City states that the Magistrate failed to have regard to clause 4 of the lease agreement which entitled either party to terminate the lease agreement on two months’ written notice.

They also state that she failed to have regard to the legal position that termination takes effect from the moment it is communicated to the other party. Furthermore, the City states that the reasons for canceling the lease are irrelevant because it had an unqualified right to do so. In any event, the City says there is no evidence that it waived or abandoned its cancellation of the lease.

[17] In addition to the above, the City states that an eviction order is just an equitable under the circumstances, since the only permanent occupants of the property are the second respondent and her 12-year old son. The City disputes that an eviction would render the second respondent and her son homeless, stating that, since she has significant business experience she can be gainfully employed elsewhere or conduct her business from an alternative location. In the alternative, the City has asked that the matter be remitted to the Magistrate's Court for determination of a just and equitable date for eviction.

[18] At the same time, the second respondent persists with her point *in limine*, although no cross appeal has been brought in respect thereof.

E. APPLICABLE LEGAL PRINCIPLES

[19] The point *in limine* raised by the second respondent has been addressed by various courts. As far back as 2003 the Supreme Court of Appeal in *Ndlovu v Ngcobo; Bekker and Another v Jika*¹ held that section 6(1) authorises organs of state legal standing to apply for the eviction of unlawful occupiers from land belonging to others. The same reasoning has been applied by different courts including this Division.² It has been explained that an organ of state may indeed proceed in terms of section 4 where it is an owner of land. It will be remembered that section 4 applies to proceedings by "*an owner or person in charge of land*", and in terms of section 1 an "*owner*" includes an organ of state.³

¹ *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA) at para 7.

² *City of Cape Town v Unlawful Occupiers, Erf 1800, Capricorn (Vrygrond Development) And Others* 2003 (6) SA 140 (C) 148 – 149. See also *Paarl Municipality v Occupiers of Houses Situated at Certain Erven, Mbekweni, Paarl*, case No 8937/2000 at p 14; *Transnet Ltd v Nyawuza And Others* 2006 (5) SA 100 (D) at 103G-H.

³ Section 1 of PIE defines an "*unlawful occupier*" as -

[20] In *Mangaung Local Municipality v Mashale and Another*⁴ the court went as far as to state that, because section 4 applies to proceedings by all owners or persons in charge of land, which include an organ of state, an organ of state that is the owner of land cannot disregard the clear provisions of section 4 and proceed in terms of section 6 in respect of eviction of unlawful occupiers from land owned by it. That court concluded⁵ that an organ of state may only proceed in terms of section 4 of the Act for eviction of unlawful occupiers from land owned by it.

[21] At the same time, it is also clear from the case law that where eviction takes place at the instance of an organ of state in circumstances to which PIE is applicable the court can only order eviction if it is satisfied that it is just and equitable to do so after having regard to all relevant factors including those set out in s 6(3) of PIE⁶, which provides as follows:

“(3) In deciding whether it is just and equitable to grant an order for eviction, the court must have regard to –

- (a) the circumstances under which the unlawful occupier occupied the land and erected the building or structure;
- (b) the period the unlawful occupier and his or her family have resided on the land in question; and
- (c) the availability to the unlawful occupier of suitable alternative accommodation or land.”

“a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land, excluding a person who is an occupier in terms of the Extension of Security of Tenure Act, 1997, and excluding a person whose informal right to land, but for the provisions of this Act, would be protected by the provisions of the Interim Protection of Informal Land Rights Act, 1996 (Act No. 31 of 1996).”

⁴ *Mangaung Local Municipality v Mashale and Another* 2006 (1) SA 269 (O) at para 11.

⁵At para 11.

⁶ *City of Johannesburg v Changing Tides 74 (Pty) Ltd* [2012] ZASCA 116; 2012 (6) SA 294 (SCA); 2012 (11) BCLR 1206 (SCA) (*Changing Tides*) at para 15.

[22] As regards the dual use of property, it is without question that section 26(3) of the Constitution of the Republic of South Africa⁷ regulates the eviction of unlawful occupiers, from both residential and commercial premises.⁸ Furthermore, the Constitutional Court has held that, even though the eviction of commercial occupants does not fall within PIE's remit, the Act nevertheless regulates the eviction of unlawful occupiers who reside on commercial premises.⁹

[23] Similar to this case, the matter of *MC Denneboom Service Station CC and Another v Phayane*¹⁰ concerned an eviction from premises which were used for both commercial purposes – as a service station and convenience store – and for residential purposes. The commercial occupation of the premises was in the name of the juristic person, MC Denneboom Service Station CC (Denneboom), while its owner also lived on the premises together with other persons. The Constitutional Court agreed with the High Court that the commercial aspect of the eviction was warranted – that the respondent was the registered owner and that the applicants were in unlawful occupation thereof. However, the Constitutional Court was not satisfied that the requirements of PIE were met or even examined by the High Court. It appears, in any event, that by the time the High Court judgment was issued the intention was that the residential aspect of the eviction should be excluded from the order, but that the order had failed to make that distinction clear. As a result, the order granting the commercial eviction was upheld by the Constitutional Court, and the order was amended to exclude the residential aspect of the eviction.

⁷ Section 26(3) of the Constitution provides:

“No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.”

⁸ *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* [2011] ZACC 33; 2012 (2) SA 104 (CC); 2012 (2) BCLR 150 (CC), especially at paras 1, 7 and 30; *MC Denneboom Service Station CC and Another v Phayane* (CCT 71/14) [2014] ZACC 29; 2015 (1) SA 54 (CC); 2014 (12) BCLR 1421 (CC) (3 October 2014) para [16].

⁹ *MC Denneboom Service Station CC and Another v Phayane* (CCT 71/14) [2014] ZACC 29; 2015 (1) SA 54 (CC); 2014 (12) BCLR 1421 (CC) (3 October 2014) paras [16] and [17].

¹⁰ *MC Denneboom Service Station CC and Another v Phayane* (CCT 71/14) [2014] ZACC 29; 2015 (1) SA 54 (CC); 2014 (12) BCLR 1421 (CC) (3 October 2014).

[24] Thus, where an eviction involves both commercial and residential premises, a court is required to ensure that PIE's requirements have been met before ordering the residential aspect of the eviction, including by examining firstly whether the respondent is an "unlawful occupier" as defined in the PIE.

[25] Further, although the PIE Act does not apply to the eviction of commercial occupants, a court is nevertheless empowered, in terms of section 172(1)(b) of the Constitution, to make an order that is just and equitable.¹¹

[26] What is required in order to succeed with an application for commercial eviction is that there was a valid termination of the respondent's right to occupy the premises and that there has been continued occupation of the property by the respondent, or someone holding on behalf of or through the respondent.

F. DISCUSSION

[27] The reasons for the Magistrate's conclusion that the lease was not validly cancelled were quoted earlier. The first, to which I now turn, was expressed as the *"reasons for cancellation in comparison with what is contained in the affidavit"*.

[28] The reason for cancellation given in the City's cancellation notice of 6 February 2020 was *"non-acceptance of the new proposed market rental"*. This is the same reason given in the City's founding affidavit, which sets out the circumstances of the valuation assessment of the property and the outcome thereof. The founding papers also set out the correspondence sent out to the respondents flowing from the valuation assessment.

[29] In the second respondent's answering affidavit it was not disputed that the City had caused a valuation of the property to be conducted; that the City made a

¹¹ *MC Denneboom Service Station CC and Another v Phayane* para 18. See also *Van der Stel Sports Club v Cape Perfect Health CC t/a Perfect Health* (4467/2018) [2018] ZAWCHC 167 (3 December 2018) para 9.

proposal to the respondents regarding an increased rental; that the first respondent made a counter proposal which was, according to the second respondent “*on the low side*”; and that the City rejected the low proposal made by the first respondent. It is also significant that the second respondent states in her answering affidavit that it was she who forwarded the correspondence of 11 December 2019 to the first respondent because the lease was still in his name. In other words, she was aware thereof. Further, as I have indicated, the second respondent admits to receiving the cancellation notice of 6 February 2020. None of these facts are in dispute in the papers.

[30] What appears from the judgment is that the Magistrate was not satisfied with the fact that the City only mentioned in its replying affidavit the fact that the property in question is reserved in favour of its Law Enforcement, Traffic and Coordination Department (“*Law Enforcement*”), for provision of municipal services, in terms of the City’s Management of Immovable Property Policy. There are several problems with the Magistrate’s approach in this regard.

[31] First, the City was not required to give a reason for cancelling the lease. Clause 4 of the lease entitles either party, at any time, to terminate it on two months’ written notice. The City had an unqualified right to cancel the lease. Secondly, the reason for cancellation given in the cancellation notice was supported by the factual events that had transpired in the months preceding the cancellation. As I have illustrated from the summary above, that reason was not gainsaid by the respondents. It was a legally unassailable reason for cancelling the lease.

[32] Thirdly, although it is correct that the issue of reserving the property in favour of Law Enforcement only arose in the replying affidavit, that does not mean that it was a reason for cancelling the lease or evicting the respondents. After all, the respondents were first approached with an offer to stay on at the property, when the City approached them with an increased offer of rental at the end of 2019. As a result, there can be no suggestion from the papers that the City wanted to evict the respondents at any cost.

[33] There was simply not enough evidence in the record to conclude as the Magistrate did, that the issue of reserving the property in favour of Law Enforcement was a reason for evicting the respondents. There was no detail in the record regarding when the property was identified and requested by Law Enforcement for provision of its municipal services. That would have been crucial information, given that the increased rental offer was presented to the respondents in late 2019 and the replying affidavit containing the new information was deposed on 13 July 2022. After all, this new information arose in reply to the second respondent's averments regarding the offer to purchase the property, which she made in May 2022, after the eviction proceedings were launched. In light of the fact there is no evidence regarding what transpired from 6 February 2020 and March 2022, when the proceedings were launched, I am of the view that it was improper for the Magistrate to rely on this as an aspect which amounted to a contradiction in the City's reasons for seeking eviction.

[34] That leads to the second reason given for the Magistrate's conclusion, which is noted as *"the lapse of time between cancellation and the institution of the eviction proceedings"*. It is correct that there was a time lapse between 6 February 2020 and the launch of the eviction proceedings on or about 24 February 2022. However, that in itself is not an indication of waiver by the City of its right to evict the respondents. In fact, there was no evidence before the Magistrate regarding what transpired between these dates. But in any event, clause 24.3 of the lease provides that *"[n]o indulgence, leniency or extension of time which a party ("the Grantor") may grant or show to the other, will in any way prejudice the grantor or preclude the grantor from exercising any of his rights in the future"*.

[35] There is no evidence that the City relented from its position from the time that it gave notice of cancellation on 6 February 2020. In order to rely on waiver, the respondents were required to show that the City, with full knowledge of its rights had abandoned the right to cancel the lease.¹² It must be shown that the City, whether

¹² *Ex parte Sussens* 1941 TPD 15 at 20; *Road Accident Fund v Mothupi* supra [24] para 17; *Borstlap v Spagenberg en Andere* 1974 (3) SA 695 (A) at 704; *Hepner v Roodepoort-Maraiburg Town Council* 1962 (4) SA 772 (A) at 778H – 779A; *Netlon Limited and Van Leer South Africa (Pty) Ltd v Pacnet (Pty) Ltd* 1977 BP 87 (A) at p 133. Also reported at 1977 (3) SA 840 (A).

expressly or impliedly, waived its right to terminate the lease and evict the respondents, in a manner that is unequivocal and consistent with no other hypothesis.¹³ There is no such evidence in the record. I add that it was not even the case of the second respondent that she thought the City had changed its mind about the termination of the lease from 6 February 2020 the date of receipt of the notice of cancellation, or from 6 April 2020 the effective date of cancellation.

[36] At paragraph 44 of the judgment the Magistrate states that the notice period provided to the respondents in the cancellation notice was a broken period, referring to the case of *Luanga v Perthpark Properties*¹⁴. However, there was no requirement to comply with two calendar months' notice in terms of the lease. Clause 4 of the lease expressly provides that "*both parties shall, at any time have the right to terminate this Lease or not less than 2 (two) months written notice of termination*". It simply granted either party the right to cancel on two months' written notice.

[37] The requirement to grant two calendar months' notice is a requirement of section 5(5) of the Rental Housing Act 50 of 1999, the subject of *Luanga v Perthpark Properties*. However, it does not find application in this case because it is common cause in the papers - and this was confirmed during the hearing by Mr Dunn who represents the second respondent - that the lease was tacitly relocated for an indefinite period, not on a periodic or month-to-month basis. This is supported by the fact that in 2018 the parties were preparing to enter into another lease agreement; and the fact that the second respondent in effect wants to remain in occupation indefinitely. That being so, the lease was terminable on reasonable notice, which in terms of the lease was two months' notice. I note as well that the second respondent did not dispute the notice period provided in terms of the lease in her answering affidavit.

¹³ *Road Accident Fund v Mothupi* 2000 (4) SA 39 (A) 50; *New Media Publishing (Pty) Ltd v Eating Out Web Services CC* 2005 (5) SA 388 (C) at 406C – E.

¹⁴ *Luanga v Perthpark Properties Ltd* (A99/2018) [2018] ZAWCHC 169; 2019 (3) SA 214 (WCC) (20 September 2018)

[38] The Magistrate also remarked that the respondents were not billed on any new amount, presumably between April 2020 to March 2022. There is nothing remarkable about this because, in terms of clause 19.2 of the lease, if the City were to cancel the agreement and the respondents dispute the City's right to cancel it but remain in occupation of the property, the respondents are obliged to continue to make all rental payments which are due and payable in terms of the lease until the dispute is resolved. If anything, the fact that the respondents were not billed in a new rental amount is evidence that the City had not changed its stance to evict them.

[39] The final basis for the Magistrate's finding is "*the negotiations which carried up until June 2022*". The only evidence of 'negotiations' between the parties contained in the papers is from May 2022, after the eviction proceedings were instituted. These were in the form of a letter and emails between the second respondent's attorney and the City's legal representatives, which continued until 16 June 2022. During that whole period, the second respondent was informed that City's representatives were awaiting instructions from the City regarding her offer. There is otherwise no indication that the City had changed its mind regarding the eviction. In fact, amongst the correspondence between the parties is an email dated 6 June 2022 from the City's legal representatives in which they advised the second respondent's attorneys to file an answering affidavit in order to meet time obligations, and suggested "*that your clients file their papers and any discussion on settlement can run parallel to the legal process*". This is a clear indication that the City had not withdrawn its legal process of evicting the respondents. There is therefore no basis to conclude that the negotiations between the parties somehow contributed towards invalidating the cancellation of the lease.

[40] As the discussion above shows, the reasons relied upon by the Magistrate for dismissing the application are not sustainable. And since she found that the respondents were not unlawful occupiers in terms of the PIE Act, the Magistrate did not proceed to consider whether their eviction would be just and equitable, and that determination must still be made.

[41] In considering the appropriate approach to be taken in this matter, there is a sense in which the issues between the parties have not been sufficiently explored. It is evident from the papers that there has been very little engagement between the City and the second respondent, and that, before the launch of the proceedings, correspondence from the City was directed only at the first respondent. It has transpired from the papers that the first respondent is no longer involved with the property. At the same time, the second respondent desires to remain at the property and to engage with the City.

[42] In my view, it is incumbent upon the City to direct any further correspondence regarding the occupation of the property, if any, to the second respondent. After all, it is common cause that the negotiations in 2018 pursuant to a new lease were directed at the second respondent. And at that stage, the parties agreed to a rental amount of R19 000, which is not far off from the current amount that the City wants to charge now, compared to the amount proposed by the first respondent's legal representatives of R6 481.20. All these considerations are relevant to the City's given reason for cancelling the lease, namely the respondents' non-acceptance of the new proposed market rental. There is no evidence that the City engaged the second respondent regarding the new proposed rental.

[43] This does not mean that the City is obliged to accept any of the second respondent's proposals. There is, however, a duty upon it to reasonably engage with her.¹⁵ Such an approach acknowledges that the City has a constitutional obligation, in terms of section 26(2), to take reasonable measures, within its available resources, to achieve the progressive realisation of the right of access to adequate housing. It also acknowledges the constitutional rights to human dignity¹⁶ and equality¹⁷ of the second respondent, who, until the cancellation of the lease, was only consulted in passing, and whose voice was not heard in this whole saga. There appears to have been no consideration that the household in question is now

¹⁵ *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* (24/07) [2008] ZACC 1; 2008 (3) SA 208 (CC) ; 2008 (5) BCLR 475 (CC) (19 February 2008) para 13 – 18.

¹⁶ Section 10 of the Constitution.

¹⁷ Section 9 of the Constitution.

headed by a single woman, who has a minor child, and who has been directly running a business from the premises for almost two decades.

[44] There is cursory mention in the answering affidavit, that the second respondent sought to engage the City. However, there is a dearth of information in this regard. The parties may need to file further affidavits dealing with engagements with each other.

[45] I do take note of the City's position that the property has now been earmarked for its Law Enforcement. However, as I have already indicated there is very little information regarding this aspect, and it may be an issue that requires closer examination by means of a further affidavit.

[46] For all the above reasons, I am of the view that the matter should be remitted to the Magistrate's Court for a decision regarding whether an eviction is just and equitable, and if so, a suitable date for eviction.

N. MANGCU-LOCKWOOD
Judge of the High Court

I agree and it is so ordered.

M. J. DOLAMO
Judge of the High Court

APPEARANCES

For the appellant: Adv P. MacKenzie
Instructed by: M. Y. Cariem
Van der Spuy Attorneys

For the respondents: Mr T. Dunn
Instructed by: TJC Dunn Attorneys