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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 16494-2018

DATE: 2018-05-11

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED. ✓

22/5/2018 TMJ.
DATE SIGNATURE

In the matter between

SWDC HOLDINGS (PTY) LIMITED Applicant

and

BUTHELEZI NICHOLAS SIBU & OTHERS Respondent

J U D G M E N T

SUTHERLAND J:

[1] The Applicant in this matter is the owner of properties registered as Erven 952, 953, 954 and 955 Marshalltown, Gauteng and has brought an urgent Application in terms of Section 5 of the PIE Act. The Respondents are

4 of about 80 people who occupy the properties. The occupation is alleged to be unlawful and that allegation is uncontested.

[2] The Application was brought for relief set out in Parts A, B and C. Part A has already been dealt with in this Court, and I shall return to deal with that fact in due course.

[3] The relief sought now, ie Part B, reads as follows:

'3.1. That the matter be treated by way of urgency;

3.2. That pending eviction proceedings instituted by the Applicant in terms of Section 4 of the PIE Act, the Respondents [as listed today] are evicted in terms of Section 5 of the said Act from the property, [which is described as I have set out]

3.3. The Respondents are ordered and directed to vacate the property within 24 hours of the date of any order of this court;

3.4. That in the event that the Respondents fail to vacate the property as directed, then the Sheriff of the Court or his/her lawfully appointed deputy may give effect to the said order, by removing the Respondents from the property together with their goods and possessions;

3.5. The Sheriff of the court is authorised and directed to

approach the South African Police Service or the Johannesburg Municipal Police Department for any assistance he may require in the circumstances;

3.6. That the Respondents are interdicted and restrained from:

3.6.1. Collecting money from any of the residential or commercial occupiers of the property;

3.6.2. Intimidating, threatening, assaulting or approaching within ten metres of any of the Applicant's offices, employees or agents.

3.7. That the Respondents are ordered and directed to pay the costs of this Application, including the costs of Part A;

3.8. Further and/or alternative relief.'

[4] The thrust of the justification for the Application is that the Respondents are criminals who extort money as rent from other occupiers at the point of a gun, threaten, harass and assault the occupants and the employees of the Applicant whom it sends to attempt to attend to the maintenance of the property. The applicant has, in short, alleged that the building has been hijacked and that the 4 Respondents are holding the residents in thrall, and prevent the Applicant from effective access to the

building. Thus, on such grounds, it is alleged they should be removed.

[5] I deal with certain preliminary matters: The case for the Applicant as regards prayer 6 [as I have read it] is superfluous, because on 2nd May 2018 Mashele J granted the same relief, in substance, when Pat A was brought before the Court. I need not consider it further.

[6] The prayers which I have quoted in paragraphs 3, 4 and 5 of the Notice of Motion which relate to the physical expulsion of the Respondents is the proper focus of these proceedings.

[7] The next aspect to address is the identification of the Respondents. The 4 Respondents were described as follows:

> '1st Respondent as Nicholas Sibu Buthelezi;
>
> 2nd Respondent as Simo Duze;
>
> 3rd Respondent a person known as a Vuyo; and
>
> 4th Respondent the building caretaker known as Buthelezi.'

[8] The person described as the 3rd Respondent is not further known other than as, as I have cited, ie, a person known as 'Vuyo'. Independently of other

considerations, it is impractical and futile to issue an order against a person who cannot be properly distinguished from others. For that reason, only the circumstances alleged to prevail in respect of the 1st, 2nd and 4th Respondents shall be addressed by me in this application.

[9] The matter was set down on 7th May 2018, and to accommodate the filing of an answering affidavit, and a replying affidavit, the hearing stood down until 10th May 2018. At the hearing a supplementary replying affidavit from the Applicant was, without opposition, handed in.

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[10] This supplementary affidavit addressed a letter to the applicant from the South African Police Service confirming the arrest and detention of the 1st Respondent on a charge, it must be inferred, of extorting so-called rent from the occupiers of the building. The letter also mentions that the South African Police Service have seized a rent book, supposedly corroborating that practice of collecting rent from the inhabitants. In addition, it says that warrants of arrest have been issued for the other 3 Respondents. Ostensibly, they are at large at his time, ie, while the proceedings have been prosecuted. Notwithstanding that, the deponent to the answering affidavit is the 2nd
20 Respondent.

[11] I deal with the personal circumstances of the Respondents as they

appear from the papers. From the affidavits filed, the personal circumstances of the Respondents are thinly set out. The answering affidavit, filed by their attorney, is deposed to by the 2nd Respondent who claims to be authorised to depose on behalf of all the Respondents. As regards the 3rd Respondent Vuyo, he identifies a youth who the Applicant readily says in reply, is not the Vuyo of whom it spoke. As to the 1st Respondent who is at present in police custody, the 2nd Respondent has obtained his fiancé to authorise him to say that she and their child live with the 1st Respondent in the building. Of himself, the 2nd Respondent says he cohabits with a wife and six children. Of the 4th Respondent Buthelezi, alleged to be a caretaker, he says nothing of his personal circumstances other than to include him with himself and the 1st Respondent as unemployed and eking out a living as Panelbeaters.

[12] Self-evidently, these allegations about, at once, being unemployed and earning money as Panelbeaters are mutually destructive, and I conclude that the three of them do indeed earn money in an unstated sum, but probably this revenue stream is erratic. As alluded to earlier, the 2nd and 4th Respondents are liable to be arrested.

[13] I deal with the case for a Section 5 Eviction. The principle, the Section under which evictions of law for occupiers takes place is Section 4 of the PIE Act. Section 5 is a specific urgent remedy. Its provisions in so far relevant in this matter are as follows:

'(1) Notwithstanding the provisions of section 4, the owner or person in charge of land may institute urgent proceedings for the eviction of an unlawful occupier of that land pending the outcome of proceedings for a final order, and the court may grant such an order if it is satisfied that—

(a) there is a real and imminent danger of substantial injury or damage to any person or property if the unlawful occupier is not forthwith evicted from the land;

(b) the likely hardship to the owner or any other affected person if an order for eviction is not granted, exceeds the likely hardship to the unlawful occupier against whom the order is sought, if an order for eviction is granted; and

(c) there is no other effective remedy available.'

[14] Self-evidently all three elements of Section 5(1) must be demonstrated. The ramifications of Section 5 applications have been addressed by this court. (see: Spilg J in *Shanike Investments No. 85 (Pty) Ltd & Another vs Ndima & Others* 2015 (2) SA 610 (W) paragraphs 17 – 21, 45 – 61, and 102 – 110) The Section 5 remedy is tantamount to an interim interdict within its own strictly defined criteria.

[15] The Applicants case, as relevant to the selection of these Respondents of the 80 inhabitants for physical removal, rests on two related bases.

[16] First, it is alleged that they present a danger to the other residents because they are gangsters who extort money; secondly, by their presence, they prevent the Applicant accessing the building, which is dilapidated and abused, from carrying out such maintenance that is necessary to make the building safe and habitable.

[17] The Respondents case in response is essentially as follows:

1. First a denial of any extortion or other violence, and further denials that in any way the Applicant's employees are inhibited from access;

2. Secondly, an assertion that since they began to occupy this building from about 2003 until 2018, when the Applicant became its owner, the building has been in a constant state of disrepair.

[18] It is admitted by the respondents that the two-storey building has been divided up into portions and that shacks had been erected on the flat room. It is claimed that 80 people occupy the building. Electricity is illegally connected. As regards ablutions, which these 80 people somehow have to share, the deponent denies the allegation by the Applicant that only one toilet is functioning, and offers in response the evasive riposte that the place has six

bathrooms and, rethorically, asks what happened to the other five toilets? No positive assertion that the other five toilets are working is actually made.

[19] Developing the defence relied on, it is said that, given the many years of ill repair there can be no urgency at this time to repair the building at this moment.

[20] In the Replying Affidavit, upon being challenged that it was false to accuse the Respondents of intimidation and extortion, the Applicant revealed the identity of two persons from whom the information was gleaned to make the allegations in the Founding Affidavit and attached corroborating affidavits setting out details of the personal dealings by each of them with one or other of the Respondents.

[21] The Respondents, for that reason, have had no chance to address these individualised allegations. No objection was raised to the filing of the Affidavits, but I must necessarily be cautious in giving weight thereto in these circumstances.

[22] There is in respect of the allegations of violence a dispute of fact, and

that dispute affects both legs of the Applicant's case. The approach which I am required to adopt in dealing with the situation is that which is set out in the well known decision of *Webster v Mitchell* 1948 (1) SA 1186 (W). The relevant extract from the headnote reads as follows:

> 'In an application for a temporary interdict, the Applicant's right need not be shown by a balance of probabilities. It I sufficient if such right is *prima facie* established, though open to some doubt.
> The proper manner is to take the facts as set out by the Applicant, together with any facts set out by the Respondent, which the Applicant cannot dispute, and to consider whether having regard to the inherent probabilities, the Applicant could on those facts obtain final relief at a trial.
> The facts set up in contradiction by the Respondent should then be considered, and if serious doubt is thrown upon the case of the Applicant, he could not succeed. In considering the harm involved in the grant or refusal of a temporary interdict, where a clear right to relief is not shown, the court acts on the balance of convenience.
> If though there is prejudice to the Respondent, and that prejudice is less than that of the Applicant, the interdict will be granted, subject if possible, to conditions which will protect the Respondent.'

[23] As explained in regard to the citation of Section 5(1) of the PIE Act, that section was modelled on the norms which are captured in *Webster v*

Mitchell. Accordingly, what I am required to do in this matter is weigh up the probabilities of the two versions.

[24] The Respondents, save for the 3rd Respondents, are reasonably identified by the two persons whose corroborating affidavits are attached. The allegations in the founding papers I can conclude, were made upon a solid foundation, despite being denied baldly by the Respondents. In addition, crucially, there is the evidence of a rent book, other than in the hands of the owner, obtained from the 1st Respondent.

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[25] The Respondent's attach affidavits from several residents who say no rent has ever been collected from them and no violence has ever been experienced. It is not possible in these circumstances to give weight to those affidavits which, although it is possible that they were freely given, it is also probable that in the face of the rent book and the allegations under oath of intimidation, the particular affidavits have been procured under duress.

[26] In my view the probabilities weighed in this way, on the principles set out in *Webster v Mitchell,* favour the Respondents being held to have been
20 engaged in criminal conduct as described in the Founding and Replying Affidavits.

[27] I now consider whether or not the requirements of Section 5 of the PIE

Act have been met.Section 5(1)(a) requires some proof of imminent danger to any person. The existence of a probable threat of extortion and intimidation satisfies that requirement.

[28] The risk of the building having become unsafe is real, but in my view has not been shown to be imminent in the sense set out in Section. 5(1) Mainly, I infer that from the absence of a proper inspection yet to be carried out.

[29] Section 5(1)(b) requires a balancing of hardship. The plain reality is that, if expelled, these Respondents shall have to find elsewhere to live. It has been argued that the rent money that they are alleged to have extorted must be in their possession and they can use that to rent premises elsewhere. That is not impossible, but is clearly speculative. The Respondents admit to earning money as Panelbeaters, and so they are not wholly without means.

[30] The shelters of the City of Johannesburg are open to them. The modest charge for over-nighting can probably be met. The eviction contemplated leaves their families, such as we know of details regarding them, undisturbed. They will, necessarily be grossly inconvenienced, but the relief is interim, pending a fuller deliberation about the propriety of their presence and that of their families.

[31] Against that must be weighed the freeing of many people from the threat of intimidation and extortion, and the allowing of free access to the building to the employees of the Applicant in order to address maintenance issues.

[32] In my view on the basis of the principles that I am required to apply, the balance must be tipped in favour of the Applicant, and the interests which it seeks to serve by such relief. It minimises disruption to the lives of the greater number.

[33] Lastly, there is, in my view, no alternative suitable or effective means to achieve this purpose as contemplated by Section 5(1)(c). The prospect of policing the building to prevent the Respondents, should they remain in occupation from any time, or day or night, committing acts of intimidation, whether directly or indirectly, obviously implies a significant contingent of security people being deployed. That in my view is too demanding of the Applicant.

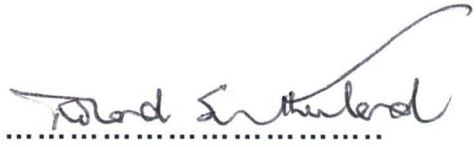
Accordingly, in the circumstances the order which is appropriate, as drawn from the Notice of Motion is as follows, and I make the following order:

1. The Respondents are ordered and directed to vacate the property within 24 hours of the date of any order.

2. That in the event that the Respondents fail to vacate the property as directed, the Sheriff of the Court or his deputy may give effect to this order, by removing the Respondents from the property together with their goods and possessions, save such goods and possessions as are necessary to provide for the needs of the families or co-inhabitants of the sections of the building which the said Respondents occupy.

3. The Sheriff of this court is authorised and directed to approach the South African Police Service and/or the Johannesburg Municipal Police Department for any assistance he may require in the circumstances;

4. The costs of this application shall be borne by the 1st, 2nd and 4th Respondents jointly and severally, the one paying the others to be absolved.



SUTHERLAND J
JUDGE OF THE HIGH COURT
DATE EDITED: 22 May 2018