IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: ***NO***
(2) OF INTEREST TO OTHER JUDGES: ***NO***
(3) REVISED:

Date: ***13th September 2019*** Signature: _____

CASE NO: 2019/29235

DATE: 13TH SEPTEMBER 2019

In the matter between:

G M J PROPERTY TRADING (PTY) LIMITED	Applicant
and	
MOLENGE, DJABAKA MARTINE	First Respondent
OTHER UNLAWFUL OCCUPIERS OF NO 9 OXFORD ROAD, KENSINGTON	Second Respondent
THE CITY OF JOHANNESBURG	Third Respondent

JUDGMENT

Adams J:

[1]. This is an opposed urgent application by the applicant for the eviction of the respondents and all other occupiers from the residential property, being Erven 5022 and 5023, Kensington Township, Gauteng Province, situate at number 9 Oxford Road, Kensington, Johannesburg ('the premises'). As a

precursor to the eviction order, the applicant applies for an order declaring as cancelled and terminated the written lease agreement concluded between the applicant and the first respondent on the 5th of March 2019. The applicant also applies for other relief ancillary to the order for an eviction from the premises of all of the occupiers. In addition to opposing the applicant's urgent application, the first and second respondents launched an urgent counter-application *inter alia* for an order directing the applicant to restore the supply of electricity to the premises.

[2]. The first and second respondents are lessees of the applicant. The applicant is the owner of the immovable property on which the premises are situated, and the premises were let to the respondents in terms of a written lease agreement concluded on the 5th of March 2019 between the applicant and the first respondent. The monthly rental was agreed upon at R30 000 per month, but in terms of 'special conditions' in the contract the rental for the first three months was agreed at R25 000 per month, pending certain alterations to be effected to the premises by the applicant. The monthly rental was apparently further reduced by agreement between the parties to R18 000 per month. The lease period, as per the written lease, is a period of twelve months from the 1st of April 2019 to the 31st of March 2019. The lease provides that the maximum number of occupants at any given point in time should be no more than fourteen people.

[3]. As and at the 1st of July 2019, the respondents were in arrears with their rental, the last payment having been received from the respondents on the 15th of June 2019, being the sum of R8 000. The applicant alleges that the amount then outstanding was the sum of R55 000. There is a dispute relating to the arrear rental. However, there is no doubt in my mind that as and at the 1st of July 2019 the respondents were in arrears with the monthly rental. No further rentals have been received by the applicant from the respondents since the payment on the 15th of June 2019.

[4]. On the 16th of July 2019 the applicant caused a letter of demand to be addressed the first respondent, placing the respondents on terms to bring their monthly rental up to date, failing which, so the demand said, the respondents were required to vacate the premises within thirty days from date of the

demand. Implicit in the letter of demand was a notice of repudiation of the lease agreement on the basis of the breach by the respondents of the terms of the lease. The respondents did not comply with this demand and on the 20th of August 2019 the applicant caused this urgent application to be issued and served on the respondents. In these circumstances, I am of the view that the applicant is fully within its rights to claim a cancellation of the lease agreement. The respondents are in breach of the said agreement and despite demand from the applicant that they remedy their breach, the rental remains in arrears.

[5]. On the 27th of August 2019 this court (Mahalelo J) issued directions in respect of the service on the respondents of the notice in terms of section 5(2) of the the Prevention of Illegal Eviction from, and Unlawful Occupation of Land Act 19 of 1998 ('the PIE Act'). These directions were complied with and it is in response to this notice and the notice of motion that the respondents delivered their notice of intention to oppose and filed a counter-application and opposing affidavits.

[6]. The applicant contends that this matter is urgent for the simple reason that there is a dire need to continue with the renovations to the property. The applicant is suffering irreparable harm in that it presently pays monthly bond fees of approximately R15 000 per month with no rental income being earned on the premises. There is a substantial amount in respect of arrear rental payable by the respondents. There is a mortgage bond of R1.25 million registered over the property and the applicant remains liable to service the bond whilst faced with the non – or late payment of rent. The respondents are refusing to pay rental and has since July 2019 refused to pay rental as per the lease agreement.

[7]. In sum, Mr Mhlanga, Counsel for the applicant, submitted that they have illustrated that the applicant is suffering damages in the form of financial losses as a result of the failure by the respondents to vacate. The damages are accumulating as time passes and flow from the non / late – payment of rental, the continued obligation on the applicant to pay for municipal services, the delay in the initiation and finalisation of the renovations.

[8]. It is trite that commercial urgency warrants the relaxation of the Uniform Rules of Court in terms of Rule 6(12). In this matter, the applicant has afforded the respondents sufficient time and opportunity to oppose the application and to fully present their case to court. The respondents in fact availed themselves of this opportunity and, in my view, any and / or all facts relevant to the adjudication of the application have been placed before me. Additionally, they have filed a counter-application in response to the applicant's urgent application. I am of the view that relaxation from the normal time parameters is commensurate to the urgency of the matter. It is indeed so that the respondents have not alleged prejudice as a result of this application being launched on an urgent basis. There is therefore, in my judgment, no possible prejudice suffered by the respondents as a result of this application being launched on an urgent basis.

[9]. In that regard, I have had regard to what is said by the court in *Luna Meubel Vervaardigers v Makin Furniture Manufacturers,* 1977 (4) SA 135 (W) at pg 137E-F:

'Practitioners should carefully analyse the facts of each case to determine, for the purposes of setting the case down for hearing, whether a greater or lesser degree of relaxation of the Rules and of the ordinary practice of the Court is required. The degree of relaxation should not be greater than the exigency of the case demands. It must be commensurate therewith. Mere lip service to the requirements of Rule 6 (12) (b) will not do and an applicant must make out a case in the founding affidavit to justify the particular extent of the departure from the norm, which is involved in the time and day for which the matter be set down'.

[10]. The point about this matter is that it has been more than two months since the applicant demanded that the respondents, who are in flagrant breach of the lease agreement, bring their rental up to date, and the matter is no closer to being resolved. Therefore, in my judgment, the applicants have made out a case for urgency and for a truncation of the time periods as provided for in Uniform Rule 6(12).

[11]. The main contention by the respondents in relation to urgency is that the applicant's urgent application for eviction was brought by the applicant in terms the provisions of s 5 of the PIE Act. The application, so the respondents

contend, has however not been brought within the confines of s 5, the requirements of s 5 not having been met.

[12]. The PIE Act expressly makes provision for and deals specifically with procedures for the eviction of unlawful occupiers. Section 5 of the PIE Act provides as follows:

'5 **Urgent proceedings for eviction**

(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.

(2) Before the hearing of the proceedings contemplated in subsection (1), the court must give written and effective notice of the intention of the owner or person in charge to obtain an order for eviction of the unlawful occupier to the unlawful occupier and the municipality in whose area of jurisdiction the land is situated.

(3) The notice of proceedings contemplated in subsection (2) must-

(a) state that proceedings will be instituted in terms of subsection (1) for an order for the eviction of the unlawful occupier;

(b) indicate on what date and at what time the court will hear the proceedings;

(c) set out the grounds for the proposed eviction; and

(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 for legal aid.

[13]. In *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes & Others,* 2010 (3) SA 454 (CC), the Constitutional Court had opportunity to deal with s 5. At par [90] the Constitutional Court (Yacoob J) has this to say on the issue.

'[90] It is apparent that s 5(1) sets out certain very stringent requirements to obtain an urgent eviction pending the determination of proceedings for a final order of eviction of the applicants. In proceedings in terms of s 5 therefore, any issue in relation to whether an order for eviction should be granted, and, in particular, whether it is just and

equitable to grant the eviction order, would be entirely irrelevant. The PIE Act contemplates that urgent proceedings in terms of s 5 will be separate, independent and distinct from the substantial eviction proceedings contemplated in s 6.

The High Court found that 'the applicants had clearly complied with the procedure laid down in s 5 of PIE' on the basis of certain notices that had been issued by that court. One would ordinarily have expected an urgent eviction order to have been obtained upon proof of the stringent requirements of s 5 of the PIE Act, including the existence of a real and imminent danger of substantial injury or damage to any person or property. In the event, although an urgent order in terms of s 5 was applied for, no order was in fact obtained.

[91] What happened was this. Although the application was initially a s 5 application, the order asked for was not a s 5 order but one for a final eviction and relocation, competent only in terms of s 6 of the PIE Act. The notice to residents had in the meantime made it plain that a final eviction order would be asked for. It will be seen that s 6 issues, that have nothing to do with an interim eviction order and which are relevant to a grant of a final order of eviction, were dealt with in the papers. These issues include whether the eviction should be ordered in all the circumstances and whether it is just and equitable to evict. Argument was heard on whether a final eviction order should be granted, and that order was in fact granted.

[92] The High Court would have put form above substance if it heard the case on the ultimate date of hearing as a s 5 case. By the time the matter was heard about three months after the application had been filed, much water had passed. Notices of intention to oppose had been filed and the parties had dealt in detail with the s 6 issues in the papers. The urgent s 5 application had been overtaken by events. In the circumstances the High Court was right to deal with the case as one which started as a s 5 case and which, by the time it was argued, had matured into a fully-fledged s 6 application. In my view, there could indeed have been no opposition of substance had the respondents applied for an amendment in the High Court shortly before the date of hearing, an amendment to regularise the matter and to make explicit what was already implicit, that an eviction was, at the date of hearing, being sought in terms of s 6. In the circumstances the question whether the stringent requirements of s 5 had been met was not material before the High Court as at the date on which the matter was finally heard. Indeed, the s 5 issues were never material because no order in terms of s 5 had ever been sought. It is therefore unnecessary for me to decide in this case whether the stringent s 5 requirements had been complied with.

[93] The High Court was undoubtedly right in ultimately deciding the case, and making an order, in terms of s 6 of the PIE Act. I conclude therefore that the occupants

enjoyed no right of occupation. It was therefore not necessary for the City to terminate that right. The essentially technical defence by the applicants that they had a right of occupation which had not been terminated fails. That does not mean that they can be evicted or relocated without more. The requirements of the PIE Act must be complied with. I must say immediately that the most important of the requirements of the PIE Act for present purposes is the requirement that their eviction must be just and equitable. I come to that later. First, however, certain essentially technical objections based on the PIE Act and taken by the applicants must be carefully considered.'

[14]. I deemed it necessary to cite as extensively as I did from the *Joe Slovo* judgment so as to place in context my view on the interpretation to be given to section 5. But before I do that I interpose to note that, in applying the principles as enunciated in this ConCourt judgment, the applicant is, in my view, entitled to the relief sought in this application.

[15]. The applicant is entitled to an eviction of the respondents in that they have complied with the procedural and substantive requirements of s 5.

[16]. In any event, I am of the view that the applicant, notwithstanding the formulation of the notice of motion is entitled to an eviction order in terms of the provisions of s 4 of the PIE Act. In my judgment, the applicant has complied with the s 4 requirements of the PIE Act must be complied with, the most notable of which is the requirement that the eviction of the respondents must be just and equitable.

[17]. I say so for the following reasons.

[18]. My reading of the *Joe Slovo* judgment, and in particular the long extract from that judgment cited immediately above, does not mean that any and / or all urgent applications for eviction should be brought in terms of section 5 of the PIE Act. This section of the act most certainly does not expressly provide that urgent eviction applications shall only be brought in terms of section 5. Moreover, the opening phrase of the section 5 provides as follows:

'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 ...'

[19]. Of significance in my view is the use of the phrase 'notwithstanding the provisions of section 4' and the use of the word 'may' in the section. This construction, in my judgment, affords an applicant the option of applying for an

interim eviction order pending an application for a final order, without in any way depriving the applicant of its right to launch an urgent application in terms of section 4. I am strengthened in my finding in that regard by the wording of section 4, which provides as follows in subsection (3);

'(3) Subject to the provisions of subsection (2), the procedure for the serving of notices and filing of papers is as prescribed by the rules of the court in question'.

[20]. I therefore interpret these provisions to mean that the applicant was fully within its rights to urgently apply for an eviction order in terms of section 4 of the PIE Act, read with Uniform Rule of Court 6(12), because that is exactly what section 4(3) of the PIE Act says. I cannot find anything in the *Joe Slovo* judgment, which in the end dealt with an application for eviction which in effect was not brought on an urgent basis, which contradicts my aforesaid view. I reiterate that, in my judgment, the *Joe Slovo* judgment is not authority for the propositions that an urgent application for eviction can only be brought in terms of section 5 of the PIE Act and that pursuant to an urgent application for eviction the court can only grant an interim eviction order pending the final order for eviction.

[21]. The respondents' opposition to the eviction application is based primarily on their claim that they are entitled to withhold payment of the rental because the applicant, in breach of the lease agreement, has terminated the supply of electricity to the premises. There is a fundamental flaw in this approach. The lease agreement expressly provides that 'the rental cannot be reduced by the tenant, for any reason whatsoever'. The respondents therefore do not have defence on the merits to the application for an eviction. They are unlawful occupiers of the premises and, provided the provisions of the PIE Act are complied with, they should be evicted. The point is this: If regard is had to the notice to vacate of the 15th of June 2019, the respondents should not be in occupation of the premises. This makes them unlawful occupiers as they are occupying the premises against the wishes of the owner and without a valid right to be there.

[22]. The only question remaining relates to the requirement in eviction matters that in terms of section 4(7) of the PIE Act the eviction should be just and equitable. The respondents did not bring to my attention any factors which

would make their eviction not just and equitable. They seemingly are able to pay rental of R18 000 per month, which means that they would be able to find alternative accommodation without any difficulty.

[23]. On the point of the 'just and equitable' requirement, it requires emphasising that risk of any one occupier being rendered homeless is slim to non – existent. In *The Occupiers, Berea v De Wet NO and Another*, 2017 (5) SA 346 (CC), the Constitutional Court remarks as follows at par [48]:

'[48] The court will grant an eviction order only where: *(a)* it has all the information about the occupiers to enable it to decide whether the eviction is just and equitable; and *(b)* the court is satisfied that the eviction is just and equitable, having regard to the information in *(a)*. The two requirements are inextricable, interlinked and essential. An eviction order granted in the absence of either one of these two requirements will be arbitrary. I reiterate that the enquiry has nothing to do with the unlawfulness of occupation. It assumes and is only due when the occupation is unlawful.'

[24]. The respondents should be given sufficient time to vacate the premises. I am of the view that it would be just and equitable to afford the respondents until the end of October 2019 to vacate the premises.

[25]. I am satisfied that the urgent application of the applicant for the eviction of the respondents should succeed. Accordingly, I intend granting the relief prayed for by the applicant in their notice of motion.

The respondents' counter-application

[26]. The respondents counter-apply for an order for the restoration of the supply of electricity to the premises, which supply, according to the respondents, was summarily terminated on the 2nd of August 2019. The application for the reconnection of the supply of electricity is based on the *mandament van spolie*.

[27]. The difficulty which the respondents face in this counter-application is that, on their own version, the supply of electricity was terminated by City Power, being a division of the City of Johannesburg. The spoliation was therefore committed by City Power and the application for an order against the applicant, who did not spoliate them, is ill-conceived at a fundamental level. The aforegoing, in my view, is confirmed by the fact that the first respondent in her

founding affidavit in support of the counter-application cites 'City Power Johannesburg (Pty) Limited' as a 'fourth respondent', although it appears that the counter-application was never served on City Power nor was the counter-application brought to the attention of City Power.

[28]. The counter-application therefore stands to be dismissed.

Cost

[29]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. See: *Myers v Abramson*, 1951(3) SA 438 (C) at 455.

[30]. I can think of no reason why I should deviate from this general rule.

[31]. I therefore intend awarding cost against the respondents in favour of the applicant.

Order

Accordingly, I make the following order:

(1) The applicant's non-compliance with the Rules of this Court be and is hereby condoned and its application is heard as one of urgency in terms of the provisions of Uniform Rule of Court 6(12).

(2) The written lease agreement concluded between the applicant and the first respondent on the 5th of March 2019 be and is hereby cancelled and terminated.

(3) The first and second respondents and all other occupiers of the applicant's property, being Erven 5022 and 5023, Kensington Township, Gauteng Province, situate at 9 Oxford Road, Kensington, Johannesburg ('the premises'), be and are hereby evicted from the said premises.

(4) The first and second respondents and all other occupiers of the premises shall vacate the property on or before the 31st of October 2019.

(5) In the event that the respondents and the other occupiers of the premises not vacating the premises on or before the 31st of October 2019, the

Sheriff of this Court or his lawfully appointed deputy be and is hereby authorized and directed to forthwith evict the respondents and all other occupiers from the premises.

(6) Once evicted, the respondents are interdicted and restrained from entering the property at any time after they have vacated the property or have been evicted therefrom by the sheriff of the court or his lawfully appointed deputy.

(7) In the event that any of the unlawful occupiers contravene the order in para 6 above, the sheriff of the court or his lawfully appointed deputy, is authorised and directed to remove them from the property as soon as possible after their reoccupation thereof.

(8) The respondents jointly and severally, the one paying the other to be absolved, shall pay the applicant's cost of this urgent application, including the cost relating to the applicant's ex parte application in terms of section 5(2) of the Prevention of Illegal Eviction from, and Unlawful Occupation of Land Act ('the PIE Act').

(9) The counter-application of the respondents be and is hereby dismissed with cost.

(10) The respondents jointly and severally, the one paying the other to be absolved, shall pay the applicant's cost of the counter-application.

L R ADAMS
Judge of the High Court
Gauteng Local Division, Johannesburg

HEARD ON:	10th September 2019
JUDGMENT DATE:	13th September 2019
FOR THE APLICANT:	Adv L Mhlanga
INSTRUCTED BY:	Precious Muleya Incorporated
FOR THE FIRST AND SECOND RESPONDENTS:	Adv Michael Laws
INSTRUCTED BY:	Hajibey Bhyat Incorporated