



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NUMBER: 2020/43335

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

DATE: 20/8/21

In the matter between: -

AZTOGRAPH (PTY) LTD

(REGISTRATION NUMBER: 2015/093389/07)

Applicant

and

G NGOBENI

First respondent

M R SITOE

Second respondent

N T NGOCOBO

Third respondent

W MABUZA

Fourth respondent

C A TAMELA

Fifth respondent

D MOYO

Sixth respondent

T B NGULUBE

Seventh respondent

G S HONONO

Eighth respondent

J J FUMO

Ninth respondent

C K MOTSEPA

Tenth respondent

A BALOYI

Eleventh respondent

A PERSON KNOWN AS LIZZY

Twelfth respondent

**THE FURTHER UNLAWFUL OCCUPIERS OF
LUNA HEIGHTS**

Thirteenth respondent

THE CITY OF JOHANNESBURG

Fourteenth 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 14h00 on 20 August 2021.

F. BEZUIDENHOUT AJ:

INTRODUCTION

[1] The applicant seeks an order for the eviction of the first to thirteenth respondents ("*the respondents*") 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 Units 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, 14 and 16, Luna Heights, 48 Op de Bergen Street, corner Market, Fairview, Johannesburg, more specifically known as Erven 245, 246, 247 and 248, Fairview Township, Registration Division IR, Gauteng ("*the property*").

[2] The respondents oppose the application firstly on the basis that Aztograph

is not the owner of the property, and secondly that they are entitled to withhold the payment of rental due to the deplorable state of the property and because they themselves have attended to the maintenance and repairs.

- [3] It is against this backdrop that I am called upon to determine whether the respondents are in unlawful occupation and whether they ought to be evicted.

PRELIMINARY

Supplementary affidavit and heads of argument

- [4] The respondents have been represented by attorneys throughout these proceedings. The respondents paid for these legal services.
- [5] Notwithstanding, the answering affidavit failed to address their personal circumstances. In addition, no heads of argument were filed on behalf of the respondents.
- [6] On the 26th of April 2021 I addressed the issues with counsel appearing for the applicant and the respondents. Counsel for the respondents requested an opportunity to file a supplementary affidavit and to submit heads of argument. I stood the matter down and insisted on an application for condonation.
- [7] On the 28th of April 2021, a supplementary affidavit was uploaded onto CaseLines, together with heads of argument on behalf of the respondents.

The condonation application explains that the respondents are lay people and that they relied on the advice of their former attorneys of record to guide them. They therefore verily believed that the answering affidavit filed on their behalf dealt with all the relevant aspects, but unfortunately this turned out not to be the case. As a result, the answering affidavit did not deal with their personal circumstances and heads of argument were not filed on their behalf.

[8] Mr Peter appearing on behalf of Aztograph indicated that the applicant did not wish to delay the finalisation of the application further and therefore did not oppose the filing of a supplementary affidavit and heads of argument.

[9] I accordingly condone the late filing of the heads of argument and allow the respondents' supplementary affidavit.

SUMMARY OF DISPUTE

[10] The applicant ("Aztograph") became the registered owner of the property on the 29th of June 2018.¹ Aztograph did however purchase the property as far back as the 15th of February 2016.

[11] The first to eleventh respondents were tenants of Aztograph's predecessor-in-title. Therefore, as at the date of transfer, and in accordance with the doctrine of *huur gaat voor koop*, Aztograph became the first to eleventh respondents' lessor.

¹ CaseLines, founding affidavit, annexure "FA2", p 001-33.

- [12] Upon taking transfer of the property, Aztograph attempted to engage with all of the tenants at the property in order to regulate their tenancies. The tenants brought a complaint before the Gauteng Rental Housing Tribunal and on 3 September 2018 a mediation was held at the tribunal between certain of the tenants and Aztograph's managing agents, Sirius Property Management.
- [13] An agreement was reached between the parties in terms whereof Aztograph undertook to furnish the tenants with proof of ownership of the property and in addition thereto, the parties agreed to meet in order to finalize and sign lease agreements. The aforesaid meeting was scheduled to take place on the 13th of September 2018.
- [14] On the 7th of September 2018 Aztograph furnished a letter to the tenants confirming that it had taken transfer of the property and had appointed Sirius Property Investment as its managing agents.
- [15] On the 13th of September 2018 a second meeting was held between Aztograph and the tenants where the tenants were provided with a copy of the title deeds. Notwithstanding, the respondents persisted with their denial of Aztograph's ownership and reiterated their refusal to pay rent to Aztograph. As a result, the meeting concluded without leases being finalized.
- [16] The first to eleventh respondents failed to pay rent to Aztograph and as a result, Aztograph instructed its attorneys to address a letter to the tenants on the 1st of October 2018 cautioning the tenants to pay rental as a failure

to do so would constitute a repudiation of the agreement.²

[17] Notwithstanding demand, the respondents failed to vacate the property.

[18] The respondents admit that they have not paid rent to Aztograph.³ They attempt to justify their failure to do so on the following basis: -

[a] They disputed Aztograph's ownership of the property;

[b] When they took occupancy the building was dilapidated and a security risk and although they implored the previous property managers to take action, they failed to do so;

[c] As a result of the property managers' lack of capacity and unwillingness to act, the tenants made contributions totalling R6,000.00 and bought locks to secure the outside gate, waste bins and paid labour costs for workers to attend to the plumbing issues experienced at the property;⁴

[d] In June 2018 the dismal condition of the building prevailed and as a result, the tenants made a further contribution totalling R14,000.00 to obtain the services of private plumbers in order to remedy the leaking pipes and toilets.⁵

[19] It is worthy to note that at paragraph 18 of the respondents' heads of argument the respondents abandoned the challenge of Aztograph's

² CaseLines, founding affidavit, paragraph 28, p 001-19 to 001-21.

³ CaseLines, answering affidavit, paragraph 4.6, p 003-10.

⁴ CaseLines, answering affidavit, paragraphs 3.1 and 3.2, p 003-7 and 003-8.

⁵ CaseLines, answering affidavit, paragraph 3.5, p 003-8.

ownership, but persisted with their stance that since Aztograph did not attend to the maintenance of the premises and the security, they were entitled to withhold the payment of rent.

[20] A point raised for the first time in the supplementary answering affidavit is that an order for the eviction of the respondents would render them homeless and that it would not be just and equitable to evict the respondents without giving the City of Johannesburg an opportunity to investigate the circumstances of the respondents and to file a report regarding alternative accommodation.

[21] Mr Peter, appearing for Aztograph, pointed out that the respondents did not deny that they are capable of paying rent and in fact stated that they would do so on confirmation of Aztograph's ownership. The only reasonable inference that can be drawn, so it was argued, is that the respondents remain capable of paying rent and that they are able to secure alternative rental accommodation elsewhere without requiring the assistance of the City of Johannesburg. Mr Peter submitted that if the respondents believed that they are entitled to temporary emergency accommodation it should not be a bar to finding them in unlawful occupation and granting an order for their eviction. In this regard, Mr Peter proposed a draft order that authorises the respondents to approach the City of Johannesburg ("*the City*") should they require temporary emergency accommodation, the requirement for which shall be considered on its own merits by the City.

FINDING

- [22] Where a private landowner applies for eviction, a court has to make two enquiries. First it has to consider all relevant factors and decide if it is just and equitable to order eviction. If it decided it is just and equitable to evict, it has to make a second enquiry into what justice and equity requires in respect of the date of eviction and conditions attaching to the order. Once the first and second enquiries are concluded, a single order is to be made.⁶
- [23] Accordingly, what Mr Peter has proposed in terms of laying the responsibility on the shoulders of the respondents to approach the City after an order for their eviction has been granted, would be contrary to the spirit of the Constitution of our country and the judicial oversight required in matters of this nature.
- [24] PIE imposed a new role on the courts in that they are required to hold a balance between illegal eviction and unlawful occupation and ensure that justice and equity prevail in relation to all concerned.⁷
- [25] Mr Peter referred me to a number of authorities⁸ in support of his argument

⁶ City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others 2012 (6) SA 294 (SCA) paragraph [25].

⁷ Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC) paragraph [13].

⁸ Teaca Properties (Pty) Ltd v John Banza and 167 Others 2018 JDR 0614 (GJ); Boshoga and Another v Mmakolo and Others (82446/2016) [2018] ZAGPPHC 656 (7 March 2018); Drakenstein Municipality v Hendricks 2010 (3) SA 248 (WCC); 10 & 10a Kenmere CC v Ndebele (Nkomo, Jaca and Liberty Fighters Network Intervening Parties) 2019 JDR 1203 (GJ)

that this was not a matter that warranted the involvement of the City of Johannesburg, or the rendering of a report, and the provision of alternative accommodation.

[26] Section 4(8) of PIE provides that if the court is satisfied that all the requirements of this section have been complied with and that no valid defence has been raised by the unlawful occupier: -

"... it must grant an order for the eviction of the unlawful occupier, and determine –

- (a) a just and equitable date on which the unlawful occupier must vacate the land under the circumstances; and*
- (b) the date on which an eviction order may be carried out if the unlawful occupier has not vacated the land on the date contemplated in paragraph (a)."*

[27] In City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others⁹ elaborated on the nature of the enquiry as follows: -

"Once the court decides that there is no defence to the claim for eviction and that it would be just and equitable to grant an eviction order, it is obliged to grant that order. Before doing so, however, it must consider what justice and equity demand in relation to the date of implementation of that order and it must consider what conditions must be attached to that order. In that second enquiry it must consider the impact of an eviction order on the occupiers and whether they may be rendered homeless thereby or need emergency

⁹ Paragraph [25].

assistance to relocate elsewhere. The order that it grants as a result of these two discreet enquiries is a single order: Accordingly it cannot be granted until both enquiries have been undertaken and the conclusion reached that the grant of an eviction order, effective from a specified date, is just and equitable. Nor can the enquiry be concluded until the court is satisfied that it is in possession of all the information necessary to make both findings based on justice and equity.”

- [28] However, the extent to which the court must go beyond normal functions was also placed in perspective by the Supreme Court of Appeal in Changing Tides. It states that this injunction must be seen in the context that courts are neither vested with powers of investigation, nor equipped with the staff and resources to engage in broad-ranging enquiries into socio-economic issues.¹⁰
- [29] An important aspect the court cannot turn a blind eye to is the rental boycott instigated by the respondents in this matter.
- [30] Initially, the first to the eleventh respondents were erstwhile rent payers who withheld rental on the basis of a denial of Aztograph’s ownership.
- [31] After the attempted intervention of Aztograph’s managing agents on 11 October 2018, the respondents changed the locks to the building so as to prevent Aztograph from gaining access.
- [32] The case advanced by the respondents is an entitlement to resort to self-help by first engaging in rent boycott and thereafter ousting Aztograph

¹⁰ Changing Tides (*supra*) paragraph [27], p 313.

from its own property, thereby preventing the owner of the property to attend to the maintenance and security of the property. An electrician appointed by Aztograph's managing agent attended to the property to conduct routine maintenance. He was threatened by the respondents and upon attempting to leave he realised that his vehicle had been vandalised and the tyres had been slashed.

[33] It defies all logic why the respondents would do this as their very complaint was that the building is not maintained and security measures are not in place. The only reasonable conclusion is that it is not about the maintenance and security of the property, but rather a ploy not to pay rent for as long as possible or to hijack the property and recover the rentals from other tenants for their own benefit. The ostensible basis for withholding rent is in my view nothing more than a series of conclusions presented without any primary facts. There is not one iota of evidence advanced as to the poor state of the building or the maintenance that the respondents attended to themselves.

[34] Whilst Aztograph is denied access to the property, it is unable to provide maintenance or security to those tenants who remain in good standing and have complied with their obligations. The housing of these paying tenants are being placed at risk and it is only a matter of time in my view that they will be harassed and intimidated by those who are withholding rental. Their constitutional rights to dignity and adequate housing are being infringed upon and I also have to take this into consideration.

[35] In the premises, I find that the respondents have failed to disclose a *bona*

fide defence and I accordingly find that they are in unlawful occupation.

[36] Section 4(7) of PIE provides as follows: -

"If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land is sold in a sale of execution pursuant to a mortgage, where the land has been made available or can reasonably be made available by a municipality or other organ of state or another landowner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women."

[37] The personal circumstances of some of the occupiers were scantily referred to in the answering affidavit. A confirmatory affidavit was deposed to by the first respondent, George Ngubeni. At paragraph 1.1 he states: *"I am an adult female..."*. He also states that he has occupied the property since 1999 and that 3 minor children live with him. They attend school within the vicinity of the property. He provided no information regarding his income.

[38] The second respondent, Mateus Edwardo Siteo, similarly states that he is *"an adult female"* in his confirmatory affidavit. He states that he has occupied the property from September 2011. He states that 1 minor child lives with him. Mr Siteo also failed to provide any information regarding his income.

[39] The third respondent, Thabisile Lufi Tsabalala, in her confirmatory affidavit merely states that she has occupied the premises from the 30th of

April 2018. The confirmatory affidavit contains no detail regarding this occupier's income.

[40] The fourth respondent, Admirah Ngulube, states in this confirmatory affidavit (her first one) that she has occupied the premises from the 1st of July 2017 and that 4 minor children live with her. No details regarding her income are provided.

[41] The fifth respondent, Christina Angelina Tamela, states that she has lived on the property from the 3rd of October 2000 and that 3 minor children live with her. No details regarding her income are provided.

[42] The sixth respondent, Frank Beeds Moyo, states at paragraph 1.1 that he is "*an adult female*". At paragraph 2.1 he states that he lawfully occupies the property from 2 September 2016 and that 1 minor child lives with him. Mr Moyo provides no details regarding his income. In fact, Mr Moyo's affidavit is neither signed, nor commissioned.

[43] The seventh respondent, Thamsanqa Ngulube, in his confirmatory affidavit asserts that he has occupied the property since 2018 and that 1 minor child and 1 elderly person live with him. Again, no details regarding his income are provided.

[44] The eighth respondent, Promise Nkosingiphile Makhubu, tells the court that she has occupied the property since 2011 and that 3 minor children live with her. Again the confirmatory affidavit is silent on the issue of income.

[45] The ninth respondent, Jaim Jose Fumo, states that he has occupied the

property from the 1st of July 2016 with 2 minor children. Mr Fumo similarly does not state a word about his income.

[46] The eleventh respondent, Mr Andrew Baloyi, states that he is "*an adult female*" and that he has occupied the property from the 29th of April 2017 with 1 minor child. The confirmatory affidavit is silent regarding Mr Baloyi's income.

[47] The twelfth respondent, Phumzile Lizzy Nkosi, avers that she has occupied the premises since 2005, that 2 minor children live with her and that she started working as a caretaker at the property. Ms Nkosi does not tell this court whether she is still so employed and what her income is.

[48] The thirteenth respondent, Litho Zandamela, in his confirmatory affidavit states that he occupied the premises from May 2008 and that 2 elderly persons live with him. He states nothing about his income.

[49] It is quite apparent that a generic confirmatory affidavit was used for all of the deponents. In fact, in some instances no effort whatsoever was made to amend the most elementary of details and that is the gender of the deponents. Every affidavit contains the same number of paragraphs and every single one of them deals with the date of occupation and the number of occupants in exactly the same paragraph, namely paragraph 2.1. All of the deponents who have children also make exactly the same allegation and that is that the child or children (as the case may be) "*attend school at the vicinity of the property*".

[50] The main answering affidavit also advances one single personal

circumstance of all the respondents and that is that they stay with minor children who are attending schools in the vicinity of the property (paragraph 8.1).

[51] In some way it makes sense that the confirmatory affidavits attached to the main answering affidavit do not deal with the issue of income. It is after all the case of these occupiers that they are withholding rent because the property is not being adequately maintained. I therefore have before me, with specific reference to the main answering affidavit, 13 respondents who earn an income.

[52] The supplementary affidavit also deals with the personal circumstances of the respondents.

[53] The deponent, Thamsanqa Ngulube, is the seventh respondent and states that he is an unemployed asylum seeker with a temporary permit and passport. A copy of the first page of his passport attached to the supplementary affidavit marked annexure "TN" reflects the expiry date as the 29th of April 2021. The asylum seeker temporary permit issued by the Department of Home Affairs in favour of the seventh respondent expired on the 15th of April 2020, which indicates, at least *ex facie* the document, that the seventh respondent is an illegal foreigner. I pointed this out to the seventh respondent's counsel, who was unable to furnish the court with any explanation.

[54] The supplementary affidavit states that: -

[a] Some of the tenants have been living in the property for more than

7 years;

[b] There are 60 people living on the property, including more than 15 minor children and 2 elderly people;

[c] Nine of the households are female headed;

[d] The average income of the occupiers is R2,500.00 (I assume this is a monthly income, although the affidavit is not clear).

[55] The personal circumstances of five tenants are set out as follows in the supplementary answering affidavit: -

[a] Nkosingiphile Promise Makhubu has been occupying the property for 11 years. This occupier is employed by Supaworld as a betting clerk and earns a monthly income of R3,000.00. Three minor children live with and are supported by her. There is no confirmatory affidavit for this occupier;

[b] Kgadi Virginia Mbedzi has lived on the property for a period of 5 years. She is unemployed, although she stated that she lives with "*and supports*" two adults (aged 21 and 27) and 1 minor child. The confirmatory affidavit deposed to by this individual describes her as a tenant;

[c] Admirah Fichani Ngulube has occupied the property for a period of 4 years and is unemployed. She lives with 6 other people, including a minor child. The confirmatory affidavit deposed to by this occupier

describes her as a tenant;

[d] Cindi Nthabicing Motsepa has been living on the property for a period of 8 years. She is employed by CCD Corrious. She lives with and supports 2 minor children. There is no confirmatory affidavit for this occupier;

[e] Phumzile Lizzy Nkosi has been living on the property for a period of 3 years. She is unemployed, although it is stated that she lives with "*and supports*" 1 adult (aged 22) and 2 minor children. There is no confirmatory affidavit for this occupier.

[56] It is worthy to point out that paragraph 8.1 of the supplementary affidavit refers to the occupiers as "*the tenants*", which presupposes a person who occupies land or property rented from a landlord. This reference in my view still points to the fact that the respondents are able to pay rent, but chose not do so.

[57] Strangely, apart from stating that he is unemployed, the seventh respondent, the deponent to the supplementary answering affidavit states the personal circumstances of five other occupiers, but not his own.

[58] I also take note of the fact that the respondents have been represented by private attorneys throughout this application. It was not suggested that the legal services were rendered on a *pro bono* basis.

[59] The relevant circumstances that I have to take into account in this matter are strikingly similar to those the court took into account in Teaca

Properties.¹¹ The legally relevant circumstances are as follows: -

- [a] The occupiers have organised themselves into a militant body that has seen it fit to take the law into their own hands. This sort of conduct is repugnant to constitutional values and the rule of law;
- [b] Pursuant to resorting to self-help through a rent boycott, the respondents have set about to usurp Aztograph from control over its own building and deprived it from a revenue stream;
- [c] As stated before, the occupiers are all people by their own admission who are able to pay rent and would have paid rent, but for the allegation that the building is not maintained.

[60] In the main answering affidavit the occupiers are all, by their admission, people who are able to pay rent and would have paid rent but for the condition of the property. This is obvious from the fact that they had, without demur, done so for many years prior or the change of ownership of the property to the applicant. The question of homelessness does not therefore arise, and there is no role for the City to play in providing them with temporary shelter.

[61] At paragraph 7.6 of the supplementary answering affidavit the seventh respondent states that: -

"The City [referring to the City of Johannesburg] which forms part of this application must file the report as (sic) PIE Act and the

¹¹ Paragraph [33].

Constitution of the Republic of South Africa requires in order (sic) assisting the court to properly adjudicate this matter as evicting us will render us homeless”.

[62] It was stated in Teaca Properties (Pty) Ltd v John Banza and 167 Others:¹² -

“The half-hearted submission on behalf of the respondents, during argument, that they will be rendered homeless if evicted, cannot trigger the City Council’s obligation to provide temporary shelter or alternative housing. As pointed out by the City in its answering affidavit, its obligations are only triggered if there is reason for it to assist people who, for reasons beyond their control, find themselves in an emergency housing situation that they are unable to address.”

[63] The court also found that the respondents failed to make out a case of homelessness or that there were women, children, the elderly or disabled, whose rights to shelter would be violated if evicted. The court stated that there was in this regard no shortage of immediately available accommodation for the occupiers.¹³

[64] Accordingly, I find that the respondents will not be rendered homeless in the event of their eviction and that there is no reason for the City to report. In the circumstances I consider it just and equitable to evict the respondents.

[65] Mr Peter in his draft order proposed what amounts to a period of approximately 60 (sixty) days within which the respondents are required to

¹² 2018 JDR 0614 (GJ) paragraph [33](d).

¹³ Paragraph [33](e), pp 13 and 14.

vacate the property.

THE DISASTER MANAGEMENT ACT, 2002

[66] Ordinarily, and having considered all the relevant factors, the determination of a just and equitable date upon which the respondents are 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.

[67] 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.

[68] In Rathabeng Properties (Pty) Limited v Mohlaoli¹⁴ 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.

[69] 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.¹⁵

[70] Some assistance can be gleaned from a comparison of the Regulations in relation to each alert level provided for in the Regulations that were

¹⁴ 2021 JDR 0275 (GJ)

¹⁵ Regulation 33; GN 650 and 651 of GG 44895

published on 29 April 2020¹⁶ 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*".

- [71] 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)

- [72] 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 Alert Level 4.¹⁷ The severity of COVID-19 was sufficient that the Minister of Cooperative Governance and Traditional Affairs, in consultation with the relevant Cabinet members,

¹⁶ GNR 480 of GG43258, 29 April 2020.

¹⁷ See Anchorprops 31 (Pty) Ltd v Levin [2020] ZAGPJHC 183 (28 May 2020), para 40 as an example of the application of regulation 19.

promulgated a stay and suspension of an eviction order as the default position i.e. unless the court ordered otherwise.

[73] 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.

[74] The default position under adjusted alert level 3 appears to be that a person may not be evicted from his 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.

[75] 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.

(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)

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

[77] 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.

- [78] 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.
- [79] 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. There is no indication at this stage when it will end which works to the benefit of the respondents in that it will provide them with ample opportunity to procure alternative accommodation and to plan their move.
- [80] Under these circumstances, I find that a period of 30 (thirty) days within which to vacate the property would be just and equitable.
- [81] This means that the respondents 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 the respondents and other occupants a month to vacate the property once the present adjusted level 3 ends.
- [82] 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.”¹⁸

[83] I remind Aztograph of the words of the Constitutional Court in City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another¹⁹: -

“It could reasonably be expected that when land is purchased for commercial purposes the owner, who is aware of the presence of occupiers over a long time, must consider the possibility of having to endure the occupation for some time. Of course a property owner cannot be expected to provide free housing for the homeless on its property for an indefinite period. But in certain circumstances an owner may have to be somewhat patient, and accept that the right to occupation may be temporarily restricted ... An owner’s right to use and enjoy property at common law can be limited in the process of the justice and equity enquiry mandated by PIE.”

[84] As far as the question of costs is concerned, I find no special circumstances urging me to deviate from the normal principle that costs should follow the result.

ORDER

I therefore make the following order: -

[1] The first to thirteenth respondents and any person occupying through them the residential property situated at Units 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, 14

¹⁸ Rhatabeng par. 62

¹⁹ 2012 (2) SA 104 (CC) at paragraph [40].

and 16, Luna Heights, 48 Op de Bergen Street, corner Market, Fairview, Johannesburg, more specifically known as Erven 245, 246, 247 and 248, Fairview Township, Registration Division IR, Gauteng ("*the property*"), shall vacate the property within 30 (thirty) calendar days from date of service of this order on the first to thirteenth respondents;

- [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 to thirteenth 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 first to thirteenth 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 to thirteenth respondents shall pay the costs of the application, jointly and severally, the one paying the others to be absolved, including the costs occasioned by the *ex parte* application brought for the authorisation of the section 4(2) notice in terms of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act, 19 of 1998,



F BEZUIDENHOUT

**ACTING JUDGE OF
THE HIGH COURT**

DATE OF HEARING: 30 APRIL 2021

DATE OF JUDGMENT: 20 AUGUST 2021

APPEARANCES:

On behalf of applicant:

Adv L Peter

leonpeterc@gmail.com

Instructed by:

Vermaak Marshall Wellbeloved Inc

Tel: 011 447 3690

megan@vmw-inc.co.za

**On behalf of first to
thirteenth respondents:**

Adv NC Nhlapo

nhlaphochristinah@gmail.com

Instructed by:

Sithi and Thabela Attorneys

Tel: 072 623 0705

thabela@Sntattorneys.co.za