



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)
REPUBLIC OF SOUTH AFRICA

CASE NO: 8433/2020

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
DATE: 18 OCTOBER 2022	
SIGNATURE: <i>ML SENYATSI</i>	

In the matter between: -

CITY OF EKURHULENI METROPOLITAN MUNICIPALITY

Applicant

and

CHIEF ALBERT LUTHULI ADHOC COMMITTEE

4th Respondent

SYLVESTER MNGUNI

5th Respondent

LUCKY MOKOENA

6th Respondent

SHIMA MALAKALAKA

7th Respondent

SIPHO MAHLANGU

8th Respondent

ZANDILE MAVUSO

9th Respondent

MABATHO MOYELA

10th Respondent

LOYD MATSEI

11th Respondent

DOCTOR MOYELA	12 th Respondent
MPHO PHOKANE	13 th Respondent
SPHIWE TSHABALALA	14 th Respondent
SIYABONGA MPONDOMBI	15 th Respondent
NJABULI NGOBO	16 th Respondent
SOLOMON MOEKLEDIWA	17 th Respondent
MOSWATHUPA MARRIAM	18 th Respondent
VIVIEAN PHAHLANGE	19 th Respondent
BETHUEL MOLEKE	20 th Respondent
FREDDY STEIN	21 st Respondent
XOLANI ZWEZWE	22 nd Respondent
SIPHAMANDLA MKHONZA	23 rd Respondent
IGNACIA DIBAKOANE	24 th Respondent
MDODA NTIMBA	25 th Respondent
GEORGE NDLOVU	26 th Respondent
JAMES MZINYANE	27 th Respondent
BUSISIWE KHANYILE	28 th Respondent
THULISILE MOEKETSI	29 th Respondent
RONNIE MOERE	30 th Respondent
NOBOMI NDABA	31 st Respondent
LINDA MYATHAZA	32 nd Respondent
DORAH PHAHLANG	33 rd Respondent
LINDIWE MASANGO	34 th Respondent
LUCKY NKOSI	35 th Respondent
NOMSA MAPHAPHU	36 th Respondent
MORUTI MATLALA	37 th Respondent
SIBONGILE MOKOENA	38 th Respondent

MDEDELENI SITHOLE	39 th Respondent
LILLIAN SIKHOSANA	40 th Respondent
MTHOKOZISI MAVUSO	41 st Respondent
GILLY ZODWA MAVIS	42 nd Respondent
LEBOHANG MOKHOLO	43 rd Respondent
NONHLANHLA MAHLANGU	44 th Respondent
GODFRY MAKAFANE	45 th Respondent
RAMAHALA MARAKE	46 th Respondent
JOKIE MOLAMODI	47 th Respondent
FAITH HLABANGANE	48 th Respondent
HEMITTON MAHLANGU	49 th Respondent
ELLI PHALA	50 th Respondent
STHEMBISO KHUMALO	51 st Respondent
THABO MOHALE	52 nd Respondent
BUYENZENI SHABALALA	53 rd Respondent
MZWANDILE MVALASE	54 th Respondent
SMANGELE LUCRACIA NKOSI	55 th Respondent
JAMES MHLANGU	56 th Respondent
FUIGI MASHAO	57 th Respondent
TSHEPISO MASIKE	58 th Respondent
NZUZO MODAU	59 th Respondent
LIZZY MOFOKENG	60 th Respondent
ESTHER MOKOENA	62 nd Respondent
FIKILE MAHLANGU	63 rd Respondent
LERATO TOLAMO	64 th Respondent
FLORINA MAMASHILA	65 th Respondent
LINDIWE MASANGO	66 th Respondent

DEBORAH MASHIKA	67 th Respondent
NTOMBI MALOPE	68 th Respondent
WILLIAM SIMELANE	69 th Respondent
KGOPOTSO MTAKANE	70 th Respondent
EDWIN MBALULA	71 st Respondent
BONGANE MSIZA	72 nd Respondent
SIBUSISO LUGONGOLO	73 rd Respondent
VERONICA BUTHELEZI	74 th Respondent
VUSI MAHLANGU	75 th Respondent
TEBOGO FUNANI	76 th Respondent
XOLANI MVUKELA	77 th Respondent
SIBUSISO NKOSI	78 th Respondent
RANGODI TSOTETSI	79 th Respondent
NOKUTHULA NKOSI	80 th Respondent
MARTHA MASHABA	81 st Respondent
MXOLISI MTHABELA	82 nd Respondent
FRANS SEROKA	83 rd Respondent
SAMUEL SEFATSA	84 th Respondent
LAWRENCE MANGQALAZA	85 th Respondent
THAMY MBATHA	86 th Respondent
SHADRACK KHOZA	87 th Respondent
MUMSY ZULU	88 th Respondent
ANDREW ADAMS	89 th Respondent
BUSISIWE MALAKA	90 th Respondent
BUYISIWE ZUNGU	91 st Respondent
QINISO MPONDOMBI	92 nd Respondent
MASHAMOSE MOKOENA	93 rd Respondent

SIYABONGA MDLALOSE	94 th Respondent
KELVIN MASONDO	95 th Respondent
ZOYISILE MRA	96 th Respondent
LINDELWA TUNZI	97 th Respondent
QUNOOI MABOPE	98 th Respondent
THOKOZANI SEGONE	99 th Respondent
ELIZABETH MASOMBUKA	100 th Respondent
EUGENE DLUDLA	101 st Respondent
DONALD MOHLALA	102 nd Respondent
INNOCENT BUTHELEZI	103 rd Respondent
SINDISIWE NGCOBO	104 th Respondent
LUNGA MTSHULA	105 th Respondent
THOLAKELE MPONDOMBI	106 th Respondent
OUPA MOERE	107 th Respondent
SIBUSISO NGUBANE	108 th Respondent
LAWRENCE NCOWA	109 th Respondent
NELISIWE NKABINDE	110 th Respondent
THEMBA MALOBOLA	111 th Respondent
SIMPHIWE SIMELANE	112 th Respondent
DESIRE KHUMALO	113 th Respondent
DAVID SITHONGA	114 th Respondent
ELSIE BINASE	115 th Respondent
AGRINETH MAGUGA	116 th Respondent
JOYCE MHLANGA	117 th Respondent
ROSE MNQAYI	118 th Respondent
NONHLANHLA NDLOVU	119 th Respondent
BELINA MTSWENI	120 th Respondent

DOUGLAS MATHE	121 st Respondent
NOMPILISO MNOYI	122 nd Respondent
LUNGISILE TENZA	123 rd Respondent
CHRISTINA PHIRI	124 th Respondent
ZIZAMELE LENGISI	125 th Respondent
MTHOKOZISI BUTHELEZI	126 th Respondent
MANDISA GCWABE	127 th Respondent
AARON MPITSO	128 th Respondent
LUCKY SIKHAKHANE	129 th Respondent
SEBENZILE ZIQUBU	130 th Respondent
MJABULISI SITHOLE	131 st Respondent
GUGU NXUMALO	132 nd Respondent
NTOBENKOSI MAZWAYI	133 rd Respondent
NOMSHADO MALATE	134 th Respondent
CELANI SILUBANI	135 th Respondent
SAZISO RADEBE	136 th Respondent
CONSTANCE MHLONGO	137 th Respondent
JEANETTE SESOKO	138 th Respondent
BONGINKOSI MBATHA	139 th Respondent
SABELO BOPHELA	140 th Respondent
SEFEELE MADUNA	141 st Respondent
LINDIWE SHABALALA	142 nd Respondent
KHANYISILE GIJANA	143 rd Respondent
THEMBELIHLE SIBIYA	144 th Respondent
SINDISIWE MBATHA	145 th Respondent
ZAKITHI MAPHANGA	146 th Respondent
MATLAKALA BANDA	147 th Respondent

THATOGATSI MOROTOLO

148th Respondent

SHIRLEY MAGADLA

149th Respondent

REASONS

SENYATSI J:

INTRODUCTION

[1] On 11 October 2021 I issued an order with the following terms:

- 1.1. An order for eviction of the Fourth to One Hundred and Forty Ninth (4th to 149th) Respondents and all those occupying the properties through and under them at the properties described as Modderfontein Farm 76 IR 28 ("the Chief Albert Luthuli Extension 6 Housing Project") is granted;
- 1.2. The Fourth to One Hundred and Forty Ninth (4th to 149th) Respondents and all those claiming occupation through and under them are ordered to vacate the property on or before 30 October 2021;
- 1.3. In the event where the Fourth to One Hundred and Forty Nine Respondents and all those claiming occupation through and under them fail to comply with the order set out above, then and in that event, the City of Ekurhuleni Police Services and or the South African Police Services and or assisted by the Sheriff of the above Honourable Court or his lawful deputy and a Locksmith are ordered and directed to carry out the eviction order on or after 10 November 2021.

- 1.4. Should the Fourth to One Hundred and Forty Nine Respondents (4th to 149th) and all those that occupy the property by virtue of, through or under them attempt to regain access or possession to the property after the eviction order has been executed by the Sheriff and/or his/her authorized deputy; the Applicant does not need to approach the Honourable Court for relief and the City of Ekurhuleni Police Services and or the South African Police Services and or assisted by the Sheriff of the above Honourable Court or his lawful deputy and a Locksmith Sheriff and/or his/her authorized deputy are authorised and directed to take all legal steps to enforce this Court order once again, including enlisting the services of the South African Police Services and a Locksmith;
- 1.5. No order as to costs
- [2] As a consequence of the order reasons for the order we requested and as set out below.

BACKGROUND

- [3] The applicant, Ekurhuleni Local Municipality, established a low cost housing project in order to alleviate the need for housing and benefit those who applied and qualified for the Reconstruction and Development Program ("RDP") housing subsidy within the City of Ekurhuleni. The RDP housing project was funded Gauteng Government Housing Grant.
- [4] Chief Albert Luthuli Extension 6 is situated in Daveyton and is also known as Modderfontein Farm 76 IR 28 and is owned by the City of Ekurhuleni ("Municipality") under title deed number T137332/2002.
- [5] The 4th to 149th respondents ("respondents") in this application were identified following the order of Fisher J granted on 12 March 2020 in terms of which the Sheriff of this Court was authorized to enter each premise in Chief Albert Luthuli

Extension 6 in order to obtain the particulars of each occupier.

- [6] It is no doubt that the RDP housing project was intended to benefit the residents within the Municipality's jurisdiction, more particularly those who had applied and have been approved for the housing subsidy and are residing within its area of jurisdiction.
- [7] It appears from the evidence that the intended beneficiaries of the housing subsidy scheme were assessed in accordance with the processes of the Municipality.
- [8] By December 2019, the Municipality managed to construct hundred and fifty seven (157) RDP houses of which fifty six (56) were completed and ready for occupation, the remainder were partially completed and not ready for occupation.
- [9] It furthermore appears that around 13 December 2019, when the Municipality and the Gauteng Provincial Government intended to allocate the 56 houses to the intended and rightful beneficiaries as approved, they were met with violence allegedly by members of the first respondent who in some instances rioted because according to them, the MMC who had promised to form part of the meeting was not present in order to attend to their grievances.
- [10] The Municipality argued that the intended beneficiaries as identified and approved for allocation of the 56 houses had been assessed and were the rightful beneficiaries. The Municipality contends that it had properly screened and approved the rightful beneficiaries for the housing and amongst them were senior citizens.
- [11] During January 2020 the Municipality became aware of the unlawful occupation of the immovable properties located at Chief Albert Luthuli Extension 6 by members of the first respondent who had unlawfully invaded the unoccupied complete and incomplete houses.

- [12] The Municipality contends that the members of the first respondent have not followed due process and have not complied with the application, screening and approval requirements, and therefore took occupation of the houses without the consent of the applicant.
- [13] It was also the Municipality's version that attempts were made to engage with the unlawful occupiers and on every occasion, a meeting had been arranged in order to reach an amicable solution, however, the members of the first respondent were uncooperative and would often resort to aggressive and violent conduct and threatening the officials of the Municipality with violence.
- [14] Since taking occupation of the houses, the members of the first respondent have refused to vacate the houses. As a consequence, the Municipality contends that it is unable to allocate the completed 56 houses to the rightful and approved beneficiaries. The Municipality is also unable to continue construction on the incomplete housing structures.
- [15] The fourth to hundred and forty ninth respondents (4th to 149th respondents) opposed the application. In their answer to the founding affidavit, sworn to by Mr. Sylvester Mnguni and confirmed by all the respondents, Mr. Mnguni confirms that the fourth respondent, is the Chief Albert Luthuli Ad - Hoc Committee, an association of persons without legal personality and that it was duly elected by the occupiers of the Chief Albert Luthuli extension 6 in a mass meeting. He goes on to provide details of each residential address and of each occupier.
- [16] The 4th to 149th respondents contend that the Municipality is acting in bad faith and avers that it has fabricated facts to mislead the court, in that when the applicant sought to evict the 4th to 149th respondents it sought to do so without following a due process, thus they were stopped by a court interdict.

- [17] The occupiers do not deny that they took occupation of the houses as alleged by the applicant. The 4th to 149th respondent raised the following defences in opposing the application; namely:
- (a) when they were forcefully removed from the properties without a court order and were restored possession of the properties following a court interdict;
 - (b) the respondents further argue that they have a *lien* over all the houses because of the alleged damage to their personal property when they were evicted without the court order.
- [18] The respondents do not deny that the meeting that took place on 18 December 2019 with the officials of the Municipality did not end well, the members allege that the meeting took place in the absence of the MMC, Mr. Lesiba Mpya
- [19] They also contend that the illegal eviction allegedly perpetrated by the Municipality during January 2020 together with the alleged unlawful confiscation of their immovable properties and groceries entitled them to return to the houses by way of *lien*.
- [20] The 4th to 149th respondents content that an application for an interdict was brought by sixty (60) applicants under case number 00004/2020.
- [21] The 4th to 149th respondents also contend that the fact that the Municipality became aware of the occupation as early as December 2019 was a clear indication of tacit consent to their occupation of the houses.
- [22] The 4th to 149th respondents deny that they are in unlawful occupation of the houses. They concede that the Chief Albert Luthuli housing subsidy was indeed approved by the applicant through the funding from Gauteng Provincial Government.
- [23] The 4th to 149th respondents contend that the housing subsidy project was approved in order to provide housing to backyard dwellers in Daveyton. They contend that the scheme was initially approved as a sectional title scheme but was later changed to

stand alone housing subsidy due to what the 4th to 149th respondent state was due to alleged corruption and financial embezzlement by the Municipality in cohorts with the contractors.

- [24] The 4th to 149th respondents also contend that the waiting list and allocation of the RDP houses have allegedly been manipulated by the applicant in order to facilitate corruption in terms of the alleged sale of houses to those with money instead of the qualifying poor members of the community. They contend that the applicant has made it a luxury and privilege to benefit from the RDP programme.
- [25] In support of their contention, the respondents further argued that those community members already approved for the RDP houses had allegedly paid the Municipality for those houses but notably they did not produce any evidence of the alleged payment. They further stated that majority of the completed houses remained unoccupied whilst the officials of the Municipality allegedly waited for further potential buyers. It is their version that the completed houses started to be in a state of disrepair and became a breeding ground for vagrants and criminals.
- [26] The respondents also challenged the Municipality's version that the completed houses were ready for occupation, by calling for the Municipality to provide a certificate of occupation as evidence.
- [27] The Municipality in reply contends that when the unlawful and illegal occupation of the RDP houses occurred, the Chief Luthuli Extension 6 Project was under phase 4 of the implementation stage and the Municipality continues to build the RDP houses in the area.
- [28] The Municipality further contends that during the period June to October 2020 whilst it managed to construct new RDP houses and whilst waiting for all due processes to be concluded, the respondents intentionally and unlawfully and without consent of the applicant, took occupation of the newly built structures.

The Municipality had no other option but to bring another court application under case number 26620/2020 which was also opposed by the respondents. The court in that action ruled in its favor and held that the Municipality, was entitled to evict the new unlawful occupiers. Accordingly, the occupiers were successfully evicted.

- [29] On the defence of *lien* as raised by the respondents, the Municipality submitted that the defence is baseless as the Municipality owes nothing to the respondents. The Municipality contends that even if a debt was proven to be owed by the Municipality, the 4th to 149th respondents are not entitled to take the law into their own hands by unlawfully occupying the RDP houses without the consent of the Municipality. Any alleged debt would need to be proved in court.
- [30] On the second defence that the 4th to 149th respondents are in fact the intended beneficiaries, this is also denied by the Municipality based on evidence provided that the subsidy application was refused to one of the respondents in this matter, namely Ms. Hlukeng Anna Mokoena.
- [31] The Municipality also denies that there was evidence of corruption as well as the sale of RDP houses as alleged by the respondents. The Municipality furthermore denies that there was a forced removal during January 2020, as averred by the respondents that in any event steps had been taken to serve the eviction application in terms of section 4(2) of the PIE Act.

THE ISSUES FOR DETERMINATION

- [30] The issues for determination
- (a) Whether the applicant has made out a case for its application;
 - (b) Whether the 4th to 149th respondents hold lien over the occupied houses;
 - (c) Whether the applicant had given tacit consent for the occupation of the

RDP houses.

LEGAL FRAMEWORK

[31] As a constitutional democracy, one of the core values of our society is the supremacy of the of the Constitution and the rule of law.¹

[32] It therefore follows that no one is entitled to take the law into his or her own hands. In *Chief Lesapo v North West Agricultural Bank and Another*², in restating the supremacy of the Constitution and the rule of law value, the Constitutional Court held as follows:

"Self-help, in this sense, is inimical to a society in which the rule of law prevails, as envisioned by section 1 1(c) of our Constitution ...

*Taking the law into one's own hands is thus inconsistent with the fundamental principles of our law."*³

[33] The eviction of illegal occupiers of land is regulated by the Prevention of Illegal Eviction Act, No 19 of 1998 ("the PIE Act"). Section 6 (1) of the PIE Act provides and gives powers to local government to institute proceedings of eviction within its area of jurisdiction where the land or building is not compliant with the by-laws.⁴

[34] Our courts have also confirmed that the ambit of PIE Act in respect of whether ex-tenants and ex-mortgagers fall within the definition of "unlawful occupier" for the purposes of this PIE Act and whether this class of occupiers warrants its substantive and procedural protection in the context of protection in the context of eviction proceedings has been held to afford protection to those class of occupiers.⁵

¹ See Section 1 (c) of the Constitution of the Republic of South Africa Act 108 of 1996.

² 2000 (1) SA 409 (CC) at para 11

³ See *Bon Quelle (Edms) Bkp v Munisipaliteit van Otavi* 1989 (1) SA 508 (A) at 511H-512 A and *Bonino v De Lange* 1906 TS 120 at 122.

⁴ See section 6(1) of the PIE Act.

⁵ See *Ndlovu v Ngcobo; Bekker & Another v Jika* [2003] (1) SA 113 SCA at para 23

- [35] The court, in determining whether or not to grant an order or in determining the date on which the property has to be vacated (Sec 4 (8)), has to exercise a discretion based on what is just and equitable.⁶
- [36] The discretion is one in the wide and not in the narrow sense.⁷ The court, consequently, does not have a free hand to do whatever it wishes to do and a court of appeal for instance is not hamstrung by the traditional grounds of whether the court of first instance exercised its discretion capriciously or upon a wrong principle or that it did not bring its unbiased judgment to bear on the question, or that it acted without substantial reasons.⁸
- [37] One of the material considerations in the eviction proceedings is that of the evidential onus. Provided the procedural requirements have been met, the owner is entitled to approach the court on the basis of ownership and the respondents' unlawful occupation. Unless the occupier opposes and discloses circumstances relevant to the eviction order, the owner, in principle, will be entitled to the order for eviction.⁹ Relevant circumstances are always facts within the exclusive knowledge of the occupier and it cannot be expected of an owner to negative in advance facts not known to him and not in issue between the parties.
- [38] It should be remembered that the PIE Act has its roots in the Bill of Rights contained in our Constitution, especially section 25(1) which provides that no one may be deprived of the property except in terms of law of general application and no law may permit arbitrary deprivation of property. The selection is aiming at curtailing the State's powers to pass laws that can arbitrarily deprive citizens of their property rights except in terms of law of general application.

⁶ Ibid at para 18

⁷ See *Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd* [1992] ZASCA 149, 1992 (4) SA 791 (A) 800; *Knox D'Arcy Ltd and Others v Jamieson & Others* [1996] ZASCA 58; 1996 (4) SA 348 (A) 360G – 362G.

⁸ See *Ex Parte Neethling and Others* 1951 (4) SA 331 (A) 335 (E), *Administrators, Estate Richards v Nichol and Another* [1998] ZASCA 82; 1999 (1) SA 551 (SCA) 561 C-F.

⁹ See *Ndlovu v Ngcobo; Bekker & Another v Jika* (above) at para 19

[39] It is impermissible in our law to take the law into one's own hands. In *President of the Republic of South Africa and Another v Moederklip Boerdery (Pty) Ltd Agri SA and Others Amicus Curiae*¹⁰, the Constitution Court had the following to say:

"[45] The execution of an eviction order does not ordinarily raise problems which cannot be accommodated through the existing mechanisms. They allow for the execution of court orders so that the citizens have no jurisdiction to take law into their own hands. Consequently, order in society is preserved and inappropriate societal disruptions are prevented."

[40] It is not enough in the eviction proceedings to raise a defence that amounts to bare denial. In *Johannesburg Housing Corporation (Pty) Ltd V Unlawful Occupiers of the Newton Urban Village*¹¹ the court held as follows:

*"[122] All Counsel who have struggled to resist an application for summary judgment, will be familiar with the case of Breitenbach v Fiat*¹² *in which Colman J made it plain that it would be difficult indeed to show good cause why such judgments should not be granted where the defence had been set out 'baldly, vaguely or laconically'. There is no reason why this principle should not apply to occupiers seeking to resist the application for their eviction. Of course, every move from one dwelling to another carries with its own traumas and disadvantages. That is not enough to resist an eviction order where the occupier has no right, recognized at common law, to remain in occupation of a particular property. The ease for remaining in occupation of the property has been set out by the occupiers laconically."*

¹⁰ 2005 (5) SA 3 CC at para 45

¹¹ 2013 (1) SA 583 (GSJ) at para 122

¹² 1976 (2) SA 226 (T) at 229 C-G

- [41] It is apparent from the quote above that only the defence recognized in common law will come to the aid of an occupier of a property in eviction proceedings.
- [42] I now consider whether a defence of lien is recognized in common law under the circumstances similar to the instant case. *Lien* can be classified into two types, namely contractual *lien* (that is a debtor and creditor) and enrichment lien where a lien holder has a contract with a non-owner and not with the owner (debtor) himself.
- [43] The expenses for which a lien holder can vest his lien are determined by the origins of the legal claim for which the lien serves as security. In the case of an enrichment lien, the lien can vest only for useful and necessary expenses.
- [44] Our law therefore recognizes those two types of lien and the legal principles pertaining thereto are trite. For instance, in *United Building Society v Smookler's Trustees and Golombick's Trustees*¹³ the court in obiter held that a contractual lien applies against the other contracting party for all expenses as determined in the agreement,
- [45] It is not necessary in an enforcement of a *lien* to be in possession of the property. The law permits, for instance in maritime lien, for the claimant of the lien to bring an action in rem ... for the arrest of a ship vessel.¹⁴
- [46] The law also recognizes that a bona fide possessor claiming a *lien* can if the facts of the case allow, elect to rely on either of the two species of *lien*, that is, contractual *lien* and enrichment *lien*.¹⁵
- [47] I now deal with the principles of tacit consent. In order to deal with the principles, it is important to define the meaning of tacit consent and requirements and lastly evaluate whether on the evidence before this court, the alleged consent can be accepted as

¹³ 1906 TS 623

¹⁴ See *Transol Bunker BV v Motor- Vessel "Andrico Unity and Others; Grecian- Mar SRL v Motor Vessel "Andrico Unity" and Others* (30/89) [1989] ZASCA 30, [1989] 2 All SA 303 (A) (29 March 1989)

¹⁵ See *Davis and Another v Purple Fountain Properties 118 (Pty) Ltd* (08/36380, 30457/15) [2016] ZAGPJHC 198 (28 July 2016)

tacit consent given by the Municipality.

[48] The PIE Act defines the unlawful occupier as follows:

“unlawful occupier” means 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 31 of 1996)” No definition is given to the word “ tacit consent”.

Our courts have held that consent must be given its ordinary meaning which is express.

In *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others*¹⁶, the court held that :

“[50] ...The PIE Act makes it plain that occupiers of property will not be regarded as unlawful occupiers unless the owners express or tacit consent is absent or if they occupy the property in terms of any other right. The question that must be answered in this context concerning the nature of the consent that is required is whether the ordinary meaning of consent to occupy is appropriate. That is consent to occupy that entails the creation of a right to occupy on the part of the occupier. On the assumption that there is a type of consent to occupation that does not entail the grant to the occupier of a right to occupy, we must determine whether the PIE Act speaks of this kind of nebulous consent or consent, as it were, in the air. I think not. The occupation is not unlawful if there is consent or some other right to occupy. It follows ineluctably that the consent referred to in the

¹⁶ CCT 22/08) [2009] ZACC 16; 2009 (9) BCLR 847 (CC); 2010 (3) SA 454(CC0 (10 June 2009)

statute is consent to occupy or permission that creates a defensible right of occupation.”

What this judgment shows is that there is no defensible right called tacit consent for the purposes of the PIE ACT. The consent is a voluntary agreement involving two contracting parties.

[49] In *Klaase and Another v van der Merwe N.O. and Others*¹⁷ the court had to define the meaning of the occupier as it relates to the tacit consent in the context of the Extension of Security of Tenure Act 62 of 1997 (“ESTA”) and held as follows:

“The meaning of ‘consent’ in the definition of occupier

[108] The relevant part of the definition of “occupier” in section 1 of ESTA is—

‘a person residing on land which belongs to another person and who has or on 4 February 1997 or thereafter had consent or another right in law to do so but excluding . . .’

[109] The ‘consent’ that is an essential element of the definition of an occupier may be express or tacit. This is reflected in the definition of the word consent in section 1. The definition of “occupier” refers to ‘consent to do so’. This refers to consent to reside on land which belongs to another. While the definition of ‘occupier’ does not expressly state who must give the consent contemplated in that definition, it expressly states that the contemplated ‘consent’ is that of the owner or person in charge of the land.”

It is clear from this case that the owner’s consent is an essential element for the defence of the tacit consent to be successfully mounted against the eviction

¹⁷ CCT 23/15) [2016] ZACC 17; 2016 (9) BCLR 1187 (CC); 2016 (6) SA 131 (CC) (14 July 2016)

proceedings and absent that consent then the occupation of the property becomes illegal.

[50] Having considered the principles applicable to evictions, I am of the view that the respondents have indeed taken law into their own hands. Consequently, it follows that the applicant has correctly complied with the procedural requirements as provided for in the PIE Act and entitled to have the respondents evicted as prayed for.

[51] The respondents have in my considered view, failed to provide sufficient grounds why the eviction order should not be granted. The alleged tacit consent of the Municipality has not been supported by any evidence. This is understandable because no record has been produced showing that the officials of the Municipality have in fact consented to the occupation. The contrary is the position where the Municipality has launched a legal challenge to have the respondents evicted from its houses. I am particularly concerned about the evidence adduced by the Municipality on how the 52 houses that were completed and allocated to the lawfully approved beneficiaries were simply illegal taken over by the respondents. The takeover included also the partly completed houses. If our courts do not intervene and come to the rescue of local authorities in circumstances such as the present, our Constitution will be subverted as the behavior such as in the present case will lead to chaos in our society.

[52] The defence of lien as raised by the respondents is not sustainable because there has not been evidence of either contractual relationship between the respondents and the applicant or any necessary expenses incurred on behalf of the applicant over the properties illegally occupied. On the contrary, the respondents seem to suggest that because of their alleged removal from the properties in January 2021 without due process, they claim to have suffered some losses when some of their personal belongings were allegedly damaged during the removal. Thus the claim of lien, under those circumstances, is not permissible and must be rejected.

- [53] The respondents averred that the officials of the applicants were corrupt. The allegation of corruption is irrelevant in the eviction proceedings. In fact, the behavior of the respondent can, if not nipped in the bud, easily lead to our society becoming disorderly where lawlessness reigns supreme. This type of behavior should be discouraged by our courts because local authorities are established in terms of our Constitution to provide services to communities within their jurisdiction.
- [54] The defence of lien as raised by the respondents is not sustainable because there has not been evidence of either contractual relationship between the respondents and the applicant or any necessary expenses incurred on behalf of the applicant over the properties illegally occupied. On the contrary, the respondents seem to suggest that because of their alleged removal from the properties in January 2021 without due process, they claim to have suffered some losses when some of their personal belongings were allegedly damaged during the removal. Thus the claim of lien, under those circumstances, is not permissible and must be rejected.
- [55] It therefore follows that the order made as stated has been so made for the reasons herein stated.



ML SENYATSI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

DATE APPLICATION HEARD: 05 October 2021

REASONS DELIVERED: 18 October 2022

APPEARANCES

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