



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

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

SIGNATURE

DATE: 16 October 2024

Case No. 2024-090272

In the matter between:

CITY OF JOHANNESBURG

Applicant

and

**UNLAWFUL OCCUPIERS OF VARIOUS UNITS
AT THE DONOVAN MACDONALD RETIREMENT CENTRE** First Respondents

TASHREEKS HANSLOW AND 24 OTHERS Second Respondents

JUDGMENT

WILSON J:

- 1 On 2 September 2024, I refused an urgent application to evict the respondents. The application was brought under section 5 of the Prevention of Illegal Eviction from, and Unlawful Occupation of, Land Act 19 of 1998 ("PIE"). The respondents are a group of residents of a retirement complex owned and managed by the applicant, the City. Some of the residents cannot

be identified. The City cited these residents as the first respondents. Other residents the City sought to evict are named in an annexure to the City's founding papers marked "PP1". The City cited these residents as the second respondents.

2 I refused the eviction order primarily on the basis that the City had failed to establish the jurisdictional requirement set out in section 5 (1) (a) of PIE. Section 5 (1) (a) requires an applicant for a section 5 eviction order to show that there is a "real and imminent danger of substantial injury to persons or property unless an unlawful occupier is immediately evicted". I held that this means that a rational factual link must be drawn between "a real and imminent danger of substantial injury" on the one hand, and an identified unlawful occupier, or group of unlawful occupiers, on the other. Because the City could not draw such a link, I held that it was not entitled to relief under section 5. A secondary concern was that the relief the City sought would leave vulnerable residents who are lawfully resident at the retirement complex without the vital care provided by family members living with them who the City wished to evict. The City had not shown that alternative arrangements could or would be made to continue that care in the absence of those it wished to evict.

3 The City sought leave to appeal my decision. On 15 October 2024, I dismissed its application for leave to appeal. I indicated that my reasons would be published in due course. These are my reasons.

Appealability

4 Orders under section 5 of PIE are interim in nature. They are granted or refused "pending the outcome of proceedings for a final [eviction] order"

(section 5 (1) of PIE). Their interlocutory nature naturally raises the question of whether and to what extent decisions under section 5 are appealable.

5 The decision to refuse a section 5 order does not finally determine the applicant's right to evict an unlawful occupier, since it does not prevent the applicant from seeking final relief under section 4 of PIE in due course. The effect of refusing an interim eviction order under PIE is simply that the unlawful occupiers concerned will remain at the property until the proceedings taken under section 4 are finalised. In other words, the refusal of section 5 relief has no final and definitive effect on the main action (see *Absa Bank Ltd v Mkhize* 2014 (5) SA 16 (SCA), paragraphs 60 and 61).

6 Accordingly, it seems to me that the refusal of relief under section 5 is not appealable. To hold otherwise would open the door to undesirable piecemeal litigation. Every refusal of relief under section 5 could, in principle, spawn an appeal, which would have to be addressed in parallel with, or before, the applicant's entitlement to final relief under section 4 is considered. To permit the fractional disposal of eviction applications under PIE in this way would lengthen and complicate PIE proceedings, which are often already factually and legally complex matters, especially where poor and vulnerable people allege that they would face homelessness on eviction.

No prospects of success

7 In any event, the City has no reasonable prospect of convincing a court of appeal that I was wrong to decide the matter as I did. The gravamen of the appeal the City proposes is that I was wrong to decide that section 5 requires it to link those it seeks to evict to a "real and imminent danger of substantial

injury to persons or property”. This requirement arises from the plain text of section 5. Mr. Nhutsve, who appeared for the City, advanced no alternative reading of section 5, which would permit the City to evict individuals or groups of people who had not been linked to a “real and imminent danger of substantial injury to persons or property”. In the absence of such a reading, there can be no success on appeal.

The judgment *a quo*

- 8 The City’s application for leave to appeal also takes issue with a number of factual findings I made in my judgment *a quo*. It seems to me that, even if I was wrong to make the specific factual findings on which the City focussed its attack, that would not mean that the City stands prospects of success on appeal. Nevertheless, for the reasons that follow, the factual findings with which the City takes issue are sound.
- 9 It was first contended that I was wrong to find that “the City all but admits that it has lost control of the Centre, and that it can no longer say who resides there”. Mr. Nhutsve submitted that this conclusion had no foundation in the papers. He was mistaken. The foundation appears at paragraph 8 of the founding affidavit, where the City admits that it cannot say who the first respondents are. I think it is a fair inference that the City has “lost control” of a property if it cannot say who resides there.
- 10 It was then suggested that I was mistaken in concluding that “there is no suggestion that the condition of the buildings at the Centre is such as to present a risk of harm to its residents”. There is, in fact, no suggestion of this kind on the papers – although there are allegations of vandalism.

- 11 My conclusion must also follow from the fact that the City did not wish to evict everyone in occupation of the complex. It only sought to evict those who had no right to be there. Had there been anything about the fabric of the buildings that made the complex uninhabitable, the City would surely have sought the evacuation of the whole property.
- 12 It was next contended, in paragraph 2.3 of the application for leave to appeal, that I was wrong to find that “the City appears to have both caused and exacerbated the problems it says this application is meant to address” and that “[h]aving failed to do that over what seems like an extended period, the City now seeks relief which would, on its face, endanger the safety and well-being of the very people the City says it wishes to protect”.
- 13 Unfortunately, the City’s legal representatives did not quote the text that appears between the two excerpts it chose to attack. That text is as follows: “[w]hatever the extent of the deterioration of living conditions at the Centre, the City must take its share of the responsibility for failing to prevent that deterioration. It is, after all, the City that owns the Centre, and the City which ought to have put in place the controls necessary to ensure that its use is properly regulated.” This was the basis on which I found that “the City appears to have both caused and exacerbated the problems it says this application is meant to address”.
- 14 The City freely admits that it seeks to evict people who provide care to lawful residents of the complex that those residents cannot do without. It was on this basis that I found that the relief sought would “endanger the safety and well-being of the very people the City says it wishes to protect.”

- 15 Read in their proper context, my findings are fully justified on the facts of this case.
- 16 The final complaint, encapsulated in paragraph 5.1 of the application for leave to appeal, was that I was wrong to characterise the application as having been brought against “unvetted” residents. The City contends that the application had “nothing to do with vetting”. However, this overlooks the contents of paragraph 11 of the City’s founding affidavit, which states that the lawful occupants of the retirement complex were selected according to its “vetting and selection criteria”. The City’s case was brought against those who had unlawfully gained access to the complex despite having been neither vetted nor selected.

The conduct of the hearing *a quo*

- 17 The City complained that it did not get a fair hearing *a quo*. The basis of this claim was that its counsel, Mr. Nhutsve, was not allowed to make a prepared speech to the court, but was rather required to answer the court’s questions about whether the facts on the papers justified the relief sought. Mr. Nhutsve argued that the extent of the questioning was such that he was not permitted to make his prepared submissions at all.
- 18 The City did not produce a transcript in support of its claims. Mr. Nhutsve was accordingly constrained to advance his complaints about the fairness of the hearing from memory. I can understand that junior counsel faced with an appearance in a busy urgent court might sometimes walk away feeling that they have not been fully heard, but I do not recognise Mr. Nhutsve’s recollection of the hearing. The hearing lasted for about an hour, around forty-

five minutes of which consisted of an exchange between me and Mr. Nhutsve about the papers and the relief sought. The exchange was robust but respectful. I listened carefully to Mr. Nhutsve's submissions, and had due regard to them in my judgment. Mr. Nhutsve submitted *a quo* and again in the application for leave to appeal that he was entitled to be heard without interruption. However, in motion proceedings, counsel has no such right.

19 In any event, the City's complaints about the way the hearing was conducted do not bear on the correctness of my decision. In particular, Mr. Nhutsve was unable to identify any submissions that he had been unable to make because he was interrupted, and to which I did not have due regard in my judgment. Nor could he point to a submission that he had been unable to get across *a quo* that would have brought the correctness of my judgment into question.

20 It was for these reasons that I refused the City's application for leave to appeal.



S D J WILSON
Judge of the High Court

This judgment is handed down electronically by circulation to the parties or their legal representatives by email, by uploading it to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 16 October 2024.

HEARD ON: 15 October 2024

DECIDED ON: 15 October 2024

REASONS: 16 October 2024

For the Applicant: E Nhutsve
Instructed by BMK Attorneys Inc

For the Respondents: Several residents in person