

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

Case Number: 2023-014224

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES /NO
(3)	REVISED: YES/ NO
1 December 2024	
DATE	SIGNATURE

In the matter between:

BYRAY HOLDINGS (PTY) LTD

Applicant

AND

THE UNLAWFUL OCCUPIERS OF UNIT [...] First Respondent
M[...] B[...] H[...]

THE UNLAWFUL OCCUPIERS OF UNIT 1[...] Second Respondent
M[...] B[...] H[...]

THE UNLAWFUL OCCUPIERS OF UNIT 3[...] Third Respondent
M[...] B[...] H[...]

RUI MIGUEL DE FIGUEIREDO N.O., THE Fourth Respondent
TRUSTEE FOR THE TIME BEING OF THE
LWWS HOLDING TRUST WITH
REGISTRATION NUMBER IT3059/04 (T)

TANYA ROCHA N.O., THE TRUSTEE FOR THE TIME BEING OF THE LWWS HOLDING TRUST WITH REGISTRATIONNUMBER IT3059/04(T) Fifth Respondent

MARIA DA CONCICAO DE FREITA VASCONCELOS N.O., THE TRUSTEE FOR THE TIME BEING OF THE LWWS HOLDING TRUST WITH REGISTRATION NUMBER IT3059/04(T) Sixth Respondent

MARIO ALEXANDRE DE FIGURIEDO ROSHA Seventh Respondent

REVENUE ASSET PROTECTION SERVICES (PTY) LTD Eighth Respondent

REDLEX 297 (PTY) LTD Ninth Respondent

EKHURULENI METROPOLITAN MUNICIPALITY Tenth Respondent

JUDGMENT

LAMPRECHT, AJ:

Background

[1] This is an opposed application in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998 (PIE), in which the applicant seeks the eviction of the first to ninth respondents and all persons occupying under or through them, from the immovable properties known as Units [...], 1[...] and 3[...]

M[...] B[...] Heights, situated at 2[...] S[...] Street, B[...] G[...], Germiston (“the properties”).

[2] The applicant is the registered owner of the properties, which form part of the sectional title scheme known as M[...] B[...] H[...], registered as such with registration number ST277/2007. The applicant alleges that the properties are currently or from time to time being occupied by the first to ninth respondents.

[3] The first to third respondents are described as the unlawful occupiers of Units [...], 1[...] and 3[...] M[...] B[...] H[...] respectively. The fourth to sixth respondents were cited in their capacities as trustees of the LWWS Holdings Trust, a trust with registration number IT3059/04 (“the Trust”). The seventh respondent is a Mr Mario Rocha (“Mr Rocha”), the eight respondent a company known as Revenue Asset Protection Services (Pty) Ltd (“RAPS”), and the ninth respondent was cited as a company, Redlex 297 (Pty) Ltd (“Redlex”). It bears mentioning that it is common cause that Redlex was placed under final winding up during February 2019, some 4 years prior to the issuing of this application. Redlex was nevertheless not cited as a company in liquidation, nor is there any indication on the papers that the liquidators were notified of the application, nor what its current status is. The tenth respondent is the Ekurhuleni Metropolitan Municipality.

[4] Notice of intention to oppose was filed by Suder Attorneys on behalf of the fourth, fifth, seventh and eighth respondents (“the opposing respondents”).

[5] By agreement between the applicant and the opposing respondents, as well as the applicants and the opposing respondents in case numbers 2022/21241, 2023/014278 and 2023/14248 (also eviction applications in respect of the M[...] B[...] H[...] scheme and where the parties are represented by the same legal representatives as in this application)(hereinafter referred to as “the other MB matters”), the outcome of this matter is to determine the outcome of the other MB matters too.

[6] It is common cause that the provisions of PIE have been complied with in this application as well as in the other MB matters.

[7] The properties were previously owned by Rapiprop 149 (Pty) Ltd (“Rapiprop”), which was placed in final liquidation on or about 14 August 2018. Mr Rocha is a former director of Rapiprop.

[8] The properties were sold by the then joint liquidators of Rapiprop by means of public auction, with the applicant purchasing the properties at the public auction held during February 2020.

[9] Transfer of the properties was effected to the applicant during the period September to October 2020.

The parties’ contentions

[10] The applicant’s core allegations and contentions in its founding and replying affidavits, are to the following effect:

- a. An information pack circulated by the auctioneers pre-auction referred to an “apparent” Head Lease.
- b. Units were to be sold as one parcel, subject to any head lease, or individually, without any leases in place.
- c. The applicant purchased the units forming the subject matter of this application on the fall of the hammer and entered into sale agreements the same day.
- d. Each of the sale agreements provided, in clause 7.5, that the property is sold without a lease. No lease had been registered against the title deed of the properties.
- e. It is denied that the applicant had knowledge of a long lease at the time of acquisition, and the applicant had no knowledge of its terms relating to duration or rental at the time, having only seen a Head Lease, purportedly entered into between Rapiprop and the Trust during 2009 (“the Head Lease”), pursuant to eviction applications later instituted in the Germiston Magistrates Court.

- f. The liquidators are in any event deemed to have repudiated the Head Lease pursuant to the provisions of section 37(2) of the Insolvency Act, 24 of 1936, read with relevant provisions of the Companies Act, 61 of 1973.
- g. A lease purportedly concluded between the Trust and RAPS during December 2015 (“the RAPS lease”) makes no commercial sense in several respects. In any event, it is also a long-term lease subject to the provisions of section 1(2) of the Formalities in Respect of Leases of Land Act, 18 of 1969 (“the Leases of Land Act”). It has not been alleged that the applicant has knowledge of this lease or that it was registered in terms of section 1(2)(a)/(b) of the Leases of Land Act.
- h. The liquidators are in any event deemed to have repudiated the RAPS Lease pursuant to the provisions of section 37(2) of the Insolvency Act, 24 of 1936, read with relevant provisions of the Companies Act, 61 of 1973.
- i. The respondents failed to formally challenge the sales “*subject to no lease*”, or to have the transfers set aside.
- j. The respondents failed to discharge the onus of proving that the applicant had prior specific knowledge of the Head Lease.
- k. The fifth respondent was not empowered to represent the Trust when the Head Lease was entered into, as she was not a trustee at the time, and the Head Lease is a nullity. Therefore, the RAPS lease is also a nullity and invalid.
- l. The allegations relating to a pending section 381 enquiry are false and misleading. Mr Rocha in any event has no standing to request such enquiry as he is not a creditor.
- m. The fifth respondent failed to disclose, in the Germiston proceedings, that there was another head lease (“the second head lease”) allegedly concluded between Redlex and Rapiprop during September 2017. The second head lease is also subject to the provisions of section 1(2) of the Act, and the section 37(2) Insolvency Act argument is similarly applicable. The second head lease in any event had the effect of extinguishing all previous rights that the Head Lease or the RAPS lease may have had.
- n. The leases are aimed at creating fictitious rights, justifying the respondents’ illegal occupation of the properties. Mr Rocha, a former director of Rapiprop and Redlex, failed to co-operate with the liquidators and hand over financial

records. If the leases were legitimate Mr Rocha would have provided them to the liquidators and/or registered a claim in the estate, would have made the applicant or the auctioneers aware of the leases and would have had records reflecting payments and the like.

- o. To the best of the knowledge of the deponent to the applicant's founding affidavit, there are no elderly or disabled persons residing at the property, they are employed and can source alternative accommodation and are not indigent. The respondents have refused to provide access to the properties.
- p. From observations made when visiting the property, the occupants are economically active, not elderly, in good physical condition and not disabled and not indigent.
- q. It is just and equitable for these reasons and well as additional reasons, including financial harm to the applicant, for the first to ninth respondents to be evicted.

[11] The opposing respondents do not contest the applicant's ownership of the properties, but oppose the application, pursuant to an answering affidavit by the fifth respondent, ostensibly on behalf of the Trust, on the basis of the following core allegations and contentions:

- a. Various units in the building (which includes the units forming the subject matter of this application) are being occupied in terms of the still valid "Poison Pill" Head Lease, not cancelled, entered into between Rapiprop and the Trust during November 2009.
- b. The liquidators of Rapiprop acted unlawfully in several respects, and the properties were sold unlawfully, irregularly and unconstitutionally by them.
- c. Mr Rocha reported the liquidators' conduct by means of a request to the Master for a Section 381 enquiry, which has commenced, according to Mr Rocha, who deposed to a confirmatory affidavit.
- d. There are ongoing criminal investigations relating to the conduct of the liquidators.
- e. The liquidators and the auctioneer were aware that the Head Lease was in place, and this was mentioned in the auction information pack. They nevertheless unlawfully auctioned the properties, stating and

misrepresenting in the auction pack that there was an “apparent” Head Lease.

- f. The liquidators were aware, or ought to have been aware of the Head Lease, but unlawfully failed to disclose the comprehensive terms of the Head Lease at the time of the auction.
- g. The applicant also knew of the existence of the Head Lease and over an extended period harassed, intimidated and employed violence against the tenants in units.
- h. The Head Lease was never cancelled by the Liquidators, and also not by the applicant.
- i. The Trust is the entity in lawful possession, occupation and control of the properties.
- j. The units were sold subject to the `Head Lease, and the “huur gaat voor koop” principle in any event applies, with the sales being subject to the lease.
- k. To the extent that the properties were lawfully sold, the applicant is bound by the terms of the Head Lease, and cannot apply for the eviction of the occupants.
- l. Mr Rocha cooperated with the liquidators and all papers, electronic documents, financial statements are in the possession of the “colluding liquidator” Hannes Muller with the full knowledge of the now late Murray Cloete. The leases were available to the liquidators, alternatively should have been available to them. All claims were lodged according to Mr Rocha.
- m. Even though the Head Lease was not registered against the title deed of the properties, successors are bound for the first ten years of the currency of an unregistered lease. Where the successor had knowledge of the lease, the “real right” would be enforceable for the entire term of the lease, even if it exceeds ten years and even though not registered.
- n. Occupiers of the units are occupying either in terms of the Head Lease or the RAPS lease concluded between the Trust and RAPS during December 2015. RAPS has lawful possession in terms of the lease, which is valid from October 2015 to December 2022, with an option to renew for a further period of 30 years, not yet taken up by RAPS. Notwithstanding, the Head Lease still subsists.

- o. It is denied that the seventh or ninth respondents occupy the properties. The Trust and RAPS occupy the properties lawfully.
- p. It is denied that it would be just and equitable for an eviction order to be granted.

Applicable legal principles/Issues

[12] PIE defines unlawful occupiers as persons who occupy 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.

[13] Providing the procedural requirements of PIE have been complied with, an owner is entitled to approach a court for an eviction order relying on ownership and the respondent's unlawful occupation. An owner is in principle entitled to an order for eviction unless the occupier opposes and discloses circumstances relevant to the eviction order.¹

[14] Sections 4(7) to 4(9) of PIE provide as follows:

“(7) 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, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women.

(8) 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).

(9) In determining a just and equitable date contemplated in subsection (8), the court must have regard to all relevant factors, including the period the unlawful occupier and his or her family have resided on the land in question.”

[15] Where a respondent relies on a right of possession, for instance a lease, the respondent has to allege the right and bears the onus of proving same.²

[16] In terms of section 1(2) of the Leases of Land Act:

“(2) No lease of land which is entered into for a period of not less than ten years or for the natural life of the lessee or any other person mentioned in the lease, or which is renewable from time to time at the will of the lessee indefinitely or for periods which together with the first period of the lease amount in all to not less than ten years, shall, if such lease be entered into after the commencement of this Act, be valid against a creditor or successor under onerous title of the lessor for a period longer than ten years after having been entered into, unless-

(a) it has been registered against the title deeds of the leased land; or

(b) the aforesaid creditor or successor at the time of the giving of credit or the entry into the transaction by which he obtained the leased land or a portion thereof or obtained a real right in respect thereof, as the case may be, knew of the lease.”

[17] Under section 1(2) of the Leases of Land Act, a long lease is not valid against a creditor or a successor under onerous title of the lessor for more than ten years unless the lease is registered or the creditor or successor-in-title knew of the lease. The *onus* of proving knowledge is on the lessee.³

[18] Regard being had to relief sought and the parties ‘respective contentions, the core issues for determination are whether the respondents, or anyone holding occupying under or through them, are unlawful occupiers as envisaged in PIE, and if so, whether it is just and equitable for them to be evicted.

The unlawful occupation issue

[19] The Head Lease and RAPS lease are long leases within the meaning of section 1(2) of the Leases of Land Act, which were not registered against the title deeds of the properties.

[20] It was accordingly incumbent on the respondents to allege and prove that the applicant “*knew*” of the leases, bearing in mind of course that these are motion proceedings and that the matter falls to be assessed with due regard to applicable principles regulating motion proceedings.

[21] Knowledge in the context of the Leases of Land Act evidently implies actual knowledge. The opposing respondents, in their heads of argument, contended that the mention of a Head Lease in the auction pack was sufficient to cause doubt for the applicant and that if the requirements of *dolus eventualis* are met, this would constitute knowledge for purposes of the Leases of Land Act. The argument was perpetuated during argument, reliance being placed *inter alia* on the judgments in ***Grant & Another v Stonestreet & Others***⁴, and ***Meridian Bay Restaurant v Mitchell***.⁵

[22] I disagree. As stated earlier, when regard is had to the express wording of the Leases of Land Act, actual knowledge is required. The judgments referred to did not deal with the provisions of the Leases of Land Act. In the ***Grant*** matter, the court in the context of an unregistered praedial servitude, reiterated the principle that clear proof of knowledge is required to hold a purchaser bound by an unregistered servitude, and that a person who wilfully shuts his eyes and declines to see what is perfectly obvious, must be held to have had actual knowledge (own underlining). The court in ***Meridian*** dealt with the common law doctrine of notice, and with reference to other authorities, stated that actual knowledge (or perhaps *dolus eventualis*)(own underlining), was required in the context of the doctrine of notice.

[23] *In casu*, the following considerations are relevant relating to the Head Lease and the RAPS lease aspects:

- a. The information pack expressly provided that units individually sold were sold without any leases in place.
- b. Clause 2.6 of the extract from the Conditions of Sale, stated that the properties were sold subject to no lease.
- c. The reference to an “apparent” Head Lease in the information pack is significant. It to my mind militates against the opposing respondents’ version relating to the knowledge aspect. The irresistible inference is that the liquidators and auctioneers did not have full and proper information relating to the Head Lease. This is to be seen in conjunction with the applicant’s allegations to the effect that Mr Rocha failed to co-operate with the liquidators and hand over financial records, and that if the leases were legitimate, Mr Rocha would have provided them to the liquidators and/or registered a claim in the estate, would have made the applicant or the auctioneers aware of the leases and would have had records reflecting payments and the like.
- d. In any event, the reference to an apparent Head Lease in the information pack does not constitute evidence that the applicant had knowledge (whether actual or amounting to *dolus eventualis*) of an onerous long lease extending to 2060.
- e. It is telling that the opposing respondents and Mr Rocha, a former director of Rapirop, who deposed to an affidavit in this matter, failed to adduce any cogent evidence indicating how, where and when the liquidators and/or the auctioneers were advised of the Head Lease, or for that matter, the RAPS lease. Reliance was placed on vague, bald and unsubstantiated assertions relating to these aspects and the provision of records. The improper reliance by the opposing respondents on a document (TAP13 to the answering affidavit) stated to be an affidavit by the co-liquidator, but where sections reflecting the purported deponent and date purportedly executed have been blanked out, takes the matter no further. It has no probative value whatsoever.
- f. The failure to take steps to have any of the sales set aside, or to lodge any claims against the insolvent estate relating to the lease aspect, is similarly telling.

- g. The section 381 enquiry aspect, to the extent that it could be said to be pending, takes the matter no further. This is so particularly in circumstances where the liquidators were appointed as long ago as 2018, the units were sold and transferred some four years ago, and no steps were taken to set aside the sales or transfers. The section 381 enquiry aspect ultimately, to my mind, does not assist the opposing respondents relating to the issue whether the applicant knew of the leases.
- h. The respondents also did not adduce any evidence that the liquidators intended to continue with any of the leases as envisaged in section 37(2) of the Insolvency Act, 24 of 1936. To the extent that any of the leases were valid, they would on that basis be deemed to have been determined at the end of three months from the date of appointment of the liquidators.
- i. Additionally, when regard is had to the terms of the Head Lease, RAPS lease and the second head lease, the continued existence of the Head Lease or RAPS lease is incompatible with the existence of the second head lease, allegedly concluded with Redlex, an entity subsequently liquidated. The various leases cannot co-exist.

[24] I point out, in conclusion that I agree with the applicant's contentions relating to the validity of the Head Lease. The fifth respondent was not empowered, regard being had to the provisions of section 6 of the Trust Property Control Act, 1988, to represent the Trust when the Head Lease was entered into, as she was not a trustee at the time, and the Head Lease, falls to be regarded as invalid on that basis alone. Consequently, the RAPS lease would also be invalid.

[25] Ultimately, the opposing respondents have failed to discharge the onus of proving or of adducing evidence justifying the conclusion that the applicant was aware of either the Head Lease or the RAPS lease when acquiring the properties. In the circumstances the opposing respondents, as well as any persons occupying under or through them, are unlawful occupiers as envisaged in PIE.

Is an eviction order just and equitable?

[26] In considering the PIE Act factors requiring consideration, I take cognisance of the following:

- a. The applicant is a private entity and has no obligation to provide alternative accommodation.
- b. To the best of the knowledge of the deponent to the applicant's founding affidavit, there are no elderly or disabled persons residing at the property, they are employed and can source alternative accommodation and are not indigent. The respondents have refused to provide access to the properties.
- c. From observations made when visiting the property, the occupants are economically active, not elderly, in good physical condition and not disabled and not indigent.
- d. The opposing respondents, who were best placed to adduce evidence relating to the circumstances of any occupiers of the properties, failed to do so.
- e. The procedural requirements of PIE having been complied with, and occupiers of the properties occupying the properties unlawfully, the applicant is entitled to have them evicted.
- f. The applicant evidently suffers financial prejudice should the relief sought not be granted.
- g. The evidence does not reveal any circumstances rendering an eviction order inequitable.

[27] In all the circumstances I am of the view it is just and equitable for appropriate eviction relief to be granted, with the effective date being 31 January 2025, which I consider to be a just and equitable date.

[28] It is inappropriate to grant relief against Redlex in circumstances where it has been liquidated, was not cited as a company in liquidation, and where it is not apparent whether the liquidators were notified of the application, nor what its current status is.

[29] Costs of the application should follow the result.

[30] In the premises I intend granting an eviction order with related relief, with similar orders to be granted in the other MB matters, which will be initialled by me, dated, and marked “X”, and uploaded to Caselines.

[31] The following order is granted:

1. The first to eighth respondents and any persons claiming right and/or all those that occupy the properties including their family, servants and/or employees, are ordered to vacate the immovable properties being **UNITS [...], 1[...] and 3[...] M[...] B[...] H[...] physically situated at 2[...] S[...] STREET, B[...] G[...], G[....** (“the properties”) by no later than 31 January 2025, failing which they are to be evicted forthwith.
2. Should the first to eighth respondents fail to vacate the property within the aforesaid time period, the eviction order may be carried out, in which event the Sheriff of this Court (“the Sheriff”), is hereby authorised and directed to forthwith evict the first to eighth respondents and all those that occupy the property by virtue of, through or under their occupation thereof including their family, servants and/or employees, or short term stay residents from the property.
3. The sheriff is authorised and directed to take all legal steps to enforce this Court order including the use of a Locksmith.
4. In the event that the first to eighth respondents and all those that occupy the property by virtue of, through or under them, including their family, servants and/or employees, attempt to regain access or possession to the properties after the eviction order has been executed by the Sheriff, the Sheriff is hereby authorised and directed to enforce this Court order by evicting the first to eighth respondents and all those that occupy the property by virtue of, through or under them, including their family, servants and/or employees once again in terms of this order.
5. The first to eights respondents are directed to pay the costs of this application jointly and severally, the one paying the other to be absolved.

LAMPRECHT, AJ
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

Date of hearing: 24 October 2024 - Open Court

Date of judgment: 1 December 2024

For the Applicant: Adv M Rodrigues instructed by Kaveer Guinness Inc

For the Opposing Respondents: Mr T Dunn, TTC Attorneys

¹ *Ndlovu v Ngcobo; Bekker v Jika* [2002] 4 All SA 384 (SCA); *Barnett v Minister of Land Affairs* 2007 (6) SA 313 (SCA).

² *Woerman NO v Masondo* 2002 (1) SA 811 (SCA).

³ *Grant & Another v Stonestreet & Others* 1968 (4) SA 1 (A) at 16H – 17A; *Ismail v Ismail & Others* 2007 (4) SA 557 (E) para [8].

⁴ *Supra*

⁵ 2011 (4) SA 1 (SCA).