

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

Case Number: 2023-124888

(1) REPORTABLE:NO

(2) OF INTEREST TO OTHER JUDGES:NO

(3) REVISED: NO

DATE 13/02/2025

SIGNATURE

In the matter between:

CIRCLE PROPERTIES (PTY) LTD

Applicant

And

DUMISANI TOMSON KHUZWAYO

First Respondent

(and all those occupying through or under him)

THE CITY OF JOHANNESBURG

Second Respondent

METROPOLITAN MUNICIPALITY

JUDGMENT

FISHER J

Introduction

[1] This is an application for eviction in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act¹ (PIE Act). The only defence raised is that there should be a stay of proceedings pending the determination of a

¹ Prevention of Illegal Eviction from and Unlawful Occupation of Land ACT 19 of 19981

complaint which was instituted in the Rental Housing Tribunal more than two years ago.

Material facts

- [2] The lease in question has been cancelled and there is no discernible defence on the application of the PIE Act.
- [3] The respondent and his family (comprising his wife and one child aged nine and an adult daughter aged 26) have occupied the flat in question for in excess of twenty-two years. However, the lease which is in issue and which has been cancelled dates from August 2017. The flat is one of approximately 71 units situated at Circle Court in Hillbrow, Johannesburg.
- [4] The material terms of the lease are as follows:
 - i. It commenced on 01 August 2017 and terminated on 31 July 2018.
 - ii. After expiry, the lease would continue indefinitely until terminated by either party giving the other one calendar month's written notice to terminate the lease.
 - iii. The rental payable was R3 934 payable monthly in advance.
 - iv. The lessor could increase the rent by giving the lessee one calendar months' notice.
 - v. There was a holding over clause which provided that if the applicant terminated the lease and the respondent disputed the applicant's right to do so and respondent remained in occupation, the respondent would pay the equivalent of the rental, and the applicant would be entitled to recover such payments without prejudice to the claim of termination.
 - vi. The lessee would pay for the following monthly:

- Water at R240.
- Effluent removal R134.57.
- Refuse removal R113.
- On-site parking R208.46
- Electricity as metered.

- [5] After the expiry of the lease the respondent remained in occupation on a month to month basis.
- [6] On 01 March 2019, the respondent was notified of an increase in the rental from R4 327.40 to R4 673.59 and in respect of the parking from R229.31 to R247.65.
- [7] More than two years later , in July 2022 the respondent was given notice of a 10% increase in rental which became effective 01 September 2022.
- [8] From a payment schedule attached to the founding affidavit, which is not seriously in dispute, the respondent was consistently paying less than the amounts due under the lease. The arrears began to climb and as at November 2023 they stood at R58 572.87.
- [9] On 18 June 2021, and with an amount of in excess of R 24 000 then outstanding, demand was made by the applicant for the bringing up of the arrears under the lease within 20 business days.
- [10] The breach was not remedied and, accordingly, the applicant cancelled the lease. It was sought that the flat be vacated by 30 July 2021.
- [11] At a stage thereafter, Mr Edi Xavier of BBM attorneys came on record for the respondent and a flurry of litigation has ensued since then.
- [12] This application is the second attempt at eviction and it comes in consequence of the applicant serving via its attorneys, Joshua Apfel attorneys, a second letter of cancellation on 05 October 2023. By this date the outstanding rental

amounted to over R 52 000. Accordingly, between the first cancellation and the second there had been some bringing up of arrears, but a substantial amount remained outstanding, and the parties continued in litigation with each other.

[13] In defence to this cancellation and this subsequent application for eviction, the respondent's attorneys embarked on a convoluted calculation in terms of which they seek on his behalf to go back more than twenty years to allege that there had been unreasonable increases in the rental over all those years. This is notwithstanding that the respondent had, from time to time over this long period of tenancy, signed new lease agreements without demur.

[14] This retrospective approach was clearly devised in a bid to stave off what was an inevitable eviction under the PIE Act. It is relevant that, no complaint as to the rental was raised prior to the cancellation of the lease and the attempts to evict the respondent.

[15] In terms of this device, it is argued that the respondent has been charged unreasonable rentals over decades; that this constitutes an unfair practice under the Rental Housing Act (the Act)² and is thus a matter which falls under the jurisdiction of the Renting Housing Tribunal (the Tribunal) established under the Act.

[16] A complaint was thus laid at the Tribunal to the effect that increases of rental which have been agreed to over the years have, in retrospect, been exorbitant and unfair. There are also allegations that there have been incorrect charges levied relating to the fact that the property is serviced by a borehole and thus the applicant should not be entitled to charge for the water usage.

[17] The argument goes that this approach to the Tribunal may ultimately result in a decision by the Tribunal which allows for the recoupment of rentals under long expired leases, some of which are decades old, on the basis that the rentals

² Rental Housing Act 50 of 1999.

have amounted to overcharging which is, according to the respondent, an unfair practice which implicates the Act and the jurisdiction of the Tribunal.

[18] The central allegation is that when these historic charges are reconciled by the Tribunal, the applicant could end up owing the respondent money.

[19] It seems, that buoyed by this approach, the respondent has stopped paying rental altogether. The last payment made by the respondent was 06 February 2024 in the amount of R 4000.

[20] Mr Xavier, in argument denied this. He does not support this denial with any details of any further payment on behalf of the respondent. It is trite that a person who contends that payment has been made should provide details and evidence of such payment to avoid the contention being rejected as unsubstantiated.

[21] There are no such details provided. On the contrary, the central allegation made is that the applicant will be shown to owe the respondent money when the retroactive calculation is done in the Tribunal.

[22] The complaint to the Tribunal was lodged more than two years ago. It has not yet been adjudicated on.

[23] The personal circumstances of the respondent are as follows. He and his wife are both gainfully employed – the respondent as a security guard and his wife as a chef. The respondent alleges that their total income is approximately R10 600 per month. There is no proof tendered of this income and the court is not told how it is made up. In addition, the respondent sub-lets part of the flat for R1 600 per month. Thus, on the respondent's version, the income received is R 12 200. And yet no rental has been paid for a year.

Application for postponement

[24] Three days before the hearing of this matter, the respondent launched an application for postponement. The reason for the postponement and the defence is essentially the same – that the Tribunal proceedings should effectively stay the eviction proceedings.

[25] If this point is not upheld in the main application, then it follows that the point is not good for the postponement application either. I thus considered it convenient that the applications be adjudicated at the same time and one judgment be given.

[26] I pause to mention that the respondent's attorneys have known of the set-down date for some months. They, however, saw fit to launch this postponement application on one day's notice and on the eve of the hearing. Furthermore, this was done on the basis that no heads of argument were filed for the respondent and no practice note.

The respondent's contentions in the main application

[27] This court was called upon, without any cogent submissions on behalf of the respondent, to determine an issue which has some complexity. This behaviour cannot be allowed to prejudice the applicant which has been without redress for some years, has significant arrears to recoup and which has had no rental for a year.

[28] Accordingly, with little to no help from the side of respondent and on the basis that a Constitutional Court judgment was produced in argument by Mr Xavier like a rabbit out of a hat and with no courtesy extended to his opponent or the court as to a copy either being provided or uploaded, it is proper that this court determine the issue.

[29] The judgment relied on for the defence and the postponement is the decision of the Constitutional Court in *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd*.³

[30] It is argued on behalf of the respondent, that this case is authority for the proposition that, where there is a pending Tribunal hearing relating to an unfair practice, any eviction should properly be stayed pending the outcome of the hearing.

[31] I move to examine the judgement in *Maphango* in light of this submission.

[32] The applicants were tenants in a ten-storey block of flats in the inner city. The landlord of the property, which was an investment company had, as its stated business practice, the acquisition of run-down inner-city low rent buildings and the stripping and refurbishing or the upgrading thereof so that much higher rentals could be commanded. The landlord bought the property in question, upgraded it and then sought to increase the rent to a much higher rental. To do so, it cancelled the existing leases, but offered the tenants new tenancies on identical terms to their existing leases but at the much higher rent.

[33] Each existing lease made provision for an annual rent increase at a stipulated rate. Each lease also had a clause entitling either party to terminate the lease on written notice. It is this latter clause that was evoked by the landlord.

[34] The landlord's case was that it could use the termination clause to oblige the tenants either to vacate or to enter new leases at the higher rentals. The tenants' case was that the law did not permit the landlord to use the bare power of termination for this purpose.

[35] The landlord admitted that its purpose in using the termination rights was to force the tenants out of their accommodation. There was no expectation that they would be able to afford the rental under the proffered new tenancies. The

³ *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* 2012 (3) SA 531 (CC).

30-day cancellation clause was thus, admittedly, employed by the landlord a tactic rather than a natural incident of a fair lease between landlord and tenant.

[36] The accommodation of a large number of inner-city dwellers was at stake. There were 58 flats occupied by various tenants and others through them.

[37] The Constitutional Court acknowledged the inherent balancing of financial and other interests of landlord and tenant in the Act and its broader legislative scheme. It took into account that there should be cognisance of economic conditions and the need for a realistic return on investment for investors in rental housing.

[38] The Court held, however, that the scheme afforded a protection of interests that went beyond the common law⁴. Hence, the Court held that the fact of the termination clauses in the leases did not circumvent a determination by the Tribunal of unfairness and remedies to such unfairness because of the common law.

[39] It acknowledged further that the Act requires the Tribunal when making a ruling to have regard to specified factors which included 'the common-law to the extent that any particular matter is not specifically addressed in the regulations or a lease', the provisions of the lease 'to the extent that it does not constitute an unfair practice', as well as 'the need to resolve matters in a practicable and equitable manner.'⁵

[40] Thus, contrary to the submissions of Mr Xavier as to *Maphango* prescribing a hard and fast rule as to the stay of eviction proceedings, the judgment represents a balancing of interests and a deference to the Tribunal where its purposes and expertise are best suited to dealing with the dispute.

Discussion

⁴ Id at para 53

⁵ Id at para 44.

[41] In *Maphango*, the Court was faced with a stratagem which went wider than the tenants affected and presented a possible threat to inner-city dwellers as a whole.

[42] The business practice involved is one which is a trend recognised internationally and is commonly called *Gentrification*. The Court held, on the facts, that this constituted a practice which was best suited to the delicate weighing up exercise between the rights of tenant and landlord which is provided for in the legislative scheme under the Act.

[43] This case is different. The rental increases in issue were not exorbitant. There has also been a consistent delinquency over the years – which has been accommodated by the landlord.

[44] Furthermore, the fact that there has been a failure to pay rental whilst deriving income from the property suggests bad faith on the part of the respondent. In contradistinction to this case, the tenants in *Maphango* were not withholding rental.

[45] The respondent alleges that the rental charged is not market related in that there are similar units in the area which are significantly cheaper to rent. If this is the case, then there is no reason why the respondent should not avail himself of these opportunities.

[46] It is doubtful that the Tribunal even has the jurisdiction to determine rental retrospectively in a manner that would create a credit position over decades. It is not necessary for me to enter this inquiry, however, as the case is so patently without merit that it bears no consideration. To my mind this is an attempt to abuse the processes of the Tribunal.

[47] The appropriateness or otherwise of staying eviction proceedings so that the Tribunal hearings can take effect is something that a court will consider in accordance with the weighing up of the just and equitable considerations which it undertakes under section 4(7) of the PIE Act.

[48] This is not a case where the rights of children or the elderly are prejudiced. The family has an income and access to appropriate accommodation. Furthermore, this financial position must have been enhanced by the holding back of rental over the past year.

Order

[49] In the circumstances I order as follows:

1. The application is dismissed with costs to be paid on the B tariff.
2. The respondent and those who occupy through him are directed to vacate the property by 31 March 2025.
3. If the respondent and those occupying through him fail to vacate the property by 31 March 2025, the sheriff of this court is directed to do all things necessary to achieve the eviction of the respondent and those occupying in breach of this order.

**FISHER J
JUDGE OF THE HIGH COURT
JOHANNESBURG**

This Judgment was handed down electronically by circulation to the parties/their legal representatives by email and by uploading to the electronic file on Case Lines. The date for hand-down is deemed to be 13 February 2025.

Heard: 03 February 2025
Delivered: 13 February 2025

APPEARANCES:

Applicant's counsel:

Applicant's Attorneys:

Respondent's Counsel:

Respondent Attorneys:

Adv. V Vergano

Joshua Apfel Attorneys

Mr E Xavier

Biccari Bollo Mariano Inc