

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 40135/2016

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

14 March 2025

DATE

SIGNATURE

Mahosi

In the matter between

CHANGING TIDES 74 (PTY) LTD

Plaintiff

And

THE CITY OF JOHANNESBURG

Defendant

JUDGMENT

Mahosi J

Introduction

[1] This is an action brought by the plaintiff, Changing Tides 74 (Pty) Ltd ("Changing Tides"), against the respondent, the City of Johannesburg, for damages to recover economic loss founded in delict, declaratory order and ancillary relief. The issue for determination concerns whether the City of Johannesburg's failure to secure emergency accommodation for the unlawful occupiers of Changing Tides' building was wrongful and breached various constitutional rights.

The parties

[2] Changing Tides 74 (Pty) Ltd is a private company with a share capital duly incorporated with limited liability and registered with registration number 2001/011908/07 in accordance with the Company Laws of the Republic of South Africa.

[3] The City of Johannesburg is a metropolitan municipality duly established by virtue of Notice 6766 of 01 October 2000, issued in terms of section 12(1) read with section 14(2) of the Local Government Municipal Structures Act¹.

Background

[4] Central to this action is an order granted by Claassen J on 14 June 2012 in terms of which the City of Johannesburg was directed to provide all those whose names appear in the document entitled "List of Residents of Chung Hua Mansions" dated 6 June 2012, with temporary shelter where they may live secure against eviction, in a location as near as possible to the area where the property is situated, by no later than 30 January 2013, provided that they are still resident at the property and have not voluntarily vacated it ("the Claassen Order").

[5] The above order was granted after Changing Tides, the owner of the property situated at 191 Jeppe Street, Johannesburg, on which is fixed an eleven (11) story building known as Chung Hau Mansions ("the property"), brought an application to evict approximately 249 men, women and children who were unlawfully occupying the property. The property was unlawfully occupied and colloquially referred to as a "hijacked building".

¹ Act 177 of 1998, as amended.

[6] It is apparent from Claassen's order that the Court ordered the eviction of the occupiers by not later than 15 February 2013 and ordered the City of Johannesburg to find them temporary accommodation not later than 30 January 2013. The City of Johannesburg did not comply with the above order. As a result, the occupiers launched an enforcement application against the City of Johannesburg, its Mayor, the City Manager and the Head of the Housing Department on 19 December 2012. Lamont J heard the matter on 06 February 2013 and issued, by agreement between the parties, an order in terms of which it, amongst others, consolidated the occupiers' enforcement application and case number 2011/20127, ordered compliance with Claassen Order and postponed the consolidated case to 09 April 2013.

[7] The City of Johannesburg failed to comply with the above orders, and Changing Tides continued to accommodate the occupiers. On 03 April 2013, Satchwell J issued an enforcement order against the City of Johannesburg and its three officials. The City of Johannesburg unsuccessfully appealed to the Supreme Court of Appeal against parts of the abovementioned order. In June 2015, its application for leave to appeal the Supreme Court judgment to the Constitutional Court was dismissed.

[8] In November 2015, Changing Tides applied to re-enrol the consolidated applications for this Court to determine a date by which the City of Johannesburg must provide temporary emergency accommodation and a date on which the occupiers must locate in compliance with the eviction order of Claassen J, alternatively, such further relief as may be just and equitable in the circumstances. Further, the City of Johannesburg's named officials had to each answer and explain under oath precisely what each had done to comply with the order of Claassen J and the first and second orders of Satchwell J and what each would do to ensure compliance with any further court orders granted.

[9] The unlawful occupiers filed supporting papers seeking an order to find that the City of Johannesburg was in contempt of Court and ancillary relief, which prompted the City of Johannesburg to provide the occupiers with temporary emergency accommodation on 10 January 2016. Following an application by Changing Tides, this matter was designated as a commercial matter in accordance with the Commercial Court Directive ("the Directive") on 16 November 2020, and Kathree-Setiloane J was appointed to manage it. After the parties filed the necessary documents, the Court enrolled the matter as a long-duration trial of 10 days. Before the commencement of the trial, the City of Johannesburg raised a

preliminary point regarding the pleadings to be considered by the Court in adjudicating the dispute. The parties were directed to file heads of argument regarding the set of pleadings that would form the basis of the matter.

[10] On the first day of the trial, 02 September 2024, the parties argued the abovementioned issue. This Court delivered its judgment on 04 September 2024, in terms of which it dismissed the City of Johannesburg's point that the matter must be adjudicated in terms of the documents filed after the matter was designated as a commercial court matter to the exclusion of the pleadings filed in terms of the Uniform Rules. The trial proceeded, and Changing Tides led its evidence through its Operations Manager, Mr. Nabeel Mohammed, while the City of Johannesburg decided not to call any witness.

Changing Tide's case

[11] Changing Tides contended that the City of Johannesburg's failure to comply with the Claassen Order not only caused it to suffer financial damages but was also wrongful and resulted in the infringement of the occupier's right to adequate housing in terms of section 26(1) of the Constitution² in that it left them to live in increasingly squalid and dangerous conditions. Further, it deprived Changing Tides of its right to property in contravention of section 25(1) of the Constitution³ for three years in that it could not renovate the property and rent it out to students until 01 February 2017, when it ought to have been able to do so on 01 February 2014.

City of Johannesburg's case

[12] The City of Johannesburg disputed that its conduct was wrongful on the basis that it had no available resources to comply with the Claassen order and worked within the

² Section 26 provides

- (1) Everyone has the right to have access to adequate housing.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

³ Section 25(1) provides:

No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

parameters of its available resources to effect the policy and constitutional imperative against homelessness. It relied on numerous "tenders" of temporary accommodation, which it alleges it made in compliance with the Claassen Order.

Legal framework

[13] In *Country Cloud Trading CC v MEC Department of Infrastructure Development Gauteng*⁴ the Constitutional Court held that wrongfulness functions to determine whether the infliction of culpably caused harm demands the imposition of liability or, conversely, whether 'the social, economic and others costs are just too high to justify the use of the law of delict for the resolution of the particular issue', mainly where it is undesirable or overly burdensome to impose liability. It further quoted with authority *Loureiro*⁵, where it articulated that the wrongfulness enquiry focuses on –

“the [harm-causing] conduct and goes to whether the policy and legal convictions of the community, constitutionally understood, regard it as acceptable. It is based on the duty not to cause harm – indeed to respect rights – and questions the reasonableness of imposing liability.”

[14] The Constitutional Court further explained that:

“The statement that harm-causing conduct is wrongful expresses the conclusion that public or legal policy considerations require that the conduct, if paired with fault, is actionable. And if conduct is not wrongful, the intention is to convey the converse: “that public or legal policy considerations determine that there should be no liability; that the potential defendant should not be subjected to a claim for damages”, notwithstanding his or her fault.”

[15] Changing Tides's case is of pure economic loss. Thus, wrongfulness must be positively established.⁶ It is trite that the City of Johannesburg's existence of a harm-causing act is a prerequisite for the enquiry into the other elements of delict, namely wrongfulness and fault. Without it, no conduct could be found to be wrongful or committed with the requisite degree of fault.⁷

⁴ 2014 (12) BCLR 1397 (CC), at para 20.

⁵ *Loureiro and others v Invula Quality Protection (Pty) Ltd* 2014 (5) BCLR (CC) at 53.

⁶ See para 23

⁷ *H v Fetal Assessment Centre* 2015 5 BCLR 127 (CC) at para [54].

Failure to comply with Claassen Order

[16] The harm-causing conduct upon which Changing Tides relies in its claim for damages against the City of Johannesburg is the latter's failure to comply with the Claassen order to provide occupiers with temporary shelter by no later than 30 January 2013. This conduct persisted for three years until January 2016, when the City of Johannesburg provided the occupiers with temporary emergency accommodation.

[17] In opposition, the City of Johannesburg relies on numerous tenders of temporary accommodation, which it alleges it made in compliance with the Claassen Order. The first tender was temporary emergency accommodation to the occupiers at the facility known as Ekuthuleni on 29 January 2013. This tender was allegedly rejected by the occupiers, represented by the Socio-Economic Rights Institute ("SERI"). However, the City of Johannesburg submitted that this tender of accommodation was only for 110 beds when there was more than double this number of people listed in Annexure A to the Claassen Order.

[18] Further, SERI disputed the existence of the temporary accommodation. They pointed out in a letter sent on 30 January 2013, immediately after it received the tender, that the beds available at Ekuthuleni were already occupied by other individuals it represented. The said accommodation was subject to the demeaning "day-time lockout rule". To the extent that no evidence was adduced to dispute the correctness of what SERI had to say about the availability of this accommodation

[19] The second tender was in respect of accommodation in the Linatex Building which was made on 11 June 2013, on the eve of the hearing by Satchwell J of an application for leave to appeal a judgment granted in the occupiers' application to enforce the Claassen Order. Changing Tides submitted that this tender was subject to a process of engagement between the occupiers and the City, which was provided for by an agreed order made by Justice Satchwell to cover the terms and conditions that would be applicable to the accommodation at Linatex, particularly the "house rules".

[20] It is not in dispute that this process ended in deadlock on the basis that the children would not be permitted to reside there, making the accommodation completely unsuitable to families, families would not be permitted to reside together in single rooms, meaning that spouses and life partners would have to live separately in single accommodation and

the City of Johannesburg sought to impose the "day-time lockout rule" with the effect that the occupiers could not access the accommodation during the day. Further, the City of Johannesburg expected the occupiers to agree to the limitation of their tenure at Linatex to 6 months and removal at the end of their tenure or upon breach of the "house rules" without a Court order to evict them. The occupiers were not willing to accept these conditions and, as a result, the City of Johannesburg withdrew this tender.

[21] Lastly, when the City of Johannesburg was not able to find accommodation which it could make available to the occupiers, it came up with a plan to build a temporary relocation area ("TRA") on vacant land. Changing Tides submitted that this process dragged on for many months, with the defendant failing to comply with its undertakings to relocate the occupiers until it was forced to admit on 18 September 2015 that it faced "challenges", including that it had not even been able to gain access to the properties which it had allegedly demarcated for the construction of the TRA. Besides, it did not plead that its attempts to build a TRA constituted compliance with the Claassen Order and adduced no evidence to support such a case.

[22] In light of the above, it is apparent that the accommodation tendered was either non-existent, inadequate or unacceptable. Changing Tides has, accordingly, discharged its onus of proving, on a balance of probabilities, that the City of Johannesburg failed to comply with the terms of the Claassen Order before January 2016. The next issue is whether its conduct was wrongful.

Wrongfulness

[23] Changing Tides contended that the City of Johannesburg's failure to comply with the Claassen Order resulted in the infringement of the occupier's right to adequate housing as protected by section 26(1) of the Constitution because they were left with no choice but to remain in unlawful occupation of the property despite its deteriorating and unsafe conditions. The City of Johannesburg denied this on the basis that it had no obligation to provide the occupiers with temporary emergency accommodation "*secure from eviction*". In this regard, the Claassen Order went far beyond its obligations in terms of section 26 of the Constitution, the Housing Act and the terms of the Constitutional Court's judgment in *Blue Moonlight*. I agree with Changing Tides that the above defence is not open to the City of Johannesburg as it elected not to appeal the Claassen Order.

[24] The City of Johannesburg submitted that its obligation in terms of section 26 was “*limited to its available resources, meaning funds earmarked for purposes of provision of [Temporary Emergency Accommodation] to the occupiers.*” I agree with Changing Tides that this defence is without merit. The Claassen Order compelled the defendant to make such emergency accommodation available whether or not it already existed and irrespective of the defendant’s financial position. Its terms were clear and specific to the circumstances of the eviction application considered by Claassen J on 14 July 2014. It did not require the City of Johannesburg to implement “*legislative or other measure*” in terms of section 26(2) of the Constitution.

[25] In addition, there is no dispute that the City of Johannesburg agreed to 30 January 2013 as the date by which it was required to provide the occupiers with temporary emergency accommodation. It did so in the full knowledge of its financial resources, budgets and so-called “earmarked” funds and the terms of the *Blue Moonlight* judgment and its increased obligations to provide temporary emergency accommodation to unlawful occupiers evicted by private landlords as well as those evicted by the City. Further, it presented no evidence of its actual financial position between 2012 and 2016.

[26] To the extent that the City of Johannesburg’s circumstances may possibly have changed after the granting of the Claassen Order, for example, when it filed the Housing Report on 21 November 2012 in which it recorded that it was “*impossible*” to accommodate the occupiers due to lack of financial and other resources, it should have applied to this Court for a variation of the Claassen Order. However, it brought no such application.

[27] Changing Tides contended that the City of Johannesburg’s failure to comply with the Claassen Order deprived it of its right to property in contravention of section 25(1) of the Constitution for a period of three years. Changing Tides’ undisputed evidence, through Mr Mahommed, categorised its main business as renovation and refurbishment of inner-city buildings, including “hijacked buildings”. It rents them out as student accommodation under the “City Waldorf” brand, providing significant upliftment to the inner City of Johannesburg and meeting an important need to house students. The City of Johannesburg pleaded that section 25(1) rights are not absolute and that Changing Tides failed to allege deprivation of this right nor that such deprivation was arbitrary. Further, the City of Johannesburg justified its conduct by relying on the alleged agreement it had with

the occupiers that their eviction would not be just and equitable unless it was able to provide them with temporary emergency accommodation. It alleged that until then, the occupiers were entitled to remain at the property, which suspended Changing Tides' rights *"in and to the Property."*

[28] It was apparent from Mr Mahommed's evidence that Changing Tides was deprived of access to and use of its property between 30 January 2013 and January 2016 because the City of Johannesburg failed to provide the occupiers with *"temporary emergency accommodation secure from eviction"* by the date set in the Claassen Order. The City of Johannesburg did not challenge the date agreed to by the parties and ordered by the Court. Changing Tides correctly argued that deprivation need not be "arbitrary" as suggested by the City of Johannesburg as the criterion of "arbitrary-ness" is applicable only in such circumstances where a law of general application permits the deprivation of property as is clear from the terms of section 26(1). Further, there is no dispute that the Claassen Order did not constitute a *"law of general application"* permitting the plaintiff's deprivation of property. Thus, there is no merit to the defence the City of Johannesburg raised.

[29] Changing Tides further contended that the City of Johannesburg infringed sections 34 and 165(4) of the Constitution in that it undermined the very rule of law, which is protected by the Constitution and requires organs of state to assist and protect the Courts to ensure, *inter alia*, their effectiveness. This is a fair proposition. The City of Johannesburg's failure to comply with the terms of the Claassen Order resulted in the eviction order not being executed and left Changing Tides in a "check-mate" position where it was forced to bear the burden of accommodating the occupiers. It did so after Changing Tides followed the correct legal procedure to secure a court order to protect their rights.

Negligence

[30] On behalf of Changing Tides, it was submitted that the City of Johannesburg lacked the political will or intention to comply with its legal and constitutional duty, and its supine attitude resulted in an ongoing breach of the aforementioned rights and caused Changing Tides to suffer financial loss. In circumstances where the City of Johannesburg agreed to the dates set out in the Claassen Order, in the full knowledge of all the relevant factors,

Changing Tides submitted that there could be no question that the latter's wrongful conduct was, at best, grossly reckless. I agree with Changing Tides.

[31] The City of Johannesburg's recklessness is further demonstrated by its failure to comply with the further orders of this Court including Lamont J's order, paragraph 4 of which repeated the relevant terms of the Claassen Order Satchwell J's order, paragraph 3 of which ordered the City of Johannesburg's functionaries to ensure that steps were taken to comply with the Claassen Order and Lamont J's order. It was only after its Mayor, Municipal Manager and Director of Housing were facing contempt proceedings that the City of Johannesburg found itself in a position to provide the occupiers with temporary emergency accommodation in the Wembley building and ensured that the occupiers were speedily relocated by January 2016. This was notwithstanding its alleged lack of financial resources or earmarked budget and its purported lack of any available facilities for the period between January 2013 and late 2015.

[32] The City of Johannesburg foresaw or ought reasonably to have foreseen that its failure to comply with the Claassen Order deprived the Changing Tides of its property and prevented it from renovating, renting it out to student accommodation and generating income for its business. Its harm-causing conduct was wrongful and the public policy and the legal convictions of the community, underpinned by the normative framework of the Constitution, dictate that it be held liable for the loss suffered by Changing Tides.

Damages

[33] The last issue for determination is the period for which Changing Tides is entitled to claim damages. Its case was that, but for the unlawful and negligent conduct of the City of Johannesburg, it would have regained possession of the property at the end of January 2013, renovated it for approximately 10 months, and rented it out to students from 01 February 2014. However, it was only able to take possession in January 2016 and could only start earning a rental income with effect from 01 February 2017. For this reason, its expert, Mr Koski, opined that the loss period was 30 months, from 01 February 2014 to 01 February 2017.

[34] The City of Johannesburg's expert, Professor van Romberg, opined that to the extent that Changing Tides was deprived of possession of the property for three years, from 30 January 2013 to 10 February 2016, and one year would have been used for

renovating, it would, but for the deprivation, have received rental income in the 20 months that followed.

[35] There are different views to determine the existence and extent of damage in given situations.⁸ The Supreme Court of Appeal recognised the comparative test, and it stated as follows:

“It is now beyond question that damages in delict (and contract) are assessed according to the comparative method. Essentially, that method, in my view, determines the difference, or, literally, the *interesse*. The award of delictual damages seeks to compensate for the difference between the actual position that obtains as a result of the delict and the hypothetical position that would have obtained had there been no delict. That surely says enough to define the measure. There appears to be no practical value in observing the distinction between positive and negative *interesse* in determining delictual damages.”

[36] In determining the extent of harm suffered, this Court must compare Changing Tides’ actual and hypothetical situation. Thus, Changing Tides is entitled to be placed in the position it would have been had it not been for the City of Johannesburg’s failure to comply with the Classen’s Order.

[37] Considering the evidence, had it not been for the City of Johannesburg’s harm-causing conduct, Changing Tides would have regained possession of the property at the end of January 2013, renovated it from that period to 31 December 2013 and rented it out to students from 01 February 2014. To the extent that it only started earning a rental income from 01 February 2017, it suffered a loss of income for three years. Accordingly, it must be compensated for that period. This aligns with the principles of fairness and justice, which are fundamental to the law of delict.

[38] The expert witnesses have agreed on the quantum of damages on both the 30 and 20-month scenarios, which obviates the need for them to be called to give evidence. Thus, the quantum of the damages suffered by Changing Tides is R12,374,993.00, including *mora* interest.

⁸ See, Neetling, Potgieter & Visser *Law of Delict* Seventh Edition at p 231 – 233.

Costs

[39] The conduct of the City of Johannesburg and its Stalingrad approach to the litigation from the commencement of the dispute justifies an order of costs on a punitive scale between the attorney and own client.

Order

[40] Accordingly, the following orders are made:

1. The defendant must pay the plaintiff damages in the amount of R12,374,993.00 together with *mora interest* of 11.75% per annum (the current mora rate) on this amount from the date of summons to the date of final payment.
2. The defendant must pay the costs of the action on the scale as between attorney and own client, including the costs of two counsel (one of whom is a senior counsel), which costs are to include the costs of preparation for and attendance at the trial of long duration for 10 days between 2 September 2024 and 13 September 2024
3. The defendant must pay the qualifying fees and expenses of the expert, Mr. Paul Koski.



D. Mahosi J
Acting Judge of the High Court

Date of hearing: 02 – 12 September 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives through email. The date for hand-down is deemed to be 14 March 2025.

Appearances

For the plaintiff: Advocates CHJ Badenhorst SC and P Bosman

Instructed by: Esthé Muller Incorporated Attorneys
c/o Couzyns Incorporated Attorneys

For the defendant: Advocate A.W. Pullinger

Instructed by: Kunene Ramapala Incorporated Attorneys