

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2024-026737

- (1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES / ~~NO~~
(3) REVISED: ~~YES~~ / NO

13 March 2026

DATE

SIGNATURE

In the matter between:

NG KERK BRACKENHURST AFTREEBEHUISING NWO

APPLICANT

And

HEYNIKE JURIE BADENHORST

FIRST RESPONDENT

CITY OF EKURHULENI METROPOLITAN MUNICIPALITY

SECOND RESPONDENT

Headnote: Contract — interpretation — contextual approach — retirement housing scheme — spouse occupying unit — eviction — PIE — just and equitable enquiry.

Summary: Eviction –retirement housing scheme – life-right agreement under Housing Development Schemes for Retired Persons Act 65 of 1988 – clause providing that

occupation endures for lifetime of purchaser and spouse whose particulars appear in agreement – purchaser later marrying respondent who resided in unit with knowledge and acquiescence of scheme operator – contextual interpretation – formal recording of spouse not decisive of continued right of occupation – respondent not an unlawful occupier – eviction under PIE dismissed.

JUDGMENT

WINDELL J:

Introduction

[1] The applicant is a non- profit company¹ that administers a retirement housing development under the Housing Development Schemes for Retired Persons Act 65 of 1988 ('the Housing Act'), in Brackenhurst, Alberton.

[2] This is an application for the eviction of the first respondent, Mr Badenhorst, from Unit 7 Andante, situated within the scheme. The application is brought in terms of section 4 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ('PIE'). The first respondent is presently 78 years old.

[3] The application arises following the death of the first respondent's wife, Ms Adriana Catharina Botha ('the deceased'), who concluded an agreement with the applicant in August 2010 in terms of which she acquired a housing interest in the unit. The housing interest took the form of a contractual life right entitling the purchaser to occupy the unit

¹ Incorporated in terms of section 21 of the Companies Act 61 of 1973.

for the duration of her life and, where applicable, for the lifetime of her spouse as contemplated in the agreement, subject to its terms and the rules of the scheme.

[4] At the time the agreement was concluded the deceased was divorced and no spouse was recorded in the agreement. In March 2019 she married the first respondent. Following the marriage the first respondent moved into the unit and resided there with the deceased until her death on 4 September 2023.

[5] The first respondent has remained in occupation of the unit since the deceased's death. The applicant subsequently requested him to vacate the unit on the basis that he had no right of continued occupation. When he refused to do so, the present eviction proceedings were instituted.

[6] The applicant contends that the first respondent is in unlawful occupation of the unit because his particulars do not appear in the agreement as the spouse of the purchaser. On the applicant's interpretation, the agreement permits continued occupation after the purchaser's death only by a spouse whose particulars appear in the agreement, with the result that the right of occupation terminated upon the deceased's death.

[7] The first respondent disputes that his occupation is unlawful. He contends that he resided in the unit openly as the deceased's spouse for several years prior to her death with the knowledge and acceptance of the applicant. In these circumstances, he submits, the applicant cannot rely on the absence of a formal amendment to the agreement recording his particulars in order to deny him continued occupation.

[8] The deceased also executed a will in August 2023 in which she purported to bequeath her interest in the unit to the first respondent and thereafter to her son upon the first respondent's death. It is common cause that a housing interest in such a scheme is a personal right and is not capable of transfer or inheritance. The provisions of the will therefore do not determine the legal entitlement to occupy the unit but are relevant insofar as they reflect the deceased's intention regarding the first respondent's continued occupation.

[9] Two principal issues arise for determination. The first concerns the proper interpretation of the agreement and whether it excludes the first respondent from any right of continued occupation. The second concerns whether, even if the first respondent does not enjoy a contractual right of occupation, it would be just and equitable to grant an eviction order in terms of PIE.

The contractual and statutory framework

[10] Housing interests created under the Housing Act arise and operate within a statutory framework regulating occupation within retirement housing developments. The Act recognises that such interests typically confer contractual rights of occupation for the duration of the purchaser's life.

[11] Section 7(1) of the Act provides that, once a housing interest has been transferred, *"no person other than a retired person or the spouse of a retired person may occupy the land"* to which the housing interest relates, unless the consent of the holders of housing interests in the scheme is obtained. The provision reflects a legislative recognition that occupation within such schemes ordinarily extends to the purchaser's spouse.

[12] Agreements concluded in respect of housing interests must therefore be interpreted in the light of this statutory context. The rights and obligations arising under such agreements do not exist in a purely private contractual sphere but are shaped by the statutory regime governing retirement housing developments.

Interpretation of the agreement

[13] The agreement records that the purchaser acquires a right to live in and occupy the unit for the duration of her life and, where applicable, for the lifetime of her spouse whose particulars appear in the agreement. The applicant contends that this provision must be applied strictly and that, because the first respondent's particulars were never formally inserted following the marriage, the right of occupation terminated upon the deceased's death.

[14] Interpretation is a unitary exercise in which the language used must be considered in the light of its context and purpose. The clause requiring the spouse's particulars to be recorded cannot be construed in isolation from the circumstances in which the agreement was implemented.²

[15] It is common cause that the deceased married the first respondent during 2019 and that he thereafter resided with her in the unit as her spouse until her death. His occupation was open, continuous and known to the applicant and the management of the

² *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18; *University of Johannesburg v Auckland Park Theological Seminary and Another* 2021 (6) SA 1 (CC) paras 64–69; *Capitec Bank Holdings Ltd v Coral Lagoon Investments 194 (Pty) Ltd* 2022 (1) SA 100 (SCA) paras 46–50.

scheme. No steps were taken during the deceased's lifetime to object to his residence or to insist upon formal amendment of the agreement.

[16] The clause relied upon by the applicant serves to define who is to be regarded as the purchaser's spouse for purposes of the agreement. It provides that, where the purchaser was unmarried at the time of conclusion of the agreement, any reference to a "spouse" shall mean a person as contemplated in section 1 of the Act whose particulars are set out in the agreement. In context, the provision is directed at the identification of the relevant spouse for purposes of administrative certainty within the scheme.

[17] The agreement further provides that the purchaser may cancel, but not amend, the particulars recorded in respect of his or her spouse after commencement of the agreement. This provision regulates the alteration of particulars where a spouse has already been identified in the agreement. It does not expressly address the position where the purchaser was unmarried at the time of contracting and subsequently marries, nor does it stipulate that the benefit of occupation will be forfeited if the particulars of a later spouse are not formally recorded.

[18] The applicant suggested that, upon the deceased's remarriage, the existing agreement was required to be terminated and replaced with a new agreement coupled with payment of a further percentage in respect of the unit. No such requirement appears from the terms of the agreement, nor was any provision in the governing documentation of the scheme identified that supports this contention.

[19] To construe these provisions as imposing an absolute formal prerequisite for continued occupation would attribute to them a rigidity not supported by their language or

purpose. In circumstances where the existence and identity of the spouse were known to and accepted by the applicant, the absence of a formal amendment recording those particulars cannot, without more, be regarded as extinguishing the contractual benefit of continued occupation contemplated by the agreement.

[20] Even if the requirement that the spouse's particulars be recorded were to be regarded as giving rise to uncertainty where the purchaser subsequently marries, the surrounding context supports the objective inference of a tacit term that the benefit of occupation was not intended to depend solely on formal amendment of the agreement. Retirement housing schemes are ordinarily structured on the premise that occupation includes the purchaser's spouse. Nothing in the language of the agreement, the statutory framework, or the manner in which the agreement was implemented suggests that the parties contemplated that the right of occupation would terminate automatically upon the purchaser's remarriage merely because the later spouse's particulars were not formally inserted.

[21] This inference accords with the objective approach to tacit terms in South African law, which requires the court to determine, on the proved facts, whether the conduct of the parties and the commercial context demonstrate a shared contractual premise forming part of their agreement.³

³ *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) 526D-F and 532C-D; *an Aardt v Galway* [2012] 2 All SA 78 (SCA).

[22] On a contextual interpretation of the agreement, the absence of formal recording of the first respondent's particulars is therefore not decisive. The agreement cannot properly be construed as rendering his continued occupation unlawful solely on that basis.

Evaluation under PIE

[23] In any event, even on a more restrictive interpretation of the agreement that would render the first respondent's continued occupation unlawful, the enquiry does not end there. Section 4(7) of PIE requires a court to determine whether an eviction order would be just and equitable after considering all the relevant circumstances.

[24] Section 4 of PIE makes clear that eviction is not a mechanical consequence of unlawful occupation. A court may grant an eviction order only if it is satisfied that such an order would be just and equitable after considering all the relevant circumstances. The enquiry requires a careful balancing of the interests of the property holder with those of the occupier, bearing in mind the constitutional values of dignity and the need to prevent unjustified loss of a home.⁴

[25] The personal circumstances of the first respondent are therefore an important consideration. The first respondent is 78 years old and in poor health. He resides on a limited income and has little capacity to secure alternative accommodation within the retirement housing market. He lived in the unit as the deceased's spouse for several years prior to her death and the unit has become his home. His residence within the retirement

⁴ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 37.

development arose not through opportunistic occupation but through his marital relationship with the deceased and the life they shared within the scheme.

[26] On the other hand, the court must also consider the prejudice alleged by the applicant. The applicant contends that the continued occupation prevents the resale of the housing interest and consequently delays the winding-up of the deceased estate. The heirs of the deceased therefore have a financial interest in the expeditious resale of the housing interest.

[27] That consideration is relevant. Continued occupation may delay the liquidation and distribution of the estate and the payment of any amount that may ultimately become due to the heirs.

[28] It is, however, notable that the present eviction proceedings were not instituted by the executor of the deceased estate but by the applicant itself, which administers the retirement housing scheme. The executor has not approached the court seeking the eviction of the first respondent in order to facilitate the finalisation of the estate.

[29] The prejudice relied upon by the applicant is therefore largely financial and administrative in nature. It must be weighed against the potential hardship that eviction would impose on an elderly occupier whose residence arose directly from his marriage to the deceased purchaser.

[30] The broader statutory context within which the occupation arose is also relevant. The housing development forms part of a retirement housing scheme regulated by the Housing Act. The Constitutional Court recently emphasised in *Harris N.O. and Others v*

*Herold Gie and Broadhead Inc*⁵ that the statutory framework governing such schemes serves an important protective purpose directed at safeguarding elderly persons who invest their resources in retirement housing developments and securing residential stability in old age.

[31] Although that case concerned the protection of funds entrusted in the course of such transactions, the Court's articulation of the protective purpose of the statutory scheme forms part of the context within which disputes concerning occupation within retirement housing developments must be assessed.

[32] In circumstances where the first respondent lived in the unit openly as the deceased's spouse with the knowledge of the scheme, and where the deceased herself clearly intended that he continue living there, eviction based solely on the absence of a formal amendment to the agreement would, in my view, be a disproportionate response.

[33] In the circumstances, the applicant has not established that it would be just and equitable to evict the first respondent from the unit. The continued occupation of the first respondent arises from a long-standing marital residence within the retirement housing scheme and occurred with the knowledge of the applicant. Eviction would impose significant hardship on an elderly and unwell occupier with limited means to secure alternative accommodation. In these circumstances the drastic remedy of eviction is not warranted.

⁵ *Harris N.O. and Others v Herold Gie and Broadhead Inc and Others* [2026] ZACC ____ (13 February 2026).

Costs

[34] As to costs, the general rule is that costs follow the result. However, courts retain a discretion to depart from that rule where the circumstances justify doing so. The applicant cannot be faulted for having approached the court. The issues raised concerning the proper interpretation of the agreement, the effect of the deceased's death on the first respondent's continued occupation, and the interaction between the contractual framework and the just-and-equitable enquiry under PIE were legitimate issues requiring determination.

[35] In addition, the applicant acts in the administration of a retirement housing scheme and was entitled to seek judicial guidance in circumstances where the continued occupation of the unit affected the operation of the scheme and the resale of the housing interest. In these circumstances and having regard to the age and personal circumstances of the first respondent, I am satisfied that the fairest order is that each party should pay its own costs.

[36] The following order is made:

1. The application for the eviction of the First Respondent from Unit 7 Andante is dismissed.
2. There is no order as to costs.


L. WINDELL

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 13 March 2026.

APPEARANCES

For the Applicant: S Kelly

Instructed by: Dreyer Engelbrecht Attorneys INC.

For the First Respondent: WR Ewart

Instructed by: Ewart Attorneys

Date of hearing: 14 October 2025

Additional Heads of Argument filed: 27 February 2026

Date of judgment: 13 March 2026