IN THE HIGH COURT OF SOUTH AFRICA

[EASTERN CAPE DIVISION: BHISHO]

CASE NO. 845/2021

In the matter between:

MEC FOR DEPARTMENT OF PUBLIC WORKS
AND INFRASTRUCTURE, EASTERN CAPE PROVINCE **Applicant**

and

THAMI LUGALO **1st Respondent**

ZOLEKA NGUBO **2nd Respondent**

MAMNGWEVU **3rd Respondent**

ALL UNKNOWN PERSONS, UNLAWFULLY AND/OR
ILLEGALLY, TRESPASSERD, INVADED AND OCCUPIED
ERF 9 HAMBURG **4th Respondent**

JUDGMENT

JOLWANA J:

[1] An *ex-tempore* judgment was granted and an order was made against the respondents on 14 April 2022. The regurgitation of the reasons given therein would serve no purpose. The respondents have since filed an application for leave to

appeal. I do not intend to traverse or reproduce the various grounds of appeal relied upon as the basis for the intended appeal. Considering them together and also with the heads of argument filed by counsel for the applicant, it becomes apparent that the central issue throughout has its nub on the various contentions about the PIE Act. There are a few other grounds that are unrelated to the PIE Act. However, I hold the view that on their own they do not take the matter any farther. In fact they, alone, would not found a basis for the granting of the application for leave to appeal. It is for that reason that I will not deal with some of them. I refer to the parties as they are in the main judgment for the ease of reading.

[2] One such ground is the issue relating to the citation of the so-called fourth respondent and the orders made in the main judgment to the extent that reference is made to it. In the application for leave to appeal, and in the notice of acting filed by their attorneys, the fourth respondent appears. This suggests that they also represent the fourth respondent. However, and very importantly, nobody has been identified as belonging to that category of respondents and on whose behalf it is submitted that he was not properly served with the papers due to the fact that the citation itself was improper.

[3] That such litigant in fact does not exist becomes clear first in the return of service. The first respondent accepted service of the papers on behalf of the fourth respondent. It goes further than that. The first respondent identified himself in the opposing affidavit as “customary law owner of the land in issue” amongst other things. He then explains that the second respondent is one and the same person as the third respondent. What this boils down to is that this matter is, as it was from the outset, essentially about the first and second respondents. Whoever the reference to the fourth respondent was intended to be in the citation, there was no submission

that that person in fact exists in this case. If raising this issue in the application for leave to appeal was merely intended to point out a patent error, that would be well and good. However, if it was to bolster a case for the granting of the application for leave to appeal, it is unsustainable.

[4] I turn now to deal with the issue of the PIE Act. The main contention as it relates to the PIE Act is that the court should have applied the PIE Act and dismissed the application on the basis that the PIE Act is applicable to this matter and that it has not been complied with. I disagree for the reasons that follow.

[5] Perhaps the preamble to the PIE Act itself is a good starting point. It reads:

> "**WHEREAS** no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property;
>
> **AND WHEREAS** no one may be evicted from their home, or have their home demolished without an order of court made after considering all the relevant circumstances;
>
> **AND WHEREAS** it is desirable that the law should regulate the eviction of unlawful occupiers from land in a fair manner, while recognising the right of land owners to apply to a court for an eviction order in appropriate circumstances;
>
> **AND WHEREAS** special consideration should be given to the rights of the elderly, children, disabled persons and particularly households headed by women, and that it should be recognised that the needs of those groups should be considered."

[6] It is apparent from the above even before one has regard to the actual provisions of section 4, that the Act itself is directed at regulating evictions at homes or households. It also provides for a case by case approach with emphasis on the vulnerable groups such as the elderly, children, and disabled persons and in particular households headed by women. These are the people that the courts are directed to ensure that they are not rendered homeless without proper procedures

being observed and an effort made to ensure that they do not end up in the streets at the whim of the land owner or person in charge thereof.

[7] On this understanding, the submission that the PIE Act especially the procedures provided for therein, is applicable to structures that may become homes down the line is incomprehensible. Such understanding in fact goes against the very purpose of the PIE Act which is clearly to ensure that no one is evicted from their home without due process. A structure that is still under construction, at whatever level it may be, cannot, by any stretch of imagination, be the home referred to in the PIE Act. The PIE Act is couched in terms that, inter alia, create an opportunity for those who are being evicted, to bring to the attention of the court, their individual and often peculiar circumstances. Such circumstances must then be considered by the court which may then grant a just and equitable order having had regard to those circumstances.

[8] In *Ndlovu v Ngcobo, Bekker and Another v Jika* [2002] 4 All SA 384 (SCA) Harms JA articulated some of these principles as follows:

> "[19] Another material consideration is that of the evidential onus. Provided the procedural requirements have been met, the owner is entitled to approach the court on the basis of ownership and the respondent's unlawful occupation. Unless the occupier opposes and discloses circumstances relevant to the eviction order, the owner in principle, will be entitled to an order for eviction. Relevant circumstances are nearly without fail facts within the exclusive knowledge of the occupier and it cannot be expected of an owner, to negative in advance facts not known to him and not in issue between the parties. Whether the ultimate onus will be on the owner or the occupier we need not now decide.
>
> [20] A further area of concern is the lease of commercial properties. Does it fall within the purview of PIE? *Prima facie* the answer would be in the affirmative because of the definition of 'building or structure' which –

'includes any hut, shack, tent or similar structure or any other form of temporary or permanent dwelling or shelter.'

The word 'includes' is as a general rule a term of extension. It may, however, depending upon the circumstances, be one of exhaustive definition and synonymous with 'comprise'. *R* v Debele 1956 (4) SA 570 (A) 575. In this instance, having regard to the history of the enactment with, as already pointed out, its roots in s 26(3) of the Constitution which is concerned with rights to one's home, the preamble to PIE which emphasises the right to one's home and the interests of vulnerable persons, the buildings listed and the fact that one is ultimately concerned with 'any other form of temporary or permanent dwelling or shelter', the ineluctable conclusion is that, subject to the *eiusdem generis* – rule, the term was used exhaustively. It follows that buildings or structures that do not perform the function of a form of dwelling or shelter for humans do not fall under PIE and since juristic persons do not have dwellings, their unlawful possession is similarly not protected by PIE." (My emphasis).

[9] There was no evidence of the respondents living or staying on the property or the property being their home or shelter. None whatsoever. The structures that were still under construction were neither homes nor dwellings that could fall under the ambit of the PIE Act. In the absence of such evidence and the respondents having failed to provide such evidence, the considerations under the PIE Act cannot arise. I must emphasize that the onus to provide proof that there were homes or dwellings on the property, not structures still under construction, rested with the respondents themselves. On the contrary, the applicant provided evidence of the fact that the structures that were there were still under construction and the respondents did not reside on the property and most importantly there were no structures of any form which could be their homes.

[10] For the reasons stated in the *ex-tempore* judgment and the legal position as further explained above I am not of the opinion that the appeal would have a reasonable prospect of success. There is also no other compelling reason why the

appeal should be heard. Therefore the application for leave to appeal stands to be dismissed.

[11] In the result, the following order shall issue:

1. The application for leave to appeal is dismissed with costs.

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M.S. JOLWANA

JUDGE OF THE HIGH COURT

Appearances

Counsel for the applicant: L. Brauns

Instructed by: STATE ATTORNEY

EAST LONDON

c/o SHARED LEGAL SERVICES

KING WILLIAMS TOWN

Counsel for the respondents: Z. Madukuda

Instructed by: Tshingana & Associates Attorneys

EAST LONDON

Date heard: 14 October 2022

Date delivered: 14 October 2022