IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION, MTHATHA

REPORTABLE

CASE NO. CA 09/2022

In the matter between:

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

and

HEATHER ALTHEA ESME PRETORIUS **First respondent**

KING SABATA DALINDYEBO MUNICIPALITY **Second respondent**

JUDGMENT

LAING J:

[1] This is an application before a full bench in relation to the eviction of the first respondent from erf 571, situated at 81 Leeds Road, Mthatha ('the property').

[2] The applicant seeks, *inter alia*, an order that the lease agreement between the parties be declared to have been terminated, that the first respondent be directed to vacate the property within 30 days, and that the sheriff and South African Police Services (SAPS) be authorised to give effect to the eviction where necessary.

Background

[3] As the owner or custodian of numerous state properties in the Eastern Cape, the Department of Public Works and Infrastructure leases same to various individuals and corporate entities. The Department has, however, allegedly encountered the theft or misuse of such properties. It is averred that tenants do so by taking advantage of general inefficiencies in the public administration and changes in management that occur from time to time.

[4] The Head of Administration for the Department, Mr Thandolwethu Manda, explains in the applicant's founding affidavit that he has the responsibility of regaining control of state properties in the Eastern Cape, under the banner of a campaign titled 'Operation Bring Back'. The Department is apparently incurring significant financial losses as a result of the mismanagement of state properties, including the making of payment for municipal services and other levies with regard to land from which the Department derives no benefit. The application was brought as a consequence of the above campaign.

[5] The applicant contends that a lease agreement that was concluded with the first respondent in relation to the property has been terminated. The first respondent refuses to vacate the property.

Applicant's submissions

[6] The parties, alleges the applicant, entered into the agreement on 1 April 2012. A copy of the agreement is attached to the founding affidavit. The applicant avers that the first respondent did not pay rental as required, causing the applicant to make formal demands for payment, which were ignored. This culminated in the applicant formally terminating the agreement on or about 25 November 2019. Notwithstanding the first respondent's refusal to vacate and her non-payment of rental, the agreement has, in any event, lapsed, argues the applicant.

[7] The agreement made provision for its expiry on 31 March 2013. It also made provision for its renewal for a further period of one year, provided that the first respondent gave prior notice. This was never done.

[8] The stipulated rental was R1,000 per month. The first respondent is in arrears with payment, to the amount of R64,375. The applicant points out that the first respondent is not an indigent person. Despite the first respondent having refused to vacate the property, the applicant remains liable for the payment of rates and municipal services. On 31 May 2020, the Department paid the sum of R32,439 for water services alone, with the implication that it was funding the illegal occupation of the property.

[9] The applicant indicates that it needs the property urgently for the accommodation of public officials and is prejudiced by the first respondent remaining in occupation. Moreover, it was obliged to report to Parliament on the steps taken to regain control over state properties in general.

[10] The first respondent, argues the applicant, has waived any rights which she may have enjoyed in terms of the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (‘PIE’). Nevertheless, the applicant has followed the procedures stipulated in terms thereof for purposes of securing the first respondent’s eviction from the property.

First respondent’s submissions

[11] In response, the first respondent avers that the property has been used to accommodate teachers employed at the Transkei Primary School. This arrangement has been in place since 1969, in terms of which the state made various properties available to the school free of charge to attract teachers to the area. The first respondent took occupation of the property that forms the subject of these proceedings in 1997. The erstwhile Department of Local Government and Land Tenure allegedly agreed to sell the property and others like it to the occupants at their original prices, provided that they had been in occupation for more than ten

years. This was decided after the state had determined that it would have cost considerably more to have restored and maintained the properties in question.

[12] A nominal rental of R200 per month was levied on the property. The school initially paid the rental but insisted that the first respondent assume responsibility therefor when it was increased to R1,000 per month. In 2016, the applicant unilaterally increased the rental to R7,500 per month, prompting the first respondent to refuse to enter into a further lease agreement that had been proposed. The applicant's Head of Department allegedly advised the first respondent and the occupiers of similar properties not to worry about the rental amount, which would be discussed further in due course.

[13] The first respondent contends that the property had no value at all upon her having taken occupation. It was dilapidated and in a state of disrepair. However, by the time that she had completed renovations and improvements, in 2001, the property was valued at R316,500. She has never been reimbursed for the costs incurred, which she estimates as having been in excess of R250,000. Nevertheless, the first respondent alleges that she had previously informed the applicant's staff about the intended renovations and improvements and had been assured that the costs could be set off against the rental.

[14] On 1 November 2001, the Department notified the occupiers of its decision to increase the rental to R1,000 per month and also informed them that they were given the option to buy the properties should they wish to do so, subject to the finalisation of its land disposal policy. The Department's failure to finalise the policy had been to the prejudice of the occupiers. Apparently, the delay was caused by difficulties associated with the valuation of the properties, the determination of the renovations and improvements made, and the extent to which same had to be reimbursed to the occupiers.

[15] Subsequently, the Department notified the occupiers about the suspension of any increases in rental. This was done on 4 March 2009.

[16] On 31 October 2012, the parties allegedly agreed upon the finalisation and implementation of the applicant's policy, which included the property of the first

respondent, subject to the proper valuation thereof and determination of the purchase price. Notwithstanding, the applicant appeared to have shifted its stance and wished to sell the properties at market-related prices and to charge market-related rentals pending such disposal. The implementation of the policy has stalled. A task team, assigned to investigate the reasons for the delay, has highlighted the problems involved and made numerous recommendations that include the need to take into account the costs of renovations and improvements and ongoing maintenance, as well as the occupiers' exercise of their option to purchase.

[17] Subsequent meetings with the applicant on 30 June 2019 and 8 June 2020 had resulted in the understanding that no eviction proceedings would be instituted and that a process of constructive engagement should be pursued.

[18] The applicant emphasises that she has been paying rental since 1997 and has used her own resources to repair and maintain the property. She resides on the property as a 62-year old woman with her daughter, who is a student, and they have no alternative accommodation. It would not be just or fair to be evicted. In any event, she asserts that the lease agreement has neither lapsed nor been properly terminated. There had been a tacit relocation of the original terms and conditions, and the agreement had been renewed on a monthly basis.

In limine

[19] The first point *in limine* raised by the first respondent is that the court has no jurisdiction over the matter. The parties agreed to the jurisdiction of the Magistrates' Court, as apparent from the lease agreement.

[20] The second point is that the applicant lacks *locus standi* inasmuch as the registered owner of the property is the South African Bantu Trust. The applicant has failed to demonstrate that the Department is vested with ownership.

[21] The third point is that the first respondent has a *ius retentionis* over the property by virtue of an improvement lien. She has spent an amount of at least R250,000 for purposes of renovations and improvements, which have enhanced the

value of the property. Until the applicant has reimbursed her, she may not be evicted.

[22] The fourth point is that the applicant lacks the necessary authority to have instituted the proceedings.

[23] The fifth point is that the applicant has failed to comply with the provisions of PIE inasmuch as the section 4(2) notice was not served on her.

Issues to be decided

[24] The points raised *in limine* by the first respondent must be considered at the outset, before proceeding to deal with the main issues identified by the parties. Briefly, these can be summarised as: (a) whether the lease agreement between the parties has been terminated; and (b) if so, then whether there is a basis upon which the first respondent and any other occupier can be evicted from the property.

[25] There is some overlap between the points *in limine* and the main issues, as shall be evident from the paragraphs that follow.

Jurisdiction, *locus standi* and authority

[26] The first respondent relies on clause 23.3 of the lease agreement to contend that this court lacks jurisdiction over the matter. The provisions thereof stipulate that:

> '[a]t the option of the Lessor, any action or application arising out of this Lease or any cancellation thereof hereunder, shall be brought in the Magistrates' Court having jurisdiction in respect of the Lessee, notwithstanding that the amount in issue may exceed the jurisdiction of such Court, and this clause constitutes the Lessee's consent in terms of the Magistrates' Court Act of 1944.'

[27] The wording of the text is clear: any legal proceedings arising from the lease agreement must be brought in the Magistrates' Court, but only 'at the option of the lessor'. In other words, the applicant enjoys the right to choose whether to do so or not; if the applicant had decided to bring the proceedings in the Magistrates' Court,

then the first respondent would have been obligated to permit the applicant to have exercised such right. Her consent would have been deemed to have been given in accordance with the wording of the text. As the matter stands, the applicant has chosen not to proceed in the Magistrates' Court and the present court has jurisdiction over the matter by reason of the parties' having entered into the lease agreement in Mthatha.

[28] The issue of *locus standi* is the next point. Notwithstanding the fact that the property may still be registered in the name of the South African Bantu Trust, the applicant has attached a copy of a certificate issued in terms of item 28(1) of Schedule 6 to the Constitution that unequivocally indicates that the property has become vested in the provincial government of the Eastern Cape.[1] The applicant is the member of the Executive Council responsible for the exercise and performance of the powers and functions pertaining to public works and infrastructure. The lease agreement entered into with the first respondent falls squarely under his authority. Nothing further turns on this point, which was eventually abandoned during argument.

[29] The applicant's alleged lack of authority is also relied upon by the first respondent. However, the basis for this argument was not apparent from her answering affidavit or from her counsel's submissions. By reason of the powers and functions attached to the office of the applicant, the argument is without merit on its own and cannot be taken further.

***Ius retentionis* and non-compliance with PIE**

[30] The first respondent argues that the renovations and improvements previously carried out at the property gave rise to an improvement lien inasmuch as she has never been reimbursed for the costs thereof. Accordingly, she enjoys a *ius retentionis* over the property.

[1] See, too, section 4(1) of the Government Immovable Asset Management Act 19 of 2007, which stipulates that the premier or a designated MEC is custodian over an immovable asset that vests in the provincial government. Here, the applicant is the MEC for the Department of Public Works and Infrastructure, responsible for the caretaking of immovable assets such as the property that forms the subject of this application.

[31] A *ius retentionis* is the right to retain physical control over another's property, whether movable or immovable, as a means of securing payment of a claim relating to the expenditure of money or something of monetary value by the possessor of that property, until that claim has been satisfied.[2] The common law recognises that a lessee has a claim for necessary and useful improvements[3] made and that he or she enjoys a lien over the property while still in possession thereof and until the claim has been satisfied.[4]

[32] The first respondent avers that the value of renovations and improvements made to the property was in excess of R250,000. The expenditure appears to have been incurred over a period of 23 years but how the amount has been calculated is not at all apparent from the faded copies of invoices and receipts attached to the answering papers. The first respondent has not provided any details about the nature of the renovations and improvements made and whether they were, in fact, either necessary or useful to the property in question. The invoices and receipts, such as are legible, do not assist. In some instances, there is no reference at all to either the first respondent or the address to which materials were delivered. There are no supporting or confirmatory affidavits from contractors or suppliers. It is also not clear whether the amount claimed takes into account the value of the use of the property by the first respondent, which may be set off against any enrichment enjoyed by the applicant in accordance with established principles.[5] Any outstanding rental, interest thereon, and rates and service charges could presumably be set off against the claim too.

[33] Counsel for the applicant suggested that at least a portion of the first respondent's claim has become prescribed. But whether an improvement lien, which is a real right,[6] and which is raised as a defence to a claim for the return of property,

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[2] TJ Scott, 'Lien', in *LAWSA* (Vol 26(1), 3rd ed, 2020), at 292.
[3] *Impensae necessariae* and *impensae utiles*, respectively.
[4] The common law position appears to have become settled after the decision of the Supreme Court of Appeal in *Business Aviation Corporation (Pty) Ltd and another v Rand Airport Holdings (Pty) Ltd* [2007] 1 All SA 421 (SCA).
[5] See *Brown v Brown* 1929 NPD 41; *Nortjé en 'n Ander v Pool* NO 1966 (3) SA (A) 96; and *Von Wuldfling-Eybers and another v Soundprops* [1994] 2 All SA 461 (C).
[6] This can be distinguished from a debtor and creditor lien, which gives rise to a personal right. See TJ Scott, *op cit*, at 293.

can be terminated merely by operation of the provisions of section 10(1), read with section 11(d), of the Prescription Act 68 of 1969, is doubtful.

[34] The common law undoubtedly provides potential recourse for the first respondent in circumstances such as these. Nevertheless, this court is constrained by the pleadings and evidence as presented in the papers. This court is not satisfied, overall, that the first respondent has adequately pleaded the alleged *ius retentionis* or that she has presented satisfactory evidence in support of her assertion that she has an improvement lien over the property and that it can be raised as a successful defence to the applicant's cause of action.[7]

[35] The remaining point *in limine* pertains to the applicant's alleged non-compliance with PIE. It would be preferable to consider this under the main issues, as identified earlier.

Whether the lease agreement has been terminated

[36] It is common cause that the parties entered into a lease agreement. There is considerable dispute, however, about if and when the agreement was terminated.

[37] The applicant contends that the agreement comprised the document attached to its founding papers. The first respondent disagrees. In the absence of any evidence, the first respondent's bald refutation of the applicant's contention does not give rise to a real dispute of fact. The document is clearly described as an 'Agreement of lease in respect of residential property- No. 81 Leeds Street, Town'. It reflects the Department and the first respondent as the parties thereto, indicates erf 571 as being the subject thereof, and is signed by both parties and four different witnesses. If the first respondent had raised the authenticity of the document as a serious point of contention, then it would have been expected that she would have obtained supporting or confirmatory affidavits from the witnesses involved or at least have placed further evidence before the court to substantiate her refutation. This was not done and the usual principles must be applied in relation to the ascertainment of

[7] A similar situation presented itself in *MEC for Department of Public Works v Lennox Bogen Gaeler and another* (Eastern Cape Local Division, Mthatha, Case no. 1298/2020, 17 August 2021, unreported), where the court declined, at [38], to uphold the first respondent's defence, based on an improvement lien, by reason of the inadequate manner in which the allegations had been pleaded.

whether a real dispute of fact exists, with the result that the applicant's version must be accepted.[8]

[38] The agreement stipulated in clause 1.3 that it had a duration of one year and that the expiry date was 31 March 2012. Furthermore, clauses 20.2 and 20.3 stipulated as follows:

> '20.2
>
> 20.2.1 The Lessor may cancel this agreement 20 business days after giving written notice of a material breach by the Lessee unless the Lessee has rectified the breach within that time.
>
> 20.2.2 The Lessor shall notify the Lessee in writing not more than 80 nor less than 40 business days before the expiry date of this agreement, of the impending expiry date including giving notice of:
>
> 20.2.2.1 any material changes that would apply if the agreement is to be renewed or otherwise continue beyond the expiry date; and
>
> 20.2.2.2 the options available to the Lessee in terms of paragraph 20.1.3 hereunder.[9]
>
> 20.3 Upon expiry of this Lease at the end of its term, it will automatically continue on a month to month basis subject to any material changes of which the Lessor has given notice in terms of clause 20.2.2.1 unless the Lessee expressly directs the Lessor to terminate the Agreement of Lease on the expiry date or agrees to a renewal for a further fixed term.'

[39] There is no evidence to the effect that the parties ever agreed to any material changes or the renewal of the agreement for a further fixed term. Rather, there is every indication that, after the expiry date, the agreement continued on a month to month basis.

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[8] See *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A), at 634H-635B. Vague and insubstantial allegations are insufficient to raise a real dispute. See *King William's Town Transitional Local Council v Border Alliance Taxi Association (BATA)* 2002 (4) SA 152 (E), 156I-J. Similarly, a bare denial of the applicant's allegations will be insufficient to create a genuine dispute. See *Peterson v Cuthbert & Co Ltd* 1945 AD 420, at 428-9; *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T), at 1163 and 1165.

[9] This seems to be a misnomer. It is likely that a reference to 'paragraph 20.3' was intended.

[40] The applicant places no reliance on an alleged breach as the basis for termination. Instead, the applicant asserts that the agreement has expired, on the basis of the letter delivered to the first respondent's address on 4 November 2019, giving 30 days' notice.

[41] In argument, counsel for the first respondent contended that written notice should have been provided within not more than 80 and not less than 40 business days of the expiry of the agreement. This does not accord, however, with the text of clause 20.2.2, which restricts the requirement to any notice given specifically with regard to the expiry date itself, as understood in terms of clause 1.3, i.e. 31 March 2012. The agreement does not attach any further requirements to the notice to be given thereafter, where the agreement continued on a month to month basis.

[42] The first respondent also argues that the applicant's letter cannot be regarded as proper notice in view of ongoing negotiations at the time and the understanding apparently reached by the parties to the effect that no eviction proceedings would be instituted. The applicant refutes this.

[43] It is a well-established principle that one month's notice is required in circumstances such as these.[10] Crucially, the first respondent does not deny that she received the applicant's letter. That is sufficient, on its own, for the court to find that the lease agreement has indeed been terminated. In any event, the applicant has, by way of the present application, made it abundantly clear that the first respondent's right to occupy the premises has been terminated. Similar facts arose in the matter of *Taylor v Hogg* (CA 317/17) [2018] ZAECGHC 64 (10 August 2018), where Plasket J held, at [10], that

> '[w]hether a lease was in place or the relationship between Taylor and Hogg was premised on a *precarium*, the result is the same: Hogg's right to reside in the premises has been revoked by Taylor. As he and his family no longer have the consent of Taylor to live in his premises, they are unlawful occupiers for purposes of the PIE and are liable to eviction.'

[10] See *Fulton v Nunn* 1904 TS 123; *Tiopaizi v Bulawayo Municipality* 1923 AD 317; and, more recently in this division, *MEC for Department of Public Works and Infrastructure, Eastern Cape v Jane Margaret Fourie and another* (Eastern Cape Local Division, Mthatha, Case no. EL 1297/2020, 16 September 2021, unreported), at [34].

[44] The first respondent's continued unlawful occupation of the property amounts to a classic example of 'holding over'. Whether the applicant has complied with PIE is the final issue for determination.

Basis for eviction: PIE

[45] As a starting point, the Supreme Court of Appeal clearly indicated in *Ndlovu v Ngcobo; Bekker v Jika* 2003 (1) SA 113 (SCA) that PIE is applicable when an unlawful occupier is to be evicted from a home, building or shelter used as a dwelling or residence. This extends to instances of 'holding over'.[11]

[46] The first respondent meets the definition of an unlawful occupier in terms of section 1 of PIE inasmuch as she occupies the property without the express or tacit consent of the applicant. Although she purportedly waived, in terms of clause 17.2 of the lease agreement, any right that she might otherwise have had to raise a defence based on the applicant's non-compliance with PIE, it is nonetheless apparent that the applicant elected (correctly so) to proceed in accordance with the provisions thereof.

Section 4(2)

[47] Since the decision in *Cape Killarney Property Investments (Pty) Ltd v Mahamba and others* [2001] 4 All SA 479 (A), it must be accepted that the provisions of section 4 of PIE are peremptory. These require, under section 4(2), that written and effective notice of the eviction proceedings must be served on the unlawful occupier and the municipality having jurisdiction at least 14 days before the date of the hearing.

[48] In the present matter, the applicant obtained leave from the court, on 15 September 2020, to serve the section 4(2) notice on the first respondent with the assistance of the sheriff. The section 4(2) notice itself is comprehensive, alleging that

[11] See the discussion thereof in Van der Merwe CG and Pienaar JM, 'The law of property (including real security)', *Annual Survey* (Juta, 2011), at 943-4.

the provincial government of the Eastern Cape is the owner of the property, that the first respondent is an unlawful occupier, that eviction proceedings had commenced, that the date of the hearing was 13 October 2020, that the grounds for eviction were as stated, that the first respondent had the right to appear at the hearing with or without legal representation and to present any information necessary to enable the court to make a just and equitable decision, and that the court could grant an order for eviction where it was satisfied that the applicant had met the requirements of PIE.

[49] The sheriff served the section 4(2) notice on both the second and first respondents on 5 and 9 October 2020, respectively. It is apparent that a domestic worker, Ms Fundiswa Yoyo, accepted service on behalf of the first respondent at the property. A notice of set down was subsequently delivered to the first respondent on 26 October 2020, who then served a notice to oppose on the applicant's attorneys on 2 November 2020. On the date of the hearing (3 November 2020), the matter was postponed *sine die,* after which full sets of answering and replying papers were filed.

[50] The first respondent avers that the court order and the section 4(2) notice were not independently served on her, but were served on her domestic worker. Consequently, argues the first respondent, the applicant has failed to comply with PIE.

[51] There is no definition for 'serve', as used within the context of section 4(2). However, section 4(3) indicates that the procedure for the serving of notices and filing of papers is as prescribed by the rules of the court in question. To that effect, the High Court rules stipulate the manner in which service of process may be effected, which include leaving a copy thereof at the place of the respondent's residence, with a person apparently in charge of the premises at the time of delivery.[12]

[52] In *Unlawful Occupiers of the School Site v City of Johannesburg* [2005] 2 All SA 108 (SCA), Brand JA held as follows, at [22] – [23]:

> '…it is clear from the authorities that even where the formalities required by statute are peremptory it is not every deviation from the literal prescription that is fatal. Even in that event, the question remains whether, in spite of the defects, the object of the statutory provision had

[12] See rule 4(1)(a)(ii) of the Uniform Rules of Court.

> been achieved… The purpose of section 4(2) is to afford the respondents in an application under PIE, an additional opportunity, apart the opportunity they have already had under the rules of court, to put all the circumstances they allege to be relevant before the court…'

[53] There is no dispute that the first respondent received the section 4(2) notice and that she subsequently served a notice to oppose and filed a full set of answering papers. Mindful of the court's reasoning in *Unlawful Occupiers*, above, it is not unreasonable to find that the first respondent has had ample opportunity to place all relevant facts before the court and that the objects of section 4(2) have been achieved.

Section 4(7)

[54] The next enquiry is rooted in section 4(7) of PIE, by reason of the first respondent's having been in occupation of the property for more than six months. The court is required to decide whether it would be just and equitable to do so after considering all relevant circumstances. These include whether land is available for relocation, as well as the rights and needs of the elderly, children, disabled persons and households headed by women.

[55] This immediately invites the question as to what approach must be taken where, as is the case here, the municipality has played an inactive role in the proceedings and has not furnished the court with a report that indicates whether land is available for relocation.

[56] In *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and another* [2001] JOL 7693 (E), Smith AJ held that the availability of land for relocation is but one of a number of factors to be taken into account when determining whether it would be just and equitable to grant an eviction order; it cannot be elevated to a pre-condition for the granting of such an order. Subsequently, in *Premier, Eastern Cape and Another v Mtshelakana and Others* 2011 (5) SA 640 (ECM), Griffiths J distilled the general principles relevant to eviction proceedings and went on to address the issue of the non-joinder of the municipality, making the following observations:

'[9] …the function of a court in performing its judicial oversight is to examine the papers before it and determine therefrom whether or not there is an apparent abuse of a fundamental right or the rights of the respondent or respondents. In practically every case which has come before me in this regard it is generally clear from the papers as to whether or not this is the case. On the one extreme, there are the cases generally dealt with in the above-mentioned judgments involving extremely poor, landless people who are merely attempting to exercise the rights afforded them by the Constitution in claiming a small portion of land and erecting a modest shelter in order to protect themselves from the elements. On the other extreme, there are those cases where well-heeled tenants have remained in occupation of rented premises well beyond the rights accorded them in terms of the lease without paying rental therefor, despite being in a position to do so.

[10] It seems to me that in the former case, and depending on the circumstances thereof, the court may well decide (in the exercise of its judicial oversight) that the local municipality should be joined as a party to the proceedings on the basis that it may in those circumstances have a direct and substantial interest in the proceedings in that it is obliged to ensure adequate accommodation for such persons in dire need of adequate shelter.

[11] In the latter case, however, it does not appear to me that the municipality would have a direct and substantial interest in the matter in that the respondent concerned would clearly have the means to be able to source accommodation elsewhere, either on a rental basis or by purchasing his or her own property. Thus, in such a case, there would be no obligation on the court to ensure that the municipality is joined as a party.'

[57] From the above, it can be contended that the absence of a report from the municipality with regard to the availability of land for relocation is a potential obstacle to the court arriving at a decision particularly when the municipality has a direct and substantial interest in the proceedings. In other words, where the respondent or respondents are 'in dire need of adequate shelter', to borrow the expression used in *Mtshelakana*, the submission of such a report assumes greater importance for purposes of a determination on whether it would be just and equitable for an eviction order to be granted. This would be in keeping with the views of Sachs J in *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC), who remarked, at [36], that

'…a court is thus called upon to go beyond its normal functions, and to engage in active judicial management according to equitable principles of an ongoing, stressful and law-governed social process.'

[58] The submission of such a report would undoubtedly assist a court in the active judicial management of an eviction scenario. However, the absence of a report does not preclude the court from granting an order for eviction where it is satisfied that it would be just and equitable to do so.[13] Overall, the submission or otherwise of a report on the availability of land for relocation is but one factor to be considered by the court when reaching a decision.

[59] In the present matter, the first respondent has been in occupation of the property since 1997. She is 64 years old and there is no indication that she is disabled or that she suffers from poor health. She lives with her daughter, who is a full-time student. No mention is made in the papers of anyone else who may be occupying the property. The first respondent avers that she has no alternative accommodation. It is common knowledge that residential property is scarce in Mthatha and that the current economic climate, against the backdrop of the COVID-19 pandemic and other constraints, is difficult. It is necessary to balance these circumstances with the fact that the first respondent is employed as an educator and that she has alleged that she has spent in excess of R250,000 on renovations and improvements to the property. It would appear that she initially occupied the property free of charge before paying a rental of R1,000 per month from at least 1 August 2008.[14] The amount was deducted directly from her salary and has remained constant, without any increase for escalation or interest on any sum in arrears. Accordingly, she has enjoyed the benefits of accommodation provided to her by the state at relatively little personal cost. At the very least, the first respondent cannot, in any way, be described as destitute or landless.

[60] In *Taylor v Hogg*, Plasket J observed, at [6], that

> '…PIE aims to balance two interests that are in conflict - the ownership rights of land owners and rights of access to housing of those in occupation of premises. Its touchstone for the balance is the concept of justice and equity. This, as was pointed out in Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter & others, 'relates to both interests': what

[13] This was the approach adopted by Rusi AJ, in this division, in *Jane Margaret Fourie*, at [49] (n 10, above).
[14] This is evident from the spreadsheet attached to the founding papers as annexure 'E'.

> is just and equitable must relate not only to those who occupy land unlawfully but also to the owner of the land.'

[61] Here, the applicant is not a private person but an organ of state, with constitutionally enjoined functions to perform. It is required to ensure the proper management of state assets, which includes the leasing of properties for a fair rental and the use of same to accommodate public officials when the need arises, as seems to be the case here.

[62] Overall, and having taken into consideration all relevant circumstances, I am persuaded that the applicant has established a basis upon which the first respondent can be evicted.

Relief and order

[63] Mindful of the duration of the first respondent's occupation of the property, her age, and the uncontested fact that her daughter would also be affected by an eviction order, adequate time needs to be afforded to her to find alternative accommodation and to vacate the property. This may cause inconvenience to the applicant but the applicant's role in the history of the matter cannot be ignored. It is clear that the applicant's officials have previously made empty undertakings or promises to the first respondent and the occupiers of other state property in relation to future ownership, creating false hopes and expectations. Moreover, the applicant cannot seriously dispute that the provincial government has benefitted from, at the very least, the repair and maintenance of the property over a period of some 25 years, even where the first respondent has not properly demonstrated the nature, extent and value of such renovations and improvements as may have been carried out. Whereas the applicant was entitled to withdraw its consent to continued occupation and to terminate the lease agreement, the overall management of the property and the lease with the first respondent was far from satisfactory and must attract the criticism of this court.

[64] Notwithstanding, I am still satisfied that it would be just and equitable to grant, in terms of section 4(8) of PIE, the relief sought by the applicant. Furthermore, a date

can be determined by which the first respondent and any other occupier is required to vacate the property and a date upon which the eviction may be carried out in the event of the first respondent's failure to do so.

[65] In its notice of motion, the applicant sought the assistance of the police to give effect to an order for eviction. The applicant has, however, failed to join the police as a party to the proceedings. Moreover, there is no indication at all from the papers that the respondent or anyone else in occupation of the property would possibly defy such an order.

[66] The only remaining issue is that of costs. The usual principle should be applied to the effect that the first respondent is liable for the applicant's costs. The matter is not of such a complex nature, however, as to justify the applicant's employment of two counsel. Accordingly, there is no basis upon which to direct the first respondent to pay such additional costs.

[67] Consequently, the following order is made:

(a) The lease agreement entered into between the applicant and the first respondent is declared to have been terminated.

(b) The first respondent and all other persons occupying erf 571, situated at 81 Leeds Road, Mthatha, are hereby directed to vacate the aforesaid property by no later than 31 December 2022.

(c) In the event that the first respondent and any other persons occupying the property have not vacated the property by the above date, the sheriff is authorised and directed to take the necessary steps to evict the occupants thereafter.

(d) The first respondent is ordered to pay the costs of the application.

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J.G.A. LAING

JUDGE OF THE HIGH COURT

I agree:

_____

I.T. STRETCH

JUDGE OF THE HIGH COURT

I agree:

_____

L. A. AH-SHENE

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

For the applicant:	Adv Gwala SC with Adv Makiwane, instructed by Mvuzo Notyesi Attorneys, Mthatha.
For the respondents:	Adv Matotie, instructed by H. S. Toni Attorneys, Mthatha.
Date of hearing:	13 June 2022
Date of handing down of judgment:	26 July 2022