



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)**

Not Reportable

CA: 28/2023

In the matter between:

NORMAN NDONGENI

APPELLANT

and

THEMBISA NDONGENI

1st RESPONDENT

**ALL UNLAWFUL OCCUPIERS OF RESIDENTIAL
ALLOTMENT NO.160A, NDONGENI RESIDENCE,
LUBHACWENI LOCATION,**

MOUNT FRERE

2nd RESPONDENT

DEPARTMENT OF RURAL DEVELOPMENT

AND AGRARIAN REFORM

3rd RESPONDENT

UMZIMVUBU LOCAL MUNICIPALITY

4th RESPONDENT

Neutral citation: *Norman Ndongeni v Thembisa Ndongeni and 3 Others*
(Case no CA28/23)

Coram: NHLANGULELA AJP, MAJIKI J and TILANA-MABECE AJ

Heard: 16 October 2023

Delivered: 30 January 2024

Summary: Appeal against orders dismissing the application for eviction and granting a counter-application against eviction – appellant's title derived from a permission to occupy — non-joinder of the maker of the permission to occupy strengthening appellant's right to evict first respondent - appeal succeeds - first respondent to vacate the property within 90 days.

ORDER

On appeal from: the judgment of Pakati J sitting as a court of first instance.

1. The appeal is upheld with costs.
2. The order of the high court is set aside and replaced by the following order:
 - 2.1 The main application is granted.
 - 2.2 The counter application is dismissed
 - 2.3 The first and second respondents are evicted from the property known as Allotment No.160A Ndongeni Residents, Elubhacweni Location, Mount Frere, Eastern Cape (the property).
 - 2.2 The first and second respondents are ordered to vacate the property within 90 days from the date of service of this order upon them.

- 2.3 If the first and second respondents have not vacated the property by the eviction date, the Sheriff , or his/her Agent, is hereby authorized to evict the first and second respondents, including all persons occupying the property through them.
- 2.4 The first and second respondents are interdicted and restrained from entering the property at any time after they have vacated or been evicted from the property.
- 2.5 The first respondent to pay the costs of the main and counter-applications.

JUDGMENT

Nhlangulela AJP (Majiki J concurring)

Introduction:

[1] The appellant is Norman Ndongeni, an adult male. The first respondent is Thembisa Ndongeni, an adult female. They are siblings. Both reside at Ndongeni Residential Allotment No. 160A, Lubhacweni Location, Mount Frere (the property). The second respondents are unlawful occupiers of the homestead whose personal particulars are to the appellant unknown. The third respondent is the Department of Rural Development and Agrarian Reform, an organ of state established in terms of s 239 of the Constitution. It has an office at Main Street, Mt Frere. The fourth respondent is Umzimvubu Local Municipality in whose jurisdiction the property is situated.

[2] The appellant brought eviction proceedings against the first respondent. He relied on the right to occupy the property, contending that

the first and second respondents were in unlawful occupation of the property, and that as

the holder of permission to occupy (the PTO) that was issued to him on 5 August 2009 he was entitled to evict the respondents from it. In resisting the eviction, the first respondent brought a counter application seeking a declarator that the PTO was unlawful and fell to be set aside by the court.

[3] The gravamen of the first respondent's counter-application was that the appellant had no right to an order of eviction because, firstly, the property is the common home which both of them are entitled to occupy. Secondly, the first respondent contended that the PTO was invalid to the extent that it was obtained without her knowledge and consent.

[4] The court *a quo* dismissed the application for eviction, granted the counter- application and ordered the appellant to pay costs incurred in both applications. The appellant appeals the judgment and the orders. The appeal to this Court is with the leave of the court *a quo*.

The background facts:

[5] The facts that gave rise to this appeal are the following: The property had previously been registered under the name of the father of the appellant and first respondent. Both of their parents are deceased. The mother was the latest to die in 2015. The appellant was appointed as an Executor of the Estate of their mother on 5 August 2021. The property was never registered into the name of the mother. The property had already been registered into the name of the appellant at the time of death of his mother. It was so registered by the National Commissioner in terms of s 4(1)(ii) of the

Location Regulations: *Unsurveyed Districts: Transkei Territories Proclamation No. 26 of 1936* (the Proclamation), which reads:

'Permission to Occupy Homesteads and Arable Allotments

4 (1) The Native Commissioner may grant permission –

...

(ii) to any Native domiciled in the district to occupy a homestead or arable allotment for domestic purposes and agricultural purposes respectively.'

[6] The appellant served a notice of eviction upon the first respondent in terms of s 4(2) of the Prevention of Illegal Evictions and the Unlawful Occupation of Land Act 19 of 1998 (PIE). A court order that eviction proceedings may be brought was obtained on 23 November 2021. The papers on the application for eviction were also served. Only the first respondent opposed the application by filing an answering affidavit and a counter-application. However, the first respondent did not serve the counter-application upon the third respondent. This omission was not explained by the first respondent. The appellant filed a replying affidavit in which he addressed both the main application and counter-application. The second respondent did not oppose the main application.

In the court *a quo*:

[7] In determining the two applications the Court *a quo* found that the declaratory relief sought by the first respondent did not affect the interest of the third respondent because the property was a common home that the parents had, upon death, left as an intestate asset which could only be validly transferred to the appellant upon the winding-up of the deceased's estate. On the issue of service of the papers, the court *a quo* found that the issue of non-service of the papers was irrelevant as the declaratory relief sought did

not affect the interest of the third respondent. It held a view that in the absence

of an explanation as to how the applicant became the owner or exercises control over the property, his contention that he had a valid title to the property in terms of the PTO was untenable and, consequently, the eviction of the first respondent was not competent.

In this Court:

[8] Three issues must be decided. The first is whether the court *a quo* erred in finding that the registration of the PTO in the name of the appellant is irrelevant to the relief sought by the first respondent in her counter application. The second issue is whether it was correct for the court a quo to find that the service of the papers of the counter-application upon the third respondent was not necessary. The third issue is whether the main application should have been dismissed and the counter-application granted.

[9] It was submitted on behalf of the appellant that the third respondent has a direct and substantial interest on the issue of validity, or otherwise, of the PTO¹. In terms of s 2 of the Proclamation, the National Commissioner is mandated to keep a register of all permissions to occupy land granted by him under s 4 (1) (ii). Further, the property did not revert to the commonage after the death of the father as envisaged in s 9 of the Proclamation.² Neither was it registered into the name of the mother during her lifetime. Instead, the

¹ See: *Lebea v Menye & Another* 2023 (BCLR 257 (CC) where it was stated that the term 'direct and substantial interest' means an interest in the right, which is the subject matter

appellant is the lawful holder of the allotment of the property, and the allotment of the property to him is valid in law because it has not been canceled by the National Commissioner. For those reasons, it was argued on behalf of the appellant that the court *a quo* ought to have found that the determination of validity of the PTO without affording a hearing to the third respondent was fatal to the counter- application. It was submitted further that the PTO gave the appellant an unassailable right to remove an unlawful occupier from the property. On the other hand, the thrust of the submissions advanced on behalf of the first respondent is that the orders granted by the court *a quo*, and the reasons given for them, are good enough for the appeal to be dismissed. In the main, counsel for the first respondent pins his faith on the submission that the appellant, as the Executor in the interstate estate of his mother, had a legal duty to first include the property in the winding-up process for it to be allocated to the beneficiaries, including the first respondent, before arrogating rights of exclusive possession of the property to himself.

of the litigation, and not merely an indirect financial interest in the litigation.

² Subsections 9 (2) (a) and (b) of the Proclamation provide – “9 (2)(a) Upon the death of an allotment holder his rights to occupy such allotment shall ipso facto be cancelled, subject to provisions of the Transkei Agricultural Development Act, 1966 and of any soil conservations scheme in force under that Act, such allotment shall become available for re – allotment to a widow or other member, including any other female member, of the previous holders family selected for the purpose by the tribal authority. (b) In the absence of any such re – allotment, the allotment shall revert to commonage”.

[10] It is trite law that in terms of s 4 (1) (ii) of the Proclamation the National the power to decide whether, or not, to grant the PTO to the appellant vested in the National Commissioner. This statement accords with the literal and grammatical meaning of the words used in s 4 (1) (ii)³. On the evidence, the PTO in respect of the property was granted by the Commissioner in the exercise of his discretionary power in favour of the appellant. That PTO has not been canceled.

[11] It was submitted on behalf of the appellant, correctly so, that with effect from 1994 the third respondent subsumed the statutory power and control of allotments by the National Commissioner as a national department, as is defined in s 1 of the Public Service Act 10 of 1994, read with Column 1 of Schedule 2 of that Act. As a national department of the government, the third respondent is an organ of the State established in terms of s 239 of the Constitution that is charged with the administrative function to grant, refuse and cancel permits to occupy unregistered state land lying in the commonage areas. Since it alone can issue and cancel a PTO, the first respondent had an obligation to seek a relief for a review of the decision of the third respondent and setting aside of the PTO, utilising the provisions of s 6 of Promotion of Administrative Justice Act 3 of 2000 (PAJA). She did not invoke the provisions of s 6 of PAJA. Consequently, in terms of the administrative law principles as set out in the judgment in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*⁴ an

³Such is the cannon of construction applicable in interpreting statutes and other documents as stated in *Natal Joint Municipal Pension Fund v Endumeni Municipality*

administrative decision made by the third respondent to issue the PTO remains extant until it has been set aside by a court of law.

[12] It seems to me that the third respondent has a legal interest in the relief sought by the first respondent that the PTO must be declared unlawful and set aside. It matters not that the basis of the challenge is that the property was a common home. What matters is the fact that the administrative decision of the third respondent is sought to be impugned. To that extent, the first respondent needed to serve the counter-claim upon the third respondent. Further, the first respondent's failure to invoke PAJA review to challenge the administrative decision of the third respondent for issuing the PTO in favour of the appellant is fatal to the counter-application. For as long as the decision to grant him the PTO has not been set aside by a court of law, it shall remain extant. It is palpably clear that the first respondent's counter-application was flawed, both procedurally and in substance. The court *a quo* ought to have found its way clear to dismiss the counter-application with costs.

[13] The main application should not have been dismissed. There is no evidence that the property was allotted to the mother of the appellant and first respondent at any stage. The appellant is the sole bearer of occupational

[2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (*Endumeni*) at para 12.

⁴*Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) at 242.

rights in terms of the PTO. The PTO was not issued under the condition that the occupational rights of the property be extended to the siblings of the appellant.

[14] On the foregoing, the first respondent's claim that the property is the common home and, by extension, the PTO is invalid as the appellant obtained it without her consent does not trump the appellant's rights to occupy the property exclusively from her. That being the case, the court *a quo* erred in finding that the appellant did not have a right to evict the first respondent even if he did so within the terms of the law.

Eviction:

[15] The statements made by Lowe J (with Mlomzale AJ concurring) in *Ndabankulu v Ndabankulu*⁵ para [13] depict the current state of the law. The following was said:

‘ Erasmus *Superior Court Practice*, Eviction under PIE sets out the purpose and effect of PIE relevant to this matter as follows:

“The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (‘PIE’), which came into operation on 5 June 1998, provides for procedures for the eviction of unlawful occupiers of land. In *Ndlovu v Ngcobo; Bekker and Bosch v Jika* [] the Supreme Court of Appeal, in a majority judgment, held that PIE disposed of certain common-law rights relating to eviction. The majority judgment can be summarized as follows:

⁵ *Ndabankulu v Ndabankulu and Another* (CA&R33/2018) [2018] ZAECMHC 45 (17 August 2018).

(a) PIE has its roots, *inter alia*, in s 26(3) of the Constitution of the Republic of South Africa, 1996.

(b) The definition of an unlawful occupier in s 1 of PIE relates to a person who *occupies* land without the express or tacit consent of the owner or person in charge of such land. In its ordinary meaning the definition of an unlawful occupier means that PIE applies to all unlawful occupiers, irrespective of whether their occupation of such land was previously lawful...'

[16] Although the first respondent is an unlawful occupier⁶ of the property, her eviction remains a constitutional issue that is regulated in terms of s 26(3) of the Constitution Act, 1996, which provides as follows:

“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. No legislation may permit arbitrary evictions.”

Section 4(7) of PIE⁷ gives effect to the provisions of s 26(3) as it was stated in *Malan v City of Cape Town*⁸ para 83 in the following terms:

“PIE in accordance with section 26(3) of the Constitution, requires a court to balance the opposing interests of landowners and occupiers. What is just and equitable therefore bears consideration in respect of both parties. Factors

⁶ In terms of s 1 of PIE an ‘unlawful occupier’ is defined as: ‘a person who occupies land without the express or tacit consent of the owner all person in charge, or without any other right in law to occupy such land, excluding a person who is the occupier in terms of extension of security of tenure act, 1997, and excluding a person whose informal right to land, but for the provisions of this act, would be protected by the provisions of the interim protection of informal land rights act, 1996 (Act No.31 of 1996)’.

⁷Section 4(7) reads: ‘ If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just an equitable to do so, after considering all the relevant circumstances, including... where the land has been made available or can reasonably be made available by the municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women”.

including fairness, social values and the implications of the eviction have to be considered.”

[17] In this case, the common cause facts are that the fourth respondent does not have an alternative accommodation to offer. In any event, the first respondent is not a poor citizen, and she is not in dire need of housing. She has her residential property for which she holds a PTO that was issued to her by the third respondent on 05 August 2009. In addition, an alternative accommodation ready for her to occupy was offered by the appellant. She flatly refused that offer. In *Grobler v Phillips and Others*⁹ factors taken into account towards the decision to evict an elderly Mrs Phillips (aged 85 years) and her physically disabled son from Mr Grobler’s residential property were, *inter alia*, that since an alternative accommodation would be provided by Mr Grobler at his cost, the personal preference expressed by Mrs Phillips to remain into the property from which she was sought to be evicted was not a relevant consideration under s 4(7) of PIE. The Constitutional Court stated at para 36 as follows:

“The question whether the constitutional rights of the unlawful occupier are affected by the eviction is one of the relevant considerations, but the wishes or personal preferences of the unlawful occupier are not relevant. An unlawful occupier such as Mrs Phillips does not have a right to refuse to be evicted on the basis that she prefers or wishes to remain in the property that she is occupying unlawfully. In terms of section 26 of the Constitution, everyone has the right to have access to adequate housing. The Constitution does not give Mrs Phillips the right to choose exactly where in Somerset West she wants to live.”

⁸ *Malan v City of Cape Town* 2014 (6) SA 315 (CC).

⁹ *Grobler v Phillips and Others* 2023 (1) SA 321 (CC).

[18] As in *Grobler*, it seems to me that the first respondent's reason for rejecting the offer of an alternative accommodation had to do with her preference to remain in the appellant's property which she regards as a common home. In the absence of prejudice to her, it will be just and equitable to evict the first respondent from the appellant's property. This Court was advised that a 90 days' notice of eviction will be adequate in the event of the appeal being dismissed.

[19] I have read the dissenting judgment penned by Tilana-Mabece AJ. I have noted that the central issue for the dissent is that the majority judgment overlooked the fact that the PTO trenches on "old order legislation" (the Black Administration Act and the regulations made thereunder), and that its continued operation is inconsistent with the Constitution. However, this constitutional issue does not arise in this appeal. It also did not arise in the *court a quo*. The central issue is compliance with s 6 of PAJA, which the dissent acknowledges in para. 44 as the applicable law to all reviews. It states further that not only did the first respondent's counterclaim not plead any of the grounds of review that are listed in s 6 of PAJA, but the first respondent failed to serve papers of her counterclaim upon the third respondent.

[20] Significantly, at paras. 38 and 39 of the minority judgment the legal principles are accepted that a PTO is 'only a perpetual right to occupy' that terminates upon the death of the holder thereof, at which point the land reverts to the tribal authority for a new PTO to be issued to another applicant. In light of these principles, it escapes me how it can be said that the appellant 'lacks *locus standi*' to exercise his possessory rights to evict

the first respondent from the property. To that extent, I remain convinced that the majority judgment is correct.

[21] Consequently, the appeal must succeed in respect of the main and counter-applications with costs.

[22] The following order shall issue:

1. The appeal is upheld with costs.
2. The order of the high court is set aside and replaced by the following order:
 - 2.1 The main application is granted.
 - 2.2 The counter application is dismissed
 - 2.3 The first and second respondents are evicted from the property known as Allotment No.160A Ndongeni Residents, Elubhacweni Location, Mount Frere, Eastern Cape (the property).
 - 2.2 The first and second respondents are ordered to vacate the property within 90 days from the date of service of this order upon them.
 - 2.3 If the first and second respondents have not vacated the property by the eviction date, the Sheriff , or his/her Agent, is hereby authorized to evict the first and second respondents, including all persons occupying the property through them.
 - 2.6 The first and second respondents are interdicted and restrained from entering the property at any time after they have vacated or been evicted from the property.
 - 2.7 The first respondent to pay the costs of the main and counter-applications.

Z. M. NHLANGULELA

ACTING JUDGE PRESIDENT OF THE HIGH COURT

I concur:

B. MAJIKI

JUDGE OF THE HIGH COURT

Tilana-Mabece AJ (Dissenting)

[23] I have had the benefit of reading the majority judgment penned by Nhlangulela AJP. Regrettably, I do not agree with the findings and the order therein for the reasons that follow.

[24] Central to this case is legislation which, in terms of Schedule 6 of the Constitution is referred to as the “old order legislation”. Such legislation is defined as legislation enacted before the Constitution of the Republic of South Africa Act 200 of 1993. It is an undeniable fact that under the apartheid regime a range of legal instruments were introduced relating to insecure forms of land tenure for the black communities. One such instrument was a Permission To Occupy (PTO).

[25] It is manifest in the main judgment that the applicant’s “right” to evict the first respondent is pivoted on the PTO issued to him during 2009. It is elaborately set out in the main judgment that the authority to issue the PTO is derived from the Location Regulations: *Unsurveyed Districts: Transkei*

Territories Proclamation No. 26 of 1936(the Proclamation). This proclamation forms part of the old order legislation and is at odds with the values, ethos and the spirit of the Constitution. To this end, the description accorded by the Constitutional court to the Black Administration Act 38 of 1927 is of equal application to the proclamation. Sachs J referred to this act as:

“an egregious apartheid law which anachronistically has survived our transition to a non-racial democracy”.

[26] He went on to say that it was:

“part of a demeaning and racist system, as obnoxious and as not befitting a democratic society based on human dignity, equality and freedom.”¹⁰

[27] Seemingly, the “old order legislation” refuses to die and it keeps rearing its ugly head when we least expect. One of the judgments where this is evident is the judgment of the Constitutional Court relating to a challenge to a provision that excluded certain sections of the Upgrading of Land Tenure Rights Act¹¹ from the rest of the Act even though its operation was extended to the entire country where Jafta J echoed the following:

¹⁰ *Moseneke and Others v Master of the High Court* [2000] ZACC 27; 2001 (20 BCLR 103; 2001 (2) SA 18 at para 20

¹¹ 112 of 1991.

“In the former homelands access to land and occupation of land are still regulated by legislation that was passed by Parliament and other legislative bodies of the apartheid era. Many people continue to be denied secure land tenure rights. They are not afforded rights better than occupational rights in land which may be terminated in terms of the old order laws. As noted here the continuing operation of laws that deny black people secure rights in land is inconsistent with the Constitution, our supreme law. The dignity of the affected people is persistently impaired by the enforcement of those laws. The victims of the unfair differentiation brought about by these laws have become second class citizens to whom the fruits of the Constitution remain a dream, deliberately kept out of their reach.”¹²

[28] The fact that a court requested to enforce a “right” from the old order legislation, especially the package of land legislation, needs to exercise caution, cannot be over emphasised. Even when the constitutionality of the old order legislation is not at issue, the court still needs to be vigilant in its approach.

[29] With that background, I now turn to consider the merits of the case.

[30] The appellant alleges that he is the rightful owner of the property. He asserts that his right as the registered owner of the property entitles him to evict the first respondent. These assertions are based on the Permission to Occupy (“PTO”).

¹² *Herbert N.O and Others v Senqu Municipality and Others* [2019] ZACC 31; 2019 (11) BCLR 1343 (CC); 2019 (6) SA 231 (CC) at para 37.

[31] It is settled in our law that proof of ownership of an immovable property is a Title Deed. In *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd*¹³ the court held as follows:

“To summarize: The appellant, having bolstered its case on appeal by the introduction of the original title deed, has at last succeeded in establishing its ownership of the property concerned.”

[32] Importantly, in *Herbert N.O. and Others v Senqu Municipality and Others*¹⁴ the court held that a PTO does not confer ownership of immovable property. Notwithstanding, the main judgment heavily relies on the PTO as establishing the appellant’s right to evict the first respondent. Regrettably, I share a different view.

[33] Section 4(1) of the PIE Act confers the right to apply for eviction only to the owner or the person in charge of the property. A reading of the record in this appeal clearly establishes that the appellant has based his application on the allegation that he is the registered owner of the property. On the binding authority of the Constitutional Court this is manifestly wrong as the PTO does not confer ownership to the holder. It is trite in our law that a litigant stands or falls by his or her papers. In this view I am fortified by the

¹³ [1992] ZASCA 208; 1993 (1) SA 77 (A) at 82.

judgment of the Constitutional Court in *South African Transport and Allied Workers Union and Another v Garvas and Others*¹⁵, where the court said:

‘Holding parties to pleadings is not pedantry. It is an integral part of the principle of legal certainty which is an element of the rule of law, one of the values on which our Constitution is founded. Every party contemplating a constitutional challenge should know the requirements it needs to satisfy and every other party likely to be affected by the relief sought must know precisely the case it is expected to meet. Moreover, past decisions of this Court have adopted this approach and in terms of the doctrine of judicial precedent we are bound to follow them unless we say they are clearly wrong. Judicial precedent serves the object of legal certainty. Following previous decisions constitutes not only compliance with the doctrine of judicial precedent but also accords with the principles of judicial discipline and accountability.’¹⁶ [See also *My Vote Counts NPC v Speaker of the National Assembly and Others*, [2015] ZACC 31, paragraph 177].

[34] The court is not at liberty to infer that the appellant was the person in charge contrary to his assertions of ownership in the papers. Consequently, a finding that the appellant is a person in charge of the property by virtue of the PTO, cannot be sustained. Unfortunately, the main judgment does not deal with this issue. In my view the appellant is neither an owner nor a person in charge and therefore lacks the necessary *locus standi* to bring the proceedings in terms of the PIE Act.

¹⁴ *Footnote 2.*

¹⁵ (CCT 112/11) [2012] ZACC 13; 2012 (8) BCLR 840 (CC); [2012] 10 BLLR 959 (CC); (2012) 33 ILJ 1593 (CC); 2013 (1) SA 83 (CC) (13 June 2012) para 114.

¹⁶ (CCT 112/11) [2012] ZACC 13; 2012 (8) BCLR 840 (CC); [2012] 10 BLLR 959 (CC); (2012) 33 ILJ 1593 (CC); 2013 (1) SA 83 (CC) (13 June 2012), paragraph 114.

[35] Even though this finding is dispositive of the appeal on the eviction application, for the sake of completeness, it is necessary to deal with all the other aspects of the main judgment in which there is divergence.

[36] In its determination, the majority judgement reached a finding that the property's status as a common home is irrelevant to the proceedings. Respectfully, I hold a different view. In opposing the eviction application, the first respondent raised two grounds of opposition, namely, that the property is a common home and the validity of the PTO. For the purposes of these proceedings the PTO and the concept of a common home also known as a family home are intertwined. The words family home and common home will be used interchangeably.

[37] The appellant, faced with the defence of the property being a common home, maintained his stance as a registered owner of the property. Curiously, he does not explicitly dispute the respondent's version. To properly assess and evaluate the facts of this case, consideration ought to be given to the history of insecure land tenure, the allocation of communal land under the previous regime and the traditions and practices within the black communities. The term, common home or family house, was and is still a term denoting a widely practised right to property in the urban and rural context amongst the black communities. It has long historical roots in apartheid urban tenure predating the extension of leasehold and ownership rights for black people, but continues to have strong traction with ownership and title in the modern era.

[38] As a starting point, it is important to understand and apply customary law in its own framework and not through the lens of common law¹⁷. I understand a PTO to be a form of tenure that is issued in communal land and does not give the full ownership but only a perpetual right to occupy. In the traditional context, the appellant as the holder of the PTO is regarded as a custodian or a caretaker of the property with a collective kin-based obligation to preserve the property for the family, the ancestors and for future generations.

[39] One can discern from the scanty information provided in the pleadings that both the appellant and the respondent occupied the property as their family home before the demise of their parents. The appellant does not deny that the PTO was in the name of their father before it was issued in his name. The circumstances upon which the PTO was issued in the name of the appellant whilst their mother was still alive, are not clear.¹⁸ In terms of the proclamation, when a holder of a PTO passes on, the land reverts to the tribal authority and a new PTO will be issued. In practise the name of the

¹⁷ *Alexkor Ltd and Another v Richtersveld Community and Others* (CCT19/03) [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) (14 October 2003) at para 51:

“While in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution.⁴⁴ Its validity must now be determined by reference not to common law, but to the Constitution.⁴⁵ The courts are obliged by section 211(3) of the Constitution to apply customary law when it is applicable, subject to the Constitution and any legislation that deals with customary law. In doing so the courts must have regard to the spirit, purport and objects of the Bill of Rights.”

¹⁸ Location Regulations: *Unsurveyed Districts: Transkei Territories Proclamation No. 26 of 1936*.

person to take over as the holder of a PTO is normally identified and agreed to by family members.

[40] In her opposing papers, the first respondent made it clear that she did not give consent for the PTO to be issued in the name of the appellant. According to her, she got to know about the PTO being in the name of the appellant during the court proceedings. This contention is supported by their sister who filed an affidavit in support of the first respondent. These averments are not disputed by the appellant.

[41] The high court in Gauteng recently had an opportunity to deal with a similar dispute over a family house initially allocated in terms of the insecure land tenure in *Shomang v Motsose N.O. and Others*¹⁹. As a background, the property in question was designated for occupation by "Black People" in terms of the Apartheid Black (Urban Areas) Consolidation Act. Because black people were not allowed to own property in urban township areas, the State issued permits, residential permits and certificates of occupation, granted in terms of the Regulations Governing the Control and supervision of an Urban Black Residential Area. The property was labelled as a family house according to the practices of the time. With the promulgation of the Upgrading of Land Tenure Rights Act²⁰ (ULTRA)

¹⁹ (6990/2022) [2022] ZAGPPHC 441; 2022 (5) SA 602 (GP) (24 May 2022).

²⁰ Footnote 2.

and the Conversion Act²¹ the property qualified to be transferred and registered in the name of a qualifying beneficiary. The family members wanted the property to be registered as a family title. Since that was not possible, they were forced to nominate a member of the family to be registered as a custodian of the title of the property on behalf of the family. The agreement between the family members was recorded in a Family House Rights Agreement outlining the supervisory role of the custodian.

[42] It appears that the problem started when the nominated custodian and caretaker of the property passed on, resulting in the appointment of his son as an executor of his estate. Subsequent to his appointment, the executor threatened to evict the other members from the property including the applicant. In an effort to protect and preserve the family home, the applicant approached the court. The court made findings favourable to the applicant and ordered the property to be declared as subject to a family rights agreement, and the registration of the property in the name of the applicant as a custodian.

[43] This judgment is a clear indication that the need to recognize family ownership, as a distinctive form of holding immovable property, is not only a reality but a constitutional imperative. The court made a case for a new kind of property right. Furthermore, it alluded to the absence in law of a family property or a family right as a lacuna with serious constitutional implications. Although this case relates to land tenure in an urban set up there is no reason why the same principle is not to be adopted in the rural set

²¹ 81 of 1988.

up. In any event, the practice of a family home has its origins from the rural areas.

[44] I now turn to the second ground of opposition raised by the first respondent was the validity of the PTO. In entrenching this ground, the first respondent filed a counter application for the PTO to be declared invalid and set aside. The main judgment elaborates at length on the application of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) in connection with the failure of the first respondent to serve the counterapplication on the third respondent. PAJA is applicable only to reviews. From the language used in the pleadings, the counter application was not brought as a review, instead, the respondent sought a declarator for the PTO to be declared unlawful and for the immovable property to be declared a common home. In *Makhaya*²² the SCA made the point that:

“[71] ...the claim that is before court is a matter of fact. When a claimant says that the claim arises from the infringement of the common law right to enforce a contract, then that is the claim, as a fact, and the court must deal with it accordingly... that the claim might be a bad claim is beside the point”.

“[72] ...a claim which exists as a fact, is not capable of being converted into a claim of a different kind by the mere use of language...”

[45] In my view, the failure to serve on the third respondent is of no consequence. The third respondent, even though cited in the application for eviction, did not participate in the proceedings. Moreover, the third respondent is not affected by the declaratory order sought by the first

²² *Makhanya v University of Zululand* 2010 (1) SA 62 (SCA) at para 71 and 72.

respondent. Clearly, the dispute had crystallised between the appellant and the respondent. Therefore, to uphold non-service will be to promote form over substance.

[46] In the event it is found that I am wrong and that PAJA is applicable, the weight accorded in the majority judgment to the failure of the respondent to serve the counter-application on the third respondent, does not warrant the dismissal of the counter application. To deprive the respondent of the right to have her case determined in the ordinary course of events is tantamount to trampling on her constitutional right entrenched in Section 34 of our Constitution. The section provides that everyone has a right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a Court or, where appropriate, another independent and impartial tribunal or forum. It is my considered opinion that the issues raised by the respondent are pertinent and require a fair determination, as they not only affect the first respondent. These issues are of public interest as they affect a number of families in the rural areas where the same legal framework is still applicable and have constitutional implication.

[47] It seems to me that the court can adopt various measures in the exercise of its discretion when dealing with a case of this nature. A court can adjourn proceedings and make a suitable order setting out the steps that a respondent has to take before a matter can continue, alternatively, a matter can be struck off the roll. In both instances, a window of reprieve will be afforded to the respondent to properly follow the processes in bringing an application before the court for proper determination. Therefore, the dismissal of the counter application is not an appropriate order under the circumstances.

[48] On the finding by the majority judgment that the application for eviction ought to have been dismissed, unfortunately I do not agree. The PIE Act provides a procedure for the lawful eviction of unlawful occupiers. One of the relevant sections is Section 4 (1). I have already made a finding with regards to the issue of ownership. At this point it is important that I also deal with the finding at paragraph 14 of the majority judgment that the respondent is “an unlawful occupier”. From the pleadings the motive for the eviction of the first respondent by the appellant is their personal differences. The appellant contends that they cannot co-exist. It is well-established that occupation is rendered unlawful by the termination of the right of occupation. Nowhere in the sparse founding papers the appellant signalled, clearly and unequivocally, his intention to terminate the first respondent’s right to occupy the property. As such, there are no averments in the appellants founding papers that the first respondent is occupying the property without his consent. Sadly, the majority judgment also does not deal with this aspect.

[49] In my view, the first respondent is not an unlawful occupier as envisaged in the Act. Even if it were to be found that the respondent is an unlawful occupier, eviction in terms of PIE requires a two pronged approach. The finding is not the end of the enquiry, the Constitution and PIE require that, in addition to considering the lawfulness of the occupation, the court must have regard to the interests and circumstances of the occupier and pay due regard to broader considerations of fairness and other constitutional values, so as to produce a just and equitable result. In a nutshell the court is required to infuse justice and equity into the inquiry.

[50] Furthermore, Section 4(8) of the PIE Act, provides that a court is obliged to order eviction when the requirements of the act are met and no valid defence has been made. It is clear that the requirements in section 4(1) of the PIE Act have not been met. Notably, the majority judgment also touches on the issue of alternative accommodation with emphasise on the appellant's version, particularly his bold statement regarding his rejected offer of alternative accommodation. According to the first respondent, this is misleading as the alternative accommodation referred to by the appellant is her own two roomed flat. It is the respondent's case that as an unemployed person, her only source of income comes from the rent of R300 she collects from renting out the 2 roomed flat. Considering all the circumstances in this case, the shortcomings of the previous and current land tenure prescripts and the two grounds of opposition raised by the first respondent, I am not convinced that it is just and equitable to evict the first respondent from her family home.

[51] The last element of the main judgment that I differ with, is the order that the first respondent be interdicted and restrained from entering the property at any time after she has vacated or been evicted from the property. In my view, there is no justification for this order. Needless to say that no case has been made by the appellant for such relief. A court cannot grant an order in circumstances where the relief sought is not supported by the facts.

[52] In my view, the order of the high court to refuse the application for the eviction of the respondent was correctly made.

S.T. TILANA-MABECE

ACTING JUDGE OF THE HIGH COURT

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