



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NUMBER: 2849/2020

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO
17/3/2023

DATE

SIGNATURE

In the matter between:

NOMVULA PAULA MAHLANGU

APPLICANT

and

**THE UNLAWFUL OCCUPIERS OF THE PROPERTY
MORE DESCRIBED AS THE 3559, CHARLETONVILLE
EXTENTION 8 TOWNSHIP REGISTRATION DIVISION IQ
THE PROVINCE OF GAUTENG ("THE PROPERTY")**

FIRST RESPONDENT

MAROFONG CITY LOCAL MUNICIPALITY

SECOND RESPONDENT

JUDGMENT

OOSTHUIZEN-SENEKAL CSP AJ:

Introduction

- [1] This is an application wherein the applicant seeks an order declaring the first respondent and all occupiers as unlawful occupants of the property described as, Erf 3559, Charletonville, Extension 8, Township Registration Division IQ, Gauteng Province (“the property”) and subsequently order their eviction from the property within a period to be determined by the court.
- [2] The second respondent, the Marofong City Local Municipality has elected not to participate in the proceedings.
- [3] On 31 January 2020 the applicant instituted an eviction application of the first respondent from the property. On 28 August 2020 Vally J granted an order in terms of section 4(2) of the Prevention of Illegal Eviction from Unlawful Occupation of Land, Act 1998 (“the PIE Act”) whereby the applicant was granted leave to serve a notice in terms of section 4(2) of the PIE Act upon the first and second respondents.
- [4] The main eviction application was served by the Sheriff on the first and second respondents on 11 March 2020.
- [5] On 11 September 2020 the first respondent filed a notice to oppose and instructed Naude Prokureurs ING to act on his behalf. The first respondent’s answering affidavit was filed on 2 October 2020 and the applicant filed her replying affidavit on 16 November 2020.
- [6] Counsel appearing on behalf of the first respondent, Naude Attorneys filed a notice to withdraw as attorney of record on 17 February 2023.
- [7] The matter was set down on the opposed roll for 28 February 2023 at 11h30. Ms Potgieter appeared on behalf of the applicant, however there was no appearance for the first respondent.
- [8] I requested Ms Potgieter to contact the erstwhile attorneys of the first respondent in order to obtain the first respondent’s mobile number and to inform him to appear. She

did as she was requested. When the Court resumed, Ms Potgieter informed me that the mobile number she called was not answered. My clerk, Ms Sithole also called the mobile number provided to no avail.

[9] Due to the nature of the application and the fact that the first respondent opposed the application, I ordered that the matter stood down until 3 March 2023 at 10h00. Furthermore, I requested Ms Potgieter to serve a notice of set down on the first respondent notifying him that the eviction application would be heard on 3 March 2023 at 10h00.

[10] Ms Potgieter issued a notice of set down as requested. She also on 28 February 2023 contacted the Sheriff's Office Fochville to assist with the service of the notice of set down. However, the receptionist advised Ms Potgieter that the Sheriff, Mr EM Peterson, has passed away and that the offices were not attending to the service of any documents until such time as an acting Sheriff has been appointed.

[11] In order to serve the notice of setdown, Mr Lewis, an employee of Du Plessis De Heus & Van Wyk Attorneys attended to the service of the set down. On 1 March 2023 at 16h30 he attended at 13 Umlaas Street, Charletonville, the property, upon his arrival he spoke to Ms Mbali, residing at the property. After informing Ms Mbali of the purpose of his visit, namely that the eviction application in relation to the property was set down for 1 March 2023, Ms Mbali refused to accept the notice of set down.

[12] Ms Mbali indicated that the "owner" of the property was not present and she had no knowledge as to when he would return to the property. As a result, Mr Lewis affixed a copy of the notice of set down to the principal gate by means of a cable tie.

[13] When the matter was called on 3 March 2023 at 10h00 the first respondent was again absent. The only party present was Ms Potgieter on behalf of the applicant. I was satisfied that the first respondent was duly notified of the hearing therefore, I ordered Ms Potgieter to proceed with the application in the absence of the first respondent.

Factual Background

- [14] On 26 September 2017 the applicant purchased the immovable property known as Erf 3559, Charletonville, Extension 8, Township Registration Division IQ, Gauteng Province. The property was purchased from the previous owner Mr Ayanda Shadrack Ndila. The purchase of the property was a private sale between the applicant and the seller, Mr Ndila, which was handled by an estate agent. The property was registered in the name of the applicant on 28 February 2018 under Title Deed number T12788/2018.
- [15] The applicant through her attorneys issued a letter dated 22 May 2019 addressed to the first respondent demanding that he vacates the premises on/before 30 June 2019, which he failed to do. On 31 January 2020 an *ex parte* application was launched and the applicant was granted leave to serve a notice in terms of section 4(2) of the PIE Act upon the first respondent. This was done by the Sheriff on 11 March 2020.
- [16] The first respondent, his wife and two minor children have occupied the property since 2012. He opposed the eviction application on the basis that he had concluded a sale agreement with Mr Thabo Chefu, who brought the property at an execution sale on 23 September 2016. After the agreement was concluded the first respondent renovated the property, which renovations amounted to R 206 057.00.
- [17] The first respondent made various payment for the “seller” in terms of the sale agreement. However, due to the fact that Mr Chefu failed to assist the first respondent to register the property on his name, the first respondent opened a criminal charge at Charletonville Police in order to investigate alleged fraud committed by Mr Thabo Chefu and the applicant during March 2020.
- [18] The first respondent disputes the validity of the sale agreement that the applicant concluded with Mr Ndila. He contends that the agreement between the applicant and Mr Ndila was fraudulent and stands to be set aside.

Condonation for the late filing of the Replying Affidavit

[19] The applicant conceded that her replying affidavit was filed late and therefore requests the Court to condone the late filing.

[20] She explained the reason for this was that on 8 October 2020, the day before the affidavit was due, the parties entered into settlement discussions, the said discussions were unsuccessful and as a result the replying affidavit was only filed on 16 November 2020.

[21] The reason provided for the late failing of the replying affidavit by the applicant is reasonable, furthermore there is no prejudice to the first respondent in granting condonation. I therefore condone the late filing of the replying affidavit by the applicant.

Issues for Determination

[22] It is common cause that the first respondent resides at the property since 2012/3. It is also common cause that the applicant is the registered owner of the property. The issues for this Court to determine are firstly, whether the first respondent and those occupying the property by virtue of his occupation are unlawful occupiers, and secondly, whether it is just and equitable to evict the first respondent and other occupiers from the said property.

Applicant's Case

[23] The applicant in her founding affidavit stated that she is the registered owner of Erf 3559, Charletonville, Extension 8, Township Registration Division IQ, Gauteng Province.

[24] She purchased the property on 26 September 2017 and it was registered in her name on 28 February 2018. She is also servicing the Nedbank bond registered on the property. Furthermore, since the property was registered on her name, she had no use and

enjoyment of it. On her instructions, her attorneys issued a letter dated 22 May 2019 to the occupiers demanding them to vacate the property on 30 June 2019. In an attempt to deliver the notice to vacate the property, the first respondent refused to accept the notice.

[25] The first respondent also refused to accept an eviction letter delivered by a friend of the applicant on 5 November 2019. The applicant on various occasions attempted to access the property, but access was refused. She stated that she never concluded any lease agreement with the first respondent or the occupiers currently residing at the property.

[26] The applicant stated that the estate agent, Mr Chefu during a visit of the property, prior to the conclusion of the sale agreement, introduced her to the first respondent as Mr John Makinde, the caretaker and gardener of the property. Mr Chefu also informed the applicant that the previous owner made improvements to the property before the property was sold to her.

First Respondent's Case

[27] In his answering affidavit, the first respondent submitted that he has been residing at the property with his family since 2012/2013. The property was bought at a sale in execution on 26 September 2016 by Mr Chefu. Prior to the execution sale, Mr Chefu informed the first respondent that he would assist him in buying a property/house. Only after these discussions, they attended the execution sale and the property was bought.

[28] During 2018, Mr Chefu informed the first respondent that the purchase price paid for the property was not sufficient and they again had to attend an auction to buy the property. The second auction was attended and the property was bought for a second time.

[29] After the second auction, the first respondent requested Mr Chefu to provide him with proof of the second transaction and JOM2 was provided to the first respondent. In terms of the document the property was purchased for an amount of R 428 000.00.

Furthermore, that Mr Chefu bought the property on behalf of IAFRIC Investments PTY from the owner, Ms Marion Esterhuizen.

[30] In October 2018 the applicant in the company of Mr Chefu arrived at the property. The first respondent at that stage was in the process of renovating the property as it was in a poor state. During the visit Mr Chefu created the impression that the applicant and him were in a joint venture, buying houses. During March/April 2019 Mr Chefu and the applicant again visited the property by which time all renovations were completed. During the visit nothing was mentioned that the applicant was the lawful owner of the property.

[31] Since 1 September 2016, the first respondent paid an amount of R 204 233.82 to Mr Chefu or his company regarding the sale of the property. The first respondent stated that he requested Mr Chefu to assist him in registering the property on his name, but to no avail.

[32] Due to the fact that Mr Chefu failed to assist him to registered the property in his name, the first respondent obtained legal advice, after which he opened a criminal charge at Carletonville Police Station against Mr Chefu. According to the first respondent he suspected that Mr Chefu and the applicant colluded in the matter.

[33] On 1 October 2020, Mr J C Landsberg, owner of Raakvat Konstruksie (Edms) Bpk, attended to the property and following an inspection, he compiled an evaluation of improvements done on the property. Mr Landsberg estimated the value of the changes and the improvements to be R 206 057.00.

Applicable Legal Principles

[34] Erasmus *Superior Court Practice*, Eviction under PIE¹ 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, Act 19 of 1998 (‘PIE’), which came into operation on 5 June 1998, provides for procedures for the

¹ Second Edition Volume 2, D9-1 to D9-9.

eviction of unlawful occupiers of land.² In *Ndlovu v Ngcobo; Bekker and Bosch v Jika*³ 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:

- (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.
- (c) PIE does not protect buildings and structures that do not perform the function of a form of dwelling or shelter for humans (e.g., commercial properties) or that are occupied by juristic persons.
- (d) The effect of PIE is not to expropriate private property. What PIE does is to delay or suspend the exercise of a landowner's full proprietary rights until a determination has been made whether it is just and equitable to evict the unlawful occupier and under what conditions.
- (e) PIE invests in the courts the right and duty to make the order which, in the circumstances of the case, would be just and equitable, and it prescribes some circumstances that have to be taken into account in determining the terms of the eviction. In other words, the court, in determining whether or not to grant an order or in determining the date on which the property has to be vacated, has to exercise a discretion as to what is just and equitable. The discretion is one in the wide, and not the narrow sense. Consequently, the court does not have a free hand to do whatever it wishes.
- (f) Provided the procedural requirements laid down in PIE have been met, a landowner is entitled to approach the court on the basis of ownership and the occupier's unlawful occupation. In this regard the occupier bears an evidential onus ('weerleggingslas').

² PIE has to be interpreted, and its governing concepts of justice and equity have to be applied, within a defined and carefully calibrated constitutional matrix. The starting and ending point of the analysis of PIE must be to affirm the values of human dignity, equality and freedom (*Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7; 2005 (1) SA 217 (CC) at 225A-229G). See also *Machele v Mailula* 2010 (2) SA 257 (CC) at 262A-B.

³ 2003 (1) SA 113 (SCA). See further 2003 (March) *De Rebus* 14-17, 18-20 and 22-24; 2003 (July) *De Rebus* 44; 2004 (July) *De Rebus* 57-60 and 2016 (October) *De Rebus* 24-26.

A draft Bill to amend certain definitions and to qualify the application of PIE was published under GN2276 of 27 August 2003.

In s 1 of PIE the word ‘court’ is defined as ‘any division of the High Court or the magistrate’s court in whose area of jurisdiction the land in question is situated’.

Section 4(1) of PIE provides that, notwithstanding anything to the contrary contained in any law or the common law, the provisions of that section apply to proceedings by an owner or person in charge of land for the eviction of an unlawful occupier. The word ‘proceedings’ may, of course, bear different meanings in different statutory provisions. It is submitted that in the context of PIE it includes action as well as application proceedings.

If the defendant is an unlawful occupier of land, as defined in PIE, written and effective notice of the proceedings must be served on both the unlawful occupier and the municipality having jurisdiction at least fourteen days before the hearing of the proceedings for the eviction of the defendant. The purpose of this requirement is to provide protection to occupants by alerting them to the threat to their occupation and the basis thereof; alerting them to the provisions of and the protections and defences afforded to them by PIE; advising them of their rights to legal representation; and informing them of the date and place of the hearing and ‘to afford the respondents in an application under PIE an additional opportunity, apart from the opportunity they have already had under the Rules of Court, to put all the circumstances they allege to be relevant before the court. In addition, the period of notice provided for permits the municipality and the occupants concerned to investigate the availability of alternative accommodation or land and to explore the possibility of mediation in terms of s 7 of PIE. The notice requirement applies even to proceedings leading to the grant of a rule *nisi* against occupants.

....

If the defendant has been in occupation of the land for less than six months, the court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women. In addition to these requirements the court is required to consider whether land has been made available or can reasonably be made available by a municipality or other organ of state or another landowner for the relocation of the defendant, if the latter has been in unlawful occupation for longer than six months. The period of occupation is calculated from the date that the occupation becomes unlawful.

....

If the requirement of s 4 of PIE are satisfied and no valid defence to an eviction order has been raised, the court ‘must’, in terms of s 4(8), grant an eviction order. When granting such an order the court must, in terms of s 4(8)(a) of PIE, determine a just and equitable date on which the unlawful occupier or occupiers must vacate the premises. The court is empowered, in terms of s 4(12) of PIE, to attach reasonable conditions to an eviction order. The date that the court determines must be one that is just and equitable to all parties.

....

... The order that it grants as a result of those two discrete enquiries is a single order. Accordingly, it cannot be granted until both enquiries have been undertaken and the conclusion reached that the grant of eviction order, effective from a specified date, is just and equitable. Nor can the enquiry be concluded until the court is satisfied that it is in possession of all the information necessary to make both findings based on justice and equity.”

Evaluation

[35] It is clear that the applicant has provided incontrovertible evidential proof of her ownership of the property, to the extent that the Title Deed as well as a Win Deed Search were made available and were attached to the founding affidavit.

[36] It is clear that the first respondent and his family are unlawful occupiers of the property as they have no legal right to occupy the property and do so without the consent of the applicant. The first respondent and his family have been in unlawful occupation of the property since at least 2017, when the property was sold to the applicant.

[37] The allegation of fraud is not fully substantiated in a manner that would incline this court to conclude that the sale and subsequent registration of the property in the name of the applicant was tainted with irregularities. The facts demonstrate that there was a valid agreement which was concluded between the applicant and Mr Ndila for the sale of the property.

[38] The first respondent’s contention that the sale agreement concluded between the applicant and Mr Ndila was *void* due to alleged fraud is with respect without merit.

[39] It is trite that the applicant has no obligation to provide alternative accommodation to the first respondent under the common law. As such she should be entitled to evict the first respondent.

[40] As referred to above, the PIE Act gives effect to section 26(3) of the Constitution of the Republic of South Africa⁴ in that it enjoins a Court to grant an eviction order only, if it is “*just and equitable to do so*”, after considering all of the relevant circumstances as contemplated in sections 4(6) and (7) and section 6(1).

[41] The Constitutional Court in *Port Elizabeth Municipality v Various Occupiers*⁵ emphasized that the Court must take an active role, that it is “*called upon to go beyond its normal functions and to engage in active judicial management according to equitable principles*” and that “*in addition to 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*”.

[42] The Supreme Court of Appeal in *Ndlovu v Ngcobo; Bekker and Another v Jika supra*, said the following:

“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 an issue between the parties.” [my emphasis]

[43] This sentiment appears to have met with approval of the Constitutional Court, as Willis J explains in *Johannesburg Housing Corporation (Pty) Ltd v Unlawful Occupiers, Newtown Urban Village*.⁶

⁴ Act 108 of 1996.

⁵ 2005 (1) SA 217 (CC) at para [36].

⁶ 2013 (1) SA 583 (GJ) (*Johannesburg Housing Corporation*) at para [70]-[71].

[44] The Court considering what is just and equitable exercises a wide discretion. What is just and equitable will vary from case to case. The following aspects should be considered;

- (i) The unlawful occupier must have occupied the land for more than six months;
- (ii) The court may grant an eviction once it formulates an opinion that it is just and equitable
- (iii) The court to consider whether the land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier;
- (iv) The court to consider the rights and needs of the elderly, children, disabled person or households headed by women.

[45] Section 4(7) of the PIE Act must be considered together with section 4(8) which is the empowering section as indicated supra. Section 4(8) provides:

“If the court is satisfied that all the requirements of this section have been complied with and that no valid defence has been raised by the unlawful occupier, it must grant an order for the eviction of the unlawful occupier, and determine –

- (a) a just and equitable date on which the unlawful occupier must vacate the land under the circumstances; and
- (b) the date on which an eviction order may be carried out if the unlawful occupier has not vacated the land on the date contemplated in paragraph (a)”

[46] It is common cause that the first respondent occupied the property for more than six months. The applicant requested the first respondent on various occasions to vacate the property, which he failed to adhere too. The applicant, the lawful owner had been refused access to the property for at least five years. Furthermore, the first respondent

paid no rent for an extended period of time, and he has been enjoying occupation of the property without any compensation to the lawful owner. Furthermore, the applicant, since 2018 serviced the Nedbank bond relating to the property.

[47] The first respondent failed to attend the hearing and therefore did not provide the Court with any facts in order to determine whether it is just and equitable to evict him from the property. I have to rely on the scant information contained in the answering affidavit into decide whether the eviction in the present matter is just and equitable.

[48] The first respondent stated that he is a business man and earns an income by importing and selling clothing. He further improved the property and the value of the improvements is approximately R 200 000.00. I can find no indication on these facts that the first respondent will be homeless and not able to afford alternative accommodation.

[49] However, I have to consider the fact that the first respondent occupied the property for a period longer than six months. The first respondent's two minor children reside with him and his wife and it is of the utmost importance that I consider the rights of children as provided for in section 26 (3) of the Constitution, which are weighty considerations in deciding on what would be fair, just, equitable and humane in the circumstances.

[50] I am of the view that the applicant is entitled to exercise her rights in relation to the property she lawfully own, and that the first respondent and those occupying the property by virtue of his occupation are unlawful occupiers.

Costs

[51] The last aspect to be addressed is the issue of costs. Awarding of costs is at the discretion of the court which must be exercised judicially. I am of the view that a just and appropriate order as to cost is that each party to bear own costs.

Order

[52] In the circumstances the following order is made:

1. The late filing of the replying affidavit by the applicant is condoned.
2. The first respondent and all those who occupy the premises known as Erf 3559, Charletonville, Extension 8, Township Registration Division IQ, Gauteng Province by virtue of the first respondent's occupancy are declared unlawful occupiers.
3. The first respondent and all those who occupy the property by virtue of the first respondent's occupancy are ordered to vacate the property on or before Wednesday, 31 May 2023.
4. It is further ordered that in the event that the first and/or second respondents do not vacate the property on or before Wednesday, 31 May 2023, the Sheriff alternatively his duly appointed deputy together with such assistance as he deems appropriate is authorised and directed to evict the first respondent and all those who occupies the property by virtue of the first respondent from the property.
5. Each party to bear own costs.

**CSP OOSTHUIZEN-SENEKAL
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG**

This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *Case Lines* and by release to SAFLII. The date and time for hand-down is deemed to be 16h00 on 17 March 2023.

DATE OF HEARING: 3 March 2023

DATE JUDGMENT DELIVERED: 17 March 2023

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