

REPUBLIC OF SOUTH AFRICA



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

CASE NUMBER: 29566/19

1. REPORTABLE: NO
2. OF INTEREST TO OTHER JUDGES: NO
3. REVISED: NO

In the matter between:

DAVID MAGWABENI

Applicant

And

SHANDUKA OMEGA MAGWABENI

1st Respondent

UNLAWFUL OCCUPIERS OF ERF 1024,

JABAVU CENTRAL WESTERN TOWNSHIP

2nd Respondent

CITY OF JOHANNESBURG

METROPOLITAN MUNICIPALITY

3rd Respondent

JUDGMENT

Delivery: This judgment was handed down electronically by circulation to the parties' legal representatives by email and by upload onto CaseLines. The date and time for hand-down is deemed to be 16h00 on 2 February 2023.

OLIVIER AJ:

- [1] This is an eviction application in terms of s 4 of the Prevention of Illegal Eviction Act 19 of 1998 (PIE). The property in question is ERF 1024, JABAVU CENTRAL WESTERN TOWNSHIP (also known as 1024 Taelo Street, Jabavu, Soweto) ("the Jabavu property").
- [2] The applicant is the son by customary marriage of Elias Magwabeni ("Magwabeni Sr") and his first wife, Sarah. Magwabeni Sr was a polygamist, who had three wives and sixteen children. Sarah Magwabeni died in November 2000; Magwabeni Sr died in 2001. The property was registered in the name of the applicant on 10 February 2018. The deed of transfer is attached to the founding affidavit.
- [3] The applicant argues that the husband in a polygamous marriage provides each wife with a fixed property. This allocated property is for the exclusive use of the particular wife and her children and is owned by her. The second wife and children have their own property, as do the third wife and her children, and so on.

- [4] The Jabavu property was owned by the applicant's mother in her capacity as the first wife. He claims that he inherited it from her, despite the property being registered in the name of their father; this was due to legal restrictions to female ownership of property that operated during Apartheid. There was an agreement between himself and his two immediate siblings that he would become owner of the property. Both siblings have filed confirmatory affidavits.
- [5] The first respondent is the daughter of Magwabeni Sr and his second wife, Selinah. The applicant alleges that she is currently occupying the property without permission or any legal justification. She is, therefore, an unlawful occupier. Despite demand, she refuses to vacate the property.
- [6] The second respondent is everyone holding occupation through the first respondent. The applicant does not say who they are. According to the first respondent her three minor children, who attend schools in the area, occupy the property with her. Their ages and educational details are not disclosed by her. The first respondent alleges also that her elderly mother lives on the property, but this is disputed by the applicant.
- [7] The third respondent is the City of Johannesburg ("the City"), who was joined as the relevant local authority. The City has not filed a report on the housing situation of the first and second respondents or the provision of alternative accommodation in the event of homelessness resulting from eviction.
- [8] The applicant's version is that the first respondent came to visit following the death of Magwabeni Sr in 2001 but overstayed her welcome. In her affidavit the first respondent states she has resided on the property since 1996.

[9] The applicant avers that he is suffering financial prejudice due to the first and second respondents' unlawful occupation of the property. There is no lease agreement in place. Neither the first respondent nor anybody else appears to pay any rent or compensation. The applicant avers that he pays the municipal rates and taxes, which is blankly denied by the first respondent.

[10] The applicant's version is that his children have had to leave the property due to the actions of the first respondent, and that protection orders were issued against the first respondent previously due to her treatment of the applicant's immediate family. The applicant describes the first respondent as a bully who terrorizes everyone on the property.

[11] The first respondent challenges the ownership of the applicant. She claims to have a right to succeed to her late father's estate, including the Jabavu property. She relies on the Intestate Succession Act 81 of 1987, as amended by the Law of Succession Amendment Act 43 of 1992. According to the first respondent, every child of Magwabeni Sr is entitled to inherit. It is unclear though on what basis the first respondent believes that she alone is entitled to reside on the property if her fifteen siblings, including the applicant, are also eligible to inherit a share of the property. The applicant relies on the principles of customary law.

[12] The first respondent alleges that the applicant had acquired ownership of the property by fraudulent means. She avers that the letters of authority were obtained from the Master of the High Court based on false information given by the applicant. A copy of the death notice form is attached to the papers; it shows that the applicant stated on the relevant form that he was the only child and that their father had never married.

[13] An application was launched by the first respondent's mother and sister (not the first respondent) apparently challenging the transfer of the property to the

applicant. According to the first respondent, the matter, under case number 6761/2019, was heard in February 2020 but postponed *sine die* to allow for the joinder of other interested parties. The applicant avers that the papers of the applicants (the mother and sister of the first respondent) were not in order, and that the matter was not postponed but removed from the roll. Nothing pertaining to that application is attached to the papers, except the first page of the founding affidavit, the death notice form of Magwabeni Sr, and the letters of authority issued by the Master of the High Court. Considering that the first respondent relies heavily on that application, I would have expected at least a copy of the notice of motion to be attached in order to know exactly what relief the applicants were seeking; a copy of the order granted by the court on the day of the hearing would also have been helpful. That matter has now stalled and to date no further action has been taken to move it forward.

[14] The accusations of fraud made by the first respondent are serious, but that is the subject matter of a separate application which is not before this court. Both counsel extensively argued ownership, but the fact remains that until the letters of authority or the transfer of the property is set aside, the applicant remains the registered owner of the property.

LEGAL PRINCIPLES

[15] In *Port Elizabeth Municipality v Various Occupiers*, the Constitutional Court explained the relevant constitutional context:¹

The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) was adopted with the manifest objective of ...ensuring that evictions, in future, took place in a manner consistent with the values of the new constitutional dispensation. Its provisions have to be interpreted against this background.

¹ [2004] ZACC 7; 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC) at para [11].

[16] In *City of Johannesburg v Changing Tides 74 (Pty) Ltd* the Supreme Court of Appeal set out the two-stage enquiry that a Court is enjoined to follow:²

[T]he court must determine whether it is just and equitable to order eviction having considered all relevant circumstances. Among those circumstances the availability of alternative land and the rights and needs of people falling in specific vulnerable groups are singled out for consideration. Under s 4(8) it is obliged to order an eviction 'if the ... requirements of the section have been complied with' and no valid defence is advanced to an eviction order. The provision that no valid defence has been raised refers to a defence that would entitle the occupier to remain in occupation as against the owner of the property, such as the existence of a valid lease. Compliance with the requirements of section 4 refers to both the service formalities and the conclusion under s 4(7) that an eviction order would be just and equitable. In considering whether eviction is just and equitable the court must come to a decision that is just and equitable to all parties. Once the conclusion has been reached that eviction would be just and equitable the court enters upon the second enquiry. It must then consider what conditions should attach to the eviction order and what date would be just and equitable upon which the eviction order should take effect. Once again the date that it determines must be one that is just and equitable to all parties. (footnotes omitted)

[17] The court furthermore elaborated on the requirements for a private landowner to successfully evict an unlawful occupier:³

In most instances where the owner of property seeks the eviction of unlawful occupiers, whether from land or the buildings situated on the land, and demonstrates a need for possession and that there is no valid defence to that claim, it will be just and equitable to grant an eviction order. That is consistent with the jurisprudence that has developed around this topic.

² *City of Johannesburg v Changing Tides 74 (Pty) Ltd*, 2012 (6) SA 294 (SCA) at para [12].

³ *Changing Tides 74 supra* at para [19].

[18] The applicant has a clear need for possession. He requires the property to house his children, who currently live in rented accommodation.

[19] Occupiers are protected against eviction should they raise a valid defence that would entitle them to remain in occupation as against the owner of the property. The best example is a valid lease agreement, whether express or implied. There is no lease agreement in this case, nor any evidence of payment of rent or compensation by the first respondent.

[20] The first respondent raises *lis pendens* as a defence. She submits that the eviction application cannot be determined until the first application challenging the transfer of the property has been finalised. The requirements for a valid defence of *lis pendens* are that there must be litigation pending between the same parties based on the same cause of action and in respect of the same subject matter.⁴ Clearly, these requirements have not been met. Most significantly, the first respondent is not a party to that matter and there is no indication that she has been joined.

[21] However, this is not the end of the enquiry. A defence directly concerning the justice and equity of an eviction, but not necessarily the lawfulness of occupation, must be taken into account when considering all relevant circumstances. The ultimate question is whether it would be just and equitable to order the eviction of the occupiers, taking into account all the information that has been placed before the Court.

[22] A Court requires as much relevant information as possible to conduct this enquiry, as Mojapelo AJ explained in *Occupiers, Berea v De Wet NO*:⁵

⁴ *Socratous v Grindstone Investments* 2011 (6) SA 325 (SCA) at para [10].

⁵ *Occupiers, Berea v De Wet NO* 2017 (5) SA 346 (CC) at para [47].

It deserves to be emphasised that the duty that rests on the court under s 26(3) of the Constitution and s 4 of PIE goes beyond the consideration of the lawfulness of the occupation. It is a consideration of justice and equity in which the court is required and expected to take an active role. In order to perform its duty properly the court needs to have all the necessary information. The obligation to provide the relevant information is first and foremost on the parties to the proceedings. As officers of the court, attorneys and advocates must furnish the court with all relevant information that is in their possession in order for the court to properly interrogate the justice and equity of ordering an eviction.

And further:⁶

The court will grant an eviction order only where: (a) it has all the information about the occupiers to enable it to decide whether the eviction is just and equitable; and (b) the court is satisfied that the eviction is just and equitable having regard to the information in (1). The two requirements are inextricable, interlinked and essential. An eviction order granted in the absence of either one of these two requirements will be arbitrary. I reiterate that the enquiry has nothing to do with the unlawfulness of the occupation. It assumes and is only due when the occupation is unlawful.

[23] The essence is that in the absence of sufficient relevant information, a court will not be able to determine whether eviction would be just and equitable in the particular case.

[24] The information supplied by both the applicant and the first respondent is limited and characterised by simple allegations and bare denials without much detail.

[25] What seems to be clear is that the household is headed by the first respondent, a woman. The other occupiers are her minor children. The children's exact ages are

⁶ *Berea supra* at para [58].

not disclosed, but according to the first respondent they attend school in the area. Removing them from their school could potentially impact on their right to basic education. The first respondent submits that her elderly mother Selinah Magwabeni, aged 89, and who is not in good health, lives with them. This is disputed by the applicant, who says that the mother lives at the house of the second family in Venda. In her opposing affidavit, the first respondent records that her mother resides in Limpopo, but later in the same affidavit she states that her mother lives with her on the Jabavu property. There is no confirmatory affidavit from the first respondent's mother.

[26] The first respondent states that she is unemployed, indigent and would have nowhere to go if evicted, rendering her and her children homeless. The applicant avers to the contrary that the respondent is employed as a security guard and has an income, and that if evicted, she could find alternative accommodation. She has adult children with whom she could live or move to the home of her mother in Venda.

[27] In respect of potential homelessness, the report of the relevant local authority is important. A failure by a municipality to report could hamper a Court's ability to determine what is just and equitable.⁷ In the *Berea* case Mojapelo AJ iterated the importance of a report from the local authority:⁸

It follows that where there is a risk that homelessness may result, the availability of alternative accommodation becomes a relevant circumstance that must be taken into account. A court will not be able to decide the justice and equity of an eviction without hearing from the local authority upon which a duty to provide temporary emergency accommodation may rest. In such an instance the local authority is a necessary party to the proceedings.

⁷ See generally *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue* 2009 (1) SA 470 (W) at 480—481D.

⁸ *Berea supra* at para [61].

Accordingly, where there is a risk of homelessness, the local authority must be joined.

[28] In my view there is a paucity of relevant, detailed information. The failure of the third respondent to file a report is a contributing factor. Had it investigated and filed a report, the Court would likely have had adequate information to make a decision.

[29] There is uncertainty about the first respondent's employment status and financial position, the number of occupiers, their ages and sex, and the effect of potential eviction on their housing situation, particularly whether they will in fact be rendered homeless and require alternative accommodation, and if so, whether such alternative accommodation is available. The relief sought by the applicant is final and I am disinclined to grant eviction in circumstances where there is a paucity of critically relevant information.

[30] The solution is that the third respondent must investigate the circumstances of the first and second respondents and submit a report to the Court. In crafting this order, I have followed the lead of other recent cases in this Division. I have specified particular aspects that the City must report on.

[31] This is not the end of the eviction application; it will be postponed *sine die*. The City must submit a report within 30 days, as specified in the order below. Costs will be in the cause.

I MAKE THE FOLLOWING ORDER:

1. The application is postponed *sine die*.
2. The third respondent is ordered to deliver, within 30 days of service of this order upon it, a report to this Court on the exact conditions of the first and

second respondents' occupancy, detailing specifically their names, ages and sex; in the case of minors, where and in which grade they attend school; whether any of the occupiers are vulnerable persons and/or have special needs; the respective occupiers' employment status and sources of income; whether they would be rendered homeless if evicted; and whether temporary accommodation will be needed and how soon it can be made available.

3. The costs of the application are costs in the cause.

M Olivier
Acting Judge of the High Court
Gauteng Division, Johannesburg

Date of hearing: 26 October 2022

Date of judgment: 2 February 2023

On behalf of Applicant: B. B. Ntsimane (Ms.)

Instructed by: Baloyi Ntsako Attorneys

On behalf of First Respondent: M. Mudau

Instructed by: Mudau & Netshipise Attorneys