REPUBLIC OF SOUTH AFRICA

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

Case Number: 2020/28676

(1) REPORTABLE: NO (2) OF INTEREST TO OTHER JUDGES: NO (3) REVISED: NO DATE 19 JANUARY 2024 SIGNATURE

In the matter between:

BATLOKWA PROPERTIES INVESTMENTS (PTY) LTD Applicant

and

LENEAR NTOMBIYESIZWE SIQWANA First Respondent

ANY OTHER ILLEGAL OCCUPIERS
924 KLIPSPRUIT TOWNSHIP
PIMVILLE SOWETO Second Respondent

CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY Third Respondent

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JUDGMENT

KORF, AJ

Introduction

[1] This is an application by the applicant, BATLOKWA PROPERTY INVESTMENTS (PTY) LTD, for the eviction of the first respondent (LENEAR NTOMBIYESIZWE SIQWANA) and second respondent (ALL OTHER UNLAWFUL OCCUPIERS) from the applicant's immovable property more fully described below. This application furthermore engages the CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY as the third respondent.

[2] This application is brought in terms of section 4(1) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998 (the "PIE Act"). In essence, the applicant seeks orders for the eviction of the first and second respondents from its property in Klipspruit, the determination of a just and equitable date for the occupiers to vacate the property, the determination of a just and equitable date on which the eviction order may be carried out (if necessary), authorising the Sheriff to enforce the eviction order, and costs.

[3] The first respondent opposes the application.

Background

[4] The immovable property in question is a residential property described as Erf […] Township, Registration Division I.Q. Province of Gauteng, situated in Soweto. In terms of a permit dated 16 March 1982, the right of occupation of the property was given to EDNA SIQWANA and her dependants, SYLVIA, CYNTHIA, THELMA, PATRICIA, ERIC and LENEAR. EDNA passed away on 22 July 1990.

[5] The Deed of Transfer (T…/03) reveals that the City of Johannesburg sold the property to THANDI SYLVIA SIQWANA (Identity Number 541101[…]) on 4 June 2003 for a purchase price of R1,206.81. Although this document is incomplete or its pages disorganised, it appears that the transfer was registered by the Registrar of Deeds, Johannesburg during 2003, seemingly on 19 September 2003.

[6] After the passing of THANDI SYLVIA SIQWANA (Identity Number 541101[…]), ANDILE OSLER SIQWANA, WATSON SIQWANA and MBUYISELI WELLCOME SIQWANA were appointed under Letters of Authority issued by the Master on 2 August 2013, in terms of Section 18(3) of the Administration of Estates Act, 66 of 1965. These appointees were authorised, *inter alia*, to take control of the estate's assets, including the subject property, then seemingly valued at R120,000.00, and to transfer those to the heir(s) entitled thereto by law.

[7] According to the Deed of Transfer (T…/2020), the transfer of the property from ANDILE OSLER SIQWANA, WATSON SIQWANA and MBUYISELI WELLCOME SIQWANA into the name of the applicant was registered on 17 February 2020, pursuant to a sale concluded on 30 October 2019, against payment of the purchase consideration in the sum of R600,000.00.

The parties' main contentions

[8] The applicant contends that, despite an informal request by the applicant and a formal notice by the applicant's attorney to vacate the property within 31 days, the respondent remained in unlawful occupation. These events occurred shortly after the applicant acquired ownership of the property when the applicant gained knowledge of the first and second respondents' occupation.

[9] The applicant states that the respondent occupiers do not pay monthly rentals for their occupation and that the first respondent is letting rooms in the property and collecting rentals for her benefit. The applicant wishes to occupy the property.

[10] The applicant avers that it has no obligation to provide alternative accommodation to the respondents, and the respondents can return to the place where they resided previously or move to alternative accommodation.

[11] In the answering affidavit, the first respondent states, *inter alia*, that:

a) Her late biological mother occupied the property in terms of a permit. The names of the first respondent and her siblings are reflected in the permit.

b) After the passing of their biological mother in 1990, "*Sylvia*" was granted "*the title deed on our behalf without our consent or knowledge*". After Sylvia's

passing on 8 February 2002 (she died intestate), ANDILE OSLER SIQWANA, WATSON SIQWANA and MBUYISELI WELLCOME SIQWANA of the property above were appointed as executors of her estate by the Master of the High Court.

c) Sylvia committed fraud in that she did not own the property but that it belonged to the first respondent and her siblings, including the late Sylvia. The same applies to the late Sylvia's children, who sold the property to the applicant: "…*they could not transfer the rights which they did not have or which were unlawful*…"

d) The first respondent intends to challenge the transfer of the property from her late sister to the applicant.

e) The applicant is not approaching the court with clean hands because, around March 2020, the applicant demolished a part of the building. The applicant allegedly stated that he (it) had purchased the property.

f) The first respondent occupied the house because she had nowhere to go. She cannot afford to rent or buy alternative accommodation, and she cannot be left homeless because of the prior unlawful transaction.

g) An eviction order will affect her constitutional right to housing, and she will be homeless together with her family members. She is 60 years of age, a householder, and the household leader and her family depend on her. She stays with children aged 17, 16, 12 and 7 (as on 12 August 2021, when deposed to the answering affidavit). She receives a pension grant, child support, and "*R1,200 per month from tenants staying in the shacks*". The children are attending school in the proximity of the premises.

Issues

[12] In the applicant's practice note dated 13 January 2023 (Caselines 011-11 to 13), the issues are defined as follows:

a) Whether or not the applicant is the lawful owner of the property in question.

b) Whether or not the first respondent is an unlawful occupier as defined in the PIE Act; and,

c) If so, is it just and equitable to grant an eviction order?

[13] In the first respondent's Heads of Argument, the issues are defined as follows:

a) Whether the Applicant has a clear and lawful title to the property.

b) Whether the title deed was obtained fraudulently.

c) Whether the first respondent is in unlawful occupation of the property; and,

d) If the first respondent's occupation is unlawful, whether it is just and equitable to evict the respondents and the determination of the date for them to vacate the property.

[14] According to the Joint Practice Note, the issue for determination is whether or not the occupants are in unlawful occupation.

[15] As indicated below, the court raised and debated the effective service of the section 4(2) Notice on the first and second respondents with the parties' representatives. In addition, the first respondent's main argument related to a just and equitable date for the respondents to vacate the property. The issues regarding the alleged fraud and the disputed lawfulness of the applicant's title of the property were effectively conceded. The first respondent's representative confirmed that the first respondent had not instituted any proceedings to challenge the validity of the applicant's ownership. Therefore, the question of effective service on the respondent accordingly emerged as the main issue for determination.

Litigation History

[16] For reasons that shall appear later, I must deal with the papers as they appear from the Caselines record.

[17] The Notice of Motion (dated 3 August 2020[1]) in the instant application was issued on 1 October 2020 and served by the Sheriff on the first and second respondents on 9 October 2020 and the third respondent on 7 October 2020. It attached the founding affidavit of SAMUEL KGOTSITSILE SEDUMENI, deposed on 3 August 2020.[2]

[18] The electronic court file further includes a Notice of Motion dated 28 October 2020, styled "*EX-PARTE APPLICATION IN TERMS OF SECTION 4(4)*" (seemingly intended to have referred to section 4(2)). This Notice of Motion indicates that on 22 April 2021, the applicant will seek an order authorising it to provide a notice to the respondents as envisaged by sections 4(2), 4(3), and 4(4) of the PIE Act. The Sheriff's returns of service reflect that this *ex-parte* application was served on the first and second respondents on 1 March 2021. A "NOTICE OF SET DOWN FOR HEARING" was served on the first and second respondents on 23 March 2021.

[19] The Notice of Motion in the *ex-parte* application referred to above further states that the affidavit of Mr SEDUMENI will be used to support the application. An affidavit deposed by Mr. SEDUMENI follows the Notice of Motion.[3] The certificate of the Commissioner of Oaths[4] reads that the Founding Affidavit was signed and sworn to on the "*11th November 2020*". Below the stamp of the Commissioner of Oaths appears "*10/11/2020*" in manuscript.

[20] According to paragraph 5.1 of this affidavit, the deponent states that "…*[M]y further advice from my attorneys of record is that we should bring an Ex-Parte application and that such application complies with Section 4(2) of the PIE Act. And* (sic) *marked as* ***Annexure BP6****…*".[5] The problem with this affidavit is manifest: the statement in paragraph 5.1 alone indicates that the affidavit, as mentioned earlier, envisaged an *ex-parte* application to be instituted. Further, Annexure BP6[6] is not an application of any nature (as is suggested by paragraph 5.1 of the affidavit) but a "… *NOTICE IN TERMS OF SECTION 4(2)*…" of the PIE Act, dated 28 October 2020[7]. Consequently, the affidavit on pages 001-32 to 001-35, although following on the last

[1] Caselines 001-4.
[2] Caselines 001-11.
[3] Caselines 001-32 to 001-35.
[4] Caselines 001-35.
[5] Caselines 001-34.
[6] Caselines 001-45 to 51.
[7] Caselines 001-49.

page of the Notice of Motion in the *ex-parte* application, could not and did not serve the purpose intended by the *ex-parte* Notice of Motion.

[21] A further affidavit[8] by Mr SEDUMENI, also deposed on 10 November 2020, follows the abovementioned affidavit. Paragraph 4.1 makes it plain that the application (relevant to that second affidavit) "…*is for the authorisation of a notice of proceedings contemplated by sections 4(2) and 4(5) of the PIE ACT*…". Strangely, the deponent states in paragraph 4.2 that "…*simultaneously with this application*…" the applicant will launch an eviction application. This statement is wrong in that, as on 10 November 2020, the Sheriff had already, on 7 and 9 October 2020, served the eviction application on the respondents. Thus, the affidavit in support of the *ex-parte* application is, in fact, that which appears on pages 001-52 to 001-58 and not the affidavit on pages 001-32 to 001-35.

[22] The papers in the *ex-parte* application, as they appear on pages 001-28 to 001-79, exceed 50 pages. These same papers are attached to the index of the *ex-parte* application under section 009.

[23] On 22 April 2021, WINDELL J granted the relief sought in terms of the *ex-parte* application. The order provided that the applicant was authorised to give notice of the intended eviction application, and "…*the applicant is directed to serve the section 4(2) notice (which is attached hereto and marked as annexure "BP6") with a copy of the order on the first respondent and other persons holding occupation through the first applicant…*", and on the third respondent. The order further provides that if the applicant cannot set the matter down for hearing on 1 July 2021, the applicant is permitted to set the matter down on a future date to be arranged with the registrar on the same papers. I point out that the order, as it appears on Caselines pages 015-5 to 015-6, is not accompanied by and does not annex a notice marked as '*annexure BP6*"'. A further copy of the order appears on 009-39 to 009-40, which is similarly not accompanied by any notice marked as aforesaid.

[24] Notices of set down for the hearing of the eviction application on 1 July 2021 were served on the first respondent on 21 June 2021, and a further notice of set down for the hearing on 25 August 2021 was served on her on 21 July 2021.

[8] Caselines 001-52 to 001-58.

[25] The First Respondent caused opposition to be noted on 17 August 2021. The first respondent's answering affidavit was delivered on 5 August 2021, and the applicant's reply, dated 7 September 2021, was delivered on an unknown date.

[26] Concerning the third respondent, the Sheriff issued a return of service on 30 April 2021 of documents described as "…*NOTICE IN TERMS OF SECTION 4(2) OF THE PREVENTION OF ILLEGAL EVICTION FROM AND UNLAWFUL OCCUPATION OF LAND ACT 19 OF 1998, FOUNDING AFFIDAVIT & ANNEXURES & COURT ORDER DATED 22/04/21…*".

[27] A further Sheriff's return of service in respect of the first respondent[9] states that on 3 June 2021, the following documents were served: "… *A copy of the EX-PARTE APPLICATION I.T.O. SECTION 4(2) AND COURT ORDER SSECTION4(4)* (sic)…". The Sheriff's return of service regarding the second respondent contains the exact description of the papers served as quoted herein.

Analysis

[28] Section 4(2) of the PIE Act is peremptory. It requires unlawful occupiers facing eviction to be given at least 14 days "*written and effective notice*" of the date on which proceedings for their eviction will be heard. An unlawful occupier is entitled to this notice separately from, and in addition to, the ordinary service of the application papers or combined summons that institute the eviction proceedings (*Cape Killarney Property Investments v Mahamba* [2001] 4 All SA 479 (A), paragraphs 13 and 14). The notice's form and manner of service must be approved by a court (see *Cape Killarney*, paragraphs 11 and 16).

[29] The first question is whether the returns of service can be interpreted to the effect that the section 4(2) notice, as authorised and directed by the order of WINDELL J, was served by the Sheriff.

[30] The rules governing the interpretation of documents may be summarised with reference to the Supreme Court of Appeal's seminal judgment by Wallis JA in the case of *Natal Joint Municipal Pension Fund v Endumeni Municipality*[10], which was

[9] Caselines 009-41.
[10] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) par [18].

endorsed as follows in *Capitec Bank Holdings and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others:*[11]

> '*Our analysis must commence with the provisions of the subscription agreement that have relevance for deciding whether Capitec Holdings' consent was indeed required. The much-cited passages from Natal Joint Municipal Pension Fund v Endumeni Municipality (Endumeni) offer guidance as to how to approach the interpretation of the words used in a document. It is the language used, understood in the context in which it is used, and having regard to the purpose of the provision that constitutes the unitary exercise of interpretation. I would only add that the triad of text, context and purpose should not be used in a mechanical fashion. It is the relationship between the words used, the concepts expressed by those words and the place of the contested provision within the scheme of the agreement (or instrument) as a whole that constitutes the enterprise by recourse to which a coherent and salient interpretation is determined. As Endumeni emphasised, citing well-known cases, "[t]he inevitable point of departure is the language of the provision itself.*"'

[31] Applied to the application at hand, one considers the language used, which must be given its ordinary grammatical meaning unless this results in absurdity, repugnancy, or inconsistency with the rest of the document. The language used must be understood in the context in which it is used and regarding the purpose of the provision of the document.[12]

[32] On the face of these returns of service relevant to the first and second respondents, it appears that the documents served by the Sheriff on 2 June 2021 comprised the *ex-parte* application in terms of section 4(2) and the order of court in terms of section 4(4) of the PIE Act. Notably, neither return mentions the service of the Notice (whether as an annexure to the order or otherwise).

[33] On a plain reading of these returns of service, the Sheriff served "… *A copy of the EX-PARTE APPLICATION I.T.O. SECTION 4(2)…*" and not a Notice in terms of Section 4(2). This express reference to the "APPLICATION", as opposed to the Notice that the applicant was directed to serve, is instructive. These returns further omit any reference to the Notice as an annexure to the order. To read a reference to the said Notice into the wording of the returns of service would be impermissible.

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[11] *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* [2021] ZASCA 99; [2021] 3 All SA 647 (SCA) para 25.
[12] *Macingwane v Masekwameng and Others* (Case no 626/2021) [2022] ZASCA 174, para 22.

[34] Further, counsel for the applicant was unable to direct my attention to any document or evidence filed on Caselines showing that the Notice, as envisaged by order of WINDELL J, was attached to the "*COURT ORDER SSECTION4(4)* (sic)…", to which the said returns of service referred.

[35] The first respondent's representative did not concede that the Sheriff had served the Notice envisaged by the order on the first respondent. It was further contended that the applicant bore the onus to demonstrate compliance with the provisions of section 4(2) and the order requiring service of the said Notice. I agree with the latter contention.

[36] The foregoing accordingly warrants a finding that the applicant failed to satisfy the requirements of section 4(2) of the PIE Act and paragraph 2 read with paragraph 1 of the order granted by WINDELL J. The application is not ripe for hearing.

Conclusion

[37] The defects in the applicant's case do not render the application fatally defective and can be remedied. A dismissal of the application would cause grave prejudice on the applicant's part.

[38] In my view, it is in the interest of justice to allow the applicant to rectify the shortcomings in its case. Accordingly, the matter ought to be postponed *sine die*.

Costs

[39] Ordinarily, the party causing a postponement of a hearing should bear the costs occasioned thereby. This is not a rule cast in stone. There may be circumstances that justify a different outcome concerning costs. It is trite law that a court has broad discretion when making cost orders. I note the *prima facie* strength of the applicant's case, the concessions made by the first respondent's representative, and the fact that the first respondent has not taken any steps to challenge the applicant's title. Further, the first respondent did not rely on the grounds that gave rise to the postponement of the matter. In

addition, pending the matter's finalisation, the respondents likely enjoy occupation of the property.

[40] I believe that each party should pay its own costs occasioned by the postponement of the matter.

Order

[1] The application is postponed *sine die*.

[2] Each party shall pay its own costs.

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C. A. C. KORF
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG
19 JANUARY 2024

For the Applicant:	Adv Z Kalashi instructed by Mathubatuba Attorneys
For the Respondent:	P Setlhodi instructed by the Soweto Justice Centre
Matter heard:	13 April 2023