REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 52957/2020

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

DATE:
SIGNATURE OF JUDGE:

In the matter between:

WERNER VAN ROOYEN N.O. **1ST Applicant**

MICHELLE PAY N.O. **2ND Applicant**

and

HANLIE JANSE VAN RENSBURG **1ST Respondent**

CITY OF TSHWANE METROPOLITAN MUNICIPALITY **2ND Respondent**

JUDGMENT

De Wet AJ:

INTRODUCTION

1. This is an eviction application. It is common cause that the applicants are the joint trustees of C PRO Construction (Pty) Ltd (in liquidation) and that the applicants on 4 May 2020 entered into a deed of sale agreement ("*the written agreement*") with the first respondent in terms of which Portion 558 of the farm Mooiplaats, number 367, Registration Division JR Gauteng ("*the property"*), was sold to the first respondent. The applicants subsequently cancelled the agreement due to the alleged default of the first respondent and thus the eviction application.

2. The lawfulness of the cancellation is disputed by the first respondent.

3. On 28 May 2021, Justice Neukircher granted an *ex parte* order in terms of section 1 of the Prevention of Illegal Eviction and Unlawful Occupation of Land Act, 19 of 1998 ("*PIE"*). On 26 August 2021, the said order was served on the first respondent in person, and she was thus apprised of her rights in terms of 4(5) of the Act.

4. On 23 September 2022, Justice Teffo granted an order that the first respondent should file her heads of argument and practice note within a period of 10 days after service of the order, failing which the respondents' defence would be struck with costs. The said order of 29 September 2022 was delivered electronically by means of an email to the first respondent's attorneys of record, Messrs van Staden Attorneys. The first respondent subsequently failed to file a practice note and/or heads of argument.

5. On 23 January 2023, the parties however signed a joint practice note and recorded that the matter would be heard on 25 January 2023. Agreement was reached that the only issues in dispute were whether condonation should be granted; whether the written agreement was cancelled prematurely or not; what the terms of the agreement were; whether or not the first respondent is an illegal occupant and this application is thus an eviction application in terms of the PIE, and "*prejudice*", i.e., if so, whether the eviction of the respondents is just and equitable under the circumstances. It was my impression that this matter would not be opposed in court by the first respondent, but that the merits remained in dispute.

THE TERMS OF THE WRITTEN AGREEMENT

6. Clauses 3, 13 and 7.3 of the written agreement deal with the purchase price, the contractual remedies upon breach; the purchaser's right to make alterations or additions to the property and its right to compensation in respect of alterations or additions. The relevant portions of the clauses provide:

6.1. "3. <u>Purchase price</u>

*The purchase price is the sum of R1 200 000.00 (One-million two-hundred thousand rand), inclusive of Value Added Tax ("VAT") (if applicable), which shall be paid to the **seller** upon registration of transfer and which shall be secured, pending registration of transfer, in the following manner:*

*3.1. A cash deposit of 10% (Ten Percent) of the **purchase price** is payable on **signature date, by the purchaser,** into the trust account of the **auctioneer**, managed by the **auctioneer** for the benefit of the **seller.** Notwithstanding this, the seller may direct in which trust account the deposit should be paid. The **purchaser** consents to the **seller** utilizing the deposit to pay outstanding levies, rates and taxes and other expenses relating to the transfer of the property.*

*The deposit shall be non-refundable, except in the instance where the sale is not accepted by the seller in which event all monies paid by the purchaser to the **seller** in terms hereof shall be refunded to the **purchaser**. The **auctioneer's** commission shall be deemed to be earned on the **date of acceptance**. Transfer of payments received less commission and expenses (if applicable) will be made from the **auctioneer's** trust account to the **conveyancer,** of the seller's choice, after confirmation of the sale.*

*3.2The balance of the purchase price shall be paid upon the registration of transfer of the **property** in the name of the **purchaser**, and pending registration of transfer, shall be secured by means of a suitable guarantee issue by a Financial Institution acceptable by the **seller.** The said guarantee shall be delivered to the **conveyancer** appointed in terms of Clause 6 ("**conveyancer**") within 30 (thirty) days from the **date of acceptance**, which guarantee shall be payable free of exchange."*

6.2 "*13. <u>Breach</u>*

In the event of the purchaser being in breach of any of the terms or conditions

*contained herein, and remaining in default for 7 (**seven**) days after dispatch of a written notice by registered post or by E-Mail or by facsimile or delivery by hand, requiring him to remedy such breach, the seller shall be entitled to, and without prejudice, to any other rights available at law:*

*13.1. claim immediate payment of any amount due by the **purchaser**, and/or*

13.2. declare the full balance of the purchase price and interest payable forthwith and to claim recovery thereof; and/or

*13.3. cancel the agreement without any further notice, and retain all amounts paid by the purchaser as 'Rouwkoop' and the **purchaser** hereby authorizes any third party holding such money to pay the same to the **seller**, and/or*

*13.4. terminate this agreement and claim damages from the **purchaser**, which damages shall include, but not limited to, the cost and expenses of advertising and selling the **property** to a third party.*"

6.3 Clause 7.3 provides:

"*7.3. The **purchaser** shall not be entitled to make any alterations or additions to the **property** before the date of registration of transfer, the **purchaser** shall be obliged, in the event of the cancellation or lapse of the disagreement, to forthwith vacate the **property** and restore it to the **seller** in the same condition as when the p**urchaser** took possession. The purchaser shall have no claim whatsoever against the seller arising out of any alterations or additions made to the **property** by the purchaser."*

6.4 The agreement further provides that the **purchaser** will pay occupational interest (Clause 5.1); commission calculated at 6% of the purchase price will be due and payable by the seller to the auctioneer (Clause 14.1); that the purchaser shall be liable for all costs of registration, including transfer duties; revenue stamps, mortgage loan costs; etc (Clause 4.1); and that the risk in and to the property will pass to the **purchaser** on the **delivery date**, i.e., the date when the purchaser delivers the guarantees referred to in

Clause 3.2 or the date upon which the full purchase price is paid to the purchaser (Clause 7.2, read with 1.7). It furthermore contains a non-variation clause (Clause 15) and a non-waiver clause to the effect that any latitude or extension of time allowed by the seller shall not be deemed to be a waiver of the seller's right to require strict and punctual compliance with the terms of the agreement (Clause 18).

7. It is the applicant's case that:

7.1. On 18 June 2020 the first respondent was put on terms by means of a letter, the relevant portion reads:

" We have obtained instructions from our client and accordingly place the following on record:

1. *An agreement of sale, dated 4 May 2020, was entered into between yourself and the trustees by virtue of which provisions our client sold the aforesaid property to yourself for an amount of R1 200 000.00, the terms and conditions of which are to be incorporated herein by reference.*
2. *In clause 3.1 it states that the deposit is non-refundable.*
3. *As per clause 3.2 of the Agreement of Sale the balance purchase price in the amount of R1 080 000.00 should have been paid or secured by a guarantee within 30 days from signature of the contract which date was 3 June 2020.*
4. *Further to the above and as per clause 3.4 of the Agreement of Sale, you are obliged to furnish ourselves with the document requested in terms of the Financial Intelligence Centre upon request.*
5. *We confirm that you failed and/or omitted to provide the required payment/guarantee(s) and document which constitutes a breach of the Agreement of Sale.*
6. *We hereby request you to provide our offices with payment/guarantee for the purchase price and provide us with the documents requested in our letter 7 May 2020 within 7 (SEVEN) days after the deemed receipt hereof, failing which our client shall be entitled to, without prejudice to any*

other rights available to it in law:

1. Cancel the Sale Agreement without further notice …

(a) …

(b) …

*(c) cancel the agreement without any further notice and retain all amounts paid by the **purchaser** as "ROUWKOOP" and the **purchaser** hereby authorize any third party holding such monies to pay the same to the **seller**; and/or*

*(d) terminate this agreement and claim damages from the **purchaser**, which damages shall include, but not limited to, the cost and expenses of advertising and selling the property to a third party;*

We thus request you to timeously remedy your contractual breach within 7 (seven) days after the deemed receipt of this written notice, failing which our client will proceed as stated above."

7.2 On 30 July 2020 Messrs Coetzer Inc, on behalf of the applicant, cancelled the written agreement. The relevant portion of the letter reads:

"

Our instructions are that you entered into a sale agreement with the insolvent estate in terms of which the abovementioned property was sold to yourself.

Our further instructions are that you did not perform in terms of the agreement as set out in the letter of demand and/or request for rectification of breach, dated 18 June 2020 sent to you by the conveyancing attorneys, Messrs VZLR Attorneys….

The liquidator elected to cancel the agreement, alternatively cancels it herewith and demand that you vacate the property immediately in terms of clause 7.2 of the agreement as you are currently in the unlawful occupation of the property.

Although our client is entitled to immediate return of the property, you are given notice to vacate the property by no later than Friday, 7 August 2020, failure of which we hold the instructions to apply for an eviction order against you or anyone occupying through you."

8. Although the first respondent was represented by a firm of attorneys, counsel was not instructed to argue the matter on her behalf. The first respondent's case appears from an opposing affidavit. The following aspects are common cause, namely:

8.1. the applicants' *locus standi* and the fact that they are duly authorised to bring the application;

8.2. that the company in liquidation is the lawfully registered owner of the property; and

8.3. on 4 May 2020 the liquidators entered into a written agreement with the first respondent.

9. The first respondent however alleges that:

9.1. she is not in breach of the agreement and is not an illegal occupant as the applicants cancelled the sale agreement prematurely and without any lawful reason to do so;

9.2. on 29 June 2019 she obtained a pre-approved bond on the property for the purchase amount, as well as transfer costs;

9.3. the parties were busy with negotiations regarding the purchase price, rates and taxes and commission since 27 February 2021 as appears from the correspondence (the date should read 27 February 2020 if one refers to the annexures/correspondence relied upon);

10. Further to the aforesaid, the first respondent requests that Annexure "C" to her affidavit and all other annexures referred to be incorporated into the opposing affidavit.

11. It appears from Annexure "C" that the first respondent alleges that:

11.1. During October 2018 she made an offer to purchase the property for R1.6m but was subsequently requested "*… to stand back …*" to afford family members the opportunity to purchase the property;

11.2. In April 2019 a further offer was made to purchase the property for an amount of R1.4m "*… and added an Addendum on the contract with photos of the 1st visit and the 2nd visit. The Liquidators confirmed middle May 2019 that the offer was accepted by the bank. I dealt with Mr Riaan van Rooyen of*

Investrust at this stage.".

11.3. The property was extensively damaged at that stage and she is given permission to "*start working and get the place in a better state, before the bank comes out for the valuation. We have spend* (sic) *nearly R400 000.00 at that stage to do the following:*

- *We have put in solar the whole property (165 000-00) and connected the electricity.*
- *We fitted all the taps, sinks, toilets and bathtubs (R105 000-00).*
- *We had to put in new ceilings and paint the 2 buildings and the outside.*
- *We had to fix the plumbing which were filthy and/or raw.*
- *We put in 2 new gate motors.*
- *We had to put in globes in both buildings (33 in small building & 28 in main new house) and 14 outside lights.*
- *We had to fix all electrical wires, and the place was starting to look like a dumping farm for the security guard there allowed people to come and dump their rubbish there and paid him for that. …"*;

11.4. On 25 June 2019 Absa approved a bond in the amount of R1.2m plus costs and the first respondent signed all the bond documentation, Nr: 8086518020;

11.5. The first applicant, at that stage, took over the transaction with Investrust, and insisted that a new contract should be concluded with his friend, the auctioneer of Dynamic Auctioneers. The first respondent realised that commission would be payable to Dynamic Auctioneers and she refused to sign the documentation as the purchase price would increase by approximately R200 000.00 as a result of the auctioneer's commission;

11.6. Mr Werner van Rooyen instructed Messrs VZLR Attorneys to deal with the matter and the first respondent started to liaise with them;

11.7. She was informed at a later stage that the first applicant insisted on occupational rent and a deposit. "*And suddenly I heard Werner van Rooyen wanted occupational rent and a deposit. The agreement I had with Mr Riaan van Rooyen was that there is no need for occupation or a deposit because I*

had a full bond and we fixed everything there that were destroyed. We added a hell of a lot of value to this property by fixing everything. I said I will not sign a new docs for the bank already approved me on the original OTP.";

11.8. "*Since then, we had fixed this property and spent a lot of money*. *Then suddenly Werner van Rooyen forwarded me the letter to say he cancel the agreement; I did not accept the letter for this is being very unfair and sly";*

11.9. She informed the first applicant that she timeously obtained a bond as per the contract, and that "*they wanted me to change the contract the whole time…. My offer is now to pay them in 6 months… Otherwise I want my money back which I have spent there and it is over R600 000 plus already. The property will be paid in six months' time …*", and

11.10. *"I have met all my requirements as requested by the OTP.* ***I do not accept the cancellation.****"*

12. The correspondence on which the first respondent relies shows that:

12.1. On 29 June 2019, Absa issued a quotation indicating that it would in principle be prepared to approve a mortgage loan in the amount of R1 020 000.00. Further that, if the quotation was accepted, an official quotation and loan agreement, that complies with the National Credit Act, would be made available for acceptance. It is clear from a reading of the quotation that it is not a loan agreement but in effect nothing more than an "*invitation to do business*".

12.2. On 24 February 2020, Mr Thabo Sithole of Absa Bank reverted to amongst others, the first applicant, and pointed out that the changes effected on the contract is not in line with Absa's internal policies: the commission is in terms of the policies not refundable; the broker's fees/commission are payable on registration and not on acceptance of the offer, and the seller nominates the transfer attorney and not the purchaser.

12.3. On the same day the first applicant, amongst others, conveyed to the first respondent that clause 3.1 does not deal with commission but with the deposit and that a refundable deposit was not acceptable to the bank. He

implored her not to change the contract and recorded that if the first respondent was not amenable to enter into the agreement on the normal conditions, she should allow the liquidators to sell the property to a purchaser that is satisfied with the normal terms and conditions. It was furthermore recorded that the banks insisted on appointing the conveyancing attorneys. The first respondent was put on terms to amend the agreement back to its standard format, failing which they would proceed with the previous eviction process that commenced a few weeks prior. It was seemingly also common cause that the property was vandalised by the guards who were employed to safeguard it.

12.4. On 27 February 2020, Mr Werner van Rooyen enquired why the first respondent increased the offer to R1.4 million and reiterated that he would endeavour to obtain approval for an offer of R1.2 million subject thereto that nothing is deleted from the proposed agreement. He amongst others, recorded that there was no reason to delete the deposit clause with its "*Rouwkoop*" provision in the light of the fact that the first respondent could allegedly pay the deposit and in the light of the fact that her bond had been approved.

13. In essence, the applicants aver in the replying affidavit that the agreement was cancelled lawfully and that the first respondent remained on the property notwithstanding a demand that the property be vacated and that she is thus an illegal occupant. Further, that the first respondent did not obtain a pre-approved bond and that she did not have permission to effect alterations or additions and that the agreement prohibits same.

CONDONATION

14. The parties agreed that the opposing affidavit could be filed late, on 3 December 2021. The respondent avers that it was not possible due to an armed robbery at the first respondent's attorney's practice on 3 December 2021 during which his wife was assaulted. Due to the disruptive effect of the robbery, the opposing affidavit was filed 6 days late. The applicants filed their replying affidavit at a very late stage, but the applicants at the same time applied for condonation. The late filing was in essence occasioned by the later conflicting advice of a new counsel, namely that a replying affidavit was indeed necessary. Nothing really turns on the

content of the replying affidavit and I hereby grant condonation for both the late filing of the opposing affidavit and the replying affidavit. It is in the interest of justice that the matter be adjudicated in the light of all the relevant facts.

EVALUATION

15. The pre-contractual events, namely the new offer of R1.4m that was made in April 2019; the damage to the property; the fact that the first applicant insisted on a new agreement that would include auctioneer's commission; the first respondent's refusal to sign such an agreement and the applicants later insistence on a deposit and occupational rental, as well as the correspondence between the parties before entering into the written agreement, are irrelevant.

16. It is common cause that on 4 May 2020 the parties entered into a written agreement for a lesser purchase price and that the agreement provides for a 10% cash deposit and for 6% auctioneer's commission (payable by the seller). In terms of the "*parol evidence rule"*, the parties' prior negotiations; arrangements or oral agreements are irrelevant if the negotiations culminated in a written agreement. The written agreement governs the rights and obligations of the parties. A party cannot seek to rely on a prior oral agreement or oral negotiations to "*contradict, add to or modify the writing by reference to extrinsic evidence and in that way to redefine the terms of the contract.*" (See: **Johnston v Leal** 1980 (3) SA 927 (AD) at 943B and also to **Absa v Michael's Bid a House** 2013 (3) SA 426 (SCA) at par 21 – 23).

17. The parties presently agreed that the written agreement "*… constitutes the whole and only agreement between the seller and the purchaser and no alteration or variation of this agreement shall be of any force or effect unless reduced to writing and signed by the parties thereto or their duly authorised agents. Any representation, warranties or undertakings made or given by the* ***seller*** *or its agents other than those contained herein shall be of no force or effect whatsoever*." (Clause 15.1). The parties' prior negotiations are therefore irrelevant. Likewise, if the oral agreements were entered into subsequent to the written agreement, the agreements have no legal effect if not reduced to writing and signed by the parties or their duly authorised agents as provided for in clause 15.1 (See: **SA Sentrale Koőp Graanmaatskappy Beperk v Shifren** 1964 (4) SA 760 AD at 766H – 767C).

18. The first respondent's denial that she breached the agreement and her reliance on

Absa's offer in respect of a mortgage loan dated 29 June 2019 in the amount of R1 020 000.00, is misplaced:

18.1. The alleged prior in principle approval of a loan for a lesser amount than the purchase price does not constitute compliance with the guarantee requirement.

18.2. The first respondent had at no stage tendered the required guarantee to secure the balance of the purchase price, nor paid the deposit or averred that the required cash deposit was paid. On the contrary, her inability to make payment and/or to perform, clearly appears from Annexure "C", "*My offer now is to pay them in 6 months. Funds will be placed in trust with my attorney and will proof of such be given to my attorney to Coetzer attorneys. Otherwise, I want my money back which I have spend there and it is over R600 000-00+ already. The property will be paid up in 6 months' time.*"

19. It is common cause that neither the guarantee nor the deposit was furnished or paid after written demand, and that the written agreement was subsequently cancelled. I find that the cancellation was lawful.

20. The cancellation would even be in order without a demand in terms of Clause 13 in the light of the first respondent's repudiation of the deposit and/or occupational interest clauses and/or the written agreement. A party repudiates an agreement if he/she indicates by words or conduct a deliberate and unequivocal attention no longer to be bound by the contract. The test is an objective test and not a subjective test. The mere fact that a party is thus *bona fide* of the opinion that he/she does not have to perform, he/she repudiates the contract if there is in fact a contractual obligation to perform. The innocent party can under these circumstances cancel the agreement without placing the repudiating party *in mora* by giving it notice calling on it to remedy a breach under the contract. (See: **Datacolor International (Pty) Ltd v Inta Market (Pty) Ltd** 2001 (2) SA 284 (SCA) at 294B – G and 295B – D**,** and **Metalmil (Pty) Ltd v AECI Explosive and Chemicals Limited** 1994 (3) SA 673 (AD) at 683G).

21. The first respondent clearly repudiated the written agreement due to her:

21.1. insistence, contrary to the provisions of clauses 3.1 and 5.1 that the written

agreement does not provide for a 10% deposit or that occupational interest is not payable, and her

21.2. insistence that a so-called prior approval of the bond, constitutes compliance with the guarantee requirement.

Her admitted financial inability to pay the deposit or to secure a guarantee would normally also excuse a creditor from the obligation to put her *in mora* in terms of the *lex commisoria/*cancellation clause before cancellation. (See: **Ponisammy and Another v Versailles Estates (Pty) Ltd** 1973 (1) SA 372 (AD) at 390A – C).

22. I have, notwithstanding the provisions of Clause 7.3, considered the theoretical possibility that the first respondent may have a right of retention due to useful and/or necessary improvements and raised the possibility with Advocate Arroyo who appeared on behalf of the applicants. She correctly argued that the answering affidavit served not only to place evidence before court, but also to define the defence and/or issues in dispute. (See **Swissborough Diamond Mines v Government of the RSA** 1999 (2) SA 279 (TPD) at 323F – 333G). The first respondent does not aver that she can remain in possession of the property and in the light of an improvement or salvation lien, and that it should thus be the end of the matter. I agree. Insofar as this interpretation is incorrect, it is noteworthy that the evidence foundational to a right of retention, namely amongst others that the expenses were necessary for the salvation of the property or useful for its improvement; the nature and extent of the actual expenses incurred and whether it resulted in an increase in the value of the property, has not been canvassed. (See: **Rhoode v De Kock and Another** 2013 (3) SA 123 (SCA) at par 15 and 17). However, this aspect is not a justiciable dispute in the light of the disputes identified in the affidavits and/or in the signed joint minute.

23. In the light of the aforesaid, I find that:

23.1. The respondents' reliance on events; negotiations; oral agreements or arrangements entered into between the parties prior to the written agreement, are irrelevant.

23.2. The written agreement is the sole memorial of the parties' contractual rights and obligations and any prior oral agreements and/or understanding cannot

alter or amend the provisions of the written agreement.

23.3. The applicants lawfully terminated the written agreement on 30 July 2020.

23.4. The first respondent was thus in unlawful possession of the property since 8 August 2020 (due to the applicants' indulgence that she could remain on the property until 7 August 2020), and she is an unlawful occupier as defined in section 1 of PIE. The mere fact that her initial occupation was lawful, does not mean that her occupation cannot subsequently become unlawful. (See: **Ndlovu v Ngcobo; Bekker and Another v Jika** 2003 (1) SA 113 SCA at par 1 – 2 and 23; "*the **Ndlovu** case*", and **Davidon v Polovin NO and Others** (167/2000) [2021] ZASA at par 12**;**). The first respondent occupies the property without the consent of the liquidators in whom and under whose control the property vests.

THE EVICTION

24. The next question is whether the first respondent should be evicted. It firstly has to be determined whether it is just and equitable to grant an eviction order. In this regard the first respondent's agreement was terminated on 30 July 2020 and this application was issued on 9 October 2020. The first respondent has thus unlawfully occupied the property for a period less than 6 months at the time when the proceedings were instituted. I have to consider "*… all the relevant circumstances, including the rights and needs of the elderly, children, disabled person and households headed by women*", in terms of section 4(6) of PIE.

25. In **Occupiers, Berea v De Wet and Another** 2017 (5) SA 346 CC ("*the **Berea** judgment*"), the Constitutional Court held as follows:

"[44] The nature of the enquiry under section 4 of PIE was examined in the case of Changing Tides.[1] In summary, it was held that there are two separate enquires that must be undertaken by a court:

'First, it must decide whether it is just and equitable to grant an eviction order having regard to all relevant factors. Under section 4(7) those factors include the availability of alternative land or accommodation. The weight to be attached to that factor must be

[1] City of Johannesburg v Changing Tides 47 (Pty) Ltd and Others 2012 (6) SA 294 (SCA) at par 12.

assessed in the light of the property owner's protected rights under section 25 of the Constitution, and on the footing that a limitation of those rights in favour of the occupiers will ordinarily be limited in duration. Once the court decides that there is no defence to the claim for eviction and that it would be just and equitable to grant an eviction order, it is obliged to grant that order.'"

[45] The second enquiry, which the court must undertake before granting an eviction order, is to consider -

'what justice and equity demand in relation to the date of implementation of that order and it must consider what conditions must be attached to that order. In that second enquiry it must consider the impact of an eviction order on the occupiers and whether they may be rendered homeless thereby or need emergency assistance to relocate elsewhere. The order that it grants as a result of these 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 an 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.' (own emphasis)

[46] As is apparent from the nature of the enquiry, the court will need to be informed of all the relevant circumstances in each case in order to satisfy itself that it is just and equitable to evict and, if so, when and under what conditions. However, where that information is not before the court, it has been held that this enquiry cannot be conducted and no order may be granted." (own emphasis)

26. The court said the following in respect of the meaning of "*valid defence*" referred to in section 4(8) of PIE:

"[65] It follows that where it is unjust or inequitable to evict, the unlawful occupiers have a defence, and no eviction can be ordered. This is so because in terms of PIE, a court may order an eviction only if it is just and equitable. Accordingly, a defence directly concerning the justice and equity of an eviction, not necessarily the lawfulness of occupation, must be taken into account when considering all relevant circumstances. To limit the enquiry under ss 4(6) and (7) to the lawfulness of occupation would undermine the purpose of PIE and be a reversion to past unjust practices under the Prevention of Illegal Squatting Act. The enquiry is whether it is just and equitable to evict. This is a more expansive enquiry than simply determining rights of occupation." (own emphasis)

27. The following principles are also important:

27.1. In the **Ndlovu** case the following was said:

"*The effect of PIE is not to expropriate the landowner and PIE cannot be used to expropriate someone indirectly and the landowner retains the protection s 25 of the Bill of Rights. What PIE does is to delay or suspend the exercise of the 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. Simply put, that is what the procedural safeguards provided for in s 4 envisage."* (par 18)

27.2. The applicant bears the onus to satisfy the court that an eviction order is just and equitable under the circumstances. (See **City of Johannesburg v Changing Tides 47 (Pty) Ltd and Others** 2012 (6) SA 294 (SCA) at par 30. (the "**Changing Tides"** judgment).

27.3. As appears from paragraph 34 of the **Changing Tides** judgment, the applicant has to place sufficient evidence before the court in its founding affidavit to discharge the onus in the light of the court's duty to have regard to all the relevant facts:

"*In my view, therefore, there are no good reasons for saying that an applicant for an eviction order under s4(7) of PIE does not bear the onus of satisfying the court that it is just and equitable to make such an order. Cases where the onus affects the outcome are likely to be few and far between because the court will ordinarily be able to make the value judgment involved and the material before it. However, the fact that an applicant bears the onus of satisfying the court on this question means that it has a duty to place evidence before the court in its founding affidavits that will be sufficient to discharge the onus in the light of the court's obligation to have regard to all the relevant factors. The City's contention, that the common-law position continues to prevail and that it is for the occupiers to place the relevant facts before the court, is incorrect. Once that is recognised it should mean that applicants go to greater lengths to place evidence of relevant facts before the court from the outset, and this will expedite the process of disposing of these applications, particular in cases that are unopposed, as the need for the court to direct that further information be obtained, will diminish."* (own emphasis)

27.4. The applicant has to prove that it has complied with the section 4 notice

requirements; that the respondents are in unlawful occupation and that the circumstances render it just and equitable to grant an eviction order (the **Changing Tides** judgment, par 30 and also; **City of Johannesburg MM v Blue Moon Properties** 2012 (2) SA 104 CC at par 30).

27.5. The applicant's response to the fact that they carry the onus *"… may be to say that the applicant for relief will be unaware of the circumstances of the occupiers and therefore unable to place the relevant facts before the court. As the general proposition that cannot be sustained. Most applicants for eviction orders governed by PIE will have at least some knowledge of the identity of the persons they wish to have evicted and their personal circumstances. They are obviously not required to go beyond what they know or what is reasonably ascertainable*". (the **Changing Tides** judgment, par 31). The court identified potential sources of information such as the security personnel on site who witness the comings and goings of the occupiers and the police in respect of criminal activities (the **Changing Tides** judgment, par 32);

27.6. The owner's need to access the property and the intended use thereof, and timelines that are important from the owner's perspective, should also be canvassed (the **Changing Tides** judgment, par 32).

27.7. The court should not play a passive role in PIE application but should "*a probe and investigate the surrounding circumstances*" (the **Berea** judgment par 43 and the **Changing Tides** par 21 – 22), and as officers of the court the parties' legal representatives have an obligation to furnish all relevant information to the Court (the **Berea** judgment at par 47).

EVALUATION

28. The applicants primarily rely on the fact that the ownership of the property vests in the company in liquidation and/or the applicants; the respondents are unlawfully occupying the property and that notice was been given in terms of section 4(2) of the Act. The order of Justice Neukircher was served on the first respondent. The court order and the notice and accompanying application advise the first respondent that "*should the respondents claim that the eviction order will infringe that right (the right to adequate housing) it is incumbent that the respondents place information*

supporting that claim before the Court." The first respondent did subsequently appoint an attorney of record, although seemingly on a limited basis.

29. The joint liquidators were appointed on 1 October 2018 and on 25 October 2018 they were authorised to sell the (im)movable assets of the company in liquidation.

30. The applicants did not place any other relevant information before the court, for example, whether the first respondent's unlawful occupation is effecting the finalisation and costs of the liquidation, and the financial implications thereof on the creditors.

31. One would expect the applicants are in control of the property and one would at least expect them to also inform the court whether the first respondent and her family reside on the property on a full-time basis or not, and whether there are elderly persons, children and/or disabled persons on the premises (in the light of the fact that the applicant bears the onus). If an applicant cannot shed light on the aforesaid questions one would expect the applicant to at least motivate why it is not possible to do so.

32. The first respondent also failed to place any facts before court to show that she would suffer prejudice if an order of eviction is granted.

    32.1. The founding affidavit concludes with the following:

"*I am of the humble opinion that there will be no prejudice to the first respondent if the order is granted as prayed in the notice of motion… "*

In reaction to this averment, the first respondent contended that she does not fall within the ambit of the description of an illegal occupant as per section 4(1) and 4(2) of the PIE. "*I am of the humble opinion that the applicants cancelled the sale agreement prematurely and without any lawful reason.*" It is seemingly the respondents' sole defence that she is in lawful occupation of the property.

    32.2. The following was noted under the heading "***Introduction of the joint minute**:"*

"*This practice note is filed in order to facilitate the hearing of this unopposed application*

without the need of any oral argument as per the amended directions issued by the Office of the Judge President concerning the lockdown period".

The parties were seemingly ad idem that the matter should be finalised on the papers in the context of the central dispute, namely whether the written agreement was cancelled prematurely or not.

33. The following information can be gleaned from the first respondent's affidavit and/or correspondence incorporated into the opposing affidavit:

    33.1. The first respondent describes herself as "*… an adult female Paralegal Practitioner at 1390A Breyer Avenue, Waverley, Pretoria, Gauteng*", in the opposing affidavit.

    33.2. The first respondent annexed correspondence to the opposing affidavit, describing her as the CEO of a private company, Rebound Legal and Forensic Services (Pty) Ltd, and, from which it appears that she has amongst others completed courses in advanced Financial Management (UCT); Labour Law (UCT); Property Law – Q5 (UCT); Corporate, Commercial and Contracts Law (UP); and Insolvency Litigation and Admin Practice (UP).

    33.3. In the written agreement her marital status is described as "*ANC*" i.e., she is seemingly married out of community of property.

    33.4. One can conclude from her identity number (671213 0043 08 8) that she was born on 13 December 1967 and that she is presently 55 years old.

    33.5. The first respondent qualified in principle for a possible loan from Absa of some R1m.

34. The indications are thus that the first respondent is married out of community of property; she is a qualified paralegal practitioner; the CEO of a private company, Rebound Legal and Forensic Services (Pty) Ltd; she probably does not have any dependent minor children of her own, and that she participates in the marketplace.

35. Notwithstanding the aforesaid, I was not in a position to reach any conclusion as far as the rights and needs of the elderly; the disabled persons or children are

concerned and the court simply does not know whether this specific household is only headed by the first respondent. As appears from the aforesaid authorities an eviction order is not competent in the absence of the aforesaid information.

36. I thus on 22 September 2023, issued a directive that reads:

"*1. Insofar as this court may find that the first respondent is an unlawful occupier in terms of the Prevention of Illegal Eviction and Unlawful Occupation of Land, 19 of 1998 ("PIE"), it is incumbent:*

1.1 On the parties and their legal representatives to place all relevant facts before court in order to determine whether it is just and equitable to evict the first respondent from the premises, and if so, to determine a just and equitable date and possible conditions for the eviction. (See section 4(6) and 4(8) of PIE)

1.2 The court to probe and investigate the surrounding circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women; and

1.3 On the court not to grant an eviction order if the relevant information is not before the court.

2. The parties are referred to the following authorities:

2.1 City of Johannesburg v Changing Tides 47 (Pty) Ltd 2012 (6) SA 294 (SCA) at par 21 – 22 and 30 – 32 and 34; and

2.2 Occupiers, Berea v De Wet and Another 2017 (5) SA 346 CC, par 44 – 48; 65.

3. If so advised, the applicants can file a succinct supplementary affidavit in respect of the just and equitable enquiry on or before 4 October 2023 and the first respondent can likewise file a supplementary affidavit on or before 11 October 2023 to deal with the just and equitable enquiry."

37. On 4 October 2023, the first respondent's attorney of record, Mr van Staden reverted by means of e-mail and recorded that the matter was opposed and noted "*… that we have not as yet been served with the Applicant's legal representatives' Index.*" He again filed the notices to oppose and the opposing affidavit. Although the directive was acknowledged, the first respondent failed to deliver a supplementary affidavit. Mr van Staden's recordal is unhelpful to say the least. Having signed the joint practice note he was aware that the matter was dealt with in the opposed motion court. In light of the duty on legal representatives to place all relevant facts before court, they

will be well advised to address directives of this nature. They ignore such directives at their own peril.

38. On 4 October 2023, a supplementary affidavit was filed on behalf of the applicants.

39. The applicants firstly placed reliance on paragraph 39 of the **Ndlovu** case and relied on the **Shezi v L.V.L. and Another** (4209/2022) [2023] ZAGPJHC 373 (24 April 2023) ("*the Shezi case"*). Paragraphs 5.1 and 5.2 of the applicant's affidavit read:

"*5.1 In the matter of Shezi v L.V.L and Another (4209/2022) [2023] ZAGPJHC 372 (24 April 2023) Shezi matter), the Honourable Court held that:*

[18] I hold the view that the respondent has failed to take the Court into her confidence in that she has not proffered any or sufficient facts as to why it will not be just and equitable to grant the eviction order. There is no evidentiary burden on the applicant to state the facts that are unknown to him about the respondent but it is for the respondent to show to the satisfaction of this Court that her personal circumstances and that of her household are of such a nature that warrants the eviction order not to be granted. She has not provided any defence to the claim of the applicant except that she is married to the seller, Mr M. and that the property is a subject of the divorce action. It is my respectful view therefore that the eviction proceedings are within the perimeters of PIE and that it is just and equitable to grant the order evicting the respondent from the property of the applicant". (first respondent emphasis)

5.2 The Supreme Court of Appeal's judgment in Ndlovu v Ngcobo and Becker v Jika (case numbers 240/2001 and 136/2002) (2002) ZASCA 87; 4 All SA 384 (SCA) (dated 30 August 2002), upon which the Shezi matter relied held the following:

[19] Another material consideration is that of the evidential onus. Provided the procedural requirements have been met, the owner is entitled to approach the court on the basis of ownership and the respondent's unlawful occupation. 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 in issue between the parties. Whether the ultimate onus will be on the owner or the occupier we need not now decide."

40. Paragraph 19 of the **Ndlovu** judgment has been qualified by the **Berea** judgment and the **Changing Tides** judgment as discussed above. The point of departure in the **Shezi** judgment, namely that an owner applicant only has to comply with the procedural requirement and to address the occupiers' unlawful occupation, is incorrect in the light of the **Changing Tides** judgment. The applicant carries the onus to satisfy the court that it is just and equitable to grant an eviction order. The applicant has the duty to place known or reasonably ascertainable facts concerning the occupiers, before court. Absent the information, the court cannot be satisfied that an eviction order is just and equitable and an absolution of the instance order may even follow. The situation can easily be avoided. The applicant will have some knowledge of the relevant information and additional information can be obtained during, for example, informal discussions with the tenant and/or purchaser. A proper and full disclosure will enable a court to make a decision whether an eviction order is just and equitable and if so, when the eviction should take place. The court will exercise its discretion in the light of all the facts and against the backdrop that the intention of PIE is not to expropriate the owner and that the owner does not have a duty to provide alternative accommodation and to subsidise the unlawful occupiers (see: the **Blue Moon** judgment at par 40 and the **Ndlovu** judgment, *supra*). The applicants' personal circumstances and the impact of the alleged unlawful occupation on them will obviously also be considered when the court considers the circumstances of the unlawful occupiers and more specifically the needs of the elderly, children, disabled persons and households headed by woman.

41. It appears from the supplementary affidavit filed on behalf of the applicants that:

41.1. On Friday, 29 September 2023, an employee of Dynamic Auctioneers inspected the property and established that the first respondent's three employees, i.e., "*Gift, Steven and Johnny*" are residing in the main house and that the premises are used to manufacture leather bags.

41.2. "*… there were no indications of any disabled, sick or elderly individuals living on the property*", and,

41.3. The first respondent failed to pay occupational interest and no income was thus derived from the unlawful occupation of the first respondent and those who occupied through her.

42. The aforesaid information could have and should have been incorporated in the founding affidavit. It is in the interest of an applicant to disclose the personal circumstances of the occupiers as far as can reasonably be ascertained. Presently, the said disclosure would have demonstrated that the matter is for all practical purposes a commercial matter and that the "*just and equitable*" enquiry only features in a very limited sense.

43. The applicants request a cost order on an attorney and client scale as the first respondent "*has demonstrated a blatant disregard for this Honourable Court's rules and has shown no respect for the orders issued by this Honourable Court during the interlocutory proceedings*". There is merit in the submission in light of the first respondent's failure to file heads of argument and a practice note.

44. A further consideration is the fact that the first respondent failed to pay occupational rental whilst using the premises to generate income at the expense of the insolvent estate. That whilst contending that the agreement remains extant. The first respondent should under these circumstances vacate the premises forthwith and a special cost order is justified.

45. In the light of the aforesaid, I make the following order:

45.1. It is hereby declared that:

45.1.1. On 30 July 2020, the applicants lawfully cancelled the written agreement entered into between the parties on 4 May 2020; and

45.1.2. The first respondent is in unlawful occupation of portion 558 of the Farm Mooiplaats, 367, Registration Division JR, Gauteng; and

45.1.3. The first respondent is an unlawful occupier in terms of the Prevention of Illegal Eviction and Unlawful Occupation of Land Act, 19 of 1998 ("*PIE"*).

45.2. The first respondent and all persons claiming any right or interest to occupation under the first respondent are evicted from the property, portion 558 of the Farm Mooiplaats, number 367, Registration Division J.R, Gauteng within 3 (three) days after the service of this order on the first respondent.

45.3. The sheriff is authorised to evict the first respondent and any of the aforesaid persons who do not within 3 (three) days after the service of this order, vacate the property.

45.4. The first respondent is liable to pay the costs of this application on an attorney and client scale.

HJ DE WET

Acting Judge of the High Court

Gauteng Division, Pretoria

This Judgment was handed down electronically by circulation to the parties' and or parties' representatives by email and by being uploaded to CaseLines. The date for the hand down is deemed to be 27 October 2023

Date of hearing: 25 January 2023

Date of judgment: 27 October 2023

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