

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case number: A276/2023

DELETE WHICHEVER IS NOT APPLICABLE

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

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In the matter between:

**MOKOTO NKOANE
OTHER UNLAWFUL OCCUPIERS OF PROPERTY
SITUATED AT ERF [...], EXTENSION 03 MAHUBE
VALLEY MAMELODI EAST, PRETORIA**

FIRST APPELLANT

SECOND APPELLANT

and

RAMBO MATHABATHE

RESPONDENT

JUDGMENT

FLATELA J***Introduction***

[1] This is an appeal against the order and judgment of the Magistrate Court, Tshwane Central, Mamelodi, which granted an eviction order against Mrs. Nkoane and her children, including a 12-year-old minor (the appellants) from the property described as ERF [...], EXTENSION 03 MAHUBE VALLEY, MAMELODI EAST, PRETORIA (the Property). The court *a quo* made a finding that the eviction of the Appellants would not render them homeless, therefore, their eviction is just and equitable.

[2] The appellants contend that the Magistrate erred in finding that their eviction was just and equitable in terms of section 4 of the Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998 (the PIE Act), particularly ss 4(7) and (8), respectively.

[3] Moreover, the appellants contend that the Magistrate erred in not conducting an enquiry as to whether the eviction would lead to homelessness. In view of her finding that the appellants did not place or plead any evidence or relevant factors before the court to show that the eviction would lead to a possibility of homelessness, they contend that this was in total disregard of her constitutional duties.

[4] At issue in this appeal is whether the court *a quo* erred in finding that an eviction order against the First Appellant and her children would be just and equitable.

[5] It is trite that all eviction matters raise competing constitutional rights, namely, the right to property.¹ and the right to have access to adequate housing and not to be evicted from a place called home without an order of court made after considering all

¹ In terms of section 25 of the Constitution.

relevant circumstances.² The Constitutional Court has reiterated the same in *Machele v Mailula*.³

[6] The court seized with eviction is enjoined by the PIE Act to balance the rights of the owner and that of the unlawful occupier. Dealing with balancing act, Horn AJ in *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter*⁴ said:

In matters brought under PIE, one is dealing with two diametrically opposed fundamental interests. On the one hand there is the traditional real right inherent in ownership reserving exclusive use and protection of property by the landowner. On the other hand, there is the genuine despair of people in dire need of adequate accommodation ... It is the duty of the court in applying the requirements of the Act to balance these opposing interests and bring out a decision that is just and equitable.

Background Facts

[7] The First Appellant, her children and her estranged husband, Masese Nkoane, have lived at the property, which is their home and primary residence since 2009. On 29 March 2022, the First Appellant's estranged husband sold the property to the Respondent without the First Appellants' knowledge and consent. Until the sale, the property was part of a joint estate in the marriage of a community of property between the First Appellant and her estranged husband. After he sold the property, Masese Nkoane left the matrimonial home and lived elsewhere.

[8] In July 2022, the Appellant was informed by the Respondent that her estranged husband sold the property to him on 29 March 2022. Subsequently, the property was registered in his name on 28 July 2022, and he needed to move into the property. The First Appellant advised the Respondent that she was the seller's

² In terms of sections 26(1) and 26(3) of the Constitution, respectively.

³ *Machele v Mailula* [2009] ZACC 7; 2010 (2) SA 257 (CC); 2009 (8) BCLR 767 (CC)

⁴ *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter* 2000 (2) SA 1074 (SECLD)

wife and married in the community of property with him; furthermore, she did not consent to the sale of the property. Thus, the property was sold fraudulently.

[9] On 17th August 2022, the Respondent served the First Appellant with a notice to vacate the property within 30 days. The First Appellant ignored the notice. Instead, through her attorneys, the First Appellant informed the Respondent that her estranged husband had sold the property without her consent; therefore, she would not vacate the property.

[10] On 11 November 2022, the Respondent launched eviction proceedings in the Magistrate Court against the Appellants under the PIE Act.

The Parties' Pleaded Case

The Respondent's case.

[11] In motion proceedings, the affidavits constitute evidence. In his founding affidavit, the Respondent testified that he is the rightful owner of the property situated at ERF [...], EXTENSION 03 MAHUBE VALLEY, MAMELODI EAST, PRETORIA, under Title Deed 57719/2022, which showed his name as the owner. He is currently paying the bond for the property, and the Appellants are in unlawful occupation of the premises as defined in the PIE Act.

[12] The Respondent contended that in 2002, he was looking to buy property on the market when he came across an advertisement for the property on Property24. He contacted the estate agent and arranged for a viewing. The Respondent attended to view the property and found Mr Nkoane (the First Appellant's estranged husband) alone at the property. Satisfied with the property, the Respondent purchased it on 29 March 2022. On 28 August 2022, the property was registered in his name. It was when he was preparing to move in that he found the First Appellant at the property, who subsequently informed him that she was Mr Nkoane's wife and that they were in the process of divorcing.

[13] The Respondent contended that the First Appellant moved into the property before he could move in because she was not present when the Respondent viewed the property. He did not have information about where she was staying during the transfer process.

[14] The Respondent testified that he was a *bona fide* buyer and the legal owner of the property who should not be affected by the domestic affairs of the First Appellant and her erstwhile husband.

[15] The Respondent testified that his attorneys had advised the First Appellant that she had a remedy to sue her estranged husband for half of her proceeds.

[16] Regarding mediation, the Respondent testified that he confronted his estate agent about the presence of the Appellants in the property. The estate agent denied any knowledge of the presence of the Appellants in the property. The Respondent then approached the attorneys to assist him; acting on his instructions, his attorneys wrote a letter to the First Appellant, cautioning her about her unlawful behavior. They also proceeded to advise her to approach the court on an urgent basis to seek an order to freeze the seller's account so as to get her half share of the proceeds.

[17] The Respondent contended that the estate agent gave the same advice to the First Appellant, but she did not seem interested in getting her half share of the proceeds; instead, her vested interest seemed to be unlawfully occupying his property.

[18] Importantly, the Respondent testified that he accepts the correct legal position of section 4 of the PIE Act as applicable in this matter and, in particular, section 4(7) of the same Act.

[19] Insofar as the provision of alternative accommodation is concerned, the Respondent testified that the third respondent, the Municipality, can be ordered to provide alternative accommodation to the First and Second Appellants.

[20] The Respondent testified further that, to his knowledge, no disabled people occupied the property. Thus, the Respondent contends that he has complied with the prescripts of the PIE Act.

The Appellants' evidence.

[21] In her answering affidavit, the First Appellant raised a point *in limine* that she was the lawful owner of the property and that the relief sought by the Respondent was incompetent. She contended that she received a demand from the Respondent's attorneys demanding that she vacate her matrimonial home together with her children, one of whom was still a 12-year-old minor.

[22] Furthermore, the First Appellant drew the court's attention to the fact that their attorneys were appointed on a *pro bono* basis since she is destitute. She also testified that her estranged husband had caused her financial stress to the extent that she was not able to maintain her children or afford anything economically. The First Appellant further testified that she had been paying a loan she had taken out on the benefit of the estranged husband, which she had finished paying in August 2022. Lastly, she also discovered that her husband left the matrimonial home in her absence, took 85% of the furniture with him, and sold the house without her consent.

[23] The Appellant further testified that she has been residing at the property with her estranged husband and children since 2009. She filed divorce proceedings in June 2022 against her estranged husband upon realizing that he sold their matrimonial home.

[24] Moreover, she testified that on 17 August 2022, she approached the Court and obtained an order *ex parte* to freeze all her estranged husband's accounts. Unfortunately, the *Rule Nisi* was discharged due to the non-appearance of her erstwhile attorneys, the State Legal Aid Attorneys.

[25] Moreover, the Appellant drew the court's attention to sections 26 and 28 of the Constitution and the Matrimonial Act 88 of 1984. Responding to the allegations by the Respondent that she was not residing at the Matrimonial home at the time of the sale of the property because when he viewed the property, she was not there, she contended that it is possible that she was working on the day the Respondent came to view the property.

The Appellants' submissions in this court

[26] Relying on the *Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele*⁵, the Appellants argued that the Magistrate failed to make a proper enquiry as to the availability of alternative accommodation in the light of the First Appellants uncontroverted evidence that she is destitute and lacks financial means and assets to maintain her children.

[27] The Appellants argued that the scant information that had been made available should have alerted the court to the fact that the occupiers were poor and that the prospects of homelessness were very real.

[28] The Appellants submitted that the Magistrate failed to seek input from the City of Tshwane Municipality regarding whether alternative accommodation is available, which renders the eviction order unjust and inequitable.

The Respondent's submissions

[29] The Respondent correctly submitted that the onus of demonstrating the justice and equity of an eviction rests on the applicant seeking the eviction order. The applicant has a duty to present facts before a court from which an inference can be drawn that an eviction would be just and equitable, as was held in *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others*⁶.

⁵ *Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* [2010] 4 All SA 54 (SCA)

⁶ *The City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others* (SCA) [2012] ZASCA 116; 2012 (6) SA 294 (SCA) (14 September 2012) paragraph 11

[30] On behalf of the Respondent, it was submitted that where an eviction application may lead to homelessness, the relevant local authority must be joined from the onset. The Respondent submitted that the requirement was fulfilled, and that the local municipality was joined in the main eviction proceedings.

[31] The Respondent argued that based on the totality of all the facts and evidence raised by the Respondent, which was properly interrogated and scrutinized by the court *a quo*, it is evident that the court *a quo* applied its mind completely and did not err in finding in favor of the Respondent. ‘

Legal principles

[32] The point of departure in all eviction applications is the Constitution. Section 26(3) provides that ‘[n]o one may be evicted from their home . . . without an order of court made after considering all the relevant circumstances’. The PIE Act was promulgated to give effect to section 26(3) of the Constitution.

[33] The PIE Act enjoins the courts to order an eviction only "if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances," as contemplated in sections 4(6) and (7).

[34] The Constitutional Court in ***PE Municipality v Various Occupiers***⁷ outlined the new approach that courts must adopt in eviction matters. It held as follows:

“The court is thus called upon to go beyond its normal functions and to engage in active judicial management according to equitable principles of an ongoing, stressful and law-governed social process. This has major implications for the manner in which it must deal with the issues before it, how it should approach questions of evidence, the procedures it may adopt,

⁷ Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC) 2004 (12) BCLR 1268 (CC) para 17.

the way in which it exercises its powers and the orders it might make. The Constitution and PIE require that, in addition to considering the lawfulness of the occupation the court must have regard to the interests and circumstances of the occupier and pay due regard to broader considerations of fairness and other constitutional values, to produce a just and equitable result.”⁸

[35] Of relevance in this matter are the provisions of section (4)(7) which provide as follows:

“If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land is sold in a sale of execution pursuant to a mortgage, whether 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, and including the rights and needs of the elderly, children, disabled persons and households headed by women.”

[36] Wilson J neatly summarised the principles of justice and equity in ***Madulammoho Housing Association NPC v Nephawe and Another***.⁹ They are as follows:

- a. first, that the applicant for an eviction order bears the onus to establish that it is just and equitable to grant one;

8

⁹ *Madulammoho Housing Association NPC v Nephawe and Another* (22/023954; 21/40262) [2023] ZAGPJHC 7, at paragraph 8

- b. second, that evictions that lead to homelessness are not generally just and equitable;
- c. third, that a court has wide powers to require applicants for eviction orders, organs of state and unlawful occupiers to produce the information necessary to enable the formulation of a just and equitable order; and
- d. fourth, that where an eviction would lead to homelessness, the duty to provide the alternative accommodation necessary to prevent an unlawful occupier from becoming homeless generally falls on the local authority with jurisdiction over the property.

[37] For the Applicants to succeed in obtaining an eviction order, he must satisfy the Court that,

- (a) That they are the rightful owners of the land or immovable property.
- (b) That the Appellants are in unlawful occupation of the property.
- (c) And that it is just and equitable to grant the eviction order.

[38] Having dealt with the law and legal principles applicable to this matter, the court now turns to the Magistrate's judgment.

Discussion

[39] It is trite that section 4 of PIE requires the court to conduct two-stage inquiries before granting the eviction order. In *Changing Tides*¹⁰ the Supreme Court of Appeal stated the following:

In terms of s 4(7) of PIE, an eviction order may only be granted if it is just and equitable to do so, after the court has had regard to all the relevant circumstances, including the availability of land for the relocation of the occupiers and the rights and needs of the elderly,

¹⁰ The City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others (SCA) [2012] ZASCA 116; 2012 (6) SA 294 (SCA) (14 September 2012) paragraph 11

children, disabled persons and households headed by women. If the requirements of s 4 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) to attach reasonable conditions to an eviction order."

[40] Dealing with the court's duties in eviction proceedings, Mojapelo AJA writing for the majority in ***Occupiers of Erven 87 and 88 Berea v De Wet N.O. and Another***¹¹ expressed himself as follows:

"[48] 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 (a). 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 occupation. It assumes and is only due when the occupation is unlawful."¹²

[41] In her judgment, the Magistrate correctly outlined the legal principles. The question is whether these principles have been correctly and judiciously applied to the pleaded case, in particular, that of the Appellants. We do not think so.

[42] Relying on the matter of ***Knox v Mofokeng and Others***¹³ the Magistrate correctly held that the Respondents are *bona fide* purchasers of the property and its

¹¹ *Occupiers of Erven 87 and 88 Berea v De Wet N.O. and Another* 2017 (5) SA 346 (CC).

¹² Port Elizabeth Municipality above n 8 at para 32 where Sachs J stated: "The court is not resolving a civil dispute as to who has rights under land law; the existence of unlawfulness is the foundation for the enquiry, not its subject-matter."

¹³ *Knox v Mofokeng and Others* (2011/33437) [2012] ZAGPC JHC 23, 2013 (4) SA 46 (GSJ).

rightful owners. With ownership established, the Appellants' occupation of the property without the owner's consent makes them unlawful occupiers.

[43] Having established the first two requirements, a two-stage enquiry was triggered. The question that the court was called to answer was whether, in its opinion of the Court, after considering all the relevant circumstances as contemplated in sections 4(6) and (7), the granting of an eviction order in the result be just and equitable having had regard to the same and all other relevant considerations of the matter as espoused thereto by the Act, albeit not exhaustively.

[44] It is apparent from the Magistrate's judgment that the learned Magistrate did not conduct an inquiry as required by sec 4(7) of the PIE Act. It is necessary to reproduce the Magistrate's evaluation of evidence. In her evaluation of evidence, the learned magistrate stated the following:

"41 The respondent has not placed any other factors before this court indicating that there is a possibility of homelessness or any other factor to mitigate her case based on the PIE and requirements.

Conclusion.

42 In conclusion, I am satisfied that the applicant is the owner of the premises and accordingly is vested with the locus standi to launch the eviction proceedings. I am satisfied that the First and Second Respondent are unlawful occupiers. I am further satisfied that the requirements in terms of PIE have been complied with. I therefore concluded that it is just and equitable to order an eviction of the First and Second Respondent.

43 On the facts of the matter an eviction order will not render the First and Second Respondent homeless, the property has been purchased in 2022 and the first respondent has had knowledge thereof to date.

The First Respondent is employed and is still married to the seller. (my emphasis)

Placing all the circumstances on a balancing scale, I hold the view that it is just and equitable to grant relief. An appropriate order coloured by the facts of this case is to declare the First and Second Respondent as unlawful occupiers and grant an eviction.”

Did the Magistrate correctly apply the provisions of sec 4 of PIE when she ordered eviction?

[45] In paragraph 41 of her judgment, the learned Magistrate held, “the Appellants has not placed any other factors before this court indicating that there is a possibility of homelessness or any other factor to mitigate her case based on the PIE and requirements.” This is factually incorrect. The Appellant pleaded destitution and that her estranged husband had sold their matrimonial home and their primary residence without her consent and left with 85% of the furniture. She stated that she does not have the financial means to take care of her children. She also pointed out that even her attorneys were appointed on a *pro bono basis*; moreover, she had been failed by the State's Legal Aid who did not appear in court when she sought to freeze her husband's account to claim her half of the proceeds. Hence the *Rule Nisi* was discharged. These pleaded facts were sufficient for an inquiry on possible homelessness.

[46] In any event, the court seized with eviction is obliged to “have regard to all the relevant circumstances “before deciding that the eviction would be just and equitable. It cannot fulfill that responsibility if it has inadequate information.

[47] In ***PE Municipality***,¹⁴ Sachs J said that:

¹⁴ *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7; 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC)

“The obligation on the court is to ‘have regard to’ the circumstances, that is, to give them due weight in making its judgment as to what is just and equitable. The court cannot fulfill its responsibilities in this respect if it does not have the requisite information at its disposal. It needs to be fully apprised of the circumstances before it can have regard to them. It follows that although it is incumbent on the interested parties to make all relevant information available, technical questions relating to onus of proof should not play an unduly significant role in its enquiry... Of equal concern, it is determining the conditions under which, if it is just and equitable to grant such an order, the eviction should take place. Both the language of the section and the purpose of the statute require the court to ensure that it is fully informed before undertaking the onerous and delicate task entrusted to it. In securing the necessary information, the court would therefore be entitled to go beyond the facts established in the papers before it. Indeed, when the evidence submitted by the parties leaves important questions of fact obscure, contested or uncertain, the court might be obliged to procure ways of establishing the true state of affairs so as to enable it properly to ‘have regard’ to relevant circumstances.”

[48] Recently, the Constitutional Court in *Pitje* said that courts are not allowed to apply PIE passively and must “probe and investigate the surrounding circumstances.”¹⁵

[49] In determining the question of whether the eviction would render the Appellants homeless, the learned Magistrate held that the eviction would not render the Appellants homeless because *the property had been purchased in 2022. The first respondent has known thereof to date. The First Respondent is employed and is still married to the seller.*”

[50] It does not appear from the magistrate's judgment that it considered the relevant provisions of section 4, as it was obliged to.¹⁶

¹⁵ *Pitje v Shibambo* [2016] ZACC 5; 2016 JDR 0326 (CC); 2016 (4) BCLR 460 (CC) at para 19.

[51] On the totality of the evidence of the Appellants, it is apparent that an inquiry regarding whether eviction would lead to homelessness should have been conducted. The learned Magistrate only states that she has assessed the evidence. However, it is not clear from her judgment how she concluded that there was no risk of homelessness in the light of uncontroverted evidence that the Appellant was very poor and could not even afford to maintain her children financially. The learned Magistrate cherry-picked the evidence and did not assess the evidence in totality. In the circumstances, the Magistrate's failure to conduct an inquiry as envisaged by the Act renders the court order inherently unjust and inequitable.

[52] In the result, it is ordered that:

1. The Appeal is upheld.
2. The Magistrate court order that the eviction is just and equitable is set aside.
3. The matter is remitted to the Magistrate Court for an expedited enquiry into whether the eviction of the Appellants would lead to homelessness.
4. There is no order as to costs.

FLATELA L

Judge of the High Court of South Africa

Gauteng Division, Pretoria

¹⁶ See *Machele and Others v Mailula and Others* [2009] ZACC 7; 2010 (2) SA 257 (CC); 2009 (8) BCLR 767 (CC) (*Machele*) at para 15.

I agree.

MOTHA M

Judge of the High Court of South Africa

Appearances

For the First & Second Appellants:		PCS Buckland
Instructed by:		Malose Matsaung Attorneys
For the Respondent	:	H Nkabinde
Instructed by	:	Mojela Attorneys
Date of Hearing	:	7 and 27 March 2024
Date of Judgment	:	05 July 2024