IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: 2571/21

In the matter between:

KASSAN NAIDOO	**FIRST APPLICANT**
MOGENDRIE NAIDOO	**SECOND APPLICANT**

and

KZN DEPARTMENT OF HUMAN SETTLEMENTS	**RESPONDENT**

This judgment was handed down electronically by circulation to the parties' representatives by email, and released to SAFLII. The date for hand down is deemed to be 24 November 2022 at 15:00

ORDER

The following order is granted:

1. The application for leave to appeal is dismissed with costs.

JUDGMENT

Mlaba AJ

[1] The applicants, Mr Kassan Naidoo and Mrs Mogendrie Naidoo, applied for leave to appeal against the *ex tempore* judgment that I delivered on 16 September

[1] The applicants, Mr Kassan Naidoo and Mrs Mogendrie Naidoo, applied for leave to appeal against the *ex tempore* judgment that I delivered on 16 September 2022. The respondent, the Department of Human Settlements, KZN, opposed the application and the parties delivered their arguments before me on 27 October 2022.

[2] On 16 September 2022 this court issued the following order against the applicants, who were the respondents in the eviction application:

'1. That the Respondents and all other persons through the Respondents being in occupation thereof shall vacate the immovable property described as Flat 01, Block A, 639 Taurus Mews, Shallcross, KwaZulu-Natal ("the property") within one month of service of this order.

2. In the event of the Respondents failing or refusing to comply with order 1 hereof, the Sheriff/Deputy of this Honourable Court be and is hereby authorised and empowered to forthwith eject from the said property the Respondents and all other persons occupying the said property through the Respondents.

3. The Respondents pay the costs of this application, jointly and severally the one paying the other to be absolved.'

[3] The applicants claimed that they had already vacated the property when the application for their eviction was instituted by the respondent but that it was their son who was in occupation of the respondent's premises. They denied that their son was occupying the premises through them. They further submitted that the respondent ought to have withdrawn the application against them and instituted an application against their son. They however admitted that when they vacated the premises they did not inform the respondent and they also did not restore occupation of the property to the respondent by handing back the keys to the premises back to the respondent. They also did not indicate the date on which they vacated the premises.

[4] The respondent submitted that it had investigated the matter to establish who had been occupying the premises but its officials were denied access in a violent manner. The officials did however establish that the applicants were the ones who were occupying the premises. They attempted on several occasions to have the applicants vacate the premises but their attempts yielded no favourable results. An application to evict the applicants was therefore instituted and the court processes were served on the applicants and some were also served on their son. At no stage

did the applicants inform the respondent that they had vacated the premises until they filed their opposing affidavit. At no stage did the applicants' son intervene in the proceedings either. The notice of set down for the 16th of September 2022 was served at the premises on the applicants' son. He did not attend court on the date of the hearing.

[5] The matter was argued and the court order was issued. Counsel for the applicants, Mr *Nortje*, submitted that the court had erred in a number of respects, as summarised hereunder:

'1. by concluding that the first and second respondents' son occupied the property "by, through or them" without any facts supporting that conclusion;

2. by not concluding that the applicant had made out its case in reply;

3. by concluding that the respondents were in occupation of the property at the time of the service of the application, despite there being no evidence supporting this conclusion;

4. by granting an order of eviction (and costs) against the respondents when they were no longer in occupation of the premises;

5. by not accepting the respondents' version of facts, despite their being no reason to reject the respondents' version;

6. by effectively evicting the respondents' son despite him not being a party, and despite being no facts before the court to determine the circumstances of the respondents' son as required by Section 4 of The Prevention of Illegal Eviction from Unlawful Occupation of Land Act 19 of 1998;

7. by granting an eviction order against the respondents, when there was no basis to do so.'

[6] Mr *Nortje* further submitted in conclusion that the court had misdirected itself when it granted relief against the applicants as there was no basis for it to do so. He requested that leave to appeal be granted, and that the appeal be heard by the full court of the KwaZulu Natal High Court, Pietermaritzburg.

[7] Counsel for the respondent, Ms *Moosa SC*, opposed the application on the basis that the court had correctly found that the applicants and those who were in occupation of the property through the applicants were in unlawful occupation and were to be evicted. The applicants had all the facts but had failed to present the facts to the respondent. They did not inform the respondent that they had vacated the property, they did not restore occupation to the respondent by returning the keys to

the property. They did not inform the respondent that their son was in occupation of the property and when he had taken occupation of the property and how. The applicants denied that their son was occupying the property through them but failed to establish the basis thereof.

[8] The respondent submitted that the applicants had failed to demonstrate that there was a rational basis for the conclusion that they had prospects of success on appeal. The order issued by the court was against the applicants and all other persons occupying the property through them. The occupier, as alleged by the applicants, was their son and the respondent's understanding that the son was occupying the property through his parents was reasonable and sensible in the absence of any other facts by the applicants. The order was therefore not erroneous, especially because service of the court processes was on the applicant's son. He failed to intervene in the proceedings when he could have done so at any stage prior to the final order being issued. The respondent had taken several steps in establishing who was in unlawful occupation of its property.

[9] In conclusion the respondent submitted that, in the main application, the applicants did not oppose the fact that the son was occupying the property through them. They also did not raise the issue of costs but they simply alleged that they had vacated the property and without giving further details thereon. The respondent requested that the application be dismissed with costs.

[10] The test to be applied in applications of this nature is set out in ss 17(1) *(a)* (i) and 17(1) (*b*) of the Superior Courts Act 10 of 2013. Leave to appeal may only be given where the judge is of the opinion that 'the appeal **would** have a reasonable prospect of success'.

[11] The test was considered in *S v Smith*[1] where the court held that:

'What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince

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[1] *S v Smith* [2011] ZASCA 15; 2012 (1) SACR 567 (SCA) para 7.

this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.' (Footnote omitted.)

[12] The applicants attempted to cloud the issues during argument on 16 September 2022, however, the issue to be determined by the court was clear: whether or not the applicants and those occupying the property through them was in unlawful occupation and had to be evicted after the respondent had complied with the requirements as set out in s 4 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE Act).

[13] Submissions were made by the respondent on 16 September 2022, and they were admitted by the applicants and could not be successfully challenged, namely that the applicants had been in unlawful occupation of the respondent's property and that their son was, as at the date of the hearing, in unlawful occupation of the respondent's property. Further, that when the applicants vacated the property, if they indeed did, they failed to inform the respondent and further restore occupation to the respondent by handing back the keys to the property. The submission in this regard by Mr *Nortje* is that the applicants had no legal duty to do so.

[14] There was no dispute that the respondent had, on numerous occasions, been denied access to its property and violently so. The applicants had failed/refused to vacate the premises and allow the respondent to take back control of its property. The respondent accordingly instituted eviction proceedings, and only then did the applicants allege that they had vacated the premises however, even at that stage, the premises were not vacant as their son was still in occupation thereof. On 16 September 2022 when the matter was heard, the applicants' son was still in unlawful occupation of the respondent's property.

[15] Having considered the submissions by both parties, I was satisfied that the respondent had complied with the PIE Act and that the applicants' son who was in

unlawful occupation of the respondent's property fell into the category of "all other persons occupying the said property through the Respondents."

[16] In my view, my finding and the order is appropriate in the circumstances.

[17] Having considered the grounds of appeal as well as the submissions made, I am firmly of the view that there is no rational basis to conclude that there are reasonable prospects of success on appeal.

[18] The applicants submitted that there was no basis in granting relief against them as they already vacated the property and that the costs order against them is unfair.

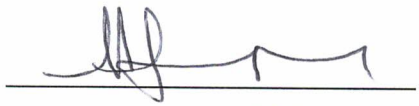
[19] If that is so, then the order will have no effect on them but their son who occupies the property through them. The costs order, in my view, is appropriate as the applicants ought not to have opposed the application as, according to them, they had already vacated the property. However, because they elected to oppose the application and the matter was decided against them, then they must pay the costs.

[20] In my view, the appeal would not have reasonable prospects of success.

Order

[21] I therefore make the following order:

1. The application for leave to appeal is dismissed with costs.



N F Mlaba AJ

APPEARANCES

Date of hearing:	27 October 2022
Date of Judgment:	24 November 2022

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