Reportable:	*Yes/No*
Circulate to Judges:	*Yes/No*
Circulate to Magistrates:	*Yes/No*

IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)

CASE NO.: 1335/2021
Date heard: 03-02-2023
Date delivered: 25-08-2023

In the matter between:

Giuseppe Trolese	**Applicant**
And	
Ross Kirby Henderson	**1st Respondent**
S Maretela	**2nd Respondent**
Sol Plaatje Municipality	**3rd Respondent**

CORAM: WILLIAMS J:

JUDGMENT

WILLIAMS J:

1. This is an application for the eviction of the first and second respondents in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998 (PIE).

2. The applicant, Mr Giuseppe Trolese, the owner of a residential property situated at 4 Trolese Manor, Royldene, Kimberley (the property), entered into a written lease agreement with the first applicant, Mr Ross Kirby Henderson on 26 April 2018 for the lease of the property for a period of 5 years.

3. The applicant avers that the 1st respondent, from the onset, failed to make regular monthly rental payments in accordance with the lease agreement which led to the applicant instituting two actions in the Magistrates Court against the 1st respondent for the payment of arrear rentals and for the cancellation of the lease agreement. The action under case number 1789/2020, for arrear rentals in the amount of R85 528, 16 has not yet been finalized and in the action under case number 266/2021, default judgment had been granted against the 1st respondent in an amount of R66 013, 86.

4. When the sheriff attempted to serve the summons in case no 266/2021 on the 1st respondent at the property, he was informed by the tenant, Ms S Maretela, the 2nd respondent, that the 1st respondent had left the given address. The summons was thereafter served on the 1st respondent on 10 June 2021 at 11 Trolese Manor, Royldene, where he apparently resides. Shortly thereafter the applicant launched this application for the eviction of both the 1st and 2nd respondents from the property.

5. The respondents opposed the application. The 1st respondent, who deposed to the answering affidavit raised various points *in limine* to wit: lack of jurisdiction, lack of *locus standi*, non-compliance with clause 16.1 of the lease agreement (re breach) and non-compliance with s1 (xi) of PIE. He furthermore denied that he was in arears with the rental and that the lease agreement had been cancelled. He alleged that he had given the 2nd respondent permission to occupy the property and that the applicant had tacitly consented to her living in the property in that the applicant's agent, a certain Ms Siebert had assisted the 2nd

respondent in obtaining a pre-paid electricity meter and that the applicant himself, in the presence of the 1st respondent made arrangements with the 2nd respondent in respect of the replacement of a geyser.

6. In addition to the above-mentioned, the 1st respondent stated that the 2nd respondent is a single, unemployed parent living with her four minor children in the property and will be rendered homeless should an eviction order be granted since the 3rd respondent, the Sol Plaatje Municipality (the Municipality) had not made provision for alternative accommodation for the 2nd respondent and her minor children.

7. In his replying affidavit the applicant denied the allegations made by the 1st respondent and more specifically that the 2nd respondent occupied the property with his permission. He stated that Ms Siebert was the previous occupier of the property and if she had assisted the 2nd respondent it was without his knowledge or approval. He stated further that he had been under the impression that the 1st respondent had taken occupation of the property with his wife, the 2nd respondent.

8. I was informed from the bar that the matter was before Mamosebo J on 11 November 2022 who postponed the application to afford the 2nd respondent the opportunity to place her personal circumstances before court. Shortly before that date the Municipality also filed their affidavit reporting on the availability of alternative accommodation.

9. Contrary to what the 1st respondent stated in the answering affidavit, to which I may add the 2nd respondent confirmed the correctness of insofar as it related to her, in her supplementary affidavit it appears that the 2nd respondent has three children who live with her in the property. Two of the children are still minors and are learners respectively at a high school situated approximately 500 meters from the property and a primary school situated about 1 kilometer from the property. The third child, who has attained majority, attends a college about 3 kilometers from the property.

10. The 2nd respondent also stated that the 1st respondent, who is the father of the three children, assists with the school fees of the two minor children. The 2nd respondent stated that she is employed as a part time receptionist earning R5000, 00 per month and is the sole breadwinner in the household.

11. Interestingly though, it appears from the 2nd respondent's affidavit that the 1st respondent never occupied the property, but seems to have entered into the lease agreement for the purpose of providing accommodation for the 2nd respondent and her children.

12. Be that as it may, on the applicant's version, when this application was heard, the 1st respondent had been in arrears with the rental payments in the amount of approximately R400 000, 00, with no payments having been made after the institution of this application. The 1st respondent's bald denials in the regard, without attaching proof of rental payments, does not create a material dispute of fact and given the discrepancies between the facts alleged in his

affidavit and that of the 2nd respondent, I have no qualms in rejecting the 1st respondent's denial of non-payment as false.

13. During argument before me Mr Babuseng, who appeared for the respondents, argued only two of the points *in limine* raised on the papers, that is, that this court does not have jurisdiction to hear this application and that the 1st respondent is not an *"occupant"* for purposes of the PIE Act.

14. As far as the jurisdictional issue is concerned, the 1st respondent relies on clause 18.1 of the lease agreement read together with s45 of the Magistrates' Court Act 32 of 1844, for the contention that this court has no jurisdiction to entertain this matter. Clause 18.1 of the agreement reads as follows:

> *"The parties agree to the jurisdiction of the Magistrates Court relating to any action or suit arising from this Agreement or the cancellation thereof."*

S 45(1) of the Magistrates' Court Act make provision for parties to consent in writing to the jurisdiction of the magistrates or regional court to determine proceedings beyond its jurisdiction subject to certain provisos.

15. A consent under s 45(1) does however not necessarily oust the jurisdiction of the High Court and unless the parties have shown a clear intention to make the Magistrates Court the exclusive forum, the High Court retains concurrent jurisdiction. This is so because, unlike the magistrates or regional courts, the superior courts have inherent jurisdiction to make orders, unlimited as to amount, in respect of matters, that come before it, subject to limitations imposed by statute or in some instances the common law.

16. In this matter the High Court retains its concurrent jurisdiction to hear the application and make orders herein since the Magistrates Court has not by consent been made the exclusive forum to decide the issue. That being said, the jurisdictional point *in limine* has no merit.

17. The other point *in limine* which was argued was that the 1st respondent is not an unlawful occupier as defined in PIE under s 1 thereof and that therefore PIE is not applicable to him. At this stage I must pause to mention that in the answering affidavit, the 1st respondent alleged that the 2nd respondent was also not an unlawful occupier by virtue of the fact that she occupied the property with his permission as lessee. This contention was not pursued during argument, counsel for the respondents apparently taking cognizance of the fact that the lease agreement prohibits sub-letting or parting with possession of the property without the lessor's prior consent.

18. S 1 (xi) defines *"unlawful occupier* as follows:
". . . a person who occupies land without the express or tacit consent of the owner or person in charge, or without any right in law to occupy such land, ..." (own underlining)
The argument is therefore that since the 1st respondent does not occupy the property, a fact which was known to the applicant before this application was launched, the relief sought against the 1st respondent is an abuse of process and should be dismissed with costs.

19. Mr Van Tonder, who appeared for the applicant, argued that it would not be untenable to grant an eviction order against the 1st respondent, who although not a *de facto* occupier, has allowed the 2nd respondent to occupy the property through him and is obviously the driving force behind the opposition to the application. He argued that it is in any event not uncommon that eviction orders are granted against a named party and all those who occupy through him or her.

20. I cannot agree with Mr Van Tonder. The instances when such orders as described are made are when a known party occupies a property together with other persons unknown to the applicant. Our Courts are not in the habit of granting orders which are unable of execution. The 1st respondent cannot be evicted because he does not occupy the property. The applicant has other civil remedies against the 1st respondent which he is currently pursuing in the Magistrates Court.

21. As mentioned in paragraph 13 above, Mr Babuseng did not raise the other points *in limine* during argument, which deal with the *locus standi* of the applicant and whether the lease agreement has been properly cancelled. I will accept that these issues have been conceded and in my view correctly so.

22. I now deal with the position of the 2nd respondent. On her version she and the children have been occupying the property since 2 April 2018 with the 1st respondent subsequently entering into the lessee agreement with the applicant on 26 April 2018. It was not disputed in argument before me that she is an unlawful occupier in

terms of PIE, although through no fault of her own. The argument in respect of her is that it would not be just and equitable to evict her as a single mother when the Municipality has not made adequate arrangements to provide her and her children with proper accommodation. Mr Babuseng contended that there is no human dignity in relocating a female headed household to an open veld.

23. In this regard the Municipality has in its affidavits, deposed to by Mr A Pitso, the legal advisor of the Municipality and Mr P Bonokwane, the Municipality's Acting Head: Housing Development, reported on the availability of alternative accommodation within the greater Kimberley area. In summary the position is as follows:

23.1 The current housing backlog in this area is estimated at about 12 000 housing units.

23.2 The municipality is attempting to address the backlog by identifying immovable property owned by it for the establishment of a township. The process involved is time consuming.

23.3 The Municipality owns flats which can be leased for about R1000, 00 per month plus electricity, if proof of income is provided, however all the flats are occupied and there is a waiting list of persons who have already applied to occupy such flats should it become vacant.

23.4 Temporary alternative accommodations can be supplied in a transit camp in Lethabo Park which is not currently fully occupied.

23.5 The Municipality can clear land in the transit camp to accommodate the 2nd respondent within 2 to 3 weeks. The land cleared will have access to basic communal water facilities and sanitation services.

23.6 Due to *inter alia* budgetary constraints the Municipality is not able to provide building materials and the 2nd respondent would have to attend to the erection of a structure herself.

23.7 The Municipality will provide a truck, if so requested, for the necessary transportation to the transit camp.

24. The relevant sections of PIE which apply in this case are s 4 (7) and s 4 (8) which read as follows:

"Eviction of unlawful occupiers

. . .

> *(7) 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.

(8) If the court is satisfied that all the requirements of this section have been complied with and that no valid defence has been raised by the unlawful occupier, it must grant an order for the eviction of the unlawful occupier, and determine—

(a) a just and equitable date on which the unlawful occupier must vacate the land under the circumstances; and

(b) the date on which an eviction order may be carried out if the unlawful occupier has not vacated the land on the date contemplated in paragraph (a).”

25. In considering what is just and equitable the courts are to consider what is just and equitable to all the parties, especially so when the applicant is a private landowner. In *Ndlovu Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA), it was held at paragraph 17 that the effect of PIE is not to expropriate the landowner and PIE cannot be used to expropriate someone indirectly. PIE does however act to delay or suspend the exercise of the landowner’s rights to his property until a determination has been made whether it is just and equitable to evict the unlawful occupier and under what circumstances. The approach was endorsed by the Constitutional Court in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC) at paragraph 40.

26. It is completely understandable that the 2nd respondent would not be happy to relocate from comfortable accommodation in one of the better suburbs in the area to the transit camp on the outskirts of town, which is what the Municipality has available right now as temporary accommodation until more permanent municipal accommodation becomes available. This is the fate, unfortunately, of a multitude of indigent people in this country, even those households headed by women. The PIE Act certainly does not place an obligation on the Municipality to provide the 2nd respondent with accommodation of her choice in the area of her choice. In *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others* 2012(6) SA 294 (SCA) at paragraph 15 thereof, the following is stated:

"The Constitutional Court has on several occasions stressed that, in the present situation in South Africa, where housing needs are so great and resources so limited, there cannot be an absolute right to be given accommodation. Specifically in regard to s 6(3)(c) of PIE, which requires the court to have regard to the availability of alternative accommodation or land, it has said that there is no unqualified constitutional duty on local authorities to ensure that there cannot be an eviction unless alternative accommodation has been made available. The correct position appears to be, as explained by O'Regan J in Joe Slovo, that an eviction order in circumstances where no alternative accommodation is provided is far less likely to be just and equitable than one that makes careful provision for alternative housing. Neither PIE nor s 26 of the Constitution provides an

absolute entitlement to be provided with accommodation. In some circumstances a reasonable response to potentially homeless people may be to make permanent housing available and in others it may be reasonable to make no housing at all available. In all of this the court will have to be mindful of all other relevant factors including the resources available to provide accommodation."

27. Whether or not the 2nd respondent and her children will in fact be rendered homeless if an eviction order is granted is not clear. The 1st respondent alleged this in his answering affidavit, but it has also transpired, as mentioned herein, that he has not been entirely truthful as to the personal circumstances of the 2nd respondent. The 2nd respondent, after having been ordered by the court to provide a supplementary affidavit setting out her personal circumstances in more detail has failed to make this averment. She has furthermore failed to state what efforts, if any, she has made to find alternative accommodation since the application for eviction was served on her two years ago. In the meantime her continued occupation of the property has resulted in major financial loss for the applicant. I am satisfied in all the circumstances of this matter that it would be just and equitable to order the eviction of 2nd respondent from the property. Should she not be able to secure alternative accommodation on her own, the Municipality has in my view made provision for appropriate temporary alternative accommodation, bearing in mind its current circumstances.

Costs

28. As far as the costs of this application are concerned, the applicant has in his Notice of Motion sought a cost order against both the 1st and 2nd respondents. During argument Mr Van Tonder persisted with a costs order, on a punitive scale, only against the 1st respondent. The argument is that the 1st respondent was obviously the driving force behind the unmeritorious opposition of the application and that he was untruthful in placing the personal circumstances of the 2nd respondent before court – circumstances which he as the father of the 2nd respondent's children had full knowledge off.

29. Mr Babuseng, on the other hand, argued that since the 1st respondent was not the occupier of the property, he should not have been dragged to court and that in these circumstances no cost order should be made against him.

30. I cannot agree with the argument put forward by Mr Babuseng. The 1st respondent is the party who signed the lease agreement with the applicant. He had consistently denied that he was in arrears with rental payments or that the lease agreement had been cancelled. It would have been remiss of the applicant if the 1st respondent had not been cited as a party to these proceedings.

31. I agree with Mr Van Tonder that it is only proper that the 1st respondent pay the costs of the application and given his conduct herein, that it be on a punitive scale.

The following order is made:

a) The 2nd respondent and all persons occupying through her (the occupiers) are evicted from the immovable property situated at 4 Trolese Manor, Royldene, Kimberley (the property).

b) The occupiers are ordered to vacate the property by no later than 29 September 2023, failing which the eviction order may be carried out from 2 October 2023.

c) The 1st respondent is ordered to pay the costs of the application on the attorney and client scale.

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C C WILLIAMS
JUDGE

For Applicant:	Adv. A G Van Tonder Haarhoffs Inc
For 1st and 2nd Respondents:	Adv. B Babuseng Magome Attorneys