IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN

REPORTABLE

CASE NO: 21243/2011

In the matter between:

CHRISTOPHER ROBIN COETZEE Applicant

and

COMMUNICARE First Respondent

(an Association not for gain, incorporated under Registration No: 1929/01590/08)

THE SHERIFF Second Respondent

For the Magistrate's Court, Goodwood

THE CITY OF CAPE TOWN Third Respondent

Goodwood Administration

JUDGMENT AS CORRECTED IN TERMS OF RULE 42(1)(b) AND DELIVERED ON THURSDAY 13 DECEMBER 2012

GAMBLE, J:

INTRODUCTION

[1] In February 2009 the Applicant and his wife Ms.Rieta Coetzee (hereinafter collectively referred to as “the Coetzee’s”) occupied a house at 11 Huguenot Street, Ruyterwacht in the Cape Peninsula, which belongs to the First Respondent (“Communicare”). Their tenancy was regulated by a written agreement of lease concluded on 16 November 1999.

[2] Communicare is an incorporated association not for gain which provides housing for economically disadvantaged citizens of the Western Cape. It achieves this objective by constructing social housing developments with capital sourced from the Social Housing Regulatory Authority.

[3] The Coetzee’s are a working class couple with four children, two of whom were minors aged 10 and 16 years in October 2011. Mr. Coetzee, the family’s sole breadwinner, worked as a welder at an engineering company in nearby Epping.

[4] Initially the Coetzee’s rent for the premises was R434,38. This escalated over the years to R1615,00 in February 2009. In light of a government subsidy received by Communicare, the Coetzee’s were only liable to pay R864,62 per month to Communicare at that time. They were also liable for certain municipal charges and electricity.

[5] Over the ten years that they occupied the house the Coetzee’s fell into arrears from time to time. They were therefore known to Communicare’s attorneys, Kaminer Kriger, whom Ms. Coetzee visited on occasion to arrange for indulgences. In January 2009 Mr. Coetzee’s employer went on to short-time and he only received

wages for ten days. This was enough to put food on the table but not enough to cover their rent and so the Coetzee's fell into arrears once again.

[6] On 10 February 2009 Kaminer Kriger sent the Coetzee's a registered letter in terms of clause 14 of the lease demanding payment of the sum of R864,62 within seven days, failing which, it was said, the lease would be cancelled. Ms. Coetzee's pleas for yet another indulgence fell on deaf ears at Communicare's Ruyterwacht offices and on 6 April 2009 the Sheriff arrived at their home to serve an *ex parte* application launched by Communicare in the Goodwood Magistrates' Court in terms of s4(2) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, No. 19 of 1998 ("PIE"). The Coetzee's were informed therein that an eviction application would be brought in the Magistrates' Court on 30 April 2009.

[7] The eviction application went ahead as planned and the Coetzee's attended Court in person. At Court they met a certain Ms. Casey, an attorney from Kaminer Kriger, who was handling Communicare's matters. Ms. Coetzee said that she asked Ms. Casey why they were in Court since their rental was up to date (which it appears was in fact so at that stage). Ms. Coetzee says that Ms. Casey told her that there were still outstanding legal fees, presumably in relation to the eviction proceedings. Ms. Coetzee says that Ms. Casey told them that they should approach the local offices of Communicare to arrange to pay off the legal fees. None of these allegations are denied by Ms. Casey.

[8] Ms. Coetzee says that Ms. Casey told her at Court that the matter had been "*stopped*" and that she and her husband then left Court believing that they could continue to live in the house as before, on condition that the legal fees were settled. These allegations are denied by Communicare who allege, through Ms. Casey, that the matter was settled with the Coetzee's agreeing to vacate the premises by the end of June 2009.

[9] Ms. Coetzee says that they continued to pay their rental and additional charges "*whenever we could*" believing that their rights of occupation were secure. She says that they were truly shocked to receive a notification by the Sheriff on 15 September 2009 that they should vacate the house within five days. Ms. Coetzee says that she did not know that an eviction order had been granted by the Magistrate on 30 April 2009 requiring them to vacate the premises by 30 June 2009.

[10] In the meantime, says Ms. Coetzee, a friend of their's had lodged a complaint with the Western Cape Rental Tribunal in mid 2009 in relation to the alleged "*exorbitant increases in rentals and unfair practices*" of Communicare. Pursuantthereto the Tribunal interdicted Communicare from evicting the Coetzee's in terms of s13(7) of the Rental Housing Act of 1999, until the complaint had been resolved.

[11] In any event, the Coetzee family was not put out of the premises on 15 September 2009 but only more than two years later on 12 October 2011. In that two-year period the Coetzee's continued to occupy the premises with the expressconsent of Communicare. And, during that period of occupancy the Coetzee's paid money

from time to time to Communicare and/or Kaminer Kriger for the right of occupation. This is common cause.

[12] After their eviction in October 2011 the Coetzee's sought legal advice from a local firm of attorneys, M.R. Kahn and Associates. Flowing from this, the current application was launched on 20 October 2011 in which an order was sought restoring occupation of the premises to the Coetzee's pending the filing of an application for condonation of the failure to timeously prosecute an appeal against the Magistrate's order, and the prosecution of such appeal itself.

[13] The application was a comprehensive one with answering and replying papers having been filed by the time it came before Justice Ndita on 14 November 2011. Due to certain factual disputes on the papers the learned Judge referred the matter to oral evidence for determination of the following issues:

13.1 was the lease lawfully cancelled?;

13.2 if it was cancelled, was there a new lease agreement entered into between the parties?; and

13.3 were the debits passed by Communicare (so-called "*Economy Cost Recovery Rental*") in its tax invoices issued to the Coetzee's subsequent to 30 April 2009, for holding over, or rental?.

[14] M.R. Kahn and Associates withdrew as attorneys of record on 22 February 2012 and at that stage no valid notice of appeal had been lodged, nor had an application for the condonation of such late filing been lodged. The Coetzee's were, in the meantime, living elsewhere in cramped conditions with family members.

[15] When the matter came before me on 13 November 2012 I requested the Cape Bar Counsel to appoint *pro bono* counsel to assist the Coetzee's. Adv.S. e Câmara was duly appointed and she stepped into the breach in the finest traditions of the legal profession to assist a poor couple. The Court is indebted to Ms. e Câmara and Adv. L. Liebenberg (who appeared for Communicare) for their assistance in the presentation of the matter and for the professional manner in which this matter was conducted.

[16] No evidence was presented by Ms. e Câmara on behalf of the Coetzee's but Ms. Liebenberg presented the evidence of **Ms. Heather Bester,** the head of Kaminer Kriger's debt collections department. Ms. Bester took the Court through the history of the Coetzee's rental file with Communicare and her firm. She is an experienced administrator having been with the firm for thirty two years. Ms. Bester said she has known the Coetzee's since about 2003, having dealt with them in relation to three previous eviction applications.

[17] Ms. Bester said that Communicare's policy was to avoid evicting its tenants if at all possible. To this end their practice was to take an eviction order against a defaulting tenant and then come to an arrangement for the paying off of arrears before re-instating the cancelled lease. In the meantime, the tenant would be

permitted to occupy the premises and would be required to pay for the right of occupation as before.

[18] Ms. Bester said that Kaminer Kriger had been given c*arte blanche* by Communicare to deal directly with tenants after the granting of eviction orders against them. It was she, she said, who would negotiate with such tenants in regard to the terms of any extended rights of occupancy, and, it was she who ultimately gave the Sheriff instructions to evict.

[19] I do not think that it is necessary, given the circumstances of the matter, to go into Ms. Bester's evidence in any great detail, for, as Ms. Liebenberg readily conceded, it demonstrates conclusively that the payments received by Kaminer Kriger from the Coetzee's after April 2009 were most certainly not in respect of holding over. And, it is further clear from Ms. Bester's evidence, that the Coetzee's continued to occupy the premises with the consent of Communicare at least through the indulgences afforded to them by Kaminer Kriger during the two-year period after service of the eviction order.

[20] In argument after the conclusion of the evidence, Ms. e Câmara submitted that a different form of relief than that originally sought in the notice of motion was warranted at this stage. She asked the Court to grant the following order:

> *"(a) declaring the eviction which was carried out on 12 October 2011 to have been an illegal eviction;*

(b) *directing the First Respondent to restore occupation and possession of the property designated as 11 Huguenot Street, Ruyterwacht to the Applicant on a date to be determined by this Court;*

(c) *directing the First and Second Respondents not to interfere with the Applicants' restored possession of the designated property without the oversight by a Court as envisaged in the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, "the PIE Act"; and*

(d) *directingthe First Respondent to pay the Applicants' costs of this application on a punitive scale."*

[21] Ms. Liebenberg did not oppose this change of tack by the Coetzee's other than to protest that there was no basis for seeking a punitive costs order. Certainly, she did not raise any prejudice on the part of Communicare to what was effectively a significant amendment to the original notice of motion, which amendment was brought under the "*alternative relief*" prayer in that original notice of motion.

[22] In working up her argument in support of this amended relief Ms. e Câmara submitted that –

22.1 it was common cause that Communicare had made application under PIE in the Goodwood Magistrates' Court for the eviction of the Coetzee's on 30 April 2009;

22.2 while there was no order on record of the Magistrate's determination of Communicare's application it was clear from his subsequent written reasons filed under Magistrates' Court Rule 51(8) that such an eviction order was in fact granted effective 1 July 2009;

22.3 the Coetzee's continued occupation of the premises after 1 July 2009 was with the consent of Communicare and was therefore lawfull;

22.4 the ultimate eviction of the Coetzee's on 12 October 2011 came some 29 months after the matter was before the Magistrate and was pursuant to a process not then controlled by the Court but arbitrarily by the agents of Communicare; and

22.5 the eviction was therefore unlawfull.

[23] Ms. Liebenberg's response to this argument was two-fold. Firstly, she said that the Applicant had not established that Communicare had waived its rights to

act in terms of the warrant of eviction issued pursuant to the Court order of 30 April 2009. She relied on the decision of Nienaber JA in Road Accident Fund v Mothupi[1] in this regard.

[24] I agree withMs. Liebenberg that the Coetzee's have failed to establish an unequivocal abandonment by Communicare of its right to evict the Coetzee's from their home at sometime in the future. Indeed, the evidence of Ms. Bester clearly demonstrates that the company wished to use the existence of the eviction order as a mechanism to ensure that the Coetzee's paid what was due to it. It was to serve as the proverbial sword of Damacles over the head of the beleagured tenants. It does seem, however, that Communicare waived its right to seek the immediate eviction of the Coetzee's fromtheir premises at the end of June 2009.

[25] When pressed to explain what the legal relationship was between the parties in the two and a half year period after the grant of the eviction order, Ms. Liebenbergmoved to the other leg of her argument and said that the agreement between the parties was a *pactum de non petendo* since Communicare had undertaken to stay the warrant of eviction pending payment by the Coetzee's of outstanding rental, legal fees, interest and the like. And, she concluded, when the Coetzee's failed to perform in terms of their obligations, the *pactum* ceased to exist and Communicare was entitled to rely on the warrant. Ms. Liebenberg referred to the

[1]2000 (4) SA 38 (SCA) at para 15

decisions in Optima Fertilizers (Pty) Ltd v Turner[2] and Woolfsons Credit (Pty) Ltd v Holdt[3] as support for this contention.

[26] I am not sure that the position here is analogous but for the sake of this judgment I shall assume that the arrangement between the parties did in fact constitute such a *pactum*. That assumption begs the question as to what the Applicant's obligation to Communicare under the *pactum*was. There can be little doubt that it was an obligation to continue to pay the amount due for the right to occupy No. 11 Huguenot Street. Whether that payment is "*rental*" or something else, matters not. What matters is that the Coetzee's were occupying the premises with the consent of Communicare and were paying for such right of occupation. That, in my view, constituted lawful occupation.

[27] I proceed then to deal with the fundamental submission made by Ms. e Câmara:that Communicare was required to make a fresh application under section 4 of PIE when the Coetzee's failed to pay what was allegedly due by them in September 2011.

[28] The applicability of PIE was dealt with in detail by the Supreme Court of Appeal in Ndlovu and Bekker[4]. Comparing the provisions ofPIE to the earlier Prevention of Illegal Squatting Act No. 52 of 1951 ("PISA"), Harms JA made the following submissions regarding the background to the introduction of PIE:

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[2]1968 (4) SA 29 (D and CLD) at 34 H

[3]1977 (3) SA 720 (N) at 726F

[4]Ndlovu v Ngcobo, Bekker and Another v Jika 2003 (1) SA 113 (SCA)

> *"[12] It is apparent from the long title that PIE has some roots in PISA. PISA had its origin in the universal social phenomenon of urbanization. Everywhere the landless poor flocked to urban areas in search of a better life. This population shift was a threat to the policy of racial segregation. PISA was to prevent and control illegal squatting on public or private land by criminalizing squatting and by providing for a simplified eviction process. PIE, on the other hand, not only repealed PISA but in a sense also inverted it: squatting was decriminalized (subject to the Trespass Act No. 6 of 1959) and the eviction process was made subject to a number of onerous requirements, some necessary to comply with certain demands of the Bill of Rights, especially s26(3) (housing) and s34 (access to courts)."*

[29] With reference to the earlier judgment of Schwartzman J in ABSA Bank Limited v Amod[5] in which that Court had found that PIE did not apply to cases of holding over, Harms JA remarked as follows:

> *"[16] There is clearly a substantial class of persons whose vulnerability may well have been a concern of Parliament,*

[5] [1999] 2 All SA 423 (W)

> *especially if the intention was to invert PISA. It would appear that Schwartzman J overlooked the poor, who will always be with us, and that he failed to remind himself of the fact that the Constitution enjoins courts, when interpreting any legislation, to promote the spirit, purport and objects of the Bill of Rights, in this case s26(3). The Bill of Rights and social or remedial legislation often confer benefits on persons for whom they are not primarily intended. The law of unintended consequences sometimes takes its toll. There seems to be no reason in the general social and historical context of this country why the Legislature would have wished not to afford this vulnerable class the protection of PIE. Some may deem it unfortunate that the Legislature, somewhat imperceptibly and indirectly, disposed of common-law rights in promoting social rights. Others will point out that social rights do tend to inpinch or impact upon common-law rights, sometimes dramatically."*

[30] The provisions of s4(6) of PIE were applicable to the Coetzee's occupancy of the premises because their occupation only became unlawful after the end of February 2009 and the application to evict followed less than six months later [6]. The provisions of s4(6) read as follows:

> *"If an unlawful occupier has occupied the land in question for less 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 the rights and needs of the*

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[6]Ndlovu and Bekker, *supra*, at p123H-I

elderly, children, disabled persons and households headed by women."

[31] A Court interpreting and applying that section of PIE excercises a wide discretion in determining the date on which the property is to be vacated under s4(8). Ultimately, it must decide what is just and equitable in the circumstances [7].

[32] In this case, the Magistrate did not give consideration to the provisions of s4(6) because, as appears from his reasons filed more than two years later, he was led to believe that the Coetzee's had agreed to vacate the premises by 30 June 2009. The Coetzee's are adamant that no such agreement was reached, particularly because they were of the view that their rent was up to date at the time that they spoke to Ms. Casey at Court on the 30th April 2009. While their contention does have the ring of truth to it, fortunately the validity and enforceability of this alleged agreement of settlement does not fall to be determined in these proceedings.

[33] The exercise of the discretion conferred under s4(6) of PIE serves a very important function in the protection of citizens' rights under s26(3) of the Constitution[8]. In Port Elizabeth Municipality v Various Occupiers[9] Justice Sachs stressed that:

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[7] Ndlovu and Bekker *supra* p124B-D

[8] S26(3): "*No one may be evicted from their home, or have their home demolished, without an order of Court made after considering all the relevant cirumstances. No legislation may permit arbitrary evictions."*

[9] 2005 (1) SA 217 (CC) at 224D

> *"[12] PIE not only repealed PISA but in a sense inverted it; squatting was decriminalized and the eviction process was made subject to a number of requirements, some necessary to comply with certain demands of the Bill of Rights…The former objective of re-enforcing common-law remedies, while reducing common-law protections, was reversed so as to temper common-law remedies with strong procedural and substantive protections…*
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> *[13] Thus the former depersonalized processes that took no account of the life circumstances of those being expelled were replaced by humanized procedures that focused on fairness to all…The courts now had a new role to play, namely to hold the balance between illegal eviction and unlawful occupation.…The new law guided them as to how they should fulfill their new complex, and constitutionally ordained function: When evictions were being sought, the courts were to ensure that justice and equity prevailed in relation to all concerned."*

[34] As this judgment and Ndlovu and Bekker illustrate so graphically, the arbitrariness of evictions, which were part of the legal machinery of the apartheid state to facilitate the forced removal of people, has been done away with and the final arbiters in relation to the fairness and justness of evictions are the courts. Ndlovu and Bekker, in particular, is authority for the proposition that a court must be approached in all cases of eviction, whether to remove squatters, person's holding over at the conclusion of a lease or other unlawful occupiers of privately owned land.

[35] In the present case, the facts show that the decision as to when the Coetzee's were to give up their home rested, not with any court of law or tribunal, but with a collections clerk in a law practice. It was Ms. Bester who decided, firstly, when the Coetzee's were in default of their obligations under the alleged *pactum*,and having made that determination (essentially a legal issue), it was she who decided when the Sheriff should ultimately be ordered to give effect to the warrant of eviction. This situation arose because it was Ms. Bester to whom Communicare had given *carte blanche*to decide when lawful occupiers against whom eviction orders had earlier been granted and who had then been given permission to occupy its premises lawfully, would once again become unlawful occupiers.And it was she (and she alone) who determined under what circumstances Communicare's premises were to be vacated.

[36] Having heard Ms. Bester's evidence, and having observed her in the witness box, I have little doubt that on the instructions of Communicare, she had only good intentions when deciding not to give effect to warrants of eviction and affording debtors one last chance to have a roof over their heads. But the position remains, as the facts of this case so clearly demonstrate, the practice implemented by Communicare through Kaminer Kriger had the effect that the ultimate decision to deprive the Coetzee's of their constitutionally protected right to housing was a decision taken arbitrarily by an agent of the landlord. I might add that it is not difficult to imagine how such a practice may be open to abuse and even corrupt practices.

[37] This is not to say that I do not have any understanding for the landlord's predicament. It provides low cost housing to families whose financial positions will

often be compromised. And, no doubt, a company such as Communicare will be faced from time to time with hard-luck stories about the inability of its tenants to meet their monthly obligations. The "*carrot-and-stick*"approach applied by Communicare is therefore understandable. Nevertheless, I am of othe view that in respect of the Coetzee's, their eviction was ultimately unlawful for the reasons already stated.

[38] This ruling does not mean that Communicare is precluded from evicting unlawful occupiers from its properties: it must simply follow the procedures required by the law. There is no reason, for instance, why the Coetzee's could not have been served with an application in terms of s4 of PIE, which application could then have been postponed pending the regularization of their continued rights of occupancy by the payment of, for instance, arrear rentals. In the event of a failure to comply with the terms of such a *pactum*, the PIE application could have been set down on due notice to the occupants. Such a process would have had a similar effect to that which Communicare sought to achieve in the present case but, importantly, the final determination as to the date and circumstances of the eviction would rest with a Court of law and the protection of the constitutionally entrenched right would then resort with the Court and not with an administrative clerk in an attorney's firm.

[39] I am accordingly satisfied that a proper case has been made out for the amended relief sought by the Applicant in this matter.

[40] As to costs, the Coetzee's have not been put to any expense in relation to the proceedings before me by virtue of the fact that Ms. e Câmara appeared *pro bono*. However, they did incur costs in relation to the engagement of M.R. Kahn and

Associates and it is only fair that those costs should be borne by Communicare. I am not persuaded that there is any basis for a punitive costs order.

[41] Accordingly it is ordered that:

A. The eviction of the Applicant which was carried out by the Second Respondent on 12 October 2011 was an illegal eviction.

B. The First Respondent is to restore occupation and possession of the property designated as 11 Huguenot Street, Ruyterwacht to the Applicant by no later than close of business on Friday 21 December 2012.

C. The First and Second Respondents are not to interfere with the Applicant's restored possession of the designated property without the oversight by a Court as envisaged in the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, No. 19 of 1998.

D. The First Respondent is to pay the Applicant's costs of suit in this matter occasioned by the engagement of M.R. Kahn and Associates on the party and party scale, such costs to be taxed or agreed.

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GAMBLE, J

Gamble, J: 7 December 2012

Accordingly it is ordered that:

E. The eviction of the Applicant which was carried out by the First Respondent on 12 October 2011 was an illegal eviction.

F. The First Respondent is to restore occupation and possession of the property designated as 11 Huguenot Street, Ruyterwacht to the Applicant by no later than close of business on Friday 21 December 2012.

G. The First and Second Respondents are not to interfere with the Applicant's restored possession of the designated property without the oversight by a Court as envisaged in the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, No. 19 of 1998.

H. The First Respondent is to pay the Applicant's costs of suit in this matter occasioned by the engagement of M.R. Kahn and Associates on the party and party scale, such costs to be taxed or agreed.

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GAMBLE, J

JUDGE	**:**	P.A.L. GAMBLE
FOR APPLICANT	**:**	Adv. S. e Câmara *(Pro Bono)*
INSTRUCTED BY	**:**	Mr. M.R. Kahn and Associates
FOR 1st and 2nd and 3rd Respondents	**:**	Adv. L. Liebenberg
INSTRUCTED BY	**:**	Kraminer Kriger and Associates
DATES OF HEARINGS	**:**	13 and 30 November 2012
DATE OF JUDGMENT	**:**	7 December 2012
CORRECTED JUDGMENT IN TERMS OF RULE 42(1)(b)	**:**	**13 December 2012**