REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A536/2011

DATE: 12 OCTOBER 2012

In the matter between:

TERSIA RONEL RESNICK Appellant

and

THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA

1st Respondent

THE MINISTER OF PUBLIC WORKS 2nd Respondent

J U D G M E N T

DAVIS, J:

On 29 July 2011, the court *a quo* ordered that the appellant, and all those holding title under her, as well as various other unlawful occupiers, should vacate the premises described as Erf 81, Military

Road, Tamboerskloof, Cape T own ("the property") at or before 12:00 on 31 October 2011. Further, the sheriff must evict the appellant and all those holding title under her, as well as other various unlawful occupiers from the property on 1 November 2011 in the event of their failure to vacate the premises.

It appears that there are three separate eviction matters heard concurrently by the court for the purposes of appeal brought the appellant who has appealed against the order of the court a *quo,* and it is to this appeal that we must now turn.

The key question for determination in this case,

concerns section 4 of the Prevention of Illegal Eviction and Unlawful Occupation Act 1998 ("PIE"). Section 4 of the Act deals with the eviction of unlawful occupiers of land sought by the owner or the person in charge of the land. To the extent that it is relevant, the owner is defined as the registered owner of land,

including an organ of state. PIE, insofar as it is relevant to this appeal, provides thus:

"(1) Notw ithst andi ng anyt hing to the contr ary cont aine d in any law or the

com
mon
law,
the
provi
sions
of
this
secti
on
appl
y to
proc
eedi
ngs
by
an
owne
r or
pers
on in
char
ge of
land,
for

the

evict

ion

of

land

of an

unla

wfull

y

occu

pier.

(2) If

an

unla

wful

occu

pier

has

occu

pied

the

land

in

ques

tion

for
less
than
six
mont
hs at
the
time
when
the
proc
eedi
ngs
are
initia
ting,
the
court
may
gran
t an
orde
r for
evict
ion if

it is
of
the
opini
on
that
it is
just
and
equit
able
to do
so.
after
consi
derin
g all
the
relev
ant
circumsta
nces,
including
the rights
and

needs of the elderly, children, disabled persons and househol ds headed by women.

(7) If an unlawful occupier has occupied the land in question for more than six months at the time that

the
procedur
es 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
consideri
ng all the
relevant
circumsta
nces,
including,
except
where the

land is
sold, in a
sale of
execution
pursuant
to a
mortgage
, whether
land has
been
made
available
or can
reasonabl
y be
made
available
by a
municipal
ity or
other
organ of
state or
another
landowne

r, for the relocation of the unlawful occupier and including the rights and needs of the elderly, children, disabled persons and a household headed by women.

(8) If the court is satisfied that all the

requirem
ents of
this
section
be
complied
with and
that no
valid
defence
had been
raised by
the
unlawful
occupier,
it must
grant an
order for
the
eviction
of the
unlawful
occupier
and
determin

e:

(a) A just

and

equitable

date on

which the

unlawful

occupier

must

vacate

the land

under the

circumsta

nces.

(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)."

It is clear that PIE has set out a twofold enquiry. The court first determines whether the person in respect of whom the eviction order is sought, is an unlawful occupier. If that is the case, then, secondly, it

decides whether, after considering all the relevant circumstances, it is just and equitable to grant such an order.

In this particular case, both arguments, namely (1) that the appellant was not an unlawful occupier and (2) that it was not just and equitable to evict her, have been raised by the appellant.

I turn, therefore, to deal with the first question of unlawful occupation. The Act defines an unlawful occupier as:

"A person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land, excluding a person who is an occupier in terms of the Extension of Security of Tenure Act 1997 an

d

> excluding a person whose informal right to land, but for the provisions of this Act, would be protected by the provisions of the Interim Protection of the Informal Land's Act of 1996."

In this particular case, the critical argument, which is raised by Mr Van der Merwe, who very ably argued on behalf of the appellant, was that the lawfulness was justified by virtue of a tacit consent with the respondents, who were the owners, or persons in charge of the property. His argument of tacit consent is thus central to this dispute. Consent is defined in the Act to mean express or tacit consent, whether in writing or otherwise, of the owner or a person in charge, to the occupation by the occupier of the land in question.

In oral argument, the court enjoyed a very useful exchange with Mr Van der Merwe regarding the complexities of the decision in Residents of Joe Slovo Community, Western Cape v Thubelisha Homes 2009 (9) BCLR 847 (CC). The point which prompted this debate concerned the scope given to consent in two of the judgments which were delivered in that case, in particular those of Yacoob, J and Moseneke, DCJ. Yacoob J at paras 57-58, said:

> "[Consent] means voluntary agreement. If consent means voluntary agreement, then tacit consent means a tacit voluntary agreement. The meaning of tacit consent is, therefore, inexplicably bound up with what is meant by a tacit agreement.

The tacit agreement is not an agreement of a different kind From that of an express agreement. The distinction really revolves around the question of evidence and proof. The evidence in an express agreement consists of proof of either a written express agreement or a verbal one. A tacit agreement is one which is established by evidence, short of that relating to an express agreement. I agree with Corbett, JA -

> 'that a court may hold that a tacit contract has been established where by, a process of inference, it concludes that the most plausible or probable conclusion of all the proved facts and circumstances is that a contract came into existence".

...In cases where the only inference to be drawn is that there was a tacit consent, there can be no difficulty. However, where more than one inference is legitimate, we must select that which is the most probable or the most plausible in all the circumstances."Moseneke. DCJ, appeared to take a somewhat different approach to this

problem. At paragraph 144 he said:

> "It is plain that unlawful occupier would be one who occupies land without consent of the owner and without any other right in law to occupy. The consent required is of the owner or the person in charge. It may be express of tacit and it may be in writing or otherwise. This definition is cast in wide terms. It envisages explicit consent but it also contemplates consent that may be tacit or, put otherwise, that may be unsaid but capable of being reasonably inferred from the conduct of the owner in relation to the occupier. The permission envisaged may be in writing but need not be so. The permission may be given other than in writing. In other words, the absence of a written resolution or of a written instrument evidencing consent of permission to occupy is not conclusive that there is no consent."

At paragraph 147, the learned Deputy Chief Justice says the following:

> "Another important consideration for adopting a generous understanding of 'consent' is embedded in our dark history of spatial apartheid and forced removals from land...In enacting PIE, the legislature recognised that there are and there will be ample instances which homeless or landless people will be forced to occupy land without formal or written proof of the right to own land or initial consent of the owner. For obvious historical reasons occupation of land often occurs without formal or explicit acknowledgement of the owner of the land... Consequently, their right to occupy will ordinarily not be evidenced by express agreements or formal resolutions of public entities but by the tact acquiescence of the owner."

It appears, therefore, that Moseneke DCJ was prepared to take a somewhat more expansive and generous approach to arguments raised to the effect that tacit consent existed. Given some uncertainty as to the ratio of this case in this connection, a more generous approach in applying these dicta to the facts of the present case is probably indicated.

The facts of this case are the following: the first respondent is the registered owner of the property. The second respondent is the organ of state that manages, maintains and exercises control of all state owned land and buildings on behalf of the first respondent, including this property.

The property was originally utilised by first respondent as a military base, but this purpose ceased in 1991. During December 1999, the appellant, apparently unilaterally, moved into a dwelling on the property with her two children without any consent to so do. The appellant contacted first respondent to inform it that she had taken occupation of the property and she wished to enter into a lease agreement. Thereafter, on 24 May 2000, the appellant and the first respondent entered into a written lease agreement, in terms of which the appellant leased the dwelling situated on a portion of the property for residential purposes on a month to month basis.

A material term of the lease agreement was that rental in the sum of R800.00 per month would be payable by the appellant to the regional manager of the second respondent, in advance on or before the first day of each

month. It is common cause that the appellant fell into arrears with these rental payments. On 27 September 2002, appellant was notified, in what was referred to in the papers as the first notice, that she was in arrears with her rental payment in the total amount of R6 800,00. She was agreed to terms to settle this amount within 14 days, failing which the lease agreement would be terminated forthwith.

On 31 January 2003, she signed an acknowledgement of debt, which acknowledged her indebtedness to the second respondent for arrear rental in the amount of R7 520,00. Again she fell into arrears. This prompted the appellant to give notice, referred to as the second notice, that she owed the Department arrear rental, which had now increased to the amount of R16 160,20. She was afforded an opportunity to settle these arrears within 30 days of delivery of the notice, failure which proceedings for the recovery would be instituted. The Department also indicated its intention to terminate the lease agreement in terms of clause 1 thereof. Further, she would be required to vacate the premises by 30 November 2005.

On 15 December 2005, a further acknowledgement of debt

was signed. This agreement is significant to this dispute. To the extent that it is relevant, it is a document which was signed by both parties, including the appellant, in which the appellant agrees and undertakes to settle her indebtedness in terms of a procedure set in clause 1 thereof. In clause 3 she agreed to the following:

> "Should I in any way fail to honour my obligations hereunder, the Department of Public Works may proceed with legal action to recover the full outstanding amount, in which event I will be liable for any cost incurred.
>
> 4. A further acknowledgement of the Department shall be entitled to secure my eviction on the premises I presently occupy in the event of my default without any further notice to me. It being understood that the contents of this document shall not be construed as a waiver, novation or abandonment of the Department's rights arising from my original breach of the lease agreement concluded on 24 May 2000."

Clearly, this represented an acknowledgement that, whatever happened, the respondent had reserved its rights in terms of its initial decision to cancel the contract.

Mr Van der Merwe accepted, as he had to, that the lease agreement had now been cancelled. It had been superseded by an acknowledgement of debt. It is the events thereafter that thus become crucial to this dispute. It is common cause that the appellant failed to fully discharge her obligations towards the respondents in terms of this acknowledgement of debt. She failed, in other words, to pay the amounts that she was required to do so in terms of this acknowledgement. Within four months, on 20 April 2006, the sheriff served what is referred to as the third notice, informing her that she was in unlawful occupation of the property and her right to occupy the property had previously been terminated, or alternatively was thereby terminated and instructing her to vacate the premises by no later than 30 April 2006. Nonetheless, she remained on in occupation of the property.

Mr Van der Merwe submitted that it was here that some form of change to the legal arrangements occurred, in terms of which the 2005 acknowledgement of debt had tacitly been cancelled and the initial lease resurrected. This would, therefore, have meant that the legal arrangements between appellant and respondents would be covered by the initial lease. As there had not been proper

invocation of the provision of cancellation in terms of that lease, the appellant stood to win its case. In effect, this is the argument of appellant.

Mr Van der Merwe fortified this argument by reference to renovations that were done by the appellant, apparently with the acknowledgement, knowledge, acquiescence or approval (I am not entirely sure of which action from the record) of respondents. It appears that a building inspector, on the version which was provided by the appellant to the court a *quo,* had given approval, although Ms Witten, who equally ably appeared on behalf of the respondent, contended that one could not be certain as to who this particular inspector worked for. It does appear that he is a municipal employee, but, of course, this court cannot take evidence from the Bar as a basis for its findings. Suffice to say this particular evidence is, therefore, in equipoise.

It is true that for almost three years nothing further happened until 27 February 2009, when a further notice was served on the appellant, informing her that she was in unlawful occupation of the property, that the lease agreement was terminated by virtue of the third notice and

demanding that she vacate the property on or behalf, before 30 March 2009, and that she was indebted to the Department in the amount of R44 741,57 for loss of rental as a result of unlawful occupation.

There was an exchange of correspondence on 17 March 2009 in which the appellant requested the Department to reinstate the lease agreement, itself evidence that she was not relying on any tacit agreement or that the lease itself was in operation. Be that as it may, this particular request was refused and she was requested once again to vacate the premises.

It appears From this detailed chronology that, whether this Court applies the approach adopted by Moseneke, DCJ or Yacoob. J to the facts, there was no tacit agreement, which meant that the initial lease governed a legal relationship between the parties. I so conclude because of the critical document, to which I have made considerable reference, of 15 December 2005. This document manifestly changed the legal relationship between the parties. There is no basis by which, either as the only probable inference or even upon a more generous interpretation, a probable inference that the events that superseded this particular acknowledgement of

debt, justified the conclusion that a tacit agreement had now been reached which cancelled the acknowledgement of debt and reinstated the initial lease. No evidence indicates to the contrary, nor does the further correspondence, including that of appellant, gainsay this particular argument.

In my view, it cannot be said that there was evidence to justify the existence of a tacit agreement on the approach of either Yacoob. J or Moseneke. DCJ and accordingly, in my view, the appellant must be considered to be an unlawful occupier for the purposes of the Act.

That then brings us to the second argument of 'just and equitable'. I set out earlier in this judgment the basis by which a court must be satisfied that it is just and equitable to evict someone such as the appellant. There is no question as has been set out luminously by Sachs, J in his seminal judgment in Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC) that a court is required to balance opposing interests of the landowner on the one hand and the unlawful occupier on the other.

There is a passage in Justice Sachs' judgment which must bear considerable weight with any court that considers

these particular problems. At para 37 he writes:

> "Thus PIE expressly requires the court to infuse elements of grace and compassion into the formal structures of the law. It is called upon to balance competing interests in a principled way and to promote the constitutional vision of a caring society, based on good neighbourliness and shared concern.
>
> The Constitution and PIE confirm that we are not islands on to ourselves. The spirit of ubuntu, of which is part of the deep cultural heritage of the majority of the population suffuses the whole constitutional order."

In this connection, it is relevant to note that ubuntu promotes a normative notion of humanity, of human beings who recognise the 'other', of values of solidarity, compassion and respect for human dignity. These serve as important guides. They are no less important when the person is involved, is in the position of appellant, who has tenaciously tried to hold on to her home, so as to provide an education for her child within a stable environment, as it would be for a larger community of applicants.

But the fact of this matter is that an eviction is justified only after a careful consideration of the factors. In this particular case these factors are important. The appellant is a divorced woman. She occupies a dwelling with her two children, 20 and 16 at the time when she gave oral evidence. She took occupation a very long time ago, in December 1999. It is clear that other than the R1 000,00 per month in maintenance from the former spouse, she struggles to make ends meet. Her son attends the Camps Bay High School, and we were informed by Mr Van der Merwe from the Bar, that he would only conclude his matric year in 2013, which does in fact mean that were they to move a long way away from the residence, that would create difficulties.

The appellant has attempted, both by taking an initiative to grow her own vegetables, to seek to ensure that the little money that she receives, stretches as far as possible. She has had her own particular difficulties, which are outlined in the papers, including issues of stress and health. It is also true, on the other hand, that the property is required by the South African Police Service as an equestrian centre, which, as I understand it, will in fact facilitate crime control within the area, not an insignificant aspect with regard to the interests of the public. Further the property was not

intended for residential accommodation, and notwithstanding the respondents' sympathy towards the appellant, this matter has gone on for over 13 years.

What then constitutes grace, compassion and a commitment to ubuntu in these circumstances? Were this court to take the view that 'just and equitable' trumps illegality, so that a person in the circumstances of the appellant can remain indefinitely on the property, no matter the illegality of the situation, this would create vast and significant implications for eviction procedures throughout this Province, in that this, as a judgment of a Full Bench, it would be binding on many of our colleagues, who would have considerable difficulty in a range of cases, and we could not predict as to how subsequent evictions should adjudicated.

In my view, 'just and equitable' in this situation, means ensuring the appellant be given some significant time to find alternative accommodation, but that 'just and equitable' jurisprudence cannot stretch far enough to overturn the decision of the court *a quo.*

In the result, the appeal must be dismissed. There is no

order as to costs, particularly given the position of appellant.

The order of the court a *quo,* however, must be amended to read as follows:

1. In the eviction application under case number 26741/09, the respondent and all those holding title under her, are to vacate the property described as Erf 81, Military Road, Tamboerskloof, Cape Town, within six months of the granting of this order.

2. Should the respondent and all those holding title under her fail to vacate the property described above, on the date referred to above (that is six months within the granting of the order), the sheriff is ordered to evict the respondent and ail those holding title under her, with the assistance of the South African Police Service, should it become necessary, from the property on the date after the expiry of the six month period referred to above.

I agree:

FORTUIN, J

It is so ordered:

DAVIS, J

CORAM	**:**	**D M DAVIS J et C M FORTUIN J**
JUDGMENT BY	**:**	**DAVIS J**
FOR THE APPLICANT	**:**	**ADV D VAN DER MERWE**
INSTRUCTED BY	**:**	**C& A FRIEDLANDER INC.**
FOR THE RESPONDENTS	**:**	**ADV S K WITTEN**
INSTRUCTED BY	**:**	**STATE ATTORNEY**
DATE OF HEARINGS	**:**	**12 OCTOBER 2012**
DATE OF JUDGMENT	**:**	**12 OCTOBER 2012**