



**OFFICE OF THE CHIEF JUSTICE
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO: 2912/21

COMMUNICARE

Applicant

v

ZUZEKA APOLISI

1st Respondent

**ANY AND ALL OTHER OCCUPIERS OCCUPYING THE
PROPERTY SITUATED AT 28 YSTERPLAAT, BROOKLYN
CITY OF CAPE TOWN**

2nd Respondent

3rd Respondent

and

CASE NO: 3653/21

COMMUNICARE

Applicant

v

Ms NCUMISE

1st Respondent

**ANY AND ALL OTHER OCCUPIERS OCCUPYING THE
PROPERTY SITUATED AT 27 DE MIST STR, BROOKLYN
CITY OF CAPE TOWN**

2nd Respondent

3rd Respondent

and

CASE NO: 4177/21

COMMUNICARE

Applicant

v

SHEILA MOGOJO

1st Respondent

**ANY AND ALL OTHER OCCUPIERS OCCUPYING THE
PROPERTY SITUATED AT 47 JUSTIN STR, DENNEHUIS**

COMPLEX

2nd Respondent

CITY OF CAPE TOWN

3rd Respondent

JUDGMENT DELIVERED ON THIS 11TH DAY OF AUGUST 2021

FORTUIN, J:

A. INTRODUCTION

[1] This matter is a consolidation of three urgent spoliation applications, in the alternative, three urgent eviction applications in terms of section 5 of the Prevention of Illegal Eviction of Unlawful Occupiers Act No 19 of 1998 (hereinafter referred to as 'PIE'). Communicare NPC is the applicant in all three matters. Ms Zuzeka Apolisi is the first respondent in case no 2912/21

3. *Costs against those of the respondents who oppose the application.*

...”

B. COMMON CAUSE BACKGROUND FACTS

[4] The applicant is the owner of Erf 125943, commonly known as 28 Ysterplaat Street, Brooklyn (hereinafter referred to as “Ysterplaat Street”) ; Erf 125948, commonly known as 27 De Mist Street, Brooklyn (hereinafter referred to as “De Mist Street”); and Unit 2, 47 Justin Street, Dennehuis Complex, Brooklyn (hereinafter referred to as “Unit 2”).

[5] The applicant’s core business is the facilitation of the provision of affordable accommodation, through social investment programmes for the benefit of citizens of the Western Cape. It is a non-profit organization, which does not receive operating subsidies or grants. The rent charged has to cover the costs of running and maintaining the housing complex, with some rentals being used to cross-subsidise the rentals in other units.

[6] On or about 7 February 2021, it was discovered that the De Mist Street property was broken into, but unoccupied. Attempts were made by the applicant to have the locks replaced, and to have one Thabo sleep in the property to secure it. While fixing the new locks, Ms Ncumise arrived and managed to get a set of keys from the locksmiths. She barricaded herself inside the property, and is still in occupation thereof.

[7] On 23 February 2021, representatives of the applicant found Unit 2 occupied by Ms Mogojo, who then made allegations of sexual assault against them. The police arrived on the scene and informed them that they could not evict her without a court order. These allegations will be discussed later.

[8] On 1 March 2021, the applicant discovered that Ysterplaat Street was broken into, and occupied by Ms Apolisi and two other men. The applicant counter-spoliated the property for one day, but was unable to hold onto it. Ms Apolisi, with the assistance of unknown others, was unlawfully placed in occupation of the property again.

[9] The applicant launched proceedings for a *mandament van spolie* in the first application on 16 February 2021, and it was set down for hearing on 19 February 2021. The second application was launched on 26 February 2021, and was set down for hearing on 3 March 2021, and the third application was launched on 8 March 2021, and was set down for hearing on 10 March 2021.

[10] The three matters were consolidated on 19 March 2021, and were postponed for hearing to the semi-urgent roll on 29 April 2021.

[11] In the *interim*, on 9 April 2021, in a separate application, Dolamo J granted an order, issuing a notice in terms of sec 5(2) of PIE, for an eviction order in terms of the Amended Notice of Motion, which application was also to be heard on 29 April 2021.

[12] The applicant's amended notice and supplementary affidavit remained unanswered by the respondents, who elected to stand by their answering affidavits to the initial application for a *mandament van spolie*.

[13] It is common cause that none of the respondents had any permission to occupy these units.

[14] Ultimately, the applicant sought an order ejecting the respondents, either in terms of the *mandament van spolie*, or alternatively in terms of sec 5 of PIE.

C. THE APPLICANT'S VERSION

[15] It is the applicant's version that, between 6 and 23 February 2021, it was dispossessed of the three properties when the respondents broke into and occupied it through violence, force or other cunning ways. The applicant seeks an order for their ejectment on the basis that, until this occupation, they were in peaceful and undisturbed possession of these vacant properties.

[16] It is further the applicant's case that the *mandament van spolie* can exist alongside the remedy provided for in PIE in appropriate

circumstances. Moreover, that the respondents acquired possession of these properties unlawfully, with the result that they were justified to seek a spoliation order.

[17] On their version, the previous occupier of unit 2 vacated during October 2020, whilst the previous occupiers of the Ysterplaat Street and De Mist Street units vacated towards the end of November 2020. During December 2020 and January 2021, the applicant was in the process of effecting repairs to these vacant properties. A screening process of suitable tenants who would be placed in the units afterwards, followed. A security guard and/or house sitter was then placed on the site to avoid any damage to or any unlawful entering of the properties. It was during this time that the respondents unlawfully occupied the units.

[18] It is the applicant's version that the Ysterplaat Street property is currently used to store drugs in or to cell drugs from. Moreover, that gangsters assisted the respondent to move back into the property when the applicant counter-spoliated. The respondent denies these allegations.

D. RESPONDENTS' VERSION

[19] It is the respondent's version that, during January 2021, they acted on information that there were units at the properties that have been vacant and unlocked for a period. As a result, they occupied the properties.

[20] On their version, the three respondents are unemployed women and their children, most of them retrenched due to the COVID 19 pandemic. In general, it is their version that, prior to the occupation, some of them (unidentified) were homeless and some were back dwellers (unidentified) on their families' properties. The group includes minor children, the elderly and the sick (also unidentified).

[21] Details were provided in respect of the respondents in the first and the third applications. The respondent in the first application occupied the unit with her minor child and her sister. At the time of filing her answering affidavit, her sister was at their homestead in the Eastern Cape. The respondent in the third application occupies the property with her two minor children.

[22] According to the respondents, different personal circumstances gave rise to their occupation. One of them (unidentified) was once a tenant of the applicant, and was evicted because she could not afford the rent. Another, (unidentified) was left homeless after leaving an abusive relationship.

[23] The respondents deny that the applicant was in undisturbed and peaceful possession as from 4 February 2021. As proof they provided a receipt for the purchase of electricity for their respective units. It is their case that they were allowed to do this without any interruption from the security guards or others living in the complex.

[24] Furthermore, that PIE is applicable as, on the applicant's own version, they are unlawful occupiers, which brings the provisions of PIE into play, in particular sec 4 thereof. The application should therefore have been brought in terms of sec 4 of PIE, and not the *mandament of spolie*.

[25] It is further the respondents' case that the applicant has not satisfied each of the requirements set out in sec 5 of PIE. Moreover, that the applicant approached the court initially, seeking the wrong common law remedy, and that they should not be subjected to costs for this mistake or choice.

[26] A number of points in *limine* were raised, but abandoned during argument.

E. ISSUES IN DISPUTE

[27] From the papers before me, it is evident that the following are the issues in dispute:

- a). Are the respondents in unlawful occupation of the units?
- b). Can the *mandament van spolie* and PIE exist at the same time?
- c). Is sec 5 of PIE applicable in situations like this?

- d). If it is just and equitable for the respondents to be evicted, what is a reasonable time within which to order the eviction and under which circumstances?

F. RELEVANT LEGAL PRINCIPLES

a) *Mandament van spolie*

[28] The *mandament van spolie* is a common law remedy to restore possession of property. This is interim relief pending a trial to determine the rights of the parties. It is trite that ownership does not come into play and that an applicant should only comply with two requirements, i.e.

- i) undisturbed and peaceful possession of the goods; and
- ii) unlawful deprivation of possession.

b) Section 5 of PIE

[29] Sec 5 of PIE reads as follows:

“5. Urgent proceedings for eviction. – (1) Notwithstanding the provisions of section 4, the owner or person in charge of land may institute urgent proceedings

for the eviction of an unlawful occupier of that land pending the outcome of proceedings for a final order, and the court may grant such an order if it is satisfied that-

- (a) there is a real and imminent danger of substantial injury or damage to any person or property if the unlawful occupier is not forthwith evicted from the land;*
- (b) the likely hardship to the owner or any other affected person if an order for eviction is not granted, exceeds the likely hardship to the unlawful occupier against whom the order is sought, if an order for eviction is granted; and*
- (c) there is no other effective remedy available.*

(2) Before the hearing of the proceedings contemplated in subsection (1), the court must give written and effective notice of the intention of the owner or person in charge to obtain an order for eviction of the unlawful occupier and the municipality in whose area of jurisdiction the land is situated.

- (3) The notice of proceedings contemplated in subsection (2) must-*
 - (a) state the proceedings will be instituted in terms of subsection (1) for an order for the eviction of the unlawful occupier;*
 - (b) indicate on what date and at what time the court will hear the proceedings;*
 - (c) set out the grounds for the proposed eviction; and*
 - (d) state that the unlawful occupier is entitled to appear before the court and defend the case and, where necessary, has the right to apply for legal aid.”*

G. DISCUSSION

a). Are the respondents in unlawful occupation of the units?

[30] It is common cause that the respondents are in unlawful occupation of the units. They are therefore unlawful occupiers as defined in PIE. The allegations of sexual assault made by Ms Mogojo are serious and should be reported to the appropriate law enforcement agency. However, it does not change the fact that the respondents are unlawful occupiers.

b). Can the *mandament van spolie* and PIE exist at the same time?

[31] Whether the common law remedy of the *mandament van spolie* can be used to obtain an ejectment order, is a question that has been discussed in numerous cases as well as various academic writings. In the unreported judgment¹ by Bozalek, J and Mantame, AJ in this division it was

¹ Case A369/12 in the Western Cape High Court, delivered 13 December 2012.

held that the *mandament* is not excluded in all circumstances, and that the trite principle that each case must be determined on its own facts, should apply.

[32] In a 2015 article by Z T Boggenpoel² titled **Questioning the use of the Mandament van Spolie in Ngqukumba v Minister of Safety and Security and other 2014 5 SA 112 (CC)**, the matter above, which dealt with the repossession of a motor vehicle, was discussed. In that matter the Constitutional Court found that the *mandament van spolie* would be an available remedy, even though the Consumer Protection Act 68 of 2008 contains a remedy to repossess property. The question that should be answered in *casu* is therefore whether the same principle is applicable when dealing with evictions.

[33] The conflict between the common law and the remedies provided for in PIE was at issue in **Cape Killarney Property Investments (Pty) Ltd v Fusile Mahamba & Others**³ where it was held that an owner cannot avoid

² Potchefstroom Electronic Law Journal / Potchefstroomse Elektroniese Regsblad.

³ 2001(4) SA 1222 (SCA).

the peremptory provisions of PIE by simply electing to use the common law remedies to evict an occupier.

[34] Sec 5 is clearly distinguishable from section 4 in that it does not list the availability of alternative accommodation as a pre-requisite for an eviction. Moreover, it does not mention the local authority as a necessary party. The procedure available to a local authority is separately contained in sec 6.

[35] In my view, the provisions of PIE are the appropriate remedy, as the common law remedy of the *mandament van spolie* used for evictions does not give equal protection to both parties. PIE envisages the constitutional protection of parties; the *mandament van spolie* does not. Section 5 of PIE, in particular, provides a constitutionally aligned urgent remedy to replace the common law remedy of the *mandament van spolie*. It deals with unlawful land intrusions and it gives an urgent remedy to the landowner whilst protecting, *inter alia*, the constitutional right of dignity of the occupier in terms of sec 10 of the Constitution.

[36] In addition to the constitutional imperative discussed above, the facts of this matter do, in my view, also exclude the applicability of the *mandament van spolie* resulting in the provisions of PIE being the only applicable remedy. The facts that are relevant in this matter are, *inter alia*, the special nature of the aim of the applicant, a not for gain organisation, providing low-cost housing, which currently is a dire need in the City of Cape Town. In addition, the fact that the urgency, which is necessary for the *mandament van spolie*, essentially disappeared when the application was set down for hearing a few weeks after the occupation. Moreover, this consolidated application was only heard four months after the initial occupation, which gave rise to the urgency.

c). Is sec 5 of PIE applicable in situations like this?

[37] The question is whether sec 5 provides sufficient protection to all parties. Does it go far enough? Indeed, it brings land intrusions, and the remedy to deal with it under constitutional scrutiny. Moreover, it provides the urgent relief which is absent from sec 4 of PIE. In my view, however, it does not go far enough, as it is silent on what happens with the occupiers

after being lawfully evicted in terms of sec 5. It is my view that it is imperative to find a solution involving all role players.

[38] In an article titled **Reconsidering counter-spoliation as a common-law remedy in the eviction context in view of the single-system-of-law principle**⁴, the authors concluded, that sec 5 of PIE provides a sufficient constitutional replacement for the *mandament van spolie*. They further concluded that sec 6 of PIE should be amended to allow local authorities to similarly be able to perform urgent evictions without the obligations to provide alternative accommodation.

[39] I am in total disagreement with this argument. Surely, the purpose of judicial and constitutional oversight over evictions is to provide more constitutional protection and not less.

[40] The solution to land intrusions cannot be the increase of the number of homeless people. Surely, the solution is to provide sufficient shelter for more homeless people, within a constitutional framework.

⁴ By G Muller from the University of Pretoria and EJ Marais of the University of Johannesburg, 2020.

[41] I find the omission of a provision to provide or at least to consider alternative accommodation in sec 5, regrettable.

d). If it is just and equitable for the respondents to be evicted, what is a reasonable time within which to order the eviction and under which circumstances?

[42] The obligation to provide shelter to its citizens lies with government. They are obliged to provide shelter to those who are destitute. Where there is no accommodation available, then they should provide emergency accommodation. Granting an eviction order without any indication of where the respondents will be sheltered afterwards, is inhumane and undignified. Should I grant an eviction order in terms of sec 5 of PIE as it stands, it would be in the absence of any consideration of alternative shelter for these respondents.

[43] It is so that these respondents did not take this court into its confidence with where they resided before illegally moving into these units. In a sec 4 application, the local authority (third respondent) would have

been ordered to place this information before the court. This information is vital in making a determination that will pass constitutional muster. I am accordingly inclined to order such an exercise to be undertaken by the third respondent.

H. CONCLUSION

[44] In summary, therefore, I am of the view that the applicant was not entitled at the outset to use the *mandament van spolie* and that they were correct in subsequently bringing an application in terms of sec 5 of PIE. This is so because the issues of housing and evictions are sufficiently dealt with within a constitutional framework in the PIE Act. There is therefore no need to revert to a common law remedy, which does not necessarily pass constitutional muster.

[45] On consideration of all the facts, I am accordingly satisfied that:

- There is a real and imminent danger or damage to property as occurred during the occupation of these units, e.g. the breaking of locks and the allegations of drug activity;

- The likely hardship to the owner who is a provider of low cost housing, which currently is a dire need in the city, exceeds the likely hardship that the respondents would suffer if they are evicted and moved to their previous places of residence;
- There is no other effective remedy available. An alternative remedy would have been a spoliation order, in the event that the occupation did not occur almost four months before the application was heard, and if there was no constitutional provision available. This is not the case.

[46] In crafting my remedy in terms of sec 5, I am conscious of the fact that the relief that I grant should be practical, implementable, and, most importantly, take into account the constitutional imperatives enshrined in our Constitution.

[47] As a result, I cannot ignore the fact that an eviction in terms of sec 5 will in all probability render the respondents homeless. I am, therefore, constitutionally obliged to ensure that this does not occur.

[48] The state's obligation to play some role in finding a solution is trite. As this court stated in a previous judgment when dealing with the possibility of unlawful occupiers being left with nowhere to go after an eviction:

"[177] As stated above, there is no distinction between the state's obligation to respect, protect, promote and fulfil the rights of both the occupiers and the applicants. That obligation remains the same. The fact that the state should give effect to these rights is undisputed.

...

[179] ... the lack of available housing for the poor will not be addressed effectively in the short term. The risk of further occupations will remain as well as the need for the city to provide emergency housing to poor and destitute homeless people. The migration of poor people to cities is not unique to the City of Cape Town. This is a global phenomenon. People move to areas where there are economic opportunities. Local and Provincial authorities cannot plan their cities in denial of this reality."⁵

I. ORDER

⁵ Case No: 9443/14 - IA Fischer & 1 Other v Persons whose identities are unknown to the applicants and who are attempting or threatening to unlawfully occupy Erf 150 (remaining) Phillippi.
Case No: 11705/15 - Manfred Stock & 4 Others v The Persons unlawfully occupying Erven 145, 152, 156, 418, 3107, Phillippi & portion of Farm 597, Cape Rd & 8 others;
Case No: 14422/14 - Copper Moon Trading 203 (Pty) Ltd v Persons whose identities are to the applicant unknown and who unlawfully occupy remainder Erf 149, Phillippi, Cape Town & 4 others
[2017] ZAWCHC 99.

[49] I am conscious of the fact that the country is currently in a national lockdown in terms of the provisions of the Disaster Management Act 57 of 2002, as amended. Moreover, that all evictions should be dealt with in terms of section 37 thereof.

[50] In the circumstances, and bearing the above sentiments in mind, I make the following order:

50.1 The application for eviction of the respondents is granted to be effected on Friday, 17 September 2021;

50.2 The City of Cape Town is ordered to undertake a full investigation, and to compile a report listing the addresses where the respondents were resident prior to their occupation of the units at 28 Ysterplaat Street, Brooklyn; Erf 125948, commonly known as 27 De Mist Street, Brooklyn; and Unit 2, 47 Justin Street, Dennehuis Complex, Brooklyn on/before Friday, 3 September 2021. Where an address is not within the Western Cape Province, an alternative address within the Western Cape Province

should be provided by the respondents to the City of Cape Town;

50.3 The City of Cape Town is to facilitate the respondents' move from the units they are currently occupying to the addresses within the Western Cape Province listed in the report in 2 above on or before 17 September 2021; and

50.4 Should the respondents not co-operate with the investigation in 50.2 and/or fail to vacate the units by 17 September 2021, the orders in 50.2 and 50.3 above will lapse, placing no further obligation on the applicants, nor the City of Cape Town, and the Sheriff is authorised to affect their removal.

50.5 The applicant is liable for all costs before 9 April 2021. The respondents are responsible for the costs thereafter.

FORTUIN, J

Date of hearing: 9 June 2021

Date of judgment: 11 August 2021

Counsel for applicant: Adv A Lawrence

Instructed by: Toefy Attorneys

Counsel for respondents

in cases 2912 & 4177/21: Adv S Genukile

Instructed by: Dlova Attorneys Inc