THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable

CASE NO: 54/04

In the matter between :

SAM KADISH MOELA Appellant

and

TICHAONA ABEL SHONIWE Respondent

Before:	**STREICHER, NAVSA, CONRADIE, CLOETE JJA & MAYA AJA**
Heard:	**18 MARCH 2005**
Delivered:	**31 MARCH 2005**
Summary:	**Act 19 of 1998 (PIE) – appeal against summary judgment evicting unlawful occupier – no compliance with the provisions of s 4(2) – object of s 4(2) not achieved – summary judgment set aside**

J U D G M E N T

STREICHER JA

STREICHER JA:

[1] The appellant appeals against an order granted by the Johannesburg High Court ('the court *a quo*') at the suit of the respondent, evicting him from a residential property.

[2] The respondent as the plaintiff instituted action against the appellant as the defendant. In his particulars of claim the respondent alleges that he is the owner of Erf 105 Elspark ('the property'); that the appellant is in occupation of the property; that such occupation is without his consent and thus unlawful; and that he is unable to sell the property (presumably as a result of the appellant's unlawful occupation thereof). When the appellant entered appearance to defend the respondent applied for summary judgment. The notice of application for summary judgment reads *inter alia* as follows:

'**FURTHER TAKE NOTICE THAT:-**

1. This notice is being served upon both the Defendant and the municipality having jurisdiction 14 (fourteen) days prior to the hearing of the proceedings as contemplated by the provisions of Section 4(2) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.
2. These proceedings are being instituted for an order for the eviction of the Defendant.
3. The Plaintiff will seek that the above Honourable Court hear this application on the date and time reflected above.
4. That the grounds for the proposed eviction of the Defendant are those set out in the summons.'

[3] In his affidavit resisting summary judgment the appellant denies that the respondent is the owner of the property but admits that he and his family are in occupation thereof. He states that his wife, his three minor children, his 75 year old mother, his 23 year old daughter and her six month old baby reside with him on the property. According to him he and his family have no other 'suitable' alternative accommodation and 'the rights and needs of [his] elderly mother and the minor children residing in [his] home would be unduly affected by an order of eviction'. No particularity is furnished. These protestations of the appellant sound somewhat hollow in the light of a statement by him that he is willing to pay rental for his occupation of the property and also to purchase the property.

[4] The appellant raised the following additional defence:

> 'I state that the Plaintiff/Applicant's failure to comply with Section 4(2) of the Prevention of Illegal Eviction from an Unlawful Occupation of Land Act, in that the Plaintiff/Applicant has failed to ensure that the court served written and effective notice of the proceedings on the Unlawful Occupier and the Municipality at least fourteen days before the sale, precludes the Applicant from securing the relief prayed for.'

[5] The court *a quo* held that the latter submission was without foundation as there was proof of service on both the appellant and the municipality. It did, however, find that the appellant had failed to disclose a *bona fide* defence, and it accordingly granted summary judgment.

[6] It is common cause between the parties that the provisions of The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ('PIE') are applicable. Section 4 of PIE provides as follows:

'4 (1) Notwithstanding anything to the contrary contained in any law or the common law, the provisions of this section apply to proceedings by an owner or person in charge of land for the eviction of an unlawful occupier.

(2) At least 14 days before the hearing of the proceedings contemplated in subsection (1), the court must serve written and effective notice of the proceedings on the unlawful occupier and the municipality having jurisdiction.

(3) Subject to the provisions of subsection (2), the procedure for the serving of notices and filing of papers is as prescribed by the rules of the court in question.

(4) Subject to the provisions of subsection (2), if a court is satisfied that service cannot conveniently or expeditiously be effected in the manner provided in the rules of the court, service must be effected in the manner directed by the court: Provided that the court must consider the rights of the unlawful occupier to receive adequate notice and to defend the case.

(5) The notice of proceedings contemplated in subsection (2) must-

(a) state that proceedings are being 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.'

[7] This court held in *Cape Killarney Property Investments (Pty) Ltd v Mahamba* 2001 (4) SA 1222 (SCA) that these provisions are peremptory (paras 11 and 17). In respect of the notice required by s 4(2) it held that it must be effective notice; that it must contain the information stipulated in ss (5); and that it must be served 'by the court'. The latter requirement it interpreted to mean that the contents and the manner of service of the notice must be authorized and directed by an order of the court (para 11).

[8] In the as yet unreported judgment of this court in *The Unlawful Occupiers of the School Site v The City of Johannesburg* (case no 36/2006), referring to the fact that the requirements of s 4(2) were peremptory, Brand JA said (para 22):

'Nevertheless, it is clear from the authorities that even where the formalities required by statute are peremptory it is not every deviation from the literal prescription that is fatal. Even in that event, the question remains whether, in spite of the defects, the object of the statutory provision had been achieved (see eg *Nkisimane and others v Santam Insurance Co Ltd* 1978 (2) SA 430 (A) 433H-434B; *Weenen Transitional Local Council v Van Dyk* 2002 (4) SA 653 (SCA) para 13).'

[9] Here the contents and manner of service of the notice had not been authorized and directed by an order of court. However, the object of s 4(2) is clearly to ensure that the unlawful occupier and municipality are fully aware of the proceedings and that the unlawful occupier is aware of his

rights referred to in s 4(5)(d). It may well be that that object, in appropriate circumstances, may be achieved notwithstanding the fact that service of the notice required by s 4(2) had not been authorized by the court. That may for example be the case if at the hearing it is clear that written and effective notice of the proceedings containing the information required in terms of s 4(5) had in fact been served on the unlawful occupier and municipality, 14 days before the hearing. Whether it would, need not be decided by us as there is no basis upon which it can be found that the municipality had been notified of the proceedings at all or that the municipality had any knowledge of the proceedings.

[10] The respondent's summons containing his particulars of claim had not been served on the municipality. The notice of application for summary judgment was addressed to the registrar of the court *a quo*, to the appellant's attorneys and to '**THE GERMISTON MUNICIPALITY HAVING JURISDICTION'** next to which someone indicated by a signature that he had received a copy of the document. It is not known who the person is, what his relationship with the municipality is, where he received a copy of the document and whether he had authority to receive documents on behalf of the Germiston Municipality. The court *a quo* therefore erred in finding that there was proof of service on the municipality.

[10] There has been no compliance whatsoever with the provisions of s 4(2) in so far as the municipality is concerned; it is not known whether the municipality had any knowledge of the proceedings; and there can, therefore, be no question of the object of the section, in so far as it requires service of the notice on a municipality, having been achieved. It follows that the court *a quo* should have dismissed the application for summary judgment.

[11] In the circumstances it is not necessary to deal with the other defences raised by the appellant. The following order is made:

1 The appeal is upheld with costs.

2 The order by the court *a quo* is set aside and replaced with the following order:

‘1 The application for summary judgment is dismissed.

2 The costs of the application for summary judgment will be costs in the cause.’

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P E STREICHER
JUDGE OF APPEAL

NAVSA JA)
CONRADIE JA)
CLOETE JA) CONCUR
MAYA AJA)