OF INTEREST

IN THE HIGH COURT OF SOUTH AFRICA
(EAST LONDON CIRCUIT LOCAL DIVISION)

Case No. EL748/2021

In the matter between:

THE TRUSTEES FOR THE TIME BEING OF THE EAST LONDON HEBREW CONGREGATION	**Applicant**

and

CHANOCH GALPERIN	**First Respondent**
SARA RAZELLE GALPERIN	**Second Respondent**
THE BUFFALO CITY METROPOLITAN MUNICIPALITY	**Third Respondent**

JUDGMENT

HARTLE J

Introduction:

[1] The applicant, The East London Hebrew Congregation ("the Congregation"),[1] issued out an application for the eviction of the first and second respondents ("the respondents")[2] from premises owned by it situated at 7 Osborne Road, Selborne, East London ("the property").[3]

[2] It alleges that the respondents came to occupy the property, initially lawfully, as an incidence of the *first* respondents' employment with it. It alleges that the second respondent, who is married to the first respondent, acquired her right to occupy the home "through" her spouse.

[3] It is apparent from the applicable employment agreement that the first respondent was appointed to serve the Congregation as its Rabbi and spiritual

[1] The applicant is a duly constituted Voluntary Association. It is an Orthodox Hebrew Congregation and a constituent member of the Union of Orthodox Synagogues of South Africa ("The Federation Council").

[2] The third respondent is cited in the application as a possible interested party and as the municipality having jurisdiction in terms of the provisions of section 4 (2) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, No. 19 of 1998 ("the PIE Act"). The municipality does not oppose the application. For convenience I will, where I intend to refer to the Rabbi and Rebbetzin collectively, allude to them as "the respondents", and to the third respondent separately as "the municipality".

[3] There is no suggestion that the applicant does not have *locus standi* as the owner of the property to vindicate its rights, but the respondents plead that the applicant has no standing in terms of its constitution to bring the present eviction application before this court. They contend in this respect that the ecclesiastical court which exercises exclusive jurisdiction over disputes arising from the employment relationship would be the proper forum in which to determine "disputes of this nature." This contention however misses the point that a party's eviction from his/her home can only be ordered by a secular court referred to in the PIE Act, after considering all relevant circumstances and that such application would be expected to be initiated by an owner, as in this case.

leader, and the second respondent as Rebbetzin, teacher and Mashgiach within the Congregation. The employment agreement was concluded with them in June 2016 and would, in the ordinary course, have terminated on 31 May 2024.[4]

[4] The relevant clause in the agreement that provides for the respondents' right to occupation of the rabbinical home for the natural duration of their employment, is made provision for as follows:

> "5. **Accommodation**
>
> 5.1 In addition to the above remuneration and allowances, the Official and the Official's Wife shall be provided with accommodation, free of charge, at the Congregation's partly furnished house in Osborne Road, Selborne, East London or such alternative accommodation of a similar nature, as specified by the Congregation."

[5] The agreement provides in clause 13 for its termination, other than in circumstances where it expires by effluxion of time or on notice, as follows:

> "13. **Termination**

[4] The contract was ostensibly entered into by the Congregation with both of the respondents and provides for a 60/40% split of the agreed upon remuneration in lieu of the obligations that each are expected to perform thereunder. Despite how the agreement is formulated, it was not suggested by any of the parties - I assume on the basis of their mutual acceptance of the Jewish faith and *Halachic* authority, that the second respondent has any entitlement to enforce its provisions, more particularly the right to occupy the property, independently *vis-á-vis* herself as primary occupier. Although the second respondent occupies the property *both* through her husband and in her own right, her voice has been somewhat muted in these proceedings. Her purported confirmatory affidavit, in which she aligns herself with the relief sought by the first respondent (namely that the present application be dismissed with costs on the scale of attorney and client), goes along with the premise that she occupies the rabbinical home at the behest of the first respondent (i.e., as a secondary occupier); and makes common with the allegations made in the main answering affidavit, was delivered unsigned. Mr. Pincus who appeared for the applicant brushed this aside as a trifling side issue, but in truth it is not. Against the express objects of the PIE Act the entitlement of each respondent to place all relevant circumstances before the court, especially where each have their own right and standing as primary occupiers to vindicate their entitlement to occupy, is a significant opportunity. Although I accept counsel's assurance that nothing is amiss thereby, it is important that a litigant's concerns, if any, are, on the face of it, properly vouched for in the papers. However, the approach I adopt herein (based on an apparent acceptance by all the parties in this regard) is that the second applicant's right to occupy is inextricably linked with her husband's.

> The parties record that termination of the agreement due to misconduct, incapacity and operational requirements shall be effected through the procedures prescribed in the Labour Relations Act.
>
> The parties further specifically record that the failure to fulfil the duties specified in Clause 9 would amount to misconduct."[5]

[6] Clause 15 is also of significance since the parties rely on it for different reasons. The applicant alleges that a dispute that arose between itself and the first respondent following his dismissal - if it was his desire to challenge it, (which he did not), fell to be settled in terms of the standard procedures outlined and prescribed in the Labour Relations Act as is provided for in clause 13. In this regard the applicant claims that these procedures were properly adhered to which rendered the matter final, thus entitling them to bring the present application as the right to occupy would have fallen away together with the termination of the first respondent's employment. The respondents, on the other hand, assert that the dispute fell - or since it is a live one still, falls to be resolved exclusively before the Jewish Ecclesiastical Court ("the Beth-Din"). The clause reads as follows:

> "15. **Beth Din**
>
> The Official, the Official's Wife and the Congregation agree to accept the authority of the Beth Din to make final and binding decisions in all matters of the Jewish Law **other than in the instance of disputes to be settled in terms of Clause 13**."

[5] The reference to clause 9 must be an error. Clause 10 sets out the unique responsibilities of each of the two respondents bearing upon their official duties. Apart from the listed obligations, the parties agreed that the terms of the first respondent's engagement would be such as are applicable, and usual or customary, for a Rabbi to perform in a standard South African Orthodox Hebrew Congregation. Section 17 of the agreement, which also deals with "conduct", specifies that the conduct of the first respondent, as official, shall "be one of dignified leadership carrying with it awe and reverence and fitting behaviour consistent with his standing as Rabbi/Chazan in the community". I highlight the expectations on his part especially as it is his claimed misconduct that, according to the applicant, has caused the respondents' entitlement to occupation of the rabbinical home to have fallen away.

(Emphasis added)

[7] The power of the Beth-Din to settle disputes (ostensibly other than those referred to in clause 13 of the parties' employment agreement) is outlined in paragraph 10 of the Articles of Association of the Union of Orthodox Synagogues of South Africa ("the Council"), of which the Congregation is both a member and constituent, as follows:

> "**10. ARBITRATION**
>
> Disputes between any Constituents shall be submitted for arbitration to the Management Committee, with the right of appeal to the Johannesburg Beth Din. **Disputes between any Constituents and officials in their employ shall be submitted to the Johannesburg Beth Din, whose decision/s shall be final and binding.**"

(Emphasis added.)

[8] The respondents, until the first respondent's dismissal, would ostensibly have been officials in the employ of a constituent of the Council.

The applicant's cause of action:

[9] The applicant as owner of the property and duly authorized by resolution asserts that the respondents' occupation of the property, which is subsidiary to the employment contract, became unlawful when it terminated the first respondent's services under the contract, including the right to occupy the rabbinical home, due to claimed misconduct on his part, ostensibly after resort by it to prior internal disciplinary proceedings. What that procedure was is given some context in the termination letter that the applicant put up as proof of the allegation that it terminated the first respondent's employment with the

Congregation and subsidiary tenancy in a notice addressed to him dated 3 February 2020 ("the termination letter"). The letter reads as follows:

> **"RE: DISCIPLINARY INQUIRY**
>
> We refer to the disciplinary inquiry held on Wednesday, 29 January 2020.
>
> We attach hereto, for your attention, a copy of the chairperson's findings and recommendation.[6]
>
> The committee[7] has considered the recommendation and has decided to implement the recommended sanction.
>
> In light of the above, you are hereby advised that your employment as Rabbi of the East London Hebrew Congregation is hereby terminated with immediate effect.
>
> Your right to reside in accommodation provided by the Congregation terminates with your employment. Despite the foregoing, a decision has been taken to allow you to remain in your current accommodation subject to your expressly agreeing:
>
> 1. vacate the premises by no later than 31 March 2020; and
> 2. agree to representatives of the Congregation and/or those appointed by the Congregation having reasonable access to the premises for purposes of measuring with a view to drafting plans for anticipated alterations.
>
> It is emphasized that the access to the premises will be on reasonable notice and on the basis of terms arranged with you and/or Rebbetzin Galperin.
>
> Should we not receive your express agreement and conditions set out in paragraphs 1 and 2 above, the offer in respect of the accommodation will be withdrawn and steps taken to vacate you from the premises without delay.
>
> Should you believe that your dismissal is unfair, you are reminded of your right to refer a dispute to the CCMA, within 30 (thirty) days from today."

[10] This was followed by a further letter dated 9 February 2020 addressed by the applicant's attorneys of record to *both respondents* (ostensibly emailed on the 11th) declaring that they are in "illegal occupation" of the property - presumably the first respondent must have spurned the Congregation's offer to warrant the stance being adopted days after the termination letter had been sent that he and his wife were already regarded as occupying the property without its consent, directing them to pay all charges due to the municipality other than the

[6] This was not included amongst the annexures to the founding papers.
[7] This is presumably the Committee of the Congregation in terms of its own Constitution.

rates - which until that point had ostensibly been covered by the Congregation as a term of the employment agreement, and foreshadowing that eviction proceedings would ensue "shortly".

[11] The applicant claims that "written requests" forwarded by its attorneys to the respondents to vacate the premises (the letter of 9 February 2020 aforesaid held up as the only example) did not have the desired effect and was taken as the respondents' refusal to meet the Congregation's request, hence the need for the present application which could not launched at the end of March 2020 as had been forewarned. This is because by then the COVID-19 pandemic had hit home, a state of national emergency was declared by the government pursuant to the provisions of the Disaster Management Act, No. 57 of 2002 ("the DMA"), and the country placed under a hard lockdown. Because the eviction of persons from residential premises was not permitted at the time under constraint of the regulations promulgated under the DMA, the respondents were by default given some respite over the period of the hard lockdown, but the request for them to vacate the premises took on formal proportions in mid-June 2020 when the present application was issued to vindicate the claimed unlawful occupation of the applicant's property.

[12] It is common cause that the respondents have remained in occupation since 3 February 2020 and oppose the present application.[8] The municipality has not entered the fray.

[13] Apart from asserting in the founding affidavit that it had met the jurisdictional grounds postulated by the relevant provisions of the Prevention of Illegal Eviction from Unlawful Occupation of Land Act, No. 19 of 1998 ("the PIE Act") as well as the procedural requirement of service of effective notice of

[8] The applicant did not state specifically whether it relies on section 4 (6) or 4 (7) of the PIE Act but purported to cover the requirements specified by the latter sub-section. Neither party suggested incidentally that the Municipality needed to become involved on the basis contemplated by sub-section (7).

the proceedings stipulated by section 4 (2), the applicant asserted that the respondents have raised "no valid defence" to the applicant's claim for their eviction from the property and that it is "just and equitable" within the meaning contended for in the PIE Act in the particular circumstances that they be ordered to vacate the property within a suggested time frame.[9]

[14] The applicant asserts in this respect that it is being inconvenienced by the respondents' holding over their occupation of the property since this effectively precludes them from appointing a Rabbi for the Congregation who is expected to be accommodated in the designated rabbinical home. Apart from the compromise of their owner's right to possession of the property, they also allude to the fact that the Congregation has been hampered in its ability to administer to the spiritual needs of its members, I would venture to suggest as a result of an ongoing spat between it and the first respondent, the details of which I will shortly relate.

The respondents' defence:

Preliminary issues:

[15] The respondents relied on several points *in limine* in resisting the application for their eviction.

[16] The first point raises a procedural issue that the applicant did not comply with the peremptory provisions of section 4 (2) of the PIE Act regarding service of effective notice of the proceedings. They claim that this renders the application fatally defective. I deal with this aspect further below.

[9] See section 4 (8) of the PIE Act. This assertion was probably premised on the expectation that the matter would proceed on an unopposed basis and that the parties could, on the applicant's averments, raise no serious defence to the eviction claim.

[17] The second point is that the Congregation, together with the respondents as members and constituent respectively of the Council, are obliged by its Articles of Association, to accept and subject themselves to the authority of the Chief Rabbi and the Beth-Din with regard to all matters falling under the Halachic authority of the Chief Rabbi and in the manner directed by the Council's Articles of Association. This, with reference to clause 10 of the Articles of Association cited above, entails the submission of all disputes between the applicant and the first respondent (as an official in its employ) to the Beth-Din.

[18] The first respondent points out that the Congregation's own Constitution, which clearly defines the powers of the trustees of the Congregation, does not afford it the power or authority to bring the present proceedings. This is "understandable", so the applicant asserts, as the Council's Articles of Association make it plain that exclusive jurisdiction lies with the Beth-Din in regard to "disputes of this nature".[10]

[19] The third point is that the application is fatally defective for want of any mention at all of the relevant provisions of the Disaster Management Regulations promulgated under the Disaster Management Act applicable at the time of the launch of the application and their peculiar application to the circumstances of the matter.

[20] The fourth point is that there is an arbitral process that was set in motion pursuant to which the first respondent is already challenging his dismissal by the applicant before the Beth-Din (which has now spilled over into the secular court along its trajectory as I will shortly explain) and which dispute is still pending as it were, thus precluding a finding that his and the second

[10] What the "dispute" is that falls to be resolved on such a basis is unfortunately not clearly spelt out. I assume contextually though that the first respondent means a prior related dispute (wills dispute) which ultimately conduced to, or culminated in, his dismissal. See Footnote 2 above though regarding my view on the suggested claim of lack of *locus standi* on the part of the applicant to bring the eviction application.

respondent's occupation of the premises, subsidiary to the employment agreement, is unlawful.

[21] Also contended under the mantle of the "4th point *in limine"* (possibly a fifth point) is that the applicant has not satisfied the requirements set forth in section 4 (7) of the PIE Act which it ought to have dealt with since the institution of the present application occurred more than six months after the respondents' alleged "unlawful occupation" of the property.[11]

The substantive issue:

[22] The dispute in respect of the substantive issue revolves around what Mr. Smuts (who together with Mr. Miller appeared on behalf of the first and second

respondents) refers to as the "purported" termination of the first respondent's services. The first respondent admits that he was dismissed but asserts that such dismissal was "wrongful and unlawful" and that that dispute, concerning the Congregation's misplaced entitlement to have so "dismissed" him, is still pending before the High Court and the Beth-Din. He claims in this respect to have a *pending* referral "for *inter alia* (his) reinstatement, arrear salaries, and benefits". On this basis, so it was contended, they would therefore not be unlawful occupiers within the meaning of the PIE Act.

[23] He admits that he eschewed the option of referring his "labour dispute" to the CCMA or the Labour Court based on advice given to him that the Beth-Din has exclusive jurisdiction to determine same in terms of the Council's Articles

[11] This contention is not really understood since the period of occupation for these purposes is calculated from the date on which the occupation becomes unlawful. Ndlovu v Ngcobo; Bekker and Bosch v Jika 2003 (1) SA 113 (SCA) at para 17. In this instance the applicant's consent to the respondents' occupation of the residency, on its case, would have fallen away at the end of March 2020 if regard is had to the extension granted to them (see termination letter), if not on the same date of the first respondent's dismissal. I have indicated above that the applicant seems however to have premised its case on the basis that the provisions of sub-section (7) are of application and indeed addressed the relevant concerns required to be raised by these provisions in its replying affidavit.

of Association. Hence, when he received the applicant's correspondence advising him that his employment had been terminated together with the right to reside in the accommodation provided by the Congregation, he believed that he and the second respondent were justified in their refusal to vacate the property "as a result of (our) pending referral to the Beth-Din and the High Court."

[24] If he is successful in the Beth-Din and "reinstated," so he asserts, he will remain the appointed Rabbi for the Congregation. He is furthermore confident that his prospects of success are extremely good given the fact that the Congregation, and the chairperson appointed by the Congregation, had no authority to dismiss him, this in his view being within the exclusive jurisdiction

of the Beth-Din in terms of the Articles of Association on the basis indicated above, by which the Congregation is bound.[12]

[25] He recognizes that his and the second respondent's right of residence is subsidiary to his employee status but avers that such status remains undetermined in his view until "the High Court matters are determined."[13] He adds in this respect that the determination of "the dispute of the labour matter" is "clearly (as a matter of law) a *pre-condition* for the termination of our right of residence" based on the authority of Snyers v Mgro Properties (Pty) Ltd[14] to which I will shortly allude.

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[12] This is the only information provided to the court in effect concerning the nature of the dismissal dispute. Reading between the lines the first respondent seems to be complaining that his dismissal was both substantively and procedurally unfair, substantively because there was a lack of proof that he is guilty of misconduct, and procedurally because the applicant purported to dismiss him prematurely before the Beth-Din, which has the final say, in fact had that say about both his proven misconduct and need to step down as the Congregation's rabbi. It is entirely illogical to suggest though that the applicant (represented through its Committee) is not the entity that is entitled to hire and fire its own rabbis.

[13] See footnote 10 above. It is not clear if he means all the matters pending in the high court or only Makhanda case no. 1340/2021 that bears directly on the dismissal dispute. In my view it would be too remote to include the pending action between the Society and the first respondent regarding the validity of the will that is in dispute.

[14] [2016] 4 All SA 828 (SCA).

[26] The respondents contend further and in any event that it is not just and equitable for this court to evict them for various other reasons.

The first respondent's "dispute":

[27] It is necessary to have regard to the "dispute" in existence between the parties, the determination of which the first respondent says is pending, and more especially what brought the parties to this point.

[28] The termination of the first respondent's services was ostensibly related to certain misconduct allegedly committed by him, which the applicant considered justified his dismissal from its employment with immediate effect pursuant to receipt of a recommendation by "the Committee"[15] that such a sanction should be implemented. What this conduct was is not disclosed in the applicant's founding affidavit, but in its replying affidavit it sets the record straight that the first respondent was "found guilty" on 11 separate charges, involving *inter alia* dishonesty, which were not limited only to the steps taken by him to benefit from the will of the late Mr. Israel Bayer".

[29] The first respondent volunteered in his answering affidavit what had happened regarding the will of the late Mr. Bayer ("the deceased"), although this is not the dispute on which their plea of "*lis pendens*" is directly founded. He explained that he had developed a personal relationship with the deceased and assisted him with his affairs. The latter, in his last will and testament dated 22 March 2018, had bequeathed one third of his estate to him, the first respondent. The congregation and the East London Chevra Kadisha (also known as the EL Helping Hand and Burial Society ("the Society")) alleged that this last will and testament was a forgery and that the first respondent had, in his own hand, written a portion of the deceased's will himself, expunging the

[15] As indicated above I assume that this would be the Committee under the Congregation's own constitution.

Society as a beneficiary and substituting himself in its place in respect of the one third portion that the deceased had in his penultimate will bequeathed to it.

[30] His accusers (both the applicant and the Society) further alleged that the two persons who had signed as witnesses to the will had not been present when the deceased signed the will, but this according to the first respondent is an unfounded allegation.

[31] The culmination of the Congregation and the Society's concerns in this respect led to them requesting the Beth-Din to arbitrate that dispute ("the wills dispute"). A copy of their agreement in this respect, dated 19 September 2019, confirms that the "parties voluntarily agree to submit the matters of controversy between them concerning the will of the late Israel Bayer" and "*all related matters"* to the arbitration of the Johannesburg Beth-Din comprising of two named Dayanim (Rabbinic Judges).

[32] It was a material term of this arbitration agreement, so the first respondent points out, that the decision of the Beth-Din would be final and binding on them and that the "matters contained therein would remain in the sole jurisdiction of the Beis Din, not subject to that of any other Beis Din or court, to modify, appeal or enforce, without the written consent of the Beis Din."[16] In a copy of the decision of the Beth Din put up by the first respondent, on the face of it the parties (as claimants) include both the Congregation and the Society (represented by Messrs. Aufrichtig and Robinson,[17] and Mrs. Ettinger respectively). The claim is defined in the following terms:

> "**CLAIM**
>
> The claimant avers that the final Will, dated the 22nd of March 2018, was in fact a forgery.

[16] In the applicant's replying affidavit, the co-president of the Congregation reveals that the Society was not happy that the applicant had bound it to the referral. This leaves the distinct impression that the dispute with the first respondent over the will of the deceased was principally driven by the applicant.

[17] The first respondent accuses Mr. Robinson, who is a trustee of the applicant and deposed to the affidavit filed on its behalf, of having been the driving force of all the proceedings against him and his wife.

> The assertion is that the Respondent wrote the handwritten portion of the Will himself, expunging the ELCK[18] from the Will and placing himself as a beneficiary instead. The Claimant further contends that the signature of the deceased was a forgery and that the witnesses who signed as witnesses to the Will, were not present when the deceased appended his signature to said Will.
>
> The Respondent denies having written the hand-written portion of the third and final Will and denies having forged the signature on said Will."

[33] The conclusion reached in the arbitration by the dayanim after hearing evidence, which included handwriting experts, is recorded as follows:

> "**CONCLUSION**
>
> Based on the above the Beth Din finds:
>
> - The Respondent did not write the hand-written portion of the Will.
> - The Will was signed by the deceased in the presence of the two witnesses who signed on the Will.
> - In view of the above, the charge that he forged the signature of the deceased, and altered the Will of his own accord in his favour, is rejected and without any merit."

[34] Despite ostensibly having been being exonerated of the "claim" by the claimants (including the Congregation who was ostensibly a party to the wills dispute), which one expects would have removed the taint of any misconduct on his part, the first respondent avers that the applicant nonetheless proceeded on 29 November 2019 to bring disciplinary charges against him.

[35] Neither party has clearly outlined the nature of the misconduct he was accused of.

[36] The disciplinary hearing commenced on 9 December 2019.

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[18] This is the acronym for the Society.

[37] The first respondent explains that he did not accept the authority of the person appointed by the Congregation to conduct the disciplinary hearing against him. As a result, the hearing was convened and heard in his absence on 29 January 2020, culminating in the result indicated in the termination letter aforesaid.

[38] Despite the arbitration award of the Beth-Din concerning the underlying claim of misconduct against him in the wills dispute being final and binding on the Congregation, the first respondent relates that the applicant then brought an application in the High Court on 7 July 2020 (East London case number 1356/2020 refers) to have the last will of the deceased declared invalid.[19]

[39] The first respondent followed suit on 27 August 2020 by resort to the secular courts to have the same award made an order of court pursuant to the provisions of the Arbitration Act, No. 42 of 1965.[20] On 1 October 2020 the Congregation filed its answering affidavit in that matter.

[40] On the same date the first respondent referred his wrongful and unlawful dismissal dispute to the Beth-Din. How this referral was framed has not been disclosed to the court.

[41] On 2 October 2020 the Congregation (*sic*) brought action proceedings in the High Court in case number 2067/2020 to declare the will of the deceased invalid.[21] The first respondent filed a counter application in that action to have the arbitration award made an order of the High Court together with ancillary relief (which appears to entail a declarator that he is competent to receive the benefits from the will of the deceased in terms of section 4A(2) (a) of the Wills

[19] This is the same date on which the respondents were served with the "*Ex parte*" application for eviction.
[20] Makhanda case number 1770/2020 refers.
[21] The applicant reveals that the action does not concern it and the first respondent, but rather that it is between the Society and him.

Act, No. 7 of 1953). He also withdrew his earlier application in case number 1770/2020 for "procedural reasons". This was on 17 November 2020.

[42] On 15 December 2020 the first respondent brought an application to the Beth-Din requesting them to make a ruling in regard to the labour dispute which he had referred to them concerning his "wrongful and unlawful dismissal".

[43] In this respect, the Beth-Din had indicated that it could not deal with the labour dispute referred to it on the basis that the Congregation was not prepared to attend a hearing before it to determine his claims in this regard.

[44] The first respondent sought to resolve this impasse by bringing an application in the High Court (Makhanda case number 1340/2021 refers) to compel the Beth-Din to hear his dismissal dispute. Judgment in that matter was handed down on 18 January 2022 shortly before this matter was argued before me with the High Court dismissing the application.

[45] I was advised from the bar by Mr. Smuts that the court's judgment is presently under appeal, rendering the provisions of section 18 (1) of the Superior Court's Act, No. 10 of 2013, applicable *vis-á-vis* its impact for the moment.

[46] It is quite apparent that all the litigation in the High Court and the proceedings before the Beth-Din have has been vociferously opposed and that, depending on the outcome of the appeal (or hopefully the applicant earlier submitting itself to the jurisdiction of the ecclesiastical court as a means to finally determine the issues between them), the parties have essentially reached a stalemate with their respective positions being stubbornly entrenched.

The applicant's reply:

[47] The approach that the applicant adopts in reply is that the first respondent's right to have challenged his dismissal and concomitantly his (and the second respondent's) right of occupation of the property was limited under the circumstances to an approach to the CCMA and/or the Labour Court (with reference to the provisions of clause 13 of the employment agreement), which he has chosen not to pursue and that his dismissal is therefore final and incontestable. That, on its own says the applicant, renders the respondents' occupation of the property unlawful and warrants their eviction.

[48] Whilst the applicant acknowledges that the first respondent sought to have the Beth-Din determine his labour dispute by way of notice of referral dated 1 October 2020, it makes no bones about the fact that it does not, as far as it is concerned, consider this to be an option open to the first respondent to pursue. It transpires that the reason for this is that the applicant advised the Beth-Din that it was, and I assume from the context, *is not*, prepared to subject itself to the ecclesiastical court's jurisdiction for purposes of determining the first respondent's dismissal dispute.

[49] The approach taken by the Beth-Din is that where one party refuses to subject itself to its jurisdiction, it has the right and obligation to allow the other disputant to approach the secular courts which it did by giving permission to the first respondent to vindicate his situation in such a manner.

[50] Whereas this would have been the end of the matter, so the applicant relates, the first respondent persisted in his "misplaced endeavour", as it calls it,

to have the labour dispute determined by the Beth-Din by filing an application for a ruling document dated 15 December 2020 wherein he asked the Beth-Din to formally rule on the issue of its jurisdiction over the labour dispute belatedly referred to it. The applicant in this next round once again asserted to the Beth-Din that it was not agreeable to the first respondent's request that it submit itself to its jurisdiction. A study of the correspondence addressed by the Beth-Din's attorney to the parties' attorneys concerning this issue reveals its view that it does indeed have jurisdiction over the dispute, but that its hands are tied as it were, because of the stance adopted by the applicant that it will not accept its jurisdiction and will not partake in any such hearing before it.

[51] The applicant reveals in its replying affidavit, (although, evidently not in its correspondence with the Beth-Din), that one of the reasons why it does not wish to submit itself to the ecclesiastical court's jurisdiction to determine the first respondent's claim that his dismissal was wrongful and unlawful is that the Society, and by extension itself, both have a reasonable apprehension of bias against it because it took relevant and material evidence from the respondents in the wills dispute hearing in the absence of the Society and omitted to declare that the second respondent had disclosed to it that it was she who had written the contentious portion of the deceased's will in her own hand. The applicant's points to the fact that the first respondent revealed for the first time in the action underway in the High Court against him by the Society that it was the second respondent who had in fact written out the deceased's contested will. This, so the applicant contends, would automatically have disqualified the first respondent from inheriting under the will.[22]

[52] It also appears to have emerged in the action between the Society and the second respondent, so this court is told, that one of the witnesses to the will

[22] The legal consequence is not relevant to these proceedings. The irony though is that this revelation possibly points away from misconduct on the part of the first respondent although, as the applicant pleads, the wills dispute is not the only issue between it and the first respondent.

made an affidavit stating that she did not witness and was not present when the deceased signed the will despite her testimony before the Beth-Din having been to the contrary in support of the first respondent.

[53] Also not revealed by the first respondent in the papers before this court, according to the applicant, is the fact that the Beth-Din in the wills dispute referral by way of correspondence dated 24 June 2020 and after the fact withdrew its original ruling that the first respondent holds onto as being in his favour. It is apparent from this communication alluded to by the applicant that it was inclined to move away from its original finding in favour of the first respondent on the basis that new evidence had come to light justifying a retrial of the issues before it.[23]

[54] Although on the face of it the dispute before the Beth-Din that went in favour of the first respondent's favor is strictly between him and Society, it was self-evidently a precursor to the disciplinary proceedings against him and underpins the charges of misconduct against him.

[55] Howsoever these issues may be dealt with in time, the vital fact *in casu* says the applicant, is that the first respondent was charged with dishonesty *inter alia* and that there has been an irretrievable breakdown of any trust relationship between him and the Congregation. Thus, even for a moment assuming that the Beth-Din were to be seized of the dismissal dispute (which it submits is a most unlikely prospect), the applicant does not consider there to be any realistic basis upon which the first respondent may be reinstated as its Rabbi.

The legal framework:

[23] A glance at the Beth-Din's correspondence in this respect dated 24 June 2020 does not at all suggest a random withdrawal of its earlier findings. It explains why a retrial was necessary having regard to its own internal process and invited the parties to a fresh hearing via *Zoom* which it offered to hear on an urgent basis on 30 June 2020. The applicant put this letter up in support of the allegation that the Beth-Din had withdrawn its original ruling, but failed to suggest what had transpired thereafter or why the invitation for a retrial was not taken up, or what the further outcome was, if any.

[56] Whereas the applicant predicated its application on the provisions of the PIE Act, as it must, the respondents deny that they are unlawful occupiers within the contemplation of the act yet raised the preliminary objection that the application is fatal for want of compliance with its provisions.

[57] It is necessary to advert to these provisions.

[58] Section 4 of the PIE Act provides in the following terms for the eviction of unlawful occupiers:

> **"4. Eviction of unlawful occupiers.—**
>
> (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.
>
> (6) 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 elderly, children, disabled persons and households headed by women.

(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*).

(9) In determining a just and equitable date contemplated in subsection (8), the court must have regard to all relevant factors, including the period the unlawful occupier and his or her family have resided on the land in question.

(10) The court which orders the eviction of any person in terms of this section may make an order for the demolition and removal of the buildings or structures that were occupied by such person on the land in question.

(11) A court may, at the request of the sheriff, authorise any person to assist the sheriff to carry out an order for eviction, demolition or removal subject to conditions determined by the court: Provided that the sheriff must at all times be present during such eviction, demolition or removal.

(12) Any order for the eviction of an unlawful occupier or for the demolition or removal of buildings or structures in terms of this section is subject to the conditions deemed reasonable by the court, and the court may, on good cause shown, vary any condition for an eviction order."

(Emphasis added.)

[59] The PIE Act was enacted to regulate the eviction of unlawful occupiers from land in a fair manner, whilst recognizing the right of land-owners to apply to a court for an eviction order in appropriate circumstances.[24] Although this is

[24] See Preamble to the Act. See also Christo Smith, Eviction and Rental Claims: A Practical Guide, Part 1: The Law of Eviction, Chapter 3 The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act re The scope of PIE at par 3.1.

the basic principle underlying the PIE Act, it is now accepted law that, due to various procedural requirements and measures contained in the Act, it has effectively disposed of certain common law rights relating to eviction.[25] PIE has its roots, inter alia, in section 26 (3) of the Constitution which provides that "no one may be evicted from their home or have their home demolished without an order of court made after consideration of all the relevant circumstances".

[60] Section 1 of the PIE 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, and excluding a person whose formal right to land, but for the provision of this Act, would be protected by the protected by the provisions of the Interim Protection of Informal Land Rights, Act, 1996 (Act 31 of 1996)."

The applicant's substantive claim for ejectment:

[61] There can be no question that the applicant is the owner of the property and that it is in the ordinary course vested with *locus standi* to vindicate its rights that flow from its ownership of the property, including the right to recover lost possession by resort to the *rei-vindicatio*.

[62] The applicant further claims to enjoy the formal support of the Congregation in bringing these proceedings, an assertion that has not in essence been challenged.[26]

[63] The onus which the applicant bears for its case founded on the *rei-vindicatio* is to prove that (1) it is the owner of the property and (2) that the

[25] Ndlovu v Ngcobo; Bekker and Bosch v Jika 2003 (1) SA 113 (SCA) at par [16].
[26] *Locus standi* is instead challenged on the basis that the parties resort should have been to the Beth-Din to resolve the first respondent's dispute/s as a precondition for a valid termination before the subsidiary tenancy can be said to have come to an end.

respondents are in possession thereof.[27] These essential allegations are not in contention.

[64] If the owner of a property pleads that the person in possession would have had a right to possession, had that right not been terminated, the owner must prove the termination of the aforesaid right.[28]

[65] The applicant relies in this respect on the termination letter as proof that the respondents' rights to occupy the property (subsidiary to their employment agreement) was terminated when the first respondent was dismissed by the Congregation as its Rabbi. In its replying papers it submits further that such termination was valid and lawful and fair in all the circumstances and that since the first respondent did not challenge his dismissal before the CCMA or in the Labour Court, their right to occupy the rabbinical home has come to an end.

[66] An examination of what transpired is that after the wills dispute was finalized, at that early stage in favour of the first respondent, the applicant commenced disciplinary proceedings against him due to his claimed misconduct *inter alia* relating to the accusations made against him by the Congregation and the Society before the Beth-Din concerning that dispute. The applicant avers that the charges against the first respondent were of a serious nature relating to misconduct. The first respondent has not explained why he did not appear before the appointed chairperson at the enquiry to state his case. The chairperson ostensibly came to a finding in the first respondent's absence that he had made himself guilty of certain misconduct and recommended the sanction of dismissal to the Committee.

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[27] Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd 1993 (1) SA 77 (A) at 82 A – C. Ndlovu *supra* at par [19].
[28] Chetty v Naidoo 1974 (3) SA 13 (A) at 21 G - H.

[67] The applicant, ostensibly acting through its "Committee", immediately terminated the first respondent's employment as well as the respondents' right to occupy the property.

[68] The first respondent was warned in the communication of his right if he considered his termination to be unfair to refer a dispute regarding his dismissal to the CCMA within thirty days.

[69] It is common cause that he did not refer any dispute to the CCMA. Indeed, he consciously elected not to follow through with such an option which the applicant contends was the only avenue open to him if he wished to challenge his dismissal.

[70] It is hard to discern the real nature of the defence to the eviction claim. The first respondent appears to equivocate between a plea that suggests that the employment agreement still exists because it was not lawfully cancelled or that its cancellation was a nullity as it were (giving him and the second respondent a *right* still to occupy), and an acceptance on the other hand that the agreement was indeed cancelled, but that the termination is assailable. Allied to the latter defence is the claim that the only forum that can decide finally whether the contract was "lawfully" cancelled is the Beth-Din and that it is a pre-requisite for that dispute to be determined before the respondents can be evicted because their right to occupy rides on the coattails as it were of that dispute determination. Interestingly, and perhaps strategically so, the first respondent does not claim that his dismissal was unfair, whether substantively or procedurally, as if to avoid any concession that the termination of the employment agreement due to his claimed misconduct was to be effected through the procedures described in the Labour Relations Act, more particularly by resort to the CCMA, or the Labour Court as the case may be, to challenge his dismissal.

[71] Whereas the applicant bears the onus to prove the termination of both the right to occupy and of the first respondent's employment agreement (the right to occupy being subsidiary thereto), the respondents bear an evidentiary burden to allege and prove the facts necessary to justify their plea that they are not in unlawful occupation of the property.

[72] It is common cause that the applicant convened disciplinary proceedings against the first respondent before a chairperson which he chose not to attend, and that his dismissal followed that process. He asserts that he took issue with the standing of the chairperson but has not taken the court into his confidence in this respect to explain why. Later he referred a dispute to the Beth-Din arising from his dismissal, which is the referral he relies on for his plea of "*lis pendens*" as it were.

[73] The applicant has established through its averments and the common cause evidence that the basis for the termination of the first respondent's employment was due to claimed misconduct on his part; that it followed an ostensibly fair procedure prior to terminating his services for such reason, which entailed inviting the first respondent to make representations before a disciplinary enquiry that it convened for such purposes (an opportunity he admits was afforded to him but which he spurned), and that the claimed misconduct entailed dishonesty and was of the nature warranting his immediate dismissal upon a confirmed finding of misconduct on his part. It further alluded to its contractual entitlement to effect the termination (at least of the first respondent's services) through the procedures prescribed in the Labour Relations Act.

[74] Moreover, the applicant as the employer was the proper entity, acting through its committee, to take this decision. Indeed, in my view it was never

the Beth-Din's to make if that is what the first respondent seeks to suggest by the proposal that the dismissal was a "purported" one.

[75] The first respondent has faintly suggested that this court should not conclude that there was a *valid* termination of his services, without explicitly revealing why.

[76] Calling the termination a "purported dismissal", because it is subject to challenge (as frequently occurs with any dismissal) does not in my view change the premise that the first respondent's employment was as a fact terminated.[29] Whether that dismissal was fair is a different enquiry to the one at hand.[30] Indeed, every enquiry into the fairness of a dismissal (which is what the labour law dispensation concerns itself with in *all* employment relationships) begins with the necessary jurisdictional fact that his/her services were as a fact terminated and this indeed appears to me to be the very basis upon which the first respondent ultimately sought to refer a dispute over his dismissal to the Beth-Din, albeit months later.

[77] I am satisfied that whether wrong or right in the first respondent's view, whether timely, or whether the Congregation followed a fair procedure, or was properly constituted when it dismissed him from its employ, the respondents can hardly wish away the fact that the first respondent's services were, as a fact, terminated on 3 February 2020 upending their contractual entitlement to remain in occupation of the property.

[78] In the result I am satisfied that the applicant has the met onus which it bears to prove the termination of the contractual right to possession which the

[29] "Dismissal" is defined in section 186 (1) of the Labour Relations Act, No. 66 of 1995 ("LRA") as "a termination of employment with or without notice".

[30] The LRA does not contemplate that a dismissal could be "invalid" and thus of no force or effect neither does an employee have a right "not to be *unlawfully* dismissed". See Steenkamp & Others v Edcon Ltd 2016 (3) BCLR 311 (CC).

first respondent would have had but for the fact that he was dismissed from the applicant's employ.

[79] This then brings the respondents within the purview of the PIE Act as "unlawful occupiers", entitling them to the benefit and protection of the provisions of the Act. Indeed, it seems counter-intuitive to suggest that the Act's provisions do not apply to their peculiar situation.

[80] To bring it back to the PIE Act's definition of "unlawful occupier" the respondents' express consent initially afforded to them by the applicant to occupy the property has been revoked.

[81] It has further not been suggested on their behalf that any "tacit consent" to their continued occupation is at play.

[82] It was finally contended on their behalf that they may have a "right in law to occupy" because the final determination of a labour dispute is a *pre-condition* for the termination of a right of residency subsidiary to such agreement.

[83] In this respect, I was referred to Snyers v Mgro Properties (Pty) Ltd[31] in which the court held that the determination of a disputed labour matter[32] is a precondition for terminating the occupier's right of residence under section 8 of the Extension of Security of Tenure Act, No. 62 of 1997 ("ESTA"), which Act's

[31] *Supra* particularly at pars [6] and [19].

[32] The occupier had referred a constructive dismissal dispute to the CCMA after he was constrained to resign in order to receive payment of his pension benefits that should have been paid to him after he entered into a new employment contract with the successors in title of a group of farms where he had previously worked as a farm labourer. He was promoted to the position of senior foreman and transferred to a different farm under occupation by him under a new contract. He claimed to have been induced by the new employer to resign after they told him that he could not access his pension payment unless he resigned. In the course of his long service on the farm (beginning from Hexrivier until he transferred to the new farm) he had accrued a substantial pension carried over from his former employer. Rightly or wrongly, so the court observed, he entertained an apprehension that he might not get his pension monies except if he resigned. The court found that his dispute had been timeously referred to the CCMA and had not been determined by the date on which he received notice to vacate the premises.

provisions were applicable to that occupier's entitlement to resist the employee owner's claim to vacate premises occupied by him which he had acquired tenancy of under a housing allowance stemming from his employment agreement. Although counsel for the respondents *in casu* did not suggest that ESTA applies to the facts of the present matter, they prevailed upon me to find that the situation pertaining to an employee under ESTA was analogous to the scenario applicable in this instance where the respondents assert a right to remain in occupation until the Beth-Din has determined the first respondent's labour (or earlier underlying) dispute one way or the other.

[84] The court in Snyers observed what an owner in the unique circumstances under ESTA had to prove as follows:

> "[6] … Under ESTA, an owner's right to apply for eviction is dependent on a number of prerequisites, one of which is that the right of occupation should be validly terminated in terms of s 8. Sections 8(2) and (3) of ESTA provide the following:
> 'The right of residence of an occupier who is an employee and whose right of residence arises solely from an employment agreement, may be terminated if the occupier resigns from employment or is dismissed in accordance with the provisions of the Labour Relations Act [66 of 1996].
> Any dispute over whether an occupier's employment has terminated as contemplated in subsection (2), shall be dealt with in accordance with the provisions of the Labour Relations Act, and *the termination shall take effect when any dispute over the termination has been determined in accordance with that Act*.' …"

[85] The court went on to conclude as follows regarding the validity of the notice to vacate that had been given to Snyers by the farm owners/employer:

> "[18] In my view, when the respondents served the notice to vacate on Snyers, his labour dispute in the CCMA had not yet been determined. That contravened the provisions of section 8(3) requiring that where there is a labour dispute relating to the termination of the occupier's right of residence, the termination only takes effect when such dispute is determined in accordance with the LRA. In *Karabo and others v Kok and others* 1998 (4) SA 1014 (LCC) at paragraph 14 [also reported at [1998] 3

All SA625 (LCC) – Ed], the LCC, in a judgment by Gildenhuys J (Moloto J concurring), correctly held that:

> "The right of residence of a person which arises solely from an employment agreement, may be terminated if the person resigns from his or her employment or is dismissed in accordance with the provisions of the Labour Relations Act. Any dispute over whether a person's employment has been lawfully terminated must be dealt with in accordance with the provisions of the Labour Relations Act, and the termination shall take effect only when that dispute has been determined in accordance with that Act." (Footnotes omitted.)

In paragraph 15, the LCC went on to say:

> "In this case, there is a dispute over the validity of the termination of the employment of the labourers, and this dispute is being dealt with under the provisions of the Labour Relations Act. Because the dispute is still pending, the termination of the employment for purposes of the Tenure Act [ESTA] has not yet taken effect."

And in paragraph 22, the LCC held:

> "It was submitted on behalf of the [farm owners] that the phrase 'dispute over whether an occupier's employment has been terminated as contemplated in [subsec] (2)' refers to a dispute on whether a termination actually occurred, and not to a dispute over the lawfulness of the termination. I do not agree with the submission. Subsection (3) refers back to [subsec] (2), which provides that the right of residence of an occupier may be terminated if he or she resigns or is dismissed in accordance with the provisions of the Labour Relations Act. The termination of the occupier's employment as envisaged in [subsec] (3) must, under the provisions of [subsec] (2), be in accordance with the provisions of the Labour Relations Act. This means that the validity of the termination is at issue. It is so, as pointed out on behalf of the [farm owners], that such an interpretation would oblige the owner of land to continue housing dismissed employees while a dispute on the validity of the dismissal is pending. Such a dispute may take months to resolve. The interpretation I have given to s[ubsec]s (2) and (3) is, in my view, the only possible interpretation. I cannot deviate from it because the consequences are alleged to be unfair. The fairness or otherwise of a legal provision is for Parliament to decide. I should point out, however, that in suitable circumstances, the owner or person in charge may be entitled to relief under s 15 of the Tenure Act."

[19] Determination of the disputed labour matter is thus clearly a pre-condition for terminating the occupier's right of residence under ESTA. Given the objects of ESTA stated in the above *dicta* of the Constitutional Court, it necessarily follows where an occupier's tenancy is subsidiary to his or her employment on a farm, that where a dismissal is disputed, the dispute over its fairness must be finally determined before the subsidiary tenancy is terminated. Accordingly, ESTA does not countenance notice

> given in terms of section 8 while a labour dispute remains undetermined. The validity of the notice so given is vitiated by the lack of determination of the labour matter. For these reasons, and as section 9(2)(a) of ESTA makes the granting by a court of an eviction order subject to the prior termination of the right of residence in terms of section 8, the notices given by the respondents to Snyers were invalid and consequently vitiated the entire eviction proceedings against him."

(Footnotes omitted.)

[86] However, no such requirement, namely that the determination of a labour dispute is a pre-condition for terminating an employee's subsidiary right to occupy property arising from an ordinary employment agreement, exists under the PIE Act dispensation where the claim for ejectment is based on the *rei vindicatio.* In such a situation the owner approaches the court merely on the basis of its ownership and the respondent's unlawful occupation of the property, subject of course to the provisions of the PIE Act, the application of which a court is obliged by its provisions to apply. [33]

[87] An occupier described under the provisions of ESTA is in a very different position to the respondents. Indeed, ESTA speaks of an occupier pursuant to its provisions as having a statutory "right of residence". Section 3 (1) of the ESTA further provides that that right (entailing consent within the meaning of the Act to reside on or use land) shall only be terminated in accordance with the provisions of section 8 of the ESTA.[34] A statutory right of residence, the

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[33] Ndlovu v Ngcobo, Bekker & Bosch v Jika *supra* at para [19].

[34] The ESTA provides as follows in this respect:

> **"8. Termination of right of residence.** —(1) Subject to the provisions of this section, an occupier's right of residence may be terminated on any lawful ground, provided that such termination is just and equitable, having regard to all relevant factors and in particular to—
> (*a*)the fairness of any agreement, provision in an agreement, or provision of law on which the owner or person in charge relies;
> (*b*) the conduct of the parties giving rise to the termination;
> (*c*) the interests of the parties, including the comparative hardship to the owner or person in charge, the occupier concerned, and any other occupier if the right of residence is or is not terminated;
> (*d*) the existence of a reasonable expectation of the renewal of the agreement from which the right of residence arises, after the effluxion of its time; and
> (*e*) the fairness of the procedure followed by the owner or person in charge, including whether or not the occupier had or should have been granted an effective opportunity to make representations before the decision was made to terminate the right of residence.

protection of which is fastidiously prescribed under defined circumstances for a particularly vulnerable category of occupier singled out by the legislature, is vastly different from the respondents' unique contractual rights arising within the four corners of the employment agreement which applies *in casu*.

[88] In conclusion, I am satisfied that the respondents are "unlawful occupiers" within the meaning of the definition in the PIE Act and that the applicant is, in principle, entitled to an eviction order subject to the constraints imposed by section 4 of the PIE Act. Indeed, this is a classic case of holding over which is in a category all of its own for purposes of applying the relevant provisions of the PIE Act.[35]

The procedural requirements:

[89] An applicant in an eviction application that is brought within the ambit of the PIE Act is required to establish that the procedural requirements of the PIE Act have also been met.

[90] Section 4 (2) of the PIE sets out the necessary requirements regarding notification to the person or persons sought to be evicted of the date of the hearing, over and above the requirement of service as determined by the rules of the applicable court.[36]

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(2) The right of residence of an occupier who is an employee and whose right of residence arises solely from an employment agreement, may be terminated if the occupier resigns from employment or is dismissed in accordance with the provisions of the Labour Relations Act.
(3) Any dispute over whether an occupier's employment has terminated as contemplated in subsection (2), shall be dealt with in accordance with the provisions of the Labour Relations Act, and the termination shall take effect when any dispute over the termination has been determined in accordance with that Act."

[35] Ndlovu v Ngcobo, Bekker & Bosch v Jika, *supra* at [16].

[36] The Joint Practice Rules of this division do not distinguish the position regarding PIE applications, but there are distinct provisions pertaining to the enrolment of both opposed and uncontested opposed application matters, as the case may be, that will have a bearing on how and when the requisite notice under the PIE Act can and should be given.

[91] The court's consideration and application of section 4 (2) is procedural in nature and does not involve a decision on the merits.[37] The two-fold enquiry concerning whether, firstly, the person in respect of whom the eviction order is sought is an unlawful occupier, and, secondly, whether it is just and equitable to grant an eviction order, do indeed involve the merits and is dealt with on the date of the hearing.

[92] I have set out above the full exposition of section 4, and I presently draw attention to the provisions of sub-section (1) to (5) thereof that concern themselves with the procedural aspects of an application such as the present one.

[93] In Cape Killarney Property Investments (Pty) Ltd v Mahamba[38] the Supreme Court of Appeal outlined the basic principles of interpretation regarding section 4 (2) of the PIE Act. In broad terms, a PIE application is to be launched like any other and after the papers on both sides have been exchanged (in opposed matters) and a date for the hearing has been determined, the court is only then approached on an *ex parte* basis for directions in terms of section 4 (2). The notice in terms of section 4 (2), containing the date of the hearing and other prescribed information is then to be served on the respondent. With the same objective in mind, if the matter is unopposed, the *ex parte* application for directions is to be brought after expiry of the *dies* for filing a notice to oppose, and the notice in terms of section 4 (2) is then served on the respondent to inform him/her of the date of which the application will be moved on an unopposed basis. There are therefore two distinct, but related, applications.

[94] The detailed notice procedure and format of applications under the PIE Act (in the Magistrate's and the High Court's respectively) has been helpfully summarized in Eviction and Rental Claims: A Practical Guide,[39] as follows:

[37] Theart and Another v Minaar NO; Senekal v Winskor 174 (Pty) Ltd 2010 (3) SA 327 (SCA).
[38] 2001 (4) SA 1222 (SCA).
[39] Christo Smith, *supra*, Part 1 at par 3.5.2.

"1. The Long Notice of Motion should be followed – High Court Form 2(*a*) and Magistrates' Court Form 1A. Proceedings may also be instituted in the Regional Civil Courts. If proceedings are instituted by way of summons, a combined summons in accordance with the rules is required – see para 10 below. The Notice of Motion must state the normal time periods for opposing and filing of opposing affidavits in terms of the rules of court. (See the precedents of both the substantive and *ex parte* applications in par 3, Appendix A)

2. Once the Notice of Motion, being the substantive application, has been served, and the time for filing a notice to oppose has expired, the *ex parte* application in terms of section 4(2) becomes relevant. This *ex parte* application serves to obtain the court's directions for service of the section 4(2) notice and the date of the hearing. The content of the section 4(2) notice is discussed below. In effect, the section 4(2) notice is an additional notice of the date of the hearing, apart from the notice of motion in terms of the court rules. Importantly, this notice must contain the same unopposed date of hearing as that in the substantive notice of motion. Therefore, when drafting the substantive Notice of Motion, care should be taken to allow sufficient time prior to the date of hearing, in the event that the matter is not opposed, for the *ex parte* application to be prepared, brought and for service of the order. A period of 14 normal days must be allowed from date of service of the *ex parte* order to the date of hearing. The *ex parte* application may be brought either in chambers or set down on the unopposed motion court roll, depending on the practice of the relevant court.[40]

3. The time periods in terms of the rules of court include only court days and therefore compliance with the 14 day period of section 4(2) will follow automatically.[41] The

[40] There are no specific practice rules in place in respect of eviction applications in the Eastern Cape Province, but a chamber book application would unlikely be permitted given the requirement in section 4 (2) of the PIE Act that "the court", as opposed to a "judge", is to serve written and effective notice of the proceedings on the unlawful occupier. Such applications are routinely brought *ex parte* and set down for hearing on the unopposed motion court roll.

[41] Kanescho Realtors (Pty) Ltd v Maphumulo and others 2006 (5) SA 92 (D) at 97.

Notice of Motion must contain a date of hearing of the application, if unopposed. This provision may not apply in some divisions of the High Court.[42]

4. After obtaining the *ex parte* order, the notice containing the court's directions and the date of the hearing, must be served on the unlawful occupier as well as the municipality having jurisdiction, at least 14 days prior to the hearing of the proceedings. Section 4(2) therefore requires 14 days' notice of the date of the hearing in addition to notice in terms of the Rules of Court.
5. If a Notice of Intention to Oppose is delivered, the *ex parte* application for the issuing of the section 4(2) notice should only be brought *after* the papers have been exchanged and a date for hearing has been determined. In case of the action procedure, the process discussed in 10 below must be followed. In opposed matters, if the respondent is represented and unless large numbers of occupiers are involved, the parties may agree to waive section 4(2) to save costs, the respondent or respondents having been effectively informed.
6. The Court Order authorising the section 4(2) notice should be served by the sheriff along with the *ex parte* notice of motion. The main thrust of section 4(2) is the requirement of notice of the proceedings and thus personal service is required in the absence of a clear indication that the respondent has received notice.
7. Section 4(2) states that the notice has to be served by the court, however, this does not mean service by a magistrate or judge, only that the contents and manner of service of the notice be authorised and directed by an order of court. The latter authorisation refers to the interlocutory (*ex parte*) application in terms of section 4(2).
8. If a Notice of Intention to Oppose is delivered but the respondent fails to deliver answering affidavits in accordance with the rules, the applicant can approach the court *ex parte* for authorisation in terms of section 4(2) and a date of hearing of the matter will be obtained and inserted into the section 4(2) notice. This notice is then to be served in compliance with section 4(2) and care taken that the date inserted in the notice and the time provided gives the respondent 14 days' (ordinary days) notice of the date of the hearing. On that date, the matter may be dealt with on an unopposed basis, or if the

[42] It is not uncommon in this division for the applicant to anticipate that a respondent may not oppose the substantive relief sought, leaving only the procedural requirements under the PIE Act to be satisfied going forward, and making allowance for all of this in the planning and timing of the application. The substantive application will then be enrolled on the projected date by the Registrar already at the time of its issue. The interlocutory application will be separately issued and enrolled on the unopposed motion court roll once the time to oppose the substantive application has run its course, and the order issued by the court arising from this process and the notice itself (served in time), will conduce to the substantive application (already enrolled in the original anticipation that it would not be opposed) being able to proceed on a default basis on the enrolled date. Of course, if the respondent files a notice to oppose the main application, then the matter takes a different trajectory. In that event the substantive application should be removed from the unopposed motion court roll and the issue of the interlocutory application is delayed then, quite substantially, to allow for an exchange of papers, whereafter the appropriate directions are sought, timeously towards that end.

respondent then appears, it may be postponed at the discretion of the court after hearing appropriate argument or as agreed between the parties.

9. In the High Court, divisions other than the WLD, and in the Magistrates' Court, if an opposed application is postponed at any stage after it has been brought before the court legally in compliance with section 4(2), an order dispensing with further section 4(2) notices should be sought to be made part of the postponement order.[43]

10. If the action procedure is utilised, it is suggested that the summons be issued in the normal way in accordance with the rules of court. Should a notice of intention to defend be given, the *ex parte* application for authorisation of the section 4(2) notice is to be brought once the pleadings are closed and a trial date set. The notice should indicate the trial date as the date of hearing of the proceedings. If the matter is undefended or, during the proceedings, the plaintiff is procedurally placed in a position (in event of a notice of bar or other interlocutory application) to apply for default judgment, the *ex parte* application for authorisation of the section 4(2) notice should then be brought. The application for default judgment should be made in the motion court. The date of the hearing indicated in the section 4(2) notice will be the date the matter will be heard in motion court, unless there has been non-appearance on the trial date and notice of the trial date had been given in accordance with section 4(2). The section 4(2) notice is to be served on the defendant and the municipality with 14 days' notice of the relevant date of the hearing.

11. In both the motion and action procedures, care should be taken to include in the section 4(2) notice, the affidavit or the particulars of claim all the necessary allegations prescribed in PIE, apart from dealing with the merits. This includes the relevant circumstances in terms of section 4(6) and (7) of PIE as well as a reference to section 26(1) and (3) of the Constitution as prescribed in the relevant case law.[44]

    The wording of the note to comply with *Saunderson*[45] and supplemented in the case of *Dawood*,[46] is as follows:

    Take notice that:

    > "(a) your attention is drawn to section 26(1) of the Constitution of the Republic of South Africa, 1996, which accords to everyone the right to have access to adequate housing. Should you claim that the order for execution or eviction will infringe that right it is incumbent on you to place information supporting that claim before the court;

[43] This essential practical step is not commonly employed although it ought to be to ensure a seamless process that is also not prohibitively costly to the respondent sought to be evicted.

[44] Standard Bank of South Africa Ltd v Saunderson 2006 (2) SA 264 (SCA) at 276F–277A; Nedbank Ltd v Jessa and Another 2012 (6) SA 166 (WCC); Standard Bank of SA Ltd v Dawood 2012 (6) SA 151 (WCC).

[45] Standard Bank of South Africa Ltd v Saunderson *supra*.

[46] Standard Bank of SA Ltd v Dawood *supra* at par 37.

(b) in terms of section 26(3) of the Constitution you may not be evicted from your home or your home may not be declared executable and sold in execution without an order of court made after considering all the relevant circumstances

(c) in terms of rule 46A(2)(*b*) of the Rules of the High Courts of South Africa (or in the case of the Magistrates' Court "in terms rule 43A(2)(*b*) of the Rules of the Magistrates' Courts") no writ of execution shall issue against your primary residence (ie your home), unless the court, having considered all the relevant circumstances, orders execution against such property;

(d) if you object to your home being declared executable or to an eviction order, you are hereby called upon to place facts and submissions before the court to enable the court to consider them in terms of rule 46A of the Rules of Court. Your failure to do so may result in an order declaring your home specially executable being granted, consequent upon which your home may be sold in execution."

12. In the case of substituted service in terms of section 4(4) of PIE, section 4(2) must still be complied with.[47]

13. When applying the strict requirements stated in the *Cape Killarney* case sight must not be lost of the exceptions noted in the subsequent decision of the SCA in *Moela v Shoniwe*.[48] In this case, the court held that:

> "The object of section 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 section 4(5)(*d*). It may well be that this object, in appropriate circumstances, may be achieved notwithstanding the fact that service of the notice required by section 4(2) had not been authorised 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 section 4(5) had in fact been served on the unlawful occupier and municipality 14 days before the hearing.

The court also referred, with approval, to the remarks made by Brand JA in *Unlawful Occupiers, School Site v City of Johannesburg*[49] to the effect that:

> ". . . it was held in *Cape Killarney Property* (*supra*) at 1227E–F that the requirements of section 4(2) must be regarded as peremptory. 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 (*supra* at 209G–H)."

[47] This is the case even though service will obviously not be effected "on the unlawful occupier".
[48] [2005] (4) SA 357 (SCA).
[49] [2005] (4) SA 199 (SCA).

14. It is clear from the above case law that the *ex parte* order may not include a *rule nisi* that in essence is an interim eviction order.[50] It is advisable to serve the *ex parte* order in terms of which the section 4(2) notice was authorised with the notice.
15. The purpose of section 4(2) is to afford respondents in eviction proceedings a better opportunity than they would have under the normal Rules of Court to put all the circumstances which they allege to be relevant before the court and to inform them of the basis upon which the order is sought in order to enable them to meet that case.[51]
16. The Regulations promulgated due to the Covid-19 pandemic, in terms of the Disaster Management Act (DMA)[52] may require that additional facts must be dealt with in eviction proceedings, depending on the applicable alert level. Regulation 53[53] applies to evictions."

[95] The respondents have raised an objection to the procedure adopted by the applicant *in casu*. They do not complain that notice was not effective within the meaning of the section's provisions, or that they were not afforded a proper opportunity to raise a defence or set out facts or circumstances bearing upon the exercise of the court's discretion to make the order but claim rather that the process adopted by the applicant was fatally defective.

[96] The applicant, purportedly in compliance with the provisions of section 4 (1) and (2) of the PIE Act, issued out a combined application incorporating both the substantive application for the respondent's eviction and the application for leave to serve notice on them in terms of these provisions, but the omnibus application appears on the face of it to have been styled "*Ex parte* application". This was filed together with a "Notice in terms of Section 4 (1) of the Prevention of Illegal Eviction from Unlawful Occupation of Land Act, No. 19 of 1998 for an order of eviction of the unlawful occupiers," followed by a founding and confirmatory affidavit respectively. The relief sought in the authorization application was granted and the court's order, and the section 4 (1)

[50] Cape Killarney *supra* at 1228 E – G.
[51] Unlawful Occupiers School Site *supra* at 209 I; Ploughman NO v Pauw 2006 (6) SA 334 (C) at 342H. See also Beetge v Bruwer [2009] JOL 23614 (GNP).
[52] Act 57 of 2002.
[53] GNR 480 of 29 April 2020.

notice together with the main application and supporting papers, were served (all together) on the respondents on 7 July 2021. They were informed in both the section 4 (1) notice and the notice of motion in respect of the eviction application that the anticipated hearing would ensue on 27 July 2021 and that they would be given a date by when they would be asked to vacate the property, failing which the sheriff's assistance would be invoked, this all assuming that no notice to oppose was expected to be given.

[97] The respondents take issue with the fact that the applicant firstly sought to truncate the time frames provided for in the Uniform Rules of Court as read with the provisions of section 4 of the PIE Act, although each application is separate and has its own unique procedures and objectives. The concern is that the single application incorporating the customary section 4 (2) interlocutory application and the actual eviction application that prescribes the usual running of *dies* to oppose and file answering papers in respect of the substantive relief sought, were initiated together at the same time.[54] The *ex parte* part of the application was enrolled for the court's directions in open court, apparently on the face of it in consequence of a direction of a judge in chambers that such application should be set down for hearing on the unopposed motion court roll. Thereupon the section 4 (2) application together with the papers in the main application, the court's order (directions) and notice advising the respondents that they were entitled to appear before the court and defend their case and, where necessary, had the right to apply for legal aid, were served on the respondents and the municipality all at the same time as the initiating process. The obvious effect of this is that the 14 days afforded to them by the notice to state their case in consideration of their likely eviction was subsumed under the *dies* to give notice to oppose and file answering papers in respect of the substantive relief sought, alternatively the appearance was given that the substantive application for eviction was launched on an *ex parte* basis.

[54] The notice of application for service directions usually presents as an interlocutory application subsidiary, or ancillary to, the main application.

[98] Secondly, whereas the parties were already involved in litigation in the numerous other applications and action aforesaid, Mr. Miller, who addressed the court in respect of the "practical issues", registered concern that an *ex parte* approach had been made to the court in all the circumstances to obtain directions for service.[55]

[99] The respondents had heralded already upon receipt of the first notice that they would object to the fact that the applicant had obtained its leave from the court to issue out the requisite notice on such a basis in circumstances where the parties were very much embroiled in other litigation before the court. Ignoring the gauntlet thrown down to the applicant's attorneys that its approach was irregular (especially since the applicant had pleaded in its founding affidavit, misleadingly in its view, that the procedural requirements of the PIE Act had already as a fact purportedly been met) and that they would object in their papers and request a punitive costs order, the respondents ultimately took the point in their answering papers that the application was fatally defective for want of compliance with the provisions of the PIE Act, and contrary to the rules of court as well as "settled case law relating to the provisions of section 4 and the manner in which applications are to be brought".[56]

[100] In resisting the respondents' contention that the application was fatally defective, the applicant contended in reply that the first notice that had been served did not purport to constitute the requisite section 4 (2) notice except in the event that the substantive relief was not going to be opposed. It was moreover submitted that the obtaining of an *ex parte* notice "in the usual manner" in applications of this nature (in other words not in open court as was here contended for) in no way prejudices the respondents. The respondents

[55] The issue as he sees it a valid one in the context that there should not be a resort to *ex parte* proceedings in the dark or behind the respondents' backs, as it were, especially where there is already ongoing litigation between the parties and both are legally represented.
[56] The settled cases relied upon by the respondents are the Cape Killarney and Kanescho judgments especially.

indeed opposed the relief sought in the substantive application and delivered answering papers, this negating any suggestion of prejudice to them.

[101] Since the substantive application was opposed after all, the applicant indicated in its replying affidavit - without conceding the point that its first notice was "irregular" in any respects, that it intended to "give proper" notice once the pleadings in the main eviction application had closed which would result in its necessary compliance with the provisions of section 4 (2).

[102] True to their word, once the pleadings had closed, the applicant again approached the court on an *ex parte* basis, and a second notice was served well in the time before the hearing.[57] The applicant thus contends that proper and effective notice was given. However, it did not address the implications of the costs order visited upon the respondent in the circumstances.[58]

[103] The "outrage" of the respondents against the obtaining of the directions and leave of the court to serve the requisite notice on an *ex parte* basis, not once, but twice, and the second time after the respondents had complained in their answering papers that their right to receive notice of such application was being ignored in the context of the acrimonious and convoluted litigation already between them, is not surprising. I can imagine that this might cause a respondent in similar circumstances to reflect that they were being kept in the dark and litigated *about* rather than *with*, but this manner and format of the procedural aspect of eviction applications has received the endorsement of our courts as is indicated in the excerpt above and is not technically incorrect.

[57] The date for the hearing was indicated as 10 February 2022 but given the congested state of the roll that week, I requested the parties to argue the matter before me on the preceding afternoon, 9 February 2022.
[58] The costs orders in these matter seem generally to be "in the cause", meaning that the party sought to be evicted will pay for the applicant's procedural compliance with the provisions of the PIE Act, ironically put in place for their benefit.

[104] I asked Mr. Miller where the approach of using the *ex parte* form of application to obtain the court's directions had emanated from, and he pointed me to paragraph [15] of the Cape Killarney[59] judgment in which the court held as follows:

> "Section 4 does not indicate how the court's directions regarding the section 4(2) notice is to be obtained. A common-sense approach to the section appears to dictate, however, that the applicant can approach the court for such directions by way of an *ex parte* application."

[105] I agree with Mr. Miller that the same common-sense approach might cause one to reflect that in a scenario where litigation is already pending it might create a perception of opacity to approach the court for directions on an *ex parte* basis, but this is indeed the indicated and time-tested method of meeting the objective of section 4 (2).[60] I therefore cannot find that the *ex parte* approach on either occasion, notwithstanding the parties' unique circumstances and involvement in other litigation at that stage, constitutes the fatal defect contended for.

[106] The point is validly taken though that the procedure adopted by the applicant at the launch of the application generally was somewhat clumsy and quite unconventional. Of course, the substantive application for eviction was not launched on an *ex parte* basis although the impression is given that it was and the section 4 (2) application, although subsidiary to the main application, was presented as the primary application whereas it was self-evidently merely interlocutory in nature. The main application is also deceptively referred to as the applicant's notice in terms of section 4 (1) of the PIE Act, whereas it contained all the elements of a Form 2 (a) notice in compliance with the provisions of rule 6 and properly directed the respondents as to what they should do and when if they wished to oppose the substantive relief sought. The

[59] 2006 (5) SA 92 (D).

[60] The ideal must surely also be to keep the costs of the applicant's necessary compliance with the procedural provisions of the PIE Act to an absolute minimum.

"section 4 (1) Notice" further directed the respondents as to what it was necessary for them to do ostensibly in compliance with the provisions of section 4 (5) of the PIE Act. Indeed, despite the strange format of the application adopted, I take Mr. Pincus' point that but for the fact that the respondents had indicated their intention to oppose, the first notice might have sufficed and met the procedural requirements of the PIE Act.

[107] In foreshadowing that a second notice would be sought and served in circumstances where the respondents had complained that the first notice suffered from certain defects, I can appreciate too how this would have seemed tantamount to an acceptance by the applicant that it had come up short, but these steps taken are merely formal and ancillary to the process and as long as the applicant ultimately gives the required notice fourteen days before the hearing (after seeking the court's leave as it did ultimately), it would in my view meet the necessary procedural requirements postulated by section 4 (2).

[108] This issue of two costs orders is however problematic. Whilst the first notice might at a push have sufficed, assuming that the application had proceeded unopposed, the second application ostensibly proved necessary in circumstances where the applicant must have reasonably foreseen that there would be pushback and opposition forthcoming from the first respondent who up to that point had strenuously defended his place as Rabbi in the community. It seems unfair therefore to mulct the respondents with the costs of two such notices. In my view it seems more appropriate in an interlocutory application in terms of section 4 (2) to ask that the costs occasioned by obtaining the necessary authorization of the court be reserved for determination at the hearing of the eviction application.[61]

[61] In the application initiating the process the applicant asked for costs outright, not even in the cause.

[109] Although the provisions of section 4 (2) are peremptory, it is a trite principle that not every deviation from the literal prescription is fatal. The question remains whether, in spite of the defects, the object of the statutory provision has in fact been achieved.[62] I have said above that I am satisfied that though unconventional, the applicant both afforded the respondents the opportunity to oppose the substantive application and gave them the opportunity, well in time before the hearing, to state why a court should not evict them.

[110] A court will be slow to penalise an applicant where the notice served the requisite purpose intended by the legislature. As was stated in Unlawful Occupiers, School Site v City of Johannesburg:[63]

> "The question whether in a particular case a deficient section 4(2) notice achieved its purpose, cannot be considered in the abstract. The answer must depend on what the respondents already knew. The appellant's contention to the contrary cannot be sustained. It would lead to results which are untenable. Take the example of a section 4(2) notice which failed to comply with section 4(5)(*d*) in that it did not inform the respondents that they were entitled to defend a case or of their right to legal aid. What would be the position if all this were clearly spelt out in the application papers? Or if on the day of the hearing the respondents appeared with their legal aid attorney? Could it be suggested that in these circumstances the section 4(2) should still be regarded as fatally defective? I think not. In this case, both the municipality's cause of action and the facts upon which it relied appeared from the founding papers. The appellants accepted that this is so. If not, it would constitute a separate defence. When the respondents received the section 4(2) notice they therefore already knew what case they had to meet. In these circumstances it must, in my view, be held that, despite its stated defects, the section 4(2) notice served upon the respondents had substantially complied with the requirements of section 4(5)."

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[62] Cape Killarney *supra* at 1227 E - F See also Property Works 5 v Jamal & Others [2014] SAECELLC 5 (2 May 2014) at par [26] in which I struck an application from the roll for want of compliance with the provisions of section 4 of the PIE Act but afforded the applicant the opportunity to rectify its shortcomings by giving the necessary notice.

[63] [2005] 2 All SA 108 (SCA).

[111] Ironically here, exactly because of the acrimonious litigation between the parties, and the sparring between their respective attorneys in a number of related cases, it can hardly be suggested that the respondents were not in the know regarding what case they had to meet, neither have they in my view been prejudiced except by having been ordered to pay the costs of the superfluous directions application in the cause.

[112] In conclusion I am satisfied that effective notice of the proceedings was given.

The constraints posed by the DMA:

[113] The objection in this respect is no longer relevant. Although the applicant failed to deal in its founding affidavit with the Disaster Management Regulations in place at the time of the launch of the application, the court would, in the event that these regulations were still in place, certainly *at the time of making such an order* have considered the import of these together with the "relevant circumstances" that it is in any event obliged to have regard to in considering whether it is just and equitable to order the eviction of the respondents. The "other relevant circumstances", relative to the state of disaster and its peculiar impact, which this court would have considered but for the emergency having been declared at an end by the time of the hearing, whether referenced by the parties in their papers or not, no longer apply.

[114] Whilst it may have been expected of the applicant to especially allude to these factors in their papers, I do not consider it "fatal" to the application that it did not do so.

Is it just and equitable to order the respondents' eviction under the relevant circumstances:

[115] If I am wrong in my conclusion above that the respondents are unlawful occupiers and that the applicant is entitled in principle to an order evicting them from the property, the enquiry does not end there. That is because an eviction application will only be granted if, after considering all the relevant circumstances, it is "just and equitable" to make such an order.[64]

[116] The court in PE Municipality v Various Occupiers[65] emphasized the unique constitutional approach that courts must adopt in eviction matters:

> "The court is thus called upon to go beyond its normal functions, and to engage in active judicial management according to equitable principles of an ongoing, stressful and law-governed social process. This has major implications for the manner in which it must deal with the issues before it, how it should approach questions of evidence, the procedures it may adopt, the way in which it exercises its powers and the orders it might make. The Constitution and PIE require that in addition to considering the lawfulness of the occupation the court must have regard to the interests and circumstances of the occupier and pay due regard to broader considerations of fairness and other constitutional values, so as to produce a just and equitable result."[66]

[117] The respondents' right to occupancy originated in an employment agreement that in itself is somewhat unique since the employer regards itself as a "Holy Assembly" in the "House of Israel" in which relationships arising within the Congregation are of a sacred character. The respondents subscribe to that religious community and exercise their fundamental rights together with the Congregation under the mantle of the voluntary association. The applicant is, in turn, a constituent member of the Federated Council and the Congregation and its members and officials are bound by its Articles of Association.

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[64] See the particular approach adopted in City of Johannesburg v Changing Tides 74 (Pty) Ltd & others (Socio-Economic Rights Institute of South Africa as *amicus curiae*) [2013] 1 All SA 8 SCA at [11] – [12].
[65] 2005 (1) SA 217 (CC).
[66] *Supra* at par [36].

[118] The respondents' derivative rights to occupy the rabbinical home obviously stand or fall by their status as officials made provision for in the employment agreement. The roles performed by the respondents are especially significant and carry with them an aura of dignified leadership, awe, and reverence. The respondents, both in their sixties, appear to be non-South African citizens hailing from Michigan USA, although having permanent residence within the country. This suggests to me that they came into the local Jewish community as invited and revered guests and are dependent for their livelihood on the largesse of the applicant's members albeit in the form of salary and related benefit entitlements under their employment agreement. To this extent their security of tenure, belonging and feeling accepted is bound up in their membership and adherence to the Jewish law and customs subscribed to under the constitutions of both the Congregation and Federated Council respectively.

[119] An employment agreement comes with its own distinct consequences and treatment in secular law. Whereas an employee has no right not to be unlawfully dismissed, he certainly has a constitutional right to fair labour practices.[67] Where an employee challenges his dismissal as unfair, he may hope to be reinstated but that is not always guaranteed.[68] From this perspective it accordingly seems inequitable to delay the respondents' eviction from the property for a slim likelihood that the first respondent may be reinstated. In terms of Jewish law and custom however his fate would be in the hands of the Beth-Din who will deal the current impasse between the parties as it deems appropriate, according to such authority and with the necessary dignity that behooves the situation. That outcome may also not entail a "reinstatement", but

[67] Section 23 (1) of the Constitution. The general guarantee of fair labour practices has far-reaching effects on this court's approach to the interpretation of the rights of parties to employment contracts and includes, for example, and especially, a right to a hearing before dismissal. See Grogan, Workplace Law, 7th Edition at pages 12 – 14.

[68] Section 193 (1) and (2) of the LRA.

it is apparent that the first respondent will accept and abide by whatever decision is made concerning his future as the Congregation's rabbi. This is what he has declared.

[120] If parties regulate their relationship as one of employment, then the provisions of the Labour Relations Act apply, but that does not necessarily mean that the many disputes between the parties that have come over a lengthy period of time comfortably resort under the tidy concept of a dismissal dispute in respect of which the CCMA has jurisdiction. Evidently, there is more to this long-standing dispute than the culmination of the first respondent's dismissal.

[121] It seems unfortunate that the first respondent spurned the opportunity to refer a dismissal dispute to the CCMA, but the irony is that if he had appealed against the disciplinary hearing outcome to the Beth-Din (as one might suggest he did, albeit later), the dispute arising therefrom would not have been conciliated in terms of the LRA until the appeal process had run its course.[69] In effect it has not yet been finally determined, neither did the first respondent participate in the pre-dismissal hearing.

[122] Despite what the employment agreement provides in clause 15, clause 13 merely provides that a termination of the agreement due to misconduct "shall be effected through the procedures prescribed in the Labour Relations Act". That is merely reinstating the law as it applies to all employment agreements save for the statutory exclusions which do not apply here.[70] Those procedures do not confine the parties to seek their recourse before the CCMA. The LRA, and more especially the Code of Good Practice in respect of Dismissals,[71] endorses the primacy of collective or recognition agreements between parties and a preference for a resolution of disputes according to such instruments.[72] In other words, a resolve of the parties differences concerning the claimed misconduct

[69] Section 191 (1)(b)(i) of the LRA. See also Workplace Law, *supra*, at 387 – 389.
[70] Section 2 of the LRA.
[71] Schedule 8 to the LRA.
[72] See Workplace Law, Supra, at p396.

by the Beth-Din would not be proscribed by "the procedures" made provision for in the LRA. To the contrary, where parties are able to resolve their disputes themselves, this is encouraged under the LRA and may found a basis for the labour fora to stay curial proceedings in the interests of such private dispute settlement option.

[123] Although I concluded above that the respondents do not have a *right* to residency such as an occupier under the ESTA, I am inclined of the view that the approach adopted by the SCA in Snyers does indeed, as counsel for the respondents submitted, provide guidance concerning what the court would consider fair in a similar scenario not only in a labour context where the respondent's right to occupy is an employment benefit under their relationship, but equally so in the constitutional realm of evictions where equitable principles apply.

[124] In Minister of Police v Moodley[73] the employer purported to evict an employee from official police quarters without regard to the latter's constitutional right to procedurally fair administrative action according to the well-established common-law concept of natural justice. Whereas section 3(2) of the Promotion of Administrative Justice Act, No. 3 of 2000 ("PAJA") requires an administrator to give an affected person adequate notice of the nature and purpose of the proposed administrative action, the respondent in that case was not told that a prior five-year occupation period would be viewed by the housing committee as an absolute disqualification. Thus, he was not afforded an opportunity to make any representations in relation thereto. The court held that it was not open to the SAPS to terminate occupation of official quarters without following due process. The purported termination of the respondent's occupation was thus unlawful and the appellant's application for eviction could not succeed.

[73] [2011] 4 All SA 47 (SCA).

[125] Whereas the facts of that matter are distinguishable from the present instance, and whereas the argument in that judgment went about the lawfulness of the occupation rather than the concepts of justice and equity envisaged under the PIE Act, it appears that a court will lean in favour of an employee being afforded a fair opportunity to defend his derivative right of residency so as not to be rendered homeless, before evicting him.

[126] By parity of reasoning, the expectation that the first respondent should be given the opportunity to have a labour dispute finally determined before being evicted to my mind accords with the constitutional objectives of justice and equity.

[127] There is every indication that the first respondent has sought to subject himself to Halachic authority in respect of the issues which have arisen and have caused this congregation to limp along since the Society first accused him of misconduct. In the context of the sacred assembly that the congregation is, it is worrying that the matter remains unresolved years after the fact and the relationships between the parties in tatters. While a resort to the secular courts may have been legally justified, this is not what voluntary associations are all about.

[128] Despite the fact that the first respondent resisted an appearance before disciplinary hearing, it is abundantly plain that he has to date not had the opportunity to state his case. Fairness underscores relationships of employment. Further, where a derivative right of occupancy inextricably linked with such relationship is under threat, a court must strive to ensure that justice and equity prevail in a scenario such as the present one.

[129] On a balance of the competing rights of the parties, it is significant to my mind that the applicant has not given an inch in making it possible for the first respondent to present his side of the story. The applicant has not even taken this

court into its confidence concerning the actual charges of misconduct against the first respondent if such complaints are against him at all (concerning the contested will), as opposed to the second respondent. Neither has it afforded a plausible reason why it would not submit itself to the authority of the Beth-Din to allow the first respondent's dispute referral to be finally determined, since the ecclesiastical court will surely be comprised of different dayanim.

[130] If this court is to remain true to the principles of justice and equity, I consider it necessary to allow the parties (and I stress that this is not only the concern of the first respondent) a reasonable opportunity to seek a resolve of the issues that continue to bedevil the harmonious order of the Congregation before determining finally whether it is fair, appropriate, and timely that an eviction order be granted.

[131] In the premises I issue the following order:

1. The application for eviction is hereby stayed pending:

    1.1 the final determination of the first respondent's appeal in Makhanda case number 1340/2021; and/or

    1.2 the (earlier) adjudication by the Beth-Din (by agreement between the parties) of the first respondent's dismissal dispute; and/or

    1.3 Mediation between the parties of the said dispute.[74]

2. The registrar of the Makhanda High Court is requested to place the matter referred to in paragraph 1.1 above on the case management roll to ensure the earliest enrolment of the appeal.

[74] Court annexed mediation was not on the cards at the time of the launch of the application, but it strikes me that such a process would provide an alternative option to the parties to resolve their differences.

3. The parties shall be entitled to apply on notice to this court on the same papers, duly supplemented, for a fresh consideration of the provisions of section 4 (7) and (8) of the PIE Act against the context of the opportunity afforded to them in paragraph 1 above and its aftermath.

4. The re-enrollment of the matter invited in paragraph 3 above shall not be given before 13 August 2022 ("the grace period"), unless the parties agree that it may happen before the end of such period.

5. Further notice in terms of section 4 (2) of the PIE Act shall not be necessary.

6. The costs are reserved.

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B HARTLE
JUDGE OF THE HIGH COURT

DATE OF HEARING: 9 February 2022

DATE OF JUDGMENT: 13 May 2022

*Judgment delivered electronically at 09H30 on this date by email to the parties.

APPEARANCES:

For the applicant: Mr. S P Pincus SC instructed by Stirk Yazbek Attorneys, East London (ref. Mr. G Stirk).
For the first and second respondents: Mr. I J Smuts SC together with Mr. T S Miller instructed by Wheeldon Rushmere & Cole c/o Lionel Trichardt & Associates the State Attorney, East London (ref. Mr. Trichardt).
For the third respondent: No appearance.