IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 45028/20

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
(4)	SIGNATURE: DATE: N V Khumalo J 20/09/2023 Electronically delivered

In the matter between:-

LISMER PROPERTIES CC	**FIRST APPLICANT**
RENETTE LEATHERN N.O.	**SECOND APPLICANT**
JERIFANOS MASHAMBA N.O.	**THIRD APPLICANT**
WILLIAM LEATHERN N.O.	**FOURTH APPLICANT**

and

AHMED DAWOOD BHORAT	**FIRST RESPONDENT**
SHEHNAZ LIBANDA	**SECOND RESPONDENT**
YUSUF BHORAT	**THIRD RESPONDENT**

RIAZ BHORAT	**FOURTH RESPONDENT**
RAIESA BHORAT	**FIFTH RESPONDENT**
ALL OTHER UNLAWFUL OCCUPANTS OF UNIT 5, SAN REMO, PAMIN ROAD, BEDFORVIEW OCCUPYING THROUGH THE FIRST TO FIFTH RESPONDENT	**SIXTH RESPONDENT**
EKURHULENI METROPOLITAN MUNICIPALITY	**SEVENTH RESPONDENT**

This judgment was handed down electronically by circulation to the parties' representatives by email. The date of hand-down is deemed to be 20 September 2023.

JUDGMENT

KHUMALO NV J

Introduction

[1] In this Application, the Applicants seek an order in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, Act 19 of 1998 ("the PIE Act"), for the eviction of the Respondents and all unknown persons occupying with and through the Respondents, a property described as Unit 5 San Remo, 16 Panim Road, Bedfordview ("the property").

[2] The property is registered in the name of Lismer properties, the 1st Applicant, a close corporation duly registered in terms of the Company Laws of South Africa and whose sole member is the 2nd Applicant.

[3] The 2nd Applicant, Ms Rianne Leatharn together with Mr J Mashamba and Mr W Leatharn, who are the 3rd and 4th Applicant respectively, are joint trustees appointed in the insolvent estate of Mr Ahmed Dawood Bhorat, the 1st Respondent.

[4] The 1st Respondent is a broker, an importer and exporter of goods. He resides in the property with the 2nd to 5th Respondents who are his family members. The 2nd Respondent, Shehnaz Limbada is the 1st Respondent's wife to whom she is married by way of Muslim customary marriage. Their children, Yusuf Bharat, a businessman and Raisane Bharat a businesswoman are cited as the 3rd and 5th Respondent respectively. The 4th Respondent is a businessman also resident in the property. The Ekurhuleni Metropolitan Municipality is joined as the 6th Respondent.

Common cause facts

[5] The trustees through the members' interest held by the 1st Applicant own the property. Prior thereto the property, together with another property situated at 24 Lagoon Drive, Umhlanga, was owned by the 2nd Respondent as the sole member of the 1st Applicant. Following the 1st Respondent being placed under final sequestration in the above Honourable on 25 Mach 2018 and the appointment of the trustees on 24 October 2018, the trustees instituted an application on 10 June 2019 against the 2nd Respondent for a caveat to be registered against the two properties. The parties reached a settlement on the matter and concluded an agreement which was made an order of court on 7 May 2020. The terms of which were the following:

[5.1] The 2nd Respondent and Lismer bound themselves jointly and severally to pay the trustees an all-inclusive sum of R4 645 000.00.

[5.2] The sum of R4 065 000.00 was due on 22 June 2020.

[5.3] The remainder of R600 000.00 was due from the sale of the proceeds of the property in Mhlanga.

[5.4] In the event of any default, the defaulting party agrees to pay the costs on an attorney and own client scale, including collection commission.

[5.5] In the event of any breach the parties agree that on non or late payment of any payments, the Applicant will immediately be entitled in their sole or absolute discretion to claim full payment of what is due, plus 2 % percent monthly interest or alternatively;

[5.6] to claim transfer of the full member's interest of the 2nd Respondent in the 1st Applicant into the name of the 2nd Applicant who is to hold same on behalf of all the trustees.

[6] On 22 June 2020 when no payment was forthcoming from the 2nd Respondent and the amount became due, a letter was sent to the 2nd Respondent's attorneys placing her on terms for the R4 065 000.00. The attorneys impressed upon her that no late payment was going to be accepted and that the breach clause will be operative from close of business on that day. This was countenanced by numerous phone calls from the 1st Respondent requesting a meeting without mentioning what was to be discussed in the meeting. There was no payment and the 2nd Respondent also failed to sign the CK10 documents for the transfer of the property to the 1st Applicant as agreed. The transfer documents where therefore signed by Mr Sybrand on behalf of the 2nd Respondent as provided in the court order. The 2nd Respondent was then divested of the member's interest in the property, with the registration of the transfer thereof to the name of the 2nd Applicant into the 1st Applicant registration having taken place on 29 June 2020. The Respondents remained in the property.

The Applicants' version

[7] According to the Applicant there is no lease agreement or any other basis on which the Respondents are occupying the property. The parties discussed a short term

tenancy against monthly payments of rents pending the sale and transfer of the property to the Bhorat family or a new owner. However, no agreement was ever concluded as there was no decision taken as joint trustees to enter into any lease agreement nor was consent given by the 1st Applicant. The insolvent also had no authority to enter into an agreement with the trustees and no written agreement was signed with anyone. The trustees are duty bound to liquidate the assets of the insolvent including the property held in Lismer. They need to sell the property on public auction without any occupants.

[8] On 27 July 2020 the occupants were furnished with a notice to vacate the property affording them 30 days within which to do so. Also to furnish an undertaking within 7 days that they will do so. The 1st Respondent on receipt of notice to vacate sent an email alleging that he has agreed with 2nd Applicant to pay rental until the debt owed to the Trustees was soughted. In a reply Mr Tintinger, the Applicant's attorney put it on record to the Respondents that no lease agreement exists between Lismer or the trustees and any of the Respondent. In addition, that the trustees will not revisit the court order or contract that has been dealt with. It was also made clear that there was no lease agreement concluded on the property. On the question whether the trustees will consider an offer to purchase from the 3rd Respondent, it was indicated that the trustees will only consider an offer to purchase for an amount of R6,7 Million with a non-refundable deposit of R500 000.00.

[9] On 5 August 2020, the 3rd Respondent's attorney sent a letter to the Applicants attorneys alleging that there were talks about a rental payable for the property and a lease agreement concluded although admitting that there was no signed lease agreement. An offer to purchase on behalf of the 3rd Respondent was made for R5 900 000.00 with a R500 000.00 deposit. On 14 August 2020 the Applicants attorneys confirmed again that there was no lease agreement, indicating that the discussion between the 2nd Applicant and the 1st Respondent did not amount into an agreement. He pointed out that no lease agreement was signed as confirmed by 3rd Respondent's attorney. The Respondents were warned about the eviction and the offer to purchase that has been rejected.

[10] On the question of 3rd Applicant talking to the 1st Respondent, the Applicants further point out that there was indeed only talks about such an agreement pending the purchase of the property by one of the 1st Respondent's son. To that end they gave instructions to their attorneys for the drafting of the lease agreement to be considered by the trustees for Lismer. The lease was to be concluded with a specified person to be liable for the payment of occupational rent. Before the lease was finalized, the trustees decided that given their history of litigation against the 1st and 2nd Respondent they had no desire to contract with any of them and create any tenancy whatsoever. If the Respondents wanted to buy the property they could do so without the trustees being bound to them. As a result, they never even considered the proposed written lease agreement that was prepared in draft. Furthermore, there is no indication of the persons with whom the purported lease agreement was concluded. The 1st Respondent told them that he does not earn an income and if he does he is obliged to disclose to the trustees. Also there is no term of the lease agreed upon. The 1st Respondent alleges that there was an agreement to pay the rent until the debt is sorted out, when there was no debt to sort out as the member's interest was taken over by the 1st Applicant instead of payment of a debt, as per the settlement agreement.

Justness and equitableness of the Eviction

[11] The Applicants pointed out that they are prejudiced by the unlawful occupation of the property by the Respondent in that the net equity to be realised for the benefit of the insolvent estate is diminished every passing day. Further, it is clear that from what was offered for the property by 3rd Respondent as a purchase consideration using a generally accepted rule of thumb for occupational interest of 1% of the purchase price, the estate is prejudiced of an amount of R60 0000 per month due to the unlawful holding over which cannot be made of any good by any of the 1st Respondent who alleges the existence of an agreement.

[12] The 1st Applicant, Lismer, is by far the single largest asset from which Applicants can levy some realization for the benefit of the creditors. Since 2016, the Respondents have been occupying the property without paying rental and the Absa bond over the property which has diminished the equity in the estate to the detriment and prejudice of the creditors. There has not been any compensation for the Respondents' occupation for a period of three years much to the detriment of the creditors, one of whom is SARS, with a proved claim of R40 million against the estate. Even if the Respondents rely on a lease agreement, in terms of the notice to vacate any right has been terminated. The Respondent have also been asked in a letter dated 20 August 2020, to pay for damages resultant from their unlawful holding over that is equivalent to a rental amount which they have also refused to do.

[13] The Respondents are also using municipality services without paying for them as well as the bond which Lismer will be held liable for to the detriment of the creditors.

[14] The Applicants point out that the purpose of the application is to evict the Respondent so that the property can be sold vacant for the benefit of the creditors with proved claims of R49 000.000.00. The trustees are duty bound to liquidate the insolvent assets and distribute the proceeds to the creditors. It is therefore imperative that the Respondents vacate the premises. As a result of the Respondent's holding over the property, it hasn't been able to be marketed in order to sell it for the benefit of creditors, making it just and equitable for the Respondents to be evicted from property as they have no right to remain in the property.

[15] The Applicants, as a result consider it just and equitable the immediate eviction of the Respondents from the property as prayed for in the relief sought in the draft order.

[16] They point out to have been advised that through the 2nd and 3rd Respondent the Respondents are able to afford rental for alternative accommodation.

Respondent's version

[17] The Respondents allege that the discussions on the lease alluded to by the Applicants culminated into conclusion of an oral lease agreement. They dispute the allegations that before the agreement was finalized the Applicants decided not to have any tenancy with them of any kind with the result that the lease was not finalized.

[18] The 1st Respondent alleges that prior thereto on 8 July 2020, the 1st Applicant represented by the 2nd and 4th Applicant and the 2nd and 3rd Respondent acting on their own behalf and on behalf of the 1st, 4th and 5th Respondent entered into an oral agreement of lease, the terms of which were the following:

> [18.1] The Respondents would be allowed to remain in the property until registration of transfer in favour of a third party takes place. They will be paying an amount of R42 000 per month for rental calculated at 1% of the forced sale value of the property.
>
> [18.2] The 1st Applicant would prepare a written lease agreement so as to record what has been agreed upon by the parties.

[19] Further that on 8 July 2020 the 1st Respondent was sent a WhatsApp message by the 4th Applicant stating that " We will send Lease agreement through for entry between Lismer and Shehnaz and Yusuf jointly and severally liable at 42 0000pm-calculated at 1% of forced value" which he claims to be consistent with the terms of the lease agreement that a written document would be sent for signature by the 2nd and 3rd Respondent so as to record the terms of the lease agreement already agreed upon with the 1st Applicant for their tenancy.

[20] The lease agreement was concluded not long after the transfer of the member's interest to the 2nd Applicant who could then transact regarding the property and did

exactly that to bring about certainty to their position. This not only protected the Respondent's interest but also advanced the interest of the insolvent estate.

[21] As a result he alleges their occupation to have been lawful being regulated by a lease agreement which entitles them to remain in the property until registration of transfer in favour of a third party and therefore the Application to have been premature.

[22] The 1st Respondent also disputes that it was up for the Applicants to terminate their tenancy as alleged to have been done by way of written notice on 27 July 2023 and indicate an intention to hold the Applicants to the terms of the lease which they insist they are entitled to enjoy until transfer of the property is effected.

[23] The 1st Respondent also indicated that prior the transfer of the member's interest they had no obligation to enter into a lease agreement as property was owned by the 2nd Respondent. It only became necessary for them to regularize their occupancy after the transfer of the property when ownership changed. Also alluding to the fact that the property is also occupied by his daughter and the 5th Respondent's nine- year old son.

[24] The 1st Respondent denies that their occupation is unlawful and therefore compelled to leave the property but instead maintain that they have a right to remain in occupation until the property is sold and transfer to a third party has taken place. He further maintains that the Applicants have no right to evict them until then.

[25] He confirmed that the 1st Applicant (at the time owned by 2nd Respondent) failed to honour the settlement agreement that was made an order of court due to a family friend reneging on a loan agreed upon and the Umhlanga property to have been auctioned in September 2020 for an amount of R6 000 000.00.

[26] The Respondent although admitting to the letters and response of the Respondent's attorney dated 24 June 2020, he denies that he or the 2nd Respondent gave the attorney any instruction in that regard.

[27] In respect of their occupation, the 1st Respondent argues that prior to the transfer there was no need to regularize their stay as the 2nd Respondent was still a holder of 100% member's interest in the 1st Applicant and their occupation with her consent.

[28] He refutes the allegation that 2nd Respondent confirmed that there was no lease agreement on 6 July 2020 as the agreement was entered into on 8 July 2020. Further that the Applicants' decision not to furnish the Respondents with a recording of what was agreed upon terminated the agreement. He argued that it did not detract from its validity or binding effect since the purpose of an agreement was just for recording.

[29] 1st Respondent points out that he did not enter into the agreement personally but benefitted from it as he resides in the premises as well.

[30] He also confirms that he received a text message from 4th Applicant on 8 July 2020 wherein he confirms that they will send the lease through for signing by the 2nd and 3rd Respondent in the terms orally agreed upon.

[31] He admits receiving the letter RL 21 but disputes the Applicants' denial of a conclusion of a lease agreement, that it is genuine, arguing that the dispute of facts is material to the determination of the application and was in the circumstances foreseeable.

[32] He also confirmed that he does not dispute that they will not be left homeless but however points to the provisions of the Disaster Management Act 57 of 2002 that provides that "a person may not be evicted from their land and or home or place of residence unless a competent court has granted an order authorizing the eviction or demolition." Whilst there is no motivation from the Applicants why the relief herein must be granted.

[33] He argues that their occupation is not intended to frustrate or block the sale of the property and denies that it is to the disadvantage of the creditors since the property can still be marketed and advertised. They have never frustrated that and their lease is up to the period of the property being sold.

[34] On those allegations he alleges the Respondents have a right to remain in the property until the property is transferred to a new owner.

Replying Affidavit

[35] In reply the Applicants accept that there were talks between the 4th Applicant and the 1st Respondent pertaining to the lease agreement possibly to be concluded when one of the 1st Respondent's son was looking into making an offer to purchase the property, but no agreement in relation to the terms of the lease were ever confirmed either orally or in writing. They deny that the WhatApp messages that have been attached indicate any agreement to have been concluded and point out that the message sent on that day at 11:21:06 by 4th Applicant does not establish the existence of such a contract. They allege the wording of the conversation on 8 July 2020 to be very clear when the 4th Applicant said "We will send Lease agreement through for entry between Lismer and Shehnaz and Yusuf jointly and severally liable at R42 000 per month, calculated at 1% of forced sale value." No such agreement was sent to either of the two to be entered into – prior to the agreement being finalized they decided not to conclude any agreement with any of the Respondents.

[36] None of the Respondents have ever made any payment towards rental for the many years that the 1st Respondent had been declared insolvent. Neither did any of the Respondents pay the alleged rental amount, utility bills or towards the applicable rates. The Applicants allege that they insisted on the payment of R42 0000 as holding over damages as pointed out by the attorneys in the letter to the Respondents dated 20 August 2023 and not as an acknowledgement of tenancy.

[37] The Applicants denied that there are any material dispute of facts, neither an oral lease agreement in existence nor do the Respondent have any lawful entitlement to occupy the property. Also that the WhatsApp message does not amount to a recording of the agreement.

[38] It pointed out that the insolvent estate derives no benefits but is only accumulating losses arising out of the continued occupation of the property by the Respondents.

[39] Except for pointing out that a child stays in the property, nothing is said if the child's has any particular circumstances that would result in any prejudice suffered by the child due to eviction or leaving the property.

Issues arising

[40] The ownership of the property not being in dispute, the issues to be determined are:

(i) whether the Respondents are in unlawful occupation and as a result can be subjected to an eviction, (the converse being whether the Respondents have made a case for them to remain in the property), if so

(ii) if there is justification for immediate eviction (a case has been made by the Applicants for immediate eviction)

Legal framework

[41] The starting point being ownership, and occupation of the property, provided the procedural requirements have been met, that not being in dispute, the principle as set

out in *Chetty v Naidoo*[1] , is applicable, that "once the plaintiff succeeds in proving ownership and that the defendant is in occupation, the onus shifts to the defendant to show that his occupation is lawful. The Court in *Chetty*[2] stated the following that is of significance:

> "The incidence of the burden of proof is a matter of substantive law (*Tregea and Another* v. *Godart and Another*, **1939 A.D. 16** at p. 32), and in the present type of case it must be governed, primarily, by the legal concept of ownership. It may be difficult to define *dominium* comprehensively (cf. *Johannesburg Municipal Council* v. *Rand Townships Registrar and Others*, **1910 T.S. 1314** at p. 1319), but there can be little doubt (despite some reservations expressed in *Munsamy* v. *Gengemma*, **1954 (4) S.A. 468** (N) at pp. 470H-471E) that one of its incidents is the right of exclusive possession of the *res*, with the necessary corollary that the owner may claim his property wherever found, from whomsoever holding it. It is inherent in the nature of ownership that possession of the *res* should normally be with the owner, and it follows that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner (e.g., a right of retention or a contractual right). The owner, in instituting a *rei vindicatio*, need, therefore, do no more than allege and prove that he is the owner and that the defendant is holding the *res*—the *onus* being on the defendant to allege and establish any right to continue to hold against the owner (cf. *Jeena* v. *Minister of Lands*, **1955 (2) S.A. 380** (A.D.) at pp. 382E, 383). It appears to be immaterial whether, in stating his claim, the owner dubs the defendant's holding "unlawful" or "against his will" or leaves it unqualified (*Krugersdorp Town Council* v. *Fortuin*, **1965 (2) S.A. 335** (T))."

[42] The evidential onus is therefore of material consideration. The owner is entitled to approach the court on the basis of ownership and the Respondent's unlawful occupation. As per Chetty *supra*, the occupier carries the evidential onus to prove an entitlement (a right enforceable against the owner) to occupy the property.

[43] The question which therefore arises in casu is whether through the 1st Respondent's version, the Respondents had proven a lawful basis to remain in the property.

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[1] 1974 (3) SA 13 (A)
[2] at 20A-E

[44] The Respondents allege to have such a lawful basis as a result of the existence of an oral agreement of lease concluded in terms of WhatsApp text messages between the 1st Respondent and the 4th Applicant. The lease agreement according to the messages was intended to be concluded between 1st Applicant and 2nd and 3rd Respondent to be terminable on registration of transfer of the property to a third party or new owner. The 1st Respondent and the Applicant had also agreed that after the lease agreement has been reduced to writing, the terms recorded, the intended parties were going to proceed and sign it. According to the 1st Respondent that conversation resulted in an oral agreement of lease that is binding between the parties. The 1st Respondent also raised a question of dispute of facts arguing that the matter should have been on action instead of Application so that the true facts can be determined at trial, an instance that should have been foreseen by the Applicants. As a result the Application should be dismissed.

[45] The Applicants on the other hand confirm the WhatsApp conversation regarding the lease to have taken place between the 1st Respondent and the 4th Applicant but dispute that it resulted in any agreement being concluded as there was no recordal (written lease agreement) that took place nor was there any such agreement signed by the intended parties due to the fact that the trustees decided against it.

[46] The question whether the said exchange resulted in an oral lease agreement is a question of law, as there is no dispute on the context and content of the exchange, but for the legal interpretation of the said exchange, whether or not it resulted in an oral agreement being concluded. The argument therefore that there is a material dispute of facts and therefore the matter should be send on trial for determination thereof is of no consequence. The court in determining the issues took counsel from *Tamarillo (Pty) Ltd v B N Aitken (Pty) Ltd*[3] that "if on the facts stated by the Respondent together with the admitted facts in the Affidavits the Applicant is entitled to the relief, the court will make an order, giving effect to such findings. In granting claims established by admitted or undisputed facts, the court does not exercise a discretion".

[3] 1982 (1) SA 398 (A)

[47] It is first important to take cognisance of the fact that the exchange was between the 1st Respondent, who has acknowledged in his affidavit and indicated to the Applicants as trustees that as an insolvent who has no income, he could not conclude or enter into any lease agreement, and the 4th Applicant. In that case he agreed with 4th Applicant that the terms of lease agreement will be recorded for entry (which simply means for conclusion or to be entered into) between the 1st Applicant and the 2nd and 3rd Respondent. The intended parties were therefore for conclusion of the agreement, to sign the recorded terms of lease, which never occurred.

[48] Legally the 1st Respondent cannot conclude a contract on behalf of the 2nd and 3rd Respondents unless he was furnished with a power of attorney authorising him to do so. It was therefore reasonable and expected that the 2nd and 3rd Respondent, having been identified to be the intended parties to conclude the agreement would have been required, as agreed, to sign the recorded terms or the written agreement in order to be bound by the terms discussed by the 1st Respondent and 4th Applicant. The 1st Respondent also did not present himself to have been an agent of the 2nd and 3rd Respondent. The 1st Applicant as represented by the trustees and 2nd and 3rd Respondent who were not part of the WhatsApp conversation could only enter into such an agreement by signing the recorded terms in agreement. .

[49] Consequently, in the absence of the written agreement signed by the 2nd and 3rd Respondent, about whom nothing more has been mentioned except that they were going to sign the recorded agreement in conclusion thereof, no lease agreement was concluded on their behalf, orally or otherwise. Even the email sent by the 1st Respondent in response to an eviction notice served on the Respondents on 27 July 2020, he did not allege an existence of an agreement orally concluded by the 2nd and 3rd Respondent or their acceptance of the terms. The 1st Respondent instead alleged to have an agreement with the 4th Applicant (not 1st Applicant) to pay rent until the debt was sorted and sought to enforce such agreement. The allegation contradicts both his assertion that a lease agreement was concluded between 1st Applicant and 2nd and 3rd

Respondent and that according to that agreement the Respondents were to stay in the property until it was sold and registered in the new owner's name.

[50] Conversely, a trustee cannot bind his co-trustees unless if they have given him authority in writing to do so. In casu, absence such authority or sanction from the other trustee on whose behalf the members interest is being held in the 1st Applicant, the 4th Applicant or both the 2nd and 4th Applicant could not be found to have validly concluded the lease agreement that was discussed and to have bound the 1st Applicant thereto without the 3rd Applicant's authority. It is their evidence that their collective decision ultimately was not to enter into any agreement with any of the Respondents and therefore no lease agreement was prepared or concluded.

[51] The Respondents accept that the notice to vacate was served on them on the 27 of July 2020, terminating their occupancy. Also that the offer to purchase by the 3rd Respondent did not culminate into a sale. The Respondent have therefore failed to justify their continued occupation of the property.

[52] To secure an eviction in terms of PIE, the relevant sub-sections in s 4 of the Act, read:

> *'(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.'*

[53] In *Ndlovu v Ngcobo; Bekker and Another v Jika*[4] the court set out the procedural threshold to be satisfied by an applicant for eviction. This is evident from what appears below:

> [18] The court, in determining whether or not to grant an order or in determining the date on which the property has to be vacated (section 4(8)), has to exercise a discretion based upon what is just and equitable. The discretion is one in the wide and not the narrow sense (cf *Media Workers Association of South Africa and others v Press Corporation of South Africa Ltd* ("*Perskor*") 1992 (4) SA 791 (A) at 800, *Knox D'Arcy Ltd and others v Jamieson and others* 1996 (4) SA 348 (A) at 360G–362G). A court of first instance, consequently, does not have a free hand to do whatever it wishes to do and a court of appeal is not hamstrung by the traditional grounds of whether the court exercised its discretion capriciously or upon a wrong principle, or that it did not bring its unbiased judgment to bear on the question, or that it acted without substantial reasons (*Ex parte Neethling and others* 1951 (4) SA 331 (A) at 335E, *Administrators, Estate Richards v Nichol and another* 1999 (1) SA 551 (SCA) at 561C–F).

[54] The next enquiry in terms of PIE is for the Court to determine a just and equitable date on which the respondent must vacate the property. The Applicants pointed out that the Respondents have been in unlawful occupation from 29 June 2020 after the members' interest in 1st Applicant was transferred to the 2nd Applicant to be held on behalf of the trustees. Further that the Respondents have confirmed that no rental has ever been paid. They have not disputed their failure to pay the rates and taxes and for municipality services, long before the takeover of the member's interest. They have also not disputed that the bond at Absa has also not been paid for a long time. The Applicant has argued that the Respondents' continued occupation prejudices the claims of the creditors, as the debts and costs being accumulated diminishes the nett equity of the

[4] 2003 (1) SA 113 (SCA)

property and or estate. The property can also not be properly marketed. On the other hand the Respondents have not raised any defence against immediate eviction sought by the Applicants .

[55] Having considered the circumstances surrounding the Respondents' occupation of the property, especially that the property forms part of an insolvent estate that needs to be realised expediently on behalf of the creditors, a fact that the Respondent has admitted being aware of. The duration of the Respondents occupation of the property without paying neither rental for their holding up nor the bond on the property that is owing to Absa bank. Moreover, that the Respondents were also not paying the rates and taxes and the utility bills notwithstanding having acknowledged not to be destitute. They have confirmed that they can afford alternative accommodation, which was evidenced, inter alia, by the 3rd and 4th Respondent's offer to purchase the property. The Respondents have not made out a case to be falling within a specific category of persons in terms of section 7 of the Act deserving of a higher level of consideration when considering a date for when an eviction should take place. It would be imposing the highest degree of injustice to further keep the Respondents in the property for any longer period, seeing that they are not destitute. It is accordingly just and equitable that the Respondents be evicted from the property as a matter of urgency although not without notice. I am of the view that in this matter, the following order accords with the requirements of being just and equitable.

[56] I therefore make the following Order:

1. The 1st to 5th Respondents and all other persons occupying through the 1st to 5th Respondent, the premises situated at Unit 5 San Remo, 16 Pamin Road, Bedfordview, are evicted and to vacate the said property not later than 13 October 2023;

2. The Sheriff of the High Court in the district in which the property is situated or his or her lawful deputy is authorised to take such steps as are

necessary to evict the 1st to 5th Respondent from the premises in the event that the 1st to 5th Respondent do not vacate the property in the time prescribed in Prayer 1 above;

3. The Sheriff of the district in which the property is situated or his or her lawful deputy is authorised to proceed with the eviction of the 1st to the 6th Respondents, in so far as such authorisation is needed to give effect to an eviction in terms of Regulation 70 of the Disaster Management Act; Regulations;

4. The 1st to 5th Respondent are ordered to pay the costs of this Application jointly and severally, the one paying the other to be absolved, as between attorney and client.

_____

N V KHUMALO

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

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