

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION**

CASE NO: A3117/2015

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.

.....

DATE

.....

SIGNATURE

In the matter between

NETSHISWINXHE MBENGENI

APPELLANT

And

MOAGI MOLEFE GLADWIN

1st RESPONDENT

CITY OF JOHANNESBURG

2nd RESPONDENT

JUDGMENT

MAYET AJ:

[1] This is an appeal against the judgment handed down by the Additional Magistrate M J Thobela on the 9 July 2015 in the Roodepoort Magistrate's Court.

[2] It is common cause that the first respondent is the registered owner of the property situate at erf [8.....] [D.....] [E.....], [S.....].

[3] On the 26 January 2015 the first respondent instituted an application for eviction against the appellant and all those persons who occupied the property through him in terms of section 4(1) of the Prevention of Illegal Eviction from and Unlawful Occupation Act 19 of 1998 (hereinafter referred to as "PIE").

[4] At the hearing which took place on 9 July 2015 the appellant and the first respondent stood down and reached an agreement in terms of which the court a quo would conduct a just and equitable enquiry as required by section 4(7) of PIE to determine when, how and under what conditions the eviction would take place. It was no longer in dispute that an eviction would have to occur.

[5] Section 4(7) of PIE reads as follows:

" 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."

[6] The appellant contends that Section 4(7) of PIE was not properly applied because the court did not take into account all the relevant circumstances, nor did the first respondent make the Applicant aware of his rights under section 26 of the Constitution of the Republic of South Africa Act 108 of 1996. Section 26 provides as follows:

1. Everyone has the right to have access to adequate housing;
2. The state must take reasonable legislative steps and other measures, within its available resources to achieve the progressive realization of this right;
3. No one may be evicted from their home or have their home demolished, without an order of Court, made after considering all the relevant circumstances.

Relevant circumstances

[7] The appellant highlighted the following measures which the court should have considered in deciding whether it was just and equitable to grant an eviction order namely the constitutional rights of the child and the role of organs of state to investigate and identify alternative accommodation where the order of eviction will lead to homelessness.

[8] It is common cause that the appellant has a son residing with him. Apart from the fact that he was in grade 8 last year no further particulars relating to his name, age and schooling were provided save that at the time of the hearing he was preparing for his mid-year examination.

[9] The appellant contends that the court failed to take into account that a child's best interests are of paramount interest in every matter concerning the child including how their schooling would be affected by an eviction order. In support hereof the court was referred to *Arendse v Arendse 2013(3) SA 347*.

[10] However no evidence was led to demonstrate that the order of eviction granted by the court had a traumatic effect on the appellant's son and on his mid-year

examinations. In any event the eviction order would have occurred only on 31 July 2015, during the school holiday had it not been stayed by this appeal.

[11] The appellant is of the view that the court misdirected the enquiry when it failed to engage meaningfully with the City of Johannesburg on the availability of alternative accommodation before it granted the eviction order. The appellant contends that at the very least the court should have ordered the City of Johannesburg to file a report on the impact of the eviction on vulnerable groups.

[12] The first respondent raised the concern that the continued occupation of the property by the appellant was prejudicing his rights as the lawful owner to use and enjoy the property. Furthermore the respondent was paying the rates and taxes on the property while the appellant and his family were living there free of charge.

[13] The PIE Act does not arbitrarily deprive the owner of his or her property rights as the court must exercise its discretion only once all the relevant circumstances have been considered. However the appellant failed to disclose his personal circumstances fully and in a manner which would have allowed the court to exercise its judicial discretion. More importantly the appellant failed to fully explain his financial circumstances. The first respondent merely states that he is a sole breadwinner because his wife is too sickly to work and he earns a low income.

[14] I am of the view that the appellant does not fall into the category of the poorest of the poor neither is he vulnerable as he has been able to afford opposing the eviction application and this appeal as well as the security for costs.

[15] In *City of Johannesburg Metro Municipality v Blue Moonlight Properties 39(Pty) Ltd and Another 2012(2)SA 1014 (CC)* at para 40 the court held that “A property owner cannot be expected to provide free housing for the homeless on its property for an indefinite period.” The appellant has been in occupation of the property since June 2014 and there is no reason to believe that he will be rendered homeless should he be evicted.

[16] The court has the task to ensure that justice and equity prevailed in relation to all concerned. It has to balance out and reconcile the opposed claims in as just and equitable a manner as possible taking into account all the factors relevant in each particular case. See *Pitje v Shibambo and Others [2016] ZACC* at para 18.

[17] In the result, I propose the following order:

The appeal is dismissed with costs.

A. MAYET

ACTING JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION

I agree, and it is so ordered.

WHG VAN DER LINDE

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION

APPEARANCES:

APPELLANT: Adv. Norman

FIRST RESPONDENT: Adv. Vobi

Date argued: 18 April, 2016

Date judgment: 29 April, 2016