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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHERS JUDGES:NO
(3)	REVISED
<u>8 May 2017</u>	
DATE	SIGNATURE

number: 21145/17

Case

In the matter between:

GERHARD VAN DER WESTHUIZEN

Applicant

and

PINKY NXIWENI

First Respondent

**ALL THE UNLAWFULL OCCUPIERS OF SECTIONAL
TITLE UNIT [...], WITH SCHEME NAME [...]**

BETTER KOWN AS [...] A.

NEW REDRUTH, ALBERTON

Second Respondent

CITY OF EKURHULENI METROPOLITAN

MUNICIPALITY**Third Respondent**

JUDGMENT

Molahlehi, J

Introduction

- [1] This is an application in terms of which the applicant seeks an order evicting the respondent, Ms Nxiweni and those occupying the property with her at [...] A. New Redruth, Alberton, Johannesburg (the property). The respondents are allegedly occupying the property without the consent of the applicant.

Background facts

- [2] It is common cause that initially the occupation of the property by the first respondent was with the prior consent of the applicant in that the parties concluded a lease agreement which commenced on 1 October 2015.
- [3] In terms of the lease agreement the first respondent had to pay the sum of R6 000.00 deposit and after that pay the sum of R6 600.00 per month as the advanced rental. Clause 11 of the lease agreement made the first respondent liable for municipal charges of the property.
- [4] Failure to make payment of any amount required in terms of the lease agreement would result in a breach of the agreement. In that event the first respondent would be given twenty days by the applicant to remedy such a violation, and after that, the applicant would be entitled to terminate the agreement.
- [5] The lease agreement further provided that upon cancellation of the lease as a result of the breach, the first respondent and any other person occupying the premises through her would be required to immediately vacate the premises and allow the applicant to take unhindered occupation as provided for in clause 24.2

of the lease agreement.

- [6] The applicant states in his founding affidavit that the first respondent had breached the lease agreement by not paying the required rent, utility charges and deposit which is outstanding in the sum of R131 453.59.
- [7] On 8 January 2016, the first respondent through her erstwhile attorney was placed on terms to remedy the breach by paying the outstanding rental in the amount of R7 365.21. The respondent having allegedly failed to remedy the breach was then issued with the letter of termination of the lease agreement on 19 January 2016. The respondent has refused to vacate the property despite the cancellation of the lease agreement and the demand that she leaves the property.
- [8] The application is opposed by the first respondent who represented herself during the hearing before me. She has raised several points in her defence against the application to evict her from the property she raised the following points.

Non-joinder

- [9] The respondent contends that the applicant ought to have joined in these proceedings the Estate Agent because she assisted in the signing of the lease agreement.
- [10] The test for non-joinder is set out by the Supreme Court of Appeal in Absa Bank Ltd v Naude NO,¹ in the following terms:

“[10] The test whether there has been non-joinder is whether a party has a direct

¹ (20264/2014) [2015] ZASCA 97 (1 June 2015).

and substantial interest in the subject matter of the litigation which may prejudice the party that has not been joined. In *Gordon v Department of Health, Kwazulu-Natal* it was held that if an order or judgment cannot be sustained without necessarily prejudicing the interest of third parties that had not been joined, then those third parties have a legal interest in the matter and must be joined.” (Footnotes omitted).

[11] In *Judicial Service Commission and Another v Cape Bar Council and another*², the Court held that:

“[12] It has by now become settled law that the joinder of a party is only required as a matter of necessity – as opposed to a matter of convenience – if that party has a direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings concerned (see eg *Bowring NO v Vrededorp Properties CC* 2007 (5) SA 391 (SCA) para 21). The mere fact that a party may have an interest in the outcome of the litigation does not warrant a non-joinder plea. The right of a party to validly raise the objection that other parties should have been joined to the proceedings, has thus been held to be a limited one.”

[12] Applying the above test, in the present matter, I am of the view that the point raised by the respondent bears no merit. There are no facts supporting the contention that it was necessary to join the Estate Agent as the party in these proceedings. Except for the fact that it (the estate agent) assisted in the signing of the lease agreement, there is nothing to show that it has direct and substantial interest in the matter.

² 2013 (1) SA 170 (SCA) at par [12]

Non-compliance with PIE

[13] The respondent contended that the applicant was not entitled to the relief sought because he did not comply with the provisions of the Prevention of Illegal and Unlawful Occupation of Land Eviction Act (PIE)³, as concerning the following:

“The first point in this respect is that the notice in terms of section 4(2) of the PIE Act does not state that the applicant has a title and that he is the owner of the property in question. This point is, in my view, unsustainable because the applicant has attached to his papers the Windeed search which shows him as the owner of the property.”

[14] The respondent has also not disputed that the applicant is in control of the property as provided for in s 4 (1) of PIE Act.

Ownership of the property

[15] The respondent disputes ownership of the property by the applicant. The applicant has alleged in his founding affidavit that he is the owner of the property and in support thereof attached the Windeed report downloaded from the web site of the Deeds Office. In my view this is sufficient to prove ownership of the property by the applicant.⁴ However, even if that was not sufficient proof of ownership, the applicant still qualifies for the relief on the bases of the provisions of s 4. (1) of the PIE Act which provides:

“4 (1) Notwithstanding anything to the contrary contained in any law or the common law, the provisions of this section apply to proceedings by an owner or

³Act 19 of 1998

⁴ Sibango and Sixteen Others v PPM Plumbing (Pty) and Another ...

<http://www.saflii.org/za/cases/ZAGPPHC/2016/243.html> Apr 20, 2016.

person in charge of the land for the eviction of an unlawful occupier.

- [16] The second point is that the applicant has failed to provide a municipality report indicating that he intends evicting her with the recommendation by the municipality on whether it can provide alternative accommodation to her and child of school going. This point is dealt with later in the judgment under the general principles governing eviction. It suffices, however, to say that it does not bear any merit because of the failure by the respondent in her papers to deal with her circumstances that would justify intervention by the municipality.
- [17] The same applies to the third point which is that the applicant has failed to indicate whether the property in question is a primary residence of the applicant and whether the household is headed by a woman, disabled person and whether the rights of children or elderly people will be affected by the eviction and whether the municipality or any other organ of state has provided alternative accommodation to relocate the applicant.
- [18] The first respondent has also submitted that she is a mother of school going children who attend school in the vicinity of the property which is also a primary residence. According to her, this is a factor which the applicant ought to have taken into account before seeking her eviction.
- [19] The first respondent further contends that the applicant has failed to honour its obligation in as far as the provisions of the lease agreement are concerned. In this regard, she states that upon entering the property after the conclusion of the lease agreement she found the property not repainted and in a near dilapidated state. She addressed a letter to the applicant's estate agent about the matter and was promised that it would be attended to, but nothing was done in that regard.

She had to repair the geyser and the broken taps at her own cost. She sent the bill of the costs related to the repairs to the estate agent who failed to settle it.

[20] It seems from the above that the respondent is insisting on staying on the property despite the cancellation of the lease on the ground that she had repaired the damaged facilities and made some improvements to it.

[21] Clause 16.2.11 of the lease agreement expressly states that the tenant is not allowed to make any improvement on the property without the consent of the landlord. There is no evidence that the respondent complied with this requirement in making the alleged repairs and improvements. It follows therefore that this complaint cannot be a sustainable defence.

[22] She also complains that the applicant cancelled the lease agreement on the basis of a 30 days' notice, rather than two months' notice as provided for in clause 23.1 of the lease agreement. Clause 23.1 of the lease agreement reads as follows:

“23.1 The Landlord may cancel this Lease on 2 (Two) month's written notice on the following conditions:

23.1.1 The Landlord intends to move into the Premises; or

23.1.2 The Landlord intends to sell the Premises.”

[23] It is clear from the proper reading of the above that the respondent's contention that she was given notice of less than two months as required by the lease agreement is unsustainable because the cancellation of the lease was not based on any of the two conditions. The cancellation on the applicant's papers was based on clause 23.2 of the lease agreement which reads as follows:

23.2 The Landlord may cancel this Lease on 7 (Seven) days' notice to the

Tenant in the following circumstances:

23.2.1...

23.2.2...

23.2.3 The Tenant remains in continuous breach of the Lease for a period of 3 (Three) months and fails to remedy such breach, despite being notified of such breach, in writing, on 3 (Three) months' and fails to remedy such breach, despite being notified of such breach, in writing, on 3 (Three) months occasions by the Landlord.

24.1 In the event of the Tenant not paying the Rental or any other monies due in terms of this Lease on the date upon which such monies are due and payable, or committing any other breach in terms of this Lease then:

2.4.1.1 Should the provisions of section 14 of the CPA apply to this Lease, and the Tenant remains in breach of any of the terms of this Lease for a period of 20 [Twenty] Business days after dispatch of a written notice, calling upon the tenant to remedy such a breach; or

2.4.1.2 Should Lease continue on a Month- to -Month basis in accordance with the provisions of clause 6.1 and the provisions of section 14 of the CPA. Accordingly, not apply to this lease and the tenant remains in breach of any of the terms of this lease for a period of 7 (seven) calendar days after dispatch of the written notice, calling upon the tenant to remedy such a breach: the landlord shall be entitled, in his sole discretion and without

prejudice to any other rights that he may have in law to give her claim specific performance in terms of this lease for to cancel the lease forth with and without further notice claim all arrear rentals and or any other damages from the Tenant."

- [24] The respondent further states that during June 2016 while attending her mother's funeral in the Eastern Cape, the applicant broke down her door, removed it and reduced the electricity supply to cater for only house lights. The applicant refused to replace the door he broke, resulting in the first respondent having to replace it at her own costs. After that, a meeting was convened between the applicant and first respondent's erstwhile attorneys.
- [25] At that meeting, the arrears were reconciled to be at R 40 000. 00. The respondent disputes the amount of R131 453 99 and states that the applicant continued to charge her for electricity she did not consume.
- [26] In the replying affidavit, the applicant denied all the allegations made by the first respondent, in particular in relation to the repair of the geyser and the breaking down of the door by the estate agent. He contended further that, even on the first respondent's own version the amount of R40 000.00 was due and owing by the first respondent.
- [27] As concerning arrears in terms of payment of the rental, the first respondent did not dispute that the last payment she made was in May 2016. She in this regard undertook to pay the sum of R40 000,00 which she claims is the correct amount due and owing to the applicant. The first respondent undertook to make an arrangement to have the amount paid by way of a debit order but has to date

failed to do so. The first respondent has continued to occupy the property without title to it and continues to do so without making any payment.

[28] The complaint about the failure by the applicant to repair or paint the property is no justification for withholding payment of the rental. The first respondent conceded in this regard that there is no clause in the lease agreement that allowed her to withhold payment of the rental.

[29] The contention that the eviction is non-compliant with the law because there was no report from the municipality regarding alternative accommodation has no merit. All that the respondent needed to do was to make the municipality aware about the eviction. It was then for the first respondent to set out in her papers her personal circumstances which would indicate whether she would be rendered homeless as a result of the eviction.

Legal principles- eviction

[30] The procedure to follow in initiating the eviction process is set out in s 4 (2) of the PIE Act which provides:

“4 (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.”

[31] On the papers as they stand before me, there is no doubt that the applicant has complied with the procedural requirements of the Act.

[32] Turning to the substantive requirements for a lawful eviction the relevant subsections are; ss 4(6), (7), (8) and (9) of the PIE Act which provide:

“(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 sold in a sale of execution pursuant to a mortgage, where the land has been made available or can reasonably be made available by a municipality or other Organ of State or another landowner 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 had 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 sub-section (8), the court must have regard to all relevant factors, including the period the unlawful occupier and his or his family have resided on the land question."

[33] The requisite approach to adopt when dealing with issues of eviction is summarised by Wallis JA in *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others*,⁵ as follows:

“A court hearing an application for eviction at the instance of a private person or body, owing no obligations to provide housing or achieve a gradual realisation of the right of access to housing in terms of s 26(1) of the Constitution, is faced with two separate inquiries. First, it must decide whether it is just and equitable to grant an eviction order having regard to all relevant factors. Under s 4(7) those factors include the availability of alternative land or accommodation. The weight to be attached to that factor must be assessed in the light of the property owner’s protected rights under s 25 of the Constitution, and on the footing that a limitation of those rights in favour of the occupiers will ordinarily be limited in duration. Once the court decides that there is no defence to the claim for eviction and that it would be just and equitable to grant an eviction order, it is obliged to grant the order. Before doing so, however, it must consider what justice and equity demand in relation to the date of implementation of that order and it must consider what conditions must be attached to that order. In that second inquiry, it must consider the impact of an eviction order on the occupiers and whether they may be rendered homeless thereby or need emergency assistance to relocate elsewhere. The order that he grants as a result of these two discreet inquiries is a single order. Accordingly, it cannot be granted until both inquiries have been undertaken and the conclusion reached that the grant of an eviction

⁵ 2012 (6) SA 294 (SCA).

order, effective from a specified date, is just and equitable. Nor can the inquiry be concluded until the court is satisfied that it is in a position of all the information necessary to make both findings based on justice and equity.”

[34] There is nothing in the papers before this court indicating that the first respondent is an indigent and is unable to pay for alternative accommodation in the event that the applicant is granted the relief sought. Her case is not that her failure to pay the rental is due to financial affordability but rather that she is refusing to pay because the applicant is alleged to have failed to repair the damaged geyser and ensure that the property is in a good state of repairs.

[35] It is trite that in considering an application for the eviction of an occupier of property the court has the discretion to exercise based on what is just and equitable in the circumstances. This principle is set out in *Ndlovu v Ngcobo*; *Bekker and Another v Jika*,⁶ in the following terms:

“[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 (s 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] ZASCA 149; 1992 (4) SA 791 (A) 800, *Knox D’Arcy Ltd and Others v Jamieson and Others* [1996] ZASCA 58; 1996 (4) SA 348 (A) 360G-362G). A court of first instance, consequently, does not have a free hand to do whatever it wishes to do

⁶ 2004 (1) SA 114 (SCA) para 18.

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) 335E, *Administrators, Estate Richards v Nichol and Another*[1998] ZASCA 82; 1999 (1) SA 551 (SCA) 561C-F)."

[36] The enquiry to conduct to properly exercise the discretion judicially is set out in *Dwele v Phalatse and Others*,⁷ as follows:

"20. Essentially there are two inquiries mandated by these sections. In terms of section 4(7) of the PIE Act, an eviction order may only be granted if it is just and equitable to do so, determined after the court has had regard to all the relevant circumstances, including the availability of land for the relocation of the occupiers and the rights and needs of the elderly, children, disabled persons and households headed by women. If the requirements of s 4 are satisfied and no valid defence to an eviction order has been raised, a court 'must', in terms of s 4(8) grant an eviction order. When granting such an order, the court must, in terms of s 4(8)(a) of the PIE Act, determine a just and equitable date on which the unlawful occupier or occupiers must vacate the premises (the next inquiry). The court is empowered in terms of s 4(12) to attach reasonable conditions to an eviction order. The date that it determines must be one that is just and equitable to all parties." (Footnote omitted).

[37] In the circumstances I find that the respondent and those occupying the property

⁷ (11112/15) [2017] ZAGPJHC 146 (7 June 2017).

with her are doing so without the consent of the applicant and their occupation is accordingly unlawful. There is thus there is no reason in fairness or equity considering the facts of this matter why the relief sought by the applicant should not granted. In other words it is just and equitable to order the eviction of the respondent and those occupying the property with her.

[38] And about the date of the implementation of the eviction order, I am of the view that it is just and equitable to afford the respondent twenty-one days from the date that this order is served on her for her to vacate the property.

Order

[39] In the premises the following order is made:

1. The First and Second Respondents, and all those that occupy the property by virtue of the occupation thereof by the First Respondent, are evicted from the following immovable property at [...] A, NEW REDRUTH, ALBERTON, JOHANNESBURG as described on Sectional Plan SS126/1988 on the Scheme known as [...] in respect of the land and building and buildings situate at ERF NEW REDRUTH, [...], GAUTENG PROVINCE, known as [...] A., NEW REDRUTH, ALBERTON, JOHANNESBURG (the "Property");
2. That the First and Second Respondents and all those that occupy the Property by virtue of their occupation thereof, are ordered to vacate the property within 21 (twenty-one) days from the date of service of this order;
3. Should the First and Second Respondents, and all those that occupy the Property by virtue of their occupation thereof, fail to vacate the Property within 21 (twenty-one) days after receipt of this order, the eviction order may

be carried out, in which event the Sheriff of this Court is hereby authorized and directed to forthwith evict the First and Second Respondents and all those that occupy the Property by virtue of their occupation thereof, from the Property.

4. The Sheriff of this Court and his/her authorised deputy are hereby authorized to exercise any force necessary to execute and carry out the order granted in terms of prayer 3 above, for which purpose the Sheriff of the Court and/or his deputy may enlist the services of the South African Police Service to the effect above, should it so be necessary;
5. That the First Respondent be ordered to pay the cost of this Application on an attorney and client scale.



E Molahlehi

Judge of the High Court;

Johannesburg

Representation:

For the Applicants: Adv L Van Gass

Instructed by: Nelis Brits Attorneys

For the 1st Respondents: In person

Heard: 18 April 2018

Judgment delivered: 08 May 2018