

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

CASE NO: A3003/2021

REPORTABLE: No
OF INTEREST TO OTHER JUDGES: No
08 /03/2022

In the matter between:

NGALE LORRAINE KGOSINKWE N.O

APPELLANT

and

**MHLONGO SIDWELL FANI
MOGALE CITY LOCAL MUNICIPALITY**

**1ST RESPONDENT
2ND RESPONDNT**

JUDGMENT

MODISE AJ:

1. This is an appeal against a decision of the Magistrate's Court wherein the Appellant had applied for an order evicting the first respondent from the premises situated at Erf [...] Nagathola Street, Kagiso 1 ("the property") with ancillary relief and costs against First Respondent.

2. The Magistrate dismissed the application with costs finding that the Appellant had “failed to satisfy the court that the grounds and the requirements of PIE had been established and that all the factors had been placed before court and that it was just and equitable for the court to evict the respondent.”

3. From the documents contained in the record, it is clear and indeed common cause that the provisions of The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (“PIE”) were applicable.

4. Put differently, the Magistrate found that the Appellant failed to demonstrate that she had *locus standi* to evict as either owner or person in charge as envisaged in PIE and secondly she had failed to comply with the procedural provisions of section 4 of PIE.

5. The Appellant appeals against the Magistrate’s orders to this Court.

6. We are of the view that there are two main issues for determination being *locus standi*, and whether there is a basis for the appeal court to interfere with the Magistrate’s discretion.

7. There is no appearance or opposition by any of the respondents.

8. Counsel for the appellant contended that by virtue of the letter of executorship issued to the appellant by the Master of the High Court on 1 September 2017 under estate number: 14385/2017 for estate of the late Molotsi Lucas Mathuloe, to whose estate the property belongs, the appellant is the person in charge of the deceased estate and therefore of the property.

THE LAW

9. The starting point is Section 26(3) of the Constitution which provides that no one may be evicted from their home or have their home demolished without a court order authorising such eviction after having due regard to “all the relevant circumstances”.

10. The PIE Act amplifies this by providing that a court may not grant an eviction order unless the eviction sought would be “just and equitable” in the circumstances. The court thus has to have regard to a number of factors including but not limited to: whether the occupiers include vulnerable categories of persons (the elderly, children and female-headed households), the duration of occupation and the availability of alternative accommodation, whether by the state or otherwise.

11. In *Bekker and Bosch v Jika* 2003 (1) SA 113 (SCA) the Supreme Court of Appeal, in a majority judgment, held *inter alia* that PIE invests in the courts the right and duty to make an order which, in the circumstances of the case, would be just and equitable, and it prescribes some circumstances that have to be taken into account in determining the terms of the eviction. In other words, the court, in determining whether or not to grant an order or in determining the date on which the property has to be vacated, has to exercise a discretion as to what is just and equitable. The discretion is one in the wide, and not the narrow sense. Consequently, the court does not have a free hand to do whatever it wishes.

LOCUS STANDI/STANDING TO EVICT

12. The appellant contended that she has *locus standi* to institute the eviction proceedings against the first respondent in terms of section 4(1) of PIE by virtue of the letter of executorship issued to her by the Master of the High Court to be in charge of the deceased estate.

13. On or about 12 August 2018, the first respondent lodged a review application in which he sought relief that the appellant’s appointment as executrix, by the Master of the High Court, be set aside.

14. At the court *a quo* and during argument in the appeal court, the appellant’s attorney conceded that the review application is still pending and that the challenge to the appellant’s authority to be in charge of the deceased estate has not been resolved. This issue becomes relevant in our consideration of a just and equitable remedy.

15. We are of the view that until such time that the review application has been decided, the Appellant's letter of executorship remains extant.

16. Against the facts and legal position relating to PIE application, the Appellant has successfully demonstrated that she is the person in charge who has standing to bring the eviction application.

17. In the circumstances it seems to us that the Magistrate erred in his conclusion in this regard.

WHAT IS JUST AND EQUITABLE?

18. The duty of a court faced with the eviction application is to consider what is just and equitable in the circumstances.

19. The issue was put succinctly in the case of *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) at para 32 as follows:

The obligation on the court is to 'have regard to' the circumstances, that is, to give them due weight in making its judgment as to what is just and equitable. The court cannot fulfil its information at its disposal. It needs to be fully apprised of the circumstances before it can have regard to them. It follows that, although it is incumbent on the interested parties to make all relevant information available, technical questions relating to onus of proof should not play an unduly significant role in its enquiry. The court is not resolving a civil dispute as to who has rights under land law; the existence of unlawfulness is the foundation for the enquiry, not its subject-matter. What the court is called upon to do is to decide whether, bearing in mind the values of Constitution, in upholding and enforcing land rights, it is appropriate to issue an order which has the effect of depriving people of their homes. Of equal concern, it is determining the conditions under which, if it is just and equitable to grant such an order, the eviction should take place. Both the language of the section and the purpose of the statute require the court to ensure that it is fully informed before undertaking the onerous and delicate task entrusted to it. In securing the necessary information. the court would therefore be

entitled to go beyond the facts established in the papers before it. Indeed. when the evidence submitted by the parties leaves important questions of fact obscure. contested or uncertain. the court might be obliged to procure ways of establishing the true state of affairs. so as to enable properly to 'have regard' to relevant circumstances." (My emphasis)

20. As already alluded to above, in our view the pending review application is relevant to the question of what is just and equitable in the circumstances. The property in question is part of a deceased estate on which both the current person in charge and the occupier have a claim. The review application will determine whether the applicant will remain the person in charge and therefore retain the power to evict the respondent. The applicant conceded that she has also done nothing to advance the finalisation of the review application, if the contention is that the respondent has been delaying.

21. In these circumstances, it cannot be just and equitable to permit the applicant to evict the respondent when her very power to do so is under review.

22. In our view, the Magistrate properly exercised his discretion in making a determination whether it is just and equitable to grant the eviction order and rightly refused to grant the order sought.

THE PROCEDURAL REQUIREMENTS OF PIE

23. PIE requires the applicant to serve the notice in terms of section 4 of PIE on the unlawful occupier and the Municipality.

24. In the instant case the Municipality was cited and served with the section 4 notices in terms of of PIE. In the circumstances relevant to procedure, the statutory process requirements was complied with.

25. Notwithstanding the above, the appellant has failed to demonstrate that an eviction in the circumstances would be just and equitable.

CONCLUSION

26. The Appellant has failed to establish that the eviction order would be a just and equitable remedy. The only order that could have been made in the specific circumstances of this case was to dismiss the application. The Magistrate in this regard made the correct order in respect of the eviction application

ORDER

27. The following order is made:

27.1 The appeal is dismissed with costs.

T. MODISE
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree.

S. YACOOB
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of hearing: 18 October 2021

Date of Judgment: 08 March 2022

Appearances

Applicant's Attorney: Smith Van Der Watt Inc