IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH

CASE NO: 2809/17

Reportable	**Yes**

In the matter between:

MOGAMAT TARIQUE ABDOL **Applicant**

AND

NOLENE PRINSLOO **First Respondent**

AND ALL THOSE OCCUPYING THE PREMISES

UNDER THE FIRST RESPONDENTS CONTROL

NELSON MANDELA BAY METROPOLITAN **Second Respondent**

MUNICIPALITY

JUDGMENT

VAN ZYL DJP:

[1] The applicant is the registered owner of a residential property situated at no 6 Hercules Street, Springdale, Gelvandale, Port Elizabeth (Erf no 1867, Gelvandale Township, Port Elizabeth). The first respondent and her family members are the

occupants of the property. The applicant seeks their eviction from the property on the basis that they are **"unlawful occupiers"** as contemplated by the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998 (the Act).

[2] The applicant purchased the property from a Mr Malgas, who in turn had acquired the property from the Estate of the late Henry Charles Malgas. (the deceased). The first respondent is one of seven children of the deceased who were the intestate heirs in the deceased estate. (the Estate). The first respondent resided on the property at the time of her father's death and continued to do so thereafter. The applicant's case is that the first respondent's continued occupation and her refusal to vacate the property is unlawful.

[3] The first respondent does not claim to have obtained any right to occupy the property from the applicant. Instead, she contends that the sale of the property by the executors of the estate was irregular in that she did not consent to the initial sale of the property by the executor to Mr Malgas, and that the subsequent sale to the applicant was fraudulent. To this extent, the first respondent contends that while she continues to reside in the property, she is liaising with her attorneys, the matter is still being investigated, and she remains uniformed about what happened to the Estate.

[4] Before dealing with the issues raised by the first respondent, there are two preliminary issues that must be dealt with. The first is the applicant's application for condonation for the late filing of his replying affidavit. The test for determining whether condonation should be granted or refused is the interests of justice. It is dependant upon the facts and circumstances of each case, and factors that are relevant to the enquiry includes, but are not limited to, the length of the delay; the explanation for the

delay; the prejudice to the other party; the effect of the delay on the administration of justice; the importance of the issues raised; and the prospects of success for the party seeking condonation. (*Smith NO v Brummer NO and Another* 1954 (3) SA 352 (O) at 358 H; *Van Wyk v Unitas Hospital* 2008 (2) SA 472 (CC) at para [20], and *Turnbull-Jackson v Hibiscus Coast Municipality and Others* 2014 (6) SA 592 (CC) at para [23].)

[5] The applicant has given a satisfactory explanation for the delay. He lives and works abroad. He was consequently not able to consult with his attorneys in person, and everything had to be done by way of electronic mail. He further did not have personal knowledge of what the first respondent contends transpired with regard to the winding up of the Estate and the sale of the property to Mr Malgas. He was advised that in the absence of particulars having been given with regard thereto by the first respondent and of alleged fraud and the improper conduct attributed to the Executor, further investigations were required to deal with what was raised by the first respondent in her answering affidavit. The Executor initially refused to release to the applicant's attorneys the relevant documentation from the Estate file. When it was eventually released, its volume required time for its analysis and distillation into evidence.

[6] The documentation in question is relevant and necessary to place the applicant in a position to properly deal with the merits of the serious allegations of malfeasance made by the first respondent, and her denial of the alleged unlawfulness of her occupation of the property. I am satisfied that the delay does not constitute a reckless or wilful neglect to comply with the Court Rules, or that the first respondent has been prejudiced thereby. Upon a consideration of the applicant's prospects of success and

of the other relevant factors, condonation of the late filing of the replying affidavit must be granted.

[7] The second preliminary issue is the following: In her answering affidavit the first respondent *in limine* raised the point that the applicant has failed to comply with the peremptory provisions of the Act. The objection is premised on the fact that the applicant's section 4(2) notice and the notice contemplated in section 4(3) of the Act were served on the first respondent at the same time. This objection is based on the decision in *Cape Killarney Property Investments (Pty) Ltd v Mahamba and Others* 2001 (4) SA 1222 SCA where the Court expressed the view that the section 4(2) notice can only be directed and authorised by the Court after all the papers on both sides have been served (at 1228 B-D of the judgment.).

[8] Although the requirements of section 4 are peremptory, a deviation therefrom will not necessarily be fatal. The material question remains whether despite the defect, the objective of the statutory provision has in all the circumstances been achieved. The object of the notices is to ensure that the unlawful occupiers and the relevant municipality are aware of the proceedings, that the unlawful occupier is aware of his rights, and the basis upon which the eviction order is sought so to enable him to meet the case. In *Unlawful Occupiers of the School Site v City of Johannesburg* 2005 (4) SA 1999 (SCA) at para [22] Brand JA, with reference to the peremptory nature of the provisions of section 4, said the following:

> **"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 (see eg *Nkisimane and Others v Santam Insurance Co Ltd* 1978 (2) SA 430 (A) at 433H-434B; *Weenen Transitional Local Council v Van Dyk* 2002 (4) SA 653 (SCA) in para [13]).

And at para [24]:

"The question whether in a particular case a deficient s 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 s 4(2) notice which failed to comply with s 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 s 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 s 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 s 4(2) notice served upon the respondents had substantially complied with the requirements of s 4(5).”**

[9] In *Moela v Shoniwe* 2005 (4) SA 357 (SCA) at para [9] the Court dealt with the situation where the contents and the manner of service of a section 4(2) notice was not authorised and directed by an order of court. Streicher JA said the following:

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

[10] In the present matter the contents and the manner of service of the section 4(2) notice was authorised and directed by an order of court. The only issue is that the notices in terms of sections 4(2) and 4(3) were served simultaneously. It is not contended that the respondents were prejudice thereby, or that the objective of the legislature has not been achieved as a result.

[11] I am accordingly satisfied that the respondents were given effective notice of the proceedings, and the case they were required to meet, and that they were not prejudiced in any way by the simultaneous service of the relevant notices in terms of section 4 of the Act.

[12] The next question is whether or not the first respondent and the other respondents are unlawful occupiers for purposes of the Act. An **"unlawful occupier"** is in section 1(ix) of the Act defined as, **"a person who occupy land without the express or tacit consent of the owner or person in charge, or without any right in law to occupy such land."** A right to occupation cannot arise from the first respondent's status as an heir in the intestate estate of her late father. Like any of the other heirs, her right was limited to an equal share in the proceeds of the Estate. As stated earlier, the first respondent also does not profess to have the consent of the applicant as the registered owner of the property to be in occupation thereof. Instead, she questions the lawfulness of the applicant's title to the property by contending that the sale of the property by the Executor to Mr Malgas and later to the applicant was executed fraudulent, and without the consent of the heirs.

[13] The sale of the property in a deceased estate is regulated by section 47 of the Administration of Estates Act 66 of 1965. It reads as follows:

> **"Unless it is contrary to the will of the deceased, an executor shall sell property (other than property of a class ordinarily sold through a stock-broker or a bill of exchange or property sold in the ordinary course of any business or undertaking carried on by**

the executor) in the manner and subject to the conditions which the heirs who have an interest therein approve in writing:

Provided that –

(a) in the case where an absentee, a minor or a person under curatorship is heir to the property; or

(b) if the said heirs are unable to agree on the manner and conditions of the sale,

the executor shall sell the property in such manner and subject to such conditions as the Master may approve"

[14] The documentation in the Estate file shows the factual position to be the following: The deceased passed away on 17 April 2002. The first respondent submitted an inventory for the Estate in terms of section 9 of the Administration of Estates Act. The first respondent recorded herself and her brother, Deon Meyer, as being the only children of the deceased. Om 21 May 2002 the Master of the High Court issued a letter of authority to a Mr Harrington to take control of the assets of the deceased estate as the representative of the Master. From correspondence between Harrington and a firm of attorneys representing a Lorna Accum, who later passed away before the finalisation of the Estate, it is evident that Ms Accum claimed to be a daughter of the deceased born out of wedlock, an consequently an heir in the intestate estate.

[15] Harrington later, in 2009 renounced his position as representative of the Estate. In his letter informing the first respondent of this, Harrington stated that he accepted the appointment to act as the Master’s representative on the basis of the first respondent’s declaration that the deceased only had two adult children. That declaration was however in conflict with what the first respondent telephonically told Harrington, namely that the deceased in fact had seven children, and not only two as she had declared earlier. Harrington, clearly conflicted by this turn of events, renounced his position as representative of the Estate.

[16] In June 2010, and again in July 2010, a meeting of the heirs was held with the Master of the High Court. The only heir that was not present at the two meetings was Ms Accum who had by then already passed away. Four of the heirs were recorded as being in favour of the sale of the property and three voted against the sale. It was also recorded that an executor was to be appointed to the Estate, but that the appointed person must not be a family member. On 27 July 2010 a Mr van Niekerk was appointed as the executor. On 2 December 2010 he wrote to the first respondent to confirm that her brother, Deon Meyer, had made an offer to purchase the property and that he was given until 30 January 2011 to obtain the necessary finance, failing which the property will be sold.

[17] This is consistent with what the first respondent says in her answering affidavit, namely that at a meeting it was pointed out to them that Ms Accum was entitled to a share in the Estate, and that as result it was decided by the remaining heirs that the property must be purchased by their brother Deon Meyer in order for the first respondent and her children to continue to reside on the property.

[18] On 17 February 2011 the Executor in writing informed the first respondent that the deadline for Deon Meyer to come up with the money for the purchase of the property was extended to 30 March 2011. Thereafter, more than a year later, the Executor once again wrote to the heirs advising them that they were given an opportunity to purchase the property, and that if they did not contact the Executor before the 14 June 22012, the property would be sold.

[19] On 9 October 2012 the Executor informed the heirs in writing that an offer to purchase the property had been received, but that the heirs will have first preference to purchase the property, and should they be interested, they must inform the executor before 26 October 2012. It is further recorded in the letter that a consent to the sale of the property was attached and must be signed and returned. That explains the existence of the consent forms signed by some of the heirs in respect of which the first respondent raised the suspicion of forgery. On 12 December 2012 the Master forwarded a letter to the Executor. The letter was from the first respondent wherein she expressed her unhappiness with the fact that the property was to be sold. What followed thereafter is correspondence between the first respondent's attorneys and those representing the executor concerning payment to the first respondent of her share of the proceeds of the sale of the property.

[20] What is evident from the aforementioned documentation is that the first respondent has been anything but frank in her responses to the applicant's claims in these proceedings and very selective in what she disclosed with regard to the events which preceded the sale of the property. She for example failed to disclose the fact that she made a declaration, under threat of criminal penalty, that the deceased only had two adult children. That was a blatant untruth. In these proceedings the first

respondent acknowledged that the deceased was survived by six legitimate children and one child born out of wedlock.

[21] Further, the first respondent's statement in her answering affidavit that she is unsure as to how it happened that the property was sold, or what happened to the proceeds of the sale, is not supported by the relevant correspondence. The correspondence shows that the executor kept the heirs, including the first respondent, informed of the steps taken by him to sell the property. That included the fact that the first respondent's brother, Mr Deon Meyer, was given an opportunity to buy the property. When he was quite clearly unable to raise the necessary finance, the property was sold, but not before the intestate heirs were given a first preference to purchase the property. The correspondence further reveals that the executor wrote to the first respondent's attorneys asking for her banking details so that payment can be made to her of her share of the proceeds of the sale. It is recorded in the said letter that the first respondent's banking details were also requested some time earlier.

[22] The first respondent's allegations that the sale was fraudulent is without any factual basis. She points to the signing of consent forms by the remaining heirs on certain dates, and signatures **"that appear seem (sic) to be different to those that the siblings previously used."** What the significance of the dates are is not stated. Similarly, in what way the signatures are different is not stated. It is telling that none of the first respondent's siblings have come forward to claim that their signatures have been forged, which is a very serious and damaging allegation to lay at the door of the attorney appointed to act as the executor of a deceased estate.

[23] The first respondent further suggests that it is illogical that the heirs would give their consent to the sale of the property after they had said a year earlier that they do not want to sell the property. As counsel for the applicant correctly submitted, their change of heart is not illogical in that some of them have agreed at an earlier meeting with the Master that the property be sold, and that save for the first respondent who is staying rent free in the property, none of them were deriving any financial benefit therefrom.

[24] In terms of section 47 of the Administration of Estates Act the executor may sell the property forming part of a deceased estate in such manner and subject to such conditions as the Master may approve if the heirs are unable to agree on the manner and conditions of the sale. It is evident that the heirs were not in agreement with regard to the sale of the property and that the nominated sibling was unable to raise the purchase price despite having been given adequate opportunity to do so.

[25] The liquidation and distribution account was lodged by the executor on 29 August 2013. On the first's respondent's own version, she was informed by Mr Malgas who purchased the property from the estate, that she must vacate the property. The first respondent further admits that the applicant visited her thereafter and informed her that the property was sold to him, and that she must vacate the property. The first respondent's attorneys in a subsequent letter to the executor similarly acknowledged the sale of the property.

[26] Despite such knowledge, the first respondent has to date not taken any steps to seek the setting aside of the sale of the property. The suggestion that it is not known how the property was sold, and that there is no further information regarding the

Estate, is not supported by the documentary evidence. The vague and unsubstantiated statement that she continued to liaise with her attorney, and that the matter was still investigated, is supportive of a conclusion that no steps of any nature have been undertaken by the applicant to set the sale of the property aside if any basis therefore exists.

[27] Counsel for the applicant submitted that there in any event exists no legal basis for seeking such an order in any proceedings in that any claim to contest the Estate or the sale of the property, has become prescribed. On the first respondent's version she was informed in 2013 that the applicant purchased the property and that she must vacate it. A letter was written to her attorney in October 2013 informing them that the property was sold and that despite transfer of ownership, the first respondent refused to vacate the property. As stated, the first respondent's attorneys in subsequent correspondence acknowledged the sale of the property.

[28] The first respondent accordingly had knowledge by the end of 2013 of the facts relevant to her claim to have the property, that she contends was fraudently sold by the Executor, restored to the Estate. Counsel for the applicant is correct that the first respondent's failure to act would adversely affect the enforceability of any claim that she may have against the Executor of the Estate, whether on the basis of an unreasonable delay in bringing review proceedings, or a failure to bring an action with the three year time period prescribed by the Prescription Act 68 of 1969.

[29] I am accordingly satisfied that the first respondent is an unlawful occupier of the property. What remains to be considered is whether it would be just and equitable to grant an eviction order. Sachs J, dealing with the concept **'just and equitable'** in the context of the Act in *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217

(CC), referred with approval to the comments of Horn AJ in *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and Others* 2000 (2) SA 1074 (SE) stating in para [33]:

> **"In matters brought under PIE, one is dealing with two diametrically opposed fundamental interests. On the one hand, there is the traditional real right inherent in ownership, reserving exclusive use and protection of property by the landowner. On the other hand, there is the genuine despair of people in dire need of adequate accommodation...It is the duty of the court, in applying the requirements of the Act, to balance these opposing interests and bring out a decision that is just and equitable...The use of the term 'just and equitable' relates to both interests, that is, what is just and equitable not only to persons who occupied the land illegally but to the landowner as well."**

The learned judge continued at paras [36] and [37]:

> **"[36] 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.

[37] Thus, PIE expressly requires the court to infuse elements of grace and compassion into the formal structures of the law. It is called upon to balance competing interests in a principled way and to promote the constitutional vision of a caring society based on good neighbourliness and shared concern. The Constitution and PIE confirm that we are not islands unto ourselves. The spirit of *ubuntu,* part of a deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern.

[30] The nature of the discretion which a court employs in this exercise is described *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA) where Harms JA held at para [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 narrow sense.”**

[31] I am satisfied that it will be just and equitable to order the eviction of the first respondent. Despite the first respondent’s misgivings, there is no evidence that Mr Malgas or the applicant did not *bona fide* acquire the property in 2013 from the Estate. The applicant has been unable to enjoy any benefit arising from his right of ownership of the property by reason of the first respondent’s unlawful occupation thereof. The first respondent on the other hand has been in occupation of the property since the death of the deceased, and continues her occupation, without any right thereto following the sale of the property. She has not been *bona fide* in the manner in which she dealt with the property and its occupation. In 2002 she misrepresented to the Master the number of children of the deceased, clearly in an attempt to limit the number of persons who may be entitled to benefit from the estate property which included the residential property. She failed to correct this until 2009 when she admitted to the representative of the Estate that there were in fact more than two children. As a result of this misrepresentation, the said representative refused to accept a claim lodged in the Estate by the daughter of the deceased who was born out of wedlock. As a consequence the said child, Ms Accum, was forced and placed in a position where she had to prove her relationship with the deceased. According to the affidavit submitted to the representative by Ms Accum, she lived with the deceased from the age of fourteen; she in fact shared a bedroom with the first respondent; her wedding reception was held at the property, and her husband and daughter lived on the property after her marriage.

[32] As a direct consequence of the aforementioned misrepresentation, the representative of the Estate was unable to proceed with the administration of the Estate and informed the first respondent thereof in writing. In these proceedings the first respondent acknowledged the fact that the deceased had seven children without disclosing to this Court that she had previously made a misrepresentation in this regard, or that the representative of the Estate felt obliged to terminate his mandate as a result.

[33] The first respondent's lack of candour and *bona fides* is further displayed by her assertion that she does not know how the property came to be sold to the applicant. The contents of the Estate file however shows that the appointed Executor kept her informed of the steps taken to realise the property, and importantly, that he afforded the heirs the opportunity to purchase the property. The first respondent clearly had access to documents relevant to the Estate when she filed her answering affidavit in the present proceedings. She annexed to her affidavit copies of several documents bearing the stamp of the Master. It is evident that she has been very selective in her disclosure in these proceedings of the facts relevant to the administration of the Estate.

[34] The first respondent further sought to attack the lawfulness of the sale of the property by the Executor by relying on what is nothing more than conjecture based on vague and unsubstantiated allegations of fraud. She is but one of several heirs, none of whom have obviously found any reason to raise, or harbour any concern about the sale of the property and the distribution of the proceeds amongst them by the Executor. These are all aspects that raises questions about the truthfulness and the

bona fides of the first respondent, and the lengths to which she is prepared to go to ensure that she continue her occupation of the property.

[35] With regard to her personal circumstances and the impact her eviction from the property may have on her and her family, the first respondent has similarly not provided this Court with much information. What she did say amounts to nothing more than the unsupported statement that she and her children, **"including those that are currently studying in schools and those that are majors,"** will be prejudiced, and further that, while she is employed, she has financial constraints and cannot afford to rent a house. In argument, the first respondent, who appeared in person following the withdrawal of her attorneys of record, informed the Court in response to enquiries made that she has four children. Three of her children are majors and only one child is of school going age. Her daughter lives with her fiancé. The first respondent further informed this Court that she is employed by the Nelson Mandela Bay Municipality and that she earns eight thousand rand per month. What the financial position of her major children are is not stated. Similarly, no information has been given with regard to what she contends in her affidavit her financial constraints are.

[36] The first respondent chose not to pertinently deal with the applicant's contention in his founding affidavit that the child that stays on the property is that of the first respondent's daughter, and that the daughter is employed and financially supports both her child and the first respondent. The first respondent *prima facie* is not indigent, and her failure to fully disclose to this Court information, which falls within her personal knowledge, regarding her financial and domestic position, strengthens that conclusion. She is employed and is earning a salary, and **"does not belong to the poor and vulnerable class of persons whose protection was obviously foremost**

in the Legislature's mind" when it enacted the Act. (Wormald NO and Others v Kambule 2006 (3) SA 562 SCA at para [20].)

[37] In all the circumstances, and on a consideration of the relevant factors set out in section 4(7) of the Act, I am satisfied that the applicant is entitled to relief claimed. With regard to the costs of this application, the conduct of the first respondent does not justify an order other than the usual order. In the result it is ordered that:

(a) The first respondent and all other occupants of the residential property, being Erf no 1867, Gelvandale Township, Port Elizabeth, and situated at no 6 Hercules Street, Springdale, Gelvandale, Port Elizabeth, be and are hereby evicted from the said property;

(b) The first respondent and all other occupants must vacate the aforesaid property on or before 31 October 2019; and

(c) The first respondent pays the costs of the application.

D VAN ZYL

DEPUTY JUDGE PRESIDENT

Counsel for the Applicants: Adv Crompton

Counsel for the Respondents: In person

Date Heard:	30 May 2019
Judgment Delivered:	13 August 2019