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REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 43615/21

REPORTABLE: Yes ☐ / No ☒

OF INTEREST TO OTHER JUDGES: Yes ☐ / No ☒

REVISED: Yes ☐ / No ☒

23 February 2023

In the matter between:

SHIRLEY ELLEN MAHLANGU

APPLICANT

and

VIOLET NKOSI AND ALL UNLAWFUL

1ST RESPONDENT

**OCCUPANTS OF ERF [....] MAMELODI WEST
PRETORIA IN THE GAUTENG PROVINCE**

BEAUTY SOMKANZA VAN EEDEN

2ND RESPONDENT

FRANK VAN EEDEN

3RD RESPONDENT

MUBI DAVID NKOSI

4TH RESPONDENT

PUSANA MARTHA NKOSI

5TH RESPONDENT

JUDGMENT

DU PLESSIS AJ

Background

[1] This is an application for an eviction in terms of the Prevention of Illegal Eviction and Unlawful Occupation Act 19 of 1998 (“PIE”) that was enrolled on my unopposed roll.

[2] On 2 February 2021, Moosa AJ authorised the Applicant to serve the application as contemplated in PIE, on all the respondents, by service by the Sheriff, on all persons they might find at the property described as Erf no [...] Mamelodi Township Gauteng Province (“the property”), and by affixing the documents on the front gate or door of the property if no other service is possible.

[3] From the founding affidavits deposed by the Applicant, the following is evident. Ms Mahlangu is an unemployed adult that lives in Mpumalanga and is the lawful owner of the property known as [...] Mamelodi West. The first Respondent resides at the property. Second to fifth Respondent lives elsewhere in Mamelodi, but the Applicant seeks no relief against them. No relief is sought against the sixth Respondent, the municipality, either.

[4] The second to fifth Respondents sold the property to the Applicant, pursuant to a sale agreement. The transfer of the property was affected on 17 September 2020. However, since the transfer, the Applicant could not take occupation since the first Respondent refused to vacate the property. The Applicant appointed attorneys and sent a letter of demand to the first Respondent and her family to vacate the

property.

[5] The Applicant further places the following facts before the Court: she purchased the property for her late brother's children and grandchildren, of which 5 are minors living in an uninhabitable residence. The guardian who takes care of the five children is unemployed and cannot afford to find a suitable habitable place of residence.

[6] The Applicant then states that she is the duly registered property owner, and that the first Respondent and her family have no right to occupy the property. The Applicant states that an order to vacate the property will place her in a position to have control and undisturbed use of the property. She currently pays the rates and taxes, although she does not have occupation of the property.

[7] She also states that the first Respondent and all the other unlawful occupants are all major persons who are gainfully employed or are employable. Other than that, she is not aware of any relevant facts that may influence the reasonability and fairness of an order for the immediate eviction of the first Respondent and her family from the property. It is not clear, for instance, whether any of the s 4(7) factors are applicable, or if the eviction will lead to homelessness.

[8] This leads to the conclusion that the damages that she, as the owner, will suffer outweigh those that the Respondent will suffer with an eviction order. An eviction order is also the only effective remedy available against the first Respondent and her family. From the affidavit, it is unclear what damages the first Respondent will suffer that leads the Applicant to this conclusion.

[9] The Applicant wants this Court to declare that the occupation of the property by the first Respondent is unlawful and that they are, therefore, to vacate the property in terms of section 4(7) of PIE. Thus, the request is that the Court must grant an order in terms of s 4(8)(a) of PIE for the first Respondent to vacate the property within five days of granting the order and to order the Sheriff to affect the

eviction in terms of s 4(8)(b), not more than five days after granting the order.

[10] A notice of intention to oppose was filed, but there was no answering affidavit filed. The circumstance of the Respondent is thus not placed before the Court other than what the Applicant stated in her affidavit.

[11] In court I asked Mr Kabinde about the factors I should consider that would make the granting of the eviction order “just and equitable” as required by PIE. He reiterated that the Applicant bought the house for her children and grandchildren and that the Applicant is unlawful. I referred Mr Kabinde to the recent case of *Madulammoho Housing Association NPC vs Nephawe and Another ; Final Housing Solutions (Pty) Ltd v Lukhanya*¹ by Wilson J, specifically the part dealing with onus, and invited him to file short heads of argument to answer the question again.

[12] Mr Kabinde did as requested. He argues as follows:

- i. The Applicant is the lawful owner, having purchased the property from the previous owners;
- ii. The Applicant is unable to occupy the property since the purchase, as the first Respondent remains in unlawful occupation of the property, preventing the Applicant from undisturbed use and enjoyment of the property in question;
- iii. The Applicant did not have knowledge of the first Respondent’s occupation of the property, and does not have knowledge of the first Respondent’s personal circumstances and or further particulars, and thus could not plead the Respondent’s circumstances;
- iv. The Applicant only became aware of the identity of the occupier when attempting to occupy the property;

¹ *Madulammoho Housing Association NPC vs Nephawe and Another ; Final Housing Solutions (Pty) Ltd v Lukhanya* [2023] ZAGPJHC 7.

v. The first Respondent is presented and has filed a notice of intention to oppose; however, the Respondent failed to do so.

vi. This means that there is compliance with the applicable legislation, namely, the Applicant has the necessary authority as the owner to launch the proceedings,² the Notice of Motion adequately informs the Respondent of her rights in terms of s 4(5) of PIE; there was proper service of the court processes and set down in accordance with the Rules of the Court (rule 4(2) and 4(3)).

vii. The application further falls within the ambit of section 4(7) PIE, “as the application was issued in access of six months of the applicant acquiring ownership of the property”. The Court must thus make a factual finding to determine what is just and equitable to order an eviction, considering the relevant circumstances “which it is submitted for the applicant include both the Applicant and Respondent’s circumstances”. The Applicant made out her case, including the detriment to her constitutional and common law rights of ownership of immovable property (the escalating municipal account and the prejudice to the minor orphans who cannot lodge in the property).

viii. The *Madulammoho Housing Association Judgment* reaffirms the courts’ judicial discretion when determining what is just and equitable to make an order of eviction in an unopposed eviction application, specifically whether the Respondent will be homeless due to the eviction. However, it is not clear whether that matter was opposed or not. There is a stark difference between a Respondent who is aware of an eviction and a Respondent who is unaware. An unaware Respondent cannot contribute to the proceedings and assist the Court.

ix. In this case, the Respondent is well aware of the proceedings, having

² In terms of s 4(1) PIE.

filed a notice of intention to oppose through a legal representative still on record. The Respondent has nonetheless wilfully omitted to provide the Court with information. Section 4(7) never envisaged placing the onus on the Applicant or the local authority to prove the Respondent's circumstances and whether the Respondent will be homeless and/or has alternative accommodation. This is the duty of the Respondent, especially if they are aware of the proceedings. The reasonable inference to make from the Respondent's omission to make submissions is that she will suffer no prejudice if an order for eviction is granted.

x. The Court's discretion in terms of s 4(7) to make an order for eviction with reference to alternative accommodation "becomes academic under circumstances as there is no evidence of the need for alternative accommodation by the Respondent", and the reasonable inference from the available evidence is that there is no apparent need for alternative accommodation.

xi. Thus, in light of the personal circumstances of the Applicant, the fact that the Respondent is aware of the proceedings and an election not to defend or place information before the Court in respect of her personal circumstances means that there is no valid defence and that the Applicant satisfies the requirements of s 4. The Applicant discharged her onus proving justice and equity, proved her ownership and proved the unlawful occupation by the Respondent. An order for eviction must thus be granted.

[13] This is not entirely in line with the law, especially caselaw, on the matter.

The law

[14] Section 26(3) of the Constitution states that

No one may be evicted from their home, or have their home demolished,

without an order of the Court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

[15] To give effect to this provision, the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) was promulgated. In this case, ss 4(1)³ and (7)⁴ are specifically applicable, as well as ss4(8) and (9).⁵ PIE authorises the Court

[16] The Constitutional Court in *Port Elizabeth Municipality v Various Occupiers*⁶ further guided how PIE should be interpreted. Sach J said the following:⁷

[S]ection 26(3) [...] [emphasises] the need to seek concrete and case-specific solutions to the difficult problems that arise. Absent the historical background outlined above, the statement in the Constitution that the courts must do what courts are normally expected to do, namely, take all relevant factors into account, would appear otiose (superfluous), even odd. Its use in section 26(3), however, serves a clear constitutional purpose. It is there precisely to underline how non-prescriptive the provision is intended to be. The way in which the courts are to manage the process has accordingly been

³ 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 person in charge of land for the eviction of an unlawful occupier.”

⁴ “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.”

⁵ S 4 (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 to order an eviction when it is “just and equitable” to do so after considering all the relevant circumstances. What exactly is “just and equitable” is a contextual inquiry based on the specific facts before the Court, although the principle has been developed and interpreted in various cases. 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). S 4(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.

⁶ *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7.

⁷ Paras 22 – 23.

left as wide open as constitutional language could achieve, by design and not by accident, by deliberate purpose and not by omission.

In sum, the Constitution imposes new obligations on the courts concerning rights relating to property not previously recognised by the common law. It counterposes to the normal ownership rights of possession, use and occupation, a new and equally relevant right not arbitrarily to be deprived of a home. The expectations that ordinarily go with title could clash head-on with the genuine despair of people in dire need of accommodation. The judicial function in these circumstances is not to establish a hierarchical arrangement between the different interests involved, privileging in an abstract and mechanical way the rights of ownership over the right not to be dispossessed of a home, or vice versa. Rather it is to balance out and reconcile the opposed claims in as just a manner as possible taking account of all the interests involved and the specific factors relevant in each particular case.

[17] Thus, the Constitution requires courts to approach eviction matters differently than the pre-constitutional structures that used to place unfettered ownership in the centre of disputes.⁸ Of course, the right of ownership means that an owner has certain remedies at their disposal, but these remedies do not exist in the abstract and will not always trump the interests of those with no or weaker rights. Individual owners do not hold (and enforce) their rights in the abstract; they do so in a particular context, standing in a particular relationship with people with no or weaker rights.

[18] The inquiry is contextual: even if the owner did comply with all the procedural requirements of filing such an application, what, in a particular circumstance, is just and equitable, considering the specific circumstances, is substantive in nature.

⁸ For a thorough analysis of this, see C Cloete, 'A critical analysis of the approach of the courts in the application of eviction remedies in the pre-constitutional and constitutional context', (2016) Stellenbosch University.

[19] In eviction matters respondents are holders of rights – the right not to be evicted without a court order, granted after the Court has considered all the relevant circumstances as per s 26 of the Constitution. This right that the unlawful occupier holds is given effect to by PIE, creating a statutory property right not to be arbitrarily evicted.⁹ As stated above: the content of this right is more than just a procedural right. It also has substantive considerations, as set out in PIE and interpreted in case law. This does not extinguish (or expropriate) ownership, but, in some instances, it does delay or suspend the exercise of the owner's rights.¹⁰

[20] This is because both the right not to be evicted arbitrarily and the property right to ownership need to be considered and weighed up. One cannot, per default, trump the other: the inquiry is always contextual. This means that even in an unopposed application, the Court can refuse an eviction order if it is of the opinion that, substantively, it will not be just and equitable to grant it, despite procedural compliance by the Applicant. This is where the importance of all relevant circumstances comes in, and who bears the onus of bringing the facts to the Court's attention.

Onus

[21] Case law clarifies that the onus of showing that an eviction will be “just and equitable” rests on the Applicant. The Applicant must place facts before a court to enable the court to exercise its Constitutional obligation to determine whether an eviction would be “just and equitable”.¹¹ Merely proving ownership of the Applicant and unlawful occupation of the Respondent is not enough for the Court to order an eviction – the facts must demonstrate that it is just and equitable to do so.¹²

⁹ See AJ Van der Walt, *Property and Constitution* (PULP) 2012 where he develops this argument from p 115 onwards.

¹⁰ *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 (6) SA 294 (SCA) para 16.

¹¹ *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 (6) SA 294 (SCA) para 34; *Madulammoho Housing Association NPC vs Nephawe and Another ; Final Housing Solutions (Pty) Ltd v Lukhanya* [2023] ZAGPJHC 7 para 10.

¹² *Madulammoho Housing Association NPC vs Nephawe and Another ; Final Housing Solutions (Pty) Ltd v Lukhanya* [2023] ZAGPJHC 7 para 10.

[22] Applicants in an eviction application thus must plead their cases thoroughly. The only way for a court to conclude that an eviction would be just and equitable in an unopposed court is if the Applicant sets out the facts that they have, or can reasonably, collect, to enable the Court to exercise its discretion. This includes information on the Respondent. This is because the Court can only perform its Constitutional duty in ensuring that a court order is only granted with consideration of all the relevant circumstances if the necessary information is available.

[23] This does not require the Applicant to also be a Respondent. Like the so-called Rule46A applications (default judgment and execution of residential property) that is also frequently on the unopposed motion courts. The Applicant can dipose of an affidavit to indicate what action they took to gather as much relevant information as possible, even if such a search amounted to nought.

[24] The extent of the onus and the extent of the Applicant's duty to provide the Court with information will, of course, depend on who the landowner is, the nature of the property, and the circumstances of the Respondent. It is a contextual inquiry that depends on the particular facts of each case. So much as stated already in *Port Elizabeth Municipality v Various Occupiers*¹³

“The combination of circumstances may be extremely intricate, requiring a nuanced appreciation of the specific situation in each case. Thus, though there might be a sad uniformity in the conditions of homelessness and desperation which lead to unlawful occupations, on the one hand, and the frustration of landowners at being blocked by intruders from enjoyment of their property, on the other, the actual details of the relationships involved are capable of infinite variation.

[30] It is not easy to classify the multitude of places and relationships involved. This is precisely why, even though unlawfulness is established, the eviction process is not automatic and why the courts are called upon to

¹³ Paras 29 - 30

exercise a broad judicial discretion on a case by case basis. Each case accordingly has to be decided not on generalities but in the light of its own particular circumstances. Every situation has its own history, its own dynamics, its own intractable elements that have to be lived with (at least for the time being), and its own creative possibilities that have to be explored as far as reasonably possible. The proper application of PIE will therefore depend on the facts of each case, and each case may present different facts that call for the adoption of different approaches.”

[25] In other words, a single private dwelling owned by a private landowner, where the respondents have been in unlawful occupation for a short period, can discharge their onus that an eviction will be just and equitable reasonably easily.¹⁴ On the other end of the continuum, state land occupied by respondents who have occupied the land for a long time and who might be homeless if evicted has a more onerous duty of discharging their onus.¹⁵

[26] In *City of Johannesburg v Changing Tides*¹⁶ the Supreme Court of Appeal also confirmed this. That case dealt with an appeal from the High Court where the eviction application was not opposed. The Court stated that¹⁷

“Both the Constitution and PIE require that the Court must take into account all relevant facts before granting an eviction order. Whilst in some cases it may suffice for an applicant to say that it is the owner and the Respondent is in occupation, because those are the only relevant facts, in others it will not. One cannot simply transpose the former rules governing onus to a situation that is no longer governed only by the common law but has statutory expression.”

[27] And

¹⁴ *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 (6) SA 294 (SCA) para 16.

¹⁵ Van der Walt, *Property and Constitution* 166.

¹⁶ *City of Johannesburg v Changing Tides 74 (Pty) Ltd* (SCA) [2012] ZASCA 116

¹⁷ At para 30.

“Most applicants for eviction orders governed by PIE will have at least some knowledge of the identity of the persons they wish to have evicted and their personal circumstances. They are obviously not required to go beyond what they know or what is reasonably ascertainable.”

[28] The Applicant noted that occupiers are all adults who can work and are staying unlawfully in the house. It did not, however, explain other circumstances that might have a bearing on the justice and equity of the eviction, and it did not explain how the unlawfulness arose. Judging from the fact that the first Respondent has the same surname as the third and fourth Respondent, this might explain why they are occupying the property. Such facts might not play an overwhelming role in granting an eviction order in this case, but they might influence determining a just and equitable date for eviction.¹⁸

[29] The Court must actively probe and investigate the surrounding circumstances.¹⁹ This is the case in settlement agreements, the Constitutional Court found,²⁰ and is also the case in unopposed motion court.

Order

[30] I, therefore, make the following order:

1. The application is postponed *sine die* for the Applicant to file a supplementary affidavit detailing what effort she has made to obtain the necessary information regarding the circumstances of the respondent occupiers.
2. The Applicant must ensure that this judgment is brought to the respondents' attention.

¹⁸ City of Johannesburg v Changing Tides 74 (Pty) Ltd (SCA) [2012] ZASCA 116 para 32.

¹⁹ Pitje v Shibambo [2016] ZACC 5 par 19; see also Cloete and Temmers Boggenpoel, 'Re-evaluating the court system in PIE eviction cases' (2018) 135 SALJ 432.

²⁰ Occupiers of Erven 87 & Berea v De Wet NO 2017 (5) SA346 (CC)

3. As soon as 1 & 2 are complied with, the Applicant may re-enrol the matter.

WJ DU PLESSIS

Acting Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

Counsel for the Applicant:

Mr Kabinde (attorney)

Instructed by:

Kabinde Attorneys

Date of the hearing:

13 February 2023

Date of judgment:

24 February 2023