

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No: A245/22

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED: YES/NO
16/8/23
DATE
SIGNATURE

In the matter between:

GOMOLEMO ANTOINETTE BAEPI

APPELLANT

and

JOHAN JACOBS SMITH

FIRST RESPONDENT

THE CITY OF TSHWANE METROPOLITAN
MUNICIPALITY

SECOND RESPONDENT

In Re:

JOHAN JACOBS SMITH

APPLICANT

and

GOMOLEMO ANTOINETTE BAEPI

FIRST RESPONDENT

THE CITY OF TSHWANE METROPOLITAN
MUNICIPALITY

SECOND RESPONDENT

This judgment has been delivered by uploading it to the court online digital data base of the Gauteng Division, Pretoria and by e-mail to the attorneys of record of the parties. The deemed date and time for the delivery is 15h00 on 16 August 2023.

APPEAL JUDGEMENT

FRANCIS-SUBBIAH J:

[1] This is an appeal against an eviction order granted by the Magistrate in terms of the Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1988 (PIE Act). The order was granted after a request for postponement of the hearing was refused. The appellant is therefore appealing to setting aside the eviction order that was granted on 25 May 2022.

[2] The appellant was evicted from a home she resided in, in terms of the Magistrate Court order, on the grounds that the appellant was allegedly in unlawful occupation of

the property. The property was purchased by the first respondent at a sale in execution on 11 June 2021.

[3] The appellant sought to apply for the postponement of the matter on the basis that the sale in execution from which the respondent purchased the property was invalid and that she intended to challenge this in the High Court.

[4] The application for postponement at the eviction hearing was opposed by the respondent. The Magistrate refused postponement and proceeded to consider the eviction application without the version of the appellant before court. The appellant complains that the court applied the concept of ownership and relied upon judgments applicable before the constitutional era and values enshrined in the Constitution of the Republic of South Africa, 1996.

[5] The Magistrate found that the postponement was not genuinely sought. That it was brought on the same basis as it was done in the appellant's urgent application to set aside the warrant of execution in the High Court on 10 June 2021. That the appellant had failed to re-enrol the urgent application and she further failed to advance reasons why the urgent application was struck off the roll. The Magistrate was therefore 'tempted to believe' that the only reason the urgent application was brought was to frustrate the sale in execution. Both parties at the appeal hearing could not provide an explanation on what evidence the Magistrate relied upon, to construe this finding.

[6] The appellant contended that her property was executed upon by the Bank without a reserve price. She intended to have the judgement granted against her property rescinded.

[7] The appellant on appeal informs the court that the respondent is not paying the support expenses. In fact, it is she who pays the municipal expenses. She further submits that the Magistrate failed to consider that the first respondent purchased the property to sell and make a profit, whereas the appellant resides in the property, and it has been her family residence since 2011. In this regard the Magistrate failed to consider the prejudice that the appellant will suffer if the postponement is not granted.

[8] The court in *Trading CC v Standard Bank of SA Ltd*¹ considered that any application for postponement must always be *bona fide* and not simply used as a tactical maneuver for the purpose of obtaining an advantage to which the applicant is not legitimately entitled. In the present appeal proceeding the appellant submits that once the sale in execution took place, she no longer intended setting aside the execution since it became mute. Instead, she intended challenging the granting of the initial judgement by seeking a rescission of that order.

[9] In considering the issue of prejudice, it is trite that a bare allegation of prejudice is insufficient. A party must satisfy the Court that there is prejudice or at least a reasonable probability thereof. The Magistrate held that prejudice will be caused to the

¹ 2004 (4) SA 1 (SCA) at 4-5.

first respondent if a postponement is granted. The Magistrate relying on the dictum in *Trading CC* took the view that the postponement sought by the appellant was simply being used as a tactical manoeuvre for the purpose of obtaining an advantage to which she was not legitimately entitled to. But does not set out the reasoning or the advantage. She will be entitled too. He took into consideration that the first respondent is currently not earning any returns on the property, responsible for servicing the property in terms of monthly bond repayments and is delayed in finding a tenant or a purchaser.

[10] The Magistrate held that at the very least eviction claims indicating proof of ownership must be adequate and that the appellant intended to indirectly contest ownership of the property. The Magistrate made the decision that the first respondent had successfully proven ownership of the property and therefore complied with provisions of the PIE Act and no valid defence has been raised by the appellant as unlawful occupiers and therefore granted the eviction.

[11] The Magistrate further considered the broader public interest and the prospects of success on the merits. The Magistrate was doubtful of the prospects of success of the appellant opposing the eviction application, setting aside the warrant of execution against immovable property and the rescission of the initial judgement. All of these are not the key principles for the consideration of eviction in a Constitutional era. The Magistrate failed to consider the just and equitable principle that is applied in consideration for the granting of an eviction order.

[12] In this respect the Constitutional Court in *Occupiers, Berea v De Wet No and Another*² held that there are two separate enquires that must be undertaken by the court. Firstly, it must be decided whether it is just and equitable to grant an eviction order after having regard to all relevant factors. Section 4(7) of the PIE Act, set out factors that include the availability of alternative accommodation, and states that:

“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.”

[13] The second enquiry entitles the court to 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. Only until both enquiries have been undertaken and a conclusion reached that an eviction order granted and effective from a specified date, is just and equitable. The enquiry cannot be concluded until the court is satisfied that it is in possession of all the information necessary to make both findings based on justice and equity.

² 2017 (5) SA 346 (CC) at para 65.

[14] There is no room for the exercise of discretion whether the PIE Act should be applied or not. In *Occupiers, Berea*³ the court held that the application of PIE Act is not discretionary, and courts must consider the PIE Act in eviction cases. Referring to *Pitje v Shibambo*⁴ the Constitutional Court entrenched that:

“...courts are not allowed to passively apply PIE and must probe and investigate the surrounding circumstances.”

[15] The opposing affidavit of the appellant was not filed and therefore the Magistrate was not apprised with all the necessary information to probe and investigate the surrounding circumstances to make a finding based on justice and equity. The appellant was not served personally with the notice in terms of s4(2) of the PIE Act. This notice is peremptory as set out in *Cape Killarney Property Investments (Pty) Ltd v Mahamba*⁵ that the notice is authorised and directed by an order of the court concerned.

[16] In *Unlawful Occupiers, School Site v City of Johannesburg*⁶ the court confirmed the decision in *Cape Killarney* and held that:

“...s 4(2) as interpreted by this Court in *Cape Killarney Property Investments (Pty) Ltd v Mahamba and A Others* 2001 (4) SA 1222 (SCA) ([2001] 4 All SA 479). According to this interpretation, s4(2) requires that, apart from the service of the eviction application prescribed by the Rules of Court, an additional notice be served upon a respondent at least 14 days before the date upon which the application is to be heard. This notice, so

³ Id para 43.

⁴ 2016 (4) BCLR 460 (CC) [2016] ZACC 5) para 19.

⁵ 2001 (4) SA 1222 (SCA) at para 12.

⁶ 2005 (4) SA 199 (SCA).

it was held in *Cape Killarney Property* (at 1227G - H), B must conform with the previously obtained directions of the court, with reference to both its contents and the manner in which it is to be served. Furthermore, s 4(2) stipulates that this notice must be 'written and effective'⁷

[17] In this regard, the attorney on record for the appellant was served in accordance with the provisions of rule 9 of the Magistrate Court Rules. The Magistrate accepted that there was proper service on the basis that the appellant was present in court. In these circumstances we accept that there was proper service on the appellant.

[18] The Magistrate erred in granting the eviction under circumstances where the refusal of the postponement and the granting of the eviction infringed the rights of the appellant. The discretion was incorrectly exercised by refusing the application for postponement and thereby infringing the *audi alteram partem* rule by not allowing a filing of the appellant's opposing affidavit before considering the eviction application. The refusal of the appellant's postponement application had far reached consequences, as the appellant's relevant circumstances were not placed before the Magistrate.

[19] In ***Vollenhoven v Hanson and Mills***⁸ it was stated:

"It is in the public interest that litigation should be disposed of as speedily as possible. There is such a thing as the tyranny of litigation and in many cases, it cannot be said that the mere offer of paying wasted costs would adequately

⁷ Id at p208.

⁸ 1970 (2) SA 368 C.

compensate a respondent for any inconvenience suffered as a result of granting the postponement.”⁹

[20] In the present matter however, a cost order and the granting of a postponement with specified time periods by the Magistrate would have addressed the potential tyranny of litigation and any inconvenience. In this regard the first respondent would not suffer prejudice as it is remedied with a cost order and the appellant is given an opportunity to deliver within a specified period an opposing affidavit in answer to the founding affidavit prior to evicting the appellant from the property in terms of Section 4 (1) of the PIE Act.

[21] As a result the following order is made:

22.1 the appeal is upheld with costs.

22.2 the order of the court below is set aside and substituted with the following order:

(a) the first respondent's application for postponement is granted.

(b) the first respondent is ordered to pay the wasted cost occasioned by the postponement.

(c) the first respondent is ordered to deliver the opposing affidavit within 15 days of this order.

⁹ Id at para 373.



R FRANCIS-SUBBIAH

JUDGE OF THE HIGH COURT, PRETORIA

I agree.



M KUMALO

JUDGE OF THE HIGH COURT, PRETORIA

APPEARANCES:

Appellant:	In person on 20 July 2023
Appellant's Counsel:	ADV. H LEGOABE – pro bono
Instructed by:	Malebye & Malehoa Attorneys

Respondent's Counsel:	ADV. J VORSTER
Instructed by:	JM Roodt Inc

DATE OF HEARING:	20 July 2023 & 4 August 2023
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DATE OF JUDGMENT:	16 August 2023
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