



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

- (1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED

22 September 2023

DATE

SIGNATURE

CASE NUMBER: 55038/2022

In the matter between:

SANDILE PERCIVAL MSIBI

APPLICANT

And

THE OCCUPIERS OF UNIT [. .]
CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY

1st RESPONDENT
2nd RESPONDENT

SUMMARY: *Civil Procedure- Leave to Appeal -Whether there are reasonable prospects of success.*

ORDER

Held: *Application for leave to appeal succeeds.*

Held: *The applicant is granted leave to appeal to the Full Bench of this Division.*

Held: *The cost of this application for leave to appeal shall be costs in the appeal.*

JUDGMENT

MNCUBE, AJ:

INTRODUCTION:

[1] The applicant, Mr Msibi has lodged an application for leave to appeal against the judgment which was delivered on 18 November 2022. This application is made in terms of section 17 (1) (a) (i) of the Superior Courts Act 10 of 2013 ('the Superior Courts Act'). The first respondent as represented by Mr Lefosa is opposing the application on the basis that it is without merit. Advocate Jacobs appeared for the applicant while the first respondent is in person.

GROUND OFS OF APPEAL:

[2] The applicant's contention is that I erred in the following respects-

- 1) In dismissing the eviction application.
- 2) In finding that all of the requirements of section 4 of the PIE Act had not been complied with.
- 3) In finding that it is not just and equitable to order the eviction of the first respondent.
- 4) That in the face of the finding that the first respondent are unlawful occupiers, and that no defence has been raised, an eviction order ought to have been granted.
- 5) There ought to have been a finding that ownership and a lack of any lawful reason to be in occupation are substantially significant factors in the exercise of the Court's discretion.
- 6) An order ought to have been made in terms whereof the first respondent were to be evicted from the property and to set a just and equitable date on which the unlawful occupiers had to vacate the property as envisaged in terms of section 4(8)(a) of the PIE Act.
- 7) In finding that the failure by the second respondent to provide a report as to the availability of alternative accommodation was fatal to the application.
- 8) In finding that an order for eviction in the absence of a report will be contrary to justice and equity.
- 9) In finding that on the factual matrix there was a real risk of homelessness.
- 10) A finding ought to have been made that the occupants are adult persons capable of earning an income to provide for alternative accommodation.
- 11) In finding that on the facts the eviction order would render the respondents' children homeless or that the eviction will affect the wellbeing of the minor children.

- 12) In rejecting the applicant's evidence that the occupants are adult persons capable of earning an income to provide for alternative accommodation and that the first respondent failed to proffer any evidence negating the applicant's evidence.
- 13) A finding ought to have been made under the circumstances that the second respondent was not required to provide a report as to the availability of alternative accommodation.
- 14) In the event that a report had been relevant or required the proceedings ought to have been postponed in order to require the second respondent to have presented same and ought to have found that a report on the availability of alternative accommodation relates to the enquiry as to a just and equitable date on which the unlawful occupier had to vacate the property.
- 15) In finding that the rights of the registered owner are no longer superior to the rights of unlawful occupier and by implication erred in equating the rights of the unlawful occupiers to that of the registered owner.
- 16) A finding ought to have been made that the effect of the PIE Act is not to expropriate private property and the owner of the property has no obligation to provide free housing indefinitely.
- 17) A finding ought to have been made that there is no valid defence to the claim it would be just and equitable to grant an order for eviction.
- 18) I erred in not awarding costs in favour of the applicant.

SUBMISSIONS OF THE PARTIES:

[3] Both parties filed their written heads of arguments and also made oral submissions at the hearing of this application for leave to appeal. All submissions have been considered. Counsel for the applicant contended in his oral submissions that in view of all the evidence the occupiers can obtain alternative accommodation and there was no evidence that granting the eviction order would render the occupiers homeless. The contention was that this Court gave great weight to the impact to the children. Counsel submitted that private individuals cannot be deprived of the right of ownership. The contention was that if the eviction order would render the occupiers homeless, an appropriate order would be to call for a report from the second respondent.

[4] The dismissal of the eviction deprived the appellant of his right to the property. Counsel argued that there was a need to obtain certainty to the law on the basis that there are three different judgments. Lastly the contention was that the Court erred in not granting an eviction

order. In his written submissions, Counsel contended that the first respondent did not allege that the eviction would have rendered him homeless and a just and equitable order should not be translated to mean that only the rights of the unlawful occupiers are given consideration and those of the property owner should be ignored. The submission was that the first respondent did not provide any evidence or expand on the bare denial to refute the allegation that he will not lose access to housing. Counsel conceded that the applicant accepted the Court's reasoning that the eviction would impact the minor children, however argued that the order for eviction would not impact the wellbeing of the children to an extent greater than any other family relocation to another residence. The contention was that there was no evidence that the eviction order would lead to homelessness. In regard to cost, the submission was that costs be costs in the appeal.

[5] Mr Lefosa contented on behalf of the first respondent that the Court did not err but rather considered the Constitution on the prevailing circumstances. The submission was that this Court went to lengths in establishing an articulating the rationale for the decision and supported the relevant legislation with case law. The contention was that the application for leave to appeal would equate to the disregard of the laws of the Republic. He argued that the grounds relied upon by the applicant were without merit and were in fact opportunistic. On the issue of costs, the submission was that the applicant's contention that an error occurred in not awarding costs in his favour was shocking and there is no case law or precedent that the applicant is reliant of. Once again Mr Lefosa reiterated the allegation he had made previously on how the applicant acquired the said property and contended that there are no prospects of success by a Full Bench and prayed for the dismissal of the application with costs.

APPLICABLE LEGAL PRINCIPLES:

[6] An application for leave to appeal is governed by section 17 (1) (a) of the Superior Courts Act which provides- *'(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that-*

(a) (i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;'

[7] The threshold for granting leave to appeal a judgment has been raised.¹ It is trite that in considering an application for leave to appeal, the Court must be alive to the provisions of section 17 (1) of the Superior Courts Act.

[8] **In Fusion Properties 233 CC v Stellenbosch Municipality [2021] ZASCA 10** (29 January 2021) para 18 it was held *'Since the coming into operation of the Superior Courts Act, there have been a number of decisions of our courts which dealt with the requirements that an applicant for leave to appeal in terms of ss 17 (1) (a) (i) and 17 (1) (a) (ii) must satisfy in order for leave to be granted. The applicable principles have over time crystallised and are now well established. . . It is manifest from the text of s 17 (1) (a) that an applicant seeking leave to appeal must demonstrate that the envisaged appeal would either have a reasonable prospect of success or, alternatively, that 'there is some compelling reason why an appeal should be heard.'* Accordingly, if neither of these discrete requirements is met, there would be no basis to grant leave'

EVALUATION OF THE GROUNDS OF APPEAL:

[9] The grounds are interlinked and I deemed it prudent to deal with all the grounds cumulatively. In respect to the ground that I erred in dismissing the eviction application after the finding that the first respondent(s) are unlawful occupiers, the judgment clearly sets out that this was so ordered after I embarked on a two -stage assessment of the facts. On the basis of this ground, I have to ask an important question- whether or not I incorrectly assessed the second leg of the enquiry (whether or not it was just and equitable to grant an eviction order based on the circumstances of the case) in view of the finding that the first respondents were unlawful occupiers. Counsel in his oral submission raised a valid legal point in that the application be granted on compelling reason. The compelling reason being the conflicting judgments. I am persuaded that there is a reasonable prospect that another Court would rule that my finding on the second leg of the enquiry was erroneous.

[10] In respect to the ground that I ought to have found that ownership and the lack of any lawful reason to be in occupation were substantial significant factors in the exercise of discretion has to be considered within the context of the circumstances of the case. A balancing of all relevant factors was done. As highlighted in the judgment, there were competing interests at stake. However, I am persuaded that there is a reasonable prospect that another Court would find that the exercise of discretion was incorrect.

¹ See *Mont Chevaux Trust v Tina Goosen and 18 Others* 2014 JDR 2325 (LCC) para 6.

[11] In respect to the ground that I erred in finding that the failure by the second respondent to provide a report was fatal to the application and that there was a real risk of homelessness is interlinked to the assessment of the applicable constitutional principles including the rights of the vulnerable. I am persuaded that this raises an important issue for consideration by the Appeal Court -whether the application of the right to adequate housing was correctly applied to the facts. Secondly I am further persuaded that my finding that the lack of a report by the second respondent rendered the application fatal requires some certainty within the Division as envisaged by section 17(1)(a)(ii) of the Superior Courts Act.

[12] The applicant's contention that I ought to have found that the effect of the PIE Act is not to expropriate private property and there is no obligation by the owner to provide free housing is with respect an incorrect assessment of my findings. The finding in the main was in regard to the second leg of the enquiry whether it was just and equitable to grant an eviction in circumstances where the rights of the vulnerable were at stake. Failure to genuinely consider such a factor would in my view amount to merely paying lip service purpose of the PIE Act. In any event, this contention will be an issue for consideration on appeal whether the finding made on the second leg of the enquiry was erroneous. The contention made by the first respondent that there is no merit to the appeal, is respectfully not upheld on the basis of section 17 (1) (a) (ii) of the Superior Courts Act in view of the conflicting judgments on the same issue whether the lack of report by the Municipality is fatal to an eviction application.

[13] Awarding of costs is a matter of discretion. In respect to the ground that I erred in not awarding costs in favour of the applicant is respectfully without merit in the absence of demonstrating that the discretion was incorrectly exercised within the trite approach of restraint by a Court of Appeal². I am not persuaded on this ground that another Court would come to a different finding.

CONCLUSION:

[14] I have formed an opinion based that there is reasonable prospect of success of appeal as I am satisfied after the assessment that the grounds for appeal raised by the applicant are of such a nature that another Court would rule differently to the findings made by me. Secondly, the submissions made by the Counsel for the applicant during the hearing of this application made an important contention that there is a need for certainty in the law due to the different

² See *Hotz and Others v University of Cape Town* 2018 (1) SA 369(CC) para 25 an 28.

judgments based on the effect of the lack of report by the Municipality. This factor caused me to conclude that this was a sufficient reason within the ambit of section 17 (1) (a) (ii) of the Superior Court Act to grant leave to the applicant to appeal. It follows that leave to appeal should be granted to the Full Bench of this Division.

Order:

[15] In the circumstances the following order is made:

[15.1] Application for leave to appeal succeeds.

[15.2] The applicant is granted leave to appeal to the Full Bench of this Division.

[15.3.] The cost of this application for leave to appeal shall be costs in the appeal.



**MNCUBE AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

Appearances:

On behalf of the Applicant	: Adv. M. Jacobs
Instructed by	: Vezi & De Beer
	: Corner South Village and Alpine Road
	: Lynwood, Pretoria

On behalf of the Respondent	: In Personam.
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Date of hearing	: 6 July 2023
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Date of Judgment	: 22 September 2023.
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