

**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Case No: A39/2020

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

TACHMO CC

Appellant

Registration Number: [....]

and

NTSWAKI MPHUTI

First Respondent

DIHLABENG LOCAL MUNICIPALITY

Second Respondent

CORAM:

C REINDERS ADJP *et* S NAIDOO, J *et* RAMLAL AJ

JUDGMENT BY:

C REINDERS, ADJP

HEARD ON:

31 JANUARY 2022

DELIVERED ON:

31 MAY 2022

[1] This appeal in terms of Rule 51 of the Magistrate's Court Rules is directed at the dismissal, by the Magistrates Court Bethlehem of an application for the eviction of the first respondent, Ms N Mphuthi, (hereafter "the respondent") in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, Act 19 of 1998 ("PIE").

[2] The appellant is a close corporation with its sole member being Mr T W Mokoena. The appellant was the applicant in the trial court, and the respondent and Dihlabeng Local Municipality ("the municipality") were the first and second respondents respectively. It is convenient to refer to the parties as in this appeal.

[3] The appeal was initially heard by myself and my brother Mhlambi J. The appellant filed an application for condonation for the late institution and filing of the record of appeal. With the advantage of having heads of arguments in respect of condonation well in advance of the hearing of the appeal, we considered and granted such condonation after hearing oral arguments by counsel on behalf of the appellant and respondent. After the merits were argued, agreement could not be reached between my colleague and me in respect of the outcome of the matter, resulting in referral of the matter to a full bench of this Division.

[4] In the grounds for appeal the appellant noted several attacks on the findings of the magistrate, the main challenge being to the finding by the magistrate that the respondent was not an unlawful occupier of the property in question, namely Erf [...] Bohlokong Bethlehem ("the property").

[5] In his founding affidavit the appellant averred that he is the lawful owner of the property. He bought the property from a couple with the surname Motloun (the "Motlouns") who at the time were the owners of the property as per the official allocation of residential sites issued by the municipality on 19 November 2008. As proof of his ownership, appellant attached to his affidavit a copy of the Deed of Transfer T [...] (the "Title Deed"), indicating that the property was transferred into his name on 14 April 2009. At the time the property was unoccupied. During 2013 he was informed that a shack had been erected on the property, but he was unable to locate any residents. In February 2014 he received information that the property had

been developed and it was pointed out to respondent that the permit she claims to be in her possession, was invalid. In 2015 he instituted eviction procedures against respondent. The parties, legally represented, entered into a settlement agreement (the "Settlement Agreement") on 20 January 2016 (annexed to appellant's replying affidavit upon respondent's denial that she had signed such a document). In terms thereof the appellant, in recognition of the improvements made by respondent to the property, paid an amount of R 25 000.00 to respondent upon an undertaking by her to vacate the property on 31 March 2016. According to him, the respondent was in the process of refunding the money.

[6] In opposition of the appellant's affidavit respondent denied applicant's assertion that he is the lawful owner of the property, claiming that she is in fact the lawful owner. In support of her claim of ownership, she attached a copy of a document which she refers to as a "blue card" (also known as a Permission to Occupy: "PTO") ostensibly issued on 26 September 2008. According to her, the said permit vested all rights to the property in her name. She paid an amount of R 8 000-00 to one Mr Mandla Khambule (and one Mr Pumla) at the offices of the municipality. A week later she was appraised of the location of the property and erected a fence to demarcate it. During 2009 she erected a shack and latrine on the property. In 2012 she obtained a loan with Capitec Bank (annexed to her opposing affidavit, "the Capitec document") and contracted a builder to construct a building for her. She occupies this building with her children, (who were minors at the time of hearing of the application) and she is heading the household as a single mother.

[7] The key question for determination in this matter concerns s 4 of PIE. S 4 deals with the eviction of unlawful occupiers of land sought by the owner or the person in charge of the land.

The Act defines an owner and unlawful occupier as follows:

'owner' means the registered owner of land, including an organ of state;

‘unlawful occupier’ means a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land,

and s 4 (1) provides that:

(1) 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 land of an unlawful occupier.

[8] The court must first determine whether the person in respect of whom the eviction order is sought, is an unlawful occupier. If that is the case then, secondly, it decides whether, after considering all the relevant circumstances, it is just and equitable to grant such an order.

[9] In the trial court the appellant and respondent filed affidavits in support of their respective cases. Even though the application was brought on motion proceedings, a senior official of the municipality responsible for housing and related matters Mr MT Ndwandwe (“Mr Ndwandwe”) testified as a “neutral witness” as it appears from the record. He was called to assist in explaining the process which is followed by the municipality in the allocation of sites. The magistrate informed him that *“we have a situation whereby two individuals applied to the municipality to be allocated a residential site or a site. And the both of them they appear to be in possession of documents that allocate the land to them”*.

[10] The “individuals” to whom the magistrate referred were the respondent and the Motlouns. Mr Ndwandwe explained the procedure in respect of obtaining a document known as a Permission to Occupy (“PTO”) or a site permit. Of importance is the fact that such official documentation will display three signatures, one of which is from the Head of the Department (as well as an official stamp), and be accompanied by a receipt as proof of payment for the allocated property (as issued by the municipality). All of the aforementioned requirements were present on the documentation of the Motlouns in the records of the municipality. The evidence of Mr Ndwandwe revealed that one Mr Mandla Kambule (“Mandla”) who had been in the

employ of the municipality but had subsequently been dismissed, allegedly in a fraudulent manner sold sites to members of the community from 2013 to 2015. His modus operandi would then be to backdate the relevant site permits to 2006/2007/2008. Mr Ndwande testified that most of the site permits issued by Mandla did not comply with the requirements for a valid permit as it did not bear the signature of the Head of Department, there was no official stamp and only one signature.

[11] The magistrate in a comprehensive judgment dealt with the legislative framework and principles relating to PIE. From a reading of the judgment it is evident that he was well apprised of the applicable principles and his constitutional duty to ensure that he actively participate in reaching a conclusion on what is just and equitable. In my view the factual matrix of the application as is evident from the papers, was in essence correctly summarised by the magistrate, bar a complete lack of dealing with the Settlement Agreement. I will deal with the importance of the said agreement later in this judgment.

[12] On the aforementioned evidence the learned magistrate made certain findings and concluded:

“I am not convinced that the 1st respondent is an unlawful occupier, even if she was, I am of the view that under the circumstances taking into account all relevant factors, it will not be just and equitable to order eviction.”

[13] The factual matrix of the application includes the appellant's averment and proof of the property that was transferred into his name by the Deed of Transfer. Save for a denial by the respondent that appellant is the owner of the property and a later averment of her having no knowledge of the title deed being registered with the Deeds Office, the title deed was, in my view, thus not seriously challenged.

[14] It is trite that the best evidence for proof of ownership of immovable property is the Title Deed as confirmed in *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd* [1992] ZASCA 208; 1993 (1) SA 77 (A) at 82. A Permission to Occupy does not confer ownership on the holder of such a document.

See: *Herbert N.O. and Others v Senqu Municipality and Others* 2019 (11) BCLR 1343 (CC); 2019 (6) SA 231 (CC) (22 August 2019)

[15] From the record it appears that Mr Ndwande in reply to a question whether there is an indication in the records of the municipality as to ownership of the property, testified that a printout done from the office file confirms that the legal owner of the property is reflected as Tachmo CC. This corroborated the version of the appellant that he is the lawful owner of the property, as testified by Mr Ndwande under oath. Mr Ndwande was not cross-examined on this aspect and his evidence stands uncontested in this regard. Appellant's prima facie proof of ownership thus shifted the onus to the respondent, and as it was not displaced it settled into proof of ownership on a balance of probabilities.

[16] Without making a finding that the appellant is the owner of the property, the magistrate acknowledged appellant's assertion that he has a right to use and enjoy the property and holds that "this is a common law right that entitles the owner to use property". The trial court then proceeds:

"However, his argument is upset by the 1st respondent's assertion that she acquired the property lawfully from housing officials. This assertion remains factually unrestrained. The applicant and Motloung had their own transaction which led to the registration of the property under the names (*sic*) of the applicant. Motloung did not tendered (*sic*) any evidence that regarding acquisition of the property, except [for a] PTO issued and completed by the housing officials."

[17] In my view the evidence put up by the appellant in support of ownership, to wit the Title Deed, should have satisfied the magistrate that the appellant succeeded in proving his ownership of the property. Reference to the absence of evidence from the Motlouns (ostensibly to testify on how they acquired the property) is misplaced. From the papers it is clear that, in accordance with the testimony of Mr Ndwande, the site was legally obtained by the Motlouns as is evident from the site permit and the proof of payment. The magistrate's finding on the other hand that the respondent's assertion of having acquired the property lawfully from housing officials remains

factually unrestrained cannot be correct. From the record it is clear that the only documentation put up by the respondent as proof of ownership, to wit the “blue card” did not comply with the requirements for a valid transaction as testified by Mr Ndwande as it lacked the necessary signatures and official stamp, and no official proof of payment accompanied the said blue card.

[18] The magistrate in his judgment in dealing with Mr Ndwande’s evidence held as follows:

“He submits that in this matter Motlaung was awarded the site legally and he and all his successors in title are lawful owners. Mr Ndwande was not part of the housing officials at the time.

All that he says is based on assumption...”

[19] In my view the learned magistrate erred in this regard. Far from being based on an assumption, the documentary proof supports the lawful ownership of the appellant. Moreover, the magistrate’s failure to deal with the Settlement Agreement, constituted a fundamental error. The importance of the Settlement Agreement is that it is indicative of the respondent having had knowledge of the unlawfulness of her occupation of the property if not before, then at the latest at the end of January 2016. The parties agreed that the appellant would pay the respondent an amount of R 25 000-00 for the improvements made by the respondent and upon her undertaking to vacate the property on 31 March 2016. Moreover, the evidence tendered by Mr Ndwande, an independent witness, supported the fact that the respondent was not the legal owner as no such evidence existed with the municipality, save for that of the Motlaungs having paid for the property and the appellant being the current owner of the property.

[20] The dates of the fraudulent transactions of Mandla tallies with the time when appellant started noticing activity on his site in 2013. The inescapable conclusion to be drawn is that respondent was swindled by Mandla. This however does not translate into her becoming the lawful owner of the property.

[21] The trial court should have found that the appellant is the owner of the property and the respondent is in unlawful occupation thereof. Moreover, I am unable to find that the respondent raised a valid defence to the appellant's claim for eviction.

[22] Section 4 of PIE entails both procedural and substantive provisions. The procedures to be followed upon a finding that a person to be evicted is an unlawful occupier are as follow:

(7) 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 sold in a sale of execution pursuant to a mortgage, **where the land has been made available or can reasonably be made available by a municipality or other Organ of State or another landowner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women.**

(8) If the court is satisfied that **all the requirements of this section had been complied with and that no valid defence has been raised by the unlawful occupier**, it **must** grant an order for the 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).

(9) In determining a **just and equitable date** contemplated in sub-section (8), the court **must have regard to all relevant factors, including the**

period the unlawful occupier and his or his family have resided on the land in question.” (own emphases)

[23] As constitutionally obliged to do, the magistrate mentioned the factors that he considered in arriving at a conclusion that it would not be just and equitable to grant an order of eviction.

“The first respondent [erroneously referred to as the 2nd respondent] is a single mother and takes care of two minor children. She obtained a loan in order to build a place she and her children can call a home and not only a shelter from elements. She has no other place to go. The applicant submitted that at this stage the property does not generate any money for the applicant neither himself can occupy the property because of the presence of 1st respondent. However, the applicant himself resides in a nearby town.”

[24] The magistrate dealt with all the aforementioned factors. The respondent, under oath, stated that she is a single parent of two minor children. However, the ages of respondent’s children can be deduced from the document relied upon by her for ownership of the property. Reference is made to a son whose identity number indicates his date of birth as 12 November 1997 (at the time of the eviction application in the trial court during 2018 thus 21 years of age and not a minor) and a daughter born on 12 December 2005 (at the time 13 years of age). At the hearing of this appeal, the minor daughter would be aged 17.

[25] The remark by the magistrate that the respondent “*has no other place to go*” is in my view not supported by the evidence at all. The appellant in his founding affidavit informed the court of the factors known to him in respect of the circumstances of the respondent as follows:

25.1 “The occupiers of this premises is (*sic*) the First Respondent and her minor son. However I do not have his full names and identity number and I am not clear on what age he is, only that he is school going.”

The respondent did not reply to these averments.

25.2 “It is clear that she is an unsupported woman and that she has a minor living on the premises, however, I am informed that **she does have employment and can support herself and move her residence to another place.**” (own emphasis)

To these averments the respondent replied as follows:

“I am employed with the Government Emergency Services since 2011 and earn a salary with which I look after myself and the minor children living with me on the premises [...] Extension 8, Bohlokong.”

25.3 There is no answer provided to the appellant’s averments that respondent can move her residence to another place. She does not indicate that she has no alternative accommodation. There is also no indication that an order of eviction would render the respondent and her children homeless. From the Capitec document confirming the loan that respondent had secured with the bank it can be inferred that she held down a good position with the government. I say so because logic dictates that she would not have been successful in obtaining the loan amount of R 96 120,35 with the resultant monthly repayments of between R 1 500 - R 2 745.28, without a proper monthly income. The respondent can most certainly not be viewed as the proverbial poorest of the poor.

[26] One of the factors to be considered in deciding whether it is just and equitable to grant an order of eviction is the duration of the occupation by a respondent. The respondent stated that she erected a shack in 2009 and instructed a contractor to build a dwelling during 2012, with the appellant’s version that he was informed of a development on his site in 2014. At time of hearing of the application in 2018 this period would thus have amounted to about 5 years. At the time of considering this appeal, the time has increased to 9 years.

[27] In deciding what is just and equitable the appellant’s non-occupation of the property since he had bought it in 2009, should not be viewed as insignificant in comparison to the factors relating to the respondent. Appellant stated that he had

made various attempts to assist the respondent in vacating the property, offering to reimburse her for improvements to the property. He complained that his rights to his property had seriously been encroached upon. Moreover, he sustained and is continuing to sustain serious prejudice in that the property cannot be rented out and he does not receive any financial gain from the respondent's occupation of the property.

[28] In *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others* 2012 (6) SA 294 (SCA) Wallis JA summarised the requisite approach by a court as follows in para [24]:

“A court hearing an application for eviction at the instance of a private person or body, owing no obligations to provide housing or achieve a gradual realisation of the right of access to housing in terms of s 26(1) of the Constitution, is faced with two separate inquiries. First it must decide whether it is just and equitable to grant an eviction order having regard to all relevant factors. Under s 4(7) those factors **include the availability of alternative land or accommodation.** The weight to be attached to that factor must be assessed in the light of the property owner's protected rights under s 25 of the Constitution, and on the footing that a limitation of those rights in favour of the occupiers will ordinarily be limited in duration. Once the court decides that there is no defence to the claim for eviction and that it would be just and equitable to grant an eviction order, it is obliged to grant the order. Before doing so, however, it must consider what justice and equity demand in relation to the date of implementation of that order and it must consider what conditions must be attached to that order. In that second inquiry it must 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.” (own emphases added)

[29] In *Occupiers of Erven 87 & 88 Berea v Christiaan Fredericks De Wet N.O.* (2017) ZACC at para 44 and 45 the Constitutional Court reiterated the dictum of the court in the *City of Johannesburg* case and held that section 4 of PIE necessitates

two separate enquiries. The first enquiry is whether it is just and equitable to grant the eviction order having regard to all the relevant factors. The factors mentioned under section 4(7) of PIE include the availability of alternative land or accommodation. **Those factors must be assessed in the light of the property owner's protected rights under section 25 of the Constitution. Once decided that there is no valid defence to the claim for eviction and that it would be just and equitable to grant an eviction order, the court is obliged to grant the eviction order.** The second enquiry is what would be just and equitable in relation to the date of the eviction and/or the implementation of that order. (own emphasis added)

[30] In *Residence of Joe Slovo Community, Western Cape v Thubelisha Homes & Others (Centre on Housing Rights and Evictions and Another, amici curiae)* 2010 (3) SA 454 (CC) it was stressed that in considering whether eviction is just and equitable the court must come to a conclusion that it is just and equitable **to all parties**. (own emphasis added)

[31] I am very much in agreement with the approach of Davis,J (Fortuin J concurring) when dealing with an application for eviction in *Resnick v Government of the Republic of South Africa and Another* 2014 (2) SA 337 (WCC) at 344:

What then constitutes grace, compassion and a commitment to ubuntu in these circumstances? Were this court to take the view that 'just and equitable' trumps illegality, **so that a person in the circumstances of the appellant can remain indefinitely on the property, no matter the illegality of the situation**, this would create vast and significant implications for eviction procedures throughout this Province, in that this, as a judgment of a Full Bench, it would be binding on many of our colleagues, who would have considerable difficulty in a range of cases, and we could not predict as to how subsequent evictions should (be) adjudicated.

In my view, 'just and equitable' in this situation, means ensuring the appellant be given some significant time to find alternative accommodation, but that 'just

and equitable' jurisprudence cannot stretch far enough to overturn the decision of the court *a quo*." (own emphasis)

[32] In terms of S7 of PIE I have to take into account if land can be reasonably made available by the municipality for the relocation of the unlawful occupier. Mr Ndwanke informed the trial court that, at the time of the hearing, the municipality did not have alternative land or accommodation to be of assistance to the respondent. Mr Van der Merwe, appearing for the appellant, suggested the appropriate way in dealing with the aforementioned problem would be to stay the order for eviction pending arrangements to urgently be made by the municipality for respondent's (and all still residing with her) relocation or accommodation. In my view this would not achieve finality in this matter and would render the date of eviction unclear.

[33] In accordance with PIE, I have to consider all factors as prescribed therein, including the fact that respondent is heading a household. As stated, the respondent has been in occupation of the property for a considerable length of time at the hearing hereof. She is gainfully employed and at one stage agreed to vacate the property by 31 March 2016. As indicated, on my calculations one of her children is a minor still attending school. I must therefore set a just and equitable date upon which she is to vacate the property. Taking all the above into consideration I calculate such date to be a period of six months from the date of the order below and the orders I intend to make will so reflect. Not only would six months afford ample time for the respondent to obtain alternative accommodation, but would it avoid a disruption of the academic school year of the minor daughter. The appellant should however compensate the respondent for the improvements made to the property by the respondent, and a period of six months would likewise grant an opportunity to the appellant to effect such compensation.

[34] It follows that I am of the view that the appeal should succeed and that the magistrate erred in not granting the application to evict the respondent from the premises.

[35] The usual cost order is that costs should follow the event. In my discretion I am however of the view that the history of this matter warrants an order that each party should pay its own costs.

[36] I therefore make the following orders:

36.1 The appeal succeeds and the order of the magistrate dismissing the application with costs, is set aside and replaced with the following:

“The application succeeds with costs.”

36.2 First respondent and all those holding title under her, are to vacate the property described as Erf [...] Bohlokong Bethlehem before or on 30 November 2022.

36.3 Should the first respondent and all those holding title under her fail to vacate the property described above on or before 30 November 2022 the sheriff is ordered to evict first respondent and all those holding title under her, from the property.

36.4 Appellant is ordered to reimburse first respondent in respect of the improvements to the property, the value of which shall be determined by a suitably qualified valuator agreed upon by the appellant and the first respondent.

36.4.1 In the event that the appellant and first respondent are unable to agree on a valuator, each party is authorised to appoint his/her own suitably qualified valuator, and the average of those two valuations will determine the value of the improvements

36.4.2 The valuations referred to above are to be undertaken by 30 November 2022. If the applicant defaults in appointing a valuator, the first respondent will remain in occupation of the property until such valuation is obtained. If the respondent defaults in the appointment of a valuator, she is directed to vacate the property on 30 November 2022.

36.5 Each party is to pay its own costs of the appeal.

C. REINDERS, ADJP

I agree

S. NAIDOO, J

I agree

A.K. RAMLAL, AJ

On behalf of the appellants:

Instructed by:

Adv HJ van der Merwe

Niemann Grobbelaar Attorneys

c/o Honey Attorneys

BLOEMFONTEIN

On behalf of the first respondent:

Mrs E Louw

HS Marais Attorneys

c/o Lovius Block Attorneys

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