

NOT REPORTABLE

**IN THE HIGH COURT OF SOUTH AFRICA
(EAST LONDON CIRCUIT LOCAL DIVISION)**

CASE NO. EL 1281/2021

In the matter between:

GARTH PETERSEN

First Applicant

SARAH-JANE PETERSEN

Second Applicant

and

KHAYALETHU GQOSHA

First Respondent

BUFFALO CITY METROPOLITAN

MUNICIPALITY

Second Respondent

JUDGMENT IN RESPECT OF APPLICATION FOR EVICTION

HARTLE J

[1] The applicants seek the eviction of the first respondent and all persons occupying through or under him from residential premises situated at [...] B [...] D [...] Place, East London (“the property”).

[2] The application purports to be one in terms of the provisions of section 4 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, No. 19 of 1998 (the “PIE Act”) and is predicated on the basis that the applicants are the

lawful owners of the property and the first respondent and his family in unlawful occupation thereof. The applicants launched the application on the basis of urgency as provided for in terms of Uniform Rule 6 (12).

[3] The applicants divulged in their founding papers only the premise that they had recently purchased the property and, contrary to a provision in the deed of sale guaranteeing them vacant possession, that they had not acquired vacant possession thereof by virtue of the fact that the first respondent and his family were found to be unlawfully occupying the property after registration of transfer to them.

[4] A copy of the deed of sale was not disclosed neither the rather unique circumstances under which the applicants came to acquire the property.

[5] In proof of their ownership of the property they relied only on a copy of a WinDeed report, although at the abortive first appearance of this matter on 2 November 2021¹ and in response to the first respondent's contention that the sale was contrived, put up a copy of the title deed which on the face of it confirms his and his wife's acquisition of the property on the basis of a sale to them on 12 February 2021 by one Colin Kriel for a purchase consideration of R2 500,000,00.² Even though this detail was not volunteered from the outset, it is common cause that Colin Kriel is the uncle of the second applicant who evidently also transacted professional business with her eponymous firm, Kriel Petersen Attorneys of East London. The firm's name is endorsed on the face of the title deed, suggesting their professional involvement in the transfer of the property to herself and her husband as well.

[6] Although the first respondent's attorney ostensibly objected to the introduction of the title deed as proof of ownership at the initial hearing when the application was struck from the roll for want of urgency, it can hardly be gainsaid that the applicants took ownership of the property on 28 July 2021.

¹ The matter was struck from the roll with costs on this date on the basis that the claimed urgency had not been established.

² The title deed was received by the court first hearing the matter on 2 November 2021 and marked Exhibit "A".

[7] Notwithstanding the applicants' rights as owners to recover possession of their property by resort to the *rei vindicatio*, the first respondent opposes the application on the primary basis that he is not an "unlawful occupier" within the meaning contended for in the PIE Act.³ He pleads over that it would not be just and equitable to evict him and his family and that they would be rendered homeless by such injunction, but evidently his main concern by such eviction is that it will "render (his) case with Colin (Kriel) moot".⁴ The first respondent and his family have lived in the property since February 2016 although the applicants plead that their unlawful occupation of the property spans only from the date upon which they took transfer of the property.⁵

[8] In essence the first respondent alleges a contrived purchase by the applicants of the property in order to thwart a "lien" he has over it. This lien, so he explained, had its origin in a "loan" he advanced to Colin Kriel, who was introduced to him by the second applicant in her capacity as attorney or conveyancer after she was professionally involved in a failed property acquisition by him. He alleges that she encouraged him to "triple" his deposit of R1 900 000.00 which he had paid into the trust account of her law firm as a payment towards the purchase price of the failed transaction, by paying it to Colin Kriel as an investment.

[9] On 24 June 2015 the second applicant advanced an initial sum of \$86 500.00 to Colin Kriel from her firm's trust account pursuant to a loan agreement entered into between Colin Kriel and the first respondent which she herself drafted. Further advances were made to Colin Kriel at his request in due course, entailing addenda to the original agreement, culminating in an obligation by Colin Kriel ultimately to pay him a sum of \$249 550.00, plus interest.

³ See the definition of "unlawful occupier" in section 1 of the PIE Act.

⁴ The first respondent is probably referring to his security constituted by his continued possession of the property.

⁵ The applicants may well have only acquired *locus standi* to invoke the *rei vindicatio* on date of registration of transfer to them of the property, but the fact that the first respondent's occupation may be held to have been unlawful vis-à-vis the previous owner earlier than this date is an entirely relevant factor in proceedings for eviction under the provisions of the PIE Act. It is also a determinant of whether the provisions of sub-section (6) or (7) of the PIE Act apply. The applicants have not located their case under either sub-section, neither have they even made the essential averment that is just and equitable, according to one of those scenarios, that this court should grant the order for the first respondent's eviction from the property.

[10] Colin Kriel's failure to pay the agreed amount to him in February 2016 led to the latter and him entering into a verbal agreement that he would take occupation of the property, then owned by Colin Kriel, "until (Kriel) has paid all the money that he owes me".⁶ It appears further, according to him, that the understanding was that he would not be required to pay either rent or service charges for so long as he occupied the property on this basis.

[11] Later, on 25 April 2016, when Colin Kriel fell into arrears with his bond repayments owed to Absa Bank Ltd, he and the latter entered into a mock deed of sale (sic) of the property to him (drafted by the second applicant's firm), but only to create the impression that the first respondent was purchasing the property from him for 7 million rands. Colin Kriel persuaded him that the simulated agreement was intended only to be used as leverage with Absa Bank Ltd in order for the latter to gain some time to catch up with his arrears on the mortgage loan(s).⁷

[12] He was surprised therefore when on 11 April 2019 Colin Kriel issued summons against him under East London Case No. 381/2019, alleging that he was holding over and in unlawful occupation of the property after having failed to pay him the purchase price as ostensibly agreed in the "mock" deed of sale. He has defended the claim of Colin Kriel for his ejectment on the basis that he is not in unlawful occupation of the property. At the launch of the present application that action stood poised to go to trial and is still a live dispute. A perusal of the court papers in that file, to which the first respondent referred this court in support of his plea of *lis pendens* as it were, confirms the same defence as presently raised to the applicants' claim for ejectment.

[13] It is the first respondent's belief that the sale of the property to the applicants was - or since it has now been successfully concluded by way of registration of transfer, *is*, a "tactical maneuver by Colin Kriel acting in cahoots with (the applicants)

⁶ Exact details of the extent of Kriel's indebtedness by the time of the launch of the application have not been disclosed.

⁷ The first respondent purported to introduce a copy of the deed of sale as an annexure to his heads of argument. This attempt was however objected to on behalf of the applicants at the first hearing of the matter and so the court has not had the benefit of considering its provisions, whereas Colin Kriel has ostensibly relied on their provisions in the live, pending, action for his claim of ejectment against the first respondent.

to ensure his ejectment from the property without being paid what is owed to him by Colin Kriel.”

[14] The first respondent alluded to a separate action (EL 835/2016) in which Shumayela Properties (Pty) Ltd, represented by Colin Kriel’s brother Tony Kriel as director, issued summons against Roger Charles Kriel, Colin Graham Kriel (who was joined in those proceedings only on 28 November 2018) and Geoffrey Colin Kriel, the second applicant’s father and Colin’s brothers respectively, cited *nomine officio* as defendants in their capacity as trustees of Thistle Trust No. IT 848/96, to recover certain indebtedness to it.

[15] It appears from a copy of a court order granted by consent between the various family members put up by the first respondent in respect of that action (“the Order”) that on the day of Colin Kriel’s joinder, he was ordered in settlement of “claim 2” in the action to pay in his personal capacity to the plaintiff a sum of 1 340 000.00. Payment of this amount was to be secured by way of a mortgage bond to be registered over the property to rank behind Absa Bank Ltd, which was then already holding six bonds registered against the property. (It appears from the historic information furnished on the WinDeed search in respect of the property that such a bond was registered by Shumayela Properties (Pty) Ltd per document reference B7721/2019 although no date is indicated when this occurred.)

[16] When Colin Kriel failed to pay this bond there was a sequel to the Order pursuant to which Shumayela Properties brought a further application to declare the property executable. The first respondent applied to join in those proceedings and at the hearing of that application asserted (as he does now) that he had “a lien over the property, as occupation of same was given to (him) as security for payment of (his) money.”

[17] The culmination of all of this is that on 12 January 2021 a further order (“the further Order”) granting leave to Shumayela Properties to immediately take its execution against the property was made. A reserve price was set for the sale of the property in execution in the sum of R2.5 million. The court’s order in this respect provided further, ostensibly in respect of the first respondent’s claimed interest in

those proceedings which had evidently warranted him been joined in that application, that:

“4. The following shall be included in the conditions of sale of the property.

“The sale of the property is subject to any legal rights which Khayaletu Wiseman Gqosha may have as occupier of the property.””

[18] The applicants did not volunteer to this court how it transpired that they came to purchase the property or on what terms vis-à-vis the first respondent who could hardly have been out of the picture as it were especially from the point of view of the second applicant (the applicants, ostensibly eschewing any direct dealings with Colin Kriel, averred in their replying papers that they negotiated with the execution creditor in respect of their private purchase of the property which to my mind requires elaboration on its own why they ignored the court’s caveat expressed in the further order which especially reserved the “legal rights” of the first respondent as “occupier” thereof), or why they saw fit, in laying out the essential allegations for their ejectment claim, to withhold details of the evidently known fact of the first respondent’s long standing possession of the property and his peculiar relationship with Colin Kriel or the second applicant’s firm’s professional dealings with both the latter and the first respondent in relation to the property. In reply they simply denied that a lien exists which denial rings hollow against the premise of their purported nescience of any prior dealings between Colin Kriel and the first respondent.

[19] The first respondent alluded to yet another significant incident preceding the applicants taking transfer of the property which self-evidently exposes their complicity with Colin Kriel and awareness of the first respondent’s long-standing possession of the property. This is that on 26 February 2021 the first applicant wrote to the second respondent (ostensibly on behalf of Colin Kriel)⁸ to request them to disconnect the supply of services to the property. This communication, which urges upon the second respondent to urgently disconnect the services to the property, reads as follows:

⁸ It is not clear in what capacity the first applicant would have purported to have written on Colin Kriel’s behalf to the second respondent.

“Morning Wayne

Thank you for taking the time this morning to talk to me over the phone.

The person in question has been occupying the property since 2016 and stopped paying the municipal accounts as of late 2018. We are very concerned as to how the occupier who is not a tenant and has no lease agreement but instead a potential buyer whereby the agreement was breached by non-payment,⁹ has not been disconnected to date as the main and the tenant account (which he was able to set up at BCM) have both been handed over and have reached no payments since 2018. I have confirmed that he is able to still purchase electricity and did so in January. He has also been running up water bills randomly to the amounts of R11 000.00 per month.

The owner did initiate eviction proceedings in 2019 which I have attached for your perusal,¹⁰ as well as the letter from the attorney requesting disconnection on behalf of the owner and a copy of the rates clearance certificate which is incomplete as per Barry Brown. I have also attached a detailed BP108 report on both accounts.

I ask that you please consider this matter with urgency to avoid any further unnecessary municipal and legal costs to the owner.”

[20] The first respondent relates that the second respondent acted upon this request and terminated the electricity to the property on 8 March 2021. However, after his attorney intervened to explain that the issue of his occupation was the subject matter of litigation (alluding to the pending action aforesaid), his electricity connection was restored. Other municipal services to the property were also unlawfully terminated at the behest of the first applicant.

[21] In a letter of demand addressed to the first respondent dated 1 September 2021 foreshadowing this application on an urgent basis the applicant’s attorneys of

⁹ This premise upon which the first applicant approached the second respondent to intervene, namely that the first respondent was holding over, was not the case made out by the applicants in their founding papers.

¹⁰ This is a clear indication that the first applicant is aware of the pending action.

record acknowledge the prior action that is alive between the first respondent and Colin Kriel. Indeed, it is averred in the demand that:

“Despite the foregoing, our client has informed us that the is aware of the current action and/or eviction proceedings between your client and the previous owner, and his election not to pursue immediate eviction proceedings against you client should not at all be construed as a forfeiture of his rights in law to do so. Our client requires occupation of the property in due course, and should your client refuse to vacate when required to do so, our client shall enforce his rights to occupation of his property.”

[22] The applicants, perhaps inadvertently, also exposed the fact of their knowledge prior to the launch of the present application of the first respondent's long-standing retention of the property as well as the pending litigation between him and Colin Kriel in Annexure “GP 7”. The annexure was put up ostensibly to demonstrate to this court that the first respondent's attorneys had on behalf of the first respondent resisted their demand (dated 4 August 2021) as the new owners of the property to inspect it by referencing a “High Court Order” (of which they claim to have had no knowledge) that purportedly protected his rights as an occupier. Rather than giving credence to the applicant's case that they were surprised to find out after the purchase of the property that it was occupied, the first respondent's attorney's response creates an entirely different impression:

“Your “notice”, which I term “request”, to inspect the property has been handed over to us for a proper response. First of all, we do not know in what capacity and on what basis you are requesting to inspect this property. As far as we are aware the owner of the property is Colin Kriel, who is embroiled in litigation with our client regarding this property.

All of this is known to you as on the 28th of February 2021, you wrote an email to Buffalo City Municipality, detailing the history of the property as well as the dispute between our client and Colin Kriel, requesting the municipality to disconnect the services to the property, despite the High Court Order that protected our client's rights as the occupier of the said

property. When that attempt failed, the services were illegally disconnected by someone who went to the property and illegally cut the supply of the municipal services to the property.”

[23] The first applicant also attached his own response to the communication received from the applicant’s attorney (Annexure “GP 8”) to clarify that he was writing in his capacity as “new owner” of the property. In reply to the allegation of the attempted disconnection, he did not refute this neither the general tenor raised in the first respondent’s attorney’s response that he and his wife knew well that the dispute between the first respondent and Colin Kriel had long been coming and that his rights as occupier were “protected” by a court order. Instead, he merely lamented as follows: “I fail to believe that Buffalo City Municipality would have been that negligent to give you the information that you are referring to without the consent of Mr. Kriel.”

[24] Neither applicant purported to explain the interference with the first respondent’s entitlement to municipal services in the formal papers filed.

[25] This background aside in an application in which the parties are expected to lay bare every legally relevant circumstance to assist the court in exercising its discretion to determine whether it is just and equitable to order an eviction, the true and primary question to be determined is whether the first respondent is indeed an unlawful occupier within the meaning of the definition of this concept in the PIE Act.¹¹

[26] Whilst the onus is on the first respondent to prove his “right” to be in occupation of the property, the applicants have attracted an evidential burden (on the belatedly accepted premise that the first respondent is holding over after the deed of sale entered between him and Colin Kriel was cancelled) to prove such cancellation. However, on the first respondent’s evidence - which I must accept on the basis of the Plascon Evans principle,¹² he claims that this sale was a farce and makes no bones about the fact that he has occupied the property in terms of a verbal agreement to keep possession of it and use it, basically free of any charge whatsoever, since

¹¹ The first respondent accepts that he will have to vacate if it transpires that he has no legal right that justifies his continued possession of the property, or if the debt that is the subject matter of his claimed lien is paid to him.

¹² Plascon-Evans Paints (TVL) Ltd v Van Riebeeck Paints (Pty) Ltd [1984] 2 All SA 366 (A).

February 2016, in terms of his claimed “lien”. This may all sound fanciful, yet it is ironically consistent with the reality that he has maintained his possession of the property and has paid neither rent nor service charges in respect thereof since he took occupation. He volunteered that he only commenced paying service charges to the second respondent more recently in order to ensure that he can purchase electricity from the second respondent. That he was allowed to occupy the property on such a basis without any ostensible demur from Colin Kriel and without paying rent and service charges (as an ordinary tenant would) for several years prior to the applicants purchasing the property lends credence to some sort of understanding between him and Colin Kriel that must have been in place.

[27] The fact that the first respondent was joined in the litigation between Shumayela Properties and Kriel family members in EL case no 835/16 also confirms in principle a recognition by a court of his interest in the property as an occupier, but what exactly the nature of that right is (or rather what the court was recognizing in those proceedings as constituting that “right”), is less clear.

[28] A contractual lien against property serves to secure a creditor’s legal claim arising from a contract with the owner usually pertaining to the thing itself. The lien vests to secure the payment of the contract amount and usually concerns an obligation arising on the back of improvements effected to the property, which situation does not pertain here on the first respondent’s version.¹³ The first respondent seems to suggest that his verbal agreement with Colin Kriel rather entailed a simple pledge of the property given as security for the latter’s indebtedness to him, which in my opinion would also constitute a defence against an owner’s *rei vindicatio* or establish a superior right to occupation of the property in such a unique scenario. Liens and pledges can be enforced against a curator of an insolvent estate as well as against the owner’s successor in title.¹⁴ In this instance and on the applicants’ own showing it could not have escaped their attention when they purchased the property from Colin Kriel that the first respondent was asserting a right of retention in respect of the property relative to Colin Kriel’s claimed

¹³ A lien is a legally recognized capacity to withhold to ensure that a claim will be met. It is less of a real or personal right than it is a defence against the owner’s *rei vindicatio*.

¹⁴ *Levy v Tyler* 1933 TPD 377. *United Building Society v Smookler’s Trustees and Golombick’s Trustee* 1906 TS 623.

indebtedness to him. This would have been evident from the pending litigation but would also have been apparent from paragraph 4 of this court's further Order which a conveyancer in the position of the second applicant preparing conveyancing documents in respect of the sale of the property to her and her husband would have been especially required to take heed of.

[29] The first respondent (who I will assume for present purposes bears the onus to establish the claimed lien to remain in possession of the property) is indeed vague about his commercial interest in the property and the status of his loan to Colin Kriel. The present extent of Colin Kriel's indebtedness to him is not mentioned anywhere, neither the minutiae of the oral agreement or what the expectation was regarding the value of his occupation of the property (if any) since he took possession of it in 2016. However, he defers to the pending litigation in the East London action under Case No. 381/2019 between him and Colin Kriel, which ostensibly involves the self-same issues between them concerning whether his right to remain in possession of the property prevails against the owner's right to recover lost possession, no doubt with the applicants joined or substituted in that matter as the new owners.¹⁵ Indeed I share his view that the applicants have "jumped the gun" and prematurely brought the present application before the pending action between Colin Kriel and him has been finalized.

[30] In my view all the elements of a successful plea of *lis pendens* avail the first respondent in the circumstances and given his reservations that the applicants purported to defeat his right of retention by purchasing the property from Colin Kriel whilst knowing full well that he was claiming a lien or pledge over it (a concern not unreasonably held by him), it appears to me to be appropriate that the applicants involve themselves in the finalization of the pending action. No doubt the matter can also be resolved earlier by the debt which is the subject matter of the pledge or lien being settled or secured to the first respondent's satisfaction.

[31] In given circumstances, a court can and should stay eviction proceedings if the outcome of other proceedings impacts the merits of the eviction or, if factual

¹⁵ It can be fairly assumed in my view that Colin Kriel anticipated that there would be a dispute of fact, hence proceeding by way of action against the first respondent rather than on motion.

disputes raised on the papers can only be resolved by oral evidence.¹⁶ Either or both situations apply *in casu*. I cannot determine the issue whether the first respondent is an unlawful occupier on motion (especially since the applicants have not entirely taken this court into their confidence) neither can I find that the pending litigation between Colin Kriel and the first respondent is legally irrelevant. To the contrary, and according to the doctrine of notice, the applicants at the time they bought the property, on their own showing, knew that the first respondent claimed a “lien” (or pledge) and in the result that right of retention ought to prevail against them as successors in title if the court in the pending action finds in the first respondent’s favour in this regard.¹⁷

[32] I have considered ordering a stay of these proceedings, but my concern is that the premise for the application set forth by the applicants in the papers is not a true one and that critical information has been withheld from the court. The launch of the present application was also unnecessary in the light of the pending litigation in East London Case No. 381/2019 which ought to dispose of the question whether the first respondent’s right of retention on the basis contended for can prevail against the owner’s *rei vindicatio*.

[33] I mention too for guidance going forward that the applicants failed to meet the procedural requirement postulated by section 4 (2) of the PIE Act in the sense that the court’s directions for service were not obtained. The applicants served a notice, but this was not authorised by this court prior to the sheriff serving it on the respondents. When the matter was initially called on the urgent roll, Ms. Collett for the applicants argued that urgency in terms of the provisions of Uniform Rule 6 (12), rather than reliance on section 5 of the PIE Act (involving a deviation from the normal forms and an abridgement of time periods), was a permissible basis upon which to launch such an application. Whilst that may well be so, once the matter was struck from the roll, the notice format relied upon (without any authorization from the court) did not survive and was required to be supplemented.

¹⁶ Pillay & Another v Pillay & Others [2012] JOL 28319 (KZD).

¹⁷ Levy v Tyler, *Supra*.

[34] Given the misconception by the applicants that they had complied with the peremptory provisions of section 4 (2) of the PIE Act, I invited the parties to make further submissions to me as to the following:

“Given the effect of the ruling of Noncembu AJ dated 2 November 2021 concerning the issue of urgency, what impact does this have on the applicants’ claimed compliance with the peremptory procedural provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, No. 19 of 1998 (“the PIE Act”), since condonation was not afforded to the applicants, and no leave granted by this court to serve written and effective notice of the proceedings as prescribed in section 4 (2) of the PIE Act?

Assuming a procedural deficiency, can this court in such event remedy the procedural shortcomings by granting the necessary leave to the applicants to serve the requisite notice on the respondents and to permit them to approach the court on the same papers, duly supplemented, once they have complied with the procedural prescripts in the PIE Act and the respondents have had an opportunity to place relevant circumstances before the court, in order to argue the matter further?”

[35] Comprehensive submissions were made to me in this respect by both parties. The general tenor of these, consistent with the relevant case law, is that the absent court authorised notice in terms of section 4 (2) of the PIE Act was not fatal, neither had there been any prejudice occasioned to the first respondent by its omission, or by the truncation of the relevant time periods made provision for in section 4 that were to be afforded to him in addition to compliance with the provisions of Uniform Rule 6 to put forward his case. Indeed, I accept that I could have condoned the absence of a directions order and the truncation aforesaid as the purported notice seems to have served its purpose in every respect. The first respondent was certainly aware of the proceedings and of his rights referred to in section 4 (5) (d) of the PIE Act and in fact made his submissions, limited by their nature to the single observation that an eviction order would render him homeless (a mere state of fact), but which situation would have been ameliorated by affording him and his family reasonable notice to move out of the property. By the first respondent’s own

admission, his primary concern is his contention that he is not an unlawful occupier within the meaning of the definition in the PIE Act. Once that issue has been resolved the applicants can approach the court afresh, alternatively can seek a directions order in the pending action to be served timeously before the hearing.¹⁸

[36] In the result, I issue the following order:

1. The application is dismissed, with costs.

B HARTLE

JUDGE OF THE HIGH COURT

DATE OF HEARING:	14 February 2022
Last date submissions received:	29 April 2022
DATE OF JUDGMENT:	9 June 2022*

*Judgement delivered by email to the parties on this date.

APPEARANCES:

For the applicants: Mr. S Collett instructed by Van Rensburg & Associates, East London (ref. Mr R Collett).

For the first respondent: Mr. Godongwana of Godongwana Pakade Attorneys, East London (ref. Mr. Godongwana).

For the second respondent: No appearance.

¹⁸ See Christo Smith, Eviction and Rental Claims: A Practical Guide, Part 1: The Law of Eviction, Chapter 3 The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act re Notice and Procedure in General at par 3.5.2, especially numbered paragraphs 5 and 10 regarding the detailed procedures to be followed in the courts in this respect.