



Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Regional Magistrates:	YES / NO
Circulate to Magistrates:	YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)**

Case No: 1238/ 2020
Argued: 14 May 2021
Date delivered: 09 July 2021

In the matter between:-

KAI! GARIB MUNICIPALITY

APPLICANT

and

**FELICITY BOOYSEN
MARTIN M. BOOM
LLEWELLYN JACOBS
RANDALL BOCK
DENZIL PIETERS
GREGORY DAMES
KOENIE KOTZE
GARSWIN GALANDT
AMBROSIUS THOMAS
NEAL COETZEE
SHADIA BOOYSEN
S. HEYENS
JOHANNES AUGUST
CEDRIC G. BASSON
MIETJIE WITBOOI
PRIESTER CLOETE**

**FIRST RESPONDENT
SECOND RESPONDENT
THIRD RESPONDENT
FOURTH RESPONDENT
FIFTH RESPONDENT
SIXTH RESPONDENT
SEVENTH RESPONDENT
EIGHTH RESPONDENT
NINTH RESPONDENT
TENTH RESPONDENT
ELEVENTH RESPONDENT
TWELFTH RESPONDENT
THIRTEENTH RESPONDENT
FOURTEENTH RESPONDENT
FIFTHTEENTH RESPONDENT
SIXTEENTH RESPONDENT**

RONICIA CLOETE

A. ISAACS

GEORGE CLOETE

SERGIO OLIVIER

LETIEFA S. POFADDER

JESSICA WHITE

ZELNA VAN ROOI

O. KORDOM

E.G. JANSEN

SEVENTEENTH RESPONDENT

EIGHTEENTH RESPONDENT

NINETEENTH RESPONDENT

TWENTIETH RESPONDENT

TWENTY FIRST RESPONDENT

TWENTY SECOND RESPONDENT

TWENTY THIRD RESPONDENT

TWENTY FOURTH RESPONDENT

TWENTY FIFTH RESPONDENT

ILLEGAL OCCUPANTS OF THE PORTION OF LAND

ENCOMPASSING ERF 386, ERVEN 1061, 158 AND

159, ERVEN 198, 1616 AS WELL AS THE REMAINING

PORTION OF ERF 431 KAKAMAS

TWENTY SIXTH & FURTHER RESPONDENTS

CORAM: STANTON AJ

JUDGMENT

STANTON, AJ

INTRODUCTION:-

- [1] The applicant seeks an order evicting the respondents from vacant land that belongs to the applicant and/or falls under its control in Kakamas. The application is filed in terms of the provisions of section 4(2) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, Act 19 of 1998 (*"the Act"*).
- [2] The first to fourth, tenth, eleventh, seventeenth, nineteenth to twenty third and twenty fifth to twenty sixth respondents ("the respondents") oppose the application and filed their answering affidavits. The remainder of the

respondents filed a notice of intention to oppose the application, but no answering affidavit. The ninth respondent passed away on 06 September 2020.

[3] The immovable properties to which this application relates are situated in Kakamas, on both sides of Hofmeyer and Luckhoff Streets, comprising of erven 386, 1061, 158, 159, 198, 431, 1616 and the remaining extent of erf 431. For ease of reference I shall refer to these erven as "the immovable property".

[4] The applicant is the registered owner of the following erven:-

4.1 The remaining extent of Erf 431;

4.2 Erf 158;

4.3 Erf 159;

4.4 Erf 196;

4.5 Erf 431; and

4.6 Erf 386.

[5] Erf 1061 is registered in the name of the Northern Cape Provincial Government, but falls under the control of the applicant.

[6] Erf 1616 is registered in the name of Mr JP Vermaak. The Kakamas Hospital is situated on erven 431 and 161.

[7] According to the applicant, the respondents started demarcating the stands on the immovable property on 15 June 2020 and by the time that the founding affidavit was deposed to (on 23 July 2020), some of the respondents had already erected structures thereon and took occupation thereof. According to the applicant, the respondents acted without its consent and did not have other right in law to have taken occupation or erect any structures.

[8] The gists of the respondents' opposition is that they are entitled to occupy the immovable property in view of the fact that a committee 3 ward member,

Rochelle Matthys, informed community members during September 2017 that she was instructed by a ward 3 councillor, Brenda Bock, to allocate the plots. The respondents further allege that Ms Bock encouraged them to build on the property to force the applicant to provide municipal services.

[9] Mr J Harmse, on behalf of the respondents, raised two points *in limine* when the application was argued, namely that:-

9.1 Mr JB Vermaak, the owner of erf 1616, is not a party to this application and did not file a confirmatory affidavit; and

9.2 The applicant filed this application on the basis of section 4(2) of the Act, but during argument, relied on section 5(2) of the PIE Act, which he submitted the applicant is not entitled to do.

APPLICABLE LAW:-

[10] It is trite that an unlawful occupier that may be evicted in terms of the PIE Act, is defined as "*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*"¹

[11] The Act balances two interests that are in conflict, namely the ownership rights of land owners and the right of access to housing of those in occupation of premises. The touchstone for the balance is the concept of justice and equity. What is just and equitable must relate not only to those who occupy land unlawfully, but also to the owner of the land.

[12] The Act provides guidance to the courts in determining the approach to eviction now required by section 26(3) of the Constitution. Its central operative provisions are section 4, which deals with evictions sought by owners or

¹ Section 1 of PIE.

persons in charge of property, and section 6, which is concerned with eviction proceedings brought by Organs of State. Section 5 provides for urgent proceedings of eviction.

[13] Section 4(8) and 4(9) of the Act state as follows:-

- "(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 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 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."*

[14] Section 6(1) of the Act governs evictions at the instance of an organ of state and reads:-

- (1) An organ of State may institute proceedings for the eviction of an unlawful occupier from land which falls within its area of jurisdiction, except where the unlawful occupier is a mortgagor and the land in question is sold in a sale of execution pursuant to a mortgage, and the court may grant such an order if it is just and equitable to do so, after considering all the relevant circumstances, and if –*
- (a) the consent of that organ of State is required for the erection of a building or structure on that land or for the occupation of the land, and the unlawful occupier is occupying a building or structure on that land without such consent having been obtained; or*
 - (b) it is in the public interest to grant such an order.*
- (2) For the purposes of this section, "public interest" includes the interest of the health and safety of those occupying the land and the public in general.*
- (3) In deciding whether it is just and equitable to grant an order for eviction, the court must have regard to –*

- (a) *the circumstances under which the unlawful occupier occupied the land and erected the building or structure;*
- (b) *the period the unlawful occupier and his or her family have resided on the land in question; and*
- (c) *the availability to the unlawful occupier of suitable alternative accommodation or land."*

[15] The Constitutional Court dealt in detail with the considerable difference between the two provisions in section 4 and 6 of the Act in the matter of ***Port Elizabeth Municipality v Various Occupiers***² ("the Port Elizabeth judgment") where it held that:-

"Simply put, the ordinary prerequisites for the Municipality to be in a position to apply for an eviction order are that the occupation is unlawful and the structures are either unauthorised, or unhealthy or unsafe. Contrary to the pre-constitutional position, however, the mere establishment of these facts does not require the court to make an eviction order. In terms of section 6, they merely trigger the court's discretion. If they are proved, the court then may (not must) grant an eviction order if it is just and equitable to do so. In making its decision it must take account of all relevant circumstances, including the manner in which occupation was effected, its duration and the availability of suitable alternative accommodation or land."

[16] I, however, also heed the warning of the Constitutional Court in the Port Elizabeth judgment where it expanded as follows:-³

"There is nothing in section 6 to suggest that the three specifically identified circumstances are intended to be the only ones to which the court may refer in deciding what is just and equitable. They are peremptory but not exhaustive. It is clear both from the open-ended way in which they are framed and from the width of decision-making involved in the concept of what is just and equitable, that the court has a very wide mandate and must give due consideration to all circumstances that might be relevant. Thus the particular vulnerability of occupiers referred to in section 4 (the elderly, children, disabled persons and households headed by women) could constitute a relevant circumstance under section 6. Similarly, justice and equity would take account of the extent to which serious negotiations had taken place with equality of voice for all concerned. What is just and equitable could be affected by the reasonableness of offers made in connection with suitable alternative accommodation or land, the time scales proposed relative to the degree of disruption involved, and the willingness of the occupiers to respond to reasonable alternatives put before them."

² 2004 (12) BCLR 1268 (CC) at paragraph [16].

³ 2004 (12) BCLR 1268 (CC) at paragraph [30] to [31].

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. 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 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."

[17] Mr JM Rust, on behalf of the applicant, submitted that this Court should distinguish the matter *in casu* from the Port Elizabeth judgment, by virtue of the following, and that an eviction order should accordingly be granted:-

- 17.1 The respondents have not been in occupation of the immovable property for a long period. According to the applicant, the demarcation of stands only started in June 2020;
- 17.2 The respondents elected not to comment on the applicant's version in their answering affidavit, but merely took note thereof and did not place a contradicting version before Court;
- 17.3 The applicant intends to put the property to productive use, firstly as a cemetery, and secondly, the respondent is awaiting approval from COGHSTA to commence with the development of the property for residential use, which would have a negative impact on the intended developments to the benefit of the entire community;
- 17.4 The respondents have not made any attempt to engage with the applicant to discuss their circumstances and need for housing; and

- 17.5 It is questionable whether the respondents are in fact in need of housing, as no such averment has been made in any the answering affidavits.

EVALUATION OF THE EVIDENCE:-

- [18] Where a respondent fails to admit or deny an allegation made in the founding papers, or to confess and avoid such allegation, the court will, for the purpose of the application, accept the applicant's allegation as correct.⁴
- [19] On an evaluation of the affidavits exchanged, the following evidence is pertinent:-
- 19.1 It is undisputed that the applicant is the owner of the immovable property and that the immovable property registered in the name of Mr. JP Vermaak falls under the direct control of the applicant;
- 19.2 The respondents elected not to disclose their addresses in the answering affidavits. The sheriff's returns of service, however, confirm that the application was served personally on the first, third, tenth, eleventh, twentieth to twenty-third and twenty-fifth respondents at addresses other than that of the immovable property. The application was served at alternative addresses of and on family members and neighbours of the fourth, nineteenth and twenty-fifth respondents and by affixing at the residence of the second respondent, after confirming that the second respondent resides at this property;
- 19.3 There are no municipal services such as refuse removal or sanitation available on the immovable property, and the occupation thereof creates a health risk;

⁴ Moosa v Knox 1949 (3) SA 327 (N) at 331. United Methodist Church of South Africa v Sokufundumala 1989 (4) SA 1055 (O) at 1059A; Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634.

- 19.4 The respondents had not yet been in occupation of the immovable property for six months when the proceedings commenced;
- 19.5 No evidence has been placed before the Court to show that the respondents do not have alternative accommodation available to them. According to the returns of service, the respondents clearly have alternative accommodation available to them;
- 19.6 The respondents elected not to respond to the evidence by the applicant that there are no elderly or disabled people occupying the immovable property or households headed by women. No personal circumstances were in fact disclosed to assist the Court;
- 19.7 A confirmatory affidavit by Ms Matthys is attached to the answering affidavit, but no confirmatory affidavit by Ms Bock is attached.
- [20] Mr Rust submitted that, on the respondents' version, the discussion between Ms Matthys and the community members had taken place during 2017 and even if the respondents could indeed rely on the permission of a ward committee member and/or councillor, which is denied, they cannot allege that they acted thereon when the action happened almost three years later.
- [21] In terms of section 74(b) of the Local Government: Municipal Structures Act, Act 117 of 1998, a ward committee has such duties and powers as the metro or local council may delegate to it in terms of section 59 of the Local Government: Municipal Systems Act, Act No. 32 of 2000.
- [22] Accordingly, a ward committee member and/or councillor does not have the authority to allocate property to community members for residential or other purposes.

- [23] To sum up: in the light of the fact that the respondents have not lived on the land in question, that there is evidence that the municipality needs to evict the occupiers in order to put the land to some other productive use, that the respondents are not homeless and in need, I am persuaded that it is just and equitable to order the eviction of the respondents.
- [24] In view of the fact that the respondents have alternative accommodation available to them, I determine that it will be just and equitable to afford the respondents 15 (fifteen) days to vacate the immovable property.
- [25] It remains to be said that this decision in no way precludes efforts to find a solution to a situation that is manifestly unsatisfactory to all concerned. It would be in the interest of all parties if a solution through the appointment of a skilled negotiator acceptable to all sides, is appointed to mediate the process further, especially taking into consideration that the structures already erected on the immovable property are brick and mortar structures and have been erected on land earmarked for the development of an informal settlement.

COSTS:-

- [26] No submissions were made that the costs should not follow the event and I find no reason to deviate from the normal practice.

WHEREFORE THE FOLLOWING ORDERS ARE MADE:-

1. The first to the twenty sixth respondents, and all those occupying through them, shall vacate the premises situated at Kakamas, on both sides of Hofmeyer Street and Luckhoff Street, and comprising of erven 386, 106, 158, 159, 198, 161 and the remaining extent of 431 ("the property") and also remove all structures and their belongings from the property within 15 (fifteen) days from the date of this order;

2. Failing compliance with prayer 1, the sheriff of this Court is authorised and directed, with the assistance of the South African Police Service if necessary, to evict the respondents and all those occupying through them from the property within 2 (two) days after the period referred to in 1 above has lapsed;
3. The applicant is authorised to demolish the building structures on the property and to remove any and all fences and poles planted on the property within 2 (two) calendar days, or as soon thereafter as the applicant is able to do so, after the respondents and all those occupying through them have vacated or been evicted from the property (whichever is the case);
4. The respondents are interdicted from occupying and/or erecting any structures on the property after they have been vacated or have been evicted from same; and
5. The respondents, jointly and severally, the one to pay the others to be absolved, shall pay the costs of this application.



pp **STANTON AJ**
ACTING JUDGE

APPEARANCES:

For the Applicant: Advocate JM Rust
On instruction of Venters Rust Incorporated

For the 1st, 2nd, 3rd, 4th, 10th, 11th, 17th, 19th, 20th, 21st, 22nd, 23rd, 25th And 26th

Respondents: Advocate J Harmse
On instruction of Engelsman Magabane Incorporated