

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

Case No: **142/2021**

Heard: **08/10/2021**

Delivered: **29/10/2021**

Reportable: YES/NO

Circulate to Judges: YES/NO

Circulate to Magistrates: YES/NO

Circulate to Regional Magistrates: YES/NO

In the matter between:

SISHEN IRON ORE COMPANY (PTY) LIMITED

Reg no. 2000/011085/07

Applicant

and

THEMBANI CLIFFORD KHOSA

1st Respondent

THE OCCUPIERS OF [...] KARLIEN STREET

ONDERWYSPARK KATHU, ALSO KNOWN AS

ERF [...], PORTION 0, KATHU

2nd Respondent

GAMAGARA LOCAL MUNICIPALITY

3rd Respondent

JUDGMENT

Mamosebo J

[1] The relief sought by the applicant, Sishen Iron Ore Company (Pty) Limited, is an order for the eviction of the first respondent, Mr Thembani Clifford Khosa, and the second respondent comprising the occupiers of [...] Karlien Street, Onderwyserspark, Kathu, also known as Erf [...], Portion 0, Kathu, from the property, in terms of the provisions of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998 (PIE). The applicant is represented by Adv. JW Kloek while the first respondent appeared in person in opposing the application.

[2] Mr James Dougal Antony Walker, a Senior Specialist: Accommodation, in the employ of the applicant deposed to the founding affidavit on its behalf. The applicant is the owner of the residential property located in the Gamagara Local Municipality Area. As proof of ownership he attached a Windeed Report from the Deeds Office database. Though not reflecting the purchase price amount, next to purchase price the word 'agreement' appears where provision is made for the insertion of such detail.

[3] The first respondent, Mr Khosa, was an employee of the applicant. On or about 24 July 2018 they concluded a lease agreement, marked annexure "C", to lease accommodation from the applicant on certain conditions among which is paying nominal rent in the amount of R1,484.76 per month. Of relevance to this application are Clauses 4.3 and 4.4 which stipulate:

"4.3 Notwithstanding any provision to the contrary as may be contained in this agreement, it is specifically recorded that, in the event of the lessee's employment relationship with the lessor being terminated for any reason whatsoever, then in such event this lease agreement will automatically and simultaneously terminate.

4.4 Notwithstanding clause 4.3 above this lease agreement can be terminated by any of the parties by giving 1 (one) calendar month's written notice on the other party."

[4] Mr Khosa's employment was terminated by his dismissal on 17 January 2020 following disciplinary proceedings. He was charged on three counts but was found guilty on Count 2 in that his conduct amounted to: Competing/conflicting with interest of the company in running a private interest/activity so intensive that it distracted him from fulfilling his duties. This created frustration and an unsafe working environment for fellow co-workers and service providers. This also created dishonesty in his whereabouts during working hours and resulted in the breaking of trust relationships and not living the ethical value of Anglo American. Count 3 was abandoned and he was found not guilty on Count 1.

[5] A termination of service clearance form marked "D" formed part of the application. Mr Khosa referred his dismissal for arbitration to the Commission for Conciliation, Mediation and Arbitration (CCMA). On 12 August 2020 Mr Martin Rabie, the CCMA Commissioner, issued an arbitration award to this effect:

"56. The dismissal of the applicant, Themba Clifford Khosa, by the respondent, Kumba Iron Ore Company Sishen Mine, was substantively fair.

57. The applicant is not entitled to relief and his dismissal is confirmed."

[6] The applicant's attorneys, Hogan Lovells Attorneys, addressed a notice to Mr Khosa dated 23 October 2020, marked annexure "E", to vacate the property which reads in relevant part in this manner:

"Dear Sir

FINAL NOTICE TO VACATE

1. We confirm that we act on behalf of Sishen Iron Ore Company (Pty) Ltd ("our client").

2. According to our client's records you currently occupy [...] Karlien Street, Onderwyserspark, Kathu without our client's permission and/or consent.

3. We place on record that you were notified that your permission to reside in [...] Karlien Street, Onderwyserspark, Kathu was withdrawn due to termination of employment.

4. As a result of the above, you and the other occupiers of the property have no legal right/permission to reside on the property known as [...] Karlien Street, Onderwyserspark, Kathu and you as well as any other occupiers are regarded as illegal occupiers of the property known as [...] Karlien Street, Onderwyserspark, Kathu and we hereby demand that you and all other occupiers vacate the said property, known as [...] Karlien Street, Onderwyserspark, Kathu within 14 (fourteen) days after date of this letter.

5. You are hereby requested to return the keys to the Housing Department by 12 November 2020, failing which our client shall institute the necessary legal proceedings against you.

6. Should you not vacate the premises known as [...] Karlien Street, Onderwyserspark, Kathu by 12 November 2020, we will not hesitate to institute the necessary legal proceedings against you for the following:

6.1 Eviction from the property known as [...] Karlien Street, Onderwyserspark, Kathu;

6.2 Damages which may include water and electricity consumption, damage to the property and holding over charges;

6.3 Costs on an attorney and client scale.

7. Finally, all our clients' rights remain reserved.

Yours sincerely

Ansie Menezes

Senior Associate”

[7] Mr Khosa did not vacate the property as demanded. He is in arrears with the municipal services in the amount of R30,000.00 and in respect of the holding-over-charges as at 31 January 2021, the applicant had suffered damages in the amount of R97,257.00 which increased monthly.

[8] On 07 May 2021 Snyders AJ granted Part A of the application and the respondents were served with an eviction notice as required by s 4(2) of PIE. Mr Kloek, for the applicant, contends that, because the respondents are not occupiers in terms of the Extension of Security of Tenure Act, 62 of 1997 (ESTA) as the property is situated in a Municipal area and his income was above the threshold of R13,625.00, the provisions of ESTA therefore do not find application.

[9] Tshiqi AJA then, in *Randfontein Municipality v Grobler and Others* [2010] 2 All SA 40 (SCA) at para 4 made the following insightful remarks pertaining to PIE and ESTA:

“ESTA and PIE were adopted with the objective of giving effect to the values enshrined in sections 26 and 27 of the Constitution. The common objective of both statutes is to regulate the conditions and circumstances under which occupiers of land may be evicted. The main distinction that broadly speaking ESTA applies to rural land outside townships and protects the rights of occupation of persons occupying such land with consent after 4 February 1997, whilst PIE is designed to regulate eviction of occupiers who lack the requisite consent to occupy. Occupiers protected under ESTA are specifically excluded from the definition of “unlawful occupier” in “PIE”. An order for the eviction of occupiers may be granted under ESTA by a competent court on just and equitable grounds, having regard to the different considerations applicable in each instance. The Land Claims Court is a specialist tribunal established by section 22 of the Restitution of Land Rights Act 22 of 1994 and enjoys jurisdiction, subject to sections 17, 19, 20 and 22 of ESTA, to deal with cases determined under ESTA. It follows therefore that if land was occupied with consent, either express or tacit, the jurisdiction of the High Court to deal with it is excluded in the absence of its consent to its jurisdiction.”

The submission by Mr Kloek is therefore correct that ESTA is not applicable in this instance.

[10] In his answering affidavit Mr Khosa starts by maintaining that the dispute between him and the applicant is *sub judice* because he has referred the arbitration award to the Labour Court. He further states that the amount he is purportedly owing as damage has been incorrectly computed. He disputes that the deponent to the founding affidavit, Mr Walker, has personal knowledge of the matter.

[11] Mr Khosa admits that his employment has been terminated, but contends that it is premature to require of him to vacate the property while the dispute is still pending at the Labour Court. He also fails to understand the reason why the applicant approached the High Court instead of the Magistrates Court for his eviction. He further contends that there are disputes of fact in respect of the amount he owes the applicant, which would necessitate the hearing of oral evidence. He denies being an unlawful occupier. He maintains that he has every right to occupy the property and it will be just and equitable for him to have a roof over his head while preparing for the proceedings in the Labour Court to run their course. He maintains that the applicant should have ensured that the municipal services are paid while the litigation between him and the applicant remained unresolved.

[12] The main issue for decision is whether or not Mr Khosa is an unlawful occupier who stands to be evicted or not. The issues around damages and the quantum of those damages as well as the holding thereof are not pertinent or material to the outcome of this adjudication. The issue of the referral to oral evidence does not arise.

[13] The applicant's case is that although Mr Khosa's lease was terminated lawfully he is refusing to vacate the property and maintains that he is not in unlawful occupation. It bears reminding that s 26(3) of the Bill of Rights provides that '*no one may be evicted from their home without an order of court made after consideration of all the relevant circumstances.*'

[14] PIE defines an 'unlawful occupier' in s 1 to mean:

'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, excluding a person who is an occupier in terms of the Extension of Security of Tenure Act, 1997, and excluding a person whose informal right to land, but for the provisions of this Act, would be protected by the provisions of the Interim Protection of Informal Land Rights Act 31 of 1996.'

[15] When the applicant brought this application for eviction the consent of the owner had admittedly lapsed. I say so because Mr Khosa's employment was co-extensive with the occupation of the property. Therefore the notice by applicant's attorneys dated 23 October 2020 confirmed the *status quo* that he must vacate [...] Karlien Street, Onderwyserspark, Kathu, by 12 November 2020. Therefore, absent any justification, it makes him an unlawful occupier because his continued occupation is not accompanied by the consent of the owner.

[16] Mr Khosa's argument that the jurisdiction of this Court in *lieu* of his matter pending in the Labour Court was ousted by the case pending in the Labour Court is seriously flawed. The provision of the accommodation was contractual and by consent. Section 39 of the Basic Conditions of Employment Act 75 of 1997 stipulates:

"39 Employees in accommodation provided by employers

1. *If the employer of an employee who resides in accommodation that is situated on the premises of the employer or that is supplied by the employer terminates the contract of employment of that employee-*

a. *before the date on which the employer was entitled to do so in terms of s 37; or*

b. *in terms of section 38, the employer is required to provide the employee with accommodation for a period of one month, or*

if it is a longer period, until the contract of employment could lawfully have been terminated.”

[17] Evidently, Mr Khosa’s employment has been lawfully terminated since January 2020 after both the disciplinary enquiry and the CCMA arbitration processes were conducted and exhausted. Mr Khosa has not demonstrated a further right to occupy save to argue that his review application is pending at the Labour Court.

[18] In *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA) at 124 para 18, Harms JA, writing for the majority made the following pronouncements:

“[18] The court, in determining whether or not to grant an order or in determining the date on which the property has to be vacated (s4(8)), has to exercise a discretion based upon what is just and equitable. The discretion is one in the wide and not the narrow sense (cf Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd (‘Perskor’) 1992 (4) SA 791 (A) at 800, Knox D’Arcy Ltd and Others v Jamieson and Others 1996 (4) SA 348 (A) at 360G – 362G). A court of first instance, consequently, does not have a free hand to do whatever it wishes to do and a Court of appeal is not hamstrung by the traditional grounds of whether the court exercised its discretion capriciously or upon a wrong principle, or that it did not bring its unbiased judgment to bear on the question, or that it acted without substantial reasons (Ex parte Neethling and Others 1951 (4) SA 331 (A) at 335E, Administrators, Estate Richards v Nichol and Another 1999 (1) SA 551 (SCA) at 561 C – F).”

The learned Judge went on to emphasise that:

“[19] Another material consideration is that of the evidential onus. Provided the procedural requirements have been met, the owner is entitled to approach the court on the basis of ownership and the respondent’s unlawful occupation. Unless the occupier opposes and discloses circumstances relevant to the eviction order, the owner, in principle, will be entitled to an order for eviction. Relevant circumstances are nearly without fail facts within the exclusive

knowledge of the occupier and it cannot be expected of an owner to negative in advance facts not known to him and not in issue between the parties. Whether the ultimate onus will be on the owner or the occupier we need not now decide.”

[19] The relevant facts presented by Mr Khosa for consideration are the following:

19.1 That the matter is still *sub judice* at the Labour Court on review;

19.2 That he never benefited from the companies owned by his family and friend before his termination in that he was only assisting them;

19.3 It is incorrect that he was a director of any of those companies despite evidence to the contrary;

19.4 He has not had a stable income since his dismissal by the applicant. His siblings and friends have, on a casual basis, engaged him to deliver goods and services at Lohatla for which he was compensated;

19.5 He resides with two of his cousins who are employed and who subsidize him financially;

19.6 He is unmarried but has a daughter in Grade 10 who resides with her grandparents in Limpopo. His father is also not enjoying good health and dependent on him for financial and medical support;

19.7 Although in his answering affidavit no mention is made that he would be rendered homeless should the eviction be ordered, in his oral argument before me, however, he fleetingly alluded to such fate.

[20] He is not residing with his parents and child on the property. The applicant is not obliged to provide him with accommodation beyond the termination period and the 30 calendar days for the notice to vacate. The applicant has no relationship with his two cousins. In actual fact, there is no reason why the three of them cannot pool their resources, since his cousins have stable incomes, to lease accommodation elsewhere. Mr Khosa has shied away from responding to this submission made by counsel for the applicant. In any event, as a Managing Director of more than one entity, with orders and business from the Lohatla military base continuing to pour in, there is no reason why Mr Khosa would be rendered homeless.

[21] Section 4(8) of PIE provides:

“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).”

[22] The applicant has complied with the requirements of s 4(8) of PIE. Mr Khosa has, in my view, not raised any valid defence. It is inexplicable why it would not be just and equitable to grant the applicant the relief sought. There are 1360 employees of the applicant on the waiting list for accommodation.

[23] Wallis JA’s concluding remarks in *City of Johannesburg v Changing Tides 47 (Pty) Limited and Others* 2012 (6) SA 294 (SCA) at para 54 are apposite:

“[54] Infusing grace and compassion into the process of eviction does not mean that an eviction should be postponed for as long as possible, but may mean that it should take place expeditiously. If delayed the property owner bears the burden of not having access to its property whilst the authority responsible for attending to the housing needs of the persons in unlawful occupation of the premises postpones the discharge of its obligations.”

[24] On the issue of costs. The applicant contended that the eviction order sought must be granted with costs whereas Mr Khosa pleaded that due to his lack of income he will not be able to afford any costs order. He says because in so doing it will be tantamount to *“killing an animal that is already dead”*.

[25] Mr Khosa's true financial position is not known. However, I am of the view that he may be downplaying his business interests. He is certainly not indigent. The Constitutional Court in *Biowatch Trust v Registrar, Genetic Resources and Others* 2009 (6) SA 232 (CC) at 242 para 18 held:

"[18] Thus in Affordable Medicines [Affordable Medicines Trust and Others v Minister of Health and Others 2006 (3) SA 247 (CC) (2005 (6) BCLR 529; [2005] ZACC 3) at para 139] this court stated that the ability to finance the litigation was not a relevant consideration in making a costs order. It held that the general rule in constitutional litigation that an unsuccessful litigant ought not to be ordered to pay costs to the State should not be departed from simply because of a perceived ability of the unsuccessful litigant to pay. It accordingly overturned the High Court's order of costs against a relatively well-off medical practitioners' trust that had launched unsuccessful proceedings. Conversely, a party should not get a privileged status simply because it is acting in the public interest or happens to be indigent. It should be held to the same standards of conduct as any other party, particularly if it has had legal representation. This means it should not be immunised from appropriate sanctions if its conduct has been vexatious, frivolous, professionally unbecoming or in any similar way abusive of the processes of the court."

[26] Resultantly, and for the foregoing reasons, I make the following order:

1. The first respondent, Thembani Clifford Khosa, and the second respondent, the occupiers of [...] Karlien Street Onderwyserspark, Kathu, also known as Erf [...], Portion 0, Kathu, and all persons occupying through them (collectively 'the occupiers') are evicted and ordered to vacate the said immovable property together with all their belongings by 31 January 2022.

2. Should the first and second respondents or any persons occupying through them refuse or fail to vacate, together with all their belongings by 31 January 2022, the sheriff, alternatively his duly appointed deputy together with such assistance as the sheriff deems

appropriate, including the South African Police Services, is authorised and directed to enter into [...] Karlien Street, Onderwyserspark, Kathu, to evict the first and second respondents and those persons occupying through them.

3. The first respondent, Thembani Clifford Khosa, is ordered to pay the costs of this application on a party and party scale.

4. A copy of this order must be served on the first respondent by the sheriff by affixing a copy on the main door of [...] Karlien Street, Onderwyserspark, Kathu, also known as Erf [...], Portion 0, Kathu, and serving a copy on the Gamagara Local Municipality.

M.C.MAMOSEBO
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION

For the Applicant:	Adv. JW Kloek
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