

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

CASE NO: 4356/2016

(1)	REPORTABLE: <u>YES/NO</u>
(2)	OF INTEREST TO THE JUDGES: <u>YES/NO</u>
(3)	REVISED.
Signature <u>[Signature]</u>	
Date <u>27/10/2020</u>	

In the matter between:

DANIEL RUDOLPH VAN VUUREN**APPLICANT**

and

JOHANNES MARAKALALA**FIRST RESPONDENT****MAMMA MARAKALALA****SECOND RESPONDENT****ISAAC TOUWATSWALA****THREE RESPONDENT****MATOME MATAKANA****FOURTH RESPONDENT****SHIBU MATAKANE****FIFTH RESPONDENT****ALL OTHER UNLAWFUL OCCUPIERS PORTION 25
(A PORTION OF PORTION 11) OF THE FARM****ZWARTWATER NR. 123****SIXTH RESPONDENT****BLOUBERG MUNICIPALITY****SEVENTH RESPONDENT**

JUDGMENT

MAKGOBA JP

[1] This is an application in terms of section 4(7) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("the PIE Act") for an order of eviction of the 1st, 2nd, 3rd, 4th, 5th and 6th Respondents ("the Respondents") from Portion 25 of the Farm Zwartwater on the basis that the property in question belongs to the Applicant and that the Respondents have no right in law to occupy the property.

[2] On the 19 October 2020 I granted an order in favour of the Applicant and in the following terms:

1. The 1st, 2nd, 3rd, 4th, 5th and 6th Respondents and anybody occupying the Property known as PORTION 25 (A PORTION OF PORTION 11) OF THE FARM ZWARTWATER N.R. 123, REGISTRATION DIVISION M.R, LIMPOPO PROVINCE, 10,3378 HECTARES BIG ("the property") through or under them are evicted from the property;
2. Should the 1st, 2nd, 3rd, 4th, 5th and 6th Respondents and anybody occupying the property through or under them fail or refuse to vacate the property within 30 (THIRTY) days from date of service of this order, that the Sheriff is authorised to evict the 1st, 2nd, 3rd, 4th, 5th and 6th

Respondents or anybody occupying the property through or under them from the property, with the assistance of the South African Police Service, should it be necessary;

3. The 1st, 2nd, 3rd, 4th, 5th and 6th Respondents are ordered to pay the costs of this application jointly and severally, the one paying the others to be absolved, including the cost of the application under PART A of the Notice of Motion.
4. The 7th Respondent is ordered to provide the 1st to 6th Respondents with an alternative accommodation.

- [3] What follows are the reasons for the above order I granted on 19 October 2020.
- [4] It is common cause that the Applicant is the lawful and registered owner of the property known as Portion 25 (A Portion of Portion 11) of the Farm Zwartwater NR 123, Registration Division M.R Limpopo Province, district Potgietersrus ("the immovable property"). The Applicant acquired ownership of the immovable property through purchase and sale from Siyaghopa Trading 71 CC on 18 May 2015.
- [5] An eviction order was granted on unopposed basis on 25 April 2017. Subsequent to the order being granted the Respondents brought a rescission application which was granted and the eviction order was set aside.

The Respondents filed the necessary answering affidavit and after the Applicant had filed his replying affidavit the matter proceeded on opposed basis.

[6] The crux of the Respondents' opposition is that they are all residing on Portion 5 of the Farm Zwartwater, and that none of them is residing on Portion 25 of the Farm Zwartwater. In addition the Respondents content that Portion 5 belongs to the State, and not to the Applicant, and therefore the Applicant cannot evict anybody from Portion 5. Attached as Annexure "B" to the Opposing Affidavit is a Windeed search proving ownership of Portion 5. The Respondents rely on this document to show that the Applicant is not the owner of Portion 5.

[7] The Applicant does not dispute ownership of Portion 5. It is common cause that Portion 5 belongs to the State. The Applicant contents that this is irrelevant for the purpose of this eviction application. This application deals with unlawful occupiers on Portion 25 and not Portion 5.

The Applicant has attached as Annexure "B" to the Founding Affidavit a Windeed search proving his ownership of Portion 25.

- [8] The Respondents go further to state that they were given permission to occupy Portion 5 by the erstwhile caretaker of the Portion 5, the late Piet who was in charge of Portion 5 in favour of the Government before his death in 2014.

This statement by the Respondents does not take this matter any further for the fact that the Applicant sought an order to evict them from his Portion 25 and not Portion 5. It is common cause that Portion 5 belongs to the state, namely the Limpopo Provincial Government.

The Respondents allege that some of them have been residing on the property, which on their version is Portion 5, for more than 15 years while others more than 2 years.

- [9] It is clear from the Respondents' version that they cannot clearly distinguish between Portion 5 and Portion 25.

Attached as Annexure "REP5" to the Replying Affidavit is a report from the Surveyor – General. The Surveyor – General did an *inspection in loco* and surveyed the Farm Zwartwater.

The Report clearly states that Portion 5 was subdivided during 1973 to create Portion 11 and Portion 11 was further subdivided in 2014 to create Portion 25 (the immovable property of the Applicant). The report clearly indicates that the boundary of Portion 25 does not encroach on the remainder of Portion 5 which belongs to the State. In fact the two Portions (5 and 25) are not even immediate neighbours.

- [10] It is clear from the Surveyor-General's report that the Surveyor-General conducted an *inspection in loco* at the farm in the presence of the Respondents. The Respondents do not dispute the contents of the report. From the report it is abundantly clear that the Respondents are occupying Portion 25 but they wrongly refer it as Portion 5. They seem not to be aware of the subdivisions that took place during the years 1973 and 2014 which gave rise to the existence of Portion 25. The remaining Portion 5 is still in existence and belongs to the State.
- [11] In the light of the undisputed evidence before me, I make a finding that the Respondents are in fact in occupation of Portion 25, the property of the Applicant. They are under a wrong impression that where they are residing is Portion 5 whereas in actual fact they are residing on Portion 25 which belongs to the Applicant.
- Consequently, they are in unlawful occupation of the Applicant's immovable property and the Applicant is entitled to an eviction order.
- [12] The Respondents, in the opposing affidavit state that "*There is not land owner or organ of state who can reasonably make another land available for the Respondents*"

I agree with Counsel for the Applicant's submission that this argument is in direct contrast to the allegation that they reside on Portion 5, and that Portion 5 belongs to the State.

On their own version the Respondents are residing on land which belongs to the Limpopo Provincial Government. So it is clear that there is in fact land available to the Respondents which belongs to the State.

The report of the Surveyor-General is an independent proof that the Respondents are occupying Portion 25.

The remainder of Portion 5(which belong to the State) is therefore available as an alternative land for the Respondents.

- [13] The Respondents' attorney of record from the stage of rescission of the default judgment upto the setting down of this matter for hearing as an opposed application, withdrew as attorneys of record on 23 August 2019.

This application was set down for hearing on the 19th to 21st October 2020.

The matter was set down for hearing for three days on the understanding that the parties would give oral evidence at the hearing.

A Notice of Set Down for the hearing on 19th to 21st October 2020 was duly served personally on each of the Respondents on 11 August 2020.

All the Respondents failed to attend Court for the hearing on 19 October 2020.

[14] Having heard the submissions made by counsel for the Applicant and considered the Respondents answering affidavit together with the heads of argument filed by the Respondents' attorneys of record before their withdrawal, I granted the order as prayed by the Applicant.

[15] It is trite that at common law an Applicant who can show that he is the owner of an immovable property and that the Respondent is in occupation of his property is, as a matter of principle, entitled to an order of eviction unless the Respondent can show that his occupation is somehow lawful.

See **Graham v Ridley 1931 TPD 476 at 479**

The aforementioned common law position remains unchanged subject to compliance with the procedural requirements prescribed in the PIE Act.

In the present matter, it is common cause that the Applicant has complied with section 4 of the PIE Act in that on 25 October 2016 he obtained an order of Court authorizing service of the section 4(2) notice on the Respondents.

[16] The Respondents in this matter have been in unlawful occupation of the immovable property for a period of more than six months.

In that regard, the provisions of section 4 (7) of the PIE Act apply to the present proceedings.

Section 4(7) of the PIE Act provides that

“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 equitable to do so, after considering all relevant circumstance including, except where the land is sold in a pursuant to a mortgage, whether land is available by the municipality or other organ of state or another land owner for relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women”.

- [17] In the decision of the Constitutional Court in **Occupiers of Erven 87 and 88 Berea v De Wet NO and Another 2017 (8) BCLR 1015 (CC); 2017 (5) SA 346 (CC)**

Mojapelo AJ had occasion to lay down the applicable test that must be considered by the Court in eviction proceedings. The learned Justice of The Constitutional Court enunciated the test as follows:

“The Court will grant an eviction order only where

- (a) it has all the information about the occupiers to enable it to decide whether the eviction is just and equitable; and*
- (b) the Court is satisfied that the eviction is just equitable having regard to the information in (a). The two requirements are inextricable, interlinked and essential. An eviction order granted in the absence of either one of these two requirements will be arbitrary.*

I reiterate that the enquiry has nothing to do with the unlawfulness of occupation.

It assumes and is only due when the occupation is unlawful.”

[18] In the present matter, the personal circumstance of the Respondents (the occupiers) were canvassed in their answering affidavit and the independent report of the Surveyor-General. I have taken those circumstance into consideration in arriving at my decision in this matter.

[19] In exercising the discretion on the date on which the Respondents should vacate the immovable property in terms of section 4(8) of the PIE Act, I take into account the fact that the Respondents have no valid *causa* for their continued occupation.

However, I also heed the injunction in the **Berea** matter (Supra) that unlawfulness is not per se a determining factor. Accordingly, it is also significant that in the present matter the Respondents have been aware of the eviction proceedings for over a period of four years (when the Applicant instituted the present proceeding). What is more, there is undisputed evidence that Portion 5 of the immovable property in question is owned by the Limpopo Provincial Government.

Therefore, the Municipality (7th Respondent) can provide the Respondents with an alternative accommodation or place of residence.

[20] Section 26(3) of the Constitution provides that:

“No one may be evicted from their home, or have their home demolished, without an order of Court made after considering all the relevant circumstance. No legislation may permit arbitrary evictions ”

The duty that rests on the Court under section 26(3) of the Constitution and section 4 of PIE Act goes beyond the consideration of the lawfulness of the occupation. It is a consideration of justice and equity in which the Court is required to and expected to take an active role. The application of the PIE Act is not discriminatory – **Machele and Others v Mailula and Others 2010 (2) SA 257 (CC)**.

[21] In **FHP Management (Pty) Ltd v Theron NO and Another 2004 (3) SA 392 (C)** at 393C-E Van Heerden J stated:

“In terms of s 4(7) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) read with s 26(3) of the Constitution of the Republic of South Africa Act 108 of 1996, it is not necessary for an Applicant, in proceedings to evict an unlawful occupier from such Applicant’s property, to place more before the Court by way of evidence than that such Applicant is the owner of the property in question and that the Respondent is in unlawful occupation thereof. It is then up to the occupier to disclose to the Court “to show why the owner should not be granted an order for the eviction of the occupier. Unless the occupier opposes and discloses circumstances

relevant to the eviction order, the owner, in principle, will be entitled to an order for eviction.....”

In *casu* the Respondents as the occupiers, did disclose in the answering affidavit circumstances for consideration by this Court. Save for the fact that there are women and children amongst the occupiers, there is no evidence that there are the elderly and the disabled persons in occupation of Portion 25.

The distance between Portion 25 and Portion 5 is less than 2 Kilometers. Relocation from Portion 25 will not be difficult or burdensome for the occupiers, that is the Respondents in the present application.

- [22] The interests of the landowner and the unlawful occupier should be balanced and taken into consideration. In **PE Municipality v Peoples Dialogue on Land & Shelter 2000 (2) SA 1074 (SECLD) at 1081 F-G**, Horn AJ (as he then was) said:

“The use of the term just and equitable relates to both interests, that is what is just and equitable not only to the persons who had occupied the land illegally, but to the landowner as well. The term also implies that a Court, when having to decide a matter of this nature, would be obliged to break away from a purely legalistic approach and have regard to extraneous factors such as morality, fairness, social values and implications and any other circumstances which would necessitate bringing out an equitably principled judgment”.

- [23] The balance that has to be struck is one between the proprietary rights of the owner and the basic human rights of the occupier. The PIE Act creates a legal mechanism whereby the human rights of unlawful occupiers are afforded some protection in the context of the exercise by property owners of their proprietary rights. See **ABSA Bank v Murray and Another 2004 (2) SA 15 (C) at 24 F – H.**
- [24] The application of the PIE Act in eviction matters is not discretionary but rather mandatory, with the Courts expected to consider whether it is just and equitable in the circumstance to order an eviction. The Constitutional Court in its decision in **Occupiers of Erven 87 & 88 Berea v De Wet NO and Another (Supra)** reaffirmed that judicial officers have to play an active role in adjudicating eviction matters
- [25] A judicial officer in eviction proceedings is not a passive arbiter existing only to rubber-stamp the application for the eviction order. Rather the judicial officer must apply his or her independent judicial mind to the proceedings and take a proactive role to establish the relevant facts, protect human rights of those being evicted – especially if they are to be rendered homeless – and apply the delicate balance between oft-competing housing and property rights during such eviction proceedings.

[26] I am of the view that all factors determining the granting of an eviction order have been taken into consideration in the present matter. Those factors are crucial consideration which this Court applied in determining whether it is just and equitable in the circumstances to grant an eviction order.

[27] The fact of the matter is that the respondents have no defence, and there exists no legal basis for their occupation of Portion 25. The Respondents are therefore in illegal occupation and stand to be evicted.

The Applicant has made out a proper case for the eviction of the Respondents from the Applicant's property.

There is an alternative state land (Portion 5) to be allocated to the Respondent by the Blouberg Municipality.

[28] It is for all the above reasons that I granted an eviction order in favour of the Applicant on 19 October 2020.



**E M MAKGOBA
JUDGE PRESIDENT OF THE
HIGH COURT, LIMPOPO
DIVISION, POLOKWANE**

APPEARANCES

Heard on	: 19 October 2020
Order granted on	: 19 October 2020
Judgment delivered on	: 27 October 2020
For the Applicant	: Adv. J F Winnertz
Instructed by	: Borman Snyman & Barnard Attorneys c/o Niland & Pretorius Attorneys
For the Respondent	: In Default