



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, DURBAN**

CASE NO: 7333/2017

In the matter between:

DEREK OOSTHUIZEN

FIRST APPLICANT

JONATHAN MICHAEL GENEVER-STUART

SECOND APPLICANT

ANTHONY DODDS

THIRD APPLICANT

C.F.K WESTERGREEN

FOURTH APPLICANT

CELIMPILO MZULWINI

FIFTH APPLICANT

STEPHEN FRY

SIXTH APPLICANT

DENNIS PEAKE

SEVENTH APPLICANT

ANDREW COTTON

EIGHTH APPLICANT

ROBYN DUGMORE

NINTH APPLICANT

and

ETHEKWINI MUNICIPALITY

FIRST RESPONDENT

SHERIFF OF THE HIGH COURT:

DURBAN COASTAL

SECOND RESPONDENT

ORDER

1. The application is referred for the hearing of oral evidence, at a time and on a date to be allocated by the registrar, for the determination of the following questions:
 - '1.1 Whether the applicants reside at the immovable property described as Erf 11577 and Remainder of Erf 11578, Durban, and particularly the portion thereof known as the Newmarket Lodge, Jaco Jackson Drive, Durban (Newmarket Lodge);
 - 1.2 Whether the applicants derive their occupation at the aforementioned property through:
 - 1.2.1 P & D Cleaning Services CC;
 - 1.2.2 Paul Judkins.
 - 1.3 If the answers to the questions in paragraphs 1.1 and 1.2 are in the affirmative, whether the order of Moodley J of 16 December 2016 applies to the applicants and consequently whether the first respondent is entitled to execute on the order for their eviction.'
2. The evidence shall be that of any witness whom the parties, or either of them, may elect to call, subject, however to what is provided in paragraph 3 below.
3. Save in the case of any deponent to any affidavit in the application, neither party shall be entitled to call any witness unless:
 - 3.1 it has served on other parties at least fifteen (15) days before the date appointed for the hearing (in the case of a witness to be called by the applicants) and at least ten (10) days before such date (in the case of a witness to be called by the respondents), a statement wherein the evidence to be given in chief by such person is set out: or
 - 3.2 the Court, at the hearing, permits such person to be called despite the fact that no statement has been so served in respect of this evidence.
4. Any person may be subpoenaed to give evidence at the hearing, whether such person has consented to furnish a statement or not;

5. The fact that a party has served a statement in terms of paragraph 3, or has subpoenaed a witness, shall not oblige such party to call the witness concerned.
6. The provisions of rule 35, 36, 37 and 37A shall apply at the hearing of oral evidence.
7. The incident of costs incurred to date, which have not already been determined, shall be determined by the court hearing oral evidence.
8. The parties are given leave to approach the Judge President for preference.
9. Pending the finalisation of the application the first respondent undertakes not to:
 - 9.1 Instruct the second respondent to evict the applicants from the properties described as Erf 11577 and Remainder of Erf 11578 Durban, and particularly the portion thereof known as the Newmarket Lodge, Jaco Jackson Drive, Durban ("the Newmarket Lodge") in terms of the order granted by her ladyship Madam Justice Moodley on 19 December 2016 under case no. 11842/2015;
 - 9.2 Disconnect the sixth applicant's water and electricity supply account number 83601282671 Newmarket Lodge pending the determination of this application, unless such termination occurs by virtue of the sixth applicant's failure to make payment for any water and/or electricity supplied by it.

J U D G M E N T

Henriques J

Introduction

[1] The present opposed application before me originates from an order of court granted on 19 December 2016 under case number 11842/2015 by my sister Moodley J, wherein the first respondent (the municipality) sought to evict occupiers from the properties described as Erf 11577 and Remainder of Erf 11578 Durban (the properties), particularly the portion known as the Newmarket Lodge. Such consent order was between the municipality, Newmarket Lodge CC, P & D Cleaning Services CC and Paul Judkins (Judkins).

[2] The applicants instituted these proceedings on 28 June 2017 in which they sought an urgent interdict in the form of a rule nisi against the respondents preventing their eviction from the properties and disconnecting their water and electricity supply to the Newmarket Lodge pending determination of this application.

[3] The relief sought in the notice of motion, although crafted in the form of a rule nisi, is for interim relief pending the final determination of this application. The second respondent has not participated in these proceedings.

[4] The relief foreshadowed in the notice of motion is the following:

‘2 That a Rule Nisi do issue calling upon the first respondent to show cause on _____ to _____ 2017 at 09h30 in the forenoon or so soon thereafter as the matter may be heard, why an Order should not be granted in the following terms;

2.1 That the first respondent be and is hereby interdicted from evicting the applicants from the properties described as Erf 11577 and Remainder of Erf 11578 Durban, and particularly the portion thereof known as the Newmarket Lodge, Jaco Jackson Drive, Durban (“the Newmarket Lodge”) in terms of the Order granted by Her Ladyship Madam Justice Moodley on 19 December 2016 under Case No: 11842/2015;

2.2 That the first respondent be and is hereby interdicted from disconnecting the water and electricity supply to the Newmarket Lodge pending the determination

of this application, unless such termination occurs by virtue of the sixth applicant's failure to make payment for any water and/or electricity supplied by it.

2.3 That the first respondent be ordered to pay the costs of this application.

3. That the Orders set out in paragraphs 2.1 and 2.2 shall operate as interim relief pending the final determination of the application.'

[5] When the matter under case no 7333/2017 served before my brother Kruger J on 3 July 2017 a consent order was taken by the municipality and the applicants as follows:

'2. Pending the determination of this application the first respondent undertakes not to:

2.1 Instruct the second respondent to evict the applicants from the properties described as Erf 11577 and Remainder of Erf 11578 Durban, and particularly the portion thereof known as the Newmarket Lodge, Jaco Jackson Drive, Durban ("the Newmarket Lodge") in terms of the Order granted by her Ladyship Madam Justice Moodley on 19 December 2016 under Case No: 11842/2015;

2.2 Disconnect the sixth respondent's water and electricity supply, account number 83601282671 Newmarket Lodge pending the determination of this application, unless such termination occurs by virtue of the sixth applicant's failure to make payment for any water and/or electricity supplied by it.

3. Costs are reserved.'

[6] The relief sought in the notice of motion was interim relief pending the final determination of the application. However, in the applicants' heads of argument Mr *Eades* who appeared, recorded that the interdict is sought until such time as the municipality has complied with its statutory obligations in terms of s 4(2) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act¹ (PIE Act). Even though the heads of argument indicate that the applicants will seek an amendment to the papers, at the hearing of the matter no such amendment was sought

¹ 19 of 1998.

and instead Mr *Eades* handed up a draft order seeking the referral of the matter for the hearing of oral evidence. The amendment to the notice of motion is inconsequential in my view, as the reference in the notice of motion can only be a reference to the first respondent.

[7] The municipality opposed the application and the referral for the hearing of oral evidence. Ms *Mahabeer* who appeared for the municipality, indicated that the application ought to be decided on the papers. Even though the applicants raised the issue of non-compliance with the PIE Act, the municipality did not institute a counter-application for reasons that will become apparent in the course of the judgment.

Issues for determination

[8] From a reading of the application and the respective heads of argument, the following issues require determination namely:

- (a) whether or not there are disputes of fact, which ought to be referred for the hearing of oral evidence;
- (b) whether the applicants reside at the properties and occupy the properties through Newmarket Lodge CC, P & D Cleaning Services CC and/or Judkins;
- (c) whether or not the municipality is obliged to comply with the provisions of the PIE Act prior to evicting the applicants from the properties;
- (d) whether the order of 19 December 2016 applies to the applicants and the municipality is not obliged to comply with the PIE Act.
- (e) whether Judkins acted as agent for the applicants and was authorised to consent to the order of Moodley J; and
- (f) whether in respect of the fifth, sixth and seventh applicants, although they are commercial sub-tenants, the order of 19 December 2016 applies to them.

[9] The municipality submits that the applicants are disqualified from obtaining a final interdict for the following reasons namely:

- (a) the applicants have not established a clear right to an interdict;
- (b) they have an alternative remedy, which lies against Judkins, their agent, who consented to the eviction order on their behalf;
- (c) as the applicants are sub-lessees, they share no contractual nexus with municipality; and
- (d) the applicants are attempting to subvert a valid and extant order of court to frustrate the municipality's right as owner of the property.

[10] The municipality indicates that it opposes the referral for oral evidence as on the applicants version, four occupants including the fifth, sixth and seventh applicants are commercial sub-tenants and the municipality need not comply with the PIE Act. Consequently, they are subject to the eviction order and have no right to the relief sought. The municipality submits that the remaining applicants have not advanced any factual basis to support the contention that they reside on the properties. In addition, the fourth and ninth applicants took occupation of the properties after the grant of the eviction order.

[11] In addition, the municipality submits that the following common cause facts are fatal to any application by the applicants namely:

- (a) Newmarket Lodge CC initially opposed the eviction order but did not file an answering affidavit;
- (b) Judkins, at the time of the application, admitted to being in occupation of the properties and operating the business of Newmarket Lodge CC;

- (c) Judkins appeared to have been appointed as the applicants' agent as he was formally joined as a party to the eviction application and consequently consented to the eviction order;
- (d) some of the applicants derive their occupation through Newmarket Lodge CC and the remainder, on their own version, through each other.

Factual matrix

Case No. 11842/2015: Ethekewini Municipality and Newmarket Lodge CC

[12] The municipality obtained an order on 19 December 2016 under case number 11842/2015 evicting P & D Cleaning Services CC, Judkins and all persons occupying through them from the properties. The order was obtained by consent between the municipality, P & D Cleaning Services CC and Judkins and refers to the portion of the property known as Newmarket Lodge, Jaco Jackson Drive, Durban. It extends to not only P & D Cleaning Services CC and Judkins but to all persons occupying.

[13] When it obtained the order, the municipality did not comply with the provisions of, inter alia, s 4(2) of the PIE Act as the properties were regarded and are regarded as commercial and not residential properties.

[14] The municipality instituted these proceedings in November 2015 in which it sought the following relief:

‘1.

THAT the respondent and all persons occupying through it are ordered to vacate the properties described as Erf 11577 and Remainder of Erf 11578 Durban, and particularly the portion thereof known as Newmarket Lodge, Jaco Jackson Drive, Durban, and to deliver vacant possession thereof to the applicant within five (5) days of service of this order upon the respondent.

2.

THAT in the event of the respondent or any person occupying through it failing to vacate the property in accordance with prayer 1 above, the sheriff or his deputy is authorised and directed to evict the respondent, and all persons occupying through it, from the property referred to in prayer 1 and to deliver vacant possession thereof to the applicant.’

[15] In the founding affidavit the municipality as owner of the properties alleged that the respondent, a close corporation, Newmarket Lodge CC, was in occupation of a portion of the properties known as Newmarket Lodge. A diagram showing the block of land owned by the municipality and depicting the properties was annexed as “B” to the application papers. The properties were depicted running along the left hand western boundary of the block and the portion of the two properties occupied by the occupiers were outlined in bold.

[16] The municipality alleged that no agreement of lease existed between the parties and further that the occupiers had no right to occupy any portion of its property. The reason for requiring the eviction of Newmarket Lodge CC was because the municipality resolved to use the property for purposes of establishing an international sports development centre with a football academy. Such decision was published in the press and the requisite Government Gazette.

[17] Annexed to the founding affidavit was a notice dated 20 July 2015 to vacate the property and same was provided to Newmarket Lodge CC which was received on its behalf by Shane Breedts whose signature was appended to it. The notice contained the description of the property as ‘Portion of Newmarket Stables’. A confirmatory affidavit by Gregory John McFarland, the chief estates officer, real estate unit of the municipality was also annexed in which he confirmed he personally inspected the premises known as the Newmarket Lodge which was occupied by Newmarket Lodge. As Newmarket Lodge CC was a commercial occupant and not a natural person the provisions of the PIE Act did not apply.

[18] On 26 January 2016, the Newmarket Lodge CC filed a notice of intention to oppose the application, by its attorneys of record G M Parker Attorneys. In consequence of the notice of opposition the matter was removed from the unopposed motion roll for hearing on 1 February 2016 by consent. Subsequent, to the filing of the notice to oppose, the attorneys for Newmarket Lodge CC filed a notice in terms of Uniform rules 35(12) and (13) requiring the municipality to produce documents for inspection including but not limited to the Deed of Transfer and Title Deed for the properties, the written lease agreement between the municipality and the Thoroughbred

Breeders' Association and documents relating to the declaration of the property and the resolution passed by the municipality for the property to be used as an international sports development centre and football academy.

[19] The municipality filed a response to such notice on 20 April 2016 in which only those documents mentioned in the founding affidavit were supplied, including the Title Deed. Such notice was served on Stirling attorneys, being Newmarket Lodge CC's attorneys of record at the time.

[20] Paragraph (b)3 of the Title Deed is germane to that application. Paragraph (b)3 of the special conditions of sale read as follows:

"The land and the buildings to be erected thereon shall be used for industrial, manufacturing, factory, and/or business purposes, the Town Council retaining the right to approve of the particular class of business, etc., to be established on the site, with the right, however, to the owner to use the said land for the erection of stables and premises necessary for the accommodation of persons employed in connection therewith, and to use the said land for such other purpose or purposes as the Town Council may approve, and the property shall be owned and/or occupied only by a person or persons of European descent, but nothing in this condition contained shall be construed so as to prevent the residence upon and in the lot and/or buildings thereon by any Native or Natives, Asiatic or Asiatics who are the bona fide servants of the owner or occupier for the time being.'

[21] On 23 June 2016, G M Parker Attorneys served a notice of withdrawal as attorneys of record for Newmarket Lodge CC and service was effected on the respondent as being Judkins c/o Newmarket Lodge, Jaco Jackson Drive, Durban. It was received on 23 June 2016 at 14h44 by a person with the surname Brown. The last known address was provided as Newmarket Lodge, Jaco Jackson Drive, Durban.

[22] Subsequent to such notice, a notice of set down for 18 August 2016 was served and filed by the municipality and served by the sheriff on a Mrs B Brown, a manager of Newmarket Lodge CC at Jaco Jackson Drive, Durban on 12 July 2016.

[23] On 18 August 2016, Lopes J granted an order by consent between the municipality and P & D Cleaning Services CC being the second respondent and

Judkins being the third respondent which made provision for P & D Cleaning Services CC to be joined in the proceedings as a second respondent and Judkins to be joined in the proceedings as a third respondent.

[24] Paragraph 3 of such order read as follows:

‘That the prayer for relief sought in the applicant’s notice of motion be amended so that the word

“respondent” is replaced wherever it appears with the words “respondents, alternatively, first, second and/or third respondents” and that the founding affidavit in this application stand as the founding affidavit in the application for relief against the second and third respondents.’

[25] In addition, time periods were set for the second and third respondents to file answering affidavits. The first respondent was to deliver an answering affidavit or make any such interlocutory applications as it may be advised on or before 2 September 2016. The order recorded that the second and third respondents were represented by counsel and an attorney of record.

[26] A formal notice to oppose was served by the second and third respondents’ attorneys on 23 August 2016 and similarly pursuant thereto a notice in terms of rules 35(11), (12) and (13) was filed, which in the main was a repetition of the previous notice filed by G M Parker Attorneys.

[27] A similar response was filed by the municipality as per the previous request. Of relevance to the application was a request by the second and third respondents’ for a copy of a long-term tenancy agreement between the municipality and the Thoroughbred Breeders’ Association of South Africa. At that stage Newmarket Lodge CC was represented by Stirling Attorneys of Glenwood.

[28] In response to such request, the municipality responded in its notice dated 28 November 2016 as follows:

‘1. No reference is made in the founding affidavit to any of the documents the respondents have claimed production of, nor has the applicant made discovery of or given notice that

it intends to use any tape recording or minute, and Rule 35(11), (12) or (13) do not oblige or entitle the respondents to their production.

2. The applicant denies the existence of any long-term tenancy agreement between it and the Thoroughbred Breeders' Association of South Africa or any tripartite agreement between it, the KZN Provincial Government and the Liverpool Football Club, and denies that any of the respondents were parties to any contemplated or inchoate agreements, but without admission of liability annexed is a copy of a short-term tenancy agreement between itself and the Thoroughbred Breeders' Association of South Africa, which terminated on 28 February 2006.'

[29] Having regard to the notices filed, sometime early in December 2016 it appears that Stirling Attorneys were no longer on record for Newmarket Lodge CC and notices were served by the sheriff directly on Newmarket Lodge CC. Pursuant to the notice of set down, the matter was removed from the opposed motion roll for 21 February 2017, such notice recording that the matter had become settled between the parties. Presumably, it was for this reason that on 19 December 2016 an order was taken by consent between the municipality and the second and third respondents being P & D Cleaning Services CC and Judkins in terms of which the second and third respondents and all persons occupying by and through them were ordered to vacate the properties and in particular the portion thereof known as Newmarket Lodge, Jaco Jackson Drive, Durban.

The present application: Case No. 7333/17

[30] On 3 July 2017, the applicants obtained a consent order before Kruger J on an urgent basis.

[31] Prior to the institution of the application, the applicants indicated that they first became aware of the order of 19 December 2016, when contacted by the second respondent who indicated they were looking for Judkins to execute an eviction order.

[32] The first applicant obtained the application papers and the order and handed it to Colyn Townsend attorneys who responded thereto. The correspondence exchanged

between the applicants' attorneys Colyn Townsend² records the applicants for whom he acts and indicates that some of the applicants occupy the premises known as Newmarket Lodge as residences and some occupy the Newmarket Lodge as their businesses.

[33] The letter further records that the applicants do not occupy the premises through P & D Cleaning Services CC or Judkins and consequently are not affected by the order of eviction obtained on 19 December 2016. The correspondence further records that on 22 July 2015, the attorney acting for Newmarket Lodge CC wrote to the office of the city manager informing him that Newmarket Lodge CC was not in occupation of the premises and that notice had to be served on the occupiers of Newmarket Stables (referring to Newmarket Lodge) personally.

[34] The attorneys for the applicants also recorded that Judkins who opposed the application on behalf of Newmarket Lodge CC and provided instructions to attorney Graham Parker, was not authorised to instruct him on their behalf. The reasons why that was so was not set out in the correspondence. The letter also recorded that the applicants occupied the premises without the express or tacit consent of the municipality and consequently the applicants were illegal occupiers or unlawful occupiers.

[35] Correspondence was exchanged between the municipality and the applicants' attorneys of record in which an undertaking was sought that the eviction would not take place pursuant to Moodley J's order of 19 December 2016 without 14 days' notice to the applicants' attorneys of record. The municipality in response indicated that it was of the view that the order extended to the applicants and no 14-day notice period would be provided prior to evicting the applicants. Presumably, it was for this reason that the urgent application was instituted.

[36] The undertaking was extended on various occasions until the matter served on the opposed motion roll. Save for the fourth and ninth applicants, the remainder of the applicants allege that they have resided at various units of the Newmarket Lodge prior

² Annexure "E" page 39 of the indexed papers, a letter dated 3 March 2017.

to the order of 19 December 2016. The sixth and seventh applicants trade from the premises and it appears that the remainder of the applicants are 'residents' of the various units of the Newmarket Lodge.

[37] The factual matrix relied on by the applicants in the founding affidavit can be summarised as follows:

- (a) the applicants admit that the municipality is the owner of the property on which Newmarket Lodge is situated and such property was originally leased to the Thoroughbred Breeders' Association and thereafter sub-let to various entities;
- (b) Newmarket Lodge CC obtained a sub-lease from the Thoroughbred Breeders' Association and operated a block of commercial properties from which various enterprises operated. These entities changed from time to time and some of the units then became occupied for residential purposes;
- (c) the lease between the municipality and the Thoroughbred Breeders' Association terminated on 28 February 2006 but Newmarket Lodge CC continued to lease the units to the various tenants, both commercial and residential tenants who occupied through the close corporation;
- (d) on 19 December 2013, the sole member of the close corporation Clifford Byrom died and the close corporation ceased any involvement in and its occupation of the Newmarket Lodge. After the death of the deceased, the tenants and subsequent tenants continued their tenancy of the units at the Newmarket Lodge although there was no formal structure through whom the applicants' derived their tenancy and the tenants made decisions jointly regarding the Newmarket Lodge and would jointly decide if a new tenant could move into the Newmarket Lodge;
- (e) there is no lease between the applicants and the municipality;
- (f) the applicants had appointed Judkins to represent them in negotiating a lease with the municipality, but these negotiations were unsuccessful;

- (g) on 20 July 2015 the municipality posted a letter to the close corporation being Newmarket Lodge CC giving it one-month calendar notice to vacate the Newmarket Lodge. Such letter was delivered to Shane Breedts, the son-in-law of the deceased who instructed the applicants' present attorney to respond and advise the municipality that Newmarket Lodge CC was no longer in occupation of the premises;
- (h) the municipality instituted eviction proceedings against Newmarket Lodge notwithstanding such letter and sought subsequently in the eviction application an order evicting Newmarket Lodge CC and all persons occupying the premises through it. Such application was not brought in terms of the PIE Act;
- (i) the eviction application was opposed by Newmarket Lodge CC and the eviction application was enrolled on the unopposed motion court roll on 18 August 2016 when a consent order was taken;
- (j) although Judkins was appointed to negotiate a new lease with the municipality he was not authorised to represent any of the applicants in the application;
- (k) the applicants submit that they did not derive their occupation of Newmarket Lodge through either P & D Cleaning Services CC or Judkins and neither were any of these parties authorised to consent to the eviction order;
- (l) the first, second, third, sixth and seventh applicants occupy the premises through Newmarket Lodge CC and the remaining applicants occupied it with the consent of the remaining tenants at the Newmarket Lodge at the time; and
- (m) none of the applicants were consulted prior to the eviction order being taken and even if Judkins had authority to represent them he had no mandate to consent to the eviction order.

[38] According to the applicants they first became aware of the eviction order when the sixth applicant was contacted telephonically by the second respondent being the

sheriff's office indicating that they were attempting to locate Judkins to serve an eviction order. The sheriff was advised that Judkins had vacated the property and subsequently the applicants obtained copies of the application papers. As a consequence, correspondence was addressed to the municipality's attorneys dated 3 March 2017 in which the applicants indicated that some of the applicants occupied the premises known as the Newmarket Lodge as their residences and some occupy as their businesses.

[39] Correspondence was exchanged between the applicants' attorneys and the municipality's attorneys in relation to identifying who the occupants of the property were. The applicants' attorneys took the view that the occupants did not obtain occupation of the premises through Newmarket Lodge CC nor through Judkins or P & D Cleaning Services and consequently did not have notice of the application for eviction. This was in addition to the fact that the provisions of the PIE Act were not complied with.

[40] The applicants maintain that they have not had notice of the intended eviction application nor has there been compliance with the provisions of the PIE Act. In addition, they were not joined in the proceedings in which the eviction order was granted despite the fact that the municipality knew that the close corporation was not in occupation of Newmarket Lodge.

The Answering Affidavit

[41] The municipality in opposition to the application, indicates that it has no knowledge of the history of the applicants' occupation of the properties and submits that they have avoided identifying where precisely on the properties they are in occupation. In addition, it submits that the applicants' occupation is connected to commercial activities which they are undertaking on the property alternatively is through the commercial operations of a lodge. The municipality consequently disputes the applicants occupation is on the subject property, any part thereof and that their occupation qualifies as 'primary residential'.

[42] The municipality takes issue with the fact that after having delivered a notice to oppose the eviction application and having full knowledge of the eviction proceedings

the applicants launched the present application as a separate matter. This, it is submitted, is intended to confuse and obfuscate the issues.

[43] In summary the municipality opposes the application on the following grounds:

- (a) the applicants are sub-lessees of a party or parties against whom the municipality obtained an eviction order;
- (b) the eviction order was obtained as such parties were commercial tenants, clearly identified and who came forward in the proceedings and consequently the provisions of PIE Act do not apply; and
- (c) the applicants have no right to occupy the properties and therefore cannot obtain an interdict as they do not have a clear right.

[44] In the eviction proceedings which the municipality instituted against Newmarket Lodge CC in November 2015, on 4 August 2016 by Attorneys T Giyapersad Inc indicated in correspondence that one Judkins was in occupation of the property and that his close corporation P & D Cleaning Services CC operated on the premises and ran the lodge which had both business and everyday lodgers.

[45] As a consequence thereof these two parties were joined to the proceedings. It was not disputed in the eviction application that no agreement of lease existed between the municipality and those respondents and that Newmarket Lodge was no longer active and consequently those respondents did not have a right to occupy any portion of the property. It was for this reason presumably that in the eviction application those respondents consented to the order of eviction.

[46] The municipality submits that on their own version, as sub-lessees, the applicants' relief lies against the lessors namely, Newmarket Lodge CC together with P & D Cleaning Services CC and Judkins. Judkins, P & D Cleaning Services as well as Newmarket Lodge CC admitted they were in unlawful commercial occupation of the municipality's premises. As a consequence, the applicants have no locus standi to institute this application.

[47] The municipality indicates that apart from being the lawful owner of the property it is suffering untold prejudice as it is deprived of the lawful use and enjoyment of the property more so the use and enjoyment of the property is in the public interest as it resolved to use the property for purposes of establishing an international sports development centre with a football academy.

[48] The applicants have an alternative remedy for damages against Judkins, his close corporation, P & D Cleaning Services CC and / or Newmarket Lodge CC. In addition, the municipality submits that the applicants could and should have intervened in the eviction matter as they had knowledge of same and it was also publicised in the media. Having regard to the contents of annexure "E" which is annexed to the founding affidavit their attorney had always been aware of the municipality's intentions in respect of the property and written to the municipal manager on the applicants' behalf. It is for these reasons it submits, the applicants are deliberately seeking to frustrate the execution of the eviction order by waiting until after the grant of the eviction order.

Analysis

[49] It is against this factual background as evidenced in the two applications, that the issues must be determined. The crux of the matter is when, how and through whom the applicants came to occupy the properties. Having regard to the factual background referred to hereinbefore, the following is clear.

[50] The municipality is the owner of the immovable property upon which Newmarket Lodge and Newmarket Lodge CC are to be found. The property was initially leased by the municipality to the Thoroughbred Breeders' Association from whom Newmarket Lodge CC obtained a sub-lease. When the lease between the municipality and the Thoroughbred Breeders' Association terminated on 28 February 2006, so too did the sub-lease with Newmarket Lodge CC terminate. What is not evident from the affidavits filed is whether Newmarket Lodge CC, Newmarket Lodge and New Market Stables is one and the same entity.

[51] After the death of the sole member of Newmarket Lodge CC, certain tenants continued with their tenancy of the units and jointly made decisions as to whom could

occupy the premises. Because the situation was becoming untenable, the applicants appointed Judkins to represent them in negotiating a lease with the municipality. What is clear is that the sub-lease which Newmarket Lodge CC had concluded related to a block of commercial properties from which various enterprises operated. Annexure “B” which is the diagram of the properties in respect of which the eviction order was granted reflects those portions of land occupied by the applicants.³

[52] In the founding affidavit there is a concession from certain of the applicants and from the documents annexed by the applicants’ attorneys as to who the occupants were and the period from which they occupied the premises.⁴ The applicants indicate that Newmarket Lodge CC, after the termination of the lease between the municipality and the Thoroughbred Breeders’ Association, continued to lease the units to various tenants both commercial and residential which tenants occupy through Newmarket Lodge CC.

[53] In addition, the applicants aver that after Newmarket Lodge CC ceased to exist, further tenants obtained occupation through existing tenants. The draft order prayed handed up by counsel on 8 November 2018 requests that the matter be referred for the hearing of oral evidence to determine whether the applicants reside at the immovable property described as Erf 11577 and Remainder of Erf 11578 Durban, particularly the portion known as Newmarket Lodge and whether the applicants derive their occupation through P & D Cleaning Services CC and Judkins.

[54] I entertain strong suspicions that Newmarket Lodge CC and Newmarket Lodge is one and the same entity and that Newmarket Lodge merely refers to the business and operations done by Newmarket Lodge CC being the close corporation.

[55] The applicants concede that even after the death of the sole member of the CC the tenants continued their tenancy of the units at Newmarket Lodge. There is thus a strong suspicion that despite the averments made in the founding affidavits the applicants obtained their occupation of Newmarket Lodge through Newmarket Lodge CC who despite the termination of the lease continued to lease the units to tenants. In

³ Annexure “B” page 13 of the application papers in case no 11842/2015.

⁴ Annexure “G” pages 43 and 44 of the indexed papers.

addition, the applicants indicate that after Newmarket Lodge CC ceased to exist, new tenants obtained occupation through existing tenants.

[56] At the hearing of the matter, I pertinently raised with Mr *Eades* the issue of how and through whom the applicants came to be in occupation of the property. He did not provide a direct answer to this question although it was repeated and he responded by referring me to portions of the affidavits and reiterated that the applicants were in de facto occupation of the premises.

[57] Mr *Eades*, was constrained to concede that the applicants do not specify from whom they derive their occupation. What he stressed was the fact that the applicants are in de facto occupation of the area known as Newmarket Lodge and why else would they appoint Judkins to represent them in negotiating a lease with the municipality

[58] The applicants are being disingenuous, in my view, in saying that they do not know what became of the negotiations. It is rather convenient for them to say Judkins was only authorised to negotiate an extension of the lease and that is where his mandate ended.

[59] Although I suspect that they derived their occupation from Judkins and appointed Judkins to act as their agent in negotiating a lease with the municipality and accordingly they ought to be estopped from denying he had no authority to act on their behalf when consenting to the order, the papers simply do not go that far for this court to make that conclusion as a matter of fact.

[60] A further issue taken by the applicants is the fact that there was non-compliance with the PIE Act. On their version, the applicants obtained occupation of the premises through Newmarket Lodge CC and thereafter they occupied at the behest of Judkins. Certain of the applicants on their own admission are commercial occupants and some of them occupied the premises post the order of 19 December 2016 and more importantly could not in my view, have obtained occupation of the premises through existing tenants.

[61] It is also extremely ironic of the applicants' attorney of record (Colyn Townsend) who indicated that he previously acted for Newmarket Lodge CC to now say that Judkins had no authority to instruct Graham Parker. He would know the basis upon which the applicants obtained their occupation and consequently in my view his bona fides in acting for them under these circumstances certainly raises questions.

[62] Be that as it may, although I am of the view that there is also no merit in the submission of the applicants that the municipality was required to obtain an order as against Newmarket Lodge CC such finding cannot be made conclusively on the papers before me. Similarly, I suspect that the entity which ran Newmarket Lodge was Newmarket Lodge CC. The member of Newmarket Lodge CC was deceased and on the applicants own version they did not continue to operate the Newmarket Lodge. This Judkins did. Consequently, he would have been quite entitled to agree to the order for the eviction of P & D Cleaning Services CC and himself. There would have been no need for the municipality to obtain an order as against Newmarket Lodge CC as same was not in occupation of the property.

[63] The applicants confirm that they instructed Judkins to negotiate the new lease with the municipality. However, they go no further in explaining what became of those negotiations. It can be safely accepted in the circumstances that these negotiations were unsuccessful and no lease agreement was concluded between the applicants and the municipality. The applicants' reliance on the PIE Act to defeat the court order is in my view ingenious and has bought them time to remain in further occupation of the premises.

[64] It must be borne in mind that according to the applicants they are sub-lessees though they do not disclose exactly how and in what circumstances they came to be in occupation of the municipality's property. This is the crux of the issue to determine namely, whether they are bound by the order of Moodley J.

[65] I am of the view they are not being entirely honest with the court as to when they also became aware of Moodley J's order and it could not only have been in March 2017. They elect not to disclose exactly when they became aware of the court order.

However, on 3 March 2017 the letter from their attorneys to the municipality appears to be the first time they allege that the consent order is not binding on them.

[66] It is common cause that the municipality seeks to evict the applicants from the properties in terms of the consent order taken before Moodley J. Such order on the face of it related to Newmarket Lodge CC, P & D Cleaning Services CC and Judkins, with the applicants submitting that they were not parties to such consent order.

[67] It is common cause that at the time such consent order was taken, the municipality did not comply with the provisions of the PIE Act . The reason for this is obvious - given that the property was a commercial property there would not be any need to comply with the Act. The applicants submit that the *de facto* position is that they presently reside at the properties and seek to interdict the municipality from evicting them in terms of the consent order until such time as it has complied with its statutory obligations, namely s 4(2) of the Act.

[68] The provisions of the PIE Act are peremptory and the landowner is required to comply with the provisions of such Act specifically s 4(2) in circumstances where occupiers reside at the property in question.⁵ Mr *Eades* is quite correct in his submission that if the applicants can show that they reside at the immovable property and/or did not derive their occupation through any of the parties to the consent order, the municipality ought not to be allowed to evict them without a court order.

[69] The municipality disputes that the applicants reside at the properties and indirectly submits that the applicants derive their occupation through the parties to the consent order. In addition, the municipality submits that the eviction order was consented to by a party who at the time purported to represent the applicants, but whom the applicants now indicate had no authority to do so.

[70] In addition, the municipality contends that the applicants are disqualified from obtaining a final interdict as they have established no clear right to an interdict⁶ in that

⁵ *Cape Killarney Property Investments (Pty) Ltd v Mahamba & others* 2001 (4) SA 1222 (SCA) para 11.

⁶ As envisaged in *Setlegelo v Setlegelo* 1914 AD 221 at 227.

they have an alternative remedy against Judkins, their agent, who consented to the eviction order on their behalf.

[71] The municipality further contends that the applicants are sub-lessees who share no contractual nexus with the municipality and that this application is an attempt to subvert a valid court order aimed at frustrating the municipality's rights as owner of the property.

[72] What then is the appropriate order given the prevailing circumstances? Uniform rule 6(5)(g) reads as follows:

'Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the foregoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for such deponent or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise.'

[73] This sub-rule sets out three options which a court can follow, namely, to dismiss the application, to refer the matter for the hearing of oral evidence and to refer the matter to trial. In *Erasmus Superior Court Practice*⁷ the authors take the view that oral evidence in terms of the sub-rule should be allowed if there are reasonable grounds for doubting the correctness of the applicants' allegations. The court must decide if the alleged dispute of fact cannot be satisfactorily determined without hearing oral evidence.

[74] In deciding to refer a matter for the hearing of oral evidence a court has a wide discretion.⁸ The authors also opine that a court must take 'a robust, common-sense approach' to a dispute in motion court proceedings and not hesitate to decide an issue on affidavit merely because it may be difficult to do so.⁹ This approach must, however, be adopted with caution and the court should not be tempted to settle disputes of fact

⁷ *Erasmus Superior Court Practice* at RS 9, 2019, D1-72.

⁸ *Lombaard v Droprop CC* 2010 (5) SA 1 (SCA) at 10A-D.

⁹ *Erasmus Superior Court Practice* at RS 7, 2018, D1-74.

solely on the probabilities emerging from the affidavits without giving due consideration to the advantages of viva voce evidence.

[75] In *Minister of Environmental Affairs and Tourism & another v Scenematic Fourteen (Pty) Ltd*¹⁰ Scott JA at para 29 cited with approval the decisions in *Khumalo v Director-General of Co-operation and Development & others* and *Moosa Bros & Sons (Pty) Ltd v Rajah* regarding the approach to be adopted in applications to hear oral evidence in terms of rule 6(5)(g). The court held the following:

‘In *Khumalo v Director-General of Co-operation and Development and Others* 1991 (1) SA 158 (A) at 167G – 168A the Court cited with approval the conclusions of Kumleben J in *Moosa Bros & Sons (Pty) Ltd v Rajah* 1975 (4) SA 87 (D) at 93E – H regarding the approach to be adopted in applications to hear oral evidence in terms of Rule 6(5)(g). The passage is worthy of repetition:

- “(a) As a matter of interpretation, there is nothing in the language of Rule 6(5)(g) which restricts the discretionary power of the Court to order the cross-examination of a deponent to cases in which a dispute of fact is shown to exist.
- (b) The illustrations of “genuine” disputes of fact given in the *Room Hire* case at 1163 do not – and did not purport to – set out the circumstances in which *cross-examination* under the relevant Transvaal Rule of Court could be authorised. They *a fortiori* do not determine the circumstances in which such relief should be granted in terms of the present Rule 6(5)(g).
- (c) Without attempting to lay down any precise rule, which may have the effect of limiting the wide discretion implicit in this Rule, in my view oral evidence in one or other form envisaged by the Rule should be allowed if there are reasonable grounds for doubting the correctness of the allegations concerned.
- (d) In reaching a decision in this regard, facts peculiarly within the knowledge of an applicant, which for that reason cannot be directly contradicted or refuted by the opposite party, are to be carefully scrutinised.”

[76] The authors of *Erasmus* further state that if there is a factual dispute the function of the court is to select the most suitable method of employing vive voce evidence for

¹⁰ *Minister of Environmental Affairs and Tourism & another v Scenematic Fourteen (Pty) Ltd* 2005 (6) SA 182 (SCA).

the determination of the dispute.¹¹ Here reference is made to *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*¹² and *Standard Bank of SA Ltd v Neugarten*.¹³

[77] I have strong suspicions that the applicants obtained their occupancy from the Newmarket Lodge CC and Judkins. However, given the manner in which the affidavits have been filed, suspicions are not enough to decide this matter. It is a matter in which only a court hearing oral evidence can make that determination. Once the applicants testify they can indicate how and when and through whom they came into occupation of the premises. In addition, the hearing of oral evidence will resolve exactly where on the properties the applicants reside.

[78] In respect of those applicants who indicate that they are commercial occupants, no notice need be given in terms of the PIE Act. However, a problem which arises is that one does not know through whom and how they came to be in occupation of the premises especially as they deny such occupation was derived from Newmarket Lodge CC, Judkins and P & D Cleaning Services. Therefore, in relation to them, although the municipality is in possession of a court order, one cannot determine without the hearing of oral evidence through whom they derive their occupation and whether Moodley J's order applies to them.

Costs

[79] Given that the matter is being referred for the hearing of oral evidence it is appropriate that such court determine the aspect of costs.

Conclusion

[80] For record purposes it is necessary to record that the municipality filed an application for condonation in respect of the late delivery of its heads of arguments. This was a precautionary measure taken by the municipality to enable it to record its apology to the court and explain the reasons for delay. As the respective parties counsel had communicated with each other, and the applicants indicated they had no

¹¹ *Erasmus Superior Court Practice* at RS 5, 2017, D1-77.

¹² *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1162.

¹³ *Standard Bank of SA Ltd v Neugarten* 1987 (3) SA 695 (W) at 699D.

objection to the late delivery of the municipality's heads of argument and did not require a formal application to be brought, nothing further need be said in this regard.

[81] In the result the following orders will issue:

1. The application is referred for the hearing of oral evidence, at a time and on a date to be allocated by the registrar, for the determination of the following questions:
 - '1.1 Whether the applicants reside at the immovable property described as Erf 11577 and Remainder of Erf 11578, Durban, and particularly the portion thereof known as the Newmarket Lodge, Jaco Jackson Drive, Durban (Newmarket Lodge);
 - 1.2 Whether the applicants derive their occupation at the aforementioned property through:
 - 1.2.1 P & D Cleaning Services CC;
 - 1.2.2 Paul Judkins.
 - 1.3 If the answers to the questions in paragraphs 1.1 and 1.2 are in the affirmative, whether the order of Moodley J of 16 December 2016 applies to the applicants and consequently whether the first respondent is entitled to execute on the order for their eviction.'
2. The evidence shall be that of any witness whom the parties, or either of them, may elect to call, subject, however to what is provided in paragraph 3 below.
3. Save in the case of any deponent to any affidavit in the application, neither party shall be entitled to call any witness unless:
 - 3.1 it has served on other parties at least fifteen (15) days before the date appointed for the hearing (in the case of a witness to be called by the applicants) and at least ten (10) days before such date (in the case of a witness to be called by the respondents), a statement

wherein the evidence to be given in chief by such person is set out:
or

3.2 the Court, at the hearing, permits such person to be called despite the fact that no statement has been so served in respect of this evidence.

4. Any person may be subpoenaed to give evidence at the hearing, whether such person has consented to furnish a statement or not;
5. The fact that a party has served a statement in terms of paragraph 3, or has subpoenaed a witness, shall not oblige such party to call the witness concerned.
6. The provisions of rule 35, 36, 37 and 37A shall apply at the hearing of oral evidence.
7. The incident of costs incurred to date, which have not already been determined, shall be determined by the court hearing oral evidence.
8. The parties are given leave to approach the Judge President for preference.
9. Pending the finalisation of the application the first respondent undertakes not to:
 - 9.1 Instruct the second respondent to evict the applicants from the properties described as Erf 11577 and Remainder of Erf 11578 Durban, and particularly the portion thereof known as the Newmarket Lodge, Jaco Jackson Drive, Durban ("the Newmarket Lodge") in terms of the order granted by her ladyship Madam Justice Moodley on 19 December 2016 under case no. 11842/2015;

- 9.2 Disconnect the sixth applicant's water and electricity supply account number 83601282671 Newmarket Lodge pending the determination of this application, unless such termination occurs by virtue of the sixth applicant's failure to make payment for any water and/or electricity supplied by it.

Henriques J

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Date of Hearing	:	8 November 2018
Date of Judgment	:	18 November 2019