



**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

*Not reportable
Not of interest to other Judges*

CASE NO: A582/2016

SIMON PHETLA

First Appellant

SOPHIE MOGOLA

Second Appellant

**OCCUPIERS OF THE REMAINING EXTENT OF
PORTION 28 OF THE FARM WINDHOEK 222
REGISTRATION DIVISION
J.R. MPUMALANGA**

Third Appellant

and

WESLEY TENDAUPENJU N.O.

First Respondent

ROBERTO JORGE MENDONGA VELOSA N.O.

Second Respondent

EMAKHAZENI LOCAL MUNICIPALITY

Third Respondent

Heard: 8 February 2017

Delivered: 26 April 2017

Coram: Prinsloo, Makgoka and Molefe JJ

Judgment: Makgoka J (unanimous)

Summary: Practice and procedure – previous court order placing the appellants on terms to file their answering affidavits – appellants failing to comply with the time-frames set out in the court order – the appellants not barred in perpetuity from filing their answering affidavits under those circumstances – court not precluded from receiving such affidavits with a possible adjournment and a suitable costs order.

Eviction – s 4(7) of the Prevention of Unlawful Eviction and Illegal Occupation Act 19 of 1998 enjoins the court to make a just and equitable order, irrespective of whether application for eviction is unopposed. To make a just and equitable order, the court must consider all relevant facts.

Jurisdiction – exclusive jurisdiction of the Land Claims Court – Land Reform Act and Extension of Security of Tenure Act 62 of 1997.

Costs – attorney-and client – proper approach restated.

ORDER

On appeal against the judgment of Basson J (sitting as a court of first instance):

1. The appeal is upheld with costs, to be paid by the first and second respondents, jointly and severally, the one paying the other to be absolved;
2. The order of the court a quo of 2 February 2016 is set aside and the following is substituted for it:
 1. The application is postponed sine die;

2. The appellants (the respondents in the main application) are ordered to file their answering affidavits (if any), accompanied by a condonation application, if so advised, for the late filing of their answering affidavits, within 15 days of the date of this order;
3. The respondents (the applicants in the main application) are ordered to file their replying affidavits to the appellants' answering affidavits (if any), together with their answering affidavit to the condonation application referred to in paragraph 2 (if any), within 10 days of receipt of the affidavits referred to above;
4. The costs are reserved for determination by the court hearing the main application.

J U D G M E N T

MAKGOKA, J

[1] This appeal, with leave of the court a quo, is against the whole of the order of a single judge of this Division made on 2 February 2016. In terms of that order, the first, second and third appellants (the appellants) were evicted from a segment of immovable property known as the Remaining Extent of Portion 28 of the Farm Windhoek 222, Registration Division JS, Mpumalanga (the farm). The appellants were ordered to vacate the farm within 30 days of the granting of the order.

[2] Ancillary to the order of eviction, the sheriff was directed to evict the appellants together with their livestock, and to demolish the structures erected by the appellants on the farm. The order also contained an interdict in terms of which the appellants were prohibited from entering, or placing their livestock on, the farm or contacting any potential purchaser of the farm. The appellants were further ordered to pay the respondents' costs, jointly and severally, the one

paying the others to be absolved. Such costs, including the costs occasioned by a previous postponement of the matter, were ordered to be paid on a punitive scale of attorney-and-client.

[3] Before us, Mr *Slabbert* appeared on behalf the appellants, while the respondents were represented by Mr *Güldenpfennig* SC.

The parties

[4] The first appellant (Mr Phetla) and the second appellant (Ms Mogola) are said to have erected dwelling structures on the farm. The third appellant was cited in the application as ‘Unknown Unlawful Occupiers’ of the farm. It is alleged that the appellants have all erected dwelling structures on the farm and have their livestock on the farm. The first and second respondents (the respondents) are the trustees of the Makonde Property Trust (the trust), which is the registered owner of the farm. The third respondent, the Emakhazeni Local Municipality (the municipality) was cited as a respondent because the farm from which the appellants were evicted, is situated in the geographic area governed by it, and as such, could in suitable circumstances be required to provide the appellants with alternative accommodation if their eviction results in them being homeless.¹ The municipality has never taken part in the litigation, neither in the court a quo nor in this appeal.

The background facts

[5] The background facts are these. The respondents launched an application in this court on 1 October 2015 seeking an order for the eviction of the appellants from the farm, together with ancillary relief. The application was

¹ This is on the authority of *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC) paras 44 and 45.

launched in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE). To place the appeal in its proper the context, it is necessary to briefly state the respondents' case in that application. The founding affidavit was deposed to by the first respondent, in which the following averments were made: When the trust purchased the farm in 2006, the late father of Mr Phetla, Mr MP Phetla (Mr Phetla Snr) was already residing on the farm, and had a house there. He was either married to Ms Mogola, the second respondent, or they were life partners. He had some livestock and personal belongings on the farm. Mr Phetla (the first appellant) was employed on a neighbouring farm and residing there. During February 2007 there was an agreement between the first respondent, Mr Phetla Snr, and Mr Phetla that the father would continue to live on the farm for the rest of his life. He died in November 2011.

[6] After Mr Phetla Snr's death in November 2011 the first respondent requested Mr Phetla and Ms Mogola to remove Mr Phetla Snr's belongings from the farm, including his livestock. The request was not adhered to. Instead, more livestock was brought onto the farm, allegedly on the authority of Ms Mogola's sister, who claimed that the farm belonged to Mr Phetla Snr and Ms Mogola, and that she was entitled to lease out grazing rights to various people. The result was that more animals were grazing the land. As regards the father's house, it had been abandoned since his death and was derelict. However, since April 2015 there is an unidentified individual permanently residing on the farm in newly-built structures. Mr Phetla, Ms Mogola and the unidentified person have built structures on the farm.

[7] During 2015 the trust wished to sell the farm. A prospective purchaser concluded an agreement of sale with the respondents, and delivered the

guarantees for the purchase price. Mr Phetla approached the prospective purchaser and indicated to him that he had launched a land claim in respect of the farm. As a result, the prospective purchaser was not interested in the property anymore and cancelled the sale agreement. According to the respondents, Mr Phetla Snr's right to live on the farm terminated when he died, hence the relief sought against the appellants.

The litigation history

[8] On 11 November 2015 an order was granted in this court in terms of s 4(2) read with s 4(5) of PIE giving directions for service of the respondents' application to evict the appellants. It is common cause that the appellants were all properly served with the s 4(2) order on 27 November 2015. The notice of motion in the main application stated that should the appellants fail to deliver their notice of intention to oppose, the application would be heard on 14 December 2015. The appellants only delivered their notice of intention to oppose on 11 December 2015, three days from the date of hearing stated in the notice of motion. As a result, on 14 December 2015 the matter was by agreement postponed to 1 February 2016. The appellants were also ordered to file their answering affidavits (if any) within 30 days of the granting of the order. Costs were reserved. Paragraph 3 of the order reads:

‘3. In the event that the first, second and third respondents [appellants] do not file their respective answering affidavits within 30 days after [the] date of this order, the applicants [the respondents] will be entitled to obtain the relief sought against the first, second and third respondents [appellants] on an unopposed basis.’

[9] A copy of the order referred to above, was transmitted to the appellants' attorneys. Contrary to the provisions of the court order, the appellants did not deliver their answering affidavits within the period set out in that order.

The proceedings on 2 February 2016

[10] On 1 February 2016 the matter came before Basson J. She stood the matter down to 2 February 2016, on which occasion counsel for the appellants appeared and conveyed to the court that the appellants' answering affidavits were on hand, and that the respondents' counsel had been given copies thereof. Counsel indicated that his instructions were to seek leave to file the answering affidavits of the appellants, which, he said, were 'comprehensive' and included a challenge to the jurisdiction of the court to grant the relief sought by the respondents against the appellants. The following exchange appears from the transcribed record of the proceedings:

'COUNSEL: M'Lady, my instructions are to file the answering affidavits. They are comprehensive. In those papers the respondents [the appellants] contest the jurisdiction of this court to grant an eviction order. Those are my instructions, M' Lady.

COURT: Yes, what about – what should I make [of] prayer 3 barring them from filling any papers after 30 days, after the date of this court order? What is the date of those affidavits?

COUNSEL: The affidavits were deposed to on Friday. I handed a copy to counsel [for] the applicants [the respondents].

COURT: Yes, but they are out of time. On what basis should I then accept them, if one reads the court order it is very specific. If they do not file within [the] allocated time then the matter can proceed on an unopposed basis.'

[11] After this exchange, counsel for the appellants explained that the appellants relied on the protection afforded in the Land Reform Act 3 of 1996 (Labour Tenant Act), alternatively on the Extension of Security of Tenure Act 62 of 1997 (ESTA) both which clothe the Land Claims Court with exclusive jurisdiction. This would result in this court lacking jurisdiction to grant an eviction order against the appellants. Counsel for the respondents also made his submissions, during which he stated that the application was unopposed, and

that the application was brought in terms of PIE which was the only basis on which the application had to be approached and determined. The court was invited to disregard the submissions made on behalf of the respondents and grant the relief sought in the notice of motion on an unopposed basis.

[12] The learned judge expressed a view that the ‘matter [was] supposed to proceed.’ The only difficulty, the learned judge pointed out, was that ‘there might be serious constitutional implications if the point [the jurisdictional challenge] is not heard.’ But, said the learned judge, ‘the fact remains why the papers were not filed within the time stipulated by the court.’ Counsel for the appellants explained that the appellants are unsophisticated people who did not properly appreciate the gravity of the matter. It was only during the festive season when attempts were made to consult with them. That, counsel explained, was the reason why the affidavits were late.

[13] After the court had repeated its reservations about the potential constitutional implications of the order sought by the respondents, counsel for the respondents submitted that the appellants had been afforded sufficient period to file their answering affidavits and that they were legally represented when the order was made on 14 December 2015. That order, stated counsel, was in fact, made by agreement between the parties’ respective legal representatives. That submission seems to have dissuaded the learned judge from the reservations she had expressed earlier. She indicated that for the reason advanced by the respondents’ counsel, she was proceeding to determine the application on an ‘unopposed basis’. The learned judge was handed a draft order making provision for the eviction of the appellants from the farm, as well as ancillary relief. I have in para 1 above, set out the full extent of the court order. The learned judge did not furnish reasons for the order at that stage.

The reasons for the order

[14] Upon being requested to do so by the appellants' attorneys, the learned judge furnished the reasons for the order on 17 February 2016.² There, two aspects were emphasised: first, that the appellants had been properly served with an order in terms of s 4(2) of PIE, in terms of which the appellants were informed of the respondents' application to apply for their eviction. Second, that the appellants' attorneys had been informed of the court order of 14 December 2015, requiring the appellants to file their answering affidavits within 30 days. The thrust of the court a quo's reasoning is encapsulated in paras 5, 6 and 7 as follows:

‘[5] Despite personal service of the order of Phatudi J [referred to in para 8 above] and despite the fact that the attorneys on record for the respondents [the appellants] were advised of the court order ordering the respondents to serve their opposing papers, no papers were filed on behalf of the respondents [the appellants] opposing the relief sought by the applicants [the respondents].

[6] In the absence of [the respondents] having filed any opposing papers [the respondents] were therefore entitled to approach this court on an unopposed basis. I should point out that I am in no doubt that [the appellants] have been represented by attorneys since the issuing of the order of Phatudi J on 11 November 2015. This is evident from the fact that it is the very same attorneys ... that are now requesting reasons for the order dated 1 February evicting [the appellants].

[7] In respect of the order granted on 1 February 2016 this court had regard to the founding affidavit filed on behalf of the applicants [the respondents] and the facts set out therein in support of the order sought by the applicants [the respondents].’

² *Tendaupenyu NO and Another v Phetla and Others* (77903/2015) [2016] ZAGPPHC 80 (17 February 2016).

[15] On 2 March 2016 the appellants filed an application for leave to appeal, which was granted by the court a quo on 4 May 2016.³

[16] Before I consider the issues for determination I make the following observations about the court a quo's reasons for its order of 2 February 2016. As is apparent from the above excerpts, no mention is made in the reasons of the appearance by the appellants' counsel at the hearing, and that the appellants' substantive answering affidavits were at hand and ready to be handed up for perusal by the court. Nor is there any mention of the fact that counsel had expressly indicated that the jurisdiction of the court was being challenged by the appellants in such affidavits. In essence, the court a quo did not furnish reasons for its refusal to accept the appellants' answering affidavits, nor its decision to proceed with the matter on an 'unopposed basis' in the circumstances illustrated in paras 8 – 11 above.

The issues on appeal

[17] In his heads of argument, counsel for the respondents submitted that no appeal lies against the interdict granted against the appellants, as well as the costs order. This is so, as, according to counsel, there are no grounds of appeal in the notice of appeal or any submissions in the appellants' heads of argument on those two. I do not agree with this submission. The notice of application for leave to appeal made it plain that leave to appeal was sought against the whole of the order of the court. The application was granted by the court a quo on that basis, and the notice of appeal followed suit.

[18] There are two further glaring difficulties with counsel's submission. First, it must be borne in mind that the main defence put up by the appellants is the

³ *Phetla and Others v Tendaupenyu NO and Others* (77903/2015) [2016] ZAGPPHC 310 (4 May 2016).

assertion that this court lacks jurisdiction, on the basis already discussed. If the interdict stands, and the court later finds the jurisdiction point to have been well taken, it would mean that the interdict had been incompetently granted (by a court lacking jurisdiction to do so). Second, both the interdictory relief and the costs order are ancillary to the main order of eviction. If that order is set aside, its ancillary orders should, accordingly and similarly, be set aside.

[19] It would result in an incongruous situation were those orders to stand in the absence of the main order. The interdict would effectively serve to evict the appellants, despite the fact that the eviction order would have been set aside. This would have the effect of rendering academic, the need to resolve the dispute between the parties. This is so because the right of the appellants to occupy the farm (which the interdict prohibits) is at the very heart of the dispute between the parties. I therefore do not agree with the respondents' counsel's formulation of the issues for determination in this appeal.

[20] Given the views expressed above, my view of the issues for determination encompasses the whole of the order of the court a quo. Those issues have crisply crystallised as follows:

- (a) whether the court a quo was correct in declining to accept the appellants' request to hand in their answering affidavits and proceeding to dispose of the application on an unopposed basis;
- (b) If the question above is answered in the affirmative, whether a punitive costs order was justified and appropriate.

Court a quo's refusal to accept the appellants' answering affidavits

[21] The essence of the submissions on behalf of the appellants is this. The court a quo, by refusing to have regard to the appellants' answering affidavits, failed to consider all the relevant circumstances which a court seized of an eviction application is enjoined to consider. This, especially in light of the disclosure by the appellants' counsel that the appellants were placing reliance on the protection of the Labour Tenants Act, alternatively of ESTA. Had this been considered and upheld, it would have resulted in the court transferring the matter to the Land Claims Court for lack of jurisdiction.

[22] On the other hand, counsel for the respondents submitted that the court a quo was correct to determine the matter on an unopposed basis. The argument is essentially this. The appellants had failed to adduce factual evidence constituting the jurisdictional facts to determine the court's perceived lack of jurisdiction. Furthermore, they had failed to adduce evidence under oath that meet all the requirements of either a labour tenant as defined in the Labour Tenant Act or the requirements of an occupier as defined in ESTA. Therefore, so was the argument, the court a quo could not on the evidence before it, consisting of the respondents' founding affidavit, determine or conclude that it has no jurisdiction as the facts set out there pointed that it had jurisdiction in terms of PIE. It was also submitted that because neither a request for a postponement nor an application for condonation was made on behalf of the appellants on 2 February 2016, there was no fault in the court a quo granting the eviction order against the appellants.

[23] As to the court's duty to make a just and equitable order after considering all the relevant circumstances, the same answer was proffered on behalf of the respondents: those considerations come into play if facts are adduced in evidence on which a court could find that an eviction order will result in

homelessness. The appellants having placed no such evidence before the court a quo, the application had to be determined solely on the respondents' version as set out in the founding affidavit. From that affidavit, so the argument went, it appeared that the first and second appellants reside in a township where the sheriff effected service. Accordingly, there was no obligation on the court a quo to call for a report from the municipality.

[24] In my view, there is no merit to any of the above submissions on behalf of the respondents, and they are mentioned only to be rejected. The premise on which these submissions are made is this: The court a quo was simply faced with an unopposed application, and therefore was entitled to grant the relief sought by the respondents without reference to anything else. This premise is, in my view, self-defeating, simplistic and unhelpful. It fails to take into account the totality of what transpired on 2 February 2016 before the court a quo.

[25] As explained earlier, the appellants were represented in court by counsel who informed the court that the appellants' answering affidavits were at hand, in which, among others, the court's jurisdiction was being challenged. Those affidavits were available for consideration, but the court refused to accept them. As stated above, the correctness of that refusal is a key issue in the appeal. It is therefore unhelpful to ignore this fact and argue as if the court was only faced with an ordinary unopposed application, with no representation whatsoever on behalf of the appellants. The court a quo's reasoning suffers the same criticism.

[26] From the transcribed record of the proceedings, it seems clear that the court a quo was under a misapprehension that the appellants were 'barred' from filing their answering affidavits if those were not filed within the period of 30 days stipulated in the court order of 14 December 2015. Despite the learned

judge being alive to the constitutional issues likely to arise from the relief sought against the appellants, she however seemingly considered her hands tied by the court order of 14 December 2015.

[27] The learned judge misconstrued the import, nature and effect of that order, as well as the court's powers. That order did not preclude the appellants in perpetuity from filing their answering affidavits, should they not be filed within the period stipulated period. All it did, and nothing more, was to state the obvious: failure to file the answering affidavits would entitle the respondents to enroll the matter on the unopposed motion roll. The order did not amount to an *ipso facto* bar in the sense used in action proceedings,⁴ contrary to what the learned judge seems to have assumed. But even in an action, it would not be the end of the matter because a party who is under bar may apply for extension of time and removal of the bar.⁵ What is more, the order could never be construed to constitute consent by the appellants for their eviction.

[28] In this regard, counsel for the respondents was at pains to explain that the appellants had to be held to the time-frames to which they agreed when the order of 14 December 2015 was made. Counsel sought reliance for this submission on *Eke*.⁶ There, the parties in a summary judgment application had entered into a settlement agreement which was made an order of court. The court order provided, among others, that the appellant (as the defendant in the main case) admitted liability to pay certain sums of money to the respondent (the plaintiff in the main action). Paragraphs 16 of the court order provided that should the appellant default in his obligation, the respondent would be entitled to enroll the summary judgment application for hearing, claiming the

⁴ See rule 26 of the Uniform Rules of Court.

⁵ See rule 27(1) of the Uniform Rules of Court.

⁶ *Eke v Parsons* 2015 (11) BCLR 1319; 2016 (3) SA 37 CC.

outstanding balance, interests and costs. Paragraph 18 of the court order had the following provision:

‘18. That the defendant agrees ... not to oppose the said application for summary judgment.’

[29] The similarity between the present case and *Eke* is that in both cases, there was a court order, made pursuant to an agreement of the parties, in which among others, certain time-frames were agreed to for certain things to be effected. But there are two important distinguishing features. First, in *Eke* the appellant had admitted liability on the merits of the respondent’s claim, which is not the case here. Second, and most crucially, the appellant gave up his right by agreeing not to oppose the re-enrolled application for summary judgment. This is not what the appellants in the present case have done. On the contrary, their agreement to time-frames for filing their answering affidavits is a plain and unequivocal signal of their intention to oppose the respondents’ claim. On these considerations, it is clear that *Eke* is distinguishable on the facts, from the present case.

[30] By misconstruing the nature and effect of the order of 14 December 2015, the court a quo was led to the erroneous conclusion that it was precluded from receiving the answering affidavits and considering the issues raised in them. With regard to the court’s powers, it is trite that this court has wide-ranging powers to regulate its own processes,⁷ and in the interest of justice, may condone any default on the part of a litigant. By refusing to accept the affidavits, the court a quo deprived itself of the opportunity to form a view whether any sustainable defence was being proffered by the appellants in those

⁷ Section 173 of the Constitution provides:

‘The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interest of justice’.

affidavits and, in particular, whether a consideration of the relevant circumstances rendered the eviction of the appellants just and equitable. For it is only when it shall have considered the appellants' version that such a conclusion could be made. This, especially in the light of the express submissions by the appellants' counsel regarding the challenge to the court's jurisdiction.

[31] The acceptance and consideration of the appellants' answering affidavits could well have resulted in the matter having to be postponed, obviously to the prejudice of the respondents. On the other hand, consideration would have been given to the prejudice likely to be suffered by the appellants as a result of them being evicted. The type of prejudice likely to be suffered by the respondents under those circumstances is one which could easily be ameliorated by a suitable costs order against the appellants, whereas the one likely to be suffered by the appellants would have been irreversible and substantive in its reach.

[32] As correctly submitted on behalf of the appellants, the court's obligation to consider all the relevant circumstances was not obviated by the contents of the court order dated 14 December 2015. As explained by the full court of this Division in *Naidoo v FTX Investments*:⁸

'13. In the present instance the court a quo did not deal with all the relevant circumstances as [they were] not part of the papers. It is however incumbent on a court to act pro-actively in these matters to ensure that all the relevant facts are available and considered before evicting occupants. It must be even more so in a case as the present where occupants of land have been occupying the land for more than three decades and the issue of alternative accommodation was not ventilated or examined in court by either of the parties or the court.'

[33] What is more, the submission on behalf of the respondents that because the appellants' version was not on oath before the court, it entitled the court to

⁸ *Naidoo v FTX Investments (Pty) Ltd and Another* (Unreported case number 74329/2014).

evict the appellants without more, was firmly rejected by the Constitutional Court in *Pitje*.⁹ There, as in the present case, a respondent facing eviction attempted in vain to hand up a rejoinder affidavit in which he sought to place his personal circumstances before the court which would have demonstrated that the eviction would result in him being homeless. Dealing with the High Court's refusal to accept the rejoinder, the Constitutional Court made the following pertinent observations:

‘[18] Mr Pitje unsuccessfully attempted to inform the High Court, in his application for rejoinder, that he does not have suitable alternative accommodation. The refusal for rejoinder means that the High Court did not consider all the relevant circumstances of Mr Pitje, including his disability and a possibility that the eviction could render him homeless. The High Court erred in not doing so. It should have allowed the rejoinder. The order I make reflects this.

[19] Moreover, courts cannot necessarily restrict themselves to the passive application of PIE. Even if there had been no rejoinder application, courts are obliged to probe and investigate the surrounding circumstances when an eviction from a home is sought. This is particularly true when the prospective evictee is vulnerable. These considerations would have enabled the High Court to apply the requirements of PIE justly.

[20] Consequently, the Shibambos were incorrect to contend that, because Mr Pitje did not disclose the information about his risk of homelessness under oath, the High Court could not consider (i) his alternative accommodation options, (ii) his health or disability or (iii) the situation of other occupants.’ (Footnote omitted)

[34] If the respondents' submissions – adopted by the court a quo – are correct, it would mean that a court is constrained to grant a patently incompetent order (for instance where it lacks jurisdiction) merely because the other party has not complied with a previous order, despite the jurisdiction issue being raised from the bar. A challenge to its jurisdiction should not be lightly

⁹ *Pitje v Shibambo and others* 2016 (4) BCLR 460 (CC).

disregarded by a court, irrespective of how and when it is raised, because it goes to the heart of the court's authority to grant the relief sought. If the court lacks jurisdiction, it is irrelevant that the matter before it is unopposed. The relief which it grants will remain a nullity.

[35] In this regard, it is necessary to have regard to s 13 (1A) of the Labour Tenant Act, on which the appellants' jurisdictional challenge is based. It provides:

‘With the exception of issues concerning the definition of “occupier” in section 1(1) of the extension of Security of Tenure Act, 1997 (Act No 62 of 1997), if an issue arises in a case in a Magistrate's court or a High Court which requires that court to interpret or apply this Act and –

- (a) no oral evidence has been led, such court shall transfer the case to the Court [Land Claims Court] and no further steps shall be taken in the case in such court.’

[36] The peremptory nature of the provisions of s 13(1A) is unequivocal. Once that defence is raised in court, the Magistrate Court or the High Court has no residual discretion but to refer the matter to the Land Claims Court. It is now settled that if a landowner applies in the High Court for the permanent eviction of a person on the basis that the person is an unlawful occupier, and the person raises the defence that he or she is a labour tenant and entitled to protection under the Labour Tenants Act, the matter must be transferred to the Land Claims Court. See *Makhaza v FCL Farming CC and another* (LCC 59/2009) [2010] ZALCC 20 (7 June 2010) para 16.

[37] It is on the above considerations that I conclude that the appeal has to succeed. The general rule is that the costs follow the result. The appellants have been successful and there is no reason to deviate from the general rule. The appeal succeeds for all of the reasons set out above, but mainly because the

court a quo erred, at procedural level, in refusing to accept the appellants' answering affidavits and by failing to consider the jurisdictional challenge conveyed to it. Even absent the above, the court a quo failed to have regard to the provisions of s 4(7) of PIE, as it was obliged to do. In *Machele*,¹⁰ the Constitutional Court made it clear that the application of PIE is not discretionary. The Court aptly explained:

‘[15] The application of PIE is not discretionary. Courts must consider PIE in eviction cases. PIE was enacted . . . to ensure fairness in and legitimacy of eviction proceedings and to set out factors to be taken into account by a court when considering the grant of an eviction order. Given that evictions naturally entail conflicting constitutional rights, these factors are of great assistance to courts in reaching constitutionally appropriate decisions.’

[38] Having concluded that the appeal should succeed, what remains to be considered is the proper order with regard to the further determination of the matter. Counsel for the appellants, as in the court a quo, sought, in the main, an order transferring the matter to the Land Claims Court. We have decided against that route because, whether the provisions of s 13(1A) of the Labour Tenant Act would find application in the present case (and make the transfer of the matter to the Land Claims Court obligatory) is not a matter which can be decided without having regard to the contents of the appellants' answering affidavits. The best-placed forum for that determination is the opposed motion court. This is where the court a quo should have directed the proceedings to.

Punitive costs order in the court a quo

[39] The appeal being upheld renders it unnecessary to consider the issue of costs made ancillary to the order of 2 February 2016. The main order being set

¹⁰ See *Machele and Others v Mailula and Others* [2009] ZACC 7; 2010 (2) SA 257 (CC); 2009 (8) BCLR 767 (CC).

aside, that costs order, being ancillary thereto, falls away consequentially. However, I feel constrained to make a few remarks about it. It would be recalled that the court a quo ordered the appellants to pay the costs on an attorney-and-client scale. The ordinary rule is that the successful party is awarded costs as between party-and- party.¹¹

[40] An attorney-and-client costs order is an extra-ordinary one which should not be easily resorted to, and only when by reason of special considerations, arising either from the circumstances which gave rise to the action or from the conduct of a party, should a court in a particular case deem it just, to ensure that the other party is not out of pocket in respect of the expense caused to it by the litigation.¹² As such, an award of attorney-and-client costs will not be granted lightly, as the court looks upon such orders with disfavour and is loath to penalize a party who has exercised a right to obtain a judicial decision on any complaint such party may have.¹³

[41] On an overview of the authorities, the grounds on which the court may order a party to pay an opponent's attorney-and-client costs, are confined to special circumstances indeed, for example where a party has been guilty of dishonesty or fraud or had vexatious, reckless and malicious, or frivolous motive or committed grave misconduct either in the transaction under enquiry or in the conduct of the case. See a comprehensive, but not exhaustive, list of instances where the court may order attorney-and-client costs, in Herbstein &

¹¹ *Valkin v Daggafontein Mines Ltd* 1960 (2) SA 507 (W) at 516; *AA Alloy Foundry (Pty) v Titaco Projects (Pty) Ltd* 2000 (2) SA 639 para 20.

¹² *Nel v Waterberg Landbouwers Ko-operatiewe Vereniging* 1946 AD 597 AT 607; and *Waar v Louw* 1977 (3) SA 297(O) at 303.

¹³ *Van Wyk v Millington* 1948 (1) SA 1205 (C) at 1215; *Moosa v Lalloo* 1957 (4) SA 207 (D); *De Goede v Venter* 1959 (3) SA 959 (O) at 963; *LF Boshoff Investments (Pty) Ltd v Cape Town Municipality; Cape Town Municipality v LF Boshoff Investments (Pty) Ltd* 1969 (2) SA 256 (C) at 272G-H.

Van Winsen *The Civil Practice of the High Courts of South Africa* (5ed) at pp 971-973.

[42] In the present case, I can discern none of the circumstances referred to above, justifying a punitive costs order. It is instructive that in its reasons for the order it made on 2 February 2016, the court a quo did not state what considerations weighed on it to award a punitive costs order. In the absence of reasons, the inescapable conclusion is that the court a quo exercised its discretion capriciously and upon a wrong principle, therefore misdirecting itself in the process.

Final remarks

[43] Before I conclude, I make an observation as to how the appellants have been referred to in the proceedings. The second appellant was referred to as ‘a concubine’ of the late Mr Phetla Snr. This is undignified and downright demeaning. The same goes for the reference of the appellants in the respondents’ submissions in the court a quo as ‘primitive’. This is decidedly unacceptable, especially in a matter involving an emotive issue like land ownership and possession, where race and class interact. As the Constitutional Court explained in *Port Elizabeth Municipality*:¹⁴

‘[15] The blatant disregard manifested by racist statutes for property rights in the past makes it all the more important that property rights be fully respected in the new dispensation, both by the state and by private persons. Yet such rights have to be understood in the context of the need for the orderly opening-up or restoration of secure property rights for those denied access to or deprived of them in the past.’

[44] The insensitivities do not end there. In the notice of motion the third appellant has been cited as ‘The Unknown Unlawful Occupiers of the Remaining Extent of Portion 28 of the Farm Windhoek 222 JS, Mpumalanga’.

¹⁴ *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268; 2005 (1) SA 217; (CC).

This was repeated in the judgment of the court a quo when the reasons were furnished. That form of citation has been deprecated by the Constitutional Court in *Golden Thread*,¹⁵ where Jacob J expressed himself thus:

‘[4] This description of human beings is less than satisfactory and cannot pass without comment. It detracts from the humanity of the occupiers, is emotive and judgmental and comes close to criminalising the occupiers. This form of citation should not be resorted to. A more neutral appellation like “occupiers” might well be more appropriate’.

[45] In sum, the appeal must be upheld with costs. The matter has to be referred to the opposed motion court which will determine whether this court has jurisdiction. Having made that determination, the proper forum would be seized of the substantive issues between the parties.

[46] In the result the following order is made:

1. The appeal is upheld with costs, to be paid by the first and second respondents, jointly and severally, the one paying the other to be absolved;
2. The order of the court a quo of 2 February 2016 is set aside and the following is substituted for it:
 1. The application is postponed sine die;
 2. The appellants (the respondents in the main application) are ordered to file their answering affidavits, accompanied by a condonation application, if so advised, for the late filing of their answering affidavits, within 15 days of the date of this order;

¹⁵ *Occupiers of Portion R25 of the Farm Mooiplaats 355 JR v Golden Thread Ltd and others* 2012 (2) SA 337; 2012 (4) BCLR 372 (CC).

3. The respondents (the applicants in the main application) are ordered to file their replying affidavits to the appellants' answering affidavits (if any), together with their answering affidavit to the condonation application referred to in paragraph 2 (if any), within 10 days of receipt of the affidavits referred to above;
4. The costs are reserved for determination by the court hearing the main application.

TM Makgoka
Judge of the High Court

I agree

WRC Prinsloo
Judge of the High Court

I agree

D Molefe
Judge of the High Court

APPEARANCES:**For the Appellants:****JP Slabbert****Instructed by:****Ledwaba Mazwai, Pretoria****For Respondents:****S Güldenpfennig SC****Instructed by:****Van Dyk Theron Inc., Pretoria**