



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 3982/2016

In the matter between:

NELIE SMITH MANSUITRUSTERS (EDMS) BPK

Applicant

and

TEREZA HERBST

1st Respondent

**MANGAUNG METROPOLITAANSE
MUNISIPALITEIT**

2nd Respondent

**N GROEP ONGEIDENTIFISEERDE OKKUPEERDERS
WAT 100 WAVERLEYWEG, BLEOMFONTEIN
VRYSTAAT PROVINSIE OKKUPEER**

3rd Respondent

HEARD ON: 2 DECEMBER 2016

JUDGMENT BY: RAMPAL, J

REASONS: 27 JANUARY 2017

- [1] The matter came to court by way of motion proceeding. The applicant seeks to have the first and the third respondents evicted from a certain property. Only the second respondent does not oppose the application.
- [2] In the founding affidavit the applicant's deponent alleged that the applicant is the registered owner of a residential property situated at 100 Waverley Road Bayswater Bloemfontein in the Free State Province. Mr Frank Pretorius, who described himself as the applicant's financial manager, described the house as a lavish property.
- [3] The said deponent alleged that the applicant and the first respondent entered into an oral lease agreement in Bloemfontein one day between 1 January 2011 and 31 July 2011. During the negotiations preceding the conclusion of the lease agreement, the applicant was represented by Mr C.A. Troskie, a duly authorised representative of Mimosa Rolprentproduksie (Pty) Ltd, an appointed agent of a business enterprise called Nelie Smith Mansuitrusters (Pty) Ltd, in other words the applicant. He averred that the first respondent personally represented himself. He then spelt out the salient terms of the lease agreement.
- [4] He stated that the applicant duly complied with the terms and conditions of the oral lease agreement. Among others, the applicant availed the leased premises to the first respondent; issued invoices and furnished her with proof of payment. However, so said the deponent, from time to time the first respondent breached the terms of the oral lease agreement. By

31 October 2015 the first respondents had committed numerous contractual breaches in connection with the, water bill and the electricity bill – (vide “anx ap2”).

- [5] The deponent stated that the outstanding total sum of the accumulated arrears in respect of the rental, water and electricity was R60 842.80 as on 15 June 2015. On that day the applicant and the first respondent reached a compromised. The practical effect of the compromise was that the applicant wrote off half the amount of the arrears to alleviate the first respondent’s burdensome contractual obligation. (vide “anx ap3”)
- [6] On 9 November 2015 the applicants, through its attorney, Honey Prokureurs, advised the first respondent that she had committed contractual breach of the compromise; that the arrears had risen to R73 294.25 and that she was called upon to vacate the leased residential property by 31 January 2016. (vide “anx ap4). The first respondent did not vacate the property.
- [7] On 11 July 2016 the applicant, again through her attorneys informed the first respondent that the total sum of her arrears had increased to R82 133.99 and that, as a result of such breach, the applicant cancelled the oral lease agreement. The first respondent was then called upon to vacate the leased property by 18 July 2017. (vide “anx ap5.1”) Again the first respondent stayed put.
- [8] The applicant contended, in the circumstances, that the first respondent, and all those who took after her, were in an unlawful

occupation of its property; that her refusal to vacate the property was unjustifiable; that her continued illegal occupation infringed its real right of ownership; that her continued occupation exacerbated the damages it has already suffered; that the continued consumption of water by the first respondent seriously prejudiced the applicant as the registered owner of the property and, as such, responsible for the payment of the water bill to the second respondent; that it was not the applicant's duty to provide the first respondent with an alternative housing shelter and that, in the light of all those factors, the eviction of the first respondent and hers was just and equitable.

This completes my summary of the applicant's version.

[9] In her answering affidavit the first respondent denied the following allegations:

- that the applicant was the rightful owner of the property in question;
- that she ever concluded the alleged oral lease agreement with the applicant;
- that she was always furnished with written proof of all the rental payments she made;
- that she was in arrears with rental payment;
- that she was, besides the rental, also contractually obliged to separately pay for water and electricity;
- that the applicant had any right to evict her from the property;
- that her occupation was unlawful;
- that her refusal to vacate the property was unjustified;

- that she had infringed any right of the applicant through her continued occupation of the property;
- that the applicant suffered any damages or prejudice whatsoever as a result of her occupation of the property;
- that there was no child among the current occupiers of the property and
- that there rested no duty on anyone save for the second respondent to provide her with alternative shelter before her eviction and
- that her eviction was just and equitable in the circumstances.

[10] The first respondent averred that she entered into an oral lease agreement of the property with Mr Boet Troskie and not the applicant. Mr Boet Troskie was her ex-husband. One child, a boy, was born of the marriage. The couple divorced later on. Before 2011 she, her current husband and her son were living together in a townhouse. She paid a monthly rental of R8000 to her landlord. In 2011 Mr Boet Troskie approached and offered the property to her for indefinite occupation. The offer was primarily informed by Mr Boet Troskie's wish to provide a benefitting lifestyle to his son. The property previously belonged to Mr Bill Troskie, her ex brother-in-law. Her understanding was that her ex husband, Mr Boet Troskie had purchased the property from the insolvent estate of his brother, Mr Bill Troskie. The latter and his wife occupied the property all along but vacated it so that she and her son could occupy it.

[11] The terms of the oral agreement between her and her former husband were:

- that the property would be placed in a trust by Mr Boet Troskie for the benefit of his son Jamie Troskie who was tipped to become its sole beneficiary;
- that the first respondent and her son would occupy the property free of charge, undisturbed and for an indefinite period;
- that her current husband, Mr Bennie Herbst, would be allowed to stay in the same house but would have to pay R5000 rental per month which included municipal bills;
- that Mr Boet Troskie would be responsible for the payment of water and electricity bills to the second respondent – and
- that the administration of the property would be carried out by “Mimosa Films”.

[12] The first respondent alleged that she accepted the foregoing as the terms and conditions of the oral lease agreement concluded with her ex husband and not the applicant. Her ex brother-in-law assured her that she would have lifelong occupational right in respect of the property. She stated that she was unaware of the existence of the applicant and that the property belonged to the applicant. However, she stated that her ex husband was once a director of the applicant. At all times relevant to the lease negotiations, she was brought, by her ex-husband, under the impression that he was the owner of the property and that she was concluding a lease agreement with him in his personal capacity as the owner and not as anyone’s agent or representative.

- [13] Soon after she and her family had taken occupation of the property, Mr Boet Troskie as the lessor did two drastic things. Firstly, he increased the monthly rental from R5000 to R6000. Secondly, decided to hold her, instead of Mr Bennie Herbst, responsible for the payment of the rental. Consequently she accepted those two contractual obligations under tremendous pressure exerted by the property owner. She repeated and stressed that she never concluded a lease agreement with the applicant.
- [14] The first respondent averred that she made certain hard cash payment directly to Mr Boet Troskie in person but that she was never issued with receipts. She also alleged that even Mimosa Films, as an agent of Mr Boet Troskie, once failed to issue a receipt to her messenger, one Thato. She further added that Mr Boet Troskie was in arrears to the tune of R12000 with the payment of maintenance in favour of the couple's son. For that reason, she decided to set off her maintenance claim against his rental claim. (vide "anx ov2")
- [15] The first respondent admitted that she signed the acknowledgement of debt "anx ap3" in favour of the applicant on 15 June 2015. However, she averred that she did so under tremendous duress exerted upon her by the applicant's representative. She explained that she did not really and truly intend acknowledging any indebtedness to applicant. She elaborated that she merely signed "anx ap3" in order to secure the return of her household furniture which the sheriff had attached and already removed by virtue of a warrant of execution.

The warrant stemmed from a default (sic) judgment which the applicant obtained against her in the local district court without serving any notice of bar on her. Her plea to the applicant's summons was set out in "anx vo4".

This completes a summary of the first respondent's version.

- [16] In the replying affidavit, the applicant's deponent replied that none of the defences raised by the first respondent had any merits.
- [17] As regards the first defence that the applicant was not the owner of the property, the deponent persisted with his founding assertion that the applicant was the registered owner thereof – see "anx ap1" attached to the replying affidavit.
- [18] As regard the second defence that the first respondent was not truly and lawfully indebted to the applicant, the deponent persisted with his founding assertion that she was – see "anx ap2" attached to the replying affidavit.
- [19] As regards the third defence that the first respondent had never contracted with the applicant, the deponent persisted with his founding assertion – see "anx ap3" attached to the replying affidavit.
- [20] As regards the fourth defence that the first respondent had a maintenance claim against her ex husband which she was entitled to set-off against his rental claim, the deponent contended that such defence was irrelevant to the applicant's eviction application and that it was bad in law.

[21] As regards the fifth defence that she was placed under enormous pressure by Mr Boet Troskie to accept personal responsibility for contractual obligations under the lease agreement and further that she was placed under tremendous duress to sign an acknowledgment of debt, the applicant dismissed both allegations as vague and unfounded.

[22] The applicant's deponent denied a substantial portion of the first respondent's version. He specifically denied:

- the allegation that the first respondent's ex husband was the current owner of the property;
- the allegation that the first respondent's ex brother-in-law was the previous owner of the property;
- the allegation that her ex husband purchased the property from the insolvent estate of his brother;
- the allegation that the first respondent's occupied the property by virtue of an oral lease agreement she concluded with her ex husband;
- the allegation that the first respondent was unaware of the existence of the applicant;
- the allegation that the first respondent was, by virtue of such an agreement, entitled to occupy the property for an indefinitely period and without any obligation;
- the allegation that the first respondent was unduly influenced by means of enormous duress to sign admission of untrue liability in favour of the applicant – and

- the allegation that the first respondent's husband Mr Bennie Herbst, and not the first respondent, was liable to pay the rental as the lessee;
- the allegation that the first respondent made certain direct cash payment in respect of which she was given no proof of payment.

Here ends my summary of the applicant's replying affidavit. I shall revert to the undisputed material facts later on.

[23] There were two issues to be determined. The first and principal issue was whether the first and the third respondents were unlawful occupiers. The second and residual issue, which would only arise if the first issue was affirmatively determined, was whether it would be just and equitable to have such respondents, declared as unlawful occupiers and evicted from the illegally occupied property.

[24] On behalf of the applicant, Mr Snellenburg principally submitted that the applicant had made out a proper case for the declaration of the respondents as unlawful occupiers and for their eviction from the property. According to counsel's argument, the version of the respondents was so untenable and far-fetched that it deserved nothing less than outright rejection. Accordingly counsel urged me to dismiss all of the first respondent's unmeritorious grounds of resistance and to grant the relief sought by the applicant.

[25] On behalf of the respondents, Mr Buys contended that it was not shown by the applicant that the first respondent was occupying

the applicant's property and that she was in arrears with the monthly rental. Consequently counsel submitted that there was no valid basis on which the lease agreement could have been properly cancelled. That being the case, counsel primarily submitted that seeing that the respondents were not in an unlawful occupation of the property, they could not be regarded, treated and declared as unlawful occupiers. Counsel's alternative submission was that the applicant had dismally failed to place relevant facts before the court to underpin a conclusion that the eviction of the respondents would be just and equitable.

[26] I deem it necessary to give a brief exposition of the applicable legal principles in relation to eviction from property. The nature of eviction proceedings entails a two stage enquiry. The first leg of the enquiry requires the court to determine whether the person in respect of whom the eviction is sought is an unlawful occupier. If the court indeed finds that to be the case, then the second leg of the enquiry requires the court to decide, after considering all the relevant circumstances, whether it is just and equitable to grant such an eviction order. **Resnick v Government of the Republic of South Africa and Another** 2014 (2) SA 337 (WCC) at 339.

[27] It has been held that the right to property is a constitutionally protected right and that the effect of the eviction statute is not to expropriate private property. See **City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others** 2012 (6) SA 294 SCA para [16]. See also **Johannesburg Housing Corporation (Pty)**

Ltd v Unlawful Occupiers, Newton Urban Village 2013 (1) SA 583 (GSJ) para [71].

- [28] The statute gives effect to and provides a statutory mechanism for the enforcement of the provisions contained in the constitution of the Republic of South Africa which delineates that “no one may be evicted from their home or help their home be demolished without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions” section 26 1996 RSA Constitution.

- [29] An occupier of a residential property will be regarded as an unlawful occupier in the event that such occupier occupies another’s property without the express consent of a property owner or a person in charge of the property. This is a definition of the word “unlawful occupier” in terms of section 1 Act No 19 of 1998. (PIE) which is an acronym for prevention of illegal evictions from land and prevention of unlawful occupation of land.

- [30] Section 4(8) of PIE provides that if a court is satisfied that all the requirements of section 4 have been met by the applicant and no valid defence has been raised by the occupier then the court is obliged to grant an eviction order.

- [31] The provision that no valid defence has been raised refers to a defence that would entitle an occupier to remain in occupation as against the wish of the owner or person in charge of the property. The existence of a valid lease agreement is a perfect example of

such a valid defence which would ordinarily influence the court to deny the grant of an eviction relief. See **Ekurhuleni Metropolitan Municipality and Another v Various Occupiers Eden Park Extension** 2013 (3) SA 23 SCA para [12].

[32] When the rightful owner of the property acknowledges that the occupier lawfully took occupation and that (s)he previously had the right of occupation, then the onus rest on the owner to prove that the occupier's right of occupation no longer exists or that it is no longer enforceable. For instance, the owner may prove that although the occupier previously had a right to occupy the property by virtue of the lease, such lease agreement between the parties has since expired through effluxion of time or that it has been prematurely terminated for some or other good cause such as contractual breach or mutual consent. However, where the owner or the person in charge of the property denies any entitlement of the occupier to be in occupation, the onus rests on the occupier to prove the grounds upon which (s)he contends (s)he is entitled to remain in occupation of the property. See **Ndlovu v Ngcobo; Bekker and Another v Jika** 2003 (1) SA 113 SCA para [131].

[33] The eviction statute was enacted, first and foremost, to alleviate the plight of the homeless through prevention of their illegal eviction from occupied land. I recognise that homelessness is a social problem of enormous magnitude in our country. This is a material consideration in any eviction proceedings. But prevention of unlawful occupation of land is another cornerstone

of the statute. I hasten to stress that it was the protection of the poor and vulnerable groups in our society which was in the forefront of the minds of the legislators which informed the enactment of the eviction statute. In my view any claimant who seeks protection of the statute by way of alternative shelter has to satisfy the court that (s)he belongs to that class of persons and not to a class of affluent individuals who occupy lavish residential properties in leafy neighbourhoods. Opulent occupiers who are holding over in order to maintain an elite type of lifestyle must realize that the eviction statute was not meant for them. See **Wormald NO and Others v Kambule** 2006 (3) SA 563 SCA para [20]

[34] Where there it is a factual dispute about material facts in motion proceedings and there is no request for the leading of oral evidence by the applicant a finale order will only be granted on notice of motion if the facts as stated by the respondents together with the facts alleged by the applicants that are admitted by the respondent justify such an order. See **Stellenbosch Farmers' Winery Ltd v Stellen Vale Winery (Pty) Ltd** 1957 (4) SA 234c at 235.

[35] Where a factual dispute about material facts is raised in motion proceedings a court must examine an alleged dispute of fact and see whether in truth there is a real dispute of fact which cannot be satisfactory determined without the aid of oral evidence. If this is not done, a respondent with an unmeritorious defence might be able to raise fictitious issues of fact and thus delay the hearing of the matter to the detriment of the applicant. See **Plascon-Evans**

Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 A at 634h-i.

- [36] In motion proceedings decisions of fact cannot properly be founded on a consideration of probabilities unless the court is satisfied that there is no real and genuine dispute on the material fact in question or that any one party's allegations are so farfetched or so clearly untenable or palpably and implausible as to warrant their outright rejection merely on the papers or that oral evidence would not disturb the balance of probabilities appearing from the affidavits. See **Administrator Transvaal, and Others v Theletsane and Others** 1991 (2) SA 192 (A) at 197a-b. Resorting to oral evidence should only be allowed if there are reasonable grounds for seriously doubting the veracity or correctness of the allegations made by the applicant. In an eviction application spurious defences must never be allowed to slow down the motion.
- [37] The court hearing motion proceedings will dismiss an application if the applicant should have realised, when launching the application, that a serious dispute of fact, incapable of resolution on papers, was bound to develop. See **Room Hire Company (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd** 1949 (3) SA 1155 (T) at 1162.
- [38] As regards the first leg of the enquiry, the crucial question revolves on the alleged unlawfulness of a respondent's occupation. It was common cause that the first and the third respondents were in occupation of the property. It was the

applicant's case that it was the lawful owner of the property. The first disputed applicant's claim of ownership. This is the first issue.

[39] As regards the first issue, I proceed to exam the facts and to apply the law to the proven facts in order to resolve the conflicting versions. According to the applicant, it has *locus standi* to initiate these eviction proceedings by virtue of its lawful title as an outright owner. According to the first respondent the applicant has no *locus standi* to bring these eviction proceedings against her because her former husband, Mr C.A Troskie aka Boet Troskie and not the applicant, owns the property.

[40] The applicant's contention was that it was a registered owner of the property and that the property was registered in its name almost four decades ago, on 7 July 1977 to be precise. See "anx ap1" replying affidavit. It was undisputed that the applicant was a juristic person with a corporate identity separate from its directors. Among its current directors are S.F Nel and J.C. Troskie. The two individuals jointly signed a resolution, "anx ap1" as directors of the applicant whereby they mandated Ms Adele Prinsloo of Honey Prokureurs to have the first respondent evicted from the property. I guess those two gentlemen are the persons or directors informally referred to as Frans and Jaco in "anx ap5".

[41] The first respondent's denial of the applicant's title to the property was not supported by Mr Boet Troskie, the very person she claimed was the rightful owner of the property. In the replying affidavit, the applicant's financial manager and deponent, Mr

Pretorius, repeatedly re-affirmed that the applicant, and not Mr Boet Troskie, was the correct and lawful property owner. On the contrary, Mr Boet Troskie made and signed a sworn statement, “anx ap4” attached to the replying in which he expressly confirmed the averments in the founding affidavit that the property belonged to the applicant.

- [42] The version of the first respondent was far less convincing. She wrote:

“10.18 Ek het op **30 Augustus 2016** ‘n selfoon boodskap vanaf **Mnr Boet Troskie** ontvang waarin hy in geen onduidelike terme bevestig het dat die woning eintlik **Mnr Bill Troskie** se woning is. In die gemelde boodskap het **Mnr Boet Troskie** onder andere aan my gesê dat “,, Tereza ek verstaan dat oom Bill se huis verkoop moet word sodat sy testament opgestel kan word...”. Ek heg ‘n afskrif van ‘n uittreksel van bogenoemde boodskap hierby aan as aanhangsel “**OV1**”.”

This appeared to me that the email, “anx ov1”, represented the high watermark of her case. But even that did not support her case in that it cosmetically suggested that Mr Bill Troskie and not Mr Boet Troskie owned the property. But that was not all the critique.

- [43] The first respondent tried to build a mountain out of a molehill. The words: “... **oom Bill se huis** ...” used by Mr B Troskie in the email were too thin and tenuous to sustain her contention. The applicant’s deponent dismissively replied:

“The averments contained in this paragraph are denied. The First Respondent selectively quotes the message sent to her out of context. She is fully aware of the fact that the property has always been referred to as “Oom Bill se huis”. Due to the fact that it was previously the house at which **Bill Troskie** was resident. It is clear from **Annexure “AP5”** attached hereto that the First Respondent does not take the Court into her confidence in disclosing the full context of the conversations which she had with Mr **Boet Troskie** in respect of the property.”

[44] On 25 November 2014 Mr Boet Troskie sent an email to Ms Tereza Herbst, the first respondent. The relevant portion read:

“Die huis waarin jy woon is in ‘n **maatskappy** van oom Bill geregistreer met Frans en Jaco as direkteure so ek kan nie daar inmeng nie.

The first respondent replied:

“Ek stem saam daarmee.”

There you have it. She admitted that a corporate enterprise owned the property. Therefore, she implicitly admitted that neither Mr Boet Troskie nor Mr Bill Troskie was the owner of the property.

[45] The applicants’ deponent gave some history of the property. He stated the following in the replying affidavit:

“34.2 As a background of the purchase of the property, the property was at all times registered in the name of the

Applicant. The applicant was however not a part of the Mimosa Group and when the Applicant was acquired by the Mimosa Group, the property as a consequence thereof also formed part of the assets of the Mimosa Group, held in the subsidiary company, to wit, the Applicant.”

He added that the property had never been registered in the name of Mr Bill Troskie or Mr Boet Troskie. I have no reason to doubt the applicant’s version. If that version is accepted, then, there can be no doubt that the applicant has a *locus standi* in terms of section 4(1) PIE.

[46] The applicant’s deponent contended further that the first respondent obtained free, undisturbed and beneficial occupation of the property by virtue of an oral lease agreement which she entered into with the applicant during the course of 2011. However, the first respondent denied the allegation. She contended that she took occupation of the property by virtue of an oral lease agreement she entered into with Mr Boet Troskie. She alleged that Mr Boet Troskie did not inform her during the lease negotiations that he was acting as a representative or as an agent of the applicant.

[47] I deem it advisable to quote the first respondent verbatim for the sake of clarity. She stated:

“10.19 Die huurooreenkoms het sonder twyfel tussen my en **Mnr Boet Troskie** tot stand gekom en die maandelikse huurbedrag het water en elektrisiteit ingesluit. Ek wil egter die Agbare Hof se aandag daarop vestig dat **Mnr Boet Troskie** op ‘n stadium ‘n

direkteur van die Applikant was, maar hy het nog nooit teenoor my gemeld en/of voorgegee dat die huurooreenkoms tussen my en die Applikant gesluit was en/of dat hy as agent namens die Applikant die huurooreenkoms met my gesluit het nie. Ek was te alle redelike tye onder die indruk geplaas dat die betrokke woning deur **Mnr Boet Troskie** aan my beskikbaar gestel was om te okkupeer.”

[48] The first respondent’s impression that the property was made available to her by Mr Boet Troskie was of no assistance to her. She did not elaborate as to how she was placed under such impression. It was obviously not her case that Mr Boet Troskie expressly represented to her that he was the lawful owner of the property. Her version was spurious. He could not contractually burden the property in respect of which he had no rights. Whatever representations he might have made to her, expressly or tacitly, could not lawfully bind the applicant as the lawful owner. In my view, the respondents dismally failed to disprove the applicants’ contention that they occupied the property with the property owner’s consent – sec 4 – **Ndlovu v Ngcobo, supra**.

[49] Now we know that the property was officially registered in the name of the applicant. We know that the second respondent billed the applicant for the water consumed on the property. We know that Centlec also initially billed the applicant for electricity supplied to the property. We know that copies of such invoices were forwarded to the first respondent for settlement. We know that the first respondent knew that Mr Boet Troskie was once a director of the applicant. We know that Mimosa Films administered the property on behalf of the applicant. We know it issued receipts in respect of rental payment which showed that

the account of the applicant was to be credited with such payments.

[50] Given such vast knowledge, the applicant could not be heard to say she was unaware of the existence of the applicant. Consequently it must be accepted that the applicant and not the first respondent's ex husband was the contracting party to the oral lease agreement. The first respondent's allegation that she was placed under enormous pressure by her ex husband to assume the obligations of her current, Mr Bennie Herbst, as the actual lessee, failed to impress me.

[51] In the light of all these considerations, I am persuaded that the first respondent and others occupied the property on the strength of the oral lease agreement she concluded with the applicant. Therefore, her occupational right flowed from such agreement and no other.

[52] The applicants contended that the first respondent breached a material term of the lease agreement. The breach had an adverse impact on the right of the respondents to occupy the property. She fell in arrears, not once but on a number of occasions, as would more fully appear from para 19 founding affidavit – see “anx ap2”. There was no proof whatsoever to show that she ever demanded any receipt in respect of any alleged direct payment she made to Mr Boet Troskie.

[53] It was an undisputed fact that on 15 June 2015 she signed an acknowledgement of debt in favour of the applicant. She

undertook to liquidate the arrears by way of monthly instalment of R3000. She was grateful to the applicant for writing off half of her actual arrears. Her persistent denial that she was never in arrears was, therefore, surprising, to put it mildly.

- [54] I was persuaded, therefore, that the first respondent had indeed committed a breach of a material contractual obligation in that she was substantially in arrears with the payment of rental for the leased and occupied property. The facts revealed that she breached not only the oral lease agreement but also the subsequent written compromise. She harvested and enjoyed the low hanging fruit of the new deal. But she soon fell in arrears again. Her failure to make regular payments in respect of the arrears in respect of, rental and water prompted the applicant to cancel the lease agreement on 11 July 2016. The effect of the cancellation was that her right to occupy the property was terminated. See “anx ap5.1”. As from that date the respondents had no right to remain in occupation of the property. Private property has to be protected. Prevention of unlawful occupation of private property must be enforced - **Changing Tides 74 (Pty) Ltd, *supra***.

Anyone who occupies a residential property without the express consent of the owner or a person in charge is regarded as an unlawful occupier – sec 1 PIE.

- [55] Notwithstanding such termination and the related demand that she vacate the property, the first respondent held over. A summons was issued, a summary judgment granted, a writ was

executed, her furniture was attached and removed. To secure the return of her furniture, she had to acknowledge her liability towards the applicant. She subsequently made one payment in accordance with her written undertaking. There was no shred of evidence to support her version that she was placed under enormous duress to sign admission of liability and indebtedness to the applicant. The allegation was disturbingly vague. It failed to impress me. Such a far-fetched version deserved an outright rejection. **Plascon-Evans Paints, *supra*.**

[56] The first respondent refused to vacate the property notwithstanding a written request to do so. The defence was based on the following:

56.1 The respondent were not unlawful occupiers.

56.2 The applicant was not the owner of the property.

56.3 The first respondent did not conclude the lease agreement with the applicant and the lease agreement which she contended was concluded on different terms.

56.4 The respondent denied that she was in arrears in respect of any amount in terms of the lease agreement.

[57] The following was a *de facto* legal precision in respect of the alleged defences. In the first place the applicant was the registered owner of the property which was transferred and registered in the applicants name on the 7 July 1977. In the second place the first respondent averment that she did not enter into an agreement with the applicant was shown to be disingenuous and deserved to be rejected outright. In the light of

the material facts set out in the papers the respondent displayed lack of candour and I took a very deep view thereof. In the third place the first respondent on her own version was indebted to the applicant and her breached agreement. On the facts the cancellation of the agreement on the 11 July 2016 was justified. Taking all the foregoing material considerations, I had no difficulty in coming to the conclusion that the first and third respondents were in an unlawful occupation of the applicants property. They deserved to be declared as such. Accordingly I have no hesitation in determining the first issue in favour of the applicants.

- [58] The required consent as defined in the statute to occupy somebodies property has been ventilated in **Residents of Joe Slovo Community, Western Cape v Thubelisha Homes & Others** 2010 (3) SA 454 (CC) para [55].

“What is required by the PIE Act is not just some kind of acquiescence by the owner or person in charge of land but the 'voluntary agreement' of the owner or person in charge. The occupier will not be on the land with the consent of the owner or person in charge if the owner simply allowed the person to stay or occupy because he, she or it had no choice but to do so, or felt under a duty to do so, or for any other reason did not agree voluntarily. Secondly, the word 'agreement' implies something bilateral. In other words consent as contemplated in the PIE Act is not unilateral consent but bilateral. It cannot be consent unless it was first asked for and later given, or unless it was accepted after it had been given even though it had not been requested.”

It is obvious from the aforesaid passage that the respondent in an application for eviction under the statute cannot contend that she is not an unlawful occupier if consent which was initially granted was subsequently lawfully withdrawn. In the instant matter I am of the trend view that the applicant was entitled to revoke the consent given to the respondent's to occupy the property initially.

Residents of Joe Slovo Community, *supra*.

[59] As regards the second leg of the enquiry, the question is whether the eviction of the respondents as unlawful occupiers was just an equitable given the peculiar facts of this particular matter.

[60] Mr Snellenburg asked me to determine the question in favour of the applicants, whereas Mr Buys asked me to determine the question in favour of the respondent's.

[61] Four years ago the Supreme Court of Appeal clarified the extent of the onus to adduce sufficient facts to enable a court, hearing an eviction application to exercise its discretion regarding the question whether it would be just an equitable to grant an order of eviction. Willis JA elucidated the onus to the residual enquiry as follows:

“[30] The implication of this is that, in the first instance, it is for the applicant to secure (sic) that the information is placed before the court is sufficient, if unchallenged, to satisfy it that it would be just and equitable to grant an eviction order. Both the Constitution and PIE require that the court must take into account all relevant facts before granting an eviction order. Whilst in some cases it may suffice for an applicant to say that

it is the owner and the respondent is in occupation, because those are the only relevant facts, in others it will not. One cannot simply transpose the former rules governing onus to a situation that is no longer governed only by the common law but has statutory expression. In a situation governed by s 4(7) of PIE, the applicant must show that it has complied with the notice requirements under s 4 and that the occupiers of the property are in unlawful occupation. On ordinary principles governing onus it also has to demonstrate that the circumstances render it just and equitable to grant the order it seeks. I see no reason to depart from this. There is nothing unusual in such an onus having to be discharged. One of the grounds upon which it was permissible to seek a winding-up order in respect of a company under the Companies Act 61 of 1973 was that it would be just and equitable for the court to grant such an order. The law reports are replete with cases in which courts dealt with applications for winding up on that basis. In cases where the applicant failed to discharge the onus of satisfying the court that it would be just and equitable to grant a winding-up order it was refused.”

The first sentence makes a better reading if the words “the applicant to ensure” are substituted for the words “the applicant to secure ...”.

- [62] In the same decision, **Changing Tides 74 (Pty) Ltd *supra*** the court went further to explain why the law saddles the applicant with the cumbersome onus, Willis JA said the following at paragraph [31].

“[31] The response to this may be to say that the applicant for relief will be unaware of the circumstances of the occupiers and

therefore unable to place the relevant facts before the court. As a general proposition that cannot be sustained. Most applicants for eviction orders governed by PIE will have at least some knowledge of the identity of the persons they wish to have evicted and their personal circumstances. They are obviously not required to go beyond what they know or what is reasonably ascertainable. The facts of this case belie the proposition that an applicant, even in a case where a building has been hijacked, is unable to place information before the court in regard to the identity and circumstances of the occupiers. Changing Tides was able to describe in considerable detail the circumstances in which the occupiers were living. It had served notices to vacate on a number of them and managed to assemble a list, albeit incomplete and defective, of the names of 97 occupiers. It made it clear that the occupiers **were people of extremely limited means**, some at least of whom gathered rubbish from the streets for personal use or resale, and left rotting garbage inside and outside the building. It specifically alleged that the occupiers were people who would, on eviction, qualify for emergency housing. It referred to earlier proceedings in which it had previously obtained an eviction order that had subsequently been set aside at the instance of occupiers. For some reason it did not provide the court with information about the occupiers' circumstances gleaned from the affidavits in those proceedings. That information might also have disclosed something of the circumstances in which the building came to be occupied originally. In that regard they could also presumably have made enquiries of the previous owners."

- [63] Homelessness presents huge social challenges to our society. Rendering somebody homeless makes my heart bleed. However emotional sympathies should not be allowed to over cloud proper,

fair and just application of law. In **Johannesburg Housing Corporation (Pty) v Unlawful Occupiers of the New Town Urban Village** 2013 (1) SA 583 (GSJ) para 122 Willis J had this to say:

“[122] All counsel who have struggled to resist an application for summary judgment will be familiar with the case of *Breitenbach v Fiat SA (Edms) Bpk*, in which Colman J made it plain that it would be difficult indeed to show good cause why such judgments should not be granted where the defence had been set out 'baldly, vaguely or laconically'. There is no reason why this principle should not apply to occupiers seeking to resist the application for their eviction. Of course, every move from one dwelling to another carries with it its own traumas and disadvantages. That is not enough to resist an eviction order where an occupier has no right, recognised at common law, to remain in occupation of a particular property. The case for remaining in occupation of the property has been set out by the occupiers laconically.”

In this instance the applicant set out, as best it could, defects in relation to the factors referred to in section 4(7) which facts resorted within the applicants knowledge. The applicants invited the respondents to place before this court relevant facts which could tend to indicate that their eviction would not be just and equitable.

[64] In my view the respondents failed to live up to the challenge. They failed to advance any such relevant facts. On behalf of the applicant it was contended that the reason for the failure of the respondents was obvious. They failed to do so because no such

facts existed to warrant the exercise of the discretion in their favour. There was substance in the critique. The material facts relating to the respondents occupation of the property, the hardships, the trauma and the disadvantages associated with the eviction and any other peculiar circumstances as envisaged in section 4(7) - primarily resorted within the personal knowledge of the respondents. Their failure to set out such material facts in opposition to the eviction was indicative of the fact that there were no facts which would render the eviction from the property unjust and inequitable. The applicant's primary onus to do so in terms of section 4(7) has, in my view, some reasonable bounds in certain cases. This is one such case.

[65] In this matter, unlike in the case of **Changing Tides, supra**, the occupiers are clearly not people of extremely limited means. None of them can be regarded as a proverbial man of straw. They are people of beyond average means. In saying so I am fortified by their demand for an alternative accommodation in the form of a house pretty much the same as the one they are currently occupying. It was mentioned in passing by counsel for the respondents that the commercial value of the property was in the region of R94 000 per month. On the facts, I am inclined to conclude that it will be just and equitable to have the first and third respondents evicted from the property.

[66] The residential property we are talking about here is no ordinary property. The property commonly known as 100 Wayverley Road, Bayswater in Bloemfontein is a rare piece of architectural design. The applicant's financial manager modestly described it

as a lavish house. Perhaps it epitomizes every home seekers dream home. Obviously the applicant entertained the wish of living in that house forever. While it is natural sometimes to take flight to Alice's Wonderland, we must still have the serenity to discern dreams from reality. The parties gave divergent versions concerning the history of the property. Their versions reminded me of the following comical definition of the word "history".

"History is an account, mostly false, of events, mostly unimportant, which are brought about by rulers, mostly knaves, and soldiers, mostly fools."

So said Ambrose Bierce. Taken from the novel, "Chameleon" by William Diehl.

- [67] Jokes aside now. In **City of Johannesburg Metropolitan Municipality v Blue Moonlight Property 39 (Pty) Ltd and Another** 2012 (2) SA 104 (CC) para [40] the court sounded the following line of caution:

"Off course a property owner cannot be expected to provide free housing for the homeless on his property for an indefinite period."

- [68] The proper approach to eviction proceedings is that the court has to take into account not only the interest of the unlawful occupiers but also the interest of the property owner in determining a just an equitable order to balance out such interest. **Porth Elizabeth Municipality v Various Occupiers** 2005 (1) SA 217 (CC) at 233f.

- [69] The applicant said virtually nothing about herself, her occupation and her income. Similarly she said virtually nothing about her husband, his occupation and his income. The first respondent is a prominent member of the community. This we know. She is a celebrity so to speak. At the height of her youth she was a beauty queen. She was once crowned Miss South Africa. This we know. To crown it all, she moved up the social ladder. She then met and married an equally prominent resident of the city and a reputable property magnet, Mr Boet Troskie. We also know that prior to her occupation of the property in 2011, she and her family were staying in a rented town house where she paid a monthly rental of R8000.
- [70] All these factors indicated to me that the first respondent was not really a desperate homeless, poor and vulnerable occupier. Her lifestyle, her dreams and ambitions are not compatible to that sort of social standing. Mr Snellenburg argued that the first respondent and her current husband were people of opulence and that the statute was not for the protection of people of her social class. It is hard to find the contrary response. Bearing all these material considerations in mind, it cannot be that the second respondent, let alone the applicant, is under any legal obligation to provide alternative shelter to the first respondent and her family. It was proven that there were no minor children who occupied the property together with the first and third respondents.

[71] In the circumstances, and on a proper reading of the papers, upon proper consideration of all the peculiar circumstances of the particular case and upon proper application of the legal principles – I am inclined to find in favour of the applicant that it is just and equitable to have the respondents evicted from the property – **Resmick, *supra***. The determination of a just and equitable eviction order requires a balancing act between the interest of the lawful property owner as well as the unlawful occupier. - **Port Elizabeth Municipality v Various Occupiers, *supra*** and **Newton Urban Village, *supra***. Moreover, the applicant cannot be reasonably expected to provide the respondents with free alternative accommodation – **Blue Moonlight, *supra***.

[72] The lease agreement was cancelled on 11 July 2016. The respondents were afforded no less than 14 weeks to vacate the property but they held over. They were called upon to vacate the premises before 31 October 2016. The given 14 week period was reasonably sufficient for the purpose. That notwithstanding, they stayed put. The date came and passed. They flatly refused, on unmeritorious grounds, it must be stressed, to surrender the unlawfully occupied land. I gave them 8 more instead of 2 weeks to vacate the property. It had to be appreciated that the longer they remained on the property the greater the harm to the property owner's rights became. That was a material consideration.

[73] As regards the alleged factual dispute, the law reports are replete with relevant decisions. In every case brought by way of motion proceedings, the salient principle is that the court must closely

examine the alleged dispute of fact to determine whether there is a really genuine dispute of fact which cannot be satisfactorily resolved without having recourse to the aid of live oral evidence. This principle is of cardinal importance. If it is readily sacrificed for the flimsiest of reasons, disingenuous respondents will be encouraged to raise fictitious points under the guise of disputes of fact and inordinately delay the hearing of unassailable and genuine motion cases to the prejudice of a whole range of applicants. **Plascon-Evans Paints, *supra*** and **Van Steel v Van Steel** 1984 (2) SA 203 (T) at 205c.

[74] There remains one more point to comment on. It concerns the way in which the applicant's annexures were marked or labelled in order to identify them. There were annexures attached to the founding affidavit marked "ap1 – ap5.2". One annexure was not marked at all. To the replying affidavit there were annexures also exactly labelled "ap1 to ap7". Again the eighth annexure was not labelled at all. Such a clumsy way of labelling annexures and duplicating their labels must be avoided. It causes a great deal of confusion during argument. It also make it very cumbersome to a judge. Once again I make a special plea to all practitioners to use the guidelines I proposed in **Morobi and Others v Umyezo Leisure Investments (Pty) Ltd and Others** [2016] 2 ALL SA 845 (FB) par 110.

[75] These then are the reasons for the *ex tempore* order I made on 2 December 2016. I guess it will do no harm to reproduce the order here for the sake of completeness and expedience.

ORDER:

1. The first and third respondents are declared to be unlawful occupiers, within the meaning of PIE, on the property situated at 100 Waverley Road, Bloemfontein, Free State Province on the grounds as set out in the accompanying affidavit of **Mr. Frank Pretorius** with annexures thereto;
2. The first and third respondents and all other persons occupying the property through them are to vacate the property no later than **31 JANUARY 2017** at **12h00**;
3. The first and third respondents and all other persons occupying the property through them are to remove all movable property belonging to them from the property by no later than **31 JANUARY 2017** at **12h00**;
4. In the event of the first and third respondents or any of the occupiers occupying through them failing to comply with this order, the sheriff for the district of Bloemfontein is authorised and directed to evict them and to remove any movable property belonging to them from the property, forthwith;
5. The first and third respondents are directed to pay the costs of this application on the scale as between attorney and client, jointly and severally, the one paying the others to be absolved;

6. Such costs shall include the costs occasioned by the employment of two councils.

M.H. RAMPAL, J

On behalf of applicant: Adv. N Snellenburg SC
with Adv. R van der Merwe
Instructed by: Honey Attorneys
Bloemfontein

On behalf of the 1st & 3rd respondent: Adv. JJ Buys
Instructed by: Crause Attorneys
Bloemfontein