

REPUBLIC OF SOUTH AFRICA**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)****CASE NO: 27485/15**

5/6/2015

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

5 June 2015

In the matter between:

MADIBENG LOCAL MUNICIPALITY**APPLICANT****and****THE UNLAWFUL OCCUPIERS OF PORTIONS****RESPONDENTS****33, 35 AND 37 OF THE FARM 448 BOKFONTEIN**

J U D G M E N T**HEARD ON: 28 MAY 2015****JUDGMENT ON: 05 JUNE 2015**

[1] The applicant is the lawful owner of portions 33, 35 and 37 of the farm 448, Bokfontein ("the land"). The respondents occupied the site in question on 6 May 2015. The applicant became aware that a group of people were illegally erecting structures on the land on 10 May 2015. The applicant immediately conducted a site inspection and established that about 150 structures were erected on the land. A notice calling upon the respondents to evacuate the land with immediate effect was issued and served on the respondents. The notice informed the respondents that if the land is not evacuated as requested in the notice legal proceedings will be instituted against them.

[2] The respondents failed to heed the notice and on 13 May 2015 the applicant served them with this application. The application stated that they appear in court the following day. They were in fact given less than 48 hours' notice to file their opposing papers. The matter was set down for hearing on 14 May 2015. The matter came before Bofilatos AJ who raised a concern about the service of the application. Bofilatos AJ postponed the matter *sine die* to afford the respondents an opportunity to file their answering affidavit. The respondents were ordered to file their answering affidavit on 18 May 2015 and the applicant to reply thereto by 20 May 2015. By 18 May 2015 the respondents had not filed their answering affidavit.

[3] The matter was re-enrolled for hearing in the urgent court and came before Mavundla J on 21 May 2015. Mavundla J made a ruling that the matter was urgent and granted the applicant relief in terms of prayer 1 of its notice of motion in respect of the urgency. Having ruled as such the judge granted the respondents a further indulgence to file their answering affidavit on 25 May 2015 and the applicant to reply thereto by 27 May 2015. When the matter appeared before me the parties, having complied with the order of Mavundla J were ready to argue.

[4] It is not in dispute that the land is earmarked for the relocation of the Orange Farm informal settlement in terms of the court order granted on 6 October 2014. The applicant is still in the process of implementing other requirements in terms of the court order and will not be in a position to finalise all the requirements in terms of the order if the respondents remain on the land.

[5] It is common course that the application for the eviction of the respondents was issued in terms of the common law and the applicant sought an urgent final eviction order. Since the application was ruled urgent by Mavundla J, what remained for determination would have been whether the applicant has made out a case for a final interdict restraining the respondent from occupying, entering and erecting any structure of whatsoever nature on the land.

[6] However, the respondents in their answering papers raised the issue of the non-compliance by the applicant of the requirements of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("the PIE"). The argument is that an order for the eviction of the respondents from the land can be granted only in terms of s 4 (6) and 4 (8) of PIE, read together with s 6 (3) and 6 (4) of PIE since the eviction is at the instance of an organ of state. It was further contented that the provisions of PIE are applicable in the circumstances of this matter.

[7] In the founding affidavit it was the applicant's case that the respondents occupied the land without its permission, but since it was not being used as a dwelling neither the Extension of Security of Tenure Act 62 of 1997 nor PIE found application in this matter. However, in reply to the respondents' answering affidavit the applicant concedes that PIE is applicable. It is, therefore, common cause that the provisions of PIE are applicable to the respondents' eviction from the land.

[8] Where the eviction takes place at the instance of an organ of state in circumstances to which PIE is applicable the court can only order eviction if it is satisfied that it is just and equitable to do so after having regard to all the relevant factors including those set out in s 6 (3) of PIE, namely the circumstances in which the occupiers came to occupy the land and erect structures thereon; the period they have resided on the land and the availability of suitable alternative accommodation or land.

[9] In terms of s 6 (6) of PIE, the procedures set in s 4 apply, with the necessary changes, to any proceedings in terms of subsection (1).

[10] It is therefore apt to quote the applicable provision of s 4 which read as follows:

“4. Eviction of unlawful occupiers.—

- (1) Notwithstanding anything to the contrary contained in any law or the common law, the provisions of this section apply to proceedings by an owner or person in charge of land for the eviction of an unlawful occupier.
- (2) At least 14 days before the hearing of the proceedings contemplated in subsection (1), the court must serve written and effective notice of the proceedings on the unlawful occupier and the municipality having jurisdiction.
- (3) Subject to the provisions of subsection (2), the procedure for the serving of notices and filing of papers is as prescribed by the rules of the court in question.
- (4) Subject to the provisions of subsection (2), if a court is satisfied that service cannot conveniently or expeditiously be effected in the manner provided in the rules of the court, service must be effected in the manner directed by the court: Provided that the court must consider the rights of the unlawful occupier to receive adequate notice and to defend the case.
- (5) The notice of proceedings contemplated in subsection (2) must—
 - (a) state that proceedings are being instituted in terms of subsection (1) for an order for the eviction of the unlawful occupier;
 - (b) indicate on what date and at what time the court will hear the proceedings;
 - (c) set out the grounds for the proposed eviction; and

- (a) state that the unlawful occupier is entitled to appear before the court and defend the case and, where necessary, has the right to apply for legal aid.
- (6) If an unlawful occupier has occupied the land in question for less than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women.
- (7) If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women.
- (8) If the court is satisfied that all the requirements of this section have been complied with and that no valid defence has been raised by the unlawful occupier, it must grant an order for the eviction of the unlawful occupier, and determine—
 - (a) a just and equitable date on which the unlawful occupier must vacate the land under the circumstances; and
 - (b) the date on which an eviction order may be carried out if the unlawful occupier has not vacated the land on the date contemplated in paragraph (a).
- (9) In determining a just and equitable date contemplated in subsection (8), the court must have regard to all relevant factors, including the period the unlawful occupier and his or her family have resided on the land in question.
- (10) The court which orders the eviction of any person in terms of this section may make an order for the demolition and removal of the buildings or structures that were occupied by such person on the land in question.
- (11) A court may, at the request of the sheriff, authorise any person to assist the sheriff to carry out an order for eviction, demolition or removal subject to conditions determined by the court: Provided that the sheriff must at all times be present during such eviction, demolition or removal.
- (12) Any order for the eviction of an unlawful occupier or for the demolition or removal of buildings or structures in terms of this section is subject to the conditions deemed reasonable by the court, and the court may, on good cause shown, vary any condition for an eviction order."

[11] The respondents contends that since the applicant in its founding papers seeks a final order on an urgent basis and having conceded that PIE applies to the eviction, the order it, therefore, wants is in terms of s 4 (6) of PIE and as such the applicant was obliged to comply with s 4 in seeking the respondents' eviction from the land. The argument is that since the applicant is seeking, as it does, a final eviction order, it was obliged in terms of s 4 (2) of PIE to at least 14 days before the hearing of the proceedings contemplated in subsection (1), serve a written and effective notice of the proceedings on the respondents. Failure to comply with s 4 (2), according to the respondents, is that they have been unable, in the light of the expedited time periods, to place before the court the personal circumstances of all the occupiers. They were only able to obtain the information of only 34 households. The court is in these circumstances unable to formulate a view based on the relevant considerations whether it is just and equitable to evict the respondents, which consideration includes the rights and needs of the elderly, children, disabled persons and households headed by women, so the argument goes.

[12] My view is that the argument by the respondents that they should have been given fourteen days' notice, as required by s 4 of PIE, within which to respond to the applicants' founding papers is not correct. The applicants approached the court on urgency and were allowed by Mavundla J not to comply with the applicable time periods.

[13] The proper procedure would have been for the court to grant an interim order in terms of s 5 (1) of PIE, however, because the respondents appeared in court on the date set for the hearing, there was no need to grant the interim relief. The respondents were afforded time, which in my opinion is reasonable, within which to file their answering affidavit and which was enough to comply with s 4 (6) of PIE. The circumstances of this case are such that the applicants had to act swiftly to avoid proliferation of the unlawful occupation of the land.

[14] In my opinion Mavundla J in condoning the non-compliance with time periods truncated the procedure to be followed by the applicants in regard to urgency. The issue of urgency has as a result fallen away. Section 5 of PIE cannot, therefore, be decided afresh.

[15] Even if the issuing of an interim order would have been peremptory in terms of s 5 (1) of PIE, the applicants would be entitled to make use of the provisions of s 4 (6) in that the respondents had occupied the land for less than six months at the time the proceedings were initiated. In terms of s 4 (6) of PIE where a defendant has been in occupation of the land for less than six months, the court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women.¹

[16] When all the relevant circumstances placed before me are considered, I am satisfied that it is just and equitable that an eviction order be granted against the respondents. From the reading of the respondents' papers I could not make out any concrete facts relating to the rights and needs of the vulnerable groups, namely, the elderly, children, disabled persons and households managed by women, as required in terms of s 4 (6). As argued by the applicant's counsel the respondents' poverty and homelessness cannot be overemphasised over that of the people for whom the land has been earmarked. I also took into account that the applicant has stated in its unchallenged evidence that it will not be able to provide alternative accommodation to the respondents due the unavailability of alternative land and budget.

¹ See Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC) at 234G.

[17] The applicants' submission, which is uncontested, is that at the time they instituted the proceedings there were about 150 uninhibited structures on the land. By the time the proceedings were instituted the applicant had already informed the respondents that they were in unlawful occupation of the land. It would seem that despite that notice the respondents proceeded to inhabit the land and more people moved in. The application as such was aimed at prohibiting this proliferation.

[18] The respondents have conceded in their answering affidavit that they do not have a defence to the applicant's claim. They agree that they are in unlawful occupation of the land in that they were not given consent to occupy the land. If the requirements of s 4 are satisfied and no valid defence to an eviction order has been raised, the court 'must', in terms of s 4 (8), grant an eviction order.

[19] The respondents are aggrieved that they have not been allocated the land even though the applicant is aware of their dire need for land and accommodation. It was argued on their behalf that they have over a period of years taken their grievances for better services and overcrowding where they were staying with the applicant and the applicant has done nothing about it. They have unlawfully occupied the land in question out of desperation and frustration. The applicant should have consulted with them prior to the court order awarding the land to the people from Orange Farm was granted, which they failed to do. They further aver that they will be left homeless should they be evicted from the land thereby making their eviction unjust and inequitable.

[20] There may be justification for these grievances, but, they do not, in my view, constitute a defence against the applicant's claim. It is not for this court to consider the veracity or otherwise of the respondents' grievances and in any way they are aware of the court order granted against the applicant in respect of the land and should have, if they wanted, taken the order on appeal or review. For as long as the order has not been set

set aside on review or on appeal, it remains binding on the applicants and must be given effect to. It is also not the duty of this court to order consultation between the applicant and any of the communities within its jurisdiction. There are processes and procedures set out for such consultations which must be followed by the respondents and not take the law into their own hands.²

[21] The effect of PIE has been held by our courts as not to expropriate the landowner and that PIE cannot be used to expropriate someone indirectly. Much as PIE counterpoises a right not arbitrarily to be deprived of a home, the landowner, on the other hand, retains the protection against arbitrary deprivation of property under s 25 of the Constitution. PIE serves merely to delay or suspend the exercise of the landowner's full proprietary rights until a determination has been made whether it is just and equitable to evict the unlawful occupier and under what conditions, if any.³

[22] In the circumstances the relief sought by the applicant to evict the respondents from portions 33, 35 and 37 of the farm 448 Bokfontein should be granted.

[23] Section 4 (8) of PIE enjoins me to determine a just and equitable date on which the respondents must vacate the land under the circumstances; and the date on which an eviction order may be carried out if the unlawful occupier has not vacated the land on the date so determined.

[24] My view is that a just and equitable date for the respondents to vacate the land should be as soon as is reasonably possible. The respondents have only just moved into the land. The first occupation happened on 6 May 2015 and most of the occupation took place

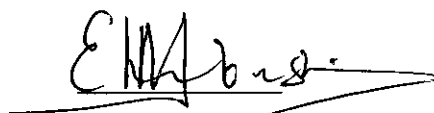
² See Minister of Local Government and Housing & Others v Various Unlawful Occupiers of Houses situated in Precincts 4 and 6, Delft Symphony & Others (108/2008) [2008] ZACGH (6 February 2008).

³ See Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC) at 229E G; Wormald NO v Kambule 2006 (3) SA 562 (SCA) at 569F – G.

after that date. From reading the respondents papers indications are that the respondents are steadily and on a constant basis occupying the land. There more time it takes for the respondents to vacate the land the more chances there will be for other occupants to move in and the more difficult it will be to remove them. I am therefore of the opinion that it is just and equitable that the respondents vacate the land within 15 days from date of this order and that they be evicted by the sheriff on 30 June 2015 should they fail to comply with this order.

[25] I, in the premises, make the following order:

1. The application is granted with costs.
2. The respondents are ordered to vacate portion 33, 35 and 37 of farm 448 Bokfontein within 15 days from date of this order, failing which the Sheriff for the district of Brits is authorised to remove the respondents and all persons under their control, together with their possessions from the said land on 30 June 2015.



E. M. KUBUSHI

JUDGE OF THE HIGH COURT

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