

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

Application number: 1381/2015

In the Appeal of:

**POTENTIAL UNKNOWN OCCUPIERS OF ERF [.....],
[.....], MANTSOPA
MUNICIPALITY**

1st Applicant

**POTENTIAL UNKNOWN OCCUPIERS OF PORTION
135 OF FARM “DORP GRONDEN VAN LADYBRAND
NR. 451”MANYATSENG, MANTSOPA MUNICIPALITY**

2nd Applicant

and

MANTSOPA LOCAL MUNICIPALITY

Respondent

HEARD ON: 25 JUNE 2015

DELIVERED ON: 28 AUGUST 2015

JUDGMENT

MOCUMIE, J

[1] On 5 June 2014, Mantsopa Local Municipality (the municipality) sought an order evicting ‘potential unknown occupiers’ of Erf [.....], Lady Brand and Portion 135 of farm Dorp Gronden, Lady Brand, within its area of jurisdiction, under case no 525/2014. On the same day Van Zyl, J granted an order which reads:

‘The notice (“the notice”) in terms of section 5(2) of the Prevention of Illegal Evictions from and Unlawful Occupation of Land Act No 19 of 1998, attached hereto marked as Annexure “X”, is authorised.

- [2] It is not clear on the applicants' founding affidavit what happened between 23 February 2014 and the date on which the matter was enrolled, 5 June 2014. But, on 5 June 2014, the so called 'potential unknown occupiers', did not make any appearance. The *rule nisi* was confirmed in their absence. On 14 October 2014 the Sheriff served the final order on Mr Samuel Sello Mohata ('Mohata'), who in a later affidavit is described as a resident of one of the ervens in dispute, Portion 135 of farm Dorp Gronden.
- [3] On 10 March 2015 under case no. 1144/2015, the applicants, led and represented by Mohata, sought an order which prohibited the municipality from evicting them; pending an application for rescission of the judgment and order granted in favour of the municipality under case 525/2014. This is the application for rescission of that judgment and order.
- [4] The applicants were initially legally represented by Mr Van Eeden of Van Eeden Attorneys, who has since withdrawn from the matter. On 4 June 2015, Mohata and a group of people who purported to be the unknown unlawful occupiers of the ervens in dispute were present in court. Mohata, with permission of the court addressed the court and confirmed that Mr Van Eeden was no longer representing the group. The group comprising mostly of indigent people had struggled to put funds together to instruct another attorney but ultimately managed to give instructions to Mr Tshangana of Tshangana Attorneys who was however not available on the day. The matter stood down until the attorney concerned, came to court. He informed the court that he was given instructions only that day. Thus he was not in a position to address the court. He sought a postponement in order to peruse the papers and consider whether to argue the case himself or brief counsel. The matter was postponed on that basis to 25 June 2015.
- [5] In the Heads of Argument, Mr Manye, on behalf of the municipality raised two points *in limine*. One, the identity of the unknown unlawful occupiers. He made the point that a person(s) cannot institute action or defend the matter as an agent on behalf of his or her principal without the necessary authorisation or Power of Attorney. And that a group of people identified as

potential unknown occupiers which did not have any Constitution and was not regulated by any law did not have capacity to sue or be sued; either in its own name or through the unknown and unidentified office bearers.

- [5] The second, point *in limine* is that the Founding Affidavit contained hearsay evidence of Mr Van Eeden, the applicants' erstwhile attorney, who although the deponent to the Founding Affidavit was not one of the unlawful occupiers; had no direct interest in the matter; and thus had no personal knowledge of the facts of the matter. Thus the Founding Affidavit did not disclose the cause of action relied on, so Mr Manye submitted. The applicant did not apply for the admission of such hearsay evidence in the interests of justice. Their case was compounded further by the fact that the same Mr Van Eeden had subsequently withdrawn from the matter.
- [6] The first point *in limine* must fail on the simple basis that the municipality on its own case obtained the court order under case number 525/2014 against the same unidentified/unknown potential unlawful occupiers. The interim order was even served on someone by the name or surname of Damane but it's not clear whether that person occupied the land in dispute. In any event, even after the municipality identified the unlawful occupiers, as per the communication attached to the papers between the Municipal manager and the community at various meetings, the municipality nonetheless proceeded on the same papers with the respondents cited as 'potential unlawful occupiers'. This argument is simply disingenuous and cannot hold water. In any event there is no such person as 'a potential unlawful occupier' in terms of PIE.
- [7] In respect of the second point *in limine*, the original Founding Affidavit was deposed to by a certain Mr Van Eeden of Van Eeden Attorneys (Van Eeden). What he deposed to was relayed to him by the unlawful occupiers. The confirmatory affidavits filed by some of them did not confirm the content of the founding affidavit to be correct. Mohata who subsequently deposed to another founding affidavit did not have *locus standi* because in *the* same founding affidavit, Mohata identified himself as a resident of Dorp Gronden,

one of the *ervens* in dispute. Not as an interested or affected party in the matter. He alleged that he was mandated to speak on behalf of others, who have filed confirmatory affidavits to support what he contended to be the true facts of this matter. I am persuaded to agree with Mr Manye on this one because it is correct that there is no Power of Attorney appended to the papers or even referred to by Mohata in his affidavit. Mr Thompson on behalf of the applicants contended that it was not necessary for Mohata as a resident of Dorp Gronden over 13 years to specify his interest in these proceedings. It is trite that not each and every unlawful occupier had the *locus standi* to do so. But those whose interests were affected. I am in agreement with Mr Manye that the affidavit was clearly filed in an attempt to address the point *in limine* raised by the municipality that Van Eeden did not have personal knowledge of the facts of the matter. This affidavit is defective. Mohata cannot enter the fray at this late stage and in the fashion that he was introduced into the proceedings. The second point *in limine* must therefore succeed.

[8] Having said that does not dispose of the matter finally. On the merits, the municipality contended that the notice in terms of s5 of the Prevention of Illegal Evictions Act (PIE) was properly obtained and served on the applicants. The land belonged to the municipality and the applicants had no legal defence. The vexed question remains, regardless of whether there was proper service initiating eviction proceedings, was the municipality supposed to embark upon on processes under PIE in the circumstances of this case? Flowing from that question were the applicants 'unlawful occupiers' as defined in PIE?

[9] Section 4 of PIE deals with the eviction of unlawful occupiers. In *Ekurhuleni Metropolitan and Another v Various Occupiers, Eden Park Extension 5*¹, the Supreme court of Appeal explained the relationship between s4(7) and 4(8) as follows:

¹ *Ekurhuleni Metropolitan and Another v Various Occupiers, Eden Park Extension 5* [2014] 1 All SA 386 (SCA)

'The first enquiry is that under s4(7) ,the court must determine whether it is just and equitable to order eviction having considered all relevant circumstances. Amongst those circumstances the availability of alternative land and the rights and needs of people falling under specific vulnerable groups are singled out for consideration. Under s4(8) ,the court is obliged to order eviction if the requirements of the section have been complied and no valid defence is advanced to an eviction.

The Court further held:

'The words 'just and equitable' has been explained in case law as relating to the interests of not only to the persons who had occupied the land illegally, but to the land owner as well.'

- [10] In *Port Elizabeth Municipality v Various Occupiers*,² Albie Sachs writing for the majority, stated, on the role of the courts when dealing with applications under PIE:

'(T) he Constitution imposes new obligations on the courts concerning rights relating to property not previously recognised by the common law. It counterposes to the normal ownership rights of possession, use and occupation, a new and equally relevant right not arbitrarily to be deprived of a home. The expectations that ordinarily go with title could clash head-on with the genuine despair of people in dire need of accommodation. The judicial function in these circumstances is not to establish a hierarchical arrangement between different interests involved, privileging in an abstract and mechanical way the rights of ownership over the right not to be dispossessed of a home, or *vice versa*. Rather, *it is to balance out and reconcile the opposed claims in as just a manner as possible, taking account of all the interests involved and the specific factors relevant in each particular case.*'³ (My own emphasis)

- [11] Section 26 of the Constitution of the Republic of South Africa⁴ provides every individual with the right to access to adequate housing and states that 'no one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No

² *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (2005 (1) SA 217) (CC)

³ Footnote 2 above.

⁴ Act 106 of 1996.

legislation may permit arbitrary evictions.’⁵

- [12] It is now trite that PIE has its roots, in the provisions of section 26 of the Constitution. Section 4(7) of PIE provides:

‘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 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 landowner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women.’(My own emphasis)

- [13] An unlawful occupier is defined in PIE, as ‘a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land, excluding a person who is an occupier in terms of the Extension of Security of Tenure Act,1997, and excluding a person whose informal right to land, but for the provisions of this Act, would be protected by the provisions of the Interim Protection of Informal Land Rights Act,1996 (Act No. 31 of 1996).’⁶

- [14] The case of the municipality is that at the time it approached this court for an interim interdict, there were no occupiers on the land that is why it cited the applicants as ‘potential unlawful land occupiers’. However by the time the final order was granted and served by the Sherriff, the applicants had then moved onto the land unlawfully. Several meetings by the Municipal Manager and the residents of the neighbouring land did not yield results. i.e people who occupied the portions of the ervens in issue refused to move unless and until provided with alternative accommodation.

⁵ See *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) para [82] and [83] also reported at 2000 (11) BCLR 1169 (CC).

⁶ Section 1 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

- [15] The provisions of PIE are relatively simple and clear as case law indicate. A land owner seeking to evict an unlawful occupier from his or her land must prove (a) ownership of the land in question; (b) that the person occupying the land does so unlawfully ;(c) that the procedural provisions of PIE have been complied with; and that on consideration of all relevant circumstances an eviction order is just and equitable. These requirements were set out by Maya JA writing for the majority in *Wormald No and Others v Kambule*⁷.
- [16] It is now trite but bears repeat that PIE must be adhered to by any landowner, ie the registered owner of land, including an organ of State, seeking to evict a person who occupies his or her land and utilises such land to erect any hut, shack, tent or similar structure or any other form of temporary or permanent dwelling or shelter without the express or tacit consent of such landowner.
- [17] Applying these requirements to the facts of this case it is clear that they do not fall within the ambit of PIE for the sole reason that there were no unlawful occupiers occupying the ervens in issue unlawfully at the time when the proceedings were initiated as is typical in cases of this nature.⁸
- [18] The watershed mark of the applicants' case is this. The final court order confirming the *rule nisi* together with a copy of the interim interdict granted on 7 February 2014 under case 525/2014 and a copy of the draft order marked X annexed to the Founding Affidavit was only served on the applicants by the Sherriff on 20 February 2015 almost a year later after this court granted the final eviction order. What compounded the case for the applicant is that annexure X referred to in the draft order was not attached. The documents served on the applicants patently did not inform them of

⁷ *Wormald No and Others v Kambule* 2006 (3) SA 562 (SCA)

⁸ Compare with *Residents of Joe Slovo Community v Thubelisha Homes* 2010(3) SA 454 (CC); *Ekurhuleni*

Metropolitan Municipality and another v Various Occupiers, Eden Park Extension 5 [2014] 1 All SA 386 (SCA); *Blue Properties v Occupiers of Saratoga Avenue* 2009 (1) SA 470 (W); *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC); *Johannesburg Housing Corporation (Pty) Ltd v Unlawful Occupiers of the Newtown Urban Village* 2013 (1) SA 583 (GSJ).

what steps to take upon receipt of the interim order and by what date. ie in the event they wanted to oppose the application as indicated in annexure X. The municipality did not explain why this important annexure was never served or attached to the order. But instead it chose to maintain that annexure X was properly served contrary to all indications that it was not.

[19] If annexure A was served, which is impossible, the question would be: on whom was it served? According to the Sherriff's return of service, the interim order with annexure A was served on 12 February 2014 worded 'AFFIX FRONT DOOR' of the residence of POTENTIAL UNKNOWN OCCUPIERS OF ERF [.....], EXTENSION 5, MANTSOPA MUNICIPALITY, 1st defendant, at [.....] LADYBRAND, which is kept locked and thus prevents alternative service. The second return service was effected by the same Sherriff worded 'AFFIX FRONT DOOR of the RESIDENCE of POTENTIAL UNKNOWN OCCUPIERS, 2nd defendant, at PORTION 135 OF FARM 'DORP GRONDEN VAN LADYBRAND NR.451', MANYATSENG, MANTSOPA MUNICIPALITY, which is kept locked and thus prevents alternative service.' Clearly there is no mention of anyone who received the processes. There is no reason proffered by the municipality why the simple methods of service provided for in the rules of this court and in the order, were not used to ensure that these processes came to the attention of the unlawful occupiers including Mohata.

[20] It is patently clear and it's the case for the municipality that there were no unlawful occupiers when the interim order was granted. It follows that the interim order was obtained without the knowledge of any party occupying the land or about to occupy the land including the applicants because as soon as some of the 'unlawful occupiers' came to know about it two days before the final order was granted, they sought legal advice and immediately approached this court for a rescission of that order.

[21] From the above it is clear that the interim as well as the final orders were granted on the wrong assumption that the applicants fell within the definition of 'unlawful occupiers' in PIE. Thus the order(s) were erroneously granted. On this basis alone, this application ought not have been entertained or

granted as it simply did not fall under s4 (7) or s4 (8) of PIE. Apart from that, there is ample evidence before this court that indicate that the service formalities were not complied with ie the interim order was not served on any interested party, let alone the applicants. It would in any event not be just and equitable to evict the unlawful occupiers from the ervens before the municipality has complied with procedural steps set out in PIE read with s26 of the Constitution. That being the case, the application for rescission of the judgment and order under case no. 525/2014 ought to succeed.

This is, however, not the end of the road for the municipality. The municipality can now, if it so deem it necessary, approach the court but in strict compliance with the requirements of PIE and guidelines set out in *Wormald* above.

[22] In the result I grant the following order.

ORDER

1. The application is upheld with costs.
2. The judgment and order under case 525/2014 is rescinded.
3. The applicants to pay the wasted costs of 4 June 2015.

B.C. MOCUMIE, J

On behalf of the applicants:
Instructed by:

Adv Thompson

Tshangana Attorneys
BLOEMFONTEIN

On behalf of the respondent:

Adv L Manye

Instructed by:
Morobane Incorporated
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/PC