



Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Regional Magistrates:	YES / NO
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**IN THE HIGH COURT
OF SOUTH AFRICA
(Northern Cape Division, Kimberley)**

Saakno / Case number: **CA & R 1/2015**
Datum verhoor/Date heard: **15 / 06 / 2015**
Datum gelewer/Date delivered: **31 / 07 / 2015**

In the matter between:

MINISTER OF POLICE

Appellant

and

LUCILLA BERNARDENE HARMSE

First Respondent

MSOBOMVU MUNICIPALITY

Second Respondent

Coram: Williams, J et Erasmus, AJ

JUDGMENT

ERASMUS, AJ

- [1] The appellant noted an appeal against the judgment of the Magistrate Colesberg in respect of a refusal to grant an eviction order in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, No. 19 of 1998 ("PIE") on the basis that the first respondent is in unlawful occupation of the property known as [.....] Street, Towervallei, Colesberg ("the property"). It is common cause that the property belongs to the South African Police Services ("SAPS") and that the SAPS is an organ of State as envisaged in PIE.
- [2] It is common cause that the first respondent had been in occupation of the property for a period of more than six months prior to the application being lodged. She started to occupy the property in September 2013 and the application was only lodged on 21 of July 2014.
- [3] It is the case of the appellant that the officials who allocated the property to the first respondent did so without having the necessary authority to do so and that they thus acted *ultra vires*. It was alleged by the appellant that the actions of its officials were *void ab initio* and that the principles of *estoppel* could not be applied against the appellant.

- [4] The first respondent opposed the application for her eviction from the property in the Magistrate's Court and denied that she was or is in unlawful occupation of the property. She further denied that the officials who allocated the property to her acted *ultra vires* and maintained that the appellant should be *estopped* from claiming that these officials acted *ultra vires*. The first respondent did not oppose the appeal.
- [5] The first respondent is a constable in the employ of SAPS and is stationed at the Colesberg police station. The property is utilised to accommodate employees of the appellant who qualify to be accommodated in official housing in accordance with the appellant's Housing Policy.
- [6] The official Housing Policy of the appellant, which formed part of the appellant's papers in the Court *a quo*, prescribes the procedure to be followed when official housing becomes available and also describes the process to be followed when such housing is to be allocated to an employee. Clauses 5 and 6 of the Housing Policy of the appellant provides for the establishment and constitution of housing committees to allocate official housing to

employees who qualify in terms of the criteria stipulated in the policy.

- [7] The factual background to the application dates back to as far as September 2013 when the property became vacant. On 19th of September 2013 the Station Commander at Colesberg Police Station sent a written request to the Area Commissioner, De Aar, to advertise the property in accordance with the Housing Policy of the appellant.
- [8] The first respondent duly completed an application form for the allocation of the property to her. As she was in desperate need of accommodation, she called a certain Colonel at the Area Management based in De Aar. She explained her situation and was informed that she had permission to occupy the house immediately. As at 30 September 2013, the first respondent was still the only applicant for the specific property. She was again informed that she may occupy the property. She was given the keys by her Station Commander and duly completed an undertaking in respect of the property.
- [9] On 2 October 2013, the first respondent was informed by an official of the De Aar Supply Chain Management Office

that she had to move out of the house into which she had just moved. On the following day the first respondent met with Colonel Du Preez at the De Aar office. He referred her to Colonel Fourie and after she had explained the situation to him, Fourie perused the file and confirmed, in the presence of the first respondent, that no other application had been received for the property in question. Fourie then called the Area Commissioner in De Aar and explained the situation to him. Fourie thereafter confirmed to the first respondent that she may stay on in the house.

[10] On 3 October 2013 the Station Commander of De Aar sent an e-mail to the Station Commander of Colesberg, informing him that the management had decided that the first respondent should stay in the property and that another constable who was also interested in the property could apply for any of the other three vacant state houses at Colesberg.

[11] Later during October 2013, the first respondent was informed that she should submit another application for the same property. A decision was then taken by the Provincial Supply Chain Management to allocate the property to the other constable who had applied for

housing. The first respondent was once again informed to vacate the property.

[12] The first respondent thereafter lodged a grievance with her employer in terms of the prescribed grievance procedure of the SAPS, but the process has as yet not been finalized.

[13] From the Housing Policy of the applicant it is quite clear that the allocation of housing to employees of the appellant who qualify for such occupation, should be done by the housing committee at area level. From the correspondence that form part of the application papers, it is clear that the initial allocation of the property to the first respondent was done at area level, but not in accordance with the Housing Policy. From the papers it is clear that the officials, on Area- and Provincial level had not complied with the applicant's Housing Policy and that due procedure was not followed. The official(s) who gave the first respondent the right/permission to occupy the property neither had the authority to do so nor was it done in accordance with the Housing Policy.

- [14] Be that as it may, the first respondent appears to have acted *bona fide* and had taken all the necessary steps in compliance with the Housing Policy, just as she was instructed to do by her superiors.
- [15] Against this factual background the learned Magistrate found that the first respondent's reliance on the defence of *estoppel* was misplaced and that the first respondent was in unlawful occupation of the property.
- [16] With reference to the case of **MANGAUNG LOCAL MUNICIPALITY v MASHALE AND ANOTHER**¹ the learned Magistrate found that the provisions of section 6 of PIE do not apply as the applicant is an organ of State and the property belongs to the organ of State itself. The learned Magistrate found that the provisions of section 4 of PIE were applicable, more especially sections 4(2) to 4(5) and that the applicant had to have complied with same.
- [17] As the first respondent had been in occupation of the property for a period of more than 6 months at the time of the application, he found that the provisions of section 4(7) were applicable and that it had to be determined

¹ 2006(1) SA 269 (OPD) at 274D-I

whether it was just and equitable to evict the first respondent.

[18] The applicant's appeal is based on the grounds that the learned Magistrate erred and misdirected himself in dismissing the application by invoking the provisions of section 4(7), instead of applying the provisions of section 4(8) of PIE. It was further argued that he applied the principles laid down in the decision of **NDLOVU v NGCOBO; BECKER AND ANOTHER v JIKA**² incorrectly. I disagree. In terms of this decision, a court has the discretion on whether or not to evict an unlawful occupier. The discretion pertaining to the date of the eviction only arises after the decision to evict has been taken.

[19] The relevant sub-sections of section 4 of PIE read as follows:

“(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.

² 2003(1) SA 113 (SCA) at par [18]

(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, ... 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."

- [20] From the wording of section 4(7) of PIE it is clear that this sub-section and not section 4(6) applies to unlawful occupiers who have occupied the land in question for more than six months, as the first respondent has done. Section 4(8) deals with the date on which an unlawful occupier must vacate a property and this only becomes relevant once the court is satisfied that all the requirements of section 4 have been complied with and that no valid defence had been raised by the unlawful occupier and that it was just and equitable to evict. This implies that a court must take into account all the

relevant circumstances and the special circumstances referred to in section 4(7), including whether land has been made available or can reasonably be made available by an Organ of State or another land owner for the relocation of the unlawful occupier and also the rights and needs of the elderly, children, disabled persons and households headed by women. Having considered the circumstances, a court may grant an eviction order if it is satisfied that it is just and equitable to do so.

[21] I am satisfied that the court *a quo* has not misdirected itself in respect of the relevant sub-sections of section 4 of PIE. Section 4(7) applies in this instance. The learned Magistrate considered the relevant circumstances of the first respondent and, against the background of the specific facts of this case, proceeded with an evaluation thereof when deciding whether it was just and equitable to grant the eviction order. Had the court decided that it was just and equitable to evict the first respondent, he would have considered sub-section (8) and decided on a date to evict the first respondent.

[22] In the alternative, it was submitted on behalf of the applicant that the learned Magistrate erred in the manner

in which he exercised his discretion, by exercising it capriciously and not judicially.

[23] It is trite law that a court of appeal shall not lightly interfere with the exercise of a discretion of a court of first instance. In the case of the **GENERAL COUNCIL OF THE BAR OF SOUTH AFRICA v GEACH AND OTHERS; PILLAY AND OTHER RELATED MATTERS v PRETORIA SOCIETY OF ADVOCATES AND ANOTHER; BEZUIDENHOUT v PRETORIA SOCIETY OF ADVOCATES**³, Nugent JA confirmed the legal position. He proceeded to explain that where a discretion is conferred, it implies that the matter for decision calls for judgment, upon which reasonable people might disagree. A Court on Appeal is restricted to determining whether the court *a quo* has embarked upon the process of the enquiry correctly. If so, the Court on Appeal may not interfere with the decision, even if it disagrees with the result/conclusion. There are two enquiries to be made in the process of exercising a discretion. The first is to establish the material facts. The second is to evaluate those facts towards the correct objective. The learned Judge summarized the legal position as follows:⁴

³ [2013] 1 All SA 393 (SCA) at 434

⁴ At par [129]

“It is not sufficient that the court made correct factual findings. It must also direct itself in accordance with those facts. Relevant factors must be considered and irrelevant ones ignored. If manifestly relevant facts do not feature in its evaluation, or irrelevant facts are taken into account, or facts are treated as pointing to one result, when they clearly point to the opposite result, the court misdirects itself and the appeal court may interfere. It is in terms of those principles that I approach this case. In doing so I am mindful that the best, indeed the only, evidence of what a court considers in arriving at its decision is the contents of its judgment and one can only consider the question of misdirection by looking at the contents of the judgment in the light of the evidence in the record.”

- [24] Mr. Khokho, on behalf of the applicant argued that the first respondent failed to place all relevant facts before the court. I disagree. The facts and circumstances relied on by the court *a quo*, appear from the record. The mere fact that the first respondent is not poor and destitute, does not mean that it would be just and equitable to evict her and her family from the property. There is further no evidence for his submission that service delivery of SAPS is being hampered by the unlawful occupation of the property by the first respondent. She is also an employee of the SAPS. The personal circumstances of the other official to whom the property was to be allocated, are similar to those of the first respondent. There is also no evidence for the submission that further occupation by the first respondent would create havoc amongst employees as they will in future not see the need to follow procedures laid down by the housing

committee. Each case needs to be evaluated on its own facts.

[25] In considering whether the learned Magistrate exercised his discretion judicially, I cannot conclude that the learned Magistrate had misdirected himself on the law and the application thereof. After considering the relevant facts, contained in the record, I can further not conclude that he had committed any misdirection in exercising his discretion in the enquiry. He gave due consideration to the relevant case law and the facts in a balanced manner.

[26] Due consideration was given to the circumstances of the first respondent. She is a married woman with two minor children. The conduct of the first respondent, leading up to the taking of occupation of the property and thereafter, does not show any *mala fides* or disregard for the rights of the land owner. The first respondent did everything that was required of her by her seniors including signing the undertaking in favour of her employer when she took occupation of the property. There is no allegation that the first respondent has not complied with her obligations in terms of the undertaking nor that she has not paid the rent to SAPS.

[27] The predicament that the first respondent finds herself in was not of her own doing, but through that of the officials of the land owner. Their conduct and disregard for the rights of the first respondent is further evidenced by the fact that alternative accommodation has not been offered to the first respondent. It is further evidenced by the fact that the grievance, lodged by the first respondent on 11 December 2013, had not yet been resolved at the time of the application. The outcome sought therein was that she retains occupation of the property for the remaining period of the lease of three years, as set out in clause 4.2 of the written undertaking dated 30 September 2013.

[28] I am satisfied that, given the circumstances relevant to the application for the eviction order, the applicant was not entitled to an order for eviction and that the learned Magistrate was right in finding that it was not just and equitable to evict the first respondent . The appeal accordingly falls to be dismissed. The first respondent would then, in the absence of any breach of her written undertaking to her employer, or any other legally valid termination of the right to occupy the property, be entitled to occupy it for the remainder of the period, as

envisaged in clause 4.2 of the written undertaking dated 30 September 2013.

[29] **I MAKE THE FOLLOWING ORDER:**

“THE APPEAL IS DISMISSED.”

S L ERASMUS, AJ
ACTING JUDGE

I agree.

CC WILLIAMS, J
JUDGE

<u>On behalf of Appellant:</u>	Adv. N.D. Khokho (oio The State Attorney)
<u>On behalf of Respondents:</u>	Unopposed