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**IN THE HIGH COURT OF SOUTH AFRICA,
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: 10015/2013

In the matter between:

ETHEKWINI MUNICIPALITY

APPLICANT

and

CALVIN BERNARD BOYCE

RESPONDENT

ORDER

1. That the respondent and all those persons claiming occupation through or in conjunction with him of the immovable property, situated at [...], Redhill, kwaZulu-Natal, are directed to vacate the property.

2. That the respondent and all persons claiming occupation through him are required to comply with paragraph 1 hereof by 30 November 2015.
3. In the event of respondent, and any other persons occupying through or under him, failing to comply with the directions in terms of paragraph 2 of this order, the sheriff or his deputy is hereby authorised and directed to take all steps and do all such things as may be necessary to eject the respondent and any such persons from the premises on 2 December 2015.
4. The respondent is ordered to pay the applicant's costs in respect of this application.

JUDGMENT

SISHI J

Introduction

[1] This is an application for the ejectment of the respondent from the property situated at [.....], Redhill, KwaZulu-Natal (“the property”)

[2] The applicant is Ethekewini Municipality, which is the registered owner of the property. The respondent who opposes the application resides on the said property.

[3] It is evident from the record that the applicant had complied fully with all the procedural requirements in terms of the Prevention of Illegal Eviction from Unlawful Occupation of Land Act No. 19 of 1998 (“PIE”).

Issue to be decided

[4] The main issue to be decided in this matter is whether the respondent should be evicted from the property.

Background

[5] The following facts are either common cause or cannot be disputed on any reasonable grounds.

- (1) On or about 19 February 2004 and at Durban, the applicant concluded a written short term lease agreement with the respondent in terms of which the respondent leased the property from the applicant.
- (2) The lease agreement was an interim measure subject to the applicant's plans for development and it was agreed that when the premises are required for that purpose, the tenant (the respondent) shall vacate the premises by the termination date of the duly given notice thereof.
- (3) The property is not low income housing.
- (4) On 7 July 2007, the Council of the applicant passed a resolution to sell the property by public tender as it was regarded as surplus and no longer needed by the applicant to provide the minimum level of municipal services.
- (5) The sale of the property was advertised from 14 December 2007 until 11 January 2008. The advertisement was withdrawn as the respondent had objected to the proposed sale. The respondent's concerns were addressed.
- (6) The sale of the property was re-advertised in November 2008. The respondent also submitted a tender, however, the sale was not valid. No award was made.

- (7) In May 2009 the sale of the property was again sent out to tender. The successful tenderer was the respondent. The respondent withdrew his offer on the basis of financial constraints. He was then refunded his deposit.
- (8) The sale of the property was again sent out to tender in December 2009 and thereafter in April 2012. The respondent participated in all the tender processes. The respondent was at all times informed of the tender processes and invited to participate therein. The respondent did so.
- (9) On 16 July 2012 the Bid Adjudication Committee of the applicant accepted the offer from Mr Thaver to purchase the property at R551 000.00.
- (10) On 10 August 2012 Mr Thaver was informed by the applicant's Head: Real Estate that his offer was successful.
- (11) On 27 August 2012 the unsuccessful tenderers (including the respondent) were notified, in writing, that their offers to purchase the property were unsuccessful.
- (12) The applicant sold the property to Mr Thaver who paid the purchase price in full.
- (13) On the 25th February 2013 the applicant's Head: Real Estate informed the respondent in writing that his lease agreement had

been terminated ("notice of termination"). The respondent was required to vacate the property by 30 of April 2013.

(14) On 5 July 2013 the applicant's Head: Real Estate directed the respondent to vacate the property with immediate effect ("the notice of vacate").

(15) The respondent has failed and or refused to vacate the property.

[5] The respondent who appeared in person opposes the application.

[6] The basis of the respondent's opposition is as follows:

(1) The respondent was allocated the property by the applicant's officials, namely Ronnie Gengan and Cyril Moodley, and was told to sign the lease agreement in view of the applicant selling the property to him by private treaty.

(2) He has undertaken renovations to the property in the some of R200 000,00 in order to make it habitable.

(3) The provisions of section 4(7) of the PIE Act apply to him and it is not just and equitable to order his eviction from the property.

Applicant's submissions

[7] Counsel for the applicant made the following submissions:

- (1) The property was not in a derelict condition as alleged by the respondent. It was renovated by the applicant prior to the respondent taking occupation of the property.
- (2) Neither Gengan nor Moodley could and did authorise the sale of the property to the respondent or anyone else for that matter nor could they authorise the respondent's renovations to the property.
- (3) No permission was given to the respondent by the applicant to conduct any renovations on the property.
- (4) Clause 7 of the lease agreement provides that:

'No alterations, additions or improvements shall be made to the premises without the prior written approval of the Municipality...'
- (5) In the absence of such prior approval being obtained from the applicant in writing, the respondent was and is barred from making alterations, additions or improvements to the property.

(6) The respondent therefore could not undertake any renovations to the property as the applicant had not authorised the same. In the event that the respondent did conduct the renovations to the property in violation of clause 7 of the lease agreement then his actions are a breach of the said lease agreement as is set out in clause 17 of the lease agreement.

(7) Accordingly, the respondent is precluded from claiming compensation for any alteration which he may have done to the property and which alteration was never sanctioned by the applicant.

Respondent's submissions

[8] The respondent on the other hand submitted that the house was not habitable at the time, he had to do the renovations. These were done with the permission of the officials of the applicant.

[9] He submitted that he has to be reimbursed of the amount of R200 000.00 he spent on renovations of the property to make it habitable.

[10] He submitted that the provisions of s 4(7) of PIE are applicable to him and that it is not just and equitable to order his eviction from the property. He submitted that he is now old and stays in the property with his son, his wife having passed away.

[11] He further submitted that the applicant should not be granted an order for eviction as prayed.

[12] The respondent has to show that there exists a legal basis why he should not be evicted from the property of the applicant.

[13] Applicant's ownership of the property has not been disputed by the respondent. Respondent has not disputed that he was notified that he should vacate the property.

[14] The applicant has to establish on a balance of probabilities that it is the owner of the property.¹ In this regard, I have no hesitation to find that it has done so.

[15] It is important to bear in mind that parties relying on the provisions of PIE to resist an eviction bear an evidential burden to disclose circumstances relevant to the eviction order and must not set out the grounds on which they rely "badly, vaguely or laconically".²

[16] The respondent's answering affidavit discloses no defence at all save for the bold statements that it should not be evicted from the property. The respondent has not shown or alleged any basis legal or otherwise which entitles him and his family to remain on the property.

¹ *Chetty v Naidoo* 1974 (3) All SA 304 SA; *City of JHB v Changing Tides* 74 2012 (6) SA 294 (SCA) at 314 B-E.

² *Troskie and Another v Liquidator of RSB Construction CC* (71322/2010) [2015] ZAGPPHC 321 (8 May 2015) at para70.

[17] The SCA in *National Director of Prosecutions v Zuma*³ stated:

“Motion proceedings unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual disputes because they are not designed to determine probabilities.”

[18] It is well established under the *Plascon Evans*⁴ rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant’s affidavit, which have been admitted by the respondent, together with facts alleged by the latter justify such order.

[19] In *Zuma (supra)*, the court went on to state that the position may be different if the respondent’s version consist of bald or un-creditworthy denials, raises fictitious disputes of fact, is palpably implausible or far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.⁵

The Improvement Lien

[20] In regard to the improvement lien, a lien cannot exist without a cause of action underpinning it. A lien is accessory to the cause of action.⁶ A successful claim to an improvement lien requires the possessor to show:⁷

³ 2009 (2) SA 277 (SCA) at para 26.

⁴ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

⁵ Para[26].

⁶ *Singh v Santam Insurance Ltd* 1997(1) SA 291 (A) at 297 E.

⁷ *Heckroodt N.O. v Gamiet* 1959 (4) SA 244 (T) at 246 D.

- (i) the possessor of the property is bona fide;
- (ii) the improvements made were necessary or useful;
- (iii) the improvements have enhanced the value of the property, i.e. the owner was enriched *iniusta*;
- (iv) the actual amount of expenses and the extent of the enrichment because the lien only covers the lesser of the amounts;⁸

[21] It is trite that for expenditure which were neither useful nor necessary the respondent will not enjoy a right of retention unless the expenses were incurred in terms of an agreement.⁹

[22] In the instant matter, the respondent effected the alleged improvements without any agreement or prior permission from the applicant. This was also contrary to clause 7 of the lease agreement prohibiting the making of improvements without the prior approval of the applicant.

[23] The respondent in this matter has not provided how he arrived at an amount of R200 000.00 and has not provided any document in support thereof. He has failed to deal with the extent of the applicant's alleged enrichment or his quantified actual expenses.

[24] For the respondent to be successful with his purported improvement lien, he must be in lawful possession of the object i.e. property in *casu*. It is

⁸ *Odendaal v Van Oudshoorn* 1968 (3) SA 433(T); *Standard Bank Financial Services Ltd v Taylam (Pt) Ltd* 1979 (2) SA 383 (C).

⁹ *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd* 1993 (1) SA 77 (AD) at 85 D

the applicant's case that the respondent is in unlawful occupation of the property¹⁰. In *casu*, I have already found that the respondent is in unlawful occupation of the property.

[25] In my view, the respondent has failed to satisfy the requisites for an improvement lien as set out above. Accordingly, he is not entitled to any payment for such improvements.

[26] I agree with the applicant's submissions in opposition to the respondent's ground of apposition.

[27] In the light of the above, I am satisfied that the respondent's occupation in the said premises is unlawful.

Just and Equitable to Evict

[28] It is also evident from the papers that the respondent has occupied the said premises for more than six months as at the time when the proceedings were initiated.

[29] It is therefore clear that s 4(7) of PIE is applicable.

[30] Accordingly, it is clear that this application is to be determined under s 4(7) of PIE.

[31] This sub-section provides:

¹⁰ *Roux en andere v Van Rensburg NO 1996 (4) SA 271 (SCA)*

“(7) If an unlawful occupier has occupied the land in question for more than 6 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, disable persons and households headed per women.”

[32] This subsection makes it clear that a court may grant an order for eviction if it is just and equitable to do so.

[33] In determining whether it is just and equitable to evict, PIE has set up a two-fold enquiry. The court must first determine whether the person in respect of whom the eviction order is sought is an unlawful occupier. If so, then secondly, to decide whether after considering all relevant facts and circumstances, it is just and equitable to grant such an order.¹¹

[34] In determining what is just and equitable, the court has to take into consideration all relevant circumstances in the exercise of its discretion, including, but not limited to those circumstances described in s 4(7).

¹¹ *Resnick v Government of RSA and Another* 2014 (2) SA 337 (WCC) at 339 B-C.

[35] In determining whether it is just and equitable in terms s 4(7) of PIE to evict the respondent, the following dictum in *Ndlovu v Ngcobo; Bekker and Another v Jika*¹² is important;

'Another material consideration is that of the evidential *onus*. Provided the procedural requirements have been met, the owner is entitled to approach the court on the basis of ownership and the respondent's unlawful occupation. Unless the occupier opposes and discloses circumstances relevant to the eviction order, the owner, in principle, will be entitled to an order for eviction. Relevant circumstances are nearly without fail, facts within the exclusive knowledge of the occupier and it cannot be expected of an owner to be negative and advance facts not known to him and not an issue between the parties. More than the ultimate onus will be on the owner or occupier, we need not now decide.'

[36] This dictum was also cited with approval by Swain J in *Jackpersad N.O. & Others v Mitha and Others*.¹³

[37] There was therefore a duty upon the respondent to place before court circumstances relevant to the exercise of the discretion the court is vest with in terms of s4(7) of PIE to decide whether it is just an equitable that the respondent be evicted after considering all the relevant facts set out in the subsection.

[38] It is trite that the court must have regard to the interest and circumstances of the occupier and pay due regard to the broader

¹² 2003 (1) SA 113 SCA; (2002) (4) All SA 384 at para 19;

¹³ 2008 (4) SA 522 (D) at 528 H to J

considerations of fairness and other constitutional values, so as to produce a just result. Elements of grace and compassion must be infused into the formal structures of the law. The competing interest of the applicant and the respondent must be balanced in a principled way and promote constitutional regime of a caring society and good neighbourliness and shared consent, per Sachs J in *Port Elizabeth Municipality v Various Occupiers*¹⁴.

[39] It is not in dispute that the property in question is not a low income housing in terms of the applicant's housing policy. Furthermore, when the house was offered for sale, the respondent himself offered to pay R650 000,00 for the property in 2009 and, R501 000.00 in 2012. According to the applicant, the respondent did not qualify for low income housing.

[40] The applicant correctly pointed out that the respondent can easily secure alternative accommodation either rental or ownership.

[41] Furthermore, although the respondent is now a pensioner, he resides in the same house with his adult son.

[42] In dealing with s 4(7) of PIE, our courts have had the following to say:

1. In *Port Elizabeth Municipality v Various Occupiers*¹⁵ the Court held that the Constitutional Court had occasion to consider PIE:

¹⁴ 2005(1) SA 27(C) paras 31, 36 and 37.

¹⁵ 2005 (1) 217 at 237 E to F

‘Thus, PIE expressly requires the Court to infuse elements of grace and compassion into the formal structures of the law. It is called upon to balance competing interests in a principled way and to promote the constitutional vision of a caring society based on good neighbourliness and shared concern...’

2. *In Wolmald N.O. & Others v Kambule*¹⁶ the Supreme Court of Appeal held:

‘It must be borne in mind that the effect of PIE is not to expropriate the landowner and that it cannot be used to expropriate someone indirectly. The landowner retains the protection against arbitrary deprivation of property under s 25 of the Bill of Rights. 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...’

2. In *Transnet Ltd v Nyawuza & Others*¹⁷ dealing with the provisions of s 4(7) of PIE in so far as the availability of alternative accommodation is concerned held as follows:

‘This is indeed a fact which I am obliged to consider, but I do not read into s 4(7) an overriding requirement that alternative land must be made available as a prerequisite before a Court may grant an ejectment order. As stated, the constitutional duty on the municipality to provide housing and the respondents’ right to housing is not a

¹⁶ 2006 (3) SA 562 at 569 F and G

¹⁷ 2006 (5) SA 100 (D) Alkema AJ at 112 C to D

absolute right or duty. Further, there is no such constitutional duty on a private landowner whose property has been invaded by squatters, or any other duty to provide the unlawful occupiers with alternative housing before it becomes entitled to an eviction order. The absence of alternative accommodation is simply a consideration (albeit an important consideration) which a Court is obliged to take into account in considering the grant or a refusal of an eviction order.'

[43] The respondent in this matter has not placed before this court any special circumstances why he should remain in occupation of the said property other than one's referred to above.

[44] Having considered all the facts of this matter, I am satisfied that there is no legal basis for the respondent to remain on the property as he continues to occupy it unlawfully.

[45] In my view, it is therefore just and equitable that an order should be granted evicting the respondent from the said premises.

[46] The respondent failed to disclose sufficient facts to persuade the Court that his interest ought to be upheld in preference to that of the applicant. The respondent has not alleged that he has searched for alternative accommodation and was unable to find any. He has not claimed that alternative accommodation is unavailable either.

[47] The next consideration is to determine a just and equitable date on which the respondent must vacate the property; and , if he does not do so, the date on which the proposed eviction order should be carried out (s 4(8)(a) and (b)).

[48] In this regard, evidence has established that the said property has already been sold to Mr Thaver and the unlawful occupation by the respondent has delayed the transfer to Mr Thaver. At the same time, the respondent must also be given sufficient time to find alternative accommodation. The court has taken into consideration that the respondent has been in unlawful occupation since the date he was given a letter to vacate the said premises. Accordingly, a period of three months from the date of the order, would be just and equitable period for him to vacate the property.

[49] On the issue of costs, there is no reason why the costs should not follow the result in this matter.

[50] Taking all the aforesaid considerations into account, including the requirements of s 4(8)(a) and (b) of PIE, I make the following order:

1. That the respondent and all those persons claiming occupation through or in conjunction with him of the immovable property, situated at [.....], Redhill, kwaZulu-Natal, are directed to vacate the property.

2. That the respondent and all persons claiming occupation through him are required to comply with paragraph 1 hereof by 30 November 2015.
3. In the event of respondent, and all other persons occupying through or under him, failing to comply with the directions in terms of paragraph 2 of this order, the sheriff or his deputy is hereby authorised and directed to take all steps and do all such things as may be necessary to eject the respondent and all such persons from the premises on 2 December 2015.
4. The respondent is ordered to pay the applicant's costs in respect of this application.

SISHI J

APPEARANCES

Date of Hearing : 05 May 2015

Date of Judgment : 25 August 2015

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