

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

Case No: 2237/2011

In the matter between

Concrete Investments CC

Applicant

and

Keith Mahabeer

Respondent

JUDGMENT

9 December 2011

Steyn J

[1] On 10 August 2011 Nkosi AJ (as he then was) ordered:

- “1. That the matter is adjourned for the hearing of oral evidence to the 5th and 6th December 2011.*
- 2. That the issue to be determined is whether the respondent has a right to occupy the premises in terms of an oral agreement relied on by him in the papers filed.*
- 3. That all those who have deposed to affidavits in the application must be available to testify and be cross-examined at the hearing.*
- 4. That the provisions of Rule 35 & Rule 37 apply.*

5. That costs to be reserved.”
(My emphasis)

[2] When the matter was heard Mr Mohamed acted on behalf of the respondent and Mr Aboobaker SC, assisted by Mr Moosa, acted on behalf of the applicant. Since the referral order clearly placed an *onus* on the respondent, respondent commenced with evidence and called Mr Keith Mahabeer to testify. After the testimony of this witness the respondent closed its case and thereafter the applicant closed its case. Mr Aboobaker submitted that the respondent failed to discharge the onus on him and that applicant is entitled to the relief sought. Mr Mohamed argued that there is some corroboration for the evidence of Mr Mahabeer and that the applicant is not entitled to the relief sought, since there was not sufficient compliance with the peremptory provisions of Act 19 of 1998. He submitted that irrespective of the notice that was served on the respondent in terms of section 4(2) of the Act, there should have been a new notice issued before the hearing on 5 December 2011.

Before any evidence was lead, Mr Aboobaker indicated that the applicant would no longer seek an order against those occupants that occupy through the respondent but that relief is sought against the respondent only.

[3] Background

The applicant is the owner of certain immovable property situated at 5th Floor Ebrahim Al Ebrahim, 85/87 Victoria Street, Durban (hereinafter referred to as 'the premises'). The property is a commercial and residential property. Respondent occupies the property and claims to have an oral lease agreement which gives him the right to occupy the property.

[4] Evidence

I shall at first deal with the oral evidence and my findings on it and then deal with the merits of the application. The evidence of Mr Mahabeer was that he is a tenant at 85/87 Victoria Street and that he had entered into a lease agreement with Mr Seedat to lease the property. He had renovated the premises in order to make provision for his business, which is low cost accommodation to residents on a monthly basis. The complex accommodates +-60 to 80 people per month. He provides rooms to the occupants who in addition make use of ablution facilities, a communal kitchen and laundry. There is also 24

hour security service at the complex.

According to him he had a meeting with Mr Seedat in December 2009 where they discussed a renewal of the existing agreement and whereupon they agreed orally to enter into a new lease with the right to renew. They agreed upon an escalation of the rental rate at 10% per annum and that the rental would include electricity and water. He however stopped paying rent in March 2010.

In cross-examination Mr Mahabeer was asked to explain why he failed to mention the option to renew the lease in his answering affidavit, which consists of some 81 pages, excluding any annexures thereto.

A number of explanations had been tendered by the respondent to this question. One, that his memory failed him due to a lack of sleep before the hearing, two - that he had stated the renewal, and three - that he did not consider it necessary to mention something so obvious, and four - that there was no reason to state it. I need to mention that he also stated that he informed his legal representative of the renewal

throughout the proceedings.

When it was put to him that the first indication of any renewal was when a notice of renewal was sent to applicant on 1 November 2011 and at no other time. Mr Mahabeer remained silent and could not answer the question. It was put to him that if he had recovered his losses then he would not have raised the issue of renewal at all, whereby he responded in saying 'probably not'. According to him no other terms were discussed between him and applicant about the lease as per the renewal except that it would be the same as before. The witness was asked to indicate whether he informed one of the occupants, Wellington Cheke, of the intended hearing on 5 December 2011. (Mr Cheke lodged an urgent application under case 13515/2011 on 2 December 2011 to stay the present matter that was set down for hearing on 5th and 6th December 2011). His answer was that Mr Cheke must have heard about the pending application, but that he had nothing to do with Mr Cheke's application. The witness was also confronted with parts of his answering affidavit for example whether it is true and correct that he resides at Apartment 44 Idlewild, 92 Goble Road Morningside and on occasion at

85/87 Victoria Street. He denied that the information contained in his answering affidavit was correct and blamed his legal representative for the incorrect information.

[5] Evaluation of evidence

Mr Mahabeer did not impress as a witness in fact he was one of the worst witnesses I have ever seen. In the witness box he was unbelievably garrulous and extremely evasive. Time and time again he had to be reminded to answer the questions put to him. He constantly tried to move away from the questions which had been asked, in order not to answer it. He was argumentative and when pressed to explain glaring improbabilities in his evidence as per his answering affidavit and his oral evidence he failed to do so. When driven in a corner he did not hesitate to place the blame for important information not contained in his affidavit, on his own attorney. His evidence is neither credible nor satisfactory. I am satisfied that no reliance can be placed on his version in the witness stand. I reject it as false.

It is common cause that on the issue of the alleged oral

agreement that the respondent bears the *onus*. On the basis of my credibility finding the respondent has failed to discharge the *onus*. Respondent's version is most improbable in the circumstances, and is inconsistent with his failure to enforce the alleged agreement. Accordingly I conclude that it has not been established by the respondent on a balance of probabilities that such agreement was ever concluded between the parties.

- [6] I shall now turn to the application and whether the applicant is entitled to the relief sought. Having found that there is no lease agreement between the parties' means that the respondent is not in lawful occupation of the premises. An unlawful occupier is defined in section 1 of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act, No. 19 of 1998 (hereinafter referred to as 'PIE'):

"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 31 of 1996)."

- [7] In terms of our common law ownership is an extensive right,

protecting an owner against unwanted intrusions on the property and affording an owner the right to evict those who illegally occupy the property. The Act is not intended to expropriate the landowner of his right to his property. It has been succinctly stated by Maya AJA (as she then was) in *Wormald and others v Kambule*:¹

[15] 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. Ndlovu v Ngcobo; Bekker and another v Jika 2003 (1) SA 113 (SCA) para 17. In the light of the foregoing remarks, the court a quo erred in finding that a right to occupy the property accrued as a result of the alleged customary marriage. The respondent's occupation of the property has no legal basis and is, thus, unlawful."

(My emphasis)

- [8] A notice has been served in terms of s 4(2) of the Act, and in my view the notice and whether it achieved its purpose should not be considered in the abstract. It could never have been the intention of the legislature to expect that notices be issued each and every time when an application is adjourned. The

1 [2005] 4 All SA 629 (SCA).

purpose of a section 4(2) notice has been definitively stated by our Supreme Court of Appeal in *Unlawful Occupiers of the School Site v City of Johannesburg*² by Brand JA as follows:

*“The purpose of s 4(2) is to afford the respondents in an application under PIE an additional opportunity, apart from the opportunity they have already had under the rules of court, to put all the circumstances they allege to be relevant before the court (See Cape Killarney Property Investments (1229 E-F). The two subsections of s 4(5) that had not been complied with were (a) and (c). The object of these two subsections is, in my view, to inform the respondents of the basis upon which the eviction order is sought so as to enable them to meet that case.”*³

Given the circumstances of the application, it cannot be said that the respondent was not aware of his right to be legally represented neither was he unaware of the case he had to meet. In my view the effectiveness of the notice is determined not as a question of law but as a question of fact.⁴ The facts of this case show that the notice served its intended purpose as required by the Act.

In the circumstances I find that the applicant has established ownership of the property and that the respondent is in occupation of the said property. I find that the respondent has failed to show that he is entitled to further occupation of the

2 [2005] 2 All SA 108 (SCA).

3 At para 23.

4 See *Unlawful Occupiers*, *supra* at para 28.

property. The respondent does not fall into any of the categories for which special allowance is made in terms of s 5(7) of the Act, and cannot in the given circumstances make a claim to the property. Having met the procedural requirements, the applicant is entitled to an order for eviction, with costs.

[9] Order

- a) The respondent is directed to vacate the property, that is 5th Floor, Ebrahim Al Ebrahim, 85/87 Victoria Street Durban, forthwith.
- b) In the event that the respondent fails or refuses to comply with paragraph (a) above, then the Sheriff or his deputy of this court is hereby authorised and empowered to forthwith eject the respondent from the said premises.
- c) The respondent is hereby ordered to pay the costs of this application, including all reserved costs, such costs to include the costs of employing two counsel.

Steyn, J

Date of Hearing:	5-6 December 2011
Date of Judgment:	9 December 2011
Counsel for the Applicant:	Adv T Aboobaker SC with Adv N Moosa
Instructed by:	Zaheer Seedat and Associates
Counsel for the Respondent:	Adv R Mohamed
Instructed by:	Motala and Associates