REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

CASE №: **6406/2022**
REPORTABLE: YES/NO
OF INTEREST TO THE JUDGES: YES/NO
REVISED: YES/NO
MG PHATUDI J

In the matter between:

SOUTH AFRICAN NATIONAL ROADS AGENCY SOC LTD **APPLICANT**

(Registration №: 1998[…])

And

RICHARD MASILO MACHABA **FIRST RESPONDENT**

(Identity №: 6[…])

PERSONS OCCUPYING PROPERTY ON BEHALF OF OR THROUGH THE FIRST RESPONDENT **SECOND RESPONDENT**

MODIMOLLE-MOOKGOPHONG LOCAL MUNICIPALITY **THIRD RESPONDENT**

CORAM: **M.G. PHATUDI J**
HEARD: **02 NOVEMBER 2023**
DELIVERED: This judgment was circulated electronically to the parties' legal representatives by email and released to SAFLII. The date and time for delivery of this judgment is deemed to be **30 January 2024** at **10:00AM**.

JUDGMENT

M.G. PHATUDI J:

INTRODUCTION:

[1] This application pertains to eviction of the First and Second Respondents (herein after called "the respondents") and any and all persons occupying the Applicant's immovable property better described as Farm 7[…] Vlaktplaas "the property" located within Modimolle-Mookgopong Local Municipality, (Third Respondent) which is occupied unlawfully through the First Respondent or on his behalf, and without the Applicant's consent

The Application is opposed by the First Respondent, Mr Richard Masilo Machaba (Machaba). The Second and Third Respondents did not participate in the litigation.

FACTUAL BACKGROUND:

[2] The Applicant (SANRAL) is the owner of the property as evinced by the Deeds Search annexed to the founding affidavit ('FA') marked 'SA[2]', reflecting the registration details thereof in the name SANRAL[1].

[3] On or about 28 November 2014, the Applicant and Machaba entered into an agreement of lease in terms of which the property was leased to the latter[2] I consider it unnecessary to refer extensively to the provisions and the terms and conditions of the lease agreement to the present dispute, save to mention its *essentiale* namely, that: -

3.1. The parties to the agreement are SANRAL, the Lessor, and Machaba, the Lessee;

3.2. The property let is Farm 7[…] Vlaktplaas KR; (formerly remainder of the Farm Padbou 7[…] – KR; Modimolle)

[1] Ibid. pp 32 -60, annexure 'SA[3]'

[2] Paginated Index Vol 1, p30 'FA'

3.3. The occupier (Lessee) shall use the property for conducting farming activities, and for no other purpose, whatsoever;

3.4. The monthly rental payable by the Lessee to the Lessor in respect of the property let for the first year comprised an amount of R 8 935.70 plus VAT, which translated into an amount of R 10 186.70.

The said rental amount became due and payable by the Lessee to the Lessor effective from 01 October 2014 (occupation date) thereafter in advance on each and every successive month, until termination date on 30 September 2017; and

3.5. The duration of the lease agreement was, therefore, for a period of three (3) years.

[4] The lease clauses referred to above, some of (2.1 to 2.4) constituted as they did, some of the material and fundamental terms and conditions of the lease agreement between the parties.

[5] According to the Applicant, Machaba had as on 18 January 2016, breached the terms of the lease agreement when he fell into arrear rental in the

amount of R47 628.97. Due notice of the breach, was given to Machaba to remedy the default which he allegedly failed to redress, within twelve (12) days as directed by the Applicant in the letter of demand.

5.1. In it, Machaba was forewarned of the consequences of breach and failure by him to square up the arrear rental owing, due and payable to the Applicant and, worse still, of termination of the lease agreement coupled with repossession and eviction of any occupier, together with a claim for damages occasioned by the default.

5.2. The default persisted in the amount of R 100 922.50 as on 04 May 2017, resulting in the Applicant eventually issuing to Machaba a notice of cancellation of the lease agreement pursuant to clause 23.1 read with clause 23.12 thereof. The provisions of the said clauses attract penalties for *mora* on the part of the Lessee in the event of breach of the agreement, which effectively entitled the Applicant the right to terminate the said agreement.

The cancellation notice to the First Respondent was issued in a letter dated 05 July 2016, addressed and read in part that: -

> *"SANRAL no longer consents to your occupation of the property above and you are now regarded as an illegal occupier".*

Machaba and/or any occupier of the property was thus given one (1) month to vacate the premises failing which eviction proceedings would be instituted against the him.

5.3. Subsequent thereto, various attempts were made by the Applicant to resolve the impasse or to settle the claim amicably, but all in vain. Meanwhile, the arrear rental accumulated further as in August 2017 to an amount of R 120 000.00. The First Respondent remained adamant not to vacate the property despite the cancellation notice issued to him.

5.4. Machaba's reasons for resisting to vacate was that he laboured under the impression that the Department of Rural Development and Land Reform ("the Department") sought to acquire the property from the Applicant for land reform beneficiaries by the said Department through Land Distribution of Agricultural Development process. ("the LRAD").

5.5. The basis of Machaba's claims as such were, however, refuted by the Department after it conducted an investigation into the allegations he made. The Department had instead made it clear that it no longer embarked on the LRAD process, but changed the strategy to the so-called Proactive Land Acquisition Strategy("PLAS") in terms of which it identifies the properties that it seeks to acquire, and the immovable property in dispute was not one of them. This much was clarified in its email dated 12 March 2018[3].

5.6. Given the aforementioned response by the Department it follows, logically, so the contention went, that Machaba lacked any enforceable right in law to remain in occupation of the property following cancellation of the lease agreement in May 2018, alternatively, on lapse or natural termination thereof on 30 September 2017, as the case may be.

[6] Furthermore, the Applicant submitted that failure, refusal or neglect of Machaba to vacate the property brought about prejudice to it in that despite

[3] Ibid. p68, Annexure 'SA7' "FA".

having leased out the property to another Lessee, it lost rental income nor is it able to sell the property pursuant to a mortgage.

[7] In pursuit of its intention to evict Machaba, the Applicant on 12 October 2023, obtained an order in terms of Section 4(2) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 1998[4] ("the PIE Act").

Paragraph 2, in particular, required that both the notice of eviction and the order be served on the respondents as prescribed by rule 4 of the Uniform Rules of Court ("the rules").

[8] Resisting the eviction process, in his answering affidavit, Machaba took a point *in limine* for non-compliance by the Applicant with Section 4(2) of the PIE Act as well as clauses 15.7.2 and 15.7.3, respectively, of the Practice Directive of this court. These directives prescribe the time and manner in respect of which eviction proceedings may be initiated, which the Applicant allegedly failed to adhere to. In consequence, Naudè-Odendaal J on 31 May 2023, upheld the point *in limine* raised, and ordered that the eviction proceedings sought be stayed for a period of 30 days, pending compliance

[4] Act 19 of 1998. The order was obtained ex-parte for the purpose of serving the S4(2) notice and the order on respondents as required by rule 4 of the Uniform Rules of Court, and for service thereof within 14 days.

with Section 4(2) of the PIE Act and court order issued by Makgoba JP on 12 October 2022.

[9] The First Respondent's submission in this court that the Applicant failed to comply with the provisions of Section 4(2) of PIE Act, is therefore misplaced. It can certainly not be argued that the eviction application is premature regard being had not only to the ex-parte application made, but also that the order was obtained on 12 October 2022. The order of Naudè-Odendaal J issued on 31 May 2023, merely stayed the eviction proceeding for 30 days. The order was subsequently complied with when it was served on 20 June 2023.

[10] The Applicant in its replying affidavit made on 02 December 2022, stated that it has since complied with the provisions of Section 4(2) of the PIE Act as well as the order of Makgoba JP referred to. I shall, for present purposes, accept that there was indeed an *ex-parte* application made pursuant to section 4(2) of the PIE Act in respect of which an order was made for its service upon the Respondents, together with the authorising court order issued on 12 October 2022. (Makgoba JP's Order). These processes were served on Machaba on 20 June 2023.

THE ISSUE:

[10] The issues in this matter are three-pronged, namely:

(a) Whether the First Respondent (Machaba) is legally entitled to remain in occupation of the property after expiry or termination of the lease agreement;

(b) Whether the PIE Act finds application in the eviction application;

(c) Whether the First and Second Respondent and any other unlawful occupiers are covered by the provisions of Extension of Security of Tenure Act 1997[5],(ESTA) if so, whether this court is competent to entertain the eviction application before it.

THE SUBMISSIONS:

[5] Act 62 of 1997.

[11] It was submitted on behalf of Machaba that he was not and cannot be regarded as an "unlawful occupier" of the property since his occupation thereof is subject to a land redistribution arrangement.

His contention was premised on the basis the that Department in the letter dated 15 August 2008, and through the Limpopo Land Reform Office ("LPLRO") declared its intention to purchase the relevant farm on behalf of black farmers for the purposes of land reform and agricultural transformation. He alleged further that Marumofase Farming Project was identified as the land reform project beneficiary back in July 2008.

[12] These allegations are denied by the Applicant. The contention, conversely, is that nowhere in the lease agreement is there a provision of Machaba's occupation or tenancy being made subject to the Department acquiring the said property from the Applicant. A reading of the lease agreement, contextually, and in its entirety, hardly supports that submission. This much is clear from the email issued by the Department as Annexure 'SA[7]' to the 'FA', to which reference was made.

12.1 From a reading of its contents, it is plain that “the Department no longer intends acquiring the Farm Vlaktplaas No: 7[…] – KR from SANRAL” since the departmental programme for land acquisition has long changed from LRAD process to PLAS in terms of which the Department identifies the properties it needs, and the property (Vlaktplaas) is not one of them.

12.2 Against the aforegoing backdrop, it follows logically that Machaba’s contention and the reasons he advanced resisting his eviction as a beneficiary under Marumofase Farm Project, is equally untenable and falls to be rejected.

<u>THE LEGAL FRAMEWORK:</u>

[13] The PIE Act in its heading stipulates its objective as *“being to provide for the prohibition of unlawful eviction, to provide for procedures for the eviction of unlawful occupiers”.*

In its preamble, the said Act embraces four basic tenets protecting any person against unlawful eviction, among others, that (1) no one may be deprived of property except in terms of law of general application, and no law permit arbitrary deprivation of property, that (2) no one may be evicted from their home, or have their home demolished without an order of court after considering all relevant circumstances, and that (3) the law should regulate the eviction of **"unlawful occupiers"** from land in a fair manner, and that (4) special consideration be given to the rights of the elderly, children disabled persons and household headed by women, their needs be considered. (underling for own emphasis).

[14] It is common cause that the Applicant (SANRAL) is in terms of Annexure 'SA2' [6](Deeds Search) the registered owner of the property in dispute. It is furthermore, common cause that the Applicant is an organ of state as defined in the PIE Act (definitions) and in Section 239 of the Constitution Act, 1996[7].

[15] Crucially the PIE Act defines in (xi) an "unlawful occupier" 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..."*

[6] Ibid. P30, vol. I

[7] Act 108 of 1996, as amended – Section 239 defines an organ of state among other things as any other functionary or institution exercising public function in terms of any legislation, *in casu* SANRAL & National Roads Act 7/1998

[16] What calls for determination in the present instance is whether or not the provisions of the PIE Act finds application and whether the respondents are afforded protection, if any, in terms of provisions of ESTA.

ESTA, generally deals with eviction of lawful occupiers or occupiers of rural or peri-urban land whose occupation was previously lawful, subject to certain conditions.

This Act defines an "occupier" as a person residing on land which belongs to another person, and who had or on 04 February 1997 or thereafter, had consent or another right in law to do so.

This excludes (a) labour tenant in terms of Land Reform (Labour Tenant Act, 1996[8]) and (b) a person using or intending to use the land in question mainly for industrial, mining, commercial or commercial farming purpose, but excluding a person who works the land himself/herself, and does not employ any person who is not a member of his/her family; and (c) a person who has

[8] Act 3 of 1996

an income in excess of the prescribed amount of R 5000.00 (amount determined from time to time by the Minister concerned).

[17] The answer to the question posed above, (para:16), I venture to suggest, would be on the interpretation of the words and language imported into the lease agreement which gave rise to Machaba's tenancy on the property. In modern legal parlance, the starting point when interpreting any contract remains the use of the words of the document and syntax.

In other words, the process of interpretation ends not at the perceived literal meaning of the ordinary words used, but considers those words against the background of all relevant and admissible context, taking into account the circumstances in which the document came into being thereby making interpretation "essentially one unitary exercise"[9].

That said, one can now safely state that the distinction between permissible background and surrounding circumstance often obscure, has in my view, become obsolete and abrogated by disuse in matters of interpretation of legislation, statutory instrument or written contract, as the case may be.

[9] See Botha-Batho Transport (EDMS) BPK v S. Bothma & Seun Transport (EDMS) BPK 2014 (2) SA 494 (SCA) par: [12]

[18] The abovementioned observation finds reinforcement in the **Natal Joint Municipal Pension Fund v Endumeni Municipality**[10]. This case aptly summarise the basic principles of the interpretation of documents.

[19] Importantly, is the fact that *"interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstance attendant upon its coming into existence … whatever the nature of the document, considerations must be given rules of grammar and syntax…"*[11]

[20] Guided by the aforementioned principles, this court would accordingly have to search for a more sensible meaning to attach to the lease agreement between the parties, weigh it in the light of all relevant factors and circumstances, and be vigilant and guard against the temptation to replace what this court might regard as reasonable, sensible or business-like **for words actually used** within the four corners of the written agreement.

[10] 2012 (4) SA 593 (SCA); [2012] 2 ALL SA

[11] Ibid, Par: [18]

What is crystal, however, is the actual language or words of the provision *per se*, read in context, its purpose, background and leading to the drafting of the final document.

[21] Eviction proceedings against an unlawful occupier are available to an owner or person in charge of the land in terms of Section 4(1) of the PIE Act. In order to initiate eviction proceedings, the applicant land owner or person in charge thereof, must at least 14 days before the hearing of the envisaged proceedings in terms of section 4(2), issue a notice and obtain a court order which must be served on the unlawful occupier or any person occupying the land at the instance of the unlawful occupier, as well the local municipality having jurisdiction.

[22] In an instance where an unlawful occupier has occupied the land in question for more than six (6) months, as in the present case, at the time when the proceedings are initiated, the court may, in its discretion, grant an order for eviction if it is of the opinion that it is "just and equitable" to do so. This exercise requires consideration of all the relevant circumstances and factors

stipulated in section 4(7) of the said Act before an eviction order may be sanctioned.[12]

[23] Given the facts and the circumstance peculiar in this case, the next inquiry is to select a "just and equitable" remedy after an order of eviction is granted if it be found that the respondents *in casu* are unlawful occupiers of the property under consideration. The inquiry is fact-bound, and the remedy is purely a matter of judicial discretion.

[24] Section 4(7) reads as follows: -

> *"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."*

[12] This section confers judicial discretion on a court to grant a just and equitable remedy after an eviction is granted.

[25] Properly read, section 4(7) sets out guidelines on what considerations must of necessity be satisfied when a court exercises its judicial discretion to decide whether or not it is just and equitable to decree an eviction order.

[26] Furthermore, if the court is satisfied on the facts that

> *"all the requirements of this sections 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 just and equitable date on which the unlawful occupier must vacate the land under the circumstance"*[13]

26.1. Regard being had to para: [12] and 12.1 above, it admits of no doubt, to my mind, that the requirements of the PIE Act having been complied with, and no valid defence being raised, this court is obliged to grant the eviction order sought against the respondents.

26.2. The word "must" in subsection 8 of Section 4 makes Section 4 mandatory, and not merely directory. Once the court is satisfied that

[13] Section 4(8) of the said Act. The provisions hereof

all the requirements of this section are fulfilled, as indicated, the court's discretion becomes fettered, and must issue the eviction order. What remains is for it to determine a "just and equitable" date on which the respondents, in *casu*, must vacate the property, and the date if they fail or refuse to vacate the land on the date set.

[27] The view I take of the matter, in the instant case, is that the lease agreement between the parties, as I understand it, was for the use by Machaba for farming activities and no other purpose, whatsoever. The duration of the lease agreement as already shown, (Annexure 'SA[3]') was for a period of three (3) years from commencement date.

27.1. The submission that the First Respondent is an "occupier" of the property as defined in ESTA is, in my view, flawed. This is simply because none of the respondents including Machaba acquired any residential right to reside on the property in terms of the lease agreement. The lessee was permitted to exclusively use the property for farming activities. On a reading of the lease agreement *in toto* no right of residence can in terms of ESTA, therefore, be attached to Machaba or any other person occupying the property at his instance. (own emphasis)

27.2. The tenancy of Machaba and co-occupiers, if any, had since terminated at the natural end of the lease agreement. To that tenancy no right of residence pursuant to the lease agreement could arise or be inferred. Either way one looks at, its ESTA provisions do not, in my view, enter the picture in this instance.

[28] The Constitutional Court ("ConCourt") in the case of **Syders & Others v De Jager & Others**[14] expressed the principle that the right of residence enjoyed by Mr. Breda and his family was not necessarily tied to the specific right they occupied. In fact, ESTA was not designed to provide security of tenure to an occupier in the house of his/her choice.[15]

There can, generally, be no justification to hold that the principle in *SYDERS' case* cannot apply to PIE matters. The rationale is that the will and whims or preferences of the unlawful occupier are not relevant.

[14] 2017 (3) SA 545 (CC) at par: [81]
[15] Oranjie v Rouxlandia Investments (Pty) Ltd 2019 (3) SA 108 (SCA)

Accordingly, unlawful occupiers such as the present respondents, have no right to resist their eviction, either under the protection afforded by PIE or ESTA, regard being had to the fact that Machaba's tenancy had long expired in terms of the lease contract.

[29] I, remark through *obiter*, that an offer of alternative accommodation is not a prerequisite for the granting of an eviction order. Of course, it is rather one of the important factors worthy of consideration by a court granting eviction order.[16]

What remain crucial are considerations of "justice and equity" required by PIE Act.[17]

These considerations require the striking of a balance between the rights of the occupier and those of the landowner so as to maintain equilibrium.

[30] This exercise, tedious as it seems to me to be, did not escape the court's attention in the case if **Ndlovu v Ngoco**, **Bekker and Another v Jika**[18]

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[16] See, Port Elizabeth Municipality v People's Dialogue on Land and Shelter 2001 (4) SA 759 (E)
[17] Section 6(1) PIE Act. See also, Hattingh v Juta 2013 (3) SA 275 (CC)
[18] [2002] 4 ALL SA 384 (SCA)

[31] The majority view in Ndlovu's case appears to be that *prima facie* commercial properties fall within the purview of PIE. In contradistinction to the court's view, however, the respondents in this case by virtue of Machaba's long expired lease can, therefore, not be covered by PIE, in particular regard being had to the provisions of section 6 (1) of the said Act.

CONCLUSION:

[32] In light of the foregoing considerations, and having taken into account all relevant circumstances, I am satisfied that it would be just and equitable to grant an order of eviction. The cusion set out in section 4(7) of PIE to mitigate the hardship of eviction order, finds no application herein. No cogent evidence was, in any event adduced by Machaba that he occupied the property lawfully for a substantial number of years in the past co-habiting with anyone disabled, or feeble minded, or the elderly or has had households led by women. There is nothing remaining to balance his interests vis-à-vis those of the Applicant.

He said nothing about seeking alternative residence, except merely alternative farming space. This is what he pleaded in his papers.[19]

[33] Before I disembark this issue, counsel for the respondents, Adv Marx, submitted supplementary heads of Argument at the hearing of the application on 02 November 2023, in which he raised for the first time an entirely new matter nowhere pleaded in their answering affidavit. This related to the respondent's alleged right of retention (ius rententiones) or lien involving the right to claim or to retain physical control or possession of the property if a debt is not paid, for instance, if the owner defaulted on mortgage bond to cite, but one example.

33.1. As already alluded to herein, nowhere did Machaba prove the existence of the right to claim compensation for expenses incurred for any necessary or useful improvements made on the farm in his answering affidavit, nor did he bring any counterclaim to ward off the eviction.

[19] P106-107, "AA" para: 59 & 62, Record

His answering affidavit provided nothing else, but a deafening silence in that regard. He made unsubstantiated claims in an attempt to justify the claim to a lien which does not exist[20] Furthermore, clause 3.2 of the lease agreement excludes any compensation for improvements on the property.[21]

In the result, I find no merit to his claim or right of retention alleged, or at all. This part of the claim can, therefore, not succeed. The main application is found to have substance and should, therefore, succeed with costs.

COSTS:

[34] It is trite principle that the costs follow the result. The Applicant is the party successful after having to put a valiant effort to vindicate its rights which, of course, came at a premium. There exists no just cause why the respondents should not pay the costs. In the result, the following order would issue:

ORDER:

[20] Ibid. He alleged investment in farming infrastructure which he did not prove by tax receipts

[21] Paginated Index pp 55-56, 'FA', Record.

1. That the First Respondent and the Second Respondent, and any and all persons occupying the hereinafter mentioned property, through the First Respondent or on his behalf, be ordered to vacate the Applicant's property, namely, Farm 7[…] Vlaktplaas (previously Padbou 4[…] – KR) Modimolle – Mookgopong Local Municipality ("the property") within thirty (30) calendar days from date of service of this order.

2. That in the event of the First Respondent and/or the Second Respondent failing and/or refusing and/or neglecting to vacate the property as per paragraph 1 above, and/ or failure and or/ neglect by any and all persons occupying the property through the First Respondent and/or the Second Respondent or on their behalf, to vacate the property, as per paragraph 1 above, the Sheriff and/or his or her deputy, is ordered and directed to proceed immediately to evict the First Respondent and/or Second Respondent, any and all persons occupying the property, through the First Respondent and/or. Second Respond or on his behalf, from the property.

3. The Respondents are ordered to vacate the Farm 7[…] Vlaktplaas (previously Padbou 4[…] – KR) Modimolle – Mookgopong Local Municipality within thirty (30) days of the granting of this order.

4. A copy of this order shall be served on the Respondents by the Sheriff concerned immediately.

5. The First Respondent is ordered to pay the costs on attorney and client scale

M. G. PHATUDI J
JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE

APPEARANCES:

Counsel for the Applicants	:	Advocate RC Mathevula
Instructed by	:	Michael Raphela Attorneys
Counsel for the Respondent	:	Advocate HF Marx
Instructed by	:	Richard Spoor Inc. Attorneys c/o Oosthuizen & Steyn Attorneys
Date of the hearing	:	**02 November 2023**
Date of delivery of Judgment	:	**30 January 2024**