

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 2023-134462

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED: NO
	
DATE 27/06/2024	SIGNATURE

In the *ex parte* application of:

DNN TECHNOLOGIES (PROPRIETARY) LIMITED

Applicant

In re:

DNN TECHNOLOGIES (PROPRIETARY) LIMITED

Plaintiff

and

NOBANTU MDWARA

Defendant

SUMMARY: Procedure- evictions under PIE Act – on a proper interpretation of the PIE Act the proceedings must be brought by way of application and not by way of action.

JUDGMENT

FISHER J

Introduction

- [1] This is an *ex parte* application in terms of which the applicant, which is the plaintiff in an action for the eviction of the defendant, seeks the court's approval of a notice to be delivered in terms of section 4(2) of the Prevention of Illegal Eviction Act¹(PIE).
- [2] The application is preparatory to the hearing of an application for summary judgment for the eviction which has been brought in terms of rule 32. I will refer to the parties as cited in the action.
- [3] This judgment considers whether it is open to a person seeking eviction under PIE to do so by way of action or whether such a case is one which must, necessarily, be brought by way of application.
- [4] The plaintiff contends that PIE, whilst prescribing certain mandatory features of the procedure to be adopted in evictions from residences, does not state that the process cannot be brought by way of action.
- [5] It argues that, provided these mandatory features are taken account of in the issuing of summons, the pleading of the cause of action and the delivery of the action such process is valid.
- [6] The determination of this issue requires an interpretation of the text of the PIE.

Legal principles – interpretation

- [7] The meaning of text is properly understood not simply by selecting standard definitions of particular words, such as in this case “proceedings”, but by

¹ Act 19 of 1998.

understanding the words and sentences that comprise the contested term as they fit into the larger structure of the statute, its context and purpose².

[8] I move to apply these principles to interpret PIE in this regard.

Interpretation of PIE.

[9] The purpose of PIE is stated, inter alia, to “provide for procedures for the eviction of unlawful occupiers”.

[10] The preamble to the Act makes it clear that it has, as its foundational value, the principle that deprivation of property may not be arbitrary. This, it states, entails that an order of court for eviction (or demolition of a dwelling) can only be made by the court “after considering all the relevant circumstances.”

[11] A person seeking eviction is given the right “to apply (my emphasis) to a court for an eviction order in appropriate circumstances” and it provides that “special consideration should be given to the rights of the elderly, children, disabled persons and households headed by women”.

[12] Section 4 provides for the mandatory procedure to be followed by an applicant for eviction.

[13] Section 4(3) provides that the procedure for the serving of notices and filing of papers is as prescribed by the rules of the court in question. It does not specifically mention a summons, but neither this nor the use of the word “apply” is conclusive of the interpretation.

² *Natal Joint Municipal Pension Fund v Endumeni Municipality*; *University of Johannesburg v Auckland Park Theological Seminary and Another* [2021] ZACC 13 (*University of Johannesburg*). [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (*Endumeni*) para 18; *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* (470/2020) [2021] ZASCA 99; [2021] 3 All SA 647 (SCA); 2022 (1) SA 100 (SCA) (9 July 2021).

- [14] In terms of section 4(8), once satisfied that all the requirements of section 4 have been complied with and that no valid defence has been raised by the unlawful occupier, the court must grant an order for the eviction.
- [15] The granting of the order of eviction entails the determination of a just and equitable date on which the unlawful occupier must vacate the land under the circumstances of the case and the date on which an eviction order may be carried out if the unlawful occupier has not vacated the land on the date contemplated.
- [16] In terms of section 4(9), in determining the 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.
- [17] In terms of section 4(10) a court ordering the eviction may make an order for the demolition and removal of the buildings or structures that were occupied.
- [18] In terms of section 4(12) any order for the eviction of an unlawful occupier or for the demolition or removal of buildings or structures in terms of this section is subject to the conditions deemed reasonable by the court and the court may, on good cause shown, vary any condition for an eviction order.
- [19] Thus, the protections afforded under the Act have both procedural and substantive aspects. The substantive aspects require expression through the mandatory procedure to be applied. The ability of the procedure to accommodate the inquiry which must be undertaken substantively is central to a purposive interpretation of PIE.
- [20] The court, in determining whether or not to grant an order or in determining the date on which it must take effect has to exercise a discretion based upon what

is just and equitable. The discretion is one in the wide and not the narrow sense.³

- [21] Consequently, a court of first instance determining a claim for eviction is not at large to do whatever it wishes and a court of appeal is not limited to a determination of whether the court exercised its discretion capriciously or upon a wrong principle, or that it did not bring its unbiased judgment to bear on the question, or that it acted without substantial reasons.⁴
- [22] Under PIE the point of departure is not the common law position that an owner has an absolute right to evict the unlawful occupier. The court is given a discretion to evict or to allow the occupier to remain in possession on apposite terms. The circumstances to be taken into account by the court in forming such an opinion are wide-ranging - PIE requires that all the relevant circumstances must be considered.
- [23] Importantly, the procedure to be undertaken is inquisitorial; it also involves in some instances receiving evidence as to the capacity of the State to provide alternative accommodation.
- [24] What then is the nature of the information upon which a court must exercise its discretion and how and by whom must this information be put before the court?
- [25] In circumstances of a holding over on the expiry of a contractual relationship in terms of which the occupation first took place, there may be the temptation to allow a landlord the facilities of trial process and particularly resort to summary judgment.

³ *Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd ('Perskor')* 1992 (4) SA 791 (A) at 800, *Knox D'Arcy Ltd and Others v Jamieson and Others* 1996 (4) SA 348 (A) at 360G - 362G.

⁴ *Ex parte Neethling and Others* 1951 (4) SA 331 (A) at 335E; *Administrators, Estate Richards v Nichol and Another* 1999 (1) SA 551 (SCA) at 561C - F.

- [26] It might thus be argued that all that it should be necessary for an owner to show is that he is the owner and the agreement allowing for occupation has ended. Surely this can be easily pleaded? And then is it not for the unlawful occupier to enter a plea as to why he should be afforded the right to continued occupation. If he cannot or is not *bona fide*, the argument goes, then the plaintiff should be entitled to summary judgment.
- [27] But this argument fails to take account of the true intended beneficiary of the process- the vulnerable land occupier.
- [28] This occupier is often oblivious of his infraction and the steps being followed to secure his eviction; he needs a place to occupy to create some shelter and this is all that drives him; he may be illiterate; he may be a foreigner who does not understand one of the official languages; he may be part of a vast encampment of persons who are itinerant for work and survival, he may be afraid of detection because he is not lawfully in the country. All of this may make opposition of the application for eviction difficult for some; impossible for others.
- [29] Notwithstanding the best intentions behind the notice requirements of the procedure, such occupiers may not receive notice through no fault of the applicant or the available processes or for that matter their own.
- [30] For these and a myriad of other reasons which arise as a result of homelessness and deprivation these applications for eviction are often not opposed.
- [31] This lack of opposition does not allow for the determination of the matter in the absence of evidence as to the relevant circumstances. The point of PIE is that the protections it affords are available to an occupier even and perhaps especially in his default.
- [32] The only procedure which allows the court access to evidence when it considers an application for eviction is the application procedure.

- [33] If the eviction is sought by way of action, regardless of how full the pleading is with reference to the relevant circumstances, the allegations do not constitute evidence on which a court can exercise its discretion.
- [34] If the court is to conduct the inquisitorial process required, it must thus, within reason, be the applicant for relief who provides the facts necessary to allow for the exercise of the discretion. He can only do this by way of affidavit.
- [35] Given that the peremptory inquisitorial nature of the just and equitable requirement does not allow for a disregard of the material facts relating to the occupier, if he does not oppose this does not relieve the court of its obligation to inquire into the position of the occupier.
- [36] Thus, it is inherent in the procedure laid down that the clear intention is that the application procedure be used.
- [37] Accordingly, if the applicant for eviction does not provide as full a case for the eviction as is possible, the risk will be run that the court will be unable to exercise the required discretion and thus will not grant an eviction order.
- [38] It has in the past been held by courts that the Legislature did not intend to extend these considerable procedural and substantive protections to an occupant who was holding-over. There previously were differing approaches in the lower courts, some holding that it could not have been the intention of the Legislature to impose the procedure on the person holding over and so subvert the common law principle that an owner was always entitled to evict an unlawful occupier; others held that the intention of the legislature was that all unlawful occupiers who were afforded the procedure.
- [39] In *Ndlovu, Ngcobo, Bekker & another v Jika*⁵ the Supreme Court of Appeal held by a majority of three to two that unlawful occupiers who held-over after lawful occupation had ended were subject to the same protections as the indigent land

⁵ 2003 (1) SA 113 (SCA).

invader. As stated by Harms JA the holder-over is equally entitled to “.. the somewhat cumbersome procedural advantages of PIE to the annoyance of the landlord.”⁶

[40] The Act makes no distinction between the cause of the unlawful occupation in relation to the procedure and it is not open to an applicant for eviction, regardless of the circumstances, to choose a different procedure.

[41] In line with this *Cape Killarney Property Investments (Pty) Ltd V Mahamba and Others*⁷ held as follows:

“Section 4(3) provides that notice of the proceedings must be served in accordance with the rules of the court in question. Accordingly, for purposes of an application in the High Court, such as the one under consideration, s 4(3) requires that a notice of motion as prescribed by Rule 6 be served on the alleged unlawful occupier in the manner prescribed by Rule 4 of the Rules of Court.” (emphasis added)

[39] Although that case dealt with compliance with rule 4(2), it made it clear that the process under PIE accepted that a notice of motion as prescribed by rule 6 was the apposite process.

[40] Both the High Court and the Magistrate’s court have jurisdiction to entertain proceeding under PIE. In *Nduna v ABSA Bank Ltd and others*⁸ it was held by a Full Court that it was the intention of the Legislature to confer jurisdiction on the Magistrate’s Court to hear eviction applications by way of application. This was in the context of an argument that section 29 (1) (b) of the Magistrate’s Court Act⁹ precluded the bringing of an application for eviction in the Magistrate’s Court in that it provided only for “actions for eviction”.

⁶ *Ndlovu, Ngcobo, Bekker & another v Jika* para 17.

⁷ 2001 (4) SA 1222 (SCA) at para 12.

⁸ [2004] 3 All SA 364 (C)

⁹ 32 of 1944.

Conclusion

[41] Thus, an application in terms of PIE must be instituted by way of application in terms of rule 6 read with the procedural requirements in the Act and an action may not be brought for such relief.

[42] The summary judgment procedure does not lend itself to the making of the necessary the inquiry.

[43] For these reasons the application for approval of the section 4(2) notice is dismissed.

[41] In relation to the facts of this matter, it is correct that the pleadings have reached a stage where a plea has been filed and the plaintiff has applied for summary judgment. There is no affidavit filed resisting summary judgment. It seems, from the plea, that the defence raised is that the occupation of the property in question took place in the context of a marriage between the plaintiff and the defendant.

[42] As an aside, it may be possible for the defendant to agree to waive compliance with the procedure. But this court, in the absence of such agreement, should not impose a procedure which is not countenanced by law.

Costs

[43] There is no reason why the costs should not follow the result.

Order

[44] I thus make an order which reads as follows:

1. For the reason that the use of action procedure is not permitted under the PIE Act, the application in terms of section 4(2) is dismissed with costs.



FISHER J
JUDGE OF THE HIGH COURT
JOHANNESBURG

This Judgment was handed down electronically by circulation to the parties/their legal representatives by email and by uploading to the electronic file on Case Lines. The date for hand-down is deemed to be 27 June 2024.

Heard: 20 May 2024 and 22 May 2024

Delivered: 27 June 2024

APPEARANCES:

Applicant's counsel: Adv. M Sethaba

Applicant's Attorneys: Fluxmans Inc