

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

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

Reportable/Not Reportable

Case No: AR 467/2022

In the matter between:

NOTHILE JOYCE MIYA NO

APPELLANT

and

STHEMBISO MIYA

FIRST RESPONDENT

INKOSI LANGALIBALELE MUNICIPALITY

SECOND RESPONDENT

ORDER

On appeal from: Magistrates' Court for the District of uThukela, held at Estcourt (Magistrate Gillespie sitting as court of first instance):

1. The appeal is dismissed with each party paying his or her own costs.

JUDGMENT

MARION AJ (SEEGOBIN J concurring):

[1] This is an appeal against the judgment and order of the court a quo, which was handed down on 17 October 2023, dismissing the appellant's application for the eviction of the first respondent.

[2] On 19 September 2022, the appellant instituted eviction proceedings against the first respondent in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1988 ('the PIE Act'), in the Magistrates' Court for the District of uThukela. The appellant sought an order evicting the first respondent from Erf 2[...], A section, Wembezi, Escourt, Kwazulu-Natal ('the property'). The application was dismissed with costs on the basis that it was not just and equitable to do so having regard to the spirit of Ubuntu.¹

[3] The appellant is the duly appointed representative of the estate of her late husband, Mr Funizwe Mtata Miya (the deceased), authorised in terms of Letters of Authority dated 1 July 2022. The first respondent is the son of the deceased, born from the deceased's first marriage to Mrs Zile Dubazane ('Mrs Dubazane'). The Inkosi Langalibalele Municipality is the second respondent but took no part in the proceedings. A report was, however, filed by the second respondent,² which mainly confirmed that it is unable to provide alternative accommodation to the first respondent and/or his family as they do not have the capacity to do so.

[4] The deceased was married to his first wife, Mrs Dubazane by customary union on 11 March 1973. Mrs Dubazane died on 4 April 1997. The first respondent was born of that marriage. The deceased thereafter married the appellant on 4 April

¹ Ubuntu is described by Mokgoro J in *S v Makwanyane and another* 1995 (3) SA 391 (CC) para 308 as follows: 'Generally, *ubuntu* translates as "*humaneness*". In its most fundamental sense it translates as personhood and "morality". Metaphorically, it expresses itself in *umuntu ngumuntu ngabantu*, describing the significance of group solidarity on survival issues so central to the survival of communities. While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation.'

² The record at 98-103.

1999 in terms of a customary union.³ The deceased passed away on 17 July 2010.⁴ The deceased died intestate.

[5] Mr Dlongolo from Legal Aid represented the appellant and Ms Mulaudzi represented the first respondent - in the court a quo and in the appeal.

[6] The appellant avers that her right to evict the first respondent emanated from the Letters of Authority granted to her by the Master of the High Court⁵ to wind-up the estate of the deceased. The Deed of Grant⁶ confirms that ownership of the property vested, and still vests, with the deceased. The first respondent argued that the appellant did not have locus standi to bring the eviction application. I agree with the court a quo that this point was not raised formally as a point *in limine* in the first respondent's papers and therefore the court did not deal with it as such during the hearing.

[7] The issue of *locus standi* has been addressed by the learned magistrate, and I will deal with it as well in this appeal. The relevant definitions in section 1 of the PIE Act are:

“owner” means the registered owner of land, including an organ of state;

“person in charge” means a person who has or at the relevant time had legal authority to give permission to a person to enter or reside upon the land in question;

“unlawful occupier” means 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 ...’

[8] Section 4(1) of PIE Act provides as follows:

‘Notwithstanding anything to the contrary contained in any law or the common law, the provisions of this section apply to proceedings by an owner or person in charge of land for the eviction of an unlawful occupier.’

³ The record, annexure ‘RA1’, at 96.

⁴ The record, annexure ‘C’, at 51.

⁵ The record, annexure ‘D’, at 52.

⁶ The record, annexure ‘B’, at 48-50.

[9] It has been held that:

'[14] ...The Letters of Authority confirms that the representative is authorised to take control of the assets of the estate as reflected in the inventory, to pay the debts and to transfer the residue of the estate to the heir/heirs entitled thereto by law.

[15] Although ss 42(2) and 47 of the Administration of Estates Act refer to the duty of executors pertaining to the sale of immovable property, there can be no doubt that these sections apply mutatis mutandis to Master's representatives who fulfil exactly the same role as executors, but only in respect of small estates.'⁷

[10] The first respondent made bald averments in his papers and during evidence that the appellant's appointment was irregular. However, no evidence was placed before the court a quo showing exactly what these irregularities were. The first respondent did not take any steps to remove the appellant from this appointment. Under section 1 of the PIE Act, the appellant is not the registered owner, she is, however, the 'person in charge' with legal authority. The Letters of Authority gives the appellant the power to take control of the assets of the deceased estate. The court a quo was correct in finding that the appellant was lawfully authorised to bring this application, as such authority was granted to her in terms of the PIE Act and the Letters of Authority.

[11] The first respondent bore the onus to show that he was entitled to occupy against the appellant's ownership. If he was unable to do so, his occupation would be unlawful. It was common cause that the first respondent was the son of the deceased and Mrs Dubazane. The deceased was married to Mrs Dubazane by customary union in 1973. In establishing the first respondent's right to occupy the property, the starting point will be to consider the marriage between his parents.

[12] In terms of section 22(6) of the Black Administration Act 38 of 1927 ('the BAA'), marriages between black persons entered into prior to 1988 were automatically declared to be out of community of property. This section '... was repealed by the Amendment Act [Marriage and Matrimonial Property Law Amendment Act 3 of 1988]. The Amendment Act deleted section 22(6) and inserted

⁷ *Steenkamp NO v Moeti and others* [2022] ZAFSHC 65 paras 14-15 ('Steenkamp NO').

sections 21(2)(a) and 25(3) into the MPA [Matrimonial Property Act 88 of 1984], thereby giving persons married out of community of property in terms of section 22(6) of the BAA the opportunity to change their matrimonial property regime within two years from 2 December 1988.’⁸

[13] The Constitutional Court in *Sithole and another v Sithole and another*⁹ invalidated the past prejudices created by the BAA and the Marriage and Matrimonial Property Law Amendment Act 3 of 1988 and ordered as follows:

‘1. The provisions of section 21(2)(a) of the Matrimonial Property Act 88 of 1984 (‘the MPA’) are hereby declared unconstitutional and invalid to the extent that they maintain and perpetuate the discrimination created by section 22(6) of the Black Administration Act 38 of 1927 (‘the BAA’), and thereby maintain the default position of marriages of black couples, entered into under the Black Administration Act before the 1988 amendment, that such marriages are automatically out of community of property.

2. All marriages of black persons that are out of community of property and were concluded under section 22(6) of the Black Administration Act before the 1988 amendment are, save for those couples who opt for a marriage out of community of property, hereby declared to be marriages in community of property.’

[14] Accordingly, the deceased’s marriage to Mrs Dubazane in 1973 was one in community of property.

[15] Mrs Dubazane died intestate and the deceased also died without leaving a will. Section 1(1) of the Intestate Succession Act 81 of 1987 (‘the ISA’) states as follows: ‘(1) If after the commencement of this Act a person (hereinafter referred to as the “deceased”) dies intestate, either wholly or in part, and—

(a) is survived by a spouse, but not by a descendant, such spouse shall inherit the intestate estate;

(b) is survived by a descendant, but not by a spouse, such descendant shall inherit the intestate estate;

⁸ *Sithole and another v Sithole and another* [2021] ZACC 7; 2021 (5) SA 34 (CC) para 1.

⁹ *Sithole and another v Sithole and another* [2021] ZACC 7; 2021 (5) SA 34 (CC).

- (c) is survived by a spouse as well as a descendant—
- (i) such spouse shall inherit a child's share of the intestate estate or so much of the intestate estate as does not exceed in value the amount fixed from time to time by the Minister of Justice by notice in the Gazette, whichever is the greater; and
 - (ii) such descendant shall inherit the residue (if any) of the intestate estate...'

[16] It is common cause that Mrs Dubazane died in 1997. Mr Dlongolo, during the proceedings in the court a quo, put to the first respondent that the current value (in 2023) of the property was R90 000.¹⁰ The value as at the date of death of Mrs Dubazane in 1997 would have been far less. The deceased, who was the surviving spouse, would have inherited the entire estate as the value of the house was less than R125 000. Where the joint estate does not exceed the sum of R125 000¹¹ and the marriage is one in community of property, the surviving spouse will inherit the entire estate. Whilst being cross-examined on this issue and in closing arguments, the first respondent conceded that he understood that the deceased would have inherited the entire estate. This ultimately meant that the first respondent would not have been a beneficiary of his mother's estate, wherein the only asset was the property.

[17] The deceased, accordingly, entered his marriage to the appellant with full title to the property. The deceased and the appellant were married by customary law and registered the marriage at the Department of Home Affairs. The marriage is one in community of property.¹² In terms of section 1(1) of the ISA, and in looking at the current value of the property (R90 000), the appellant would lawfully be entitled to inherit a 100% share of the property from the deceased estate. The first respondent disputed that the only asset owned by the deceased was the property. He testified that the deceased also owned motor vehicles which were subsequently sold by the appellant. The first respondent has, however, not taken any steps at the Masters

¹⁰ The record at 142.

¹¹ This was the amount fixed at the time in terms of the following notice: Fixing of the amount for the purposes of section 1(i)(c)(i) of the Intestate Succession Act, 1987, GN 483, GG 11188, 18 March 1988.

¹² *Gumede v President of Republic of South Africa and others* [2008] ZACC 23; 2009 (3) SA 152 (CC).

Office to remove the appellant as the person with authority to wind-up the estate nor did he lodge any objections regarding the sale of the vehicles. Nothing more needs to be said of this, as the appellant's *locus standi* has already been established.

[18] It was common cause between the parties that the first respondent occupied the property for most of his life. The appellant had not resided on the property for a few years prior to the deceased's death nor after the death of the deceased. The appellant testified that there was conflict between her and the first respondent at the time of the deceased's death. She did try and resolve the issues and requested the first respondent to vacate the property as she needed a place to stay. The first respondent refused to vacate the property and chased the appellant off the property. There was no evidence before the court a quo that the first respondent resided on the property with the consent of the deceased. It was also clear from the record that the appellant did not consent to the first respondent residing on the property and hence the need to institute the PIE Act application. The first respondent was correctly found by the court a quo to be an unlawful occupier in terms of the PIE Act.

[19] In terms of section 1 of the PIE Act, an unlawful occupier is someone 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...'. The first respondent does not have the consent of the appellant nor is he a lawful occupier in terms of the law. It has been established firstly, that the appellant has the authority to evict the first respondent and secondly, that the first respondent is an unlawful occupier. The enquiry now turns to whether it is just and equitable to evict the unlawful occupier. If the court finds that in the circumstances it is just to grant an eviction order having regard to all the relevant factors,¹³ the court has an added duty to consider what justice and equity demand in relation to the date of the implementation of that order and what conditions must be attached thereto.¹⁴

¹³ *Occupiers, Berea v De Wet NO and another* [2017] ZACC 18; 2017 (5) SA 346 (CC) para 52 ('Berea').

¹⁴ *City of Johannesburg v Changing Tides 74 (Pty) Ltd* [2012] ZASCA 116; 2012 (6) SA 294 (SCA) para 25.

[20] In *Ndlovu v Ngcobo; Bekker and another v Jika*¹⁵ the Supreme Court of Appeal held:

‘PIE has its roots, *inter alia*, in s 26(3) of the Bill of Rights, which provides that ‘no one may be evicted from their home without an order of court made after consideration of all the relevant circumstances’. *Cape Killarney Property Investments (Pty) Ltd v Mahamba and Others* 2001 (4) SA 1222 (SCA) at 1229E. It invests in the courts the right and duty to make the order, which, in the circumstances of the case, would be just and equitable and it prescribes some circumstances that have to be taken into account in determining the terms of the eviction.’

[21] Section 4(7) of the PIE Act governs any eviction proceeding and provides that: ‘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.’

[22] It has been held that courts ‘are not permitted to passively apply PIE and must probe and investigate the relevant surrounding circumstances and particularly so where the occupiers are vulnerable’.¹⁶ The first respondent testified that if he had to vacate the property, he would be homeless as he has no alternate accommodation. The second respondent’s report made it abundantly clear that they do not have the capacity to assist the first respondent or his family with alternate accommodation. The first respondent is unemployed and cannot afford alternate accommodation. The appellant, on the other hand, desires to move onto the property so that she may gain title to it. The record clearly showed that she currently resides with her family and that her son owns cottages that he rents out. The first respondent submitted that these are possible alternate options that the appellant could exercise instead of

¹⁵ *Ndlovu v Ngcobo; Bekker and another v Jika* 2003 (1) SA 113 (SCA) para 3.

¹⁶ *Lochner NO v Gardner and others* [2024] ZAWCHC 39 para 10. See also *Berea* paras 43-44.

having him evicted from what he considered to be a family home. The court a quo took note of the appellant's delay in applying for the Letters of Authority, which spanned over 12 years. It was further held that the appellant was not in dire need of accommodation but merely wanted to take occupation of the property. The appellant testified that she was a retired teacher who received a government pension payout. She also confirmed that she received a Road Accident Fund claim in the sum of R200 000.

[23] The courts have dealt with and considered the competing risk of homelessness in determining what is just and equitable:

'In *Port Elizabeth Municipality v Various Occupiers* the court held that PIE expressly requires courts to infuse elements of grace and compassion into the formal structures of the law and therefore, courts shall consider the spirit of ubuntu in these kind of cases. This *dictum* was repeated with approval in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another*. It is also important to note that in the last mentioned case, as is the situation in *casu*, the applicant for eviction did not seek eviction to enable him to move into the premises. There is therefore no competing risk of homelessness on the part of the appellant (the applicant in the court a quo).'¹⁷ (Footnotes omitted.)

The court a quo considered that should the respondent not be evicted, there would be no competing risk of homelessness.

[24] The court a quo applied the principles of Ubuntu which encompasses the values of 'humanity to others', in arriving at a just and equitable decision. The court a quo carefully considered that it was dealing with a family and reiterated the sentiments in *Steenkamp NO*¹⁸ that the principles of Ubuntu must take precedence, even in this matter. The first respondent stated that he got along well with the appellant, and he did not chase her off the property. Of note was the first respondent's remark that he would be able to reside in peace with the appellant if alternate arrangements were made on the property.

¹⁷ *Steenkamp NO* para 11.2.

¹⁸ *Ibid* para 21.

[25] The appellant herself in her evidence stated that ‘... if the [first] respondent is not ready to move out but he must obey or abide by my rules. Or else he must build a separate structure that he is going to stay in and he must not proceed to fight’.¹⁹ In my view, the application to evict the first respondent was misplaced as it is clear from the evidence that the appellant had no issue with him residing on the property.

[26] The issue revolved around the first respondent obeying the appellant’s rules. The appellant has a right to protect herself should there be any abuse on the part of the first respondent if they live together. She has a right to apply for a protection order in terms of the Domestic Violence Act 116 of 1998. This avenue remains open for the appellant to pursue, if she so wishes. The submissions made by the parties at the appeal revealed that the property was approximately 400 square meters in size. The surface area of the property is big enough to accommodate a structure for the dwelling of the first respondent. The court a quo correctly expressed its view in this regard and that the parties need to engage in mediation and reach a solution to live peacefully with each other. In considering all the circumstances and the relevant case law referred to above, I agree with the findings of the court a quo that it is not just and equitable to evict the first respondent.

[27] The general rule is that costs should follow the result. However, the circumstance of this case calls for a deviation from that rule. The appellant is represented by Legal Aid and an adverse cost order will not be just in these circumstances.

[28] I accordingly grant the following order:

1. The appeal is dismissed with each party paying his or her own costs.

MARION AJ

¹⁹ The record at 112, lines 8-11.

SEGOBIN J

Appearances

Date of hearing: 16 August 2024

Date of Judgment:

For the Appellant: Mr Dlongolo

Instructed by: Legal Aid South Africa
Ladysmith Local Office
c/o Pietermaritzburg Local Office
187 Hoosen Haffeejee Street
Pietermaritzburg

Reference: B. Dlongolo/N.D. Sokhela/ CU/HC

For the 1st Respondent: Ms Mulaudzi

Instructed by: Miya-Mulaudzi Attorneys
74 Harding Street Estcourt