

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case Number: A181/2024

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

DATE: 29/1/25

SIGNATURE

In the matter between:

SANDILE PERCIVEL MSIBI

Appellant

and

**THE OCCUPIERS OF UNIT 6[...] C[...] C[...]
T[...] ROAD, ORMONDE, EXT 28**

First Respondent

**THE CITY OF JOHANNESBURG
METROPOLITAN MUNICIPALITY**

Second Respondent

Summary: Appeal against part of the order granted by the Court below. The appellant contends that the Court below erred by dismissing the eviction order sought with an order that each party must pay its own costs. After obtaining leave to appeal the appellant delayed in serving and filing the notice of appeal. Condonation for the late filing of the notice of appeal was sought. The respondent contended that the explanation furnished by the appellant is poor and ought to be rejected since excellent prospects of success are immaterial.

The explanation furnished by the appellant is reasonable and acceptable. The prospects of success are nevertheless excellent. Accordingly, the condonation sought must be granted. The respondent launched an application seeking condonation for the late filing of a cross-appeal. Leave to launch a cross-appeal was not sought and obtained. Accordingly, this Court, as a Court of Appeal, lacks the necessary power to adjudicate the cross-appeal.

With regard to the merits of the appeal, the Court below erred by dismissing an eviction application in the circumstances where the occupation by the respondent is declared unlawful. The respondent failed to allege and prove homelessness. The true gripe of the respondent relates to the alleged ownership of the property. The Court below correctly dismissed the allegations of fraud regarding the sale of the property in question. The issue of the presence or absence of a municipal report is not a legal requirement for the granting or even refusal of an eviction order within the contemplation of section 4(7) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE), when properly interpreted.

Held: (1) The late filing of the notice of appeal is condoned. Held: (2) The application for the condonation of the late filing of the cross-appeal is dismissed. Held: (3) The appeal is upheld and the impugned order of the Court below is set aside and replaced with an order, (a) granting an ejectment and ordering the respondent and other unlawful occupiers to be ejected from the property within 30 days of this order, failing which the Sheriff of the High Court or his or her Deputy is authorised to forthwith enter upon the property and eject the respondent and the other occupiers, (b) that the respondent occupiers pay the costs of the eviction application as well as those of this appeal on party and party scale to be taxed or settled on scale B.

JUDGMENT

MOSHOANA, J (KOOVERJIE J and GCAWU -DAMBUZA AJ concurring)

Introduction

[1] The Constitution of the Republic of South Africa, 1996 promised in section 2 that it is the supreme law of the Republic; law and conduct inconsistent with it is invalid; and the obligations imposed by it must be fulfilled. Additionally, the self-same Constitution promised in section 25(1) that no one may be deprived of property except in terms of law of general application and no law may permit arbitrary deprivation of property. The promise continued in section 26(1) and (2) to say that everyone has the right to have access to adequate housing and the State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. For proper context purposes, section 165(1) and (2) of the Constitution provides that the judicial authority of the Republic is vested in the Courts and that Courts are independent and subject only to the Constitution and the law. As it shall be demonstrated in due course, the impugned order dismissing an eviction application against an unlawful occupier, is with respect, one that offends the constitutional provisions outlined above.

[2] That said, this is an appeal noted with the leave of the Court below. The appeal is only against two orders made by the Court below; namely; that (a) the application for eviction is dismissed; (b) each party to bear own costs. On 22 September 2022, in a written judgment, the Court below, ordered that; (a) application for leave to appeal succeeds; (b) the applicant [appellant] is granted leave to appeal to the Full Bench of this Division; and (c) the costs of this application for leave to appeal shall be costs in the appeal. The present appeal is opposed by one Mr Makaonyane Lefosa ("Mr Lefosa"), who was referred to as the first respondent in the Court below. In opposing the appeal, Mr Lefosa, raised an objection against Vezi & De Beer Incorporated representing the appellant, Mr Sandile Percivel Msibi. Additionally, he launched an application seeking condonation for the late filing of a cross-appeal which seeks to impugn the order to the effect that he and those who occupy the property are declared to be unlawful occupiers.

Pertinent background facts to the present appeal.

[3] It is unnecessary for the purpose of this judgment to narrate all the facts appertaining the ejectment dispute as between the parties. Those facts were appropriately and sufficiently outlined in the written judgment of the Court below and do not require regurgitation. For the purposes of the present appeal, the pertinent facts are that Mr Lefosa and his family, has since 1 December 2017 occupied Unit 6[...], C[...] C[...], T[...] Road, Ormonde, Extension 28, Johannesburg (“the property”). On 15 July 2021, the appellant acquired ownership of the property pursuant to a sale agreement concluded between the appellant and one Ms Siyasanga Mangisa. Following the sale and transfer of the property into the names of the appellant, the occupation of Mr Lefosa and his family became unlawful since it was without the express or tacit consent of the appellant.

[4] Mr Lefosa disputed the validity of the sale agreement and alleged that it was fraudulent. I pause to comment, in passing, that Mr Lefosa failed to launch a proper counter-application to challenge the sale agreement. In his answering affidavit, without a notice of motion, he prayed for the reversal of the so-called “fated purchase” as being fraudulent and for an instruction, without citing the Deeds Office as a party, for it to cancel and reverse the sale of the property. That notwithstanding, on or about 21 January 2022, the appellant launched an application seeking an eviction order against Mr Lefosa and his family from the property.

[5] On 1 September 2022, the eviction application emerged before the opposed motion Court beaoned by Mncube AJ. After hearing the parties, her Ladyship Mncube AJ issued a written judgment containing the impugned order. Disenchanted by the impugned order, the appellant, on 29 November 2022, launched an application seeking leave to appeal. I interpose, and comment that Mr Lefosa failed to launch an application for leave to cross-appeal any unfavourable order issued against him and his family. As already indicated at the dawn of this judgment the application for leave to appeal met with the favour of Mncube AJ.

Evaluation

[6] This Court is, with respect, unable to reconcile an order declaring a party as an unlawful occupier with the dismissal of the application for evicting that party who

is declared to be in unlawful occupation. As indicated earlier, this Court takes a firm view that an order dismissing the eviction application of an unlawful occupier is at odds with the provisions of section 25 of the Constitution. Section 165(1) enjoined the Court below to issue an order that is consistent with the Constitution. The legal effect of the impugned order dismissing the eviction application is that, unless reversed on appeal, the appellant, contrary to section 25(1) of the Constitution is deprived of property not in terms of any law of general application. The appellant as the owner of the property, is entitled to enjoy ownership of his property. On this singular basis, the appeal ought to be upheld. Mr Lefosa failed to demonstrate any legal basis for him and his family to remain in occupation. None of the cases cited by the learned Mncube AJ, supports the proposition that the appellant should through a Court order be permanently deprived of the enjoyment of ownership of his property. The Constitutional Court in the *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) and Another*¹, perspicuously stated the law to be as follows:

“[40] It could reasonably be expected that when land is purchased for commercial purposes the owner, who is aware of the presence of occupiers over a long time, must consider the possibility of having to endure the occupation *for some time*. Of course, a property owner cannot be expected to provide free housing for the homeless on its property for an *indefinite period*. But *in certain circumstances and owner may have to be somewhat patient and accept that the right to occupation may be temporarily restricted*, as Blue Moonlight situation in this case has already illustrated. An owner’s right to use and enjoy property at *common law can be limited* in the process of the justice and equity inquiry mandated by PIE.”

[7] The Supreme Court of Appeal in *Wormald N.O. and Others v Kambule*², had already reverberated the following binding statement of law:

“[11] An owner is in law entitled to possession of his or her property and *to and ejectment order* against the person who unlawfully occupies the property except if

¹ 2012 (2) SA 104 (CC).

² 2006 (3) SA 562 (SCA).

that right is limited by the Constitution, another statute, a contract on some other legal basis.”

[8] The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act³ (*PIE*) is the only statute that may limit as opposed to permanently deprive an owner of his or her common law right of ownership. If regard is had to the preamble of the *PIE*; it exists to provide for the prohibition of unlawful eviction. It is to the unlawful eviction that the *PIE* is purposed to frown upon. The *PIE* does not define what an unlawful eviction is, however, it defines the unlawful occupier to mean 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. Axiomatically, an unlawful eviction must mean depriving a person of occupation of land, in the circumstances where occupation thereof, is with the express or tacit consent or is justified by some other legal basis.

[9] Regard being had to the provisions of section 25 of the Constitution, other than prohibiting unlawful evictions, primarily, the *PIE* exists to provide for procedures for the eviction of the unlawful occupiers. In emphasis, an unlawful occupier cannot use the provisions of the *PIE* to legitimise, as it were, his or her continued unlawful occupation. Simply put, unlawful occupiers are prone to ejectment, once the procedures legislated in the *PIE* are complied with.

[10] In due course and for the sake of posterity, this Court shall deal with the interpretation of section 4(7) of the *PIE*, with a particular focus on the aspect of alternative accommodation. Barring that, this Court, fervently concludes that the learned Mncube AJ miscued when she dismissed the eviction application.

The condonation application-notice of appeal

[11] It is common cause that the notice of appeal was filed outside the time period prescribed in Rule 49(2) of the Uniform Rules of the High Court. Howbeit, it is also common cause that prior to the departure of one Mr Du Plessis, an attorney who was in the employ of the appellant's attorneys of record until April 2024, a notice of

³ Act 19 of 1998.

appeal was already prepare and dated. It is also common cause that on 16 and 19 February 2024 respectively, the appellant applied for a date of the hearing of the present appeal and invited the Registrar to the Court online profile as required when pursuing an appeal in this Court. Based on the above common cause facts, it is perspicuous to this Court that the appellant was genuinely under a mistaken impression that he was flogging a living as opposed to a dead horse. Clearly, had it become apparent to the appellant that as at February 2024, the notice of appeal was not served and filed as required, the appellant would definitely have corrected the error. Otherwise, it would have not made any logical sense for the appellant to prepare an appeal record and apply for the hearing of the appeal, when his attorneys of record were aware that the prepared and dated notice of appeal had not been served and filed as required.

[12] Mr Lefosa, other than suggesting that the period of the delay is eight months as opposed to the five months alleged by the appellant and contending that the appellant's attorneys of record should not be representing the appellant, failed to demonstrate any palpable prejudice suffered by him as a result of the delay. During oral submissions, Mr Lefosa handed up to this Court a 2004 Labour Appeal Court (LAC) unreported judgment of *NEHAWU obo Mofokeng and Others v Charlotte Theron Children's Home* wherein Davis AJA, writing for the majority, correctly concluded that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial. This apt statement of law finds no application in *casu* since, the appellant in our view, furnished an honest, reasonable and acceptable explanation for the delay. Nevertheless, recently, the LAC in *Government Printing Works v PSA and Another* ⁴, per Govindjee AJA stated the following, to which this Court agrees:-

“[40] On balance, the appellant has succeeded in proving that there is good cause to grant the indulgence sought. The uncontested prospects of success, in particular, coupled with the importance of the issue, are such that these factors compensate for the excessive delay and complete inadequacy of part of the

⁴ (JA35/24) [2024] ZALAC 63 (28 November 2024).

explanation. *Considering the relevant factors in their totality, the interests of justice and fairness are best served by granting condonation.*

[13] Likewise, even if the explanation furnished by the appellant is inadequate, which this Court does not find it to be, the interests of justice demands the granting of condonation⁵. In this particular instance, Mr Lefosa does not dispute that the appellant is possessed of reasonable and excellent prospects of success on appeal. With regard to the contention that the appellant's attorneys of record are not entitled to represent the applicant, Mr Lefosa failed to employ the provisions of rule 7 of the Uniform Rules of the High Court. This Court, in the absence of employing the provisions of the rule, is not empowered to rule on the right to represent a party. Accordingly, this Court concludes that the condonation sought must be granted.

The issue of a cross-appeal and condonation for the late filing of the notice of cross-appeal

[14] It is common cause that Mr Lefosa did not apply, within the contemplation of section 17(1)(a) of the Superior Courts Act, 2010, for leave to appeal an order declaring him and his family members as unlawful occupiers. In the absence of an application for leave to appeal, this Court lacks jurisdictional powers to entertain any cross-appeal. In *Monyepao v Ledwaba and Others* ⁶, the SCA felicitously stated the following:

“[6] An application has also been brought by Ms. Ledwaba for condonation for the late filing of a notice of cross-appeal. Given the state of the record, it is not clear to me if this relates to the counter application. It was struck off the roll by the court of first instance and, although it was mentioned in the appeal, no order was made in respect of it. Whatever the subject-matter of the proposed cross-appeal, *leave to cross-appeal is necessary because the rules relating to appeals apply mutatis mutandis to cross- appeals. Leave has never been granted in respect of the counter application.* The application will therefore be dismissed.

⁵ See also *City of Ekurhuleni Metropolitan Municipality; In re: Unlawful Occupiers: 1 Argyl Street and Others v Rohlandt Holdings CC and Others* 2025 (1) SA 1 (CC) at paras 24-25

⁶ (1368/18) [2020] ZASCA 54 (27 May 2020).

[15] A similar approach was adopted by the Full Court of the Local Division of this Court in *B-Sure Africa Insurance Brokers (Pty) Ltd and Others v Dotsure Insurance Company and Another*⁷ where the Court stated the following: -

“[24] Post 23 August 2013 the SCA has, on a number of occasions, confirmed that *a court of appeal will only have jurisdiction to consider substantive relief sought by a respondent if leave to cross-appeal has been obtained as required by sections 16 and 17 of the Act.*

[36] At the end of the day, the law in this matter is clear. That is:

36.1 in terms of sections 16 and 17 of the Act, an *Appeal Court does not have the requisite jurisdiction to consider issues on appeal without leave to appeal to that court having been granted;*

36.2 there is no distinction between appeals and cross appeals. As held by the erstwhile Appellate Division, a cross-appeal is “*simply an appeal which is conveniently tacked onto another appeal.*”

[16] In light of the above binding authorities, this Court reaches a conclusion that in the absence of a valid cross-appeal, this Court lacks the necessary jurisdiction to entertain the application for condonation of the late filing of the notice of cross-appeal. There is nothing to condone for, since no valid cross-appeal serves before this Court.

The merits of this appeal and the proper interpretation of section 4(7) of PIE

[17] It is apparent to this Court that the Court below interpreted section 4(7) of the *PIE* to mean that absent alternative accommodation being made available, in order to prevent homelessness, a Court must not order an eviction. If the section was to be interpreted in that manner, every eviction application must be refused since, the unlawful occupiers will, as a result, generally be without accommodation once evicted.

[18] Section 4(7) of the *PIE*, reads thus: -

⁷ (A2023/041879) [2024] ZAGPJHC 958 (24 September 2024).

“(7) 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 in 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.*”

[19] *Ex facie* the provisions of the subsection, a Court seems to possess a discretion, once it forms an opinion that it is just and equitable to do so, to grant the order. The question to consider is whether a Court possesses a wide or narrow discretion in this regard. In *Ndlovu v Ngcobo, Bekker and Another v Jika (Jika)*⁸, Harms JA stated the following:

“[18] The discretion is one in the wide and not narrow sense. A court of first instance consequently, *does not have a free hand to do whatever it wishes to do* and a court of appeal is not hamstrung by the traditional grounds of whether the court exercised its discretion capriciously or upon wrong principle, or that it did not bring its unbiased judgment to bear on the question, or that it acted without substantial reasons. ”

[20] This Court agrees that the learned Acting Judge did not have a free hand to do whatever she wished to do. Thus, this Court is not hamstrung to interfere with the exercise of discretion apparent in subsection (7). Subsection (8) obligates a Court to grant an order for the eviction of an unlawful occupier. What will oblige a Court to do so, is, (a) a satisfaction that all the requirements of the section have been complied with; and (b) that no valid defence have been raised by the unlawful occupier. There can be no doubt in the mind of this Court that Mr Lefosa has not raised a valid defence in law to justify his continued unlawful occupation. The opaque question is whether reference to “all the requirements of the section have been complied with” made in subsection (8), includes the requirements in subsection (7) or not.

⁸ 2003 (1) SA 113 (SCA).

[21] To my mind, subsection (7) does not contain a list or tabulation of requirements, which require any specific compliance by an applicant for an eviction order. Grammatically, the word requirement, when used as a noun, means a thing that is needed or wanted. What one observes from the subsection are factors that may influence a Court to in its discretion grant an eviction order. Those are (a) formation of an opinion that it is just and equitable to grant the order; and (b) consideration of all the relevant circumstances. These factors are, in my view, conjoined. In order to formulate an opinion, all the relevant circumstances must have been considered. In my view, circumstances do not mean requirements. Grammatically, a circumstance means a fact or condition connected with or relevant to an event or action. It is important to state that the relevant circumstances will be those to be considered by a Court minded to grant an eviction order as opposed to refusal of an eviction order. Subsection (7) is couched in a permissive as opposed to opposite manner. It permits, when properly interpreted, the grant as opposed to the refusal of an eviction order. When regard is had to the text of section 25(1) of the Constitution, the default position must be one of granting as opposed to refusal of an eviction order. When further regard is had to the preamble of the *PIE*, it is incongruent to read into subsection (7) a refusal of an eviction order. A legally permissible invasion into the common law right as guaranteed in section 25(1) of the Constitution would be to delay the enjoyment of the right as opposed to a permanent deprivation of the right.

[22] The fact whether land has been made available or can reasonably be made available for the relocation of the unlawful occupier and the rights and needs of the mentioned persons, is not a requirement but a circumstance that may be brought for the consideration of a Court minded to grant the order of eviction. In my judgment, subsection (7) cannot be read to mean that if an applicant is unable to show that a land has been made available or is capable of being made available, such an applicant must be non-suited as if he or she failed to satisfy a Court that all the requirements of the section have not been complied with. Subsections (7) and (8) shares an inextricable relationship. On the question of onus, the Court in *Jika* had the following to say: -

“[19] 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 negative in advance facts not known to him and not in issue between the parties.*”

[23] Clearly, once the owner proves ownership and the unlawful occupation, he or she need not do more because in principle, he or she will be entitled to an eviction order. The SCA in the matter of *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others (Changing Tides)*⁹ acknowledged the relationship between subsections (7) and (8) and concluded thus: -

“[25] A court hearing an application for eviction at the instance of a private person or body, owing no obligation to provide housing or achieve the gradual realisation of the right of access to housing in terms of s 26(1) of the Constitution, *is faced with two separate enquiries.* First it must decide whether it is just and equitable to grant an eviction order having regard to all relevant factors. Under 4(7) those *factors include the availability of alternative land or accommodation.* The weight to be attached to that factor must be assessed in the light of the property owner’s protected rights under s 25 of the Constitution, and on the footing that a limitation of those rights in favour of all occupiers will ordinarily be limited in duration. Once the court decides that there is no defence to the claim for eviction and it would be just and equitable to grant an eviction order, it is obliged to grant that order. Before doing so, however, *it must consider what justice and equity demand in relation to the date of implementation of that order.* In that second enquiry it must consider the impact of an eviction order on the occupiers and whether they may be rendered homeless thereby or need emergency assistance to relocate elsewhere. The order that it grants as a result of these two discrete enquiries is a single order. Accordingly, it cannot be granted until both enquiries have been undertaken and the conclusion reached that the grant of an eviction order, effective from a specified date, is just and equitable.

⁹ 2012 (6) SA 294 (SCA).

Nor can the enquiry be concluded until the court is satisfied that it is in possession of all the information necessary to make both findings based on justice and equity.”

[24] Discernibly, the Court in *Changing Tides* chose to name the provisions in subsections (7) and (8) as enquiries as opposed to legal requirements. The labelling, is, in my considered view, apt. There are no legal requirements mentioned in those subsections. In order to justify the granting and indeed the refusal of an eviction order, there must be demonstration that an enquiry has been conducted by a Court. The issue of alternative land and accommodation is a factor that resides in the subsection (7) enquiry. Even though, the text of both subsection suggests two places to make an order, there is a single order to be made after both enquiries have been conducted. According to *Changing Tides*, the issue of being rendered homeless arises only in the second enquiry contemplated in subsection (8). This Court is in agreement that a consideration of any possible pleaded homelessness belongs to implementation date stage, since it is only after the implementation date that homelessness may enter the fray. That enquiry is directed to the implementation date as opposed to the refusal of the eviction order.

[25] The Court below reached the following indefensible conclusion instead. It concluded thus: -

“[38] However despite the finding of unlawful occupancy, in terms of section 4(8) of the PIE Act I am not satisfied that all the requirements in section 4 have been complied with. *This conclusion is based on the finding that it is not just and equitable to order the eviction of the first respondent and those who occupy the said property. On the facts of this matter an eviction order will render the first respondent’s children homeless. To order the eviction of the first respondent in the absence of the report from the second respondent will be contrary to justice and equity*”

[26] The conclusion reached by the Court below as exposed above is indefensible because, it is predicated on two legs; namely (a) homelessness; and (b) absence of a report from the municipality, in the circumstances where there was no evidence led by Mr Lefosa that he and his family will be rendered homeless. Being rendered homeless is different from being faced with the inevitable consequences of an

ejection from a property. Being rendered homeless involves an inability by the occupier to obtain alternative accommodation. An employed occupier must have resources to avoid homelessness. Regard being had to the main gripe of Mr Lefosa; he was not rendered homeless at any given stage. He could avoid homelessness and he submitted that much before us that he had acquired alternative accommodation since two years ago. Nevertheless, it was the obligation of Mr Lefosa to present evidence in support of being rendered homeless if the eviction order was granted. He failed to do so. In motion proceedings, affidavits serve two purposes; first as pleadings and secondly as evidence. Having scoured the 17 page answering affidavit of Mr Lefosa, nowhere does he allege that the eviction will render him homeless. On the contrary, Mr Lefosa is not a man of straw. He managed to pay an amount of R100 000.00 as a move-in deposit. On his version he afforded instalments of R10 000 per month to defray the balance of the purchase price of R800 000.

[27] Accordingly, the Court below erred in concluding that the children of Mr Lefosa will be rendered homeless in the absence of any evidence to support that conclusion. On the strength of *Changing Tides*, which was a binding authority to the Court below, the enquiry related to possible homelessness is directed to the question of the implementation date of the eviction as opposed to the granting of the eviction order.

[28] It is apparent that the Court below, for reasons that are not altogether clear, sought to single out the children of Mr Lefosa on the aspect of homelessness. Subsection 4(7) of the *PIE* refers to rights and needs of children. The rights of children are guaranteed in section 28(1)(b) of the Constitution. The section affords every child the right to, amongst others, family care or parental care. In my view, this right implies that a responsible parent must provide a child with a shelter or home. A child is incapable of providing for himself or herself a shelter or home. To my mind, a child is rendered homeless only if the responsible parent fails to provide a home or shelter for that child. Section 18(2)(a) of the Children's Act¹⁰ provides that one of the responsibilities of a parent is to care for the child. In terms of section 1 of the

¹⁰ Act 38 of 2005 as amended.

Children's Act, care in relation to a child, includes, where appropriate, within available means, providing that child with, amongst others, a suitable place to live. As indicated, providing the child with a suitable place to live, is the responsibility of a parent. With respect, a landowner, has no legal obligation to provide a child with a place to live.

[29] To my mind, it is a wrong interpretation of subsection 4(7) of the *PIE* to single out a child from an unlawful occupier parent. Once a parent is in unlawful occupation, so is the child. A child should not be painted with a different brush, and say, as the Court below said, his or her homelessness deserve a stronger protection than that of the unlawful occupying parent. Unless there is cogent evidence to demonstrate that an unlawful occupier parent is unable to care for the child, it remains the legal duty of a parent to provide suitable place to live. In *casu*, there was no evidence by Mr Lefosa that he is unable to provide his children with a suitable place to live. On the other hand, section 26(1) of the Constitution guarantees everyone the right to have access to adequate housing. Arguably, everyone, although doubtful, given the content of the right, may include a child. However, the right is limited to having access as opposed to being provided a home. The responsibility to provide that access lies on the state as opposed to a private land owner. The Housing Act¹¹ is a legislation passed in recognition of the rights in section 26 of the Constitution. Section 2(1)(a) of the Housing Act, is very specific, it concerns itself with giving priority to the needs of the poor in respect of housing development as defined in section 1 of the Housing Act. There was no evidence provided before the Court below to demonstrate any poverty.

[30] Needs are not rights. A need, is a necessity, which is the state of being required. Thus, when taking into account the needs of children, a Court hearing an eviction application must be appraised of what those needs are. In other words, evidence must be led, firstly indicating what the specific needs are, and secondly demonstrate that those needs will be jeopardised when recognition is given to the common law rights of a landowner. In *casu*, there was no *iota* of evidence

¹¹ Act 107 of 1997 as amended.

demonstrating the needs of those children or demonstrating the manner in which the exercise of the common law rights would jeopardise those needs.

[31] Turning to second reason of the lack of report, this Court categorically states that the availability of a report by a municipality is not a legal requirement to obtain an eviction order. In *Drakenstein Municipality v Hendricks and Others*¹² the Court confirmed that there is no general duty on a municipality to report in all cases before an eviction order may issue. In *Absa Bank Limited v Murray and Another*¹³ an order was issued in the absence of a municipality report. When regard is had to the provisions of subsection (7), the issue of the availability of land, it being made available, or reasonably being made available falls squarely on the shoulders of three bodies; namely; (a) the municipality; (b) organ of state; or (c) another land owner. That being so, why is it not a requirement that a report must be obtained from the organ of state or another land owner before it could be considered just and equitable to order eviction. To my mind, it just seems illogical to expect from a private owner a report from a municipality, in the circumstances where a private individual has no obligation to provide access to housing within the contemplation of section 26 of the Constitution.

[32] In practical terms, if a Court requires a report from a municipality, a Court may hold back the issuance of an eviction order until the municipality as ordered by it presents a report. However, there is simply no justification in law to dismiss an application for eviction on the basis that a municipal report is unavailable. Perhaps in an eviction at the instance of organ of state, section 6(3)(c) of the *PIE* may compel a municipality to provide a Court with a report with regard to the availability to the unlawful occupier of a suitable alternative accommodation. In *casu*, the appellant only had a legal obligation to establish (a) ownership and (b) unlawful occupation in order to obtain an eviction order. It then becomes the duty of the Court hearing an application from a private individual to conduct the enquiries mentioned in *Changing Tides* and not to impose, as it were, an additional unlegislated burden on the owner, whose rights are constitutionally protected, to prove the unknown and negatives.

¹² (A254/2009) [2009] ZAWCHC 228 (15 December 2009).

¹³ 2004 (2) SA 15 (C).

Such an imposition of a burden is at odds with the letter and spirit of subsections (7) and (8) of the *PIE* when appropriately interpreted.

Conclusions

[33] For all the above reasons, the appeal must be upheld since the Court below erred in dismissing the eviction application. As commanded by subsection (8), the Court below was obligated to grant an eviction order since Mr Lefosa had no valid defence and all the requirements of section 4 were complied with. It is always just, equitable and fair to set a vacation date within a period which will enable the unlawful occupier to vacate with dignity and in the interim period obtain alternative accommodation, if there is evidence of available means to do so. For that reason, this Court is minded to allow Mr Lefosa to vacate the property within a period of 30 days from the date of its order.

Order

[34] For all the above reasons, I propose to make the following order:

1. The late filing of the notice of appeal is hereby condoned.
2. The application to condone the late filing of the notice of cross-appeal is hereby dismissed.
3. The appeal is upheld and the orders dismissing the eviction application together with that of each party to bear its own costs are set aside and are replaced with the following orders: -
 - 3.1 The First Respondent (Mr Lefosa) and all those who occupy the premises known as **Unit 6[...], C[...] C[...], T[...] Road, Ormonde, Extension 28, Johannesburg** (“the property”) by virtue of the First Respondent’s occupancy thereof, including the First Respondent’s employees, if any, be and are hereby evicted from the property within 30 (thirty) days of service of this order;
 - 3.2 In the event that the First Respondent and all those who occupy the property under or by virtue of the First Respondent’s occupancy thereof, refuse to vacate the property within the period stated above, the Sherriff of this Court and or his Deputy be and is hereby authorised to forthwith enter upon the property

and to evict the First Respondent and all those who occupy the property under and by virtue of their occupancy thereof;

- 3.3 The First Respondent to pay the costs of the eviction application as well as the costs of this appeal on a scale of party and party to be taxed or settled on scale B.

GN MOSHOANA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA
(I AGREE AND IT IS SO ORDERED)

H KOOVERJIE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA
(I AGREE AND IT IS SO ORDERED)

N GCAWU-DAMBUZA
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA
(I AGREE AND IT IS SO ORDERED)

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 31 January 2025.

APPEARANCES:

For the Appellant:

Mr M Jacobs

Instructed by:

Vezi & de Beer Inc, Pretoria

For the Respondent:

In Person (Mr Lefosa)

Date of the hearing:

20 January 2025

Date of judgment:

31 January 2025