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

**APPEAL CASE NO: AR 408/2024
CASE NO: 1038/2023**

In the matter between:

**DENNY SUBRAYADN
RICKY PILLAY
KUBEN PILLAY
JAMES MOODLEY
BONGANI MYEZA**

**FIRST APPELLANT
SECOND APPELLANT
THIRD APPELLANT
FOURTH APPELLANT
FIFTH APPELLANT**

and

**CATWALK INVESTMENTS 200 (PTY) LTD
(DULY REPRESENTED BY THAYNE MEYER) FIRST RESPONDENT
UMDONI MUNICIPALITY SECOND RESPONDENT**

ORDER

On appeal from: the Scottburgh Magistrates' Court (sitting as court of first instance):

1. The appeal is upheld and the order of the court a quo is set aside.
2. The first respondent is ordered to pay the costs of the proceedings before the court a quo and the costs of appeal on Scale B.

JUDGMENT

Mathenjwa J (Olsen J concurring)

Introduction

[1] This is an appeal against the judgment and order of the learned magistrate A Gopal handed down in the Scottburgh Magistrates' Court on 21 May 2021 in which the learned magistrate ordered the eviction of the appellants from the premises described as Unit 1, Erf 6[...], K[...], Scottburgh KwaZulu-Natal (the property).

[2] The proceedings in the court a quo commenced by way of notice of motion which read as follows:

'KINDLY TAKE NOTICE THAT an application will be made at the Scottburgh District Magistrate's Court, Scottburgh on 12 -09- 2023 at 08h30 or as soon thereafter as the matter may be heard for an order in the following term:

- 1 Authorising service by the Sheriff of the notice in terms of section 4 (2) read with section 4 (5) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (annexure "TM1" hereto), on the first, third, and fifth respondents and or any one occupying the premises from or through them at the physical addresses 638 Kelso, Scottburgh, KwaZulu-Natal.
- 2 Authorising service of the notice in terms of section 4 (2) read with section 4 (5) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (Annexure "TM1" hereto), on the sixth respondent, at its legal services division situated at Cnr. Bram Fischer & Williamson Street, Scottburgh.
- 3 That services shall be affected at least fourteen (14) calendar days prior to the date of hearing of the eviction application.
- 4 That the matter be adjourned to----- for the hearing of the eviction application
- 5'

The original hearing date of 12-09-2023 which was inserted by hand, was further altered and replaced by the date 16-01-2024. The later date was also inserted by hand, initialled and bore the stamp of the Civil Court, Scottburgh Magistrates' Court.

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[3] In its founding affidavit the first respondent stated that it purchased the property from the previous owner on 7 March 2017. The appellants were in occupation of the property before it was transferred to the first respondent. After the first respondent had taken transfer of the property, it invited the appellants to pay

rent for living on the property, but the appellants did not respond to that correspondence. Subsequently, the first respondent requested the appellants to vacate the property but they refused. It appears from the appellants answering affidavits that they had resisted the eviction mainly on the grounds that the director of the first respondent who instituted the application was not authorised by the first respondent to do so, and that the appellants had a right of habitation to the property.

Issues before this court

[4] The appellants main grounds of appeal are that the first respondent did not have locus standi to launch the application; the magistrate failed to recognise that the appellants had a right of habitation to the property and had acquired acquisitive ownership to the property. In their amended notice of appeal the appellants contended that the court a quo erred in not having regard to the fact that the first respondent's notice of motion did not include a s 4(2) notice read with s 4(5) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) and that the court erred in hearing the eviction application in the absence of an order authorising the service of the notice in terms of s 4(2).

[5] In their heads of argument and oral argument before court the first respondents' counsel submitted that the s 4(2) notice was issued at Scottburgh Magistrates' Court on 1 August 2023 and was attached to the notice of motion; and that a court order authorising the service of the s 4(2) notice was granted by the court on 23 October 2023. It was further contended on behalf of the first respondent that the s 4(2) notice was served on the appellants and the municipality concerned.

[6] Therefore, the primary issues to be determined in this appeal are:

- (a) whether the court a quo granted an order authorising the service of the s 4(2) notice on the appellants and the municipality.
- (b) whether the s 4(2) notice was served on the appellants and the municipality.
- (c) whether the absence of a court order authorising service of the s 4(2) notice or the failure by the first respondent to serve the notice on the appellants and the municipality constitutes a fundamental irregularity that would necessitate the setting aside of the eviction order.

[7] Prior to the hearing of this **appeal**, we wrote to the parties and raised the following queries about the record:

- ‘1. Prior to its amendment the notice of motion gave notice that an application would be made on 12 September 2023. That was changed to 16 January 2024 and there are a stamp and initial which purports to be that of the clerk of the civil court confirming that amendment. There is no record of what occurred on either of those days.
2. According to the magistrate’s judgment an order authorising the service of a notice in terms of section 4 (2) was made on 23 October 2023. There is no document indicating that the matter would be heard on that day, and no copy of that order in the record.
3. There are no returns of service reflecting service of the notice in terms of section 4 (2) on any of the respondents.’

[8] In response the first respondents’ attorneys confirmed that the s 4(2) application was heard in chambers on 23 October 2023 and therefore there is no record of those proceedings. Regarding the amendment of dates of the hearing in the notice of motion from 12 September 2023 to 16 January 20224 the first respondent confirmed that the eviction application was before an open court on 16 January 2024, however, it could not explain the change of dates because the messenger who was attending to the obtaining of dates was no longer in its employment. The first respondent confirmed that the s 4(2) notice was served by the sheriff on the appellants even though the service thereof was not reflected on the return of service.

[9] Furthermore, the first respondent attached to its written response to the queries a copy of a draft order in terms of s 4(2) of PIE. That draft order bore the stamp of the clerk of the court, civil section, Scottburgh dated 23 October 2023. Furthermore, the first respondent attached a copy of a notice in terms of s 4(2) read with s 4(5) of PIE dated 28 July 2023 which purported to inform the appellants that the first respondent had launched an application to evict them from the property and that such application will be heard at Scottburgh Magistrates’ Court. That notice had a date stamp from the clerk of the court dated 1 August 2023.

Analysis and applicable legal principles

[10] PIE governs the eviction of unlawful occupiers of land. The eviction of unlawful occupiers under PIE has received judicial attention in our courts. In *Cape Killarney Property Investments (Pty) Ltd v Mahamba and Others*,¹ the Supreme Court of Appeal in interpreting s 4 of PIE held that the provisions thereof are peremptory; the notice of the proceedings in terms of s 4(2) must be effected on the unlawful occupier and the municipality having jurisdiction at least 14 days before the hearing of those proceedings; the notice must contain the information stipulated in ss (5) and the contents and the manner of service of the notice must be authorised and directed by an order of the court; the notice of the proceedings must be served in accordance with the rules of court and the notice of motion in terms of the rules of court is required in addition to the s 4(2) notice.

[11] In *Ubunye Co-operative Housing (Association Incorporated under Section 21) v Mbele and 31 Others (2)*² the full court of this Division, citing with approval from the *Cape Killarney* judgment, laid down the practice to be followed in PIE applications in the high court. Levinsohn J stated that *Cape Killarney* set out two separate and distinct elements in the procedure set out in ss 4(1) to 4(5) of PIE as follows:³

‘Firstly, there is the notice of motion which institutes the application in terms of the High Court Rules and secondly, there is the section 4(2) notice which *inter alia* sets forth the date when the proceedings for eviction are to take place’.

The notice is not merely issued by the registrar; it is an order of the court directing that such service take place.⁴ The application would have to be served on the respondent (or his/her attorneys) as with all interlocutory applications.⁵

[12] It is evident from section 4(2) that prior to the hearing of the proceedings, "a notice of these proceedings" must be delivered to both the unlawful occupier and the

¹ *Cape Killarney Property Investments (Pty) Ltd v Mahamba and Others* 2001 (4) SA 1222 (SCA) paras 11-13.

² *Ubunye Co-operative Housing (Association Incorporated under Section 21) v Mbele and 31 Others (2)* [2005] ZAKZHC 13.

³ *Ibid* at 9.

⁴ *Ibid* at 7.

⁵ *Ibid* at 10.

municipality.⁶ Sub-section (2) specifies that this notice must include the information outlined in s 4(5)(a), (b), (c), and (d). These subsections require that the notice inform the respondent about the initiation of eviction proceedings, specify the date and time for the court hearing, outline the reasons for the intended eviction, and indicate that the respondent has the right to appear in court to contest the case, as well as their entitlement to seek legal aid if necessary. Here again the proposed s 4(2) directions should be annexed to the notice of motion.⁷

[13] The judgment in *Occupiers of OMPAD Farm v Green Horizon Farm (Pty) Ltd and Others*⁸ dispelled any doubt about whether the practice and procedures laid down in *Ubunye* for applications under PIE were equally applicable in the magistrates' court. In *Occupiers of OMPAD* a full bench of this Division reviewed a judgment and order of the magistrates' court wherein the court had ordered eviction of the respondents who were unlawful occupiers of a farm. The court found that the failure by the applicants to follow the procedure laid down in *Ubunye*, more particularly pertaining to the service of the notice of motion together with the founding affidavit and the order to be sought reflecting the proposed directives in terms of s 4(2) of PIE, constituted a fundamental irregularity that justified the reviewing and setting aside of the court judgment and order.⁹ In emphasising the importance of serving the s 4(2) court order on the respondents, Olsen AJ stated as follows:¹⁰

'...It is the court order, and not the notice of motion, which alerts a respondent to the fact that a final order against the respondent will be granted without further ado if the respondent does not take steps to show cause on or before the appointed date why that should not be done'.

⁶ Ibid at 7.

⁷ Ibid at 12.

⁸ *Occupiers of OMPAD Farm v Green Horizon Farm (Pty) Ltd and Others* [2014] ZAKZPHC 29 (*Occupiers of OMPAD*).

⁹ Ibid paras 22-26.

¹⁰ Ibid para 24.

[14] Furthermore, the *Occupiers of OMPAD* judgment clarified and modified the approach outlined in *Ubunye* regarding the commencement of applications under PIE in the Magistrates' Courts:¹¹

'...It is now necessary that applications under PIE be commenced by way of an application on notice of motion, the form being the long form contemplated by rule 6(5)(a). The form must be modified so that it informs the respondent that if notice to oppose is not delivered, an application will be made on a given date for directions in terms of section 4(2) of PIE. Those proposed directions must be annexed to the notice of motion. Commencing the application proceedings by way of a rule nisi is no longer permitted.'

The procedure laid down in *Occupiers of OMPAD* regarding the commencement of applications under PIE employs or follows the procedure provided for in rule 55 of the Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa, regarding applications in the magistrates' court.

[15] Contrary to the principle that applications under PIE consist of two distinct notifications to be served on the respondent, (that is firstly the notice of motion commencing the application and seeking the directions and authority of the court as to the notice in terms of s 4(2), and secondly the notice authorised by the court advising the respondent that the court will hear the eviction application on the stipulated date), the notice of motion herein consisted of one notice that purported to inform the appellants that an application will be made for an order authorising the service by the Sheriff of the notice in terms of s 4(2). The notice did not contain the grounds for the proposed eviction, nor did it inform the appellants that they were entitled to appear in court to defend the case and that if necessary, they had the right to apply for legal aid. Furthermore, the notice of motion failed to inform the appellants that 'if notice to oppose is not delivered, an application will be made on a given date for directions in terms of s 4(2) of PIE'.¹² In this regard the application is irregular.

¹¹ Ibid para 28.

¹² *Occupiers of OMPAD* para 28.

[16] According to the first respondent the application for authorisation of the service of the s 4(2) notice was heard and the order issued *ex parte* in chambers on 23 October 2023. It is clear from the first respondent's own version that the procedure followed in commencing the application and the hearing of the application was irregular. In accordance with the principle set out in the *Occupiers of OMPAD*, applications under PIE should not be commenced *ex parte* and should not be heard in chambers. Furthermore, it is clear from the initial respondent's account and the appeal documentation that the s 4 (2) order was either never issued or not delivered to the appellants. Firstly, the first respondent's initial submission that the s 4(2) notice was issued at Scottburgh Magistrates' Court on 1 August 2023 cannot be correct. A section 4(2) notice is the product of an order issued by a court after the application has commenced by way of motion. Neither the alleged court order authorising the service of the s 4(2) notice, nor the s 4(2) directions, were contained in the appeal record. Furthermore, the first respondent had stated in its notice of motion that the notice in terms of s 4(2) read with s 4(5) was attached as per annexure "TMI". However, the annexure "TMI" referred to in the notice of motion was not a s 4(2) notice. It was resolution of the directors of the first respondent.

[17] In response to our queries the first respondent's lawyers provided a copy of the so-called s 4(2) notice together with directions which was stamped by the clerk of the court, Scottburgh, on 21 August 2023. However, the date on which the application would be heard in court was left blank. That clearly shows that the direction was not ordered by the court because the court would not have issued s 4(2) directions without endorsing a date when the eviction application would be heard in court. That reinforces the appellants' contention that the s 4(2) notice and directions were not issued by the court. There was no proof of service of the s 4(2) notice in the record, or otherwise provided by the first respondent.

[18] These irregularities, individually and cumulatively, are so fundamental that they vitiate the proceedings in the magistrates' court. For these reasons the appeal should succeed, and the decision of the court *a quo* be set aside. There is no reason why costs should not follow the result.

Order

[19] In the premises the following order is made.

1. The appeal is upheld and the order of the court a quo is set aside, and substituted with an order dismissing the application with costs.
2. The first respondent is ordered to pay the costs of appeal. Counsel's fees may be taxed on scale B.

Mathenjwa J

I agree.

Olsen J

Date of hearing: 31 October 2025

Date of judgment: 30 January 2026

Appearances:

Appellants counsel: K J Chetty

Instructed by: S Parshotam and Company
Pietermaritzburg

First respondent's counsel: ME Mathibela

Instructed by: Robinson Manzi & Company Attorneys
Scottburgh