

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

**THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE DIVISION, CAPE TOWN)**

**Case No:** 2025-218300

In the matter between:

**NC.M. W[...]**

**Applicant**

And

**P.S. K[...]**

**1<sup>ST</sup> Respondent**

**ALL OTHER OCCUPANTS**

**2<sup>ND</sup>**

**Respondent**

**CITY OF CAPE TOWN MUNICIPALITY**

**3<sup>RD</sup> Respondent**

**Heard : 13 April 2026**

**Delivered : Electronically on 29 May 2026**

**Summary:** Eviction Application - dispute of facts exists which could not be resolved on paper – matter referred for oral hearing in terms of Rule 6(5)(g) of the Uniform Rules of the Court

---

## JUDGMENT

---

**YAKE AJ**

### **Introduction**

[1] This is an application brought in terms of section 4(1) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ('PIE') for the eviction of the first respondent and all other occupiers from the immovable property situated at Unit 4[...]. S[...], S[...] Avenue, Kuilsriver, Cape Town ('the property').

[2] The application is opposed by the first respondent ('respondent'). The respondent contends that her occupation is lawful, alternatively that the eviction sought would not be just and equitable within the meaning of section 4(6) and 4(7) of PIE. In addition, the respondent raised two points in limine, namely (a) the nonjoinder of Ms. Unathi M[...] ('Ms. M[...]') who is alleged to be the wife of the applicant and (b) and an alleged conflict of interest arising from Ms. M[...] representing the applicant.

### **Factual background**

[3] It is common cause that the applicant is the registered owner of the property in question. The applicant and the respondent were engaged in a romantic relationship. During the subsistence of their relationship, the respondent took occupation of the property. The circumstances under which the respondent assumed occupation are, however, in dispute. The applicant avers

that the respondent's occupation was pursuant to a verbal tenancy agreement ('tenancy agreement') concluded between the parties. The respondent, on the other hand, disputes the existence of such an agreement. She contends that her occupation is founded upon her alleged co-ownership of the property, which she claims arises by virtue of a universal partnership said to have existed between herself and the applicant.

[4] Furthermore, the precise date of occupation is contested. The applicant maintains that the respondent took occupation during the course of 2023, whereas the respondent asserts that she moved into the property on 8 July 2022. These divergences in the parties' versions form part of the factual matrix to be considered in determining the nature of the occupation and the rights, if any, arising therefrom.

[5] The applicant contends that none of the respondents has a legal right to remain in occupation, as the alleged tenancy agreement has since been cancelled. He submits that the requirements of section 4(2) of PIE have been complied with, including proper service of notices on the respondent(s) and the municipality. In the result, he asserts that he is entitled to the relief sought.

### **The applicant's case**

[6] The applicant contends that the terms of the tenancy agreement concluded between himself and the respondent were that the respondent would occupy the property for a period of three months. During such occupation, the respondent would be responsible for the payment of body corporate levies and municipal accounts.

[7] Upon the expiry of the initial three-month period, the respondent sought an extension of the tenancy, which the applicant reluctantly granted. The

applicant states that such extension was granted, albeit reluctantly, and was expressly conditional upon the respondent's continued fulfilment of her obligations under the tenancy agreement; namely the payment of body corporate levies and municipal accounts. The applicant contends that the respondent failed to honour her obligations, in that she did not pay the levies and municipal accounts as undertaken, thereby falling into arrears.

[8] As a result of the respondent's alleged breach, the applicant submits, he cancelled the agreement and requested the respondent to vacate the property. Following such cancellation, the applicant contends that the respondent no longer had any lawful right to occupy the property and that her continued presence constitutes unlawful occupation. On this basis, the applicant asserts that he is entitled to bring the present eviction application.

### **The respondent's case**

[9] The respondent disputes that she entered into any agreement with the applicant. She contends that, notwithstanding the property being registered in the applicant's name, it was in fact acquired by the applicant for her benefit as her home. She asserts further that the parties were engaged to be married and that a universal partnership existed between them. By virtue of such partnership, she maintains, she was entitled to occupy the property. On this basis, the respondent denies that her occupation is unlawful. The respondent argues that these contentions raise a material dispute of fact. She submits that the application accordingly stands to be dismissed, alternatively that the matter should be referred for the hearing of oral evidence.

## **Issues in dispute**

[10] The court is enjoined to determine, firstly; whether the respondent is unlawfully occupying the applicant's property. Secondly, whether the respondent has raised a dispute of fact that would preclude the granting of the relief sought on the papers. In addition, the court is required to determine whether the respondent has established a proper basis for the points raised in limine.

## **Points in limine**

[11] It suffices to note that when the respondent filed her answering papers, no points in limine were raised. These points were introduced for the first time in the respondents' heads of argument. Counsel for the respondent submitted that they only arose after receipt of the applicant's replying affidavit. Accordingly, before engaging with the substantive merits of the eviction application, the court is required to determine the preliminary points raised by the respondent, namely:

- (a) whether the non-joinder of Ms. M[...], who according to the respondent has a direct and substantial interest, constitutes a defect in this application; and
- (b) whether Ms. M[...]’s legal representation of the applicant contravened clause 3.9 of the Code of Conduct for All Legal Practitioners, Candidate Legal Practitioners and Juristic Entities<sup>1</sup> as amended (the ‘LPC code of conduct’).

---

<sup>1</sup> Published under GenN 168 in GG 42337 of 29 March 2019

[12] The court will accordingly consider each of these objections in turn, mindful that if either is upheld, it may affect the applicant's entitlement to proceed with the eviction application.

### **Non-joinder**

[13] Uniform rule 10 regulates joinder proceedings. The purpose of joinder is to ensure that all parties whose rights or interests may be affected by the court's order are before the court, thereby preventing multiple or inconsistent judgments. Our law recognises two categories of joinder. The first is necessary joinder, which arises where a party has a direct and substantial interest in the subject matter of the litigation that may be prejudicially affected by the court's order.<sup>2</sup> In such circumstances, failure to join amounts to non-joinder, and the court may decline to hear the application until such joinder has been effected. Alternatively, the matter may proceed only if the absent party has expressly consented to be bound by the judgment or has waived their right to be joined.<sup>3</sup>

[14] The second category is a joinder of convenience.<sup>4</sup> This occurs where the joinder of a party is permissible but not essential. Such joinder does not arise from a direct and substantial interest but rather from considerations of practicality, efficiency, or the avoidance of multiple proceedings. The absence of joinder in these circumstances does not render the proceedings defective, nor does it amount to misjoinder. The court retains a discretion to allow or refuse it, depending on the circumstances of the case.

[15] For the respondent to succeed in her point in limine, she must establish that Ms. M[...] has a direct and substantial interest in the subject matter of the litigation. Such interest must be of such a nature that the judgment in the main

---

<sup>2</sup> *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A); *Absa Bank Ltd v Naude NO and Others* [2015] ZASCA 97; 2016 (6) SA 540 (SCA).

<sup>3</sup> Section 17 of the Matrimonial Property Act 88 of 1984.

<sup>4</sup> *United Watch & Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another* 1972 (4) SA 409 C.

application cannot be sustained or carried into effect without necessarily prejudicing her interest.<sup>5</sup> It is only where this threshold is met that non-joinder arises, and the court may decline to entertain the application until joinder has been effected, or until the absent party has consented to be bound by the judgment. The Supreme Court of Appeal in *Absa Bank Ltd v Naude NO*,<sup>6</sup> formulated the test for non-joinder as follows:

‘The test whether there has been non-joinder is whether a party has a direct and substantial interest in the subject matter of the litigation which may prejudice the party that has not been joined.’

[16] In *Gordon v Department of Health, Kwa Zulu Natal*,<sup>7</sup> the Supreme Court of Appeal held that a person must be joined when they have a direct and substantial interest in the subject matter of the litigation that may be prejudicially affected by the court’s judgment and order. It further held that a court must raise non-joinder *mero motu* if it appears that a necessary party has not been joined. Failure to join such a party renders the proceedings fatally defective, as the court cannot make a binding or enforceable order in the absence of such party. This was confirmed by the Constitutional Court in *Matjhabeng Local Municipality v Eskom Holdings Limited*.<sup>8</sup>

[17] In light of the foregoing principles, the question to be asked is whether Ms. M[...] has a direct and substantial interest in the eviction application that may be prejudicially affected by any order of this Court. This enquiry is two-phased. The first leg requires a determination of whether Ms. M[...] possesses a direct and substantial interest in the eviction application. If the answer to this leg is in the affirmative, the court must then proceed to the

---

<sup>5</sup> Ibid fn 2.

<sup>6</sup> Ibid fn 2 para 10.

<sup>7</sup> *Gordon v Department of Health, KwaZulu-Natal* 2008 (6) SA 522 (SCA).

<sup>8</sup> *Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Mkhonto and Others v Compensation Solutions (Pty) Limited* [2017] ZACC 35; 2018 (1) SA 1 (CC).

second leg, namely whether her interest may be prejudicially affected by the court's order. If the answer to both legs is in the affirmative, Ms. M[...] must be joined, as her absence renders the proceedings defective. The court cannot make an order that binds or prejudices a party without affording such party the right to be heard. In such circumstances, failure to join may result in the matter not being heard at all.

[18] Conversely, if the answer to the above is in the negative; meaning that the party's interest is indirect or insubstantial, or that notwithstanding a direct and substantial interest, her non-joinder will not be prejudicial; the court retains a discretion. In such circumstances, the absence of joinder does not vitiate the proceedings, and the court may proceed to adjudicate the matter, since the outcome will not have a *dire* impact on third parties who are not accordingly joined to the proceedings.

### **Submission by the respondent**

[19] Mr. Tait, counsel for the first respondent, argued that at paragraph 8 of the replying affidavit, the applicant alleges that he is traditionally married to Ms. M[...] and has paid lobola in accordance with her customs as far back as 2018. Counsel submits that the applicant has averred that he and Ms. M[...] concluded a formal universal partnership agreement on 14 February 2018. In terms of paragraph 6 of that agreement, the parties recorded their intention to marry in accordance with customary law, with the marital regime of in community of property, on or about December 2018.

[20] Counsel submitted that the property in question was purchased on 5 July 2022 and registered in the applicant's name on 19 August 2022. It was argued

that, in light of the universal partnership and customary marriage between the applicant and Ms. M[...], the latter is the co-owner of the property. In support of this contention, counsel referred to paragraph 36 of the applicant's replying affidavit wherein the applicant expressly admitted this position. Paragraph 36 records that:

‘the first respondent- despite the knowledge and circumstance that I submitted herein above, still clutches to the belief that there is a universal partnership- and now appears to claim joint ownership over my property, *which, in any event, by virtue of my marriage belongs to me and my wife in equal shares.*’ (My emphasis)

[21] Counsel submits that by virtue of Ms. M[...]'s co-ownership of the property, she has a direct and substantial legal interest in the relief sought. It was argued that such interest may be prejudicially affected by the judgment and order of this Court, and accordingly that Ms. M[...] ought to be joined as the second applicant. On this basis, counsel contended that the application should be postponed pending the formal joinder of Ms. M[...] to the proceedings.

### **Submission by applicant**

[22] In reply, Mr Smit, counsel for the applicant submitted that section 15(2) of the Matrimonial Property Act 88 of 1984 requires a written consent of both spouses only in respect of the alienation, mortgage, or pledge of immovable property forming part of the joint estate. He contends that an eviction application does not constitute an alienation or encumbrance of property. Rather, it is the exercise of a possessory right, which falls entirely within the applicant's unilateral legal capacity.

[23] Counsel contends that, in terms of section 1 of PIE, the applicant qualifies to bring this application as the “person in charge” of the property. He submits that Ms. M[...] played no role in the acquisition, management or administration

of the property. Accordingly, the applicant argues that his standing to institute this application is not dependent upon, nor affected by Ms. M[...]’s co-ownership interest.

[24] Counsel further argues that the relief sought is equally in Ms. M[...]’s interest as a co-owner, in that it will restore the property to the registered owner. He submits that the respondent has failed to demonstrate in what manner the granting of an eviction order in the applicant’s favour would be prejudicial to Ms. M[...].

[25] It was further submitted that Ms. M[...] has filed a confirmatory affidavit and is accordingly before court by virtue of such affidavit. Counsel contends that Ms. M[...] is aware of these proceedings and, as such, there is no adverse interest that would necessitate her formal joinder. On this basis, the applicant argues that the point of non-joinder is without merit and should be dismissed.

## **Discussion**

[26] It is common cause that the applicant and Ms. M[...] are married in community of property, as confirmed in the replying affidavit filed by the applicant.<sup>9</sup> Section 17(1) of the Matrimonial Property Act 88 of 1984 (‘MPA’) stipulates that a spouse married in community of property *shall not without the written consent of the other spouse institute legal proceedings* against another person or defend legal proceedings instituted by another person. Although the property in question, is registered solely in the name of the applicant, it nonetheless forms part of the joint estate and therefore belongs to both the applicant and Ms M[...] by virtue of the matrimonial regime. This is underscored by the applicant’s own admission wherein he expressly conceded

---

<sup>9</sup> Replying affidavit para 8 (record page 190).

that the property is jointly owned.<sup>10</sup> Accordingly, it cannot be argued that Ms M[...] has a direct and substantial interest in the present eviction application.

[27] Notwithstanding Ms M[...] direct and substantial interest in these proceedings, the applicant is not thereby precluded from instituting this application. These proceedings are governed by “PIE”, and section 4(1) thereof expressly confers standing on the owner of property, or a person in charge, to institute eviction proceedings. The applicant is not only the registered owner of the property in question but also the person in charge thereof, as the responsibility for paying levies and municipal accounts rests solely upon him. This underscores his right and authority to bring this application.

[28] Moreover, section 17(2) of the MPA provides in clear terms that no party to legal proceedings instituted or defended by a spouse may challenge the validity of such proceedings on the ground of the absence of the consent required in subsection (1). The legislature has thus insulated proceedings from being vitiated merely by the lack of spousal consent. In the present matter, although Ms. M[...] has not been formally joined as a second applicant, her awareness of the proceedings is beyond dispute. This is evidenced by her confirmatory affidavit, which demonstrates her knowledge of and alignment with the relief sought. Accordingly, while Ms M[...]’s interest is acknowledged, the applicant retains the statutory authority to bring this eviction application. The respondent’s suggestion that he cannot proceed until M[...] is joined is untenable. It is my considered view that, the absence of M[...]’s explicit authorisation as a co-owner does not vitiate the validity of the proceedings.

[29] What remains is for the court to determine whether Ms. M[...] is likely to be prejudicially affected by the outcome in the proceedings as a result of her failure to be joined. If so, joinder must take place as a matter of necessity,

---

<sup>10</sup> Replying affidavit para 36 (record page 199).

otherwise prejudice will manifest if a joinder did not occur and a judgment and order adverse to the applicant has been issued.

[30] In *Matjhabeng Local Municipality v Eskom Holdings Limited and Others*,<sup>11</sup> the Constitutional Court states as follows:

‘The law on joinder is well settled. No court can make findings adverse to any person’s interests, without that person first being a party to the proceedings before it. The purpose of this requirement is to ensure that the person in question knows of the complaint so that they can enlist counsel, gather evidence in support of their position, and prepare themselves adequately in the knowledge that there are personal consequences – including a penalty of committal – for their non-compliance. All of these entitlements are fundamental to ensuring that potential contemnors’ rights to freedom and security of the person are, in the end, not arbitrarily deprived.’

[31] The relief sought in the present matter is the eviction of the respondent from the property jointly owned by the applicant and Ms. M[...] in accordance with their marital regime. Granting the eviction order will not, in my view, prejudice Ms. M[...]. Her proprietary rights will remain intact, and the order will operate only to evict the respondent. Similarly, a refusal of the application will retain the status quo, leaving Ms. M[...]’s interests unaffected. The only conceivable prejudice would arise from an adverse costs order against the applicant. However, section 17(3) of the MPA provides a safeguard: such costs may be recovered from the applicant’s portion of the joint estate, thereby insulating Ms. M[...] from liability. Accordingly, the respondent has failed to demonstrate prejudice sufficient to render joinder necessary. The point in limine based on non-joinder is without merit and must be dismissed.

### **Conflict of interest**

---

<sup>11</sup> Ibid fn 8 paras [92]-[93].

[32] Mr. Smit, raises a serious contention: that Ms. M[...]’s direct and substantial interest in the proceedings, coupled with her firm’s representation of the applicant, creates a potential conflict of interest. The suggestion is that the application may not be genuinely brought on the applicant’s instruction, but rather motivated by personal considerations, specifically the alleged discovery of an extra-marital affair. The respondent relies on clause 3.9 of the LPC code of conduct, which prohibits legal practitioners from acting where their personal interests’ conflict with those of their client. The principle is clear; the integrity of representation must be safeguarded, and practitioners must avoid situations where personal entanglements compromise professional judgment.

[33] Counsel for the applicant on the other hand correctly maintains that the application is brought solely on the applicant’s instruction and that Ms. M[...]’s representation is proper and professional. He submits that the allegation of a conflict of interests, premised on speculation about personal motives is unsupported by evidence. Importantly, it is irrelevant to the central issue of determination under PIE of whether the respondent’s occupation is unlawful. Moreover, the respondent’s contention does not provide a lawful ground to dismiss, postpone or set aside the eviction application.

[34] Counsel contends that the LPC code of conduct governs the disciplinary relationship between practitioner and the Council. It does not confer procedural rights on opposing litigants in civil proceedings. The respondent is not M[...]’s client and has no standing to invoke the code’ s protection. Furthermore, it was pointed out that the issue is entirely moot. Ms. M[...]’s firm has since withdrawn as attorneys of record and the law firm Brasington Macris Inc. have taken over as attorneys of record. The latter firm has no personal interest in the outcome of these proceedings. Counsel submits, therefore, that this point in limine also stands to be dismissed.

## **Discussion**

[35] The court notes that clause 3.9 of the LPC code of conduct requires a legal practitioner to "retain the independence necessary to enable them to give their clients or employers unbiased advice". This independence is a professional duty that ensures the integrity of the practitioners. When read alongside clauses 3.5 and 3.6, the framework becomes even clearer: legal practitioners are strictly prohibited from acting where they hold a direct and substantial personal or financial interest that conflicts with their client's interests. The language of these provisions is unequivocal. Where such conflict arises, the practitioner is not permitted to exercise discretion; withdrawal is mandatory. The duty to withdraw in cases of conflict is not discretionary but mandatory, underscoring the seriousness with which the profession regards impartiality.

[36] The contention by the respondent that Ms. M[...] had a substantial interest in the matter, and that her representation thereby creates a conflict of interest, *prima facie* appears to be persuasive. However, upon careful scrutiny of the facts, no such conflict arises. The LPC code of conduct prohibits legal practitioners from acting in circumstances where their personal or financial interests conflict with those of their clients. In the present matter, the interests of Ms. M[...] and the applicant were aligned, both seeking the eviction of the respondent. In my view, there was no conflict of interest that could compromise her professional independence.

[37] While it may have been ideal that Ms. M[...] ought not to have represented her spouse, as such representation may risk clouding her judgment, the court notes that this concern was ultimately addressed. Ms. M[...] has subsequently withdrew from the matter and this demonstrates an appreciation of the ethical obligations imposed by the LPC code of conduct. With her

withdrawal, the potential for conflict was extinguished. The new attorneys engaged in the matter hold no personal interest therein. In light of the withdrawal of Ms. M[...] and the appointment of new attorneys, the point in limine alleging conflict of interest is without merit and stands to be dismissed. Having dismissed both points in limine, I pause to deal with the merits of the main application.

### **The applicant's locus standi**

[38] Section 4(1) of PIE provides:

‘(1) 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.’

[39] “Owner”, insofar as is relevant, is defined in PIE as “*the registered owner of land*”. “Person in charge”, in turn, 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*”. (*My emphasis*)

[40] The onus to prove *locus standi* for the institution of these proceedings is on the applicant (see *Kommissaris van Binnelandse Inkomste v Van der Heever*).<sup>12</sup> It is common cause that the applicant is the registered owner of the property in question as contemplated in section 1 (the definitions section) of PIE. This was not placed in dispute by the respondents. Accordingly, the applicant's *locus standi* to institute these proceedings is established and beyond question.

---

<sup>12</sup> 1999 (3) SA 1051 (SCA) para [10].

[41] Once the applicant's *locus standi* has been established, the court is enjoined to undertake a threefold enquiry in determining whether an eviction order should be granted in terms of PIE:

(a) First, the court must determine whether the respondents possess any

extant legal right to occupy the property. Put differently, the enquiry is whether they are lawful occupiers. Should such a right exist, the application cannot succeed and must be dismissed.

(b) Second, if no lawful right of occupation is found, the court must consider whether it is just and equitable, in all the circumstances, to order the eviction of the respondents. This enquiry requires a balancing of the rights of the registered owner against the personal circumstances of the occupiers, with due regard to constitutional values.

(c) Third, if it is held that eviction is just and equitable, the court must then determine the terms and conditions upon which such eviction is to be carried out. This includes consideration of the period within which the respondents must vacate and any measures necessary to ensure fairness in execution of the order. This was reaffirmed in *Transcend Residential Property Fund Ltd v Mati and Others*.<sup>13</sup>

### **Are the respondents unlawful occupiers?**

[42] Section 1(xi) of the PIE defines 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...*'

---

<sup>13</sup> 2018 (4) SA 515 (WCC) para [3]

[43] It is trite that application proceedings are not designed to resolve factual disputes but rather serve to determine legal issues on the basis of common cause facts. Whilst it is generally undesirable to attempt to decide an application on affidavit where there are material facts in dispute, it is equally undesirable for a court to accept all disputes of fact at face value which would enable a respondent to raise fictitious issues of fact in avoidance. It is therefore necessary to scrutinise the alleged disputes and determine whether they are bona fide or can be satisfactorily resolved without the aid of oral evidence.

[44] From the outset, it is apparent that in this matter a dispute of facts exists whether the respondent is in unlawful occupation or not. In *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another*,<sup>14</sup> Heher JA said the following:

‘A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts alleged are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will genuinely have difficulty in finding that the test is satisfied. I say ‘generally’ because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party.’

[45] In *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*,<sup>15</sup> it was held that a real dispute of fact will arise in one of three ways. Firstly, the respondent may deny one or more of the material allegations made by the

---

<sup>14</sup> *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) para [13].

<sup>15</sup> *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T).

applicant and produce evidence to the contrary or may apply for the leading of oral witnesses who are not presently available or who though averse to making an affidavit, would give evidence if subpoenaed. Secondly, the respondent may admit the applicant's affidavit evidence but allege other facts which the applicant disputes. Thirdly, the respondent, while conceding that he has no knowledge of one or more material facts stated by the applicant, may deny them and put the applicant to the proof, and himself give or propose to give evidence to show that the applicant and his deponents are untruthful or their evidence unreliable.

[46] The general rule is that final relief in motion proceedings may only be granted if those facts as stated by the respondent, together with those facts stated by the appellant that are admitted by the respondent, justify the granting of the application, unless it can be said that the denial by the respondent of the facts alleged by the appellant is not such as to raise a real, genuine or *bona fide* dispute of fact.<sup>16</sup>

[47] In determining whether a dispute of fact has genuinely been raised on the papers, the court does not enquire into the merits of a respondent's defence. The enquiry is confined to whether the respondent's averments, if established at trial, would constitute a defence to the applicant's claim. The court must also consider whether such averments are made *bona fide*. This is demonstrated where the deponent seriously and unambiguously engages with the issues sought to be placed in dispute. Where such engagement is absent, the court may conclude that the alleged dispute is not genuine.<sup>17</sup>

[48] In the present matter, there is a serious dispute which has been raised regarding the respondent's occupation of the applicants' property. The applicant

---

<sup>16</sup> *Plascon-Evans Paints (TVL) Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; [1984] 2 ALL SA 366 (A); 1984 (3) SA 623 (A).

<sup>17</sup> *Ibis* 16

contends that the respondent breached the tenancy agreement in that she failed to pay levies and municipal accounts. Due to the breach, he cancelled the agreement making the respondent's occupation of the property to be without lawful right or consent, thereby rendering her presence unlawful. Conversely, the respondent denies that there was ever an agreement between the parties and contends that a universal partnership exists between herself and the applicant, which, in her view, confers co-ownership rights in respect of the property. This universal partnership is of course denied by the applicant.

[49] Notably, the reasons advanced by the applicant for the respondent's occupation of the property materially differs from those advanced by the respondent. The applicant anchors his case on a tenancy agreement, yet he is unable to specify the date on which such agreement was concluded. No explanation was tendered for this omission. Furthermore, the applicant does not dispute the respondent's allegation that she took occupation on 8 July 2022. He also fails to address the lapse of time between the respondent's occupation in 2022 and his first demand that she vacates the property in June 2024. The intervening period, extending well over a year, remains unexplained. This silence is significant, for it undermines the applicant's assertion that the respondent's occupation is unlawful.

[50] The respondent, by contrast, maintains that her occupation was pursuant to a universal partnership, which she alleges confers co-ownership rights. While the existence of such partnership is denied by the applicant, the evidentiary shortcomings in his version, particularly the absence of a specified agreement date, the failure to contest the respondent's occupation date, and the unexplained delay in requiring her to vacate, cast doubt on the reliability of his account.

[51] It is my considered view that the applicant has not been candid in his founding affidavit regarding the true nature of his relationship with the respondent, which led to her occupation of the property. The facts surrounding their relationship only emerged upon the filing of the respondent's answering affidavit. It was only then that the applicant disclosed aspects of their relationship, raising new issues to which the respondent was unable to reply. This lack of candour, coupled with the applicant's failure to specify the date of the alleged agreement, his omission to dispute the respondent's occupation date of 8 July 2022, and his unexplained delay in requiring her to vacate until June 2024, undermines the reliability of his version. In my view, the issue of whether the respondent is an illegal occupant of the property is squarely in dispute.

[52] Regrettably, despite the applicant having been alerted to the respondent's contention that a dispute of fact exists, he elected to proceed by way of motion. Upon consideration of the applicant's founding affidavit together with the respondent's answering affidavit, it is evident that a genuine dispute of fact has arisen. Such dispute cannot be resolved on the papers alone.

[53] In light of these findings, the further question of whether eviction would be just and equitable in terms of PIE does not arise. The prerequisite of unlawful occupation has not been met, and the court can therefore not engage with the equitable considerations envisaged under PIE.

## **Conclusion**

[54] Having found that a material dispute of facts has been established which cannot be resolved on papers, the question arises as to the proper course that ought to have been adopted in circumstances. The well-established principle is that where such a dispute is reasonably foreseeable, the matter should not be

pursued by way of motion proceedings. Instead, the applicant ought to have refer the matter for oral hearing of proceeded by way of action, thereby allowing for the resolution of factual disputes through oral evidence and cross-examination. The situation was regulated by Uniform Rule 6(5)(g). Rule 6(5)(g) provides as follows:

‘Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as to it seems meet with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the foregoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for him or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise.’ (Own emphasis)

[55] This rule extends a wide discretion to the court. Where a material dispute of fact arises on the affidavits and cannot be resolved without the hearing of oral evidence, the court is vested with a discretion as to the future course of the proceedings. In exercising this discretion, the court may adopt one of three alternatives: it may dismiss the application; it may direct that oral evidence be heard on specified issues in terms of the rule; or it may refer the matter to trial. Importantly, the court is not confined to these remedies alone. It retains the power to make any order it deems fit, provided such order is directed at securing a just and expeditious resolution of the dispute.

[56] The respondent has requested the matter to be dismissed, alternatively that it be referred for hearing of oral evidence. While it is noted that the applicant ought to have anticipated the material dispute of fact upon receipt of the answering paper and not persisted with motion proceedings, it remains imperative that both parties be afforded a fair opportunity to ventilate their respective cases. Dismissal of the matter at this stage would have serious repercussions and would not serve the interest of justice. In the circumstances, a

referral of this matter to oral evidence would best serve the interests of justice and ensure an expeditious resolution. The hearing of oral testimony will enable the court to properly assess the credibility of the witnesses and to resolve the factual disputes that have arisen on the papers. Once such evidence has been heard, the court will be in a more informed position to determine whether the respondent is in unlawful occupation.

[57] For the reasons set out above and in the exercise of the court's discretion under Rule 6(5)(g), the matter is accordingly referred for the hearing of oral evidence.

### **Order**

[58] In the result, I make the following order:

- a) The respondent's points in limine are dismissed.
- b) The main application is referred for the hearing of oral evidence in terms of Rule 6(5)(g), on the date agreed by the parties or determined by the Registrar, limited to the determination of whether the respondent is in unlawful occupation of the applicant's property.
- c) Uniform Rule 35 shall apply to discovery for the purpose of the hearing.
- d) The costs of this application is reserved for determination by the court hearing the oral evidence.

---

**YAKE S.**

**ACTING JUDGE OF THE HIGH COURT**

### **Appearances**

For the Applicant: Adv. C. Tait

Instructed by: Brasington Macris Inc.

For the Respondents: Adv. PS Smit

Instructed by: Smit & Hugo Attorneys