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**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG**

Not Reportable

**Case No: CIV APP MG 13/2025
Magistrate's Court Case No: 4394/2024**

In the appeal between:

KUTLWANO DIKGWATHLE

APPELLANT

and

MBUTI JACOB PHETHENI

FIRST RESPONDENT

MATHAPELO PATRICIA PHETHENI

SECOND RESPONDENT

Coram: Reddy J; Tsautse AJ

Heard: 13 March 2026

Delivered: 12 June 2026

Summary: Civil appeal — PIE Act — eviction of unlawful occupiers — sections 4(2) and 4(5) — private pre-litigation eviction notice not a court-authorized notice — Notice of Motion lacking hearing date and section 4(5)(d) information — peremptory requirements not met — online rental advertisement inadmissible as proof of alternative accommodation — *Plascon-Evans* rule — uncontested sale defence in answering affidavit — genuine dispute of fact on ownership and *locus standi* — appeal upheld.

ORDER

1. The appeal is upheld.
2. The judgment and orders of Additional Magistrate L Loli dated 29 July 2025 are set aside and replaced with the following order:
 - 2.1 The application is dismissed, without prejudice to the right of the first and second respondents to institute fresh proceedings in compliance with the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.
3. The first and second respondents are ordered to pay the costs of the application in the court *a quo*, on the party-and-party scale.
4. The first and second respondents are ordered to pay the costs of this appeal on the party-and-party scale, including the costs of counsel on Scale B.

JUDGMENT

REDDY J

Introduction

[1] This is an opposed appeal against the judgment and orders of Additional Magistrate L Loli (the court of first instance). Pursuant to a motion brought by the first and second respondents (the Phethenis') under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (the PIE Act),¹ the court of first instance granted an order for the eviction of the appellant and other unlawful occupants from Erf 1[...], Extension 3, Tigane, Hartbeesfontein (the property). It is this crisp issue subsumed within provisions of the PIE Act that fall for consideration.

Background

[2] The Phethenis' are the registered owners of the property, an erf of 1 271 square metres in Tigane Extension 3, Hartbeesfontein. In their founding affidavit the first respondent averred that in approximately 2004 he concluded a verbal lease agreement with the late Philemon Dikgwathle, (Dikgwathle) in terms of which the late Dikgwathle occupied the property in exchange for a monthly rental that varied from month to month. He averred that upon the death

¹ Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 Act 19 of 1998.

of Dikgwathle that agreement terminated by operation of law, and that the appellant, a member of the deceased's family, thereafter, remained in occupation without any right to do so.

[3] On 21 February 2024 the Phethenis' issued a private written eviction notice directing the appellant and the other occupants to vacate within seven days. On 23 February 2024 the appellant's family responded, disputing unlawful occupation and asserting that the late Dikgwathle had purchased, not leased, the property.

[4] The Phethenis' thereafter launched motion proceedings praying for an order evicting the appellant and other unlawful occupants, directing vacation within 30 days, authorising the Sheriff to execute the eviction in the event of non-compliance, and ordering costs.

[5] In his answering affidavit the appellant raised a *point in limine* that the Phethenis' had failed to comply with sections 4(2) and 4(5) of the PIE Act and had not properly identified the "other unlawful occupants". On the merits, the appellant contended that the late Dikgwathle had purchased the property from the first respondent. Two affidavits were annexed. First, the affidavit of Mr Piet Nkemeleng Moeng (the Moeng affidavit), a ward councillor, who deposes that in 2019 the first respondent himself approached the municipality requesting assistance to transfer the property into the late Dikgwathle's name, thereby acknowledging the sale.

[6] Second, the affidavit of Ms Sonia Katryn Pheteni (the Sonia Pheteni affidavit), who deposes that she personally witnessed the written sale agreement

concluded in 2002 at the offices of Mr Zahed Minty in Klerksdorp. Significantly, Sonia Pheteni confirms that she personally received payments of the purchase price from the late Dikgwathle on the first respondent's behalf. Moreover, Sonia Pheteni observed substantial improvements made to the property by the late Dikgwathle after taking occupation. The Phethenis' elected not to file a replying affidavit.

[7] The court of first instance dismissed the *point in limine*, finding compliance with sections 4(2) and 4(5) of the PIE Act on the basis that the eviction notice, a private notice to vacate had been given to the occupants and that the appellant had served a notice of intention to oppose on 24 October 2024. On the merits, the court of first instance rejected the Moeng and Sonia Pheteni affidavits because the person who drafted the written sale agreement had not deposed to an affidavit.

[8] The court of first instance reasoned that because the application was about eviction, not the validity of any contract observing that the first respondent "should have opted for other avenues" to challenge the contract. Conclusively the court of first instance found that the Phethenis' had provided documentary proof of ownership. Importantly that alternative accommodation was available as shown by an online property listing; that no elderly, disabled, or sick persons or minor children resided at the property; and that it was accordingly just and equitable to grant the eviction order.

Grounds of appeal

[9] The Notice of Appeal advances seven grounds. To this end it was postulated that the court of first instance erred :

- (i) in finding that the first and second respondents complied with sections 4(2) and 4(5) of the PIE Act;
- (ii) in treating the private eviction notice as a notice in terms of sections 4(2) and 4(5);
- (iii) in accepting the online rental advertisement as proof of the availability of alternative accommodation, when that advertisement amounts to hearsay;
- (iv) in rejecting the Moeng affidavit and the Sonia Pheteni affidavit because the person who drafted the written sale agreement had not deposed to an affidavit;
- (v) in failing to appreciate that the appellant's opposition was based on the contention that the late Philemon Dikgwathle purchased, not leased, the property, and that this raised a dispute of fact incapable of resolution on the papers;
- (vi) in not dismissing the application or, alternatively, referring the question of ownership to oral evidence; and
- (vii) in not applying the *Plascon-Evans* rule, which required the sale version to be accepted in the absence of a replying affidavit.

Submissions

[10] Advocate Masike, for the appellant, submitted that the eviction notice is a private pre-litigation notice to vacate drafted by the Phethenis' own representatives, not a court-authorized notice under section 4(2) of the PIE Act. Advocate Masike contended that the Notice of Motion is equally defective as it neither indicates a hearing date nor notifies the occupants of their right to appear and to apply for legal aid. Towards this end, Advocate Masike placed much store on *Cape Killarney Property Investments (Pty) Ltd v Mahamba and*

*Others*² for the proposition that section 4(2) of the PIE Act requires court-directed, court-authorized notice.

[11] Advocate Masike submitted that on the evidence the online rental advertisement is inadmissible hearsay. He asserted that this is a statement by an unidentified third party offered for the truth of its contents. Advocate Masike maintained that an online rental advertisement cannot, without more, prove that specific, suitable and affordable accommodation is in fact available to these occupants. Advocate Masike claimed that the court of first instance conflated the existence of the advertisement with proof of its contents.

[12] Insofar as the merits, Advocate Masike contended that Mr Moeng and Ms Sonia Pheteni are independent witnesses with personal knowledge of the sale transaction and should not have been rejected merely because the drafter of the agreement did not depose to an affidavit. Advocate Masike argued that in the absence of a replying affidavit by the Phethenis', the sale version stands uncontested and must be accepted in terms of the Plascon-Evans rule. The uncontested sale version, it was submitted, raises a material question regarding the Phethenis' *locus standi* to bring the eviction proceedings, which could not be resolved on motion.

[13] Mr Baloyi for the first and second respondents did not file heads of argument, however he contended that the appeal should be dismissed given that there had been compliance with s 4(2) of the PIE Act. This was founded primarily on Mr Baloyi's submission that the appellant in fact participated in the proceedings and suffered no prejudice. Furthermore, Mr Baloyi submitted that the court of first instance correctly accepted the online property listing as proof

² *Cape Killarney Property Investments (Pty) Ltd v Mahamba and Others* [2001] ZASCA 87; [2001] 4 All SA 479 (A); 2001 (4) SA 1222 (SCA)

of the availability of alternative accommodation and that the court of first instance was entitled to rely on it. Mr Baloyi further contended that the online property listing did not constitute hearsay and that the court of first instance correctly found that there was alternative accommodation available to the occupants.

The powers of this court on appeal

[14] An appellate court will not disturb the findings of a court of first instance unless a material misdirection has occurred either in law or on the facts or the decision is one no reasonable court properly directed could have reached.³ In our view the fulcrum of this appeal pivots on questions of law. These can be subclassed as follows: (i) whether the peremptory PIE Act notice requirements were met, (ii) whether evidence was admissible, and (iii) whether the correct approach to disputes of fact in motion proceedings was applied. We address each in turn.

Analysis

Sections 4(2) and 4(5) of the PIE Act

[15] Section 4(2) of the PIE Act is peremptory. It prescribes that at least 14 days before the hearing, the court must serve written and effective notice of the proceedings on the unlawful occupier and the municipality having jurisdiction. Section 4(5) of the PIE Act prescribes the mandatory content:

[16] Section 4(5) of the PIE Act provides:

“(5) The notice of proceedings contemplated in subsection (2) must—

³ Medicross Healthcare Group (Pty) Ltd v Linde and Associates (A2024/113909) [2025] ZAGPJHC 804; 2026 (1) SA 222 (GJ) (6 August 2025) para 39.

- (a) state that proceedings are being instituted in terms of subsection (1) for an order for the eviction of the unlawful occupier;
- (b) indicate on what date and at what time the court will hear the proceedings;
- (c) set out the grounds for the proposed eviction; and
- (d) state that the unlawful occupier is entitled to appear before the court and defend the case and, where necessary, has the right to apply for legal aid.”

[17] The four requirements in s 4(5) of the PIE Act are cumulative and peremptory. Each must be satisfied. A notice that is silent on any one of them is not a compliant notice for the purposes of s 4(2) of the PIE Act.

[18] In *Cape Killarney Property Investments (Pty) Ltd v Mahamba and Others*⁴ the court held that the notice must be authorised and directed by a court order and served by the court not merely by the applicant. Strict compliance is required; substantial compliance does not suffice.⁵

[19] In our view, the court of first instance erred in identifying the private eviction notice as the s 4(2) notice. A closer examination of the latter unequivocally establishes that it is a private pre-litigation eviction notice, drafted and served by the Phethenis' own representatives on 21 February 2024, six months before these proceedings were instituted. Moreover, *ex facie* the document, the following legal shortcomings are obvious. First, it is not a court document. Second, it was never authorised by any court order. Third, it was not served by any officer of the court. Fourth, it does not contain the information

⁴ (495/99) [2001] ZASCA 87; [2001] 4 All SA 479 (A); 2001 (4) SA 1222 (SCA) (10 September 2001).

⁵ *Cape Killarney* paras 11 and 13–16.

required by section 4(5) of the PIE Act. In sum, it does not align with the character of what s 4(2) of the PIE Act requires.

[20] The notice of motion yields no different result. Even if we were to afford it that status as the intended s 4(2) of the PIE Act notice, which is itself contestable as it was drafted by the respondents' attorneys without any court order directing its service as a PIE notice. It suffers from two fundamental defects. First, it does not indicate the date and time at which the court will hear the proceedings.⁶

[21] It follows the standard Rule 55 of the Magistrates Court Rules opposition procedure, with the hearing to be fixed only after the opposition time periods have run. An occupier served with it cannot know when to attend court. Second, it does not expressly state that the occupier is entitled to appear before the court and defend the case and has the right to apply for legal aid .⁷ A general PIE paragraph drawing attention to factors the court may consider does not constitute the explicit notification of procedural rights which s 4(5)(d) requires, directed as it is at ensuring that unrepresented occupiers are specifically apprised of their entitlement to attend and obtain legal assistance.

[22] The Phethenis' submission that the appellant in fact participated in the proceedings and suffered no prejudice cannot cure non-compliance. Section 4(2) of the PIE Act compliance is assessed at the time of service. The fact that the appellant may have learned of the proceedings through other means and chose to oppose says nothing about whether a compliant court directed notice was ever served. Strict compliance is demanded and was not achieved. On our evaluation the *point in limine* should have been upheld and the application

⁶ *Cape Killarney* para 11.

⁷ Section 4(5)(d) of the PIE Act.

dismissed without prejudice to the Phethenis' right to launch fresh proceedings on proper notice. This finding alone is dispositive of the appeal. We proceed to the remaining grounds for a holistic consideration of the matter and to ensure certainty should it be reconsidered.

Alternative accommodation

[23] The court of first instance accepted a screenshot of an online property listing as proof that alternative accommodation is available to the occupants. This is unsustainable. The advertisement is a statement by an unidentified third party tendered for the truth of its contents, namely that suitable, accessible, and affordable accommodation is in fact available for these specific occupants.⁸ What stands out is that in the absence of a confirmatory affidavit from the advertiser or a property expert, it is inadmissible hearsay.

[24] The Phethenis' submission that the court of first instance could take judicial notice of the general availability of rental accommodation in Hartbeesfontein is unjustifiable. Judicial notice is confined to facts of common knowledge beyond reasonable dispute, facts so notorious and generally accepted that no reasonable person would think of questioning them.⁹ The apex Court has applied this doctrine by dispensing with formal proof of facts it described as facts so notorious that it is already part of the shared knowledge of the community.¹⁰

⁸ *Public Protector v Mail & Guardian Ltd and Others* 2011 (4) SA 420 (SCA) para 14.

⁹ Schwikkard & Van der Merwe *Principles of Evidence* 4th ed (2016) at 427–428.

¹⁰ *Fose v Minister of Safety and Security* (CCT14/96) [1997] ZACC 6; 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC) (5 June 1997) para 6

[25] Contrastingly, the availability of specific accommodation at affordable rentals for particular occupants in a specific town is not a matter of common knowledge; it is a particular fact that varies by location, affordability, and individual circumstance, and must be proved.

[26] In *Msibi v the Occupiers of Unit [...] O[...] and Another*¹¹ and that such a determination may require a proper factual foundation on the papers. Even on its own terms, the online rental advertisement proves only that a property was listed online at some point in time; it does not establish that the listed property was available, affordable, or accessible for these specific occupants.

The approach to disputes of fact in motion proceedings

[27] The appellant raised a substantive defence in the answering affidavit that the late Dikgwathle had not leased but purchased the property. This version was corroborated by the affidavits of Mr Moeng and Ms Sonia Katryn Pheteni. The court of first instance summarily rejected both affidavits on the basis that the person who drafted the written sale agreement had not deposed to an affidavit. This reasoning is misdirected.

[28] The context of these affidavits ought to have been considered within the body of the appellant's opposition. Mr Moeng and Ms Sonia Pheteni are not the drafters of the agreement. They are independent witnesses deposing from their own personal observation of the transaction and payments. Their evidence is admissible in its own right. That the drafter did not also file a statement goes at most to weight, not admissibility. Besides, the court of first instance's view that

¹¹ *Msibi v the Occupiers of Unit [...] O[...] and Another* [2022] ZAGPPHC 880 (18 November 2022) para 31-32

the appellant “should have opted for other avenues” to challenge the contract is misplaced and is no answer to a defence raised in opposition to eviction proceedings. Our jurisprudence enjoins a respondent in PIE eviction proceedings to raise in opposition any matter including a challenge to the applicant’s *locus standi* as owner which goes to the legal competence of the application.

[29] Notably, the Phethenis¹² filed no replying affidavit. In motion proceedings, where an applicant who prays for final relief does not reply to a defence raised in the answering affidavit, the court must, for the purposes of the application, accept the respondent’s version of those facts unless it is so clearly untenable as to be rejected out of hand.¹²

[30] Put simply, the sale version, advanced with specificity, carefully detailed, and deposed to by witnesses with intimate knowledge, is not inherently implausible. It stood as admitted. Accordingly, the factual premise the court of first instance was bound to apply is that the first respondent sold the property to the late Dikgwathle in 2002 for a purchase price paid in full, and that the property was substantially improved by the late Dikgwathle thereafter.

[31] On that uncontested version, a significant question arises. If the first respondent sold the property to the late Dikgwathle in 2002, how did the City Council of Matlosana come to hold and sell the same property to the Phethenis¹² in 2022 under Deed of Transfer T000072142/2022? The previous title is T54887/1990. No account of the chain of title from the late Dikgwathle’s alleged purchase through to the 2022 deed is offered in the papers. The *locus standi* of the Phethenis’ to bring eviction proceedings as lawful owners is, on

¹² *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634–635.

the uncontested version, a genuine and material question that could not be resolved on motion. The court of first instance should have dismissed the application or referred the ownership question to oral evidence. The failure to do so constitutes a material misdirection.

Just and equitable considerations

[32] It is not necessary to deal at length with the just and equitable enquiry given the findings above. We note that with the online rental advertisement excluded as inadmissible, there is no evidence of available alternative accommodation. Under section 4(7) of the PIE Act which applies here, since the occupation has subsisted for well over six months, having commenced in or around 2004 the court is required to consider, among other things, whether land has been made available by the municipality for the occupants' relocation.¹³

[33] No such evidence was placed before the court. Furthermore, on the uncontested version, the late Dikgwathle paid the full purchase price and made substantial improvements to the property. These are material considerations bearing on the constitutional right of every person not to be evicted from their home without a court order made after proper consideration of all relevant circumstances.¹⁴ Neither consideration was engaged with by the court of first instance. This constituted a further misdirection.

Conclusion

[34] From a conspectus of the foregoing, the following is apposite. The peremptory requirements of s 4(2) and 4(5) of the PIE Act were not met. Neither the private eviction notice nor the Notice of Motion constitutes a

¹³ Sections 4(7) and 4(8) of the PIE Act; *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others* 2012 (6) SA 294 (SCA) para 25.

¹⁴ Section 26(3) of the Constitution of the Republic of South Africa, 1996.

compliant court-authorized PIE notice. The Notice of Motion omits both the hearing date and the explicit notification of the right to appear before the court and the right to legal aid, two of the four mandatory section 4(5) requirements. The *point in limine* should have been upheld.

[35] Additionally, the reliance on the online rental advertisement as proof of alternative accommodation was unsustainable, the rejection of the Moeng affidavit and the Sonia Pheteni affidavit was misdirected, and the failure to accept the uncontested sale version and its implications for the Phethenis' *locus standi* constituted a further material misdirection. In the premises, the appeal succeeds.

Costs

[36] Costs follow the result. There is no basis for a deviation from this deep rooted principle. The application in the court of first instance was launched on a fundamentally defective basis and should have been dismissed at the outset; the costs of those proceedings follow accordingly. On appeal, the matter raised questions of law of some complexity concerning the peremptory requirements of the PIE Act, the admissibility of hearsay evidence, and the correct approach to disputes of fact in motion proceedings. Scale B is accordingly appropriate.

Order

[37] In the premises, the following order is made:

1. The appeal is upheld.
2. The judgment and orders of Additional Magistrate L Loli dated 29 July 2025 are set aside and replaced with the following order:

- 2.1 The application is dismissed, without prejudice to the right of the first and second respondents to institute fresh proceedings in compliance with the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.
3. The first and second respondents are ordered to pay the costs of the application in the court *a quo*, on the party-and-party scale.
4. The first and second respondents are ordered to pay the costs of this appeal on the party-and-party scale, including the costs of counsel on Scale B.

REDDY J
JUDGE OF THE HIGH COURT, SOUTH AFRICA
NORTH WEST DIVISION

I agree.

T TSAUTSE
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA,
NORTH WEST DIVISION

Appearances

For the Appellant: Advocate T Masike

Instructed by: Mothibi Attorneys, Mahikeng

c/o Kennedy Kgomongwe Attorneys, Klerksdorp

For the 1st and 2nd Respondents: Mr Baloyi

Instructed by: Khotso Baloyi Attorneys, Klerksdorp