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**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

Case No. 22/023954

REPORTABLE: YES

OF INTEREST TO OTHER JUDGES: YES

REVISED.

10 January 2023

In the matter between:

MADULAMMOHO HOUSING ASSOCIATION NPC

Applicant

and

SHOTHODZO NEPHAWE

First Respondent

CITY OF JOHANNESBURG

Second Respondent

Case No. 21/40262

And in the matter between:

FINAL HOUSING SOLUTIONS (PTY) LTD

Applicant

and

LUVALO LUKHANYA

First Respondent

**ALL THE UNIDENTIFIED ILLEGAL OCCUPANTS OF
ERF [....] V[....] EXTENSION 14**

Second Respondents

CITY OF EKURHULENI MUNICIPALITY

Third Respondent

Summary

Unlawful occupation of land – application of the Prevention of Illegal Eviction from, and Unlawful Occupation of, Land Act 19 of 1998 (“PIE”) – substantive requirements discussed.

Practice – Pleading – Burden of pleading under PIE is threefold – applicant must demonstrate ownership or lawful control of the property, that the respondent is in unlawful occupation, and that there are facts that support the conclusion that an eviction would be just and equitable.

JUDGMENT

WILSON J:

1 The applicant in each of these matters owns residential property from which it seeks to evict unlawful occupiers.

2 In case number 22/023954, the applicant is Madulammoho, a well-known social housing company. Madulammoho is a non-profit landlord that exists to provide

low cost housing to people who cannot afford to rent on the open market. Madulammoho let a unit in the Fleurhof Views housing development to the first respondent, Mr. Nephawe. Its lease with Mr. Nephawe commenced on 1 June 2016. The monthly rent payable at the commencement of the lease was just over R2 500. By 31 March 2021, Mr. Nephawe had fallen into arrears in the sum of R14 984.80. He continued making payments, however, and by 4 July 2022, his arrears had been reduced to R9 715.83. At the point he signed his lease in 2016 it appears that no-one was living with him. It is not clear from Madulammoho's papers whether Mr. Nephawe still lives alone.

3 In case number 21/40262, the applicant is Final Housing Solutions (Pty) Ltd ("FHS"). FHS owns a property in V[...] Extension 14. FHS says that it purchased the property from Nedbank in 2005, and that it found the first respondent, Mr. Lukhanya, living on it with his family. FHS entered into an agreement with Mr. Lukhanya that entailed what appears to have been a complex set of arrangements aimed at enabling Mr. Lukhanya to purchase the property with the assistance of the State. It is not clear precisely what that arrangement was, because the critical averments describing the arrangement appear at paragraphs 17 to 20.7 of FHS' founding affidavit, which have been omitted from the papers presented to me.

4 Still, the founding affidavit makes mention of "guarantees for the subsidy" given by "the department" in the sum of R163 573. The purchase agreement annexed to the founding affidavit puts the total purchase price at R210 000, R50 000 of which is payable as a deposit, presumably on signature of the agreement. It is not clear whether this amount was actually paid, but FHS does not complain that it was not. FHS' complaint is that Mr. Lukhanya neglected to pay the outstanding rates and taxes on the property, which was apparently necessary to unlock the subsidy. It seems that, if the subsidy were paid, Mr. Lukhanya would be able to take ownership of his home. However, the purchase agreement makes no mention of the subsidy guarantees, and the precise nature of their relationship to the purchase agreement remains obscure. This is notwithstanding a supplementary affidavit filed on the applicant's behalf, in which it is baldly asserted that the subsidy guarantees, which turn out to have been given by the Department of Human Settlements, have now expired.

5 Madulammoho and FHS each claim an eviction order under the Prevention of Illegal Eviction from, and Unlawful Occupation of, Land Act 19 of 1998 (“PIE”). They allege that the occupation of the property in each case has become unlawful. In Mr. Nephawe’s case, this is because his lease has been cancelled on breach. In Mr. Lukhanya’s case it is because the purchase agreement has been cancelled, apparently because of Mr. Lukhanya’s failure to pay the outstanding rates and taxes on the V[....] property.

6 The case for Madulammoho and FHS ended there. The attitude of counsel appearing before me was that once unlawful occupation has been proved, an owner is entitled to an eviction order, at least in the absence of any other relevant information. That is a fundamental misunderstanding of the applicable law. It is unfortunately a common one in the unopposed motion courts over which I have presided, in which eviction applications under PIE are regularly moved without any attempt to satisfy the substantive requirements PIE imposes. In these circumstances, it is necessary to restate the requirements of PIE before moving on to deal the applications brought by Madulammoho and FHS.

PIE’s substantive requirements

7 PIE authorises a court to evict an unlawful occupier only where it is “just and equitable”, after having considered all the relevant circumstances (sections 4 (1), 4 (6) and 4 (7) of PIE). The justice and equity standard has a clear and principled structure, developed through a series of well-known appellate decisions.

8 The principles of justice and equity are, first, that the applicant for an eviction order bears the onus to establish that it is just and equitable to grant one; second, that evictions that lead to homelessness are not generally just and equitable; third, that a court has wide powers to require applicants for eviction orders, organs of state and unlawful occupiers to produce the information necessary to enable the formulation of a just and equitable order; and fourth, that where an eviction would lead to homelessness, the duty to provide the alternative accommodation necessary to prevent an unlawful occupier from becoming homeless generally falls on the local authority with jurisdiction over the property. I address each of these principles in turn.

Onus

9 The onus of demonstrating the justice and equity of an eviction rests on the applicant for an eviction order. The applicant has a duty to place facts before a court from which an inference can be drawn that an eviction would be just and equitable (*City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 (6) SA 294 (SCA), paragraph 34) (“*Changing Tides*”). The decision in *Changing Tides* supersedes and overrules earlier decisions in which it was held, *obiter*, that the onus to place information before the court shifts to the unlawful occupier once the applicant has proven ownership and unlawful occupation (see for example *Ndlovu v Ngcobo, Bekker and Another v Jika* [2002] 4 All SA 384 (SCA) (“*Ndlovu*”), paragraph 19).

10 It follows that it is no longer sufficient to approach a court for an eviction order merely on the basis of the applicant’s ownership or control of a property, and the respondent’s unlawful occupation. Before an eviction order can be granted, the facts must demonstrate that it would be just and equitable to make one.

11 There is accordingly no presumption in favour of granting an eviction order simply because the applicant has alleged and proven ownership and unlawful occupation. Satisfying these requirements does no more than trigger a further enquiry into whether it would be just and equitable to evict an unlawful occupier. The fact that an owner is, at common law, entitled to exclusive use and occupation of their property where there are no other counter-veiling common law rights held over it is a factor that counts in favour of granting an eviction order. But it is by no means dispositive of the issue.

Homelessness

12 Although there are potentially a wide variety of reasons why an eviction may not be just and equitable, the case law developed under PIE has tended to focus on the injustice of homelessness. The appellate courts have consistently held that it will not be just and equitable to order an eviction where the execution of the eviction order would leave an unlawful occupier homeless (See *Occupiers, Berea v De Wet* 2017 (5) SA 346 (CC), paragraph 57 and *Occupiers, Shulana Court, 11 Hendon*

Road, Yeoville, Johannesburg v Steele [2010] 4 All SA 54 (SCA) (“*Shulana Court*”), paragraph 16). It follows that eviction orders that will lead to homelessness cannot be made.

A court’s fact-finding and remedial powers

13 Even where an eviction application is unopposed, if it appears that an eviction might lead to homelessness, a court is entitled neither summarily to evict an unlawful occupier, nor summarily to dismiss the application. It is required to act “proactive[ly]” to ensure that it is “appraised of all relevant information in order to enable it to make a just and equitable decision” (*Shulana Court*, paragraph 15). Its principal method of obtaining the necessary information will be to require a local authority to investigate the circumstances of the unlawful occupiers, and to report to the court on a range of matters, including whether and to what extent an eviction order may lead to homelessness, what steps the local authority will take to provide any necessary alternative accommodation, and when those steps will be taken (see, in this respect, *Changing Tides*, paragraph 40).

14 That is why applicants for eviction orders that may lead to homelessness are required to join the relevant local authority from the outset (*City of Johannesburg v Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC) (“*Blue Moonlight*”) paragraph 45). Where they fail to do so, a court will rectify that failure by joining the relevant local authority, and, if necessary, other organs of state concerned with the provision of housing. The court will generally require a report to be filed addressing the need for and provision of alternative accommodation (*Sailing Queen Investments CC v Occupants of La Colleen Court* 2008 6 BCLR 666 (W) and *Occupiers of ERF 101,102, 104 and 112, Shorts Retreat, Pietermaritzburg v Daisy Dear Investments (Pty) Ltd* [2009] 4 All SA 410 (SCA)).

15 Once that report is filed, a court will generally be in a position to make an order directing alternative accommodation to be provided where it is needed, and setting a timetable for the provision of the accommodation and for the eviction of the unlawful occupiers who do not or are not entitled to relocate to it.

16 Sometimes, however, local authorities may unreasonably refuse to provide alternative accommodation, or provide information that is of such a generalised nature as to be of little or no assistance in resolving the specific case before a court. In those circumstances, a court may order the local authority to produce further specific information (see *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers Saratoga Avenue* 2009 (1) SA 470 (W)), or it may direct a local authority simply to provide the accommodation by a given date, linking that date to a date on which an eviction order may be executed (see *Blue Moonlight*, paragraph 97).

17 PIE does not enjoin a court automatically to dismiss an eviction application merely because it might result in homelessness. There are cases where the facts require the dismissal of such an application, but they are rare (see, for example, *Ekurhuleni Metropolitan Municipality v Various Occupiers, Eden Park Extension 5* 2014 (3) SA 23 (SCA), *All Builders and Cleaning Services CC v Matlaila* [2015] ZAGPJHC 2 (16 January 2015) and *Fischer v Unlawful Occupiers* 2018 (2) SA 228 (WCC)).

18 Instead, a court will normally seek to craft an eviction order that may only be executed once alternative accommodation is objectively available to the unlawful occupiers, and which allows the local authority to be compelled, if necessary, to provide the accommodation if it fails to do so promptly (see, for example, *City of Johannesburg Metropolitan Municipality v Hlophe* [2015] 2 All SA 251 (SCA)).

Cases that do not raise the possibility of homelessness

19 There are, of course, many eviction applications under PIE where there is no indication that homelessness will follow on eviction. In the absence of some other reason why an eviction would be unjust and inequitable, a court will in those cases give effect to the applicant's common law right to exclusive possession, and will issue an eviction order. But the only way a court will be able to draw the conclusion that an eviction would be just and equitable is if the applicant sets out facts that allow the court to do so. That is why it is important for applicants for eviction orders under PIE to plead their cases fully, going beyond the traditional common law approach of alleging ownership and unlawful occupation.

The Madulammoho and FHS cases

20 It follows that, apart from the need to address PIE's procedural requirements, the burden of pleading on an applicant for an eviction order is now three-fold. The applicant must allege (1) ownership of the property (or control of it in the sense conveyed by the term "person-in-charge" in section 4 (1) of PIE); (2) unlawful occupation of the property; and (3) facts on which a just and equitable eviction order can be made.

21 It may be that these facts are not available to the applicant and it would be unreasonable to put the applicant to the trouble of obtaining them. In that event, there is no reason why the applicant themselves should not procure a local authority's report to provide a basis on which the court can exercise its equitable jurisdiction, having regard to the principles I have set out.

22 In both matters currently before me, however, the applicants and the respondents are embedded in long-standing relationships. It is inconceivable that the applicants could have had any trouble in providing the facts on which I would have been able to exercise my equitable jurisdiction. But neither applicant has ultimately done so.

The Madulammoho case

23 In the Madulammoho case, the applicant limited itself to alleging Mr. Nephawe's breach of his lease, and the valid cancellation of that lease. It stated that, other than his sex, his identity number, and his occupation of one of its units, Mr. Nephawe's further details were unknown. That obviously cannot be taken at face value. A social housing provider will be aware of a range of facts and circumstances relevant to whether an eviction would be just and equitable. In particular, a social housing provider will likely have, or easily be able to obtain, important information about an unlawful occupier's means and ability to afford alternative accommodation.

24 These details are critical, especially where Mr. Nephawe appears to have taken occupation of his unit precisely because he was poor and vulnerable. His

lease also indicates the possibility that his unit was constructed with the assistance of a state housing subsidy. In these circumstances, Madulammoho very likely had more relevant information within its grasp than it disclosed in its founding papers.

25 My principal concern on reading the papers was that Mr. Nephawe was (a) plainly not a recalcitrant tenant, in that he had, on Madulammoho's own documents, been making payments in reduction of his arrears, and (b) if Mr. Nephawe could genuinely no longer afford to live at Fleurhof View – itself a low-cost housing development – there was a strong possibility that he faced homelessness on eviction. When I put these difficulties to Madulammoho's counsel, she was understandably constrained by the paucity of the information on the affidavits.

26 My concerns were borne out by what happened after I reserved judgment. The next morning, Mr. Nephawe extinguished his arrears, and the eviction application was withdrawn. The notice of withdrawal was invalid, as it was filed without my leave and in the absence of evidence of either of the respondents' consent (see *Protea Assurance Co Ltd v Gamlase* 1971 (1) SA 460 (E) at 465G).

27 Mr. Nephawe's payment nonetheless rendered the matter moot. But I indicated that I would deliver judgment in any event. In doing so, I exercised my discretion to decide a matter that has become moot where it is in the interests of justice to do so (*Sebola v Standard Bank of South Africa* 2012 (5) SA 142 (CC), paragraph 32). Because of the fundamental misunderstanding of PIE's substantive requirements to which I have already referred, it is plainly in the interests of justice to decide the issues arising in the Madulammoho case.

28 Had Mr. Nephawe not paid his arrears, I would have directed the applicants to file an affidavit addressing the obscurities I have outlined. I would also have directed the City of Johannesburg to file a report dealing with Mr. Nephawe's ability to afford alternative accommodation, and the City's capacity to provide it.

29 None of those orders is now necessary. Nevertheless, Madulammoho failed to discharge its onus to demonstrate that Mr. Nephawe's eviction would be just and equitable. For that reason, the application will be dismissed. Since the matter was

called in unopposed court, there is no reason to make a costs order against Madulammoho. Each party will pay their own costs.

The FHS case

30 The FHS case is more complex. There are two principal obscurities to be explored before just and equitable relief can be granted. The first is the fate of the arrangement through which Mr. Lukhanya was supposed to have been able to take ownership of his home. The second relates to the numbers and circumstances of those in occupation of the property.

31 It was initially submitted on the applicant's behalf that there was no-one other than Mr. Lukhanya and his family in occupation of the property. But Mr. Lukhanya, who appeared in person, states that there are a significant number of people living in backyard rooms on the property.

32 In these circumstances, I am left with little option but to join the Provincial Department of Human Settlements to the proceedings, and to direct it and the third respondent, the Ekurhuleni Municipality, to file reports dealing with the relevant matters that lie within their purview. When those reports are filed, I may be in a position to decide whether an eviction would be just and equitable, and, if so, on what terms.

Order

33 For all these reasons, I make the following orders.

34 In case number 22/023954, the application is dismissed, with each party paying their own costs.

35 In case number 21/40262, the Member of the Executive Council for Human Settlements (Gauteng) is joined as the fourth respondent in these proceedings.

36 The MEC is directed to file a report, under oath, by no later than 28 February 2023, dealing with the following issues –

36.1 The nature of the subsidy scheme applicable to the parties in this matter;

36.2 Whether it is possible to arrange the purchase of ERF [....] V[....] EXTENSION 14, GAUTENG (“the property”) for the benefit of the first respondent using that subsidy scheme, or any other applicable scheme; and

36.3 Any other information the Department of Human Settlements has under its control relating to the purchase agreement concluded between the parties, and the role of the Department in implementing that agreement.

37 The third respondent is directed to file a report, under oath, by no later than 28 February 2023 dealing with the following issues –

37.1 The number and circumstances of the occupiers of the property;

37.2 The occupiers’ ability to afford alternative accommodation;

37.3 Whether the eviction of anyone in occupation of the property would lead to homelessness; and

37.4 What steps the third respondent will take to provide alternative accommodation, and when those steps will be taken.

38 The applicant is directed, by no later than 20 January 2023, to serve a copy of this judgment on the following persons, and to draw their attention to the contents of this order –

38.1 The first and second respondents;

38.2 The MEC for Human Settlements (Gauteng);

38.3 The State Attorney; and

38.4 The third respondent.

39 The matter will remain with Wilson J, who will supervise the matter until it is finally determined. The applicant may, at any time after 1 March 2023, have the matter re-enrolled before Wilson J, having given all the other parties ten days' notice of the re-enrolment, for such further relief as may then be appropriate.

40 The question of costs is reserved.

S D J WILSON

Judge of the High Court

HEARD ON:

29 November and 1 December 2022

DECIDED ON:

10 January 2023

For the Applicant in case no. 023954:

A Kohler

Instructed by

Vermaak Marshall Wellbeloved Inc

For the Applicant in case no. 40262:

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For the First and Second Respondents

in case no. 40262:

In person