/SG

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

DATE: 04/09/2006
CASE NO: 24134/2005

REPORTABLE

In the matter between:

CASHBUILD (SOUTH AFRICA) (PTY) LTD	APPLICANT
And	
RAMATSEBE LARRYMORE SCOTT	1ST RESPONDENT
NOMPUMELELO PETRONELLA SCOTT	2ND RESPONDENT
JAMES HENRY VAN RENSBURG N.O.	3RD RESPONDENT

JUDGMENT

POSWA, J

[1] This matter came to me by way of an unopposed application. The applicant is the owner of site no 1673, which is situated in the township of Lebowakgomo District of Thabamoopo. The first and second respondents are described as unrehabilitated insolvents, with the third respondent being an appointed trustee of the insolvent estate of the first and second respondents. The applicant is the owner of site no 1673.

[2] In the founding affidavit it is alleged that the applicant and the first respondent entered into a Deed of Alienation in respect of the property, on 15 June 2004. It is alleged that the first respondent permitted a breach of the terms of agreement which entitled the applicant to cancellation of the contract. Notwithstanding a letter written to the first respondent requesting him to rectify the breach within a period of fourteen days, the first respondent failed to rectify the breach. By a letter dated 25 May 2005, the applicant's attorneys notified the first respondent of cancellation of the Deed of Alienation.

[3] On 15 September 2005, the applicant's attorneys caused to be served on the first respondent a notice informing him of his unlawful occupation of the property. Notwithstanding the notice, in terms whereof he was to vacate within seven days, the first respondent failed to vacate the property but, instead, wrote the following letter, annexure "BB10":

> "I agree with receipt of your letter dated 09 September 2005 delivered by the sheriff of Lebowakgomo on 15 September 2005. Contents thereof appear and the instruction is very straightforward. I understand that I am

supposed to vacate the property within seven days from the date of receiving the letter. I write this letter to you not to undermine your instruction but to say to you, that based on the agreement between me and Kupa, the prospective buyer, of which you also acknowledge in writing to him that I may use the property till 31 December 2005, I made ... arrangements as of January 2006. Your insistence of my vacation of the property will definitely disrupt my life in my family in that my children will have to quit school until January 2006. I humbly appeal to you as a human that please reconsider your decision and spare my children the devastation this action may cause. Tentatively allow Kupa to keep me till 3 December 2005 when schools will close. *I do not wish to stand before any court of law* as you threaten, but I am appealing to you human to human." (Emphasis added)

[4] In his concluding paragraph, the deponent to the applicant's founding affidavit states:

"8.1 The first respondent has no legal right to be in occupation of the Property and as it appears from the

applicant's attorneys' letters, the first respondent has neither applicant's express, nor applicant's tacit consent to occupy the property and first and second respondents' occupation is therefore unlawful.

8.2 For purpose of this application, *applicant will adhere to and comply with the provisions and procedural requirements of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, no 19 of 1998 ('PIE').* (Emphasis added)

The Notice of Motion was completed on 14 October 2005 and filed on 17 October 2005. The respondents were required to notify the applicant of their intention to oppose the application by not later than 3 November 2005 and to deliver their answering affidavits, if any, within fifteen (15) days from the date on which they would have given their notice of intention to oppose the application. They were also notified that, if they failed to file their perspective notices to oppose the application, the applicant would proceed with the application before this Court, on 11 November 2005 that:

‘(i) the Court make a determination in terms of prayer 1.4 above; and

(ii) prayers 1.1, 1.2 and 1.3 be postponed to the date to be determined by the Court.’”

[5] Paragraph 1.4 reads:

“1.4 The above honourable court determines the contents and manner of service of the notice contemplated in Section 4(2), read together with Section 4(5) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, no 19 of 1998 (‘PIE’).”

[6] Prayer 1.1 relates to the ordering of the respondents to vacate the premises, in order to allow the applicant undisturbed possession of the property. Prayer 1.2 is for the eviction of the respondents and the removal of their property, in order to place the applicant in undisturbed possession of the property. Prayer 1.3 relates to the payment of costs of the application by the first and second respondents and, in the event of his opposing the application, the third respondent.

[7] An order made by my brother, LEDWABA J, on 15 November 2005 reads:

> "After having heard Counsel on behalf of the Applicant, the Court grants an order in the following terms:
>
> 1. That the notice contemplated in Section 4(2) read together with Section 4(5) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, no 19 of 1998 ('PIE') should be served in the usual manner as provided for in the High Court Rules in the form set out in annexure 'A' hereto.
>
> 2. That prayers 1.1, 1.2 and 1.3 on the notice of motion be postponed to the 13th day of December 2005."

I should point out that if the notice of motion added the following further paragraphs:

> '**TAKE NOTICE THAT** the respondents will be notified of the date determined for hearing of

the matter in terms of the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, no 19 of 1968 ('PIE').

TAKE FURTHER NOTICE that the respondents are entitled to appear before the Court and oppose the matter and they are entitled to apply for legal aid.'"

[8] The applicants had a notice in terms of section 4 of PIE served on the respondents and it reads:

"**BE PLEASED TO TAKE NOTICE THAT:**

1. The abovementioned applicant has initiated proceedings for the eviction of Ramatsebe Larrymore Scott ('the first respondent') and Nompumelelo Petronella Scott ('the second respondent') from the property known as site 1673 (Zone 'S') ...

2. The said proceedings have been instituted in terms of section 4 of the Prevention of Illegal Eviction from

and Unlawful Occupation of Land Act no 19 of 1998 ('PIE').

3. The grounds for the proposed eviction are set out in the Applicant's founding affidavit and are principally as follows:

3.1 the Applicant is the owner of the abovementioned property;

3.2 the Deed of Alienation as entered into between the parties was cancelled on 19 July 2005;

4. In the [*sic*] view of Applicant's ownership of the property it is entitled to possession and occupation thereof.

5. The first and second respondent are in occupation of the property and their occupation thereof is unlawful.

6. The applicant is entitled to an order for eviction of the first and second respondents from the property.

BE PLEASED TO TAKE FURTHER NOTICE THAT on this 15th day of November 2005 the above honourable court determined that:

7. The proceedings in the application for the first and second respondents' eviction in the abovementioned matter is enrolled for hearing and argument in the unopposed motion court on the 13th day of December 2005 at corner of Paul Kruger and Vermeulen Streets, Pretoria.

8. The respondents are hereby informed that:

8.1 They are entitled to;

8.1.1 appear before the Court when the application is dealt with on the 13th day of December 2005;

8.1.2 then and there to oppose the application;

8.1.3 they have the right to apply for legal aid."

[9] This notice was served by the sheriff on all three respondents. There was no appearance on behalf of any of the respondents when the application was called before me.

[10] During argument, on 13 December 2005, I raised the question as to whether the relevant municipality should not have been joined as a party. Mr De Klerk's response was that the municipality had been served with the same notice that was served on the three respondents, respectively, and that it had not responded to such notice. I asked further whether a municipality was not under a statutory obligation to respond whenever such notices are served on it. In other words, the question was whether a municipality that has received notice in terms of s 4(2) of PIE could simply ignore that notice and act as though it had never been served on it. Mr De Klerk's response, as I understood it, was that PIE imposes no obligation on a municipality that has received such notice. Consequently, so he submitted, the municipality is at will to ignore such notice. I was not satisfied that the intention of the legislature in having a municipality given such notice was merely to inform it and that there was no obligation on its part to do something about

the information received. As there was inadequate time, I gave Mr De Klerk opportunity to address me further in that regard and I ordered that the application be postponed to 15 December 2005.

[11] When Mr De Klerk next appeared before me, on 15 December 2005, he adhered to his initial submissions and backed them up with some authorities with which I shall deal later. Mr De Klerk's submissions, as I understood them, can be summed up as follows:

> "1 Because this application was brought within six months of the commencement of the unlawful occupation of the property by the first and second respondents, the relevant section of PIE is s 4(6) and not s 4(7).
>
> 2 Because s 4(6) is the relevant section in this application, the requirement for a municipality to ensure that land has been made available for relocation of the unlawful occupiers, the first and second respondents, does not arise, as that would be the case only if s 4(7) was applicable.

3 In the circumstances, there was neither a statutory nor a constitutional obligation on the part of the Lepelle-Nkumpi Local Municipality to intervene in any way on account of the notice in terms of s 4(2) of PIE. There is no obligation akin to that of the Master in sequestration proceedings, for instance, to give a report to the Court.

4 The respondents bear an evidential *onus* to disclose circumstances, known exclusively to them, which will render the eviction of the first and second respondents not to be just and equitable.

5 In the present case, the respondents have not opposed the application.

6 On the basis of facts before this Court, the applicant is the only party that may suffer prejudice in consequence of a decision of this Court. That would be in the event of the Court refusing the application for the eviction of the first and second respondents."

[12] Before discussing each of the submissions made on the applicant's behalf, it is necessary, in my view, that all the sections of PIE that have or may have a bearing upon this application be set out and I proceed to do that.

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

> "4(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." (Emphasis added)

[14] Section 4(2) reads:

> "4(2) At least 14 days before the hearing of the proceedings contemplated in subsection (1), *the court* must serve written and effective notice of the proceedings on the unlawful occupier *and the municipality have the jurisdiction*." (Emphasis added)

[15] Section 4(5) reads:

> "4(5) The notice of proceedings contemplated subsection (2) must –
>
> (a) state that the 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." (Emphasis added)

[16] Section 4(6) reads:

"4(6) If an unlawful occupier *has occupied the land* in question for less than six months at the time when the proceedings are initiated, a court *may* grant an order for the eviction if it is of the opinion that it is *just and equitable to do so*, after considering *all the relevant circumstances*, including the rights and needs of the elderly, children, disabled persons and households headed by women." (Emphasis added)

[17] Section 4(7) reads:

"4(7) If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court *may* grant an order for eviction if it is of the opinion that it is *just and equitable to do so*, after considering all relevant circumstances, including, except where the land is sold in a sale of execution pursuant to a mortgage whether land has been made available or can reasonably be made available *by a municipality* or other *organ of state* or another land owner for the *relocation of the unlawful occupier*, and including the

rights and needs of the elderly, *children*, disabled persons and households headed by women." (Emphasis added)

[18] Section 7(1) reads:

"7(1) If *the municipality* in whose area of jurisdiction the land in question is situated is not the owner of the land *the municipality* may, on the conditions that *it* may determine, *appoint one or more persons with expertise in dispute resolution* to facilitate meetings of interested parties and to *attempt to mediate and settle any dispute* in terms of this Act: Provided that the parties may at any time, by agreement, appoint another person to facilitate meetings or mediate a dispute, on the conditions that the municipality may determine." (Emphases added)

[19] Section 4(8) of PIE reads:

"4(8) If the court is satisfied that *all the requirements of this section* have been complied with *and* that *no valid*

defence has been raised by the unlawful occupier, it *must* grant an order for the eviction of the unlawful occupier, and determine –

(a) a *just and equitable* date on which the unlawful occupier must vacate the land under the circumstances; and

(b) the date on which an eviction order must be carried out if the unlawful occupier has not vacated the land on the date contemplated in paragraph (a)." (Emphasis added)

[20] Concerning Mr De Klerk's first and second submissions, it is true that the period between the date when the first and second respondents' occupation became unlawful and the date of this application is less than six months. The notice to vacate was served on the respondents on 15 September 2005 (annexure "BB9"), giving the first and second respondents seven days, i.e. not later than 22 November 2005, in which to vacate the property. Consequently, I agree with Mr De Klerk that there is no obligation on the municipality, such as there might have been if the

application was governed by the provisions of s 4(7), to provide other land for relocation of the respondents and their dependents.

[21] Mr De Klerk's submission, that the municipality (Lepelle-Nkumpi Local Municipality) has no statutory or constitutional obligations arising from receipt of notice in terms of s 4(2) of PIE is, in my view, incorrect. The question as to whether the municipality, nevertheless, has any obligations in terms of this statute is to be found in the provisions of s 7(1). It is clear, in my view, that that which the municipality is required to do under s 7(1) has nothing to do with whether or not the application falls under s 4(6) or s 4(7) of PIE. Section 7(1) states what *may* be done by a municipality "in whose area of jurisdiction the land in question is situated" without reference to how long the period of unlawful occupation is. The subsection then gives the municipality an option to "appoint one or more persons with expertise in dispute resolution to facilitate meetings of interested persons and to *attempt to mediate and settle any dispute* in terms of this Act". (Emphasis added.) Clearly, the municipality is given the obligation to apply its mind whether or not to appoint one or more of persons with expertise in dispute resolution, in an endeavour to settle any dispute.

[22] The Act does not define the word "disputes". It can, in my view, be assumed that the "dispute" is the question whether or not the occupation is unlawful and, even where that is common cause, the question as to what "a just and equitable date" is on which the unlawful occupier must vacate the land. Quite clearly, if the question of the unlawfulness of the occupation and/or what a just and equitable date for the unlawful occupier to vacate can be thus resolved by the municipality, such issue or issues would no longer come to court as disputes and the proceedings would be greatly facilitated. The court would, in those circumstances, merely be called upon to make the agreement between the parties, based on the intervention of the municipality, an order of court as contemplated in s 8(1) of the Act. That section reads:

> "8(1) No person may evict an unlawful occupier except on the authority of an order of a competent court."

[23] It follows, in my view, that, even where the municipality has ensured that a dispute has been mediated upon and settled in terms of s 7(1), it would still be necessary to have that made an order by "a competent court".

[24] Section 7(1) clearly contemplates the existence of a "dispute" which a municipality must attempt to mediate and settle. In the manner in which the subsection is worded, it might appear as though the municipality has an option whether or not "to attempt to mediate and settle any dispute" that it finds to be in existence. The relevant portion reads:

> "the municipality *may*, on the conditions that it may determine, appoint one or more persons with expertise in dispute resolution to facilitate meetings of interested parties and to attempt to mediate and settle any dispute in terms of this Act." (Emphasis added)

[25] It appears to me unlikely that the legislature would have intended to give a municipality in whose area of jurisdiction there is a dispute between the owner of land and the occupants thereof an option whether to resolve such dispute or otherwise. Even if, however, the municipality is given that option, there is no doubt in my mind that s 7(1) contemplates the municipality being given the opportunity to make the decision whether, in the first place, a dispute exist and, if it does, whether or not to mediate and settle it. In the circumstances, the Lepelle-Nkumpi municipality has a legal

interest in the subject matter of this litigation, arising out of its legal obligation in terms of s 7(1) of PIE. (See Erasmus "Superior Court Practice", cases sited in *footnote* 2, Commentary on Rule 10 of the Uniform Rules of Court.) Parties cited in the notice served on the municipality, in this case, are only the applicant and the two respondents.

[26] The question then arises whether the municipality was under any obligation to respond to the notice where it was not a party. As I have already stated, Mr De Klerk's submission is that the municipality was not obliged to respond to the notice because, with this application falling under s 4(6) and not s 4(7), the municipality was under no constitutional or statutory obligation to do anything whatsoever with regard to any dispute that might be in existence between the applicant and the respondents. In my view, the municipality was technically under no obligation to react to the notice because it is not implicated in any way in the proposed application involving the applicant and the two respondents. I, however, think that municipalities should, by now, be aware of the provisions of PIE Act, it being a 1999 Act. I expect that legal departments of all organs of state that have anything to do with land affairs and evictions, where there is human interaction, ought,

by now, to have knowledge of the provisions of PIE from either direct education of employees in those departments or from seminars that one would expect to take place, from time to time, on, amongst others, the PIE Act.

[27] It would, in my view, therefore, be expected of the municipality to respond even to a defective notice once it becomes evident, as it must have been evident from the notice that was served on the present municipality, that there is a dispute or potential dispute between a landowner and occupants of his/her/its land. The municipality should, in my view, have taken on itself to steps to intervene and to ensure that it is joined cited as one of the respondents in the application.

[28] Sight must not be lost of the purpose for which the PIE Act was enacted and, *inter alia*, why municipalities were given a role in that Act. In the Bill of Rights, the Constitution provides the background in, *inter alia*, subsections 25(1) and 26(3). Subsection 25(1) of the Constitution deals with property and reads:

> "25(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."

[29] Subsection 26(1) deals with housing and reads:

> "26(1) Everyone has the right to have access to adequate housing."

[30] The legislature did not end up with subsection 26(1) but, in its wisdom, elaborated in subsection 26(3) as follows:

> "26(3) No one may be evicted from their home or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."

[31] To ensure that the right to housing was made meaningful, the legislature went on to provide as follows, in subsection 26(2) of the Constitution:

> "26(2) The state must take reasonable legislative and other measures, between its available resources, to achieve the progressive realisation of this right."

[32] It is in my view, as a direct consequence of s 26(2) of the Constitution that PIE was enacted in 1998. When, therefore, the role of a municipality with the context of PIE is being considered, it should be against this background. It is further, in my view, unthinkable and ludicrous to contemplate that a municipality served with a notice in terms of s 4(2) of PIE, in relation to an application that falls under s 4(6), would be under no obligation to react to such notice in any manner whatsoever. I am, of course, in the first place, referring to a notice that appropriately joins the municipality. I have already stated my view even in respect of the situation where the municipality was not joined in the notice which is served on it, *viz* that municipality ought to take appropriate steps to ensure that it is a party in such proceedings. This is not a mandate it receives from an applicant – it is what parliament entrusts the municipality with, *viz* to see to it that the Constitution's provisions are not rendered superfluous or ...

[33] On the basis of the approach I have taken in this matter, the authorities cited by Mr De Klerk are not applicable, at this stage. He referred me to *Ndlovu v Ngcobo*; *Bekker and Another v Jika* 2003 1 SA 113 (SCA); *FHP Management (Pty) Ltd v Theron NO and Another* 2004 3 SA 392 (C); *Davids and Others v Van Trauton and Others* 2005 4 SA 468 (C) and *PE Municipality v Various Occupiers* 2005 1 SA 217 (CC).

[34] None of these cases, in my view deals pertinently or at all with the question in issue in the present case, *viz* whether a municipality that has been served with a notice in terms of s 4(2) of PIE, where the application falls under s 4(6) of the same Act is under any obligation to do anything in response to such notice. **PE Municipality** (*supra*) deals with a situation in which the municipality, is itself, evicting the occupier.

[35] I do not find it necessary, in the circumstances, to deal with these cases. Suffice it to say that I have no disagreement with, for instance, how the concept of "just and equitable" should be dealt with, as discussed at 484B in *Davids and Others* (*supra*); or that it is for the occupier himself or herself to bring forth the circumstances relevant to his or her eviction order, as stated in

Ndlovu (*supra*), in para [19] and referred to in *PHP Management* (*supra*) at 405b. That, of course, relates to "the evidential *onus* mentioned in *Ndlovu* (*supra*) in para [19]. That question does not, in my view, arise at this stage, in the present application because, the application cannot, in my view, be concluded without the municipality having been appropriately cited and given opportunity to consider the facts of the case as is contemplated in s 4(6) of PIE.

[36] It is, perhaps, appropriate that I express my views on the question whether or not, in the circumstances of this case, there is a dispute. As already stated, this application comes before me unopposed by all three respondents. Consequently, it could understandably be assumed that the facts on which the application must be dealt with are those set out in the applicant's founding affidavit. That does not, in my view, seem to be the correct approach, on the facts of this case. It is not clear to me why the respondents have not opposed this application, in the light of the contents of the first respondent's letter of 21 September 2005 ("BB10").

[37] Had I not come to the conclusion that the municipality should have been joined and that, therefore, the application may not proceed to the next stage, I would still have made an order that would have

ensured that the first and second respondents are aware of the relevant provisions of PIE, in order to enable them to place their case either before the local municipality, for mediation in terms of s 7(1) of PIE or before this Court, in terms of s 8(1) of PIE. The least that the first and second respondents are entitled to is to have the Court determine "a just and equitable date on which [they] must vacate the land under the circumstances described in the first respondent's letter, 'BB10'".

The first respondent clearly refers therein to the applicant having "acknowledged in writing" that the first and second respondents might "use the property till 31 December 2005". In its application, the applicant has not acknowledged that undertaking on its part and, in prayers 1.1 and 1.2, seek eviction of the first and second respondents and the removal of their property, without reference to what the first respondent states in his letter. Moreover, there is clear reference, in the first respondent's letter, to his "children [who] will have to quit school until (*sic*) January 2006". Whilst it is not clear what, precisely, the first respondent meant to say about the children and January 2006, it is quite evident that the eviction will affect the children in a way in which only the first respondent could explain.

[38] The extent to which the first and second respondents and the children would be affected by an eviction order is best known to and can only be described by the first and the second respondents. It is true that, by failing to oppose the application and thus filing an appropriate answering affidavit, the first and second respondents have deprived themselves of the opportunity of the intervention by the Court. It should not, however, be forgotten that the vast majority of South Africans are totally ignorant of their legal rights. It would come at no surprise if it transpires that the first and second respondents are not aware of the existence of PIE, let alone the provisions thereof.

There is another aspect of crucial importance which I would have had to deal with had the application proceeded without joinder of the municipality. That relates to the question whether or not failure on the part of the first and second respondents to oppose the application should be allowed to detrimentally affect the interests of the children. The answer, in my view, is a definite "No". When, in both s 4(6) and 4(7), reference is made to "all the relevant circumstances" that a court may take into account in arriving at a decision, such relevant circumstances are described as "including

the rights and needs of the elderly, *children*, disabled persons and household headed by woman". (Emphasis added.)

[39] In a case where the parents or guardians of children whose interests are affected in the manner contemplated in s 4(6) and s 4(7), decide not to oppose an application for eviction, the Court should, in my view, make an order that ensures that the children's predicament is properly placed before it, to enable it to make the appropriate order concerning their interests.

[40] It follows, therefore, that I would still have made an order that would have taken the first and second respondents' children's interests into account, even if I had found it appropriate for me to proceed without the municipality being joined.

[41] From the above, it must be obvious that I have dealt with Mr De Klerk's fourth, fifth and sixth submissions. I am of the view that the question of the *onus* does not arise at this stage. The fact of the application being unopposed must, in my view, be considered in the light of the fact that the first and second respondents may well be unaware of their rights and that the question of the applicant

being the only prejudiced party is questionable, in the light of the contents of annexure “BB10”.

[42] In the circumstances I make the following order:

THAT:

1. The Local Municipality of Lepelle-Nkumpi be and is hereby joined as the fourth respondent for the purpose of exercising its discretion in terms of section 7(1) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998 (hereinafter referred to as “the PIE Act”);

2. Service of this order and any consequential amendments to the applicant’s papers be effected on the Local Municipality of Lepelle-Nkumpi;

3. Service of the notice of motion, founding affidavit and annexures thereto, as well as annexure 1 upon the Municipality of Tshwane is not necessary.

4. The application is postponed *sine die*;

5. The applicant be and is hereby authorised to approach the matter down on these papers or supplemented papers.

J N M POSWA
JUDGE OF THE HIGH COURT

HEARD ON: 15/11/2005 – 15/12/2005
FOR THE APPLICANT: ADV P DE KLERK
INSTRUCTED BY: MESSRS VAN DEN HEEVER & ASSOCIATES, JOHANNESBURG
FOR THE RESPONDENT: NO APPEARANCE
DATE OF JUDGMENT: 04/09/2006