

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 46325/2013

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES:
YES/NO
(3) REVISED.

DATE

SIGNATURE

In the matter between:

DIBETLE, KABELO EUGENE

Applicant

And

CHILOANE, ARON

First Respondent

ALL OTHER PERSONS CLAIMING OCCUPATION

OF ERF 9178 PROTEA GLEN EXTENSION 12 TOWNSHIP

Second Respondent

CITY OF JOHANNESBURG

Third Respondent

Summary:

Application for the eviction of unlawful occupiers in terms of Prevention of the Illegal Eviction from and the Unlawful Occupation of Land Act, 19 of 1998 (PIE Act) – found first respondent is an unlawful occupier – but Court lacking sufficient information on which to make determination that eviction would be just and equitable, and that eviction order from a

specified date would be just and equitable, as envisaged in section 4(7) and (8) of PIE Act – application dismissed – no costs order made.

JUDGMENT

MAENETJE AJ:

Introduction

1. The applicant seeks an order evicting the respondents from erf 9178 Protea Glen Extension 12 Township (“the property”). He brought the application in terms of the Prevention of the Illegal Eviction from and the Unlawful Occupation of Land Act, 19 of 1998 (“the PIE Act”). The applicant seeks additional relief to the order for eviction. It is convenient to quote the relief sought as set out in the notice of motion:

- “1. That the First Respondent and the Second Respondent herein, be evicted from the property and the buildings erected on the property better known as **ERF 9178 PROTEA GLEN EXTENSION 12** (“the Property”).
2. The determination by the Court of a just and equitable date on which the First and Second Respondents shall vacate the above premises.
3. The determination by the Court of a date on which an eviction order may be carried out if the First and/or Second Respondents have not vacated the property by the date set out in paragraph 2 hereof.
4. That in the event that the First and/or Second Respondents do not vacate the property on the date determined by the Honourable Court, the Sheriff of the Court or his lawfully appointed deputy be authorized and directed to evict the First and/or Second Respondents from the property.

5. That the First and/or Second Respondents are interdicted and restrained from entering the property at any time after they have vacated the property, or been evicted therefrom by the Sheriff of the Court or his lawfully appointed Deputy.
 6. That in the event that the First and/or Second Respondents contravene the order contained in paragraph 5 above, the Sheriff of the Court or his lawfully appointed Deputy is hereby authorized and directed to remove them from the property as soon as possible after their reoccupation thereof.
 7. The First and Second Respondents to pay the costs of this Application.”
2. The first respondent opposes the application on the basis that he owns the property, having allegedly bought it from Inyathi Properties of 247 Rondebult Road, Farrar Park, Boksburg. Furthermore, that it would not be just and equitable to grant the eviction order.

Ownership of the property

3. The applicant states the following in his founding affidavit regarding his ownership of the property:
 - “11. On or about the 10 July 2013 the property was registered into my name in the Deeds Office, Johannesburg under Title Deed No T24706/2013. I respectfully refer ... the above Honourable Court to the Conveyancers Certificate marked “DK2”.
 12. I am not in possession of my original Title Deed, because the property serves as security for mortgage loan I obtained from ABSA BANK LTD in the amount of R120 000.00, and ABSA BANK LTD is keeping same as security until I have repaid the said mortgage loan in full.
 13. ...

Background facts:

14. On or about the 8 May 2013 I purchased the property in terms of a written offer to purchase from the previous owner, Dipapadi Prop 7 CC.
 15. The agreed purchase price was the amount of R350 000.00. I duly paid a deposit of R230 000.00, and obtained a mortgage loan for the balance of the purchase price outstanding from ABSA BANK LIMITED in the amount of R120 000.00.
 16. ABSA BANK [LIMITED] caused a mortgage bond as security to be registered over the property under Bond Deed No. B17958/2013 simultaneously with the transfer of the property in my name on the 10 July 2013.”
4. The applicant attaches a copy of the Deed of Transfer referred to in the founding affidavit. It records the date of execution as 10 July 2013, and reflects that the property was transferred from Dipapadi Property 7 CC into the applicant’s name. A conveyancer’s certificate is also attached, which is dated 23 November 2013, and confirms that the property was registered in the Johannesburg Deeds Registry on 10 July 2013 into the name of the applicant.
 5. In contrast to the applicant’s allegations in the founding affidavit, the first respondent states the following in his answering affidavit:
 - “1. The property alleged to be evicted being house number 9178 Extension 12 (twelve) Protea-Glen, Soweto is mine.
 2. I bought the property from **INYATHI PROPERTIES of**

247 Rondebult Road

Farrar Park

Borksburg

tel : 011- 896- 1650

3. I bought the house for R380, 000,00 as per offer to purchase signed by me and them through their Agency Mrs Zelda Lackay and their representative Mr GEORGE MTEBE copy of the offer is attached hereto marked **"AC 1".**
6. The offer to purchase that the first respondent refers to in his answering affidavit bears the heading "INYATI PROPERTIES". Contrary to what the first respondent states in his answering affidavit, the offer to purchase is only signed by the purchaser. There is no signature by or for the seller. It seems to be dated 16 October 2013, which is probably the date when the purchaser signed it. The date of 16 October 2013 is after the property was transferred into the applicant's name, which transfer occurred on 10 July 2013 as per the Deed of Transfer and the conveyancer's certificate referred to above.
7. The first respondent alleges that the property was bought through a bond with Standard Bank.
8. Surprisingly, the first respondent later states the following in his answering affidavit:

"

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The property that I am being evicted was bought by my child Patric Ch[i]loane and counsin Mr J. Masikenya for us in the house. The house was bought from Peoples Bank for the amount of R128, 000,00 on a bond loan, copy is attached marked Annexure **"AC 3"**.

6

My child Mr Chiloane continued to pay for the bond as from 27th July, 2003 until 2005 when the company he was working for was liquidated and was subsequently retrenched. He brought to the attention of the Peoples Bank that he is not working and once he found work will pay the arrears and outstanding moneys. This was accepted by the Bank's clerks that no action will be taken against them. As to Mr Masikenya he was retrenched and was also unemployed.

7

I was surprised when one of the Banks agent attended my house to inform us that the house is in arrears. We attended the Bank with my child as I was doing skropies even if I was not earning much I binded myself to pay the arrears and the bond. I attach hereto copies of payment to Nedbank that I have finished paying the bond is not owing **“AC 4”**.

8

On receiving the summons, application by the Applicant I approached Nedbank where payment is made and asked, and brought to their attention of the eviction, that the house has been sold to applicant. I was advised that they do not know and to get an attorney to assist me.

9

I was phoned by one Agent of INYATHI PROPERTIES that the house belongs to them. I do not remember the date well but it was in August, 2013 I attended their offices where I was shown papers and asked that the house is in their hands they can sell the house to me. I was given papers for sale by then I did not read them in their office as Mrs Zelda Lackay completed the form and I signed. She asked me to take the papers, offer to purchase to the bank and told me they know what to do which I did.

10

I attended Standardbank, Carlton Cenre branch, Johannesburg, for a loan and my application for a loan was successful. Mr Godfrey the Banks employee completed the necessary papers and send some papers to Inyathi Properties for completion.

11

On a date unknown to me Mr Godfrey called me to take the necessary papers to Inyathi [P]roperties to further complete loan papers. I attended the Inyathi Properties offices and gave the forms to Mrs Lackay to complete she refused and said no she had made a mistake by completing and giving me the offer to

purchase and there is nothing she can help me with. I then proce[ded] to get legal advise.

12

My Attorneys of record phoned Inyathi Properties and Mrs Lackay confirmed what was said to me legal representative that she has made a mistake by selling the house to me. I have instructed my legal representative to bring an application against the company to enforce the sale as I had withdrawn my investments, moneys from Capitec Bank in the payment of my loan with Inyathi Properties copies are attached marked Annexure “AR 5”.

13

I bought the house back as I do not have any place to stay and I have been staying in the said house from my young days and all my moneys were spend on the improvement to the house. ...” (Emphasis added)

9. It is clear from what is stated in the quoted passages above that Inyathi Properties never signed the offer to purchase. It also seems that the first respondent was attempting to purchase the property back, probably after repossession and a sale in execution. The latter is, however, not stated and made clear on the papers. What is clear is that the first respondent never acquired ownership of the property from Inyathi Properties, contrary to his earlier allegation in the answering affidavit.
10. In the circumstances, I find the first respondent’s defence that he owns the property and is therefore not an unlawful occupier as contemplated in the PIE Act to be unsustainable. The date on which the purchaser, which is presumably the first respondent, signed the offer to purchase by Inyathi Properties appears to be after the date of transfer of the property into the applicant’s name, i.e. 10 July 2013. In addition, the Inyathi Properties offer to purchase is only signed by the purchaser and not the seller. Furthermore, any valid and effective sale of the property by Inyathi Properties to the first respondent is directly contradicted by what the first respondent says at quoted paragraphs 11 and 12 of the answering affidavit. At these paragraphs of the first respondent’s answering affidavit, it is plain that Inyathi Properties declined

to go ahead with the alleged sale of the property to the first respondent on the basis that it was a mistake to have made the offer to sell in the first place.

11. In the absence of any other alleged legal title, other than ownership, entitling the first respondent to lawfully occupy the property, I have to find that he is an unlawful occupier as defined in the PIE Act. It is clear that the applicant does not consent to the first respondent's occupation of the property. The PIE Act states that an unlawful occupier means:

“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, excluding a person who is an occupier in terms of the Extension of Security of Tenure Act, 1997, and excluding a person whose informal right to land, but for the provisions of this Act, would be protected by the provisions of the Interim Protection of Informal Land Rights Act, 1996 (Act No. 31 of 1996).”

12. A person is an unlawful occupier even if at some point in time he or she had lawful title to occupy the property, if such title has been lost as at the time when eviction proceedings are brought.¹

Whether it is just and equitable to grant the eviction order

13. In *City of Johannesburg v Changing Tides 74 (Pty) Ltd and others (Socio-Economic Rights Institute of South Africa as amicus curiae)* [2013] 1 All SA 8 (SCA), Wallis JA summed up the proper enquiry where an eviction order is sought by a private owner, as opposed to an organ of State, as follows:

“[25] Reverting then to the relationship between sections 4(7) and (8), the position can be summarised as follows. A court hearing an application for eviction at the instance of a private person or body, owing no obligations to provide housing or achieve the gradual realisation of the right of access to housing in terms of section 26(1) of the Constitution, is faced with two separate enquiries. First, it must decide whether it is just and equitable to grant an eviction order having regard to all relevant factors. Under section 4(7) those factors include the

¹ *Ndlovu v Ngcobo; Bekker and Bosch v Jiba* 2003 (1) SA 113 (SCA).

availability of alternative land or accommodation. The weight to be attached to that factor must be assessed in the light of the property owner's protected rights under section 25 of the Constitution, and on the footing that a limitation of those rights in favour of the occupiers will ordinarily be limited in duration. Once the court decides that there is no defence to the claim for eviction and that it would be just and equitable to grant an eviction order it is obliged to grant that order. Before doing so, however, it must consider what justice and equity demands in relation to the date of implementation of that order and it must consider what conditions must be attached to that order. In that second enquiry it must consider the impact of an eviction order on the occupiers and whether they may be rendered homeless thereby or need emergency assistance to relocate elsewhere. The order that it grants as a result of these two discrete enquiries is a single order. Accordingly, it cannot be granted until both enquiries have been undertaken and the conclusion reached that the grant of an eviction order, effective from a specified date, is just and equitable. Nor can the enquiry be concluded until the court is satisfied that it is in possession of all the information necessary to make both findings based on justice and equity." (Emphasis added)

14. Section 4(7) of the PIE Act provides as follows:

"(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 the 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."

15. Section 4(8) of the PIE Act provides as follows:

“(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 may be carried out if the unlawful occupier has not vacated the land on the date contemplated in paragraph (a).”

16. In this case not enough information has been placed before the Court by the parties in order to enable the Court to undertake the two-stage assessment, i.e. whether it would be just and equitable to grant an eviction order, and what justice and equity demands as regards the date for the implementation of the eviction order.

17. In his founding affidavit the applicant makes the following relevant allegations:

- a. “I have no knowledge whether the 1st and 2nd Respondents are currently working and do not know whether they can afford suitable alternative accommodation”.
- b. “The 1st Respondent, to my knowledge, is in good health of middle age and cannot be considered an elderly person. I am therefore not aware of any special circumstances relating to the needs of an elderly, minor or disabled person residing in the property as stipulated in the Act and I submit that the 1st Respondent can find an alternative accommodation.”
- c. “In this regard I submit respectfully that the protection of the rights and interest of the category of those individuals and person which the Legislature had in mind when promulgating the Act into law, does not in the present instance apply at all and further I have no knowledge whatsoever of any other within or even outside the City of Johannesburg, who would be willing to accommodate and/or house any individual for free.”

18. The first respondent alleges in his answering affidavit that when the applicant bought the house “he was aware that there are people in the house, children, women, elderly etc, he did not buy an empty house”. The applicant does not deal with this allegation in his replying affidavit, save to state a bare denial to paragraphs 23 to 50 of the first respondent’s answering affidavit, which include the allegations regarding other people that live on the property, which I have quoted from the first respondent’s answering affidavit. The applicant does not even state that he does not know that there are other people living on the property in addition to the first respondent. In addition, it is common cause from the replying affidavit that the first respondent has been living on the property for a period of 10 years.
19. In the circumstances, I have to decide the matter on the basis that there are other occupants of the property in addition to the first respondent, and who include children, women and the elderly.
20. I am not able, on the information provided to the Court, to find that it would be just and equitable to grant an order of eviction in light of the factors in section 4(7) of the PIE Act. I can also not determine what, on the available information, and in light of equity and justice, would be an appropriate date on which an order of eviction should be implemented, or what conditions should be attached to such an order to ensure that the implementation of an eviction order is just and equitable. Without being satisfied of these matters, the Court is precluded from granting an eviction order in terms of the provisions of section 4(8) of the PIE Act.
21. During oral argument, the Court raised the above matters, regarding justice and equity, with counsel for the applicant, especially the issue regarding children, women and the elderly that the first respondent alleges live on the property with him. Counsel for the applicant contended that the applicant had put up all relevant facts for the Court to grant an eviction. He submitted that the Court must grant the orders sought in the notice of motion on the basis of the papers before the Court.
22. In light of what I have set out above, I am not in a position to grant the eviction order sought in light of the peremptory provisions of section 4(8) of the PIE Act. The applicant carries the burden in the first instance to place information before the Court to satisfy it that the order of eviction would be just and equitable, including the date by which it is to be implemented. The Supreme Court of Appeal said the following in *Changing Tides* in this regard:

“[29] . . . After all what is being sought from the court is an order that can be granted only if the court is satisfied that it is just and equitable that such an order be made. If, at the end of the day, it is left in doubt on that issue it must refuse an order. There is nothing in PIE that warrants the court maintaining litigation on foot until it feels itself able to resolve the conflicting interests of the landowner and the unlawful occupiers in a just and equitable manner.

[30] The implication of this is that, in the first instance, it is for the applicant to secure that the information placed before the court is sufficient, if unchallenged, to satisfy it that it would be just and equitable to grant an eviction order. Both the Constitution and PIE require that the court must take into account all relevant facts before granting an eviction order. Whilst in some cases it may suffice for an applicant to say that it is the owner and the respondent is in occupation, because those are the only relevant facts, in others it will not. . . .” (Emphasis added)

23. In *Ekurhuleni Metropolitan Municipality and another v Various Occupiers, Eden Park Extension 5* [2014] 1 All SA 386 (SCA) at paragraph 21, the Supreme Court Appeal referred with apparent approval to the *dicta* in paragraphs 29 and 30 in *Changing Tides*.
24. It is open to the applicant to approach the Court again for the order of eviction and to provide the Court with relevant facts on which it can properly decide the matter in light of section 4(8) of the PIE Act. It is clear from the allegations in the first respondent’s answering affidavit regarding persons occupying the property that the relevant facts in this matter cannot be limited to ownership of the property by the applicant, and occupation of the property by the first respondent. The applicant should be given an opportunity to come to Court on the same papers duly supplemented to deal with the factors in section 4(7) of the PIE Act.
25. Given my findings regarding ownership of the property, and the contradictory allegations that the first respondent made in his answering affidavit on this issue, I exercise the Court’s discretion against awarding costs against the applicant. The first respondent was not entirely candid with the Court. Furthermore, whilst the applicant is not granted an order of eviction, this constitutes a limited burden on the applicant’s

right of ownership, as the first respondent has not put up other lawful title to remain in occupation of the property. Ultimately, and once the Court is satisfied as to the requirements of section 4(7) of the PIE Act, it would be obliged to grant an eviction order to the applicant in terms of section 4(8) of the PIE Act.

Order

26. In the circumstances, I make the following order:

- a. The application is dismissed.
- b. The applicant is given leave to approach the Court for an eviction order on the same papers duly supplemented to deal with the factors in section 4(7) of the PIE Act.
- c. There is no order as to costs.

Appearances:

Counsel for applicant:	JM Prinsloo
Attorneys for applicant:	KNB Attorneys
Counsel for first and second respondents:	M Monnakgotla
Attorneys for first and second respondents:	TM Selamolela Attorneys
Date of hearing:	19 November 2014
Date of judgment:	28 November 2014