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REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

JOHANNESBURG

CASE NO: 26535/2019

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: No
(3)	REVISED.

In the matter between -

CLOETE MURRAY N.O.

First Applicant

ASAD SULIMAN N.O.

Second Applicant

(In their capacities as joint provisional trustees of the insolvent estate of Kwa-Ndlondlo Trust)

And

SIFISO AUBREY MSIBI
(ID No. [...])

First Respondent

MMAPHEKO DORIS MSIBI
(ID No. [...])

Second Respondent

JOHANNESBURG METROPOLITAN MUNICIPALITY

Third Respondent

JUDGMENT

MAKOLA AJ:

- [1] This matter concerns the interpretation of section 4(2) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (“PIE Act”).
- [2] The question that arises is whether it is just and equitable to evict the first and second respondents (respondents) from the property described as Portions 1 and 2, Erf [...] Hyde Park Township, Registration Division IR in extent 1457 and 1336 square metres held by Deed of Title T60331/2010, corresponding to [...] Road, Hyde Park, Sandton (“the property”).
- [3] The Kwa-Ndlondlo Trust (“the Trust”) is the owner of the property. The first and second respondents are married to each other and they live on the property with their three minor children. The applicants were appointed provisional trustees on 17 July 2018 and the Trust was finally sequestrated on 16 October 2018. On 12 November 2018 the applicants wrote a letter to the respondents cancelling any lease agreements there with the Trust and demanding that they vacate the property by no later than 31 December 2018.
- [4] The respondents failed to comply with the demand, thus triggering these proceedings. As grounds for their relief, the applicants say that the Trust is the owner of the property; the respondents are in unlawful occupation of the property; the applicants are entitled to sell the property in the administration of

the insolvent estate for the benefit of the general body of creditors; there is no agreement between themselves and the respondents as regards the occupation of the property and as such the occupation is unlawful. At the time of launching these proceedings in July 2019, the respondents had been in unlawful occupation of the property for four months.

- [5] The second respondent says in her answering affidavit that she resides on the property with the first respondent and their three minor children who are all of school going age, the eldest being 14 years old. The property is the primary residence of the family, the children attend school in the area and there are domestic workers on the premises but they do not reside there on a fulltime basis.

- [6] The respondents' defence was struck out because they failed to comply with the order of Ally J of 28 January 2020 requiring them to deliver their heads of argument and practice note within three court days of the order.

- [7] Section 4(1) of the PIE Act provides that 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. Under section 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 having jurisdiction. The contents and the manner of service of the notice contemplated in subsection (2) must be authorised and directed by an order of the court concerned(*Killarney Property Investments (Pty) Ltd v*

Mahamba and others 2001 (4) SA 1222 (SCA) [11])

- [8] The section 4(2) notice must be served upon a respondent at least 14 days before the date upon which the application is to be heard. It must conform with the previously obtained directions of the court, with reference to both its contents and the manner in which it is to be served (***Unlawful Occupiers School Site v City of Johannesburg 2005 (4) SA 199 (SCA) at [17]; Moela v Shoniwe 2005 (4) SA 357 (SCA) [9]***).
- [9] The effect of section 4(2) is clearly to ensure that the unlawful occupier and municipality are fully aware of the proceedings and that the unlawful occupier is aware of his rights under section 4(5)(d). It may well be that the object, in appropriate circumstances, may be achieved notwithstanding that service of the notice required by section 4(2) has not been authorised by the court.
- [10] This court has held that a deviation from the proceedings set out in section 4(2) is not fatal (***Van Niekerk and Ano v Favel and Ano 2006 (4) SA 548 (W) at [39]***). The question is whether in spite of the deviation, there was substantial compliance with the requirements of the statute (***Unlawful Occupiers supra at [22], Moela at 8-12; Maharaj and others v Rampersad 1960 (4) SA 638 (A) at 646 C-E***).
- [11] This court authorised the section 4(2) notice on 18 February 2020 (the order). In terms of the notice, the respondents are informed that the applicants intend to make application on 16 March 2020 at 10h00 or so soon thereafter as counsel may be heard for an eviction order against the respondents from the property and directing the respondents to pay the costs of the application. The

grounds of the application are as set out above. The respondents are told that they are entitled to appear on 16 March 2020 at 10h00 to defend the case and to state any grounds and/or reasons why they should not be evicted. They are told to appear in person or through a legal practitioner and if they are unable to afford such they have a right to apply for legal aid. The Sheriff is directed that the notice must be served on the respondents in accordance with the provisions of Rule 4, alternatively, if such notice is not possible, by affixing the notice to the front gate at the property. The Sheriff is also directed to read out and explain to the respondents in English that the return of service must specifically state that each of the above directions was duly carried out.

[12] On 20 February 2020 the applicants' attorneys instructed the Sheriff to serve the order on the respondents personally. As can be seen from his return, the Sheriff made numerous attempts to serve the order on the respondents personally. This he did on 20, twice on 21, 24 and 25 February 2020 and on 9 March and 10 March 2020.

[13] On 21 February 2020, the security guard at the property informed the Sheriff that the first respondent's father had passed away and that the latter was in Kwa-Zulu Natal. The first respondent also contacted the Sheriff and informed him that he would be returning to Johannesburg on 2 March 2020. He forwarded his father's death certificate to the Sheriff. The first respondent subsequently informed the Sheriff that he would be returning to Johannesburg only on 9 March 2020 and that he will contact the Sheriff on his return.

[14] The applicants' attorneys on 24 February 2020 and on 4 March 2020 served

the order by email on the attorney representing the respondents.

[15] The Sheriff attempted again to serve the order on 9 and 10 March 2020 but was unsuccessful. The Sheriff says that the respondents were home but refused to open the gate for him. On 10 March 2020 Mr Azar informed the applicants' attorneys that he had not received the order timeously. This is disputed by the applicants' attorney, Ms van der Merwe, in her compliance affidavit.

[16] The Sheriff eventually served the order on 11 March 2020 by affixing it to the principal door at the respondents' place of residence. The Sheriff says in his return that after a diligent search and enquiry no other manner of service was possible at the given address. The applicants' attorney says that the respondents are attempting to evade service in an effort to stave off an eviction order for as long as possible and that their conduct is obstructive and disingenuous and interferes with the proper functioning of the court. I agree with her.

[17] As stated in **Moela** *supra*, the object of section 4(2) is to ensure that the unlawful occupier and municipality are fully aware of the proceedings, and the unlawful occupier is aware of his rights referred to in section 4(5) (d). I have no doubt that the respondents were informed about the eviction proceedings and were made aware of their rights under section 4(5) (d). Their attorney was informed twice about these proceedings. It was his duty as their legal representative to bring the order to their attention.

[18] Also, the first respondent was aware that the Sheriff was attempting to serve

the order on him. He called the Sheriff to let him know that he was in Kwa-Zulu Natal attending his father's funeral and that he will be back in Johannesburg on 2 March 2020. He knew the reason why the Sheriff was looking for him. He called again to let the Sheriff know that he will be coming back only on 9 March 2020. The sheriff did what he is allowed under the Rules, he affixed the order to the principal door.

[19] I am satisfied that the proceedings were brought to the attention of the respondents as early as 24 February 2020 and 4 March 2020 (through service on their attorney) and that they were made aware of their rights under the PIE Act. There is thus no merit in the assertion that there was no compliance with section 4(2) of the PIE Act.

[20] Section 4(7) provides that 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 , whether land has been made available or can reasonably be made available by a municipality or other organ of state or another landowner for the relocation for the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women.

[21] Under section 4(8), if the court is satisfied that all the requirements of the 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.

[22] Section 4(9) provides that in determining a just and equitable date contemplated in subsection (8), the court must have regard to all relevant factors, including the period the unlawful occupier and his or her family have resided on the land in question.

[23] The Trust became the owner of the property on 1 September 2010, presumably it was from this date that the respondents and their children acquired the right to occupy the property. The property is located in the middle to upper income suburb of Hyde Park on two stands. It is a large three story residential. The market value of the property is estimated to be R13.5m and it has a forced sale value of R8.7m. The respondents reside on the property and their children attend school in the area.

[24] The respondents are unlawfully occupying the property and have been since 31 December 2018. They do not pay rental for the occupation, nor do they pay the municipality rates and taxes. As at the date of the replying affidavit, 19 September 2019, there was an outstanding amount of R678, 603.68 owed in respect of portion 1, and R426, 867.00 in respect of portion 2 of the property. The applicants are also deprived of monthly rental of between R80 000 and R120 000. Their agents are unable to market the property whilst the respondents are in occupation of and control access to the property. This is untenable.

[25] I have taken note of the circumstances of the respondents, including the fact that they are minor children who go to school in the local area. I am also satisfied that there is no valid defence raised by the respondents. In my view it would be just and equitable to afford the respondents no more than thirty (30) calendar days to secure alternative accommodation.

[26] I accordingly make the following order:

- (1) The first and second respondents are ejected and evicted from the immovable property described as Portions 1 and 2, Erf [...] Hyde Park Township, Registration Division IR in extent 1457 and 1336 square metres held by Deed of Title T60331/2010, corresponding to [...] Road, Hyde Park, Sandton.
- (2) The first and second respondents and all persons claiming occupation through or under them are hereby ordered to vacate the property by 20 April 2020.
- (3) The Sheriff of this court is hereby authorised to eject and evict the first and second respondents (and all persons claiming through or under them) from the immovable property on 30 April 2020, in the event that the first and second respondents (and all persons claiming through or under them) have not vacated the immovable property on the date referred to above.
- (4) The first and second respondents are ordered jointly and severally to pay the costs of this application.

BL MAKOLA
ACTING JUDGE OF THE HIGH COURT,
GAUTENG LOCAL DIVISION

DATE OF HEARING: 17 March 2020

DATE OF JUDGMENT 20 March 2020

Counsel for the applicants: Adv JE Smit

Counsel for the second respondent: Mr Fehler (attorney)