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REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

APPEAL CASE NO: A3022/2022
RANDBURG MAGISTRATE'S COURT CASE NO: 25200/2020
REPORTABLE: YES
OF INTEREST TO OTHER JUDGES: YES
Date:2/9/2022

In the full bench appeal between:

MIYA, BONGIWE WINNIE

Appellant

and

MATLHKO-SEIFERT, SALLY-ANN

Respondent

JUDGMENT

This judgment is deemed to be handed down upon uploading by the Registrar to the electronic court file.

Gilbert AJ:

1. The appellant appeals against an eviction order granted in the Magistrate's Court for the District of Johannesburg North held at Randburg on 26 April 2021 evicting her and all other occupants from a residential property situated in Cosmo City, Extension [...], falling within the area of jurisdiction of that magistrate's court.

2. The appellant failed to timeously prosecute the appeal in that she failed to timeously lodge the appeal record within the period stipulated in Uniform Rules 50(4)(a) and 50(7)(a), resulting in the appeal lapsing in terms of Uniform Rule 50(1).

3. The appellant sought condonation for the late filing of the record, and effectively that the appeal be reinstated. The respondent initially opposed the application.

4. The appellant explains the delay in filing the record and so prosecuting the appeal on the basis that there were difficulties in obtaining a transcription of the record. At the commencement of the hearing of the appeal, the respondent's counsel indicated that the respondent no longer opposed the appellant's application for condonation. In these circumstances, the appeal is reinstated.

5. A further challenge faced by the appellant was that the magistrate that had granted the eviction order had left the magistrate's court and could not be traced. The magistrate had failed to furnish reasons for granting the eviction order, although requested to do so by the appellant in terms of Magistrate's Court Rule 51(1). For the same reason, it would appear, the magistrate failed to deliver the statement in writing required in terms of Magistrate's Court Rule 51(8), which would have set out *inter alia* his reasons for granting the eviction order. The absence of reasons from the magistrate cannot stand in the way of the appeal, particularly where the parties seek to persist with the appeal on its merits.¹

6. The appellant seeks that the appeal should be upheld, and the eviction order set aside while the respondent seeks that the appeal be dismissed.

7. The grounds of appeal as advanced in argument are, in summary, that:

¹ See, for example, *Lucas v Minister of Safety & Security* 2015 JDR 1730 (ECG). In *Anti-Corrosion Engineering (Pty) Ltd v Sanlam* 1975 (1) SA 897 (C) the court found at 901F-H that the parties can agree that the appeal be noted and prosecuted without the magistrate's reasons. In that matter the magistrate had died before giving reasons.

7.1. the magistrate did not have jurisdiction to grant the eviction order as the right of occupation of the property exceeded the jurisdiction of the district court as stipulated in section 29(1)(b) of the Magistrates' Court Act, 1944;

7.2. there is a dispute of fact relating to the ownership of the property, which cannot and should not have been decided on motion by the magistrate, and which stands to be decided by the High Court in a pending action in which the appellant is a party;

7.3. the magistrate erred in finding that it was just and equitable to grant the eviction order.

8. The respondent argued that the appellant could not rely on appeal upon the magistrate's court not having jurisdiction in that this ground of appeal was not raised by in her notice of appeal.² I shall return to this ground of appeal later in the judgment.

9. The respondent as the applicant in the application proceedings *a quo* relies on her ownership of the property in seeking to evict the appellant from the property, asserting that the appellant is in unlawful occupation.

10. The respondent's case is that she purchased the property on 27 October 2020 from Mr and Mrs Raluare for R500,000.00, and that pursuant thereto, registration of ownership was effected in her favour in the deeds office on 27 October 2020. In support of this, the respondent produced the sale agreement and the deed of transfer. The details in the deed of transfer accord with the sale agreement.

11. To complete the respondent's narrative, the Raluares, from whom she purchased the property, had purchased the property from the previous joint owners Mr K Dikgale and Mrs Tshegare on 19 June 2017 for R260,000. The property was

² The copy of the notice of appeal in the electronic court file was missing a page but a complete copy was subsequently furnished.

transferred to the Raluares pursuant to that sale on 4 August 2017, as appears from a deed of transfer annexed to the respondent's founding affidavit.

12. Mr K Dikgale and Mrs Tshegare in turn had acquired the property from the City of Johannesburg as part of the government's then Reconstruction and Development Programme on 12 May 2005 for a purchase price of R31, 929.00. This too appears from a deed of transfer attached to the respondent's founding affidavit.³

13. The respondent's claim of ownership is therefore supported by the deed of transfer, and corroborated by the history leading to her acquisition of the property. Apart from also being corroborated by contemporaneous documents such as deeds of transfer and a sale agreement, the respondent also attached to her founding affidavit an affidavit by Mr Dikgale that he had filed in earlier eviction proceedings by the Raluares against the appellant, in which he confirms the sale of the property to the Raluares.

14. The respondent in her founding affidavit in the eviction proceedings described the appellant's occupation of the property as unlawful in that she as owner did not give the appellant permission to occupy the property. The respondent in her founding affidavit also deals with why the appellant's claim to ownership, which is described later in this judgment, did not and does not confer ownership upon the appellant.

15. The respondent also set out in her founding affidavit the personal circumstances of the parties to have enabled the magistrate to consider those circumstances when deciding whether it was just and equitable to grant an eviction

³ Notably the deed of transfer contained a restrictive condition that in terms of the provisions of section 10A of Act 107 of 1999 the property could not, without the consent of the Gauteng Provincial Housing Department, be sold or otherwise alienated within a period of 8 (eight) years from the date of transfer, unless it was first offered to the Department. The deed of transfer further records on 4 August 2017 that his restrictive condition has lapsed due to the effluxion of time. The eight-year period would have ended on in August 2014. The sale from Mr K Dikgale and Mrs Tshegare to the Raluares was after the eight-year restriction period had lapsed. In contrast, the sale upon which the appellant relies, as appears below, was concluded during this eight-year period.

order in terms of sections 4(7) and section 4(8) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 1998 ["PIE"].

16. To counter the considerable body of evidence supporting the respondent's claim to ownership, the appellant asserts in her answering affidavit in the eviction proceedings that she purchased the property from Mr Dikgale on 3 July 2007, long before the property was sold to the Raluares in 2017, and who in turn would sell the property to the respondent in 2020. In support of this, the appellant attaches to her answering affidavit what she describes as the deed of sale between her and Mr Dikgale, being a single page manuscript document, and which purports to bear her signature and that of Mr Dikgale.

17. The appellant's case, simply put, is that she purchased the property first, and so cannot be evicted.

18. There is no dispute that the appellant is not, and never was, the registered owner of the property because registration of transfer was not effected to her in the deeds office. Although the appellant contends that ownership should have been transferred to her pursuant to the sale in July 2007, she does not dispute that did not happen.

19. There cannot be a transfer of ownership in immovable property unless there is registration of transfer in the deeds office, whatever the other requirements may be for the transfer of ownership (such as an intention on the part of the transferor to transfer ownership and the intention of the transferee to become the owner of the property).⁴ As there was no registration of transfer to the appellant, she cannot be the owner. The appellant's purchase of the property, assuming that transaction to be valid, cannot by itself constitute the appellant the owner of the property. And so her reliance on ownership *simpliciter* to defeat the respondent's claim for eviction, which features as one of her grounds of appeal in her notice of appeal, cannot succeed. It also follows that there can be no genuine factual dispute relating to the ownership of the property, which also featured amongst her grounds of appeal.

⁴ *Legator McKenna Inc and Another v Shea and Others* 2010 (1) SA 35 (SCA) para 22.

20. Adopting a generous approach in favour of the appellant, particularly as these are eviction proceedings, the appellant may rather be contending that because she had purchased the property first in July 2007 from Mr Dikgale, it was not open to Mr Dikgale to subsequently sell and transfer the property to the Raluares in 2017. And so, the argument goes, it was not open to the Raluares to then sell the property to the respondent on 20 July 2020 and pass ownership thereof to the respondent on 27 October 2020.

21. As restated in *Meridian Bay Restaurant (Pty) Limited and others v Mitchell* NO 2011 (4) SA 1 (SCA) at paragraph 12 “[i]t is a basic principle of our law that a real right generally prevails over a personal right (even if the personal right is prior in time) when they come into competition with each other.”

22. Applying this principle, the respondent’s real right of ownership although arising later on 27 October 2020 would prevail over the appellant’s prior personal right arising from any sale that she may have concluded in July 2007.

23. This principle is subject to the doctrine of notice. As also held in *Meridian Bay* “under the doctrine of notice someone who acquires an asset with notice of a personal right to it which his predecessor in title has granted to another, may be held to give effect thereto... if C has purchased the property with knowledge of the prior sale to B, B would be entitled to claim that the transfer to C be set aside and that transfer be effected from A to B, or B may perhaps even claim transfer directly from C”.⁵

24. Assuming in favour of the appellant that the respondent did have notice of the appellant’s contended for prior personal right (which is a *bona fide* factual dispute on affidavits as it is unclear as to precisely what knowledge the respondent had when purchasing the property from the Raluares on 20 July 2020 as the respondent admits that she was aware that there were unlawful occupiers on the property that refused to vacate, but not that the appellant was contending for a prior sale), the

⁵ *Meridian Bay* at para 15.

insurmountable difficulty for the appellant is that the 2007 sale transaction upon which she relies to establish her prior personal right is invalid.

25. The appellant relies squarely on the document annexed as “BM2” to her answering affidavit in the eviction proceedings⁶ as the sale agreement pursuant to which she purchased the property from Dikgale.⁷ The appellant describes this document as the contract entered into between her and Dikgale⁸. In her summons in a pending High Court action in which she seeks an order as against the Raluares declaring her the owner of the property (which action the appellant launched consequent upon the Raluares, before their sale of the property to the respondent, seeking her eviction), the appellant expressly describes the document as the deed of alienation in terms of which the property was sold to her in July 2007.⁹

26. This manuscript document reads as follows: ¹⁰

“To whom it may concern.

2007 on the third of July.

I Mr Stephen Dikgale here by confirm that I have received the amount of R8000,00 from Mrs Bongiwe Miya in connection with the agreement about Stand No [...] C [...] A [...] and T [...] Ave in Cosmo City Ext T [...] and the balance will follow within a period of two months and failing to receive that balance meance that a levy of a futher amount of R5000, will be imposed unconditionally.

Yours faithfully [what purports to be the signature of Mr Dikgale]

⁶ At 004-179

⁷ See AA para 25.4 at 004-138.

⁸ See, for example, para 2 of the appellant’s attorney’s letter of 26 June 2017, at 004-103, referring to the document annexed thereto at 004-104.

⁹ See para 9 of the particulars of claim annexed as “BM3” to the answering affidavit, at 004-183.

¹⁰ Verbatim, with errors.

Received by Bongiwe Miya Signature [what purports to be the signature of the appellant].”

27. Mr Dikgale, in his affidavit described earlier in this judgment, disputes that he signed this document and asserts that the signature is a forgery. He also disputes that he sold the property to the appellant and describes how the property was effectively ‘hijacked’ from him by force, and that he did not agree to the sale of the property, until he sold the properties to the Raluares.

28. But even if it is assumed in favour of the appellant that Mr Dikgale did sign the document and that his version is to be disbelieved, the sale of the property is invalid, as correctly argued by the respondent, in that it is not contained in a deed of alienation signed by the parties thereto or their agents acting on their written authority, as is required in terms of section 2(1) of the Alienation of Land Act, 1981.

29. The registered owners of the property at the time of the contended for sale on 3 July 2007 were both Mr Dikgale and Ms Tshegare, having jointly taken transfer of ownership from the City of Johannesburg on 23 March 2006 as appears from the deed of transfer annexed to the founding affidavit. Assuming in favour of the appellant that Mr Dikgale did sign the document, which is disputed, Ms Tshegare is not a signatory to the document.

30. Further, the material terms of the sale must be contained in the deed of alienation, failing which the agreement would be void for non-compliance with the Act.¹¹ A material term of the sale would include the names of the sellers, which in this instance are both Mr Dikgale and Ms Tshegare, and not only Mr Dikgale.¹²

31. Further, the document does not reflect the purchase price, which would be another material term of the agreement. The appellant contends that the purchase

¹¹ See, for example, *Fraser and Another v Viljoen* 2008 (4) SA 106 (SCA) at para 5 and at 110I-111A. In that matter, the document did not contain the names of the purchasers.

¹² *Thorpe NNO and Another v Trittenwein and Another* 2007 (2) SA 172 (SCA).

price is 13 000.00.¹³ Rather it appears from the document that although an amount of R8 000.00 had been received from the appellant in connection with some or other unspecified agreement relating to the property, the balance, which is not stated, would follow within a period of two months, failing which a levy (or penalty) for a further amount of R5 000.00 would be imposed. Upon a plain reading of this document, the purchase price was more than R8 000.00 and that there was an outstanding unspecified balance and should that balance not be paid, a penalty would be paid of R5 000.00. The purchase price is not R13 000.00 (being the sum of R8 000.00 and R5 000.00) as stipulated in the document. There appears to be some or other agreement preceding the document.

32. The appellant therefore cannot have a valid prior right to take transfer of the property arising from the purported sale on 3 July 2007, as evidenced by the manuscript document of that date.

33. It follows that issue of whether such a prior personal right to take transfer of the property can prevail over the respondent's subsequent real right of ownership because of the application of the doctrine of notice does not arise.

34. Although the appellant further contends that she is entitled to occupy the property as she has effected improvements thereto and so is entitled to exercise a lien over the property, the appellant has failed to make out a case for such a lien.¹⁴ Although the appellant contends that she spent R200,000 in effecting improvements to the property¹⁵ (and so she was impoverished in this amount), it was incumbent on the appellant to also demonstrate the increase in value of the property because of these improvements (that is the respondent's enrichment as the owner), as both are necessary to sustain an improvement lien as the lienholder is only entitled to the

¹³ See, for example, AA para 25.1 at 004-135, 136.

¹⁴ It is for the appellant to demonstrate that she has a lien and so defeat the owner's right to occupation: *Wynland Construction (Pty) Ltd v Ashley-Smith en andere* 1985 (3) SA 798 (A) at 812 C-G.

¹⁵ Vague and unsubstantiated allegations of enrichment will not suffice in discharging the onus that rests upon the retentor in resisting the owner's entitlement to possession: *De Aguiar v Real People Housing (Pty) Limited* 2011 (1) SA 16 (SCA) at para 19.

lesser of the two.¹⁶ In any event, the lien is no more than security for a possessor's claim and so the possessor, in this instance the appellant, would in any event not be entitled to use and occupy the property while exercising the lien.¹⁷

35. As the appellant has not advanced any right to occupy the property so as to defeat the respondent's vindication of the property, the appellant's occupation of the property is unlawful, as envisaged in section 4(7) of PIE.¹⁸

36. Section 4(8) of PIE provides that the court is obliged to order an eviction (i) "*if the requirements of the section have been complied with*" and (ii) "*no valid defence has been raised by the unlawful occupier*".¹⁹

37. As appears above, no valid defence has been raised and the appellant's occupation is unlawful.

38. Compliance with the requirements of section 4 refers to both the service formalities and the conclusion under section 4(7) that the granting of an eviction order would be "*just and equitable*". In considering whether the eviction is just and equitable the court must be of the opinion that is just and equitable to all the parties, "*after considering all the relevant circumstances*".²⁰

39. In the present instance the appellant does not raise any difficulties with the service formalities having been complied with.

¹⁶ *FHP Management (Pty) Ltd v Theron NO and another* 2004 (3) SA 392 (C) at 405E-I; *Guman NO v Ansari* [2011] ZAGPJHC 124 (23 September 2011) at para 15.3 and 17.2. Both of these cases related to persons seeking to exercise improvement liens over residential properties in unsuccessful attempts to avert eviction.

¹⁷ *Rekdurum (Pty) Ltd v Weider Gym Athlone (Pty) Ltd t/a Weider Health & Fitness Centre* 1997 (1) SA 646 (SC) at 654A-C in the context of an eviction from a commercial property; *Guman NO v Ansari* above at paras 14, 16 and 17.3, in the context of an eviction from a residential property.

¹⁸ Section 4(7) of PIE is applicable rather than section 4(6) as the appellant had been in occupation of the property for more than six months when these eviction proceedings were launched.

¹⁹ *City of Johannesburg v Changing Tide 74 (Pty) Ltd and Others* 2012 (6) SA (SCA) para 12 at 304H.

²⁰ *Changing Tides* para 12 at 304I-305A.

40. The appellant does in relation to the remaining requirement that the eviction order must be just and equitable assert on appeal that the magistrate erred in finding that it was just and equitable to grant the eviction order, contending that she is the *de facto* owner of the property, has nowhere else to go, that her claim for ownership of the property is yet to be determined in the High Court and she has expended monies on the property.

41. As the magistrate failed to deliver reasons, it is not clear what factors he took into account in deciding whether it was just and equitable to grant the order. Presumably the magistrate did form an opinion that it was just and equitable to grant the eviction order given the submissions that were made by the parties' legal representatives during argument on this issue before the magistrate. In any event, this court is in a position to do so. Neither of the parties, particularly the appellant, contend that they were prejudiced because they were denied an opportunity to place relevant circumstances before the court, especially as they were legally represented throughout, both before the magistrate and in these proceedings.

42. As the respondent points out, the appellant is still relatively young and is gainfully employed. Accordingly, it appears that in the absence of any further evidence from the appellant as to her financial position, she can afford alternative accommodation for her and her 15-year old daughter.

43. Insofar as the appellant contends that it is not just and equitable to evict her while her ownership of the property is still to be determined in her pending High Court action against the Raluas, those proceedings suffer from the same fatal difficulty that her contended for ownership is predicated upon the invalid deed of alienation of 3 July 2007. It would not be just and equitable to refuse an eviction order to enable that action to be finalised where it has no prospects of success. In any event, the appellant has not taken any steps for many months to advance that action, which appears to have been more of a dilatory step to ward off eviction than an action that was (and is) seriously pursued,

44. Insofar as the appellant has spent monies on improving the property, although the appellant has failed to establish any right to occupy the property pursuant to

some or other lien, that does not mean that she does not have a claim in unjustified enrichment. The appellant remains at liberty to pursue that enrichment claim.²¹ Whether that claim has any prospects of success is uncertain, as Mr Dikgale contends in his affidavit that the improvements were effected without municipal approval and are illegal.

45. The appellant contends that it would not be just and equitable to evict her from the property as she has been residing there for many years since 2007. In my view, this cannot deprive the respondent of her rights to occupy the property pursuant to ownership of that property. At no stage did the appellant take any steps to secure registration of transfer of the property into her name, until she eventually launched the High Court proceedings on 30 May 2018 and then only because proceedings had been brought to evict her by the previous owners. The records of the deeds office at all times have reflected the registered owners as Mr Dikgale and Mrs Tshegare and then the Raluares, and now the respondent.²²

46. Having considered all the relevant circumstances, I am of the opinion that it was just and equitable for the magistrate to have granted the eviction order.

47. The remaining challenge by the appellant to the magistrate's order is that he did not have jurisdiction to grant the order.

48. Section 29(1)(b) of the Magistrates' Court Act confers jurisdiction upon the magistrates' courts to grant ejectment orders against the occupier of any premises or land within its district provided that the right of occupation of such premises or land

²¹ *Guman supra* at para 17.2.

²² This matter is distinguishable from, for example, *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC and Others* 2011 (2) SA 508 (SCA) where the records of the deed office showed that the property belonged to someone other than the true owner, by way of a fraudulent transfer, and where the true owners had failed to take any steps for a protracted period to correct the deeds registry, and so creating the impression that the person reflected as the registered owner was the true owner entitled to dispose of the property. And so estopped operated in that matter to prevent the true owner from taking steps to obtain transfer of the property as against a *bona fide* third party transferee who had relied on what was contained in the deeds registry.

does not exceed the amount determined by the Minister from time to time, which in the instance of a district court is R200 000.00.

49. The respondent argues that as this challenge to jurisdiction is not contained in the appellant's notice of appeal, it cannot now be raised as the appellant is confined to what is set out in her notice of appeal.

50. The respondent further contends that provisions of PIE confer jurisdiction on the magistrate's court.

51. Magistrates Court Rule 51(7)(b) which requires that the notice of appeal must *inter alia* state the grounds of appeal, specifying the findings of fact or rulings of law appealed against. The Supreme Court of Appeal in *Leeuw v First National Bank Ltd* 2010 (3) SA 410 (SCA) pointed out that although non-compliance with the rule has been held to render the notice invalid, the Uniform Rules were amended in 1987²³ to provide for the first time for the delivery, prior to the appeal hearing, by the appellant of heads of argument in the appeal in the form of a "*concise and succinct statement of the main points (without elaboration) which he intends to argue on appeal*".²⁴ Accordingly the object of the notice of appeal to inform the respondent of the case the respondent must meet on appeal and the appeal court of the points to be raised on appeal is now also achieved by the heads of argument.²⁵ In the present instance, the appellant does expressly raise the challenge to the magistrate's court's jurisdiction in her heads of argument on appeal.

52. Further, the Supreme Court of Appeal had the following to say in *Quartermark Investments (Pty) Ltd v Mkhwanazi and Another* 2014 (3) SA 96 (SCA):²⁶

²³ Uniform Rule 50(9).

²⁴ Para 2, at 413E/G.

²⁵ At para 2, at 413F.

²⁶ At para 20.

“[20] In considering the role of the court, it is appropriate to have regard to the well-known dictum of Curlewis JA in R v Hepworth to the effect that a criminal trial is not a game and a judge’s position is not merely that of an umpire to ensure that the rules of the game are observed by both sides. The learned judge added that a ‘judge is an administrator of justice’ who has to see that justice is done. While these remarks were made in the context of a criminal trial, they are equally applicable in civil proceedings and, in my view, accord with the principle of legality. The essential function of an appeal court is to determine whether the court below came to a correct conclusion. For this reason the raising of a new point of law on appeal is not precluded, provided the point is covered by the pleadings and its consideration on appeal involves no unfairness to the party against whom it is directed. In fact, in such a situation the appeal court is bound to deal with it as to ignore it may ‘amount to the confirmation by it of a decision that is clearly wrong’, and not performing its essential function”.

53. Accordingly, I do not decline to consider the challenge to the jurisdiction because it was not raised in the notice of appeal. This is particularly so given that a court is enjoined in terms of section 4 of PIE to consider whether the granting of an eviction order would be just and equitable, which allows considerable latitude to the court when it comes to issues of procedural non-compliance. And further where the magistrate failed to furnish reasons for his judgment.

54. To oust the court’s jurisdiction in terms of section 29(1)(b) of the Magistrates’ Court Act, the appellant must show that:

54.1. there is a *bona fide* dispute as to the right of occupation; and

54.2. the right of occupation is worth more to the occupier than R200 000.00.²⁷

²⁷ See Jones and Buckle *The Civil Practice of the Magistrates’ Courts in South Africa* (Juta) revision service 25, 2020 at pp 123, 124 citing various authorities in fn 78.

55. In deciding whether the magistrate's court had jurisdiction, "*it is obviously not competent for the magistrate first to decide that the defendant has no right of occupation and then to hold that, for this reason, the court has jurisdiction to hear the case. If the right of occupation is in dispute the jurisdiction of the court depends upon the value to the occupier of the right of occupation, whether that right exists or not*".²⁸

56. Although I have found against the appellant's asserted right to ownership of and to occupy the property, I am prepared to accept for present purpose in the appellant's favour that she *bona fide* asserted that right.

57. Where the title of the property is in dispute or where a defendant claims a right of control over the property, which is tantamount to ownership, then the capital value of the premises is a factor to be taken into account when determining jurisdiction.²⁹ In the present instance the appellant's right that she asserts to occupy the property does arise from her contended for ownership, or right to ownership, of the property. The capital value of the property is relevant. The right of occupation that is the subject of these proceedings is more than R200 000.00. This is evident from the most recent sale of the property, being that to the respondent, which was for R500 000.00.

58. If regard is had to section 29(1)(b) of the Magistrates' Court Act alone, the appellant's challenge to the magistrate's jurisdiction would appear to be good.

59. The respondent argues that PIE nonetheless confers jurisdiction on a magistrates' court to grant an eviction order, even if otherwise beyond the jurisdiction established by section 29(1)(b) of the Magistrates' Court Act.

60. Section 8(1) of PIE provides that:

"No person may evict an unlawful occupier except on the authority of an order of a competent court."

²⁸ *Munsamy v Govender* 1950 (2) SA 622 (N) at 623.

²⁹ *Klerksdorp & District Muslim Merchants Association v Mahomed* 1948 (4) SA 731 (T) at 740.

61. Section 9 of PIE expressly provides in relation to the jurisdiction of the magistrate's court that:

“Notwithstanding any provision of any other law, a magistrate's court has jurisdiction to issue any order or instruction or to impose any penalty authorised by the provisions of this Act.”

62. Further, a court is defined in section 1 of PIE to include the magistrate's court in whose area of jurisdiction the land in question is situated.

63. It is common cause that the present eviction falls within the ambit of PIE, and so that section 4 of PIE regulates the grant of an eviction order by a court.

64. In the circumstances, there is much to be said for the respondent's argument that a magistrate's court has jurisdiction to grant an eviction order even where it may otherwise be beyond the monetary jurisdiction of the magistrate's court for in section 29(1)(b) of the Magistrate's Court Act, provided that the eviction falls within the ambit of PIE (which it does in the present instance) and the property is in area of jurisdiction of that particular magistrate's court (which it does in the present instance).

65. In *Nduna v ABSA Bank Limited and Others* 2004 (4) SA 453 (C), the full bench of that Division held that section 9 of PIE conferred jurisdiction on a magistrate's court to entertain applications for ejectment, as distinct from actions for ejectment although the magistrate's court's jurisdiction in terms of section 29(1)(b) was limited to actions and made no reference to motion proceedings.

66. Section 9 of PIE expressly says that *‘[n]otwithstanding any provision of any other law’*, a magistrate's court has jurisdiction to issue any order authorised by the

provisions of the Act. This is reinforced, as the full bench pointed out in *Nduna*,³⁰ by the provisions of section 4(1) of PIE which 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.”

67. Adopting the reasoning that the provisions of PIE expand on the magistrate’s court’s jurisdiction, a magistrate would have jurisdiction to grant an eviction order in terms of section 4 of PIE, whatever the value of the right of occupation.

68. Given that many unlawful occupiers, who would fall within the ambit of the protection afforded by PIE in preventing illegal evictions, would not have access to extensive legal resources, it makes sense that a magistrate’s court would have jurisdiction in respect of any order to be granted under the Act.

69. I therefore find that the magistrate did have jurisdiction to grant the eviction order.

70. But even if the magistrate’s court did not have jurisdiction to grant the eviction order, in my view that does not prevent this court on appeal in doing so in circumstances where the unlawful occupier should otherwise be evicted. To require of the respondent to start eviction proceedings afresh in circumstances where an eviction order would otherwise have been granted but for the jurisdictional difficulty would not be just and equitable.

71. Section 87 of the Magistrate’s Court Act confers wide powers on a court of appeal which includes to *“take any course which may lead to the just, speedy and as much as may be inexpensive settlement of the case”*.³¹ This is reinforced by section 19(d) of the Superior Courts Act, 2013 which provides that *“a Division [of the High Court] exercising appeal jurisdiction may, in addition to any power as may be*

³⁰ Above, para 9.

³¹ Section 87(d).

specifically provided for in any law... confirm, amend or set aside the decision which is the subject of the appeal and render any decision which the circumstances may require." The powers of the appeal court are, in my view, wide enough to enable the appeal court, even if it sets aside the magistrates' order for want of jurisdiction, to then make the order itself. In doing so, the appeal court would be taking such course as would lead to the just, speedy and inexpensive settlement of the case before it.

72. To the extent that this results in an appeal court effectively going beyond what may be considered an appellate jurisdiction and exercising what may be considered original jurisdiction (as in the absence of the magistrate's court having jurisdiction, the appeal court, when granting the order that the magistrate's court could have made but for it lacking jurisdiction, would be the first court with jurisdiction to grant the order), there is precedent for such an approach.

73. In *Botha v Hargreaves N.O.* (1905) 22 SC 509, the appeal court in an appeal from the magistrate's court found that it was within its very extensive powers on appeal "*so as to secure speedy justice*" to enable a party to be substituted on appeal, although this meant that in relation to that party as was now substituted into the action the appeal court cannot be said to have been strictly exercising an appeal jurisdiction as that party introduced on appeal had not featured in the court *a quo*.

74. In *Groenewald v Mabuya* 1920 EDL 136, the appeal court in exercising its extensive powers and in particular those conferred by the identically worded predecessor to the present section 87(d) of the Magistrate's Court Act³² held that it could on appeal grant judgment in respect of a counterclaim that the magistrate had overlooked in that in doing so it was "*taking any other course which may lead to the just, speedy, and, as much as may be, inexpensive settlement of the case.*" There too it could not strictly be said that the appeal court was exercising appeal jurisdiction in that the magistrate had not in the first instance decided the counterclaim.

³² Being section 84(d) of Magistrates' Court Act 32 of 1917.

75. *Scholtz v Unterhalter and Another* 1934 AD 529 was an appeal from a provincial division. The provincial division had in the exercise of its appeal powers under the same identically worded predecessor to the present section 87(d) of the Magistrate's Court Act³³ declined to uphold various technical objections to the what the magistrate had decided as to do so would not result in the matter being finalised. The provincial division found that it could come to a final conclusion on the matter in issue and thus bring about '*just, speedy and as much as may be inexpensive settlement of the case*'. On further appeal to the Appellate Division, the exercise of that appeal power by the provincial division was upheld.³⁴ While I do not relegate a challenge to jurisdiction as being a technical objection, the reasoning adopted by the Appellate Division in *Scholtz v Unterhalter* is nonetheless instructive in that it demonstrates the wide powers of an appeal court in hearing an appeal from a magistrate's court to make such decision as would be just, speedy and result in inexpensive settlement of the case.

76. Section 87 of the Magistrates' Court Act in particular is drafted wide enough to confer original jurisdiction rather than only appellate jurisdiction on the appeal court, at least in the sense described above and as to be applied in the present instance. The appeal court need not, in terms of section 87(d), first have to set aside the magistrate's order before taking such course that may lead to the just, speedy and inexpensive settlement of the case. And section 19(1) of the Superior Court Act provides for appeal jurisdiction "*in addition to any power as may be specifically provided for in any other law*", which would include in addition to the jurisdiction that is conferred by section 87(d) of the Magistrates' Courts Act

77. In any event, section 172(1)(b) of the Constitution empowers a court to make any order that is just and equitable when deciding a constitutional matter within its power. The granting of an eviction order in terms of PIE is a constitutional matter in that it implicates the appellant's right to have access to adequate housing in terms of section 26(1) of the Constitution, and her right in terms of section 26(3) of the

³³ Being section 84 of the Magistrate's Court Act 32 of 1917.

³⁴ At p 533.

Constitution not to be evicted from her home without an order of court made after considering all the relevant circumstances.³⁵ At the same time, the respondent's right to property in section 25 of the Constitution is implicated. An order can be made in terms of section 172 of the Constitution that is just and equitable without first necessarily declaring any law or conduct invalid as being inconsistent with the Constitution.³⁶

78. To the extent that the magistrate's court did not have jurisdiction, this court of appeal for the reasons set out above is nonetheless able to grant an eviction order where, as appears above, the requirements of section 4 of PIE have been satisfied.

79. Whether this court on appeal substitutes its own eviction order for the eviction order of the magistrate in terms of its wide powers under section 87 of the Magistrates Court Act or section 19 of the Superior Court Act or in terms of section 172(1)(b) of the Constitution or whether this court on appeal upholds the magistrate's eviction order on the basis that the magistrate had jurisdiction would practically make no difference to the appellant in that she is to be evicted in either event. But which of the orders are to be made depends upon whether the magistrate had jurisdiction to grant the order in terms of PIE.

80. Given the wide wording of PIE, and following upon the expansive approach taken in *Nduna*, I have found that the magistrate did have jurisdiction. But even if I have erred, then, for the reasons set out, an eviction order is in any event the outcome.

81. Accordingly, the magistrate's court's judgment is to stand save that the dates by which the appellant and other occupants are to vacate the property needs to be adjusted. In this regard the respondent submitted during argument that two months should be sufficient, particularly given that the appellant and other occupants have

³⁵ *Occupiers, Berea v De Wet N.O. and another* 2017 (5) SA 346 (CC) at 368D.

³⁶ *Head of Department, Mpumalanga Department of Education and another v Hoerskool Ermelo and another* 2010 (2) SA 415 (CC) at para 97; *Minister of Safety and Security v Van der Merwe and others* 2011 (5) SA 61 (CC) at para 59.

continued to remain in occupation since the magistrate granted the eviction order on 26 April 2021, which is now some sixteen months ago.

82. In the circumstances, the appeal is dismissed save that the appellant and other occupants are to vacate the property by no later than 17h00 on 2 November 2022 and should they then fail to vacate the property, the Sheriff is authorised to evict the appellant and other occupants two weeks thereafter.

83. The magistrate's judgment provides for costs to be paid by the first and second respondents jointly and severally on an attorney and client scale. Although no specific challenge was made by the appellant on appeal to the costs order, in the absence of reasons from the magistrate, I cannot determine why the court would have ordered costs on that scale rather than party and party costs. The costs in the magistrates' court is therefore to be altered to party and party costs.

84. I also intend limiting the costs to being payable by the first respondent rather than also payable jointly and severally by unidentified further respondents.

85. An order is granted as follows:

85.1. Save as appears from the following sub-paragraph, the appeal is dismissed with costs;

85.2. The order of the magistrate dated 26 April 2021 is varied as follows:

85.2.1. The first respondent and all those occupying by, through or under her are to vacate the property known as Erf [...] of Cosmo City, Extension [...] by no later than 17h00 on 2 November 2022.

85.2.2. If the property is not vacated within the period stipulated in the preceding sub-paragraph, the Sheriff and/or Deputy Sheriff is authorised to evict the first respondent and any other occupants and to remove their belongings two weeks thereafter.

85.2.3. The first respondent is ordered to pay the costs on a party and party scale.

Gilbert AJ

I agree.

Manoim J

Date of hearing: 4 August 2022

Date of judgment: 2 September 2022

Counsel for the appellant: Adv Knopp SC

Instructed by: Michael Krawitz and Co.

Counsel for the respondent: Adv N X Nxumalo

Instructed by: Tshabalala Attorneys, Notaries and
Conveyancers