REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 6504/2019

REPORTABLE: ***NO***

OF INTEREST TO OTHER JUDGES: ***NO***

REVISED:

27TH SEPTEMBER 2022

In the matter between:

DE WET, GERT LOUWRENS STEYN N O	First Applicant
KOIKANYANG, OLCKERS CHOPOLOGE N O	Second Applicant

And

GEFFEN, AVIGDOR	First Respondent
GEFFEN, HANNAH	Second Respondent
CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY	Third Respondent

THE GROVE BODY CORPORATE Fourth Respondent

WEINSTEIN, STANLEY Fifth Respondent

Coram: Adams J

Heard: 23 May 2022 – The 'virtual hearing' of the application was conducted as a videoconference on *Microsoft Teams*.

Delivered: 27 September 2022 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 12:00 on 27 September 2020.

Summary: Opposed PIE Act application for eviction from primary residence –
The purpose of s 4(2) notice is to afford the respondents an opportunity to place before court relevant circumstances – despite its defects, s 4(2) notice sufficient if it achieved that purpose –
Factual dispute relating to grounds of opposition – valid right to occupy premises – respondent's version rejected as far-fetched –
Whether eviction just and equitable, the court is required to consider 'all the relevant circumstances' – respondents have the means to afford alternative accommodation – application for the eviction from primary residence granted.

ORDER

(1) The first and second respondents and all other occupiers of the applicants' property, being Unit [....], The G [....] C [....], [....] L [....] Road, corner Daisy Road, Sandton, Gauteng Province ('the applicants' property' or 'the premises'), be and are hereby evicted from the said property.

(2) The first and second respondents and all other occupiers of the premises shall vacate the applicants' property on or before the 30th of November 2022.

(3) In the event that the first and second respondents and the other occupiers of the premises not vacating the applicants' property on or before the 30th of November 2022, the Sheriff of this Court or his lawfully appointed deputy be and is hereby authorized and directed to forthwith evict the first and second respondents and all other occupiers from the said property.

(4) The first and second respondents, jointly and severally, the one paying the other to be absolved, shall pay the first and second applicants' costs of this application.

JUDGMENT

Adams J:

[1]. The first and second applicants ('the Liquidators') are the duly appointed joint liquidators of Sehri Trading (Pty) Limited (in liquidation) ('Sehri'), which is the owner of Unit [....], The G [....] C [....], [....] L [....] Road, corner Daisy Road, Sandton, Gauteng Province ('the applicants' property'). The first and second respondents, who were the shareholders and sole directors of Sehri at the time of its liquidation on 10 May 2017, presently occupy the applicants' property.

[2]. In this opposed application, the Liquidators apply for an order evicting from the said property the first and second respondents, whom they allege are unlawful occupiers. There is no written lease agreement in place in terms of which the respondents occupy the property. And what is more is that the first and second respondents do not pay the levies due and payable to the fourth respondent ('the Body Corporate of the Grove' or simply 'the Body Corporate'), which is presently under administration, with the fifth respondent ('Weinstein') having been duly appointed on 15 December 2009 as the administrator under and in terms of the provisions of s 46(1) of the Sectional Titles Act, 1985 ('the Act').

[3]. The main issue to be decided in this application is whether it would be just and equitable to evict the first and second respondents from the property. This issue, together with a few other peripheral issues, are to be decided against the backdrop of the facts in this matter, which are dealt with in the paragraphs which follow.

[4]. On 23 November 2018, the Liquidators delivered a notice to the first and second respondents, advising them of the cancellation of any lease or leases in place in respect of the property. In terms of the said cancellation notice, the first and second respondents were afforded until 15 January 2019 to vacate the property, which the Liquidators intended putting up for sale on the open market. Despite such notice having been duly delivered, the first and second respondents have to date refused to vacate the property.

[5]. The first and second respondents oppose the application on the basis that: (1) The eviction application is fatally defective; (2) they have a valid and *bona fide* defence to the eviction application – a right of occupation of the property; and (3) the eviction of the first and second respondents from the property is not just and equitable in light of their personal circumstances and those of their son, who occupies the property with them.

[6]. The first ground of opposition is ostensibly based on the provisions of s 4(2) and (5) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, Act 19 of 1998 ('the PIE Act'), which provides for the service by the Court of 'written and effective' notice to evictees and the municipality having jurisdiction. The first and second respondents contend that the Liquidators did not comply with the aforesaid provisions, which are peremptory, in that they (the Liquidators) did not obtain authorisation by way of a court order for the contents and manner of a s 4(2) notice in respect of the eviction application. Instead, so the first and second respondents contend, the Liquidators' notice of motion simply incorporates what is referred to therein as a s 4(2) notice.

[7]. Moreover, so the first and second respondents submit, the Liquidators failed to comply with the provisions of the Practice Manual of this Division, which require a separate *ex parte* interlocutory application authorising a s 4(2) notice. Therefore, so

the first and second respondents conclude, the eviction application of the applicants is fatally defective.

[8]. This defence is without merit. It is so that the applicants' s 4(2) notice, which incidentally was served on the third respondent (the Johannesburg Metropolitan Municipality) on the 7 March 2019 – as evidenced by the sheriff's return of service – did not comply procedurally with the letter of the section. However, by all accounts, there has been substantial compliance with the relevant provision and, importantly, the object of the provision was clearly achieved. In that regard, it was held as follows by the SCA in *Unlawful Occupiers, School Site v City of Johannesburg*[1]: -

> '[22] … … Nevertheless, it is clear from the authorities that even where the formalities required by statute are peremptory it is not every deviation from the literal prescription that is fatal. Even in that event, the question remains whether, in spite of the defects, the object of the statutory provision had been achieved (see eg *Nkisimane and Others v Santam Insurance Co Ltd* 1978 (2) SA 430 (A) at 433H – 434B; *Weenen Transitional Local Council v Van Dyk* 2002 (4) SA 653 (SCA) in para [13]).

[23] The purpose of s 4(2) is to afford the respondents in an application under PIE an additional opportunity, apart from the opportunity they have already had under the Rules of Court, to put all the circumstances they allege to be relevant before the court (see *Cape Killarney Property Investments* at 1229E - F). The two subsections of s 4(5) that had not been complied with were (a) and (c). The object of these two subsections is, in my view, to inform the respondents of the basis upon which the eviction order is sought so as to enable them to meet that case. The question is therefore whether, despite its defects, the s 4(2) notice had, in all the circumstances, achieved that purpose. With reference to the appellants who all opposed the application and who were at all times represented by counsel and attorneys, the s 4(2) notice had obviously attained the Legislature's goal. However, there were also respondents who did not oppose and who might not have had the benefit of legal representation. It is with regard to these respondents that the question arises whether the s 4(2) notice had, despite its deficiencies achieved its purpose. In

[1] *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA);

considering this question it must be borne in mind that, as a result of the way in which the order of the Court a quo was formulated, it will affect only those respondents who had been served by the Sheriff with both the application papers and the notice under s 4(2).

[24] The question whether in a particular case a deficient s 4(2) notice achieved its purpose, cannot be considered in the abstract. The answer must depend on what the respondents already knew. The appellant's contention to the contrary cannot be sustained. It would lead to results which are untenable. Take the example of a s 4(2) notice which failed to comply with s 4(5)(d) in that it did not inform the respondents that they were entitled to defend a case or of their right to legal aid. What would be the position if all this were clearly spelt out in the application papers? Or if on the day of the hearing the respondents appeared with their legal aid attorney? Could it be suggested that in these circumstances the s 4(2) should still be regarded as fatally defective? I think not. In this case, both the municipality's cause of action and the facts upon which it relied appeared from the founding papers. The appellants accepted that this is so. If not, it would constitute a separate defence. When the respondents received the s 4(2) notice they therefore already knew what case they had to meet. In these circumstances it must, in my view, be held that, despite its stated defects, the s 4(2) notice served upon the respondents had substantially complied with the requirements of s 4(5).' (My emphasis).

[9]. On the basis of this authority, the first and second respondents' first ground of opposition is not sustainable. The point is simply that, despite its defects, the s 4(2) notice had, in all the circumstances, achieved its purpose. The first and second respondents were represented in these proceedings by counsel and attorneys. Therefore, the s 4(2) notice had obviously attained the Legislature's goal.

[10]. The second ground of opposition is to the effect that the first and second respondents, the former directors of Sehri, occupy the property in terms of and pursuant to an agreement between them and the Liquidators. In terms of this alleged agreement, so the first and second respondents contend, the Liquidators were to consider the claims of the first and second respondents against Sehri once lodged. The Liquidators were thereafter to convene the necessary meeting of creditors for

the lodgement of the respondents' claims, and until such time as the respondents' claims against the company were lodged at a special meeting of creditors and considered by the Liquidators, the first and second respondents were entitled to occupy the property.

[11]. The first and second respondents' initial claims were rejected at the first meeting of creditors held on 4 October 2018. However, so the respondents allege, in breach of the agreement, the Liquidators failed to convene a special meeting of creditors for the purpose of the respondents lodging their claims and nevertheless instituted the eviction application. Therefore, so the argument on behalf of the first and second respondents are concluded, the said agreement afforded them – and still affords them – the right to occupy the property until such time as the Liquidators have afforded them the opportunity to lodge their claims at a special meeting of creditors, to be convened by the Liquidators.

[12]. This ground of opposition was raised during argument on behalf of the first and second respondents as set out in the preceding paragraphs. However, this defence is not borne out by the case advanced by the first and second respondents in their answering affidavit, which, on a proper reading, is to the effect that, because they are entitled to have their claim against Sehri considered by a special meeting of the creditors, they can continue occupying the premises in question. The high watermark of the first and second respondents' case in that regard are the following averments in their answering affidavit: -

> '10.4.It was fully understood that the joint liquidators were awaiting the lodging of first and second respondent's claim(s) which they were advised would be ready for lodgement in April 201;
>
> 10.5. As indicated, the first and second respondents contend that the misrepresentations made to their accountant, Mr Benno Dippenaar ('Dippenaar') regarding the lodging of their claim against the estate of Sehri Trading (in liquidation) do not accord with the final resolutions adopted and effectively amounts to an abuse of process. In seeking the eviction of applicants without any regard to their claim in circumstances in which the

Master of the North Gauteng High Court has not been afforded an opportunity to scrutinise or call for any evidence or submissions relating to this dispute prior to the joint liquidators issuing out their approved resolutions;

10.6. I respectfully submit that these acts are tantamount to unlawful and fraudulent series of oppressive acts executed by the joint liquidators in league with Anton Shaban, a liquidator in the employ of West Veal Trust (Pty) Ltd, the very same offices the applicants operate out of. Whereby these parties attempted to deny the first and second respondents their lawful opportunity to lodge their claim(s).'

[13]. This conclusion by the first and second respondents is a *non sequitur.* And for this reason alone, the second ground of opposition falls to be rejected. In any event, insofar as the first and second respondents' case can be interpreted as an agreement as contended for above, that version can and should be rejected on the papers as far-fetched and untenable.

[14]. That then brings back to the first and second respondents' claim that their eviction from the applicants' property would not be just and equitable. The respondents' case in that regard is based on the fact that their personal circumstances, including that of their adult son, who is living with them, are such that their eviction would not be just and equitable. The property, so they say, is their primary residence, where they have resided in since 2002. As at 2019, they were sixty-eight and seventy-one years old respectively, which means that they fall into that category of vulnerable persons. Their forty plus year old adult son, who suffers *inter alia* from muscular dystrophy, also occupies the premises.

[15]. Moreover, so the first and second respondents aver, they are of advanced age and do not have a pension. They survive by means of rental income in respect of other properties which are not suitable to house them and their ill son.

[16]. Section 4(7) and (8) 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.

(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).’

[17]. In deciding whether eviction would be just and equitable, the court is required to consider ‘all the relevant circumstances’, to include the factors specified in these sections. The weight to be afforded to those circumstances, the determination of such further circumstances as might be relevant and the weight to be afforded to them, as also the balance ultimately struck, are matters left entirely to the judgment and discretion of the court[2].

[2] *City of Cape Town v Rudolph* 2003 (11) BCLR 1236 (C);

[18]. The onus of demonstrating the existence of circumstances meriting the limitation of the owners right to possession is on the unlawful occupier. The Supreme Court of Appeal held in *Ndlovu v Ngcobo; Bekker and Another v Jika*[3]:

> 'Unless the occupier opposes and discloses circumstances relevant to the eviction order, the owner, in principle, will be entitled to an order for eviction. Relevant circumstances are nearly without fail facts within the exclusive knowledge of the occupier and it cannot be expected of an owner to negative in advance facts not known to him and not in issue between the parties. Whether the ultimate onus will be on the owner or the occupier we need not now decide.'

[19]. Applying these principles *in casu*, the very first observation which needs to be made is the fact that the first and second respondents are persons of considerable wealth. As correctly pointed out in his heads of argument by Mr Mushet, who appeared on behalf of the first and second applicants, the first and second respondents own no less than four properties, of which at least three are residential in nature. The properties owned by them include sectional title units in the following Sectional Title schemes: The Blues, The Courtyard and Cindywood. All of these units are rented out and generate rental income for the respondents. In addition to the sectional title units, the respondents also own a commercial property which is utilised by various businesses.

[20]. Moreover, during the month of November 2018, the first and second respondents, in one foul swoop, were able to settle and pay up outstanding bonds amounting in total to R4 254 386.72, relating to the property owned by the first and second respondents in the Sectional Title Scheme known as The Blues.

[21]. The aforegoing, in my view, proves conclusively that the first and second respondents are persons of considerable wealth and it cannot possibly be said that they fall into that category of person described as 'the vulnerable in society'.

---

[3] *Ndlovu V Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA), [2002] 4 All SA 384 (SCA) par 19;

[22]. Additionally, on their own version, the chances of the first and second respondents being rendered homeless as a result of the eviction, is slim to non-existent. They own a number of residential properties, and, despite their contention to the contrary, the first and second respondents can easily relocate to any one of those properties. In that regard, I do not accept the bald assertion by the respondents that none of these properties are suitable as alternative accommodation for them. The fact that these properties are rented out does not necessarily mean that they are not suitable as alternative accommodation. In any event, the objective evidence suggests that the first and second respondents, if the need arises, has the financial muscle to pay for such alternative accommodation. As already indicated, the first and second respondents cannot possibly be described as the 'poorest of the poor' in our society.

[23]. In all of these circumstances, I am of the view that the eviction of the first and second respondents will be just and equitable. I am also of the view that the first and second respondents should be afforded until the end of November 2022 to vacate the property. They have, after all, been in unlawful occupation of the property since at least 2019 whilst these eviction processes have been ongoing. In the interim, no levies and other charges levied by the Body Corporate have been paid, which places an undue financial burden on the other unit owners in the G [....], who have to carry the costs of the upkeep and the maintenance of the scheme.

[24]. Accordingly, the relief sought by the first and the second applicants should be granted.

Costs

[25]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. See: *Myers v Abramson*[4].

[26]. I can think of no reason why I should deviate from this general rule.

---

[4] *Myers v Abramson*, 1951(3) SA 438 (C) at 455.

[27]. I therefore intend awarding costs against the first and second respondents in favour of the first and second applicants.

Order

[28]. Accordingly, I make the following order: -

(1) The first and second respondents and all other occupiers of the applicants' property, being Unit [....], The G [....] C [....], [....] L [....] Road, corner Daisy Road, Sandton, Gauteng Province ('the applicants' property' or 'the premises'), be and are hereby evicted from the said property.

(2) The first and second respondents and all other occupiers of the premises shall vacate the applicants' property on or before the 30th of November 2022.

(3) In the event that the first and second respondents and the other occupiers of the premises not vacating the applicants' property on or before the 30th of November 2022, the Sheriff of this Court or his lawfully appointed deputy be and is hereby authorized and directed to forthwith evict the first and second respondents and all other occupiers from the said property.

(4) The first and second respondents, jointly and severally, the one paying the other to be absolved, shall pay the first and second applicants' costs of this application.

L R ADAMS

Judge of the High Court of South Africa

Gauteng Division, Johannesburg

HEARD ON:	23rd May 2022 – as a videoconference on *Microsoft Teams*.
JUDGMENT DATE:	27th September 2022 – handed down electronically.
FOR THE FIRST AND SECOND APPLICANTS:	Advocate Steven Mushet
INSTRUCTED BY:	A J Van Rensburg Incorporated, Parkwood, Johannesburg
FOR THE FIRST AND SECOND RESPONDENTS:	Adv Louis Hollander
INSTRUCTED BY:	Martin Speier Attorneys, Melrose Arch, Johannesburg
FOR THE THIRD, FOURTH AND FIFTH RESPONDENTS:	No Appearance
INSTRUCTED BY:	No Appearance