REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: NO CASE NO: **25893/2015**

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED

4/3/2016

DATE

JOACHIM HENDRIK BOTHA N.O. **FIRST APPLICANT**

NOMVUYO YVONNE SERITI N.O. **SECOND APPLICANT**

AND

BENJAMIN MOUTON **FIRST RESPONDENT**

GERTRUDIA DOROTHEA MOUTON **SECOND RESPONDENT**

THE CITY OF TSHWANE MUICIPALITY **THIRD RESPONDENT**

TRAKPROPS 118 (PTY) LTD **FOURTH RESPONDENT**

JUDGMENT

THOBANE AJ,

[1]On 28 January 2016 I gave an order in the following terms:

> 1.1. The first and second respondent and all those holding under them, be ejected from the immovable property situated at […], Pretoria, better known as […]("the property");
>
> 1.2. That the ejectment order in paragraph 1 shall become
>
> effective and executable 30 days after the granting of this order ;
>
> 1.3. That the first, second and fourth respondents jointly and severally be ordered to pay the costs of this application.

I indicated at the time that my reasons for the order will follow . These are those reasons .

[2] The applicants who are joint trustees in the insolvent estate of the Pater Familias Trust, approached this court for an order of eviction of the first and second respondent from the immovable property known as […], […], Pretoria . This application is opposed by the first, second and fourth respondents .

[3] It is common cause that a final order of sequestration was granted after an opposed hearing before Prinsloo J. An application for leave to appeal was subsequently launched, however it was dismissed by Prinsloo J.

[4] Thereafter, an application for leave to appeal was launched by the trust in the Supreme Court of Appeal. I will deal in some detail with the pending appeal when considering the merits of the respondents' opposition of this application.

[5] The applicants make the point that;

5.1. The immovable property is the only asset in the insolvent estate,

5.2. The immovable property is occupied by the first and second respondent without the consent of the applicants, the trustees,

5.3. Whereas there is an agreement of lease entered into between the fourth respondent on one hand and the trust on the other hand, in terms of which the occupational rental is debited against a loan account, this arrangement is a sham aimed at frustrating the sequestration process.

[6] The application is opposed on the following basis,;

6.1. That there is a pending appeal before the Supreme Court of Appeal. It is in fact an application for leave to appeal,

6.2. That there is a clear dispute of fact that was foreseeable and/or foreseen, and,

6.3. That the respondents are in lawful occupation of the property.

[7] In the heads of argument counsel for the respondents deals extensively with the provisions of The Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998, hereinafter referred to as the "PIE Act". This is despite the fact that the PIE Act is not referred to at all in the affidavit resisting the eviction application. Ordinarily, this court would not entertain any submissions which do not have their genesis in the founding papers and that are raised for the first time during argument. Our law requires that the parties themselves set out and define the nature of the dispute as well as the issues to be canvassed. The role of the court is to adjudicate upon those issues as identified. See ***National Director of Public Prosecutions v Zuma 2009 (2) SA 27 SCA para 15 and 19.***

[8] In this matter the respondents were allowed some leeway to deal with the PIE Act and the applicants to respond to issues raised with regard thereto despite the

absence thereof in the opposing affidavit for the simple reason that this being an application for eviction, the provisions of the PIE Act would ordinarily be relevant.

[9] I now turn to consider the various grounds of opposition.

IS THERE A PENDING APPEAL

[10] This defence is raised by the respondents *in limine.* The respondents contend that there is an application for leave to appeal the sequestration order pending before the Supreme Court of Appeal. For this reason, so they argue, granting the application and ordering eviction will be tantamount to realizing the immovable property, for which the requisite written consent, of the trustees, has neither being sought nor provided.

[11] In the applicants' replying affidavit, the applicants dispute the contention that there is a pending application for leave to appeal before the Supreme Court of Appeal. In so doing, applicants relied on a letter from the Registrar of the Supreme Court of Appeal a Mr. PSW Myburg, the relevant portions of which read as follows;

> " *The applicant has to date not served an application that meets the requirements of the Rules of this Court . Until such time as the application is filed there is no application for leave to appeal and there is nothing that suspends any legal process"*

[12] In light of the letter from the Registrar of the Supreme Court of Appeal there can be no pending application for leave to appeal before the Supreme Court of Appeal. This point *in limine* must fail.

[13] The respondents further contend that this application for eviction in fact *"amounts to realisation of the property and is therefore irregular".* The irregularity, so they argue, lies in the fact that the trustees of the trust have not given their consent. The respondents have failed to advance reasons why they hold the view that eviction from the property equals realization thereof. In their papers applicants indicate that the property is an asset in the insolvent estate and that their intention is to avail it for

rental purposes and perhaps later for sale. There is nothing on the papers that suggests that the applicants plan to deal with the asset in an underhand manner. Further, there is no application before me to authorise or ratify realisation of the property. The submission that this application amounts to a realisation falls to be rejected.

DISPUTE OF FACT

[14] The respondents state in their answering affidavit that;

> "/ am *further advised that there is* a *clear substantial dispute of fact in this matter, which dispute was, from the reading of the founding affidavit, clearly anticipated by the applicants, who* despite knowledge of the mentioned disputes, proceeded with the eviction proceedings on notice and not by way of action. In the premises the application should be dismissed with costs".

[15] The respondents however do not indicate what the dispute of fact is so that the court can determine whether there is in fact such a dispute of fact, that it was anticipated or foreseeable and therefore that the proceedings ought to have taken the form of an action and not an application.

[16] In the case of ***Room Hire Co (Pty) Ltd v Jeppe Street Mansions Ltd 1949*** *(3)* ***SA 1155 (T),*** it was decided, as a general rule, that the choice between the procedures depends on whether a bona fide material dispute of fact should have been anticipated by the party launching the proceedings. When such a dispute is anticipated, a trial action should be instituted. At page 1161 Murray AJP stated;

> "...There are certain types of proceeding (e.g., in connection with insolvency) in which by Statute motion proceedings are specially authorised or directed... There are on the other hand certain classes of case (the instances given...are matrimonial causes and illiquid claims for damages) in which motion proceedings are not permissible at all. But between these two extremes there is an area in which...according to recognised practice a choice between motion proceedings and trial action is given according to whether there is or is

not an absence of a real dispute between the parties on any material question of fact"

[17] Accordingly, a court will be less inclined, when there are genuine disputes of fact on material issues, to decide the matter on motion on a mere balance of probabilities, as would be ordinarily done in an action. If, during an application, a dispute of facts arises, the court must exercise a discretion as determined in terms of Rule 6(g) of the Uniform rules, to dismiss the application or to refer the disputes to oral evidence or to trial. This discretion must be exercised judiciously.

[18] In ***P/ascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984***

(2) All SA 366 (A) at page 368 Corbett JA stated;

"...where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. "

[19] In the case of ***Room Hire*** supra at page 1162, it was stated that an

"...application may be dismissed with costs, particularly when the applicant should have realised when launching his application that a serious dispute of fact was bound to develop. *It is certainly not proper that an applicant should commence proceedings by motion with knowledge of the probability of* a *protracted enquiry into the disputed facts not capable of easy ascertainment ...what is essentially the subject of an ordinary trial action."*

[20] This was supported in the case of ***Lombaard v Droprop CC and Others 2010 (5) SA 1 (SCA).*** At page 11 Heher JA et Shongwe JA stated;

"...Therefore, if a *party has knowledge of* a *material and bona fide dispute, or should reasonably foresee its occurrence and nevertheless proceeds on motion, that party will usually find the application dismissed."*

[21] In ***Wightman t/a JW Construction v Headfour (Pty) Ltd and Another 2008 (3) SA 371 (SCA)*** the Supreme Court of Appeal succinctly and meticulously set out what is a dispute of fact and the approach to be adopted when confronted thereby. Heher JA said;

> "*A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where* a *bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred* are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence} if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter."

[22] In light of the above approach, the respondents, who are under obligation to point out the disputes of fact, in my view, have failed to unambiguously identify and address any facts disputed. Instead, the answering affidavit is replete with bare

denials. In the opposing papers and in argument before me, there was lack of articulation of the basis for disputing certain facts. This is one matter where a robust view of the matter, as cautioned by Heher JA in ***Whightman v Headfour,*** above, is warranted. The defence that there are disputes of fact must fail.

DO THE RESPONDENTS OCCUPY THE PROPERTY LAWFULLY

[23] The first and second respondent contend that their occupation of the property is lawful in that there is a lease agreement dated 20 July 2012, concluded between first respondent and second respondent, albeit in a representative capacity as trustee of the fourth respondent. The question that inadvertently arises, in the event it is found that the agreement is valid, is whether the agreement is binding on the applicants in their capacities as trustees in the insolvent estate of the Pater Familias Trust.

[24] The applicants dispute that the lease agreement is genuine. In fact counsel for the applicants called it a "simulated" agreement or contract. In his view, it was entered into for the sole purpose of frustrating the liquidation process. The applicants highlighted numerous grounds on which they base such strong submissions;

> 24.1. Nowhere in the agreement is it stated that the right to occupy the property is derived from the fourth respondent,
>
> 24.2. That the occupation of the property without payment of rental is an absurdity,
>
> 24.3. That the fourth respondent is burdened with the duty of keeping the immovable property in good condition without any corresponding responsibility from the lessee. By way of example clause 5 has very strange provisions. Clause 5.6 thereof provides that the Lessor must obtain prior written consent from itself. The list is not exhaustive but some of the strange provisions provide that;

"The Lessor shall:

5.1. Be responsible for the maintenance of the interior of the premises and undertakes to deliver the premises back to the Lessee at the termination of this lease in the same good order and conditional r cried by the Lessor from the Lessee with allowances only for ordinary wear and tear.

5.2. Repair, or where necessary replace, any door handles, Jocks and keys, glass, Window fasteners, electrical fittings and figures, baths, basins, sanitary ware, water taps, burglar alarm a, *automated gates/ g*arage doors and sprinkler systems, which are damaged by the Lessee. The Lessor shall also replace at his/her expense, any light bulbs, fluorescent tubes, fluorescent starters, tap washers and water blasts on the premises as and when necessary. All repairs affected shall be to the level of quality acceptable to the Lessee.

……..

……..

5.6. Not to cut or remove trees or plants or effect any alterations to the garden, without the Lessors prior written consent.

24.4. That with regard to subletting, there is a clear imbalance of power demonstrative of the contrived nature of the agreement. The Lessor is barred from ceding or subleasing its own property without prior written consent of the Lessee. The strangest provision is this;

6.2. Any exercise of the Lessors rights in terms of this agreement, will be without prejudice to any claim that the Lessee may have for rental and or for damages arising from the lessors breach.

24.5. That in essence, the agreement is entered into between husband and wife,

24.6. That the loan agreement forming the basis of the lease has not been made available despite requests,

24.7. That the agreement of lease was in any event cancelled.

[25] Coupled with the enquiry as to whether the respondents occupy the immovable property lawfully, are issues raised in connection with noncompliance with the PIE Act, which issues do not warrant detailed consideration. I shall nevertheless touch on the PIE Act, if only briefly.

[26] The issue of the immovable property and the occupational rental was briefly dealt with by Prinsloo J in his judgment. He said;

> *"The issue of the alleged occupational rental is, to put it mildly,* a *vague affair: the first respondent told Murray that the trust entered into* a *lease agreement with* a *company known as Trac Props for occupational rent, which was not paid though, but* debited to loan account in favour of the trust. It is common cause that the trustees have been occupying the property at all material times and still do so, without paying any occupational rental to the trustees or to anyone else.

[27] Prinsloo J, in summarizing his conclusions, further states;

> *"Moreover, I* am *satisfied,* as *this court also found when the provisional sequestration order was granted, that* a *proper case has been made out to the effect that* a *sequestration order will be to the advantage of the creditors of the trust. Mr. Van der* Merwe argued that the property is the only asset of the trust (this is common cause) and therefore the only source of money for the creditors. Mr. Mouton stated, although ambiguously, that the movable assets attached belong either to his wife or to the company with which the alleged contract (as yet unseen) with *regard to occupational rental has been entered into.* "

[28] Since the immovable property is the only asset of the trust, it is important that it be utilized maximally for the benefit of all, particularly creditors. On the assumption that there is a valid lease agreement, the nonpayment of occupational rental does not amount to beneficial use. Even more non-beneficial is the arrangement in terms of which occupational rent is debited to a loan account against a trust, especially in light of the fact that the terms of the loan agreement or as it is referred to in the lease agreement the "financial accommodation agreement", are unknown. In his judgment Pronsloo J, touches on the meagre nature of the sum of R 10 000-00 as occupational rental which amount is clearly disproportionate to the market related rental, agreed at the trial to be the sum of R25 000-00.

[29] A clause in the agreement records the following;

> *"Lessor has signed a financial accommodation agreement (the agreement) with the Lessee in terms of which financial assistance is given by the Lessee the Lesssor on condition that:*
>
> > *(a) The Trustees shall be allowed (as from the effective date) to remain in beneficial occupation of the property for residential purposes;*
> >
> > *(b} and further on condition that the market related <u>rental for the premises is paid monthly by the Trustees to the Lessee</u> (my emphasis). Until such time* as a *market related rental is determined by an independent third party, the minimum amount of R10 000-00 (ten thousand Rand) shall be paid monthly and shall be applied towards the repayment of the loan amount from time to time outstanding and owing to the Lessee in terms of the agreement".*

[30] The criticism leveled at the lease agreement by the applicant is founded on solid legal grounds. The cumulative effect of the contradictory nature of the provisions of the agreement, the fact that the lease does not make any commercial sense, the clear disproportionate nature of rights and obligations of parties to the lease, the prejudicial nature of the agreement to creditors and to the applicants, add to that, the fact that the property which is the only asset of the insolvent estate is kept out of reach of the applicants for purposes of carrying out their functions, lead me to

conclude that the agreement was created for no other purpose but to frustrate the applicants and is clearly prejudicial to creditors.

[31] No explanation has been advanced by the respondents, if they hold the view that the agreement is valid, why they do not respect the cancellation of the lease agreement as communicated by Mr. Murray or at the very least make available all documents, including the loan agreement and most importantly the reconciliation statement in respect thereof, to the applicants for purposes of proving that such an arrangement exists as well as the details thereof. The fact that the lease agreement with its numerous flaws coupled with circumstances of its disclosure, was touted as evidencing lawful occupation is something that this court takes a dim view on.

[32] There can be no doubt that the lease agreement is a fabricated document. Occupation of the property based on the lease agreement is equally unlawful. Even on the assumption that occupation of the property by the respondents is lawful, which lawfulness is derived from the agreement, the lease agreement was cancelled in clear and unequivocal terms.

THE PIE ACT

[33] The respondents argued extensively that the PIE Act has not been complied with and that therefore on that basis alone the application for eviction must be dismissed. As indicated above, this defence was only raised in argument and is not encapsulated in the papers before me. I am of the view that willful, persistent and unlawful occupation of the property, in light of the findings above, has been established. I also could find no other basis of occupation of the property in the papers before me as the respondents failed to state any other right in law permitting occupation of the property. The respondents, as an afterthought, argued that the procedural requirements of the PIE Act have not been complied. Such submissions were baseless and opportunistic in light of the fact that the applicants did cause the application for eviction to be served on all the parties including the municipality. I was also referred to the order of my brother Justice AA Louw dated the 5th May 2015,

authorizing the form and manner of service of the eviction application, as well as returns of service evidencing compliance with the order of Louw J.

[34] The aforegoing having been established, section 4(7) of PIE sets out what this court should take into consideration in deciding whether or not to grant an order for the respondents' eviction. It reads thus;

> *"If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, the 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 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."*

[35] The respondents developed their argument further and submitted that since the application for eviction was postponed *sine die* after the initial date contained in the section 4(2) notice, the applicants were under obligation to seek further authorization and/or serve afresh the section 4(2) notice before proceeding further. Counsel for the applicants referred me to the unreported judgment of ***Van der Berg AJ,*** in this division; ***G.P. Troskie and another v Liquidator of RSD Construction CC Wilbecar Liquidators CC tla Bureau Trust Gauteng RSD Construction CC and Others, case no: 7132212012*** at paragraph 65, where it was held, in summary, that in circumstances where a matter had been postponed *sine die* the party setting the matter down cannot be expected to once again serve the section 4(2) notice, where parties had been aware of the pending application and had participated in the proceedings. Although the reasoning is not set out in the judgment, it is easy to understand why the court arrived at that conclusion. The purpose of a section 4(2) notice is to inform the respondent of an application to be brought seeking, among others his/her eviction. Once the respondents had been made aware and had participated in the legal proceedings up to the date of postponement of the application *sine die,* they can not be heard to be saying they need to be notified, again, that an order for their eviction would be sought.

[36] In the papers before me it is clear;

36.1. How the respondents came to occupy the property;

36.2. How the respondents continue to occupy the property and claim that their right is derived from the lease agreement discussed above;

36.3. How the respondents failed to advance reasons why they should continue to occupy the property or why their right in law, if any, is superior than that of the applicants;

36.4. How the respondents failed to place facts before me, despite having ample opportunity to do so, about any prejudice they stand to suffer if the order of eviction is granted;

36.5. How the insolvent estate stands to be prejudiced should occupation under these circumstances be persisted with, in light of the fact that the immovable property is the only asset at the trustees' disposal, nor has the respondent dealt with the plight of creditors;

36.6. There has not been any allegation that the respondents are a vulnerable group whose plight the municipality has a vested interest on, thus triggering the municipality's obligation to provide accommodation;

[37] In the premises I am satisfied that applicants have demonstrated that it is just and equitable for the respondents to be evicted, and that applicants have placed sufficient information before this court to justify the granting of such an order.

[38] In the result I make the following order;

1. The first and second respondent and all those holding under them, be ejected from the immovable property situated at […]("the property");

2. That the ejectment order in paragraph 1 shall become effective and executable 30 days after the granting of this order ;

3. That the first, second and fourth respondents jointly and severally be ordered to pay the costs of this application.

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SA THOBANE

ACTING JUDGE OF THE HIGH COURT

APPEARANCES

ATTORNEYS FOR THE APPLICANT	:TIM DU TOIT & CO INC.
COUNSEL FOR THE APPLICANT	:ADV. MP VAN DER MERWE, SC
ATTORNEYS FOR THE RESPONDENT	:KMG & ASSOCIATES INC.
COUNSEL FOR THE DEFENDANTS	:ADV. R. RAUBENHEIMER