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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION PRETORIA**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHERS JUDGES: NO
(3) REVISED.
17 SEPTEMBER 2021

CASE NUMBER: 45721/19

In the matter between:

**BHEKICEBO PIUS BASI
MABLI FAVOURITE BASI**

**FIRST APPLICANT
SECOND APPLICANT**

And

**CORNELIA MAGRIETHA PRINSLOO
HENDRIK PETRUS PRINSLOO
THE UNLAWFUL OCCUPIERS RESIDING
AT [....]
PRETORIA, GAUTENG
THE CITY OF TSHWANE METROPOLITAN
MUNICIPALITY**

**FIRST RESPONDENT
SECOND RESPONDENT
THIRD RESPONDENT

FOURTH RESPONDENT**

JUDGMENT

TLHAPI J**INTRODUCTION**

[1] This is an application for the eviction of the first, second and third respondents from the property described a [...], in terms of the Unlawful Occupation of Land Act 19 of 1998 (the PIE Act). The application was also brought against the third respondents who may be occupiers if any, and whose details were unknown to the applicants. No order is sought against the fourth respondent. The application is opposed by the first and second respondent. The respondents were duly served by notice in terms of section 4(2) of the PIE Act by the sheriff on 8 December 2020. The application was opposed by the first and second respondent in that at the hearing the first respondent appeared in person and she was given audience by the court. For convenience the first and second respondents will be referred to as the respondents.

[2] The grounds for eviction are based on a breach of the Lease Agreement entered into between the applicants and respondents on 4 May 2015 which agreement was cancelled on 12 February 2018. An order was sought authorizing the sheriff to evict the unlawful occupiers

[3] A previous application under case number 15658/18 involving the same parties as mentioned above was withdrawn by the applicants and notice of such withdrawal was served by email addressed to hpprinsloop1@gmail.com on 18 December 2020. According to the first respondent there were duplicate files and that the case under 15658/18 had been postponed by Fourie J to date in June 2021 although an order on 8 May 2018 by Fourie J postponed the matter *sine die*. The said matter was not before this court for adjudication and as indicated a notice of withdrawal of 15658/18 had been served as indicated above. It seemed there was another case under 66997/19 which related to a writ in execution which was flagged as a duplicate file to the present matter. I turn to the issues raised by the respondents later.

[4] In reply the applicant applied for condonation for the late filing of their relying affidavit, there was no objection to the application and having considered their reasons condonation is granted.

BACKGROUND

[5] The applicants presently live in Pietermaritzburg. [...] (the property) was purchased as an investment by the applicants, who are husband and wife and are married in community of property. A lease agreement was entered into by the applicants and respondents on 4 May 2015 for the duration of 12 months, which lease was to continue thereafter until terminated by either of the parties, who were obliged in terms of the agreement to give two-months notice of the termination of the lease agreement. The rental payable was in the amount of R7000.00 payable in advance and at an escalation of 10% per annum.

[6] A written demand Annexure "D" for payment of outstanding rentals in the amount of R217 000. 00 dated 13 November 2017 was made. As at February 2018 the respondents were in material breach for failing to pay their monthly rentals in the amount of R261 000.00 as from May 2015 and as appears in annexure "C" . The demand required payment of the outstanding amount within 7 days, failing which the lease agreement would be cancelled, that an action would be instituted for damages and arrear utility charges and, that an application in terms of the PIE Act would be launched. When no payment was made by letter dated 12 February 2018, annexure "E" the lease agreement was cancelled and respondents were informed that the legal processes would follow. Based on the letter of cancellation it is contended that the respondents have been in occupation of the property for more than 6 months

[7] The applicants contend that the respondents have remained in occupation, have not paid rentals and all requests for them to vacate have not been heeded and they remained in illegal occupation of the premises to the detriment and prejudice of the applicants. In terms of the requirements of section 4(7) of the Act the applicants contended that:

- (a) The property was not occupied by an elderly person;
- (b) The household was not headed by a woman;
- (c) There are properties in the vicinity available to be taken up by the respondents;
- (d) The respondents and all who occupy the property through them would not suffer any prejudice since alternative accommodation is readily available;
- (e) The eviction order would not infringe their right to adequate housing as provided in section 26(1) of the Constitution of the Republic of South African.

[8] The respondents were invited to place information before the court should they be of the view that their rights to adequate housing had been infringed.

[9] The respondents contended in their defence that applicants had not disclosed the true facts and had given false information:

- (a) The applicants owed the respondents an amount of R250 000.00 as commission they were entitled to for selling as sole mandate agents the property and, that the applicants refused to sign the Purchase Offer. The failure to pay the amount affected their business and they had to apply for a SASSA Grant. They admitted staying on the property and contended that they did not owe the applicants any money since they had not been paid.
- (b) That the applicants purchased the property purely for speculation or investment and by refusing to sign the purchase offer they had put themselves in the present dilemma.
- (c) The respondent contend that they rely solely on their SASSA grants and could not afford any rental at the going rate of R9000.00 in the areas they live in. They cannot move to any place and are not in a position to rent any property.
- (d) Presently the second respondent as a military veteran has applied for housing from the Department of Military Veterans and are

currently on their waiting list.

- (e) Their eviction would amount to being thrown in the street and would expose them to criminal elements. Their rights under section 26(1) of the Constitution would be severely infringed without any help from the Government.

[10] In reply the applicants contended that they had previously lived on the property before moving to Swaziland on work commitments and on their return to South Africa in 2018 they were unable to move back into the property since the respondents refused to vacate the property. Consequently, the first applicant had resigned his employment and settled in Pietermaritzburg, however, they wished to return to their home. The applicants averred that only three instalments of the rental were paid and for all these years the first and second respondents have lived free on the property, They had four children of school going age, two at tertiary who have had to put a hold on their education and the two younger children had to be in special schools. Their plans to return to Pretoria had been thwarted by the refusal of the respondents to vacate the property. The defences raised by them did not entitle them to remain unlawfully on the property.

THE ISSUES

[11] The issue to be determined is whether given the facts of the matter a valid defence has been raised and whether it is just and equitable to grant an order for the eviction of the first to the third respondents.

THE LAW

[12] The first to the third respondents have not taken issue in their opposition regarding compliance with the Act by the applicants in launching the application. It is common cause that the applicants are the owners of the residential property.

[13] Section 1 of the Act defines an unlawful occupier as;

"unlawful occupier means a person who occupies land without the express or tacit consent of the owner or the person in charge, or without

any other right in law to occupy such land, excluding a person who is and occupier in terms of the Extension of Security of Tenure Act, of 1977, and excluding a person whose informal right to land, but for the provisions of this Act, would be protected by the provisions of the Interim Protection of Informal Land Rights Act, 1996 (Act 31 of 1996)"

[14] A letter of demand was sent, the lease agreement was cancelled and the required notices and founding affidavit were duly served on them and on the fourth respondent as is required by the Act. It is common cause that by cancelling the lease agreement the first to third respondent were occupying the property without the consent of the owner rendering their occupation unlawful in terms of section 1 of the Act, since 12 February 2018.

[15] It is also common cause that the first and second respondents which may include the third have been in occupation of the property for more than 6 months. It is therefore important having regard to all the relevant circumstances that the order to evict be just and equitable and that in that regard section 4(7) of the Act which provides:

"....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 relevant circumstances including,....whether land has been 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.

[16] The discretion to evict or not evict should be just and equitable and should be exercised judicially, having regard to the facts and the rights of both the applicants and the respondents. The respondents have raised a defence that they were elderly persons, and that they have applied for accommodation with the Department of Military Veterans and are on the waiting list, further that they being elderly they cannot afford to pay rent in the area where they live because rentals in the surrounding areas were going for more than R9000.00.

[17] It is contended by counsel for the applicants that the respondents could at their age still look for reasonable accommodation and should not be considered by the court to be elderly and that even if they were to be considered as elderly it would not be just and equitable not to evict them to the harm and prejudice of the applicant

[18] The main defence by the respondents is that they are owed a sum of R250 000,00 which is commission they were entitled to and which applicants were refusing to pay. Their entire heads of argument centres around this aspect of their entitlement to this payment and to the matter under case number 15658/18 which was postponed *sine die* by Fourie J. As indicated this application was not before me, except for the notice of withdrawal of the application. They contend that a right contemplated in section 26(1) of the Constitution would greatly be infringed if the liquid claim was not paid. The court had to determine why they were expected to leave. They would not leave the property without them being paid. The respondents intimated in their submissions that they needed the money in order to buy themselves a piece of land, or stand to build a dwelling. In the answering affidavit they stated that they were on the waiting list for housing offered by the Department of Military Veterans, This is not dealt with in argument.

[19] Counsel for the applicants contended that just and equitable means a consideration not only of the rights of the occupier/ respondents but also the rights of the owner / applicant. The attitude of the respondents is that the applicants do not need the property because it was purchased as an investment, they have put themselves in this dilemma by not paying. The first respondents submits that the applicants have all the money to engage in unnecessary litigation instead of paying up. As I see it, the respondents are of the view that the applicants' changed circumstances, being the needs of the applicants and family unit the need to be restored a home which he owns are not deserving of any consideration until the R250 000.00 is paid. As I see, it them being elderly is a

secondary reason given for not evicting them.

[20] In my view the argument of the respondents is misplaced because the protection afforded by the Constitution as contemplated in section 26 has nothing to do with disputes relating to the payment of illiquid claims between the unlawful occupier and the owner. Although the issue of the illiquid claim is not up for any consideration the question that needs to be asked is, when and how is this going to end. For purposes of the application of the Act the respondents have had the benefit of free accommodation from the time that the lease agreement was cancelled on 12 February 2018, when they became unlawful occupiers. Now the applicants need a home where the family needs of their children will be served. The respondents have had the opportunity since prior to the termination of the lease to consider alternatives, which should not be confined to areas where obviously it shall not be affordable for them.

[21] It is my view that the R250 000.00 they seek payment for even if paid today, will not buy them a house or be adequate to buy a stand and to enable them to build a house. They were in the property market and should be in a position to find a place to stay falling within their means; they could pursue their application with the Department of Military Veterans where accommodation is probably free or provided at a reasonable fee, they could look for accommodation at retirement villages run by the Government or subsidised by the Government or other NGO's. Furthermore, the fourth respondent is not absolved within the context of the Act from providing or assisting to obtaining a place to stay and they must be approached by the respondents. There has been no indication other attempts have been made other with the Department of Military Veterans. I am satisfied that the applicants have discharged their onus to prove that it is just and equitable in the circumstances of this case to grant the order of eviction.

[22] In the result the following order is made:

1. The first, second and third respondents and all those claiming occupation under the aforesaid respondents be immediately evicted

from the immovable property known as [...];

2. That the first, second and third respondents and all those claiming occupation under the aforesaid respondents vacate the property described above within 60 days after the service of this order upon them, failing which the Sheriff of the area within which the property is situated be authorised to evict the first, second and third respondents and all persons holding under them.
3. That the South African Police at the request of the Sheriff of this Court be authorised to assist the Sheriff in enforcing the eviction authorised in 1, above.
4. The first and second respondents are ordered to pay the costs of this application.

TLHAPI VV

(JUDGE OF THE HIGH COURT)

MATTER HEARD ON : 27 JANUARY 2021

JUDGMENT RESERVED ON : 27 JANUARY 2021

**ATTORNEYS FOR THE APPLICANTS : BURDEN SWART & BOTHA
INC.**

ATTORNEYS FOR THE RESPONDENTS : APPEARED IN PERSON