IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case no: 40090/21

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED: NO
23 SEPTEMBER 2022

In the matter between:

RETHA STOCKHOFF In her capacity as Trustee in the Insolvent estate of Russell Barney Vickers	**APPLICANT**
AND	
RABONE MORIPE	**FIRST RESPONDENT**
MATHOTO MORIPE	**SECOND RESPONDENT**
THE OCCUPANTS OF ERF [....] M[....] EXTENSION 2	**THIRD RESPONDENT**
CITY OF JOHANNESBURG	**FOURTH RESPONDENT**

The judgment and order are published and distributed electronically. The date of hand-down is *deemed to be on 23 September 2022.*

JUDGMENT

MAZIBUKO AJ

1. The applicant seeks an order declaring (a) that the instalment sale agreement

(the agreement) concluded on 16 January 2018 was cancelled, (b) declaring the respondents as unlawful occupants of the property described as Erf […..] Extension 2 Township, B[....], Gauteng province (the property) and consequently order (c) their eviction from the property within a period to be determined by the court.

2. The applicant deposed to an affidavit stating that on 24 March 2020, the registered owner of the property, Russell Barney Vickers (Vickers), was declared insolvent. In August 2020, she was appointed as a Trustee of his Insolvent Estate.

3. On 16 January 2018, Vickers sold the property to the first and second respondents (the Moripes) for R1.3 million and signed an instalment sale agreement (the agreement). In terms of the agreement, they were to pay a quarterly instalment of R250 000 on 31 March 2018, 30 June 2018, 30 September 2018, 31 March 2019 and 30 June 2019, as well as R50 000 on 31 December 2018, respectively. Prior to the conclusion of the agreement with Vickers, the respondents were already occupying the property for about four months. They had agreed on monthly payments towards rental at R11 000 and other monthly charges for electricity, refuse removal, water, sewerage, and others.

4. The Moripes defaulted to make the first instalment payment. Vickers, through his attorneys, sent a letter of demand dated 13 April 2018 demanding the payment within 30 days of R293 092.33, being the March 2018 instalment and the other

monthly amounts due. To this letter, the attorneys also attached their statement regarding their costs.

5. Part of the letter of demand, the last but one paragraph, reads,

> *"We have been instructed to demand from you, as we hereby do, that you remedy your breach by furnishing us with payment for the total amount of R293 092 33 within 30 days of despatch of this notice to you, failing which our client reserves his rights in terms of the instalment deed of sale agreement which includes the cancellation thereof. In the event of cancellation, you will be liable for damages to our client and to the agency for commission and vacate the property with immediate effect".*

6. In May 2018, the Moripes paid R200 000 and R50 000, respectively. On 14 May 2018, Vickers' attorneys sent another correspondence: "*Instalment Deed of Sale: RB Vickers to R and M Moripe over erf [....] M[....] Extension 2."*

The only paragraph reads "you have failed to remedy your breach as called for on the 13 April 2018. *On the instruction of the seller, we hereby notify you that the matter has been cancelled.*

7. She further stated that notice to vacate dated 24 June 2021 was personally served on 28 June 2021 on the first respondent by the Sheriff. However, the Moripes and the other occupiers still possess and occupy the property.

8. It was argued on behalf of the applicant that the Moripes are in default of the terms of the agreement in that they failed to make payments towards the purchase price and other amounts. The instalment agreement was cancelled on 14 May 2018. Consequently, they are in unlawful occupation and are unlawful occupiers of the property in terms of PIE. The applicant seeks an order for their eviction within 14 days.

9. The first respondent deposed to an affidavit and confirmed that they only made the first instalment payment in May 2018 as they could not make it in March

2018. Whilst arranging to pay the second instalment in June 2018, the applicant's attorneys informed them that the seller had unilaterally cancelled the agreement and that they had forfeited the payments made in May 2018.

10. The respondents contended that the agreement is not cancelled. It remains in force as they have been trying to conclude as per the agreement to no avail from Vickers' side. They averred that on 15 December 2020, an evaluator, Xen Dippenaar (Xen), came to evaluate the property. They told him they were still desirous of purchasing the property though they previously experienced frustrations dealing with Vickers and his attorneys. He said to them that he was evaluating Luna Corina Carlson's (Luna) instruction employed by the applicant. In January 2021, they met with Luna. She promised to assist them in finalising the purchase of the property and that she would revert to them with the evaluation report and consider their new offer for the property.

11. In May 2021, one Dominique Elizabeth Malan (Dominique) contacted and informed them that she was taking over from Luna and was aware that she would furnish them with the evaluation report. She also requested them to make an offer. They made an offer and informed Dominique that they had already paid an initial instalment towards the purchase of the property, made improvements to the property and that they had been staying in the property for some time.

12. In July 2021, they increased their offer for the property. To date, they have not heard a response from the applicant. The applicant continued to send people to view the property without informing them.

13. It was submitted on behalf of the respondents that they are not in unlawful occupation of the property as their stay or occupation of the property is based on the instalment sale agreement, which has not been cancelled and remains valid and in force. Alternatively, they have been residing on the property for over four years, an extended period. They regard the property as their primary home, and evicting them will leave them and their minor child homeless. Further that the respondents' eviction would not be just and equitable.

14. To her reply, the applicant attached a supporting affidavit by Luna denying that she informed the respondents that they should relax, go back, and continue to enjoy their property. She admitted informing them that she would provide them with a property evaluation report and that they needed to place a new offer for the property. She stated that the Moripes were aware of the agreement's cancellation, which made it patent for them to make a new offer if they still wished to purchase the property.

15. She also attached a supporting affidavit by Dominique, stating that she informed the respondents that they could continue to reside on the property if their offer to purchase was accepted by the bank, as the bank would accept the highest bid on the property. Their proposals were too low and rejected by the bank.

16. It was argued on behalf of the applicant that the five adults residing on the property could find alternative accommodation for themselves and the minor child. According to the agreement, the respondents had to pay R11,000 rent per month in addition to their quarterly instalment payment of R250,000 until the property was transferred to them. Therefore, the respondents can afford alternative accommodation. Also, the respondents have been residing on the property for over four years without paying rent.

17. To succeed in being granted the order that the agreement was cancelled, the applicant has to satisfy the court that, among others, there was breach of the agreement on the part of the respondents that was not remedied. There is no dispute that the respondents failed to make the first instalment in March 2018 as per the agreement. After the 13 April 2018 letter of demand, they only paid towards the purchase price, not the rental and other monthly services. The letter of demand, among others, reserved the seller’s rights regarding the instalment sale agreement, which included the cancellation clause and consequences thereof. The Moripes were in breach and did not remedy it as they paid part of what was due.

18. On 14 May 2018, Vickers exercised his rights by cancelling the instalment sale agreement in a letter addressed to the respondents referring to 13 April 2018. There can be no doubt that the respondents became aware of that letter. The fact

that they kept on trying to negotiate and make offers after that to purchase the property still did not reverse the cancellation by Vickers through his attorneys. Consequently, the agreement concluded on 16 January 2018 was duly cancelled and no more in force.

19. Upon cancellation, the Moripes and the third respondents became unlawful occupiers though initially, they were lawful since they were renting to purchase the property. An unlawful occupier of the land or immovable property is defined as a person who occupies land or immovable property without the express or tacit permission of the owner or person in charge. Tacit permission is when an owner is aware of the occupant being on the land or premises but does nothing to stop this.

20. The applicant submitted through its Counsel that it relied on the PIE Act relating to the unlawful occupancy by the respondents and the eviction order. The Supreme Court of Appeal in the matter of Ndlovu v Ngcobo, Bakker and Another v Jika (1) (240/2001, 136/2002) [2002] ZASCA 87; [2002] 4 ALL SA 384 (SCA) (30 August 2002) at para 11, pg 123, held that "..., *PIE Act applies to all unlawful occupiers, irrespective of whether their possession was at an earlier stage lawful." Therefore, the applicant's reliance upon the PIE Act can* not be faltered.

21. The PIE Act provides procedures for the eviction of unlawful occupants and also prohibits unlawful evictions. It protects both occupiers and landowners. It is peremptory for a landowner or landlord to follow the provisions of the PIE Act where they desire to evict an unlawful occupier or tenant.

22. To succeed in being granted the eviction order, the applicant, as the trustee in the insolvent estate of Vickers, the registered owner of the property, has to satisfy the court that though ownership is not an issue and the respondents are unlawful occupiers, it is just and equitable to grant an eviction order.

23. Section 4(7) of the Prevention of Illegal Eviction from Unlawful Occupation of Land Act, Act 19 of 1998 (PIE Act) provides that:

"*if an unlawful occupier has occupied the land in question for more than six months from 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 relevant circumstances, including, except where the land is sold on execution pursuant to a mortgage, whether the 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 person and households headed by women.*"

24. Section 4(8) of the PIE Act provides that :

"*...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: -*

That they are the owners of the land or immovable property; That the respondents are unlawful occupiers and

(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)."

25. It is not in dispute that when the Moripes and Vickers concluded the Instalment sale agreement in January 2018, they had been in occupation of the property four months earlier. The property owner must furnish the court with adequate information to demonstrate that an eviction would be just and equitable if granted. Where the eviction is likely to result in homelessness, the relevant municipality must be joined. In terms of Section 26 of the Constitution, the municipalities are Constitution-

ally obligated to provide alternative accommodation where the evicted persons cannot obtain it themselves.

26. The duty to provide alternative accommodation is applicable when an organ of the State evicts people from their land and when a private landowner applies for the eviction of unlawful occupiers. It is not enough to only join the municipality. The land owner must ensure that there is a report before the court from the municipality dealing with the provision by the municipality for alternative accommodation as required by the constitution.

27. In the matter of ABSA Bank v Murray and Another 2004(2) SA 14 (C) at para [41] and [42], the court held that :

> "*in (its) view, the failure by municipalities to discharge the role implicitly envisaged for them by statute, that is, to report to the Court in respect of any of the factors affecting land and accommodation availability and the basic health and amenities consequences of eviction, especially on the most vulnerable such as children, the disabled and the elderly, not only renders the service of the (s 4(2) notice superfluous and unnecessarily costly exercise for the applicants, but more importantly, it frustrates an important objective of the legislation. It will often hamper the Court's ability to make decisions which are truly just and equitable. If PIE is to be properly implemented and administered, reports by municipalities in the context of eviction proceedings instituted* in terms of the old statute should be the norm and not the exception."

28. There is no doubt that the respondents are unlawful occupiers of the property as they are in occupation without the express or tacit permission of the registered owner due to the cancelled instalment sale agreement. Despite repeated demands by the applicant that they should vacate the property and failed attempts to bid for the property, they have remained in possession and occupation of the property.

29. It was argued on behalf of the applicant that the respondents could afford to pay for alternative accommodation and occupy same with the minor child. This sub-

mission is inconsistent with the other cogent facts. For instance, it is undisputed that in March 2018, the respondents could not pay their first instalment towards the purchase, rent, and other services. They have not been paying rent, and their offers to purchase the property have been declined by the applicant and the banks more than once.

30. In Pheko and Others v Ekurhuleni Metropolitan Municipality (CCT19/11A) [2015] ZACC 10; 2015 (6) BCLR 711 (CC); 2015 (5) SA 600 (CC) (7 May 2015), the Constitutional Court affirmed that Section 26(3) does not permit legislation authorizing evictions without a court order. The PIE Act reinforced this by providing that a court may not grant an eviction order unless the eviction would be just and equitable in the circumstances. The court has to have regard to several factors, including but not limited to :

> (a) whether the occupants include vulnerable categories of persons (the elderly, children and female-headed households) ;
>
> (b) the duration of occupation and
>
> (c) the availability of alternative accommodation or the state provision of alternative accommodation in instances where occupiers cannot obtain alternative accommodation for themselves.

31. The fact that five adults live with one minor child on the property does not make the adults afford alternative accommodation. It also does not make the child not vulnerable. No municipality report shows plans regarding fulfilling its statutory requirement to provide access to adequate housing and implementation thereof. The report would have assisted the court in determining whether it was just and equitable to grant the eviction order.

32. It is undisputed that one of the respondents is a school-going minor child in Grade 9. If granted, the eviction order might cause a haphazard change of school, which might not be in the child's best interest. There are no persuasive facts that it

would be just and equitable to grant the eviction as it would cause difficulty to the respondents, including the minor child, and render them homeless and destitute.

33. Consequently, the following order is made:

(a) The instalment sale agreement concluded on 16 January 2018 is declared cancelled.

(b) The first, second and third respondents are declared unlawful occupiers of the property described as Erf […..] Extension 2 Township, B[....], Gauteng province.

(c) The application for eviction is dismissed.

(d) Each party is to bear their costs.

N. Mazibuko
Acting Judge of the High Court,
Gauteng, Pretoria

Counsel for the Applicant:	Mr JW Kiarie
Instructed by:	Findlay and Niemeter Inc
Counsel for Second Respondent:	Mr N. Mawela
Instructed by:	Mawela Attorneys
Date of hearing:	18 July 2022
Judgment delivered on:	23 September 2022