REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No. : A49/2021

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES:NO
(3) REVISED.

26/10/2022
.....
DATE

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SIGNATURE

In the matter between:

EFKE TCHANGOU Appellant

and

C KANTU Respondent

J U D G M E N T

MNGQIBISA-THUSI, J:

[1] This is an appeal against the judgment and order in the Tshwane District Court (per Magistrate Mrs B Botha), handed down on 12 March 2020, wherein the appellant's application in terms of section 4(1) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("the Act") for the eviction of the respondent was dismissed with costs.

[2] The following facts are common cause. During 2016 the appellant, EFKE Tchangou, and the respondent, C Kantu entered into an oral lease agreement in terms of which the applicant leased the property, situated at 258 Smuts Avenue, Lyttelton Manor, Centurion, to the respondent against payment of a rental in the amount of R4, 000.00 and any ancillary expenses due. Due to the fact that the respondent on numerous occasions either failed to pay or paid the rent late, in December 2018 the respondent cancelled the lease agreement and demanded that the respondent vacate the premises. The respondent has failed to vacate the premises and is still in occupation of the premises.

[3] During May 2019 the applicant initiated proceedings at the Tshwane Magistrates' Court for the eviction of the respondent from the property by filing a notice of motion and supporting affidavit in which he sought an order for the eviction of the respondent and other ancillary relief.

[4] From the appellant's Notice of Appeal the following appears:

4.1 on 19 July 2019 the application was struck from the roll as the court a quo was not satisfied with the service of the application documents which were not served by the sheriff. Service was effected by the sheriff on the respondent on 28 August 2019.

4.2 On 16 September 2019 the respondent served a Notice of intention to oppose and served and filed an affidavit opposing the relief claimed on 6 October 2019.

4.3 On 13 November 2019 the applicant filed a replying affidavit and enrolled the matter for hearing for 7 February 2020 on which date judgment was reserved.

4.4 However, before judgment could be handed down, the Magistrate directed the parties' legal representatives to appear before her on 12 March 2020 to address her on whether there was compliance with the provisions of section 4(2) of the Act. Thereafter the Magistrate dismissed the application, with costs, on the ground that there was non-compliance with section 4(2) of the Act; and

4.5 the local authority having jurisdiction was not cited nor served with the application for eviction.

[5] In dismissing the application, the court a quo relied on the decisions in *McNeil and Another v Van Aspeling and Others*[1] and Supreme Court of Appeal decision in *Cape Killarney Property Investments (Pty) Ltd v Mahamba*[2] where in the former dealt with the procedure to be followed in eviction applications in

[1] (A85/18) [2018] ZAWCHC 185 (28 June 2018).
[2] 2001 (4) SA 1222 (SCA)

the Magistrates Court and the latter interpreting the provisions of section 4 of the Act and stated that[3]:

> "[8] Appreciating the Applicant's argument that the matter is opposed and properly before court the Applicant's application is not in compliance with S4(2) since there is no signed order in terms of Section 4(2) before the court. The court bundle clearly makes provision for the application which was drafted and is in the indexed bundle.
>
> [9] In terms of the aforesaid in paragraph 7 supra- Section 4(2) will be served twice and it is a pre-emptory requirement that a service directive must be granted and should have been served on the Respondent.
>
> [10] Having regard to the foregoing and what is mentioned in paragraphs [6] and [7] above it is conclusive that the Applicant has not complied with the requirement of Section 4(2) of the PIE Act."

[6] The appellant's grounds of appeal are the following:

6.1 The court *a quo* erred in coming to the conclusion that the appellant failed to comply with the provisions of section 4(2) of the Act.

6.2 The court *a quo* misdirected itself by losing sight of the import and purport of section 4(2) of the Act.

6.3 The court *a quo* erred in over-emphasising the peremptory requirements of section 4(2) of the Act.

6.4 That the respondent never raised an objection of lack of compliance with section 4(2) of the Act.

[3] Magistrate Botha's Reasons for Judgment in terms of Rule 51(1) at page 6.

6.5 The court *a quo* erred in that section 4(2) of the Act is about justice and should not be sacrificed on the altar of formalism - substance should triumph over form.

[7] The following submissions were made on behalf of the appellant. It was submitted that the court a quo had failed to consider that the respondent had received the founding papers which contained the grounds relied for her eviction and that as a result, by the time the matter was heard in court on 7 February 2020, the respondent had consulted a lawyer, served and filed her notice of intention to oppose and her opposing affidavit, had been served with the applicant's replying affidavit and was legally represented at the hearing on 7 February 2020 and 12 March 2020. It is the appellant's contention that the procedure followed complied with the provisions of section 4(2) as the purpose of section 4(2) was to fully inform the unlawful occupier of the case she was facing and she had ample opportunity to prepare for her defence and was therefore in a better position to defend the matter.

[8] On behalf of the respondent it was submitted that since the provisions of section 4 of the Act were peremptory, the failure by the appellant to obtain an order authorising the service of the section 4(2) notice was in contravention of the provisions of section 4 of the Act.

[9] Section 4 of the Act reads as follows:

"**4 Eviction of unlawful occupiers**

(1) 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.

(2) At least 14 days before the hearing of the proceedings contemplated in subsection (1), the court must serve written and effective notice of the proceedings on the unlawful occupier and the municipality having jurisdiction.

(3) Subject to the provisions of subsection (2), the procedure for the serving of notices and filing of papers is as prescribed by the rules of the court in question.

(4) Subject to the provisions of subsection (2), if a court is satisfied that service cannot conveniently or expeditiously be effected in the manner provided in the rules of the court, service must be effected in the manner directed by the court: Provided that the court must consider the rights of the unlawful occupier to receive adequate notice and to defend the case.

(5) The notice of proceedings contemplated in subsection (2) must—

(a) state that proceedings are being instituted in terms of subsection (1) for an order for the eviction of the unlawful occupier;
(b) indicate on what date and at what time the court will hear the proceedings;
(c) set out the grounds for the proposed eviction; and
(d) state that the unlawful occupier is entitled to appear before the court and defend the case and, where necessary, has the right to apply for legal aid."

[10] In the *Cape Killarney* matter (above), the Supreme Court of Appeal held that the provisions of section 4 of the Act are peremptory and in summary interpreted section 4(2) to mean the following:

10.1 In an application for eviction, service on the respondent or unlawful occupier has to happen twice. Firstly, the applicant must, as envisaged in section 4(3) of the Act, serve on the respondent a notice of motion and affidavit setting out the grounds on which the eviction of the unlawful occupier is sought. In this regard service has to be effected in accordance with the provisions of Uniform Rule 6(5). Further, an *ex parte* application must be made in which the applicant seeks the court's authorisation and directions with regard to the service of the notice contemplated in section 4(2) of the Act.

10.2 The section 4(2) must also set out the grounds on which the eviction of the respondent is sought as envisaged in section 4(5)(e) of the Act; and the date on which the eviction proceedings will be heard. The order authorising the service of the section 4(2) notice must be served on the respondent as directed by the court.

The court went further by stating that:

"[14] The fact that the s 4(2) notice is intended as an additional notice of forthcoming eviction proceedings under the Act is also borne out by s 4 (4).The later subsection provides for the possibility of substitute service where the court can be satisfied that for reasons of convenience or expedience, the notice of motion cannot be serviced in the manner prescribed by rule 4. However, even in this event, s 4(2) must still be complied with since s 4(4) is expressly made subject to the provisions of ss4(2)."

[11] Further, in the *McNeil* matter (above) the court stated the following:

> "[26] Following the amendment of Rule 55 of the Magistrates' Court Rules, the application procedure in the Magistrates' Court is in all material respects identical to that in the High Court. Rule 55(1) now provides that every application shall be brought on notice of motion supported by an affidavit and addressed to the party or parties against whom relief is claimed, and to the registrar or clerk of the court.
>
> [27] ... It must therefore be accepted that the procedure laid down in *Cape Killarney* also governs eviction applications in terms of PIE brought in the Magistrates' Court (see *Occupiers of Ompad Farm v Green Horizon Farm (Pty) Ltd and Others* [Unreported appeal judgment in case no AR468/2013 KZD)."

[12] From the *Cape Killarney* matter (above), it is clear that the appellant did not comply with the peremptory requirements of section 4 of the Act. No authorisation and directions were obtained from the court as envisaged in s 4(2). Further, the local authority having jurisdiction was served with the eviction application.

[13] I am therefore satisfied that the court a quo did not err or misdirect itself in dismissing the eviction application on the ground that there was non-compliance with section 4(2) and that the appeal ought to fail.

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

> "The appeal is dismissed with costs."

NP MNGQIBISA-THUSI
JUDGE OF THE HIGH COURT

I agree:

N DAVIS
JUDGE OF THE HIGH COURT

Date of hearing:17 February 2022
Date of judgment: 26 October 2022

Appearances

Counsel for appellant: Adv. BR Matlhape (instructed by Elliot Attorneys

Counsel for respondent: Adv. J Van Wyk (instructed by Noko Ramaboya Attorneys Inc)