IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Not Reportable

Case No: AR 571/20

In the matter between:

ALBERT MICHAEL **FIRST APPELLANT**

OTHER OCCUPIERS **SECOND APPELLANT**

and

THE TRUSTEES OF THE GOVENDER FAMILY TRUST **RESPONDENT**

Heard: This appeal was, by consent between the parties, disposed of without an oral hearing in terms of s 19*(a)* of the Superior Courts Act 10 of 2013.

Delivered: The judgments in this matter were handed down electronically by circulation to the parties' representatives by email and release to SAFLII. The date and time for hand-down is deemed to be 10:00 am on 27 November 2020.

ORDER

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1. Save to the extent set out in paragraph 2 hereof, the appeal is dismissed.

2. The order of the court *a quo* is substituted by the following order:

'a) The first respondent, and all who occupy under and through him the property described as Lot 1812, Marburg, Port Shepstone, KwaZulu-Natal, are directed and ordered to vacate the said property by no later than 30 January 2021.

b) In the event of paragraph (a) hereof not being complied with, the Sheriff is directed to take such steps as are reasonably necessary to give effect to paragraph (a) of this order.'

JUDGMENT

GORVEN J (CHETTY J concurring)

[1] This is an appeal against a judgment dated 29 August 2019 of the additional magistrate of the Port Shepstone Magistrates Court. He ordered the eviction of the first appellant and all who occupy under and through him from the property described as Lot 1812, Marburg, Port Shepstone, KwaZulu-Natal (the property) by no later than 27 September 2019. Although two appellants are listed, it appears that only the first appellant has sought to appeal the judgment. In any event, the other appellants derive their occupation from him. I shall therefore simply refer to him as the appellant. The municipality concerned was joined in the application but took no part in proceedings.

[2] The other member of the appeal panel, Mngadi J, proposes that an order be granted setting aside the judgment of the learned magistrate and remitting it to him for further hearing, with the parties being granted leave to 'reopen their respective cases and to adduce any evidence in relation to the issue of whether it is just and equitable to order the eviction of the appellant and all those who occupy through him from the property.' Having read this judgment, I respectfully differ from that outcome for the reasons set out below.

[3] The application in the court quo was brought by the respondent, the Trustees of the Governor Family Trust (the Trust). In it, the Trust asserted that it was the owner of the property and, in support of that assertion, put up evidence of ownership in the form of a Windeed Search. Ownership was transferred to the Trust on 10 April 2015 by Michael and Tamryn Gordon. As such, the Trust sought to vindicate its property. Possession of one's property is an incident of ownership.

[4] In order to vindicate property, an applicant must allege and prove ownership of the thing and that the respondent was in possession at the time the application was launched.[1] Absent a legal basis for possession which can be asserted against an owner, possession of another's property is unlawful. This was explained as follows:

'The owner, in instituting a *reivindicatio,* need, therefore, do no more than allege and prove that he is the owner and that the defendant is holding the *res* – the *onus* being on the defendant to allege and establish any right to continue to hold against the owner'.

In the present matter, accordingly, the appellant bore the onus to show that he was entitled to occupy over and against the ownership of the Trust. If he was unable to do so, his occupation of the property would be unlawful.

[1] *Chetty v Naidoo* 1974 (3) SA 13 (A) at 20B-D.

[5] The only right to occupy asserted by the appellant in the application was that he was the owner of the property. In support of this assertion, he led no evidence of ownership. His evidence was limited to the right of his now deceased mother to occupy the property which, at the time, was owned by the relevant municipality. Prior to her death, the municipality informed her that she qualified to obtain ownership of the property. It is common cause that this did not take place during her lifetime. Instead, after her death, two of her relatives purchased the property from the municipality. After paying the purchase price, they obtained transfer of ownership of the property in 2009. They sold and transferred the property to the Trust in April 2015. The appellant sought to rely on the will executed by his deceased mother in terms of which she purported to grant a form of ownership at least to the appellant and his brother. However, since, at the time of her death, she was not owner, she could not bequeath the property to them. The learned magistrate correctly held that this fell short of proving ownership. This means that the appellant was in unlawful occupation of the property. Ordinarily, accordingly, the Trust would be entitled to vindicate the property by way of evicting the appellant.

[6] Because the property is residential in nature, and because the appellant has resided on the property since 2006, the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) governed the application. The appellant is an unlawful occupier as defined in PIE. The provisions of s 4(7) of PIE govern any eviction proceedings against the appellant. This provides that:

‘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 . . . 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.'

It can thus be seen that PIE limits the right of owners to vindicate their property in these circumstances.

[7] In *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others*,[2] Wallis JA held that the provisions of this section trigger a two-stage enquiry:

A court hearing an application for eviction at the instance of a private person or body, owing no obligations to provide housing or achieve a gradual realisation of the right of access to housing in terms of s 26(1) of the Constitution, is faced with two separate enquiries. First it must decide whether it is just and equitable to grant an eviction order having regard to all relevant factors. Under s 4(7) those factors include the availability of alternative land or accommodation. The weight to be attached to that factor must be assessed in the light of the property owner's protected rights under s 25 of the Constitution, and on the footing that a limitation of those rights in favour of the occupiers will ordinarily be limited in duration. Once the court decides that there is no defence to the claim for eviction and that it would be just and equitable to grant an eviction order, it is obliged to grant the order. Before doing so, however, it must consider what justice and equity demand in relation to the date of implementation of that order and it must consider what conditions must be attached to that order. In that second enquiry it must consider the impact of an eviction order on the occupiers and whether they may be rendered homeless thereby or need emergency assistance to relocate elsewhere. The order that it grants as a result of these two discrete enquiries is a single order. Accordingly, it cannot be granted until both enquiries had been undertaken and the conclusion reached that the grant of an eviction order, effective from a specified date, is just and equitable. Nor can the enquiry be concluded until the court is satisfied that it is in possession of all the information necessary to make both findings based on justice and equity.'

[2] *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others* 2012 (6) SA 294 (SCA) para 25.

This, then, is the approach that the learned magistrate was enjoined to make.

Added to that, is the dictum of Harms JA concerning relevant circumstances 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.'

[8] The learned magistrate satisfied himself with a finding that ownership of the property vested in the Trust and not the appellant. He went on to conclude:

'I am therefore satisfied that the onus rests on the applicant that it is just and equitable to grant the order has been discharged and that it is the lawful owner and the first and second respondents are the illegal occupiers. The court in exercising its discretion given the time that has elapsed when this matter first came to court has determined that the date of eviction be the 27 September 2019.'

The only finding thus made by the learned magistrate was that the appellant and those occupying under and through him were illegal occupiers within the definition of PIE. No regard was had to the provisions of s 4(7) of PIE. This clearly amounted to a misdirection on his part since he failed to consider the relevant circumstances under that section.

[9] As a result, it seems, of that misdirection, Mngadi J holds that the appeal should be upheld, the order set aside, and the matter remitted to the learned magistrate for him to give consideration to all relevant factors. He would also allow further evidence to be adduced. It is here where I respectfully part ways with Mngadi J. I do so for the following reasons.

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[3] *Ndlovu v Ngcobo; Bekker v Jika* 2003 (1) SA 113 (SCA) para 19.

[10] The appeal lies from an application. Both parties led evidence by way of three sets of affidavits. A number of relevant circumstances emerge from those affidavits. The appellant, and those occupying under and through him, have lived on the property since 2006. The occupants comprise the appellant, his wife, his son, and his nine-year-old grandson (although the age of the grandson only emerged after judgment was granted). The appellant is currently 59 years of age and unemployed as is his wife. His son, he says, is not permanently employed but 'depends on contractual work from time to time'. The Trust has owned the property since 10 April 2015 and has, as a result, perforce given free accommodation to the appellant and other occupants for a period of more than five years.

[11] What the appellant has failed to give evidence on, despite having ample opportunity to do so, is the following. There is no evidence of the qualifications or work experience of the appellant or his wife. Neither is there evidence that they have sought work. There is likewise no evidence of the average income of his son over any period of time or currently. Nor does the appellant indicate the nature of the work done by the son or how frequently and the duration of contracts obtained by him. There is no evidence as to whether the appellant or his wife qualifies for, or is in receipt of, any grant or pension. The appellant makes no mention whatever of any attempts to secure alternative accommodation. This includes any approach to the municipality or to family or friends. He does not give evidence of any details of an amount the occupants can afford as rental or available rental accommodation. All of these matters are within the exclusive knowledge of the appellant. For a period of five years, he has known of the ownership of the property by the Trust. He satisfies himself

with the simple assertion that, if evicted, 'I will have no alternative accommodation as I have been residing in the above property since 2006.'

[12] In my view, this brings squarely into play the dictum of Harms JA referred to above that '[u]nless the occupier . . . discloses circumstances relevant to the eviction order, the owner, in principle, will be entitled to an order for eviction.' The appellant could not have been ignorant of this since the application papers inform the appellant:

'The respondent(s) is/are entitled to present before this honourable Court all relevant circumstances (including the rights and needs of the elderly, children, disabled persons and households headed by women as set out in Section 4(6) of the Act) to show why an order for eviction should not be granted and, in this regards, the respondent(s) bear the onus of proof.'

An eviction order must weigh the rights of the Trust to vindication of its property and the concomitant right to occupy against the persistent and lengthy unlawful occupation by the appellant. It is clear that it is just and equitable that the appellant and those occupying under or through him be evicted.

[13] The next stage of the enquiry arises by virtue of s 4(8) and (9) of PIE:

'(8) If the court is satisfied that all the requirements of this section had 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 placate the land under the circumstances; and

(b) the date on which an eviction order may be carried out if the unlawful occupier has not placated the land on the date contemplated in paragraph *(a)*.

(9) In determining a just and equitable date contemplated in subsection (8), the court must have regard to all relevant factors, including the period the unlawful occupier and his or her family have resided on the land in question.'

[14] This, likewise, requires regard to be had to all relevant factors. Once again, the only reason given by the appellant for his being unable to find alternative accommodation if evicted, is that he has resided in the property since 2006. Against that is the situation that the property rights of the Trust under the s 25 of the Constitution have been limited for over five years. Any referral back will only serve to prejudice the Trust.

[15] It must be accepted that it may take time to find suitable, alternative accommodation or even to seek emergency housing. In addition, moving from the property will take more time than if the appellant had occupied for a shorter period of time. The period of just less than a month given by the learned magistrate was inadequate in the circumstances. In any event, that date, and the extended date for execution, have passed. In my view, a period of three months would be just and equitable in all the circumstances.

[16] In the result, the following order is granted:

1. Save to the extent set out in paragraph 2 hereof, the appeal is dismissed.

2. The order of the court *a quo* is substituted by the following order:

‘a) The first respondent, and all who occupy under and through him the property described as Lot 1812, Marburg, Port Shepstone, KwaZulu-Natal, are directed and ordered to vacate the said property by no later than 30 January 2021.

b) In the event of paragraph (a) hereof not being complied with, the Sheriff is directed to take such steps as are reasonably necessary to give effect to paragraph (a) of this order.’

GORVEN J

DATE OF HEARING: This appeal was, by consent between the parties, disposed of without an oral hearing in terms of s 19*(a)* of the Superior Courts Act 10 of 2013.

DATE OF JUDGMENT: The judgments in this matter were handed down electronically by circulation to the parties' representatives by email and release to SAFLII. The date and time for hand-down is deemed to be 10:00 am on 27 November 2020.

FOR THE APPELLANT:	Heads of argument by AH Kaloo Instructed by Legal Aid South Africa.
FOR THE RESPONDENT:	Heads of argument by S Ranjit instructed by Melvyn Pillay Attorneys.