THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 483/08

J T THEART — First Appellant
COPPERSUN (PTY) LTD — Second Appellant

and

DEON MINNAAR N.O — Respondent

and

Case No: 007/09

ANSIE SENEKAL — Appellant

and

WINSKOR 174 (PTY) LTD — Respondent

Neutral citation: *Theart v Deon Minnaar NO* (483/08) and *Senekal v Winskor 174 (Pty) Ltd* (007/09) [2009] ZASCA 173 (3 December 2009)

Coram: MPATI P, BRAND, SNYDERS, MALAN et BOSIELO JJA

Heard: 5 November 2009

Delivered: 3 December 2009

Summary: Interpretation – s 4(2) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 – procedure to be followed in magistrates' court.

ORDER

On appeal from: Cape High Court (sitting as a court of appeal).

In *Theart v Deon N.O* (appeal No 483/08):

On appeal from High Court, Cape Town (R B Cleaver and D H Zondi JJ sitting as court of appeal from the magistrates' court).

1 The appeal is dismissed with costs.

2 The order of the court a quo is amended to read as follows:

'(a) The appeal is dismissed with costs.

(b) The order of the court a quo is amended to read as follows:

"(i) The application is granted with costs.

(ii) The first respondent and others occupying through him are ordered to vacate the premises at 65 Van der Stel Street, Stellenbosch within one month.

(iii) Failing compliance with the order in (ii) the sheriff is authorised to evict the first respondent and others occupying through him from the said property together with their belongings and to hand over vacant possession to the applicant."'

3 The one month period referred to in (b)(ii) shall be calculated from the date of this judgment.

In *Senekal v Winskor 174 (Pty) Ltd* (appeal No 007/09):

On appeal from High Court, Cape Town (Veldhuizen J and E T Steyn AJ sitting as a court of appeal from the magistrates' court).

1 The appeal is dismissed with costs.

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(iii) Failing compliance with the order in (ii) the sheriff is authorised to evict the respondent and others occupying through her from the said property together with their belongings and to hand over vacant possession to the applicant.”’

3 The period of fourteen days referred to in (b)(ii) shall be calculated from the date of this judgment.

JUDGMENT

BOSIELO JA (Mpati P, Brand, Snyders and Malan JJA concurring):

[1] The two appeals before us raise the issue of the proper interpretation and application of s 4(2) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) in the magistrates' courts. As the two appeals raise similar questions of law it is convenient to deal with both at the same time.

[2] It would be convenient to set out the provisions of s 4 of PIE which are relevant to this matter:

'**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.'

[3] The facts in both matters are fairly straightforward and can be conveniently summarised as follows: In *Theart* the appellants occupied the respondent's premises on the strength of an option to buy the premises. It is common cause that the appellants defaulted in their payment in terms of the option. As a result the option expired. The respondent gave the appellants due notice of the expiry of the option and demanded that they vacate his premises. On 24 October 2004 the respondent caused to be issued a notice in terms of s 4(2) of PIE. In addition the magistrate authorised the procedure for the service thereof. On the same day the respondent had a notice of motion issued in terms of rule 55 of the magistrates' courts rules which informed the appellants that an application for their eviction from the respondent's premises would be heard in the magistrates' court, Stellenbosch on 29 November 2007. The notice of motion informed the appellants, amongst other things, of the respondent's intention to evict them from his premises; the grounds for such eviction; the date and place for the hearing; their right to defend the matter and seek legal representation; their right to adduce relevant facts before a court to enable it to decide whether the eviction would be justified and their constitutional right to adequate housing in terms of s 26(3) of the Constitution. The s 4(2) notice and the notice of motion were served by the sheriff on the appellants on 26 October 2007 as authorised by the order of the magistrate's court. The appellants responded to these two notices by filing a notice of intention to oppose and an answering affidavit. In addition, the appellants were duly represented by an attorney when the matter was heard in court on 6 December 2007 and when the magistrate granted an order for the eviction of the appellants. The appellants' appeal to the Cape Provincial Division (per Cleaver J, with Zondi J concurring) was unsuccessful. This appeal is with the leave of the court below.

[4] In *Senekal* the respondent had no agreement of lease with the appellant who was the new owner of the property. The respondent sought an eviction order against the appellant on the grounds that she had no right to occupy the property and that she was accordingly an unlawful occupier. The application for the eviction order was couched in the form of a notice of motion in terms of rule 55. No dedicated s 4(2) notice was issued. Yet the notice of motion contained the information as prescribed by both ss 4(2) and (5). On 10 July 2007 the magistrate made an order authorising service of the notice in terms of s 4 of PIE. This notice of motion was served on the appellant and the municipality concerned on 11 July 2007. In the notice of motion the appellant was advised to appear before the magistrates' court on 14 August 2007 if she intended to oppose the matter.

[5] The appellant in *Senekal* filed an affidavit opposing the order sought, alleging that she was entitled to occupy the property as part of her employment benefits with her previous employer. She was represented by an attorney. The matter was heard on 10 October 2007 and, having listened to both sides, the magistrate granted an order evicting the appellant from the premises. The appellant's appeal to the Cape Provincial Division was dismissed by Veldhuizen, J with E T Steyn AJ concurring. The appellant now appeals to this court with the leave of the court below.

[6] I pause to observe that the appellants in both appeals did not dispute the merits of their respective cases. They confined themselves to an attack on the procedures which had been adopted by the respondents. In *Theart* the objection was that although two notices had been issued separately they were served simultaneously. In *Senekal,* on the other hand, the objection was that there was only one hybrid notice issued, which embodied the information required by s 4. Both appellants contended that the failure to have two notices served separately on them infringed their rights to procedural and substantive justice expressly provided for in s 4(2), read with s 4(5) of PIE. They contended that a proper interpretation of s 4(2) required that two separate notices be issued and served on them separately. Their principal submission was that this procedure was intended to give them an additional opportunity

apart from that ordinarily accorded them by the rules of the magistrates' courts to consider their positions and put all relevant facts before the court for its consideration. Reliance was placed on *Cape Killarney Property Investments (Pty) Ltd v Mahamba and Others* 2001 (4) SA 1222 (SCA) for this contention.

[7] It is useful to quote the relevant part of the judgment in *Cape Killarney* paras 11 and 12 where Brand AJA stated the following:

'[11] Section 4(1) makes it clear that the provisions of the subsection that follow are peremptory. It also defines the "proceedings" to which the section applies, namely proceedings for the eviction of an unlawful occupier. Section 4(2) requires notice of such proceedings to be effected on the unlawful occupier and the municipality having jurisdiction at least 14 days before the hearing of those proceedings. Section 4(2) further provides that this notice must be effective notice; that it must contain the information stipulated in ss (5) and that it must be served by the court. The term "court" is defined in s 1 of the Act, as the "High Court or the magistrates' courts". Although s 4(2) could have been more clearly worded, it is obvious in my view that the Legislature did not intend physical service of the notice by the court in the person of a Judge or magistrate. On the other hand, mere issue of the notice by the Registrar or clerk of the court would not suffice. What is intended, I believe, is that the contents and the manner of service of the notice contemplated in ss (2) must be authorised and directed by an order of the court concerned.

[12] Section 4(3) provides that notice of the proceedings must be served in accordance with the rules of the court in question. Accordingly, for purposes of an application in the High Court, such as the one under consideration, s 4(3) requires that a notice of motion as prescribed by Rule 6 be served on the alleged unlawful occupier in the manner prescribed by Rule 4 of the Rules of Court. It is clear, in my view, that this notice in terms of the Rules of Court is required in addition to the s 4(2) notice. Any other construction will render the requirement of s 4(3) meaningless.

And in para 15 he said:

'Section 4 does not indicate how the court's directions regarding the s 4 notice are to be obtained. The common-sense approach to the section appears to dictate, however, that the applicant can approach the court for such directions by way of an ex parte application.'

[8] It is clear to me that the appellants failed to appreciate the fine but crucial distinction between the procedures for applications in the high court in

contrast to the magistrate's court. Rule 55(1) of the magistrates' courts rules reads as follows:

'Except where otherwise provided, an application to the court for an order affecting any other person shall be on notice, in which shall be stated shortly the terms of the order applied for and the time when the application will be made to the court. Delivery of such notice shall be effected in the case where the State is the respondent, not less than 20 days and in other cases not less than 10 days before the date of hearing.'

[9] Unlike the procedure prescribed by rule 6 of the uniform rules, rule 55(1) of the magistrates' courts rules does not create a procedure whereby an application in opposed matters has to be set down by way of a notice after all the papers have been filed as in the high court. On the contrary, in terms of rule 55(1), upon the issue of the application, such application must state the terms of the order sought and the date and time when the application will be heard. The result is that on being served with the application, a respondent will be fully informed of the nature of the application, the order sought, the date, time and court when and where the application will be heard. Section 4(2) in itself does not require an additional notice. All it requires is that written and effective notice of the proceedings be served on the unlawful occupier and the municipality 14 days before an order for eviction could potentially be granted. It follows logically that *Cape Killarney* is no authority for the proposition that s 4(2) requires two separate notices to be served on a respondent in the magistrates' courts.

[10] Reverting to the facts of the two cases on appeal, it is not in dispute that, although the notices were not contained in separate and distinct documents and not served separately, the appellants were served with notices duly authorised by the respective magistrates that, read together, complied with ss 4(2) and (5).

[11] It is important not to lose sight of the central role played by the courts during the issuing of the notice contemplated in s 4. Before a court authorises a s 4(2) notice, the notice must contain all the essential information prescribed

by s 4(5). This is consonant with one of the primary ideals of PIE as reflected in its preamble, which is to regulate the eviction of unlawful occupiers from land in a fair manner and, quite importantly, to ensure that no one is evicted from their home or have their home demolished without an order of court made after considering all the relevant circumstances as contemplated by s 4(8).

[12] In the present appeals both applications were properly served by the sheriff on the two appellants in a manner approved by the court concerned. Both appellants understood what the applications were all about and duly instructed legal representatives to represent them. In opposing the applications both appellants filed affidavits setting out their defences to the applications. Significantly both appellants were represented by legal representatives when their applications were heard. There is no doubt that the object of s 4(2) to give the occupiers sufficient and effective notice of the intended eviction was achieved. Notwithstanding this the appellants contend that both applications should have been dismissed on the simple basis that there was no additional notice served on them. However, counsel for the appellants (the same counsel appeared for the appellants in both cases) was unable to point to any section in PIE which requires an additional notice. For the reasons I have given, I find this argument untenable. But there is an additional reason why neither appeal could succeed even if the provisions of s 4 of PIE and/or the rules of the magistrates' court had not been strictly complied with. The considerations underlying this additional reason appear from the dicta that follow. In *Moela v Shoniwe* 2005 (4) SA 357 (SCA) para 9, Streicher JA said:

'Here the contents and manner of service of the notice had not been authorised and directed by an order of court. However, the object of s 4(2) is clearly to ensure that the unlawful occupier and municipality are fully aware of the proceedings and that the unlawful occupier is aware of his rights referred to in s 4(5)(d). It may well be that that object, in appropriate circumstances, may be achieved notwithstanding the fact that service of the notice required by s 4(2) had not been authorised by the court. That may, for example, be the case if at the hearing it is clear that written and effective notice of the proceedings containing the information required in terms of s 4(5) had in

fact been served on the unlawful occupier and municipality 14 days before the hearing. . . .'

And in *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA) para 24 where Brand JA stated:

'The question whether in a particular case a deficient s 4(2) notice achieved its purpose, cannot be considered in the abstract. The answer must depend on what the respondents already knew. The appellant's contention to the contrary cannot be sustained. It would lead to results which are untenable. Take the example of a s 4(2) notice which failed to comply with s 4(5)(d) in that it did not inform the respondents that they were entitled to defend a case or of their right to legal aid. What would be the position if all this were clearly spelt out in the application papers? Or if on the day of the hearing the respondents appeared with their legal aid attorney? Could it be suggested that in these circumstances the s 4(2) [notice] should still be regarded as fatally defective? I think not. In this case, both the municipality's cause of action and the facts upon which it relied appeared from the founding papers. The appellants accepted that this is so. If not, it would constitute a separate defence. When the respondents received the s 4(2) notice they therefore already knew what case they had to meet. In these circumstances it must, in my view, be held that, despite its stated defects, the s 4(2) notice served upon the respondents had substantially complied with the requirements of s 4(5).'

[13] During argument, counsel for the appellants was unable to indicate any prejudice suffered by the appellants due to the failure by the respondents to serve separate notices on separate occasions on them. This is so because the applications served on the appellants complied substantially with s 4(2) and, quite importantly, contained all the necessary information prescribed by s 4(5). There is no doubt that both appellants were fully apprised of the cases against them. To put the matter beyond doubt, both appellants were legally represented when the matters were heard in court. To my mind there can be no better proof of effective service of the written notice as demanded by s 4(2) than in the present two matters. If they had intended to place any matter before the respective courts for consideration the appellants had the opportunity to do so. Instead they elected to rely on technical defences rather than dealing with the merits of their cases.

[14] Viewed against the main purpose of PIE, the real issue is not so much whether or not there are two separate notices. The real and proper enquiry should be whether there has been effective notice of the proceedings on the occupier in the sense that a court is satisfied that the occupier has been fully informed of the impending eviction, the grounds therefor, the date and place of hearing and the right to appear in court and be represented. This is exactly what happened in the two appeals. Accordingly I am satisfied that effective notice was given to the appellants. To hold otherwise would promote slavish adherence to form above substance.

[15] In order to avoid any possible confusion, I find it appropriate to encapsulate what I believe to be the import of what we have decided in this case:

A. With regard to evictions under PIE the procedure in the high court is determined by s 4 of PIE and the uniform rules of the high court. The combined effect of these statutory provisions has been explained by this court in *Cape Killarney Property Investments (Pty) Ltd v Mahamba* 2001 (4) 1222 (SCA). As far as proceedings in the high court are concerned, nothing I have said in this case must be understood to detract from that explanation.

B. The procedure in the magistrates' courts is different from the high court because of the difference in the provisions of magistrates' courts rule 55, on the one hand, and rule 6 of the uniform rules of the high court, on the other.

C. In the magistrates' court two notices contained in two separate documents are not required. One document will suffice as long as:

(1) the content of the document and the manner of service is approved by the magistrates' court having jurisdiction, as envisaged by s 4(2) of PIE, pursuant to a preceding *ex parte* application.

(2) the contents of the document comply with the provisions of s 4(5) of PIE, with rule 55 of the magistrates' courts rules and the court order under (1).

(3) the document is served on the respondent and the municipality concerned in accordance with s 4(2) of PIE, the magistrates' courts rules pertaining to service and the court order under (1).

D. When considering the order to be granted under C the court is obliged to ensure that the notice will be 'effective' in the circumstances of the case

having regard to the intent and import of PIE and s 26(3) of the Constitution.

E. The fact that the notice served on the respondent is in some respect deficient of s 4(2) or rule 55 will not necessarily be fatal if the notice achieved the purpose contemplated by these statutory provisions. Whether that purpose had been achieved cannot be considered in the abstract, but will depend on the facts of each case.

[16] In the result, the following orders are made:

In *Theart v Deon N.O* (appeal No 483/08):

On appeal from High Court, Cape Town (R B Cleaver and D H Zondi JJ sitting as court of appeal from the magistrates' court).

1 The appeal is dismissed with costs.

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3 The one month period referred to in (b)(ii) shall be calculated from the date of this judgment.

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L O BOSIELO
JUDGE OF APPEAL

APPEARANCES:

FOR APPELLANT CASE 483/08:	B C Wharton Instructed by R P Totos Attorney, Cape Town Symington & De Kock, Bloemfontein
FOR APPELLANT CASE 007/09:	B C Wharton Instructed by R P Totos Attorney, Cape Town Symington & De Kock, Bloemfontein
FOR RESPONDENT CASE 483/08:	C H J Maree Instructed by Van der Spuy & Vennote, Cape Town Phatshoane Henney Ing, Bloemfontein
FOR RESPONDENT CASE 007/09:	M Verster Instructed by J C Van der Berg Attorneys, George Hill, McHardy & Herbst, Bloemfontein