

IN THE HIGH COURT OF SOUTH AFRICA**(WESTERN CAPE HIGH COURT, CAPE TOWN)****CASE NUMBER:**

A536/2011

DATE:

12 OCTOBER 2012

5 In the matter between:

TERSIA RONEL RESNICK

Appellant

and

THE GOVERNMENT OF THE REPUBLIC**OF SOUTH AFRICA**1st Respondent10 **THE MINISTER OF PUBLIC WORKS**2nd Respondent

J U D G M E N T**DAVIS, J:**

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On 29 July 2011, the court *a quo* ordered that the appellant, and all those holding title under her, as well as various other unlawful occupiers, should vacate the premises described as Erf 81, Military Road, Tamboerskloof, Cape Town ("the property") at or before 12:00 on 31 October 2011. Further, the sheriff must evict the appellant and all those holding title under her, as well as other various unlawful occupiers from the property on 1 November 2011 in the event of their failure to vacate the premises.

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It appears that there are three separate eviction matters heard concurrently by the court for the purposes of appeal brought the appellant who has appealed against the order of the court *a quo*, and it is to this appeal that we must now turn.

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The key question for determination in this case, concerns section 4 of the Prevention of Illegal Eviction and Unlawful Occupation Act 1998 ("PIE"). Section 4 of the Act deals with the eviction of unlawful occupiers of land sought by the owner
10 or the person in charge of the land. To the extent that it is relevant, the owner is defined as the registered owner of land, including an organ of state. PIE, insofar as it is relevant to this appeal, provides thus:

15 “(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 land of an unlawfully occupier.

20 (2) If an unlawful occupier has occupied the land in question for less than six months at the time when the proceedings are initiating, the court may grant an order for eviction if it is of the opinion that it is just and equitable to do
25 so, after considering all the relevant

circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women.

- 5 (7) If an unlawful occupier has occupied the land in question for more than six months at the time that the procedures 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
- 10 circumstances, including, except where the land is sold, in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state or
- 15 another landowner, for the relocation of the unlawful occupier and including the rights and needs of the elderly, children, disabled persons and a household headed by women.
- 20 (8) If the court is satisfied that all the requirements of this section be complied with and that no valid defence had been raised by the unlawful occupier, it must grant an order for the eviction of the unlawful occupier and determine:
- 25 (a) A just and equitable date on which the

unlawful occupier must vacate the land under the circumstances.

- 5 (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)."

It is clear that PIE has set out a twofold enquiry. The court first determines whether the person in respect of whom the
10 eviction order is sought, is an unlawful occupier. If that is the case, then, secondly, it decides whether, after considering all the relevant circumstances, it is just and equitable to grant such an order.

- 15 In this particular case, both arguments, namely (1) that the appellant was not an unlawful occupier and (2) that it was not just and equitable to evict her, have been raised by the appellant. I turn, therefore, to deal with the first question of unlawful occupation. The Act defines an unlawful occupier as:

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- "A person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land, excluding a person who is an occupier in terms of
25 the Extension of Security of Tenure Act 1997 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 the Informal Land's Act of 1996."

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In this particular case, the critical argument, which is raised by Mr Van der Merwe, who very ably argued on behalf of the appellant, was that the lawfulness was justified by virtue of a tacit consent with the respondents, who were the owners, or
10 persons in charge of the property. His argument of tacit consent is thus central to this dispute. Consent is defined in the Act to mean express or tacit consent, whether in writing or otherwise, of the owner or a person in charge, to the occupation by the occupier of the land in question.

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In oral argument, the court enjoyed a very useful exchange with Mr Van der Merwe regarding the complexities of the decision in Residents of Joe Slovo Community, Western Cape v Thubelisha Homes 2009 (9) BCLR 847 (CC). The point which
20 prompted this debate concerned the scope given to consent in two of the judgments which were delivered in that case, in particular those of Yacoob, J and Moseneke, DCJ. Yacoob J at paras 57-58, said:

25 "[Consent] means voluntary agreement. If consent

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means voluntary agreement, then tacit consent means a tacit voluntary agreement. The meaning of tacit consent is, therefore, inexplicably bound up with what is meant by a tacit agreement.

5 The tacit agreement is not an agreement of a different kind from that of an express agreement. The distinction really revolves around the question of evidence and proof. The evidence in an express agreement consists of proof of either a written
10 express agreement or a verbal one. A tacit agreement is one which is established by evidence, short of that relating to an express agreement. I agree with Corbett, JA –

‘that a court may hold that a tacit contract has
15 been established where by, a process of inference, it concludes that the most plausible or probable conclusion of all the proved facts and circumstances is that a contract came into existence”.

20 ...In cases where the only inference to be drawn is that there was a tacit consent, there can be no difficulty. However, where more than one inference is legitimate, we must select that which is the most probable or the most plausible in all the
25 circumstances.”

Moseneke, DCJ, appeared to take a somewhat different approach to this problem. At paragraph 144 he said:

5 "It is plain that unlawful occupier would be one who
occupies land without consent of the owner and
without any other right in law to occupy. The
consent required is of the owner or the person in
charge. It may be express or tacit and it may be in
10 writing or otherwise. This definition is cast in wide
terms. It envisages explicit consent but it also
contemplates consent that may be tacit or, put
otherwise, that may be unsaid but capable of being
reasonably inferred from the conduct of the owner in
15 relation to the occupier. The permission envisaged
may be in writing but need not be so. The
permission may be given other than in writing. In
other words, the absence of a written resolution or
of a written instrument evidencing consent of
20 permission to occupy is not conclusive that there is
no consent."

At paragraph 147, the learned Deputy Chief Justice says the following:

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“Another important consideration for adopting a generous understanding of ‘consent’ is embedded in our dark history of spatial apartheid and forced removals from land...In enacting PIE, the legislature
5 recognised that there are and there will be ample instances which homeless or landless people will be forced to occupy land without formal or written proof of the right to own land or initial consent of the owner. For obvious historical reasons occupation of
10 land often occurs without formal or explicit acknowledgement of the owner of the land...Consequently, their right to occupy will ordinarily not be evidenced by express agreements or formal resolutions of public entities but by the
15 tact acquiescence of the owner.”

It appears, therefore, that Moseneke DCJ was prepared to take a somewhat more expansive and generous approach to arguments raised to the effect that tacit consent existed.
20 Given some uncertainty as to the ratio of this case in this connection, a more generous approach in applying these dicta to the facts of the present case is probably indicated.

The facts of this case are the following: the first respondent is
25 the registered owner of the property. The second respondent

is the organ of state that manages, maintains and exercises control of all state owned land and buildings on behalf of the first respondent, including this property.

5 The property was originally utilised by first respondent as a military base, but this purpose ceased in 1991. During December 1999, the appellant, apparently unilaterally, moved into a dwelling on the property with her two children without any consent to so do. The appellant contacted first
10 respondent to inform it that she had taken occupation of the property and she wished to enter into a lease agreement. Thereafter, on 24 May 2000, the appellant and the first respondent entered into a written lease agreement, in terms of which the appellant leased the dwelling situated on a portion
15 of the property for residential purposes on a month to month basis.

A material term of the lease agreement was that rental in the sum of R800,00 per month would be payable by the appellant
20 to the regional manager of the second respondent, in advance on or before the first day of each month. It is common cause that the appellant fell into arrears with these rental payments. On 27 September 2002, appellant was notified, in what was referred to in the papers as the first notice, that she was in
25 arrears with her rental payment in the total amount of R6
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800,00. She was agreed to terms to settle this amount within 14 days, failing which the lease agreement would be terminated forthwith.

5 On 31 January 2003, she signed an acknowledgement of debt, which acknowledged her indebtedness to the second respondent for arrear rental in the amount of R7 520,00. Again she fell into arrears. This prompted the appellant to give notice, referred to as the second notice, that she owed
10 the Department arrear rental, which had now increased to the amount of R16 160,20. She was afforded an opportunity to settle these arrears within 30 days of delivery of the notice, failure which proceedings for the recovery would be instituted. The Department also indicated its intention to terminate the
15 lease agreement in terms of clause 1 thereof. Further, she would be required to vacate the premises by 30 November 2005.

On 15 December 2005, a further acknowledgement of debt was
20 signed. This agreement is significant to this dispute. To the extent that it is relevant, it is a document which was signed by both parties, including the appellant, in which the appellant agrees and undertakes to settle her indebtedness in terms of a procedure set in clause 1 thereof. In clause 3 she agreed to
25 the following:

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“Should I in any way fail to honour my obligations hereunder, the Department of Public Works may proceed with legal action to recover the full
5 outstanding amount, in which event I will be liable for any cost incurred.

4. A further acknowledgement of the Department shall be entitled to secure my eviction on the premises I presently occupy in the event of my
10 default without any further notice to me. It being understood that the contents of this document shall not be construed as a waiver, novation or abandonment of the Department’s rights arising from my original breach of the lease agreement
15 concluded on 24 May 2000.”

Clearly, this represented an acknowledgement that, whatever happened, the respondent had reserved its rights in terms of its initial decision to cancel the contract.

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Mr Van der Merwe accepted, as he had to, that the lease agreement had now been cancelled. It had been superseded by an acknowledgement of debt. It is the events thereafter that thus become crucial to this dispute. It is common cause
25 that the appellant failed to fully discharge her obligations

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towards the respondents in terms of this acknowledgement of debt. She failed, in other words, to pay the amounts that she was required to do so in terms of this acknowledgement. Within four months, on 20 April 2006, the sheriff served what
5 is referred to as the third notice, informing her that she was in unlawful occupation of the property and her right to occupy the property had previously been terminated, or alternatively was thereby terminated and instructing her to vacate the premises by no later than 30 April 2006. Nonetheless, she remained on
10 in occupation of the property.

Mr Van der Merwe submitted that it was here that some form of change to the legal arrangements occurred, in terms of which the 2005 acknowledgement of debt had tacitly been cancelled
15 and the initial lease resurrected. This would, therefore, have meant that the legal arrangements between appellant and respondents would be covered by the initial lease. As there had not been proper invocation of the provision of cancellation in terms of that lease, the appellant stood to win its case. In
20 effect, this is the argument of appellant.

Mr Van der Merwe fortified this argument by reference to renovations that were done by the appellant, apparently with the acknowledgement, knowledge, acquiescence or approval (I
25 am not entirely sure of which action from the record) of
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respondents. It appears that a building inspector, on the version which was provided by the appellant to the court *a quo*, had given approval, although Ms Witten, who equally ably appeared on behalf of the respondent, contended that one
5 could not be certain as to who this particular inspector worked for. It does appear that he is a municipal employee, but, of course, this court cannot take evidence from the Bar as a basis for its findings. Suffice to say this particular evidence is, therefore, in equipoise.

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It is true that for almost three years nothing further happened until 27 February 2009, when a further notice was served on the appellant, informing her that she was in unlawful occupation of the property, that the lease agreement was
15 terminated by virtue of the third notice and demanding that she vacate the property on or behalf, before 30 March 2009, and that she was indebted to the Department in the amount of R44 741,57 for loss of rental as a result of unlawful occupation.

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There was an exchange of correspondence on 17 March 2009 in which the appellant requested the Department to reinstate the lease agreement, itself evidence that she was not relying on any tacit agreement or that the lease itself was in
25 operation. Be that as it may, this particular request was

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refused and she was requested once again to vacate the premises.

It appears from this detailed chronology that, whether this
5 Court applies the approach adopted by Moseneke, DCJ or
Yacoob, J to the facts, there was no tacit agreement, which
meant that the initial lease governed a legal relationship
between the parties. I so conclude because of the critical
document, to which I have made considerable reference, of 15
10 December 2005. This document manifestly changed the legal
relationship between the parties. There is no basis by which,
either as the only probable inference or even upon a more
generous interpretation, a probable inference that the events
that superseded this particular acknowledgement of debt,
15 justified the conclusion that a tacit agreement had now been
reached which cancelled the acknowledgement of debt and
reinstated the initial lease. No evidence indicates to the
contrary, nor does the further correspondence, including that
of appellant, gainsay this particular argument.

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In my view, it cannot be said that there was evidence to justify
the existence of a tacit agreement on the approach of either
Yacoob, J or Moseneke, DCJ and accordingly, in my view, the
appellant must be considered to be an unlawful occupier for
25 the purposes of the Act.

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That then brings us to the second argument of 'just and equitable'. I set out earlier in this judgment the basis by which a court must be satisfied that it is just and equitable to evict
5 someone such as the appellant. There is no question as has been set out luminously by Sachs, J in his seminal judgment in Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC) that a court is required to balance opposing interests of the landowner on the one hand and the unlawful occupier on
10 the other.

There is a passage in Justice Sachs' judgment which must bear considerable weight with any court that considers these particular problems. At para 37 he writes:

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"Thus PIE expressly requires the court to infuse elements of grace and compassion into the formal structures of the law. It is called upon to balance competing interests in a principled way and to
20 promote the constitutional vision of a caring society, based on good neighbourliness and shared concern. The Constitution and PIE confirm that we are not islands on to ourselves. The spirit of ubuntu, of which is part of the deep cultural heritage of the
25 majority of the population suffuses the whole

constitutional order.”

In this connection, it is relevant to note that ubuntu promotes a normative notion of humanity, of human beings who recognise the ‘other’, of values of solidarity, compassion and respect for human dignity. These serve as important guides. They are no less important when the person is involved, is in the position of appellant, who has tenaciously tried to hold on to her home, so as to provide an education for her child within a stable environment, as it would be for a larger community of applicants.

But the fact of this matter is that an eviction is justified only after a careful consideration of the factors. In this particular case these factors are important. The appellant is a divorced woman. She occupies a dwelling with her two children, 20 and 16 at the time when she gave oral evidence. She took occupation a very long time ago, in December 1999. It is clear that other than the R1 000,00 per month in maintenance from the former spouse, she struggles to make ends meet. Her son attends the Camps Bay High School, and we were informed by Mr Van der Merwe from the Bar, that he would only conclude his matric year in 2013, which does in fact mean that were they to move a long way away from the residence, that would create difficulties.

The appellant has attempted, both by taking an initiative to grow her own vegetables, to seek to ensure that the little money that she receives, stretches as far as possible. She has had her own particular difficulties, which are outlined in the papers, including issues of stress and health. It is also true, on the other hand, that the property is required by the South African Police Service as an equestrian centre, which, as I understand it, will in fact facilitate crime control within the area, not an insignificant aspect with regard to the interests of the public. Further the property was not intended for residential accommodation, and notwithstanding the respondents' sympathy towards the appellant, this matter has gone on for over 13 years.

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What then constitutes grace, compassion and a commitment to ubuntu in these circumstances? Were this court to take the view that 'just and equitable' trumps illegality, so that a person in the circumstances of the appellant can remain indefinitely on the property, no matter the illegality of the situation, this would create vast and significant implications for eviction procedures throughout this Province, in that this, as a judgment of a Full Bench, it would be binding on many of our colleagues, who would have considerable difficulty in a range of cases, and we could not predict as to how subsequent

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evictions should adjudicated.

In my view, 'just and equitable' in this situation, means ensuring the appellant be given some significant time to find
5 alternative accommodation, but that 'just and equitable' jurisprudence cannot stretch far enough to overturn the decision of the court *a quo*.

In the result, the appeal must be dismissed. There is no order
10 as to costs, particularly given the position of appellant.

The order of the court *a quo*, however, must be amended to read as follows:

15 1. In the eviction application under case number 26741/09, the respondent and all those holding title under her, are to vacate the property described as Erf 81, Military Road, Tamboerskloof, Cape Town, within six months of the granting of this order.

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2. Should the respondent and all those holding title under her fail to vacate the property described above, on the date referred to above (that is six months within the granting of the order), the sheriff is ordered to evict the
25 respondent and all those holding title under her, with the

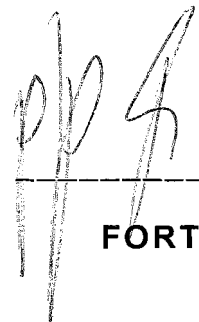
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assistance of the South African Police Service, should it become necessary, from the property on the date after the expiry of the six month period referred to above.


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I agree:



FORTUIN, J

10 It is so ordered:



DAVIS, J