REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: A 176/17

Ceres MC Case Number: 1435/2014

In the matter between:

ANTHONY JOHN STROEBEL Appellant

and

WITZENBURG MUNICIPALITY Respondent

***Coram*:** Baartman et Boqwana JJ

Delivered: 2 November 2017

JUDGMENT

BOQWANA, J

Introduction

[1] This is an appeal against an eviction order granted by the Ceres Magistrates' Court with costs, in favour of the respondent, against the appellant and all other occupants who obtained occupation through him, to vacate the property known as Erf [...], Ceres, situated at[…], Plantation Street, Ceres, Western Cape Province ('the property') on or before 30 July 2016, or be forcefully removed by the sheriff or the South African Police Service anytime from 5 July 2016.

Background facts

[2] It is common cause that the respondent is the registered owner of the property. The appellant has occupied the property since 1991. At that time the appellant was an employee of the appellant, until his employment was terminated for medical reasons on 31 August 2011.

[3] It is the respondent's case that the appellant was granted permission to occupy the house, as a free housing benefit, based on the performance of certain duties related to his employment agreement with the appellant. It is perhaps relevant to refer to the contents of the letter dated 31 December 1991, for completeness. The letter, addressed to the appellant, read as follows:

> **"PERSONEEL: BEHUISING: WONING TE KRAGSTASIE**
>
> Graag bevestig ek hiermee dat die raad tydens sy vergadering van 27 Mei 1991 goedkeuring verleen het dat bogemelde woning, wat tans bewoon word deur mnr. J P Swart, deur u bewoon mag word by ontruiming.
>
> Bogemelde woning word kosteloos aan u beskikbaar gestel inruil waarvoor u die nodige toesig oor die kragstasie en die perseel moet hou.
>
> Aangesien mnr. J P Swart eersdaags die betrokke woning ontruim, sal dit waardeer word indien u die nodige reëlings kan tref om dit spoedig moontlik daarna te beset. Besetting daarvan sal ook gesien word as u aanvaarding van bogemelde voorwaardes.
>
> …"

[4] Upon termination of his employment on 31 August 2011, due to ill health, the appellant received notice to vacate the premises within 30 days of receipt of the letter dated 31 October 2011. Again, on 31 July 2012 a letter was served on him

giving him final notice to vacate the premises within 30 days. On 30 May 2013, further notice was sent to the appellant, by the respondent's attorneys, for him to vacate the house by no later than 30 June 2013. The letter also specified that any possible agreements which the appellant could rely on, whether express or *tacit*, were cancelled and terminated therewith.

[5] The appellant having failed to vacate the premises, an application in terms the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998 ('PIE Act') was lodged by the respondent on 19 December 2014.

[6] In his judgment, the magistrate considered it unnecessary to go beyond the question of whether the employer could be expected to keep a person, whose services had been terminated, in a house for free that had been intended for and tied to the person's employment with it. Having found that the house was tied to the appellant's employment with the respondent, the magistrate found that the appellant and those occupying the house with him occupied the house without the respondent's consent and therefore unlawfully. The magistrate further held that this was not a case of an applicant who was not offered alternative accommodation, he was offered but failed to exercise an option of taking it.

Grounds of appeal

[7] The grounds of appeal are essentially that the magistrate erred by concluding that the appellant was in unlawful occupation of the property, because his right to occupy the property stems from an oral agreement which the he alleges he entered into with the respondent. According to him, the agreement was that he would perform duties as a caretaker of the premises and the electrical power station and, although his employment was terminated, he still fulfilled the aforesaid duties. He further alleges that the oral agreement had not been terminated and/or that the respondent was not entitled to unilaterally terminate it. Accordingly, so he argues, the magistrate misdirected himself by linking the lawful occupation of the property to the employment contract.

[8] The appellant contends further that, should the court find that he is an unlawful occupier, then it is relevant to determine whether an eviction order was just and equitable in the circumstances.

[9] In this connection, the appellant submits that he is disabled and suffers from ill-health, hence he was medically boarded. He has also, since 1991, resided in the property with his wife and his octogenarian mother, who also suffers from ill health. His 58 year old sister-in-law, who is disabled, also lives with them. Therefore four people live in the house of whom three are ill. The occupiers therefore are persons considered as vulnerable individuals in need of protection. Accordingly, the magistrate failed in his view, to consider that in light of these factors, that he and his family members should not be evicted unless and until suitable alternative accommodation, comparable with their current accommodation, had been provided.

[10] The appellant further submits that the Wendy house offered by the respondent, measuring 3 x 6 metres and in an unsafe area, posed a real threat of victimisation and it was far from the available medical facilities which the appellant and his family needed. Furthermore as there was no structure that existed, there was no electricity and water supply currently in existence either.

[11] The appellant argues therefore that the magistrate erred by failing to consider whether or not the offer of alternative accommodation was suitable for him and his family, taking into account the unique circumstances of their health and age. According to him, the magistrate erred by failing to consider that he lacked financial means to seek alternate suitable accommodation for him and his family.

[12] Lastly, according to the appellant, the magistrate failed to consider that he was not compelled to order an eviction, but should have exercised his discretion, having been satisfied that it was just and equitable to do so, taking into account all the relevant factors as required by the PIE Act. Those factors would include: the vulnerability of the occupants of the property, the circumstances under which the accommodation was provided, the period of occupation, the availability of suitable

alternative accommodation, and that the appellant would be reaching retirement age of 65 in some two and a half years, at which time he will received his pension pay out - the list is not exhaustive.

Duties of the Court

[13] The duties of the court when dealing with proceedings for the eviction from residences, have been dealt with in many cases, and were recently re-iterated by the Constitutional Court in the decision of *Occupiers, Berea v De Wet N.O. and Another* 2017 (5) SA 346 (CC), at para 47, where the Court observed that:

> "…the duty that rests on the court under s 26(3) of the Constitution and s 4 of PIE goes beyond the consideration of the lawfulness of the occupation. It is a consideration of justice and equity in which the court is required and expected to take an active role. In order to perform its duty properly the court needs to have all the necessary information. The obligation to provide the relevant information is first and foremost on the parties to the proceedings. As officers of the court, attorneys and advocates must furnish the court with all relevant information that is in their possession in order for the court to properly interrogate the justice and equity of ordering an eviction. This may be difficult, as in the present matter, where the unlawful occupiers do not have legal representation at the eviction proceedings. In this regard, emphasis must be placed on the notice provisions of PIE, which require that notice of the eviction proceedings must be served on the unlawful occupiers and 'must state that the unlawful occupier…has the right to apply for legal aid"

[14] The Court in *Berea* went on to stress in para 48 that:

> "[t]he court will grant an eviction order only where: (a) it has all the information about the occupiers to enable it to decide whether the eviction is just and equitable; and (b) the court is satisfied that the eviction is just and equitable, having regard to the information in (a). The two requirements are inextricable, interlinked and essential. <u>An eviction order granted in the absence of either one of the two requirements will be arbitrary. I reiterate that the enquiry has nothing to do with the unlawfulness of occupation. It assumes and is only due when the occupation is unlawful</u>." (Own emphasis)

[15] Section 4(7) stipulates that if an occupier has occupied the land for more than six months, the court may grant an eviction order if it is of the opinion that it is just and equitable to do so, after considering all 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*".

[16] If the court is satisfied that all the requirements of section 4 have been complied with and that no valid defence has been raised by the unlawful occupier, it must grant the order of eviction and determine a just and equitable date of eviction, along with the date on which the eviction may be carried out if the unlawful occupier has not vacated the land on the date stipulated. In determining a just and equitable date the court must have regard, amongst others, to the period the unlawful occupier and his or her family have resided on the land in question (see sections 4 (8) and 4 (9) respectively).

The question of the lawfulness of occupation

[17] The first issue to be determined in this case is the issue of consent to occupy the property, which in terms of the PIE Act means express or *tacit,* whether in writing or otherwise, by the owner or person in charge, to the occupation by the occupier of the land in question. If a person occupies land without the express or *tacit* consent of the owner or person in charge, or without any right in law to occupy such land, except in instances specifically excluded by the PIE Act (which are not applicable in this case), that person is said to be an '*unlawful occupier*'.

[18] The appellant bases his and his family's right of occupation on an alleged oral agreement, which he states gave him a right to occupy the property free of charge in exchange for acting as a caretaker over the premises and over the power station situated on the premises. He alleges that he was never relieved of his duties as a caretaker. This assertion is in my view unsustainable. Firstly, it is clear from the facts that the appellant was given occupation of the house by virtue of his

employment with the respondent. In other words, had he not been employed by the respondent, he would not have had the benefit of living in the house purely on the basis that he was the caretaker of the premises. In any event, even if that were the case, as Mr Wilkin, who appeared for the respondent, argued, there could be no basis to allege that the property would be occupied permanently. This is because apart from earlier notices served on the appellant to vacate the premises, the notice of termination given by the respondent on 30 May 2013 was unequivocal in stating that any possible agreements which the appellant could rely on, whether express or *tacit*, were cancelled and terminated therewith. That being so, it does not avail the appellant to seek to retain, or enforce some kind of right of retention or contract allowing him to occupy the property *in perpetuum.* The magistrate was therefore correct to find that the appellant and other occupants were in unlawful occupation of the property. That is, however, not the end of the enquiry, as I have already outlined. The magistrate was enjoined to go further and consider whether or not it was just and equitable to grant the eviction order, taking into account the relevant circumstances of this case.

Did the magistrate take into account the relevant circumstances before granting the eviction order?

[19] It was submitted by Mr Wilkin that he did, because those factors appear in his judgment. My reading of the court *a quo*'s judgment differs. The magistrate set out the common cause facts and submissions made by the parties, including that the appellant was declared unfit to work, that he lived with his mother and later on his sister-in-law; then later on in the context of the notice to vacate the premises the magistrate mentioned that the appellant had been in the property for longer than 24 years. Other than the mentioning of those factors in the judgment, there is no further assessment by him. It is clear in my view that the magistrate confined himself to the question of lawfulness in his adjudication of the issues. This fact is spelt out in the judgment, as follows:

> "Hierdie hof ag dit nie nodig om verder op die meriete van die saak te dwaal nie. Die vraag wat die hof hom nou egter verder moet afvra is, of dit die wetgewer se bedoeling kan wees dat die werkgewer wat 'n person in diens neem en huisvesting verskaf, hom steeds na beëindiging van sy diens verder in die woning moet verdra. Hierdie hof is gedagtig daaraan dat elke saak op sy besondere meriete beoordeel moet word."

[20] Having been persuaded that the appellant was an unlawful occupier, the magistrate went no further and ordered the appellant and other occupants to vacate the property, having mentioned that this was not a case of the appellant not having been offered alternative accommodation. As a starting point, it is important to point out that "*the availability of suitable alternative accommodation is a consideration in determining whether it is just and equitable to evict the occupiers, it is not determinative of that question"*. (See *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) at para 58).

[21] Other than mentioning that this was not a case of the respondent not having offered alternative accommodation, it is not clear what persuaded the magistrate to find that it was just and equitable to order the eviction of the occupiers. In my view, the magistrate's judgment does not demonstrate that the peculiar circumstances of the occupiers of the property were interrogated, as was postulated by Nkabinde J in *Pitje v Shibambo and Others* 2016 (4) BCLR 460 (CC) at para 19, where she held that: "*…courts cannot necessarily restrict themselves to the passive application of PIE. Even if there had been no rejoinder application, courts are obliged to probe and investigate the surrounding circumstances when an eviction from a home is sought. This is particularly true when the prospective evictee is vulnerable. These considerations would have enabled the High Court to apply the requirements of PIE justly"*.

[22] In that case, Mr Pitje was 76 years old and in ill-health. He had lived on the property his whole life. I am mindful of the fact that in *Pitje* it appears that the issue of suitable alternative accommodation was not considered at all by the High Court. In the instant case, although it is mentioned that the appellant exercised his choice to decline an offer of alternative accommodation, the details thereof and

what persuaded the magistrate, are not evident in the judgment. They are also not apparent in the founding papers.

[23] A glimpse of the offered accommodation appears in the opposing affidavit, wherein the appellant confirms that he had a meeting with a Mr Kotze, of Hauptfleisch and Kotze Incorporated, where he was offered a "Hop" house in Nduli, Ceres. In reply, the respondent alleged that a wooden structure measuring 3m x 6m was offered and that electricity would have been installed and that the appellant would have adequate access to ablution and running water. Apart from that no other information is proffered as to what kind of structure the "Hop" house was, where Nduli, Ceres was and whether it was suitable alternative accommodation. Same can be said about the wooden structure.

[24] It is upon a consideration of those circumstances, in my view, that a conclusion such as was held in *Baron and Others v Claytile (Pty) Ltd & Another* 2017 (5) SA 329 (CC) could be found. In *Baron* the nature of the accommodation offered, and that the City had addressed the concerns of the applicants to the best of its abilities as to the ill-suited nature of the initial accommodation offered, was a consideration that rendered refusal of the alternative accommodation unreasonable.

[25] In *Baron* the magistrate clearly considered the interests of both parties before granting an eviction order. It is also important to note that the issues in *Baron* had narrowed down to the single issue of suitable alternative accommodation by the time the matter was before the Constitutional Court. The thrust of the litigation in that case was, therefore, homelessness. In that case the applicants had rejected the offer made by the City, due to the distance from their places of employment and the children's school. They further submitted that the housing units were inadequate structures, as the units had been constructed with corrugated cladding. None of these issues have been considered at the Magistrates' Court level in the present case. The magistrate expressed no view as to the suitability of the alternative accommodation offered and the appellant's unreasonableness in refusing it, taking into account the vulnerabilities as mentioned.

[26] Earlier on, the magistrate had found that when the appellant became ill, it was logical that he had to make provision for other accommodation. I am alive to the fact that there has been an allegation that the appellant earns income to the tune of R9000, is therefore not indigent, as other evictees often are and would thus not be rendered homeless as he can afford alternative accommodation. His income is apparently also supplemented by an undisclosed income that he allegedly receives from work as a mechanic. That is a valid consideration which must be considered with all other factors and in context; however it is not apparent from the papers and was not considered by the magistrate. It is imperative that the appellant's alleged financial independence be properly assessed so as to avoid a situation such as in *Arendse v Arendse* 2013 (3) SA 347 (WCC), at para 42, where the court *a quo* was found to have apparently been swayed by the applicant's pension pay-out even though there was no evidence that that enabled her to afford alternative accommodation. Consideration of the relevant factors is a prerequisite prior to the forming of a view by the court as to whether an eviction order should be granted.

[27] I am not advocating that the appellant's rights should trump those of the respondent. All I am saying is that, once an eviction is brought in terms of PIE, constitutional and statutory considerations kick-in. The magistrate is enjoined to consider all the applicable factors and that such should, in my view, be demonstrated in the findings.

[28] Whilst it is upon the appellant to provide whatever information is relevant for consideration by the court, one ought not to lose sight of what was held by the court in *Berea* in relation to the duty that the parties have to provide the court with the necessary information. (See *Berea* supra at para 47)

[29] This fact was also observed by Wallis JA in *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others* 2012 (6) SA 294 (SCA), at para 34, where he stated:

> "[34] In my view, therefore, there are no good reasons for saying that an applicant for an eviction order under s 4(7) of PIE does not bear the onus of satisfying the court that it is just and equitable to make such an order. Cases where that onus affects the outcome are

> likely to be few and far between because the court will ordinarily be able to make the value judgment involved on the material before it. However, the fact that an applicant bears the onus of satisfying the court on this question means that it has a duty to place evidence before the court in its founding affidavits that will be sufficient to discharge that onus in the light of the court's obligation to have regard to all relevant factors. The City's contention, that that common-law position continues to prevail and that it is for the occupiers to place the relevant facts before the court, is incorrect. Once that is recognised it should mean that applicants go to greater lengths to place evidence of relevant facts before the court from the outset, and this will expedite the process of disposing these applications, particularly in cases that are unopposed, as the need for the court to direct that further information be obtained will diminish." (Own emphasis)

[30] It is also worth reflecting on Sachs J's remarks in *Port Elizabeth Municipality*, supra, at para 32, where he emphasised that, "…*although it is incumbent on the interested parties to make all relevant information available, technical questions relating to onus of proof should not play an unduly significant role in its enquiry*".

Conclusion

[31] In conclusion, I am not persuaded that the enquiries as envisaged by PIE were undertaken in this case. Even though I have found the appellant and other occupiers of the property to be '*unlawful occupiers*', it has been held that "*the existence of unlawfulness is the foundation for the enquiry, not its subject matter*'. (See *Port Elizabeth Municipality*, supra, at para 32.)

[32] It was argued on behalf of the respondent that, even if it were to be found that the magistrate failed to take the relevant circumstances into account, this court is well placed, and has all the information necessary, to make a decision on the justness and equitability of the eviction of the occupiers. I do not think so. As I have already mentioned, the details of the alternative structure, or accommodation, and other relevant circumstances are not clear from the papers.

[33] For these reasons, this is a matter that should be remitted to the Magistrates' Court for reconsideration in my view. Parties should be given leave to supplement their papers, to the extent required.

[34] In view of the period that has lapsed since the eviction proceedings were lodged, it is imperative that this matter be placed before the magistrate on an expedited basis.

[35] Having considered all the circumstances of the parties, a cost order would not be appropriate.

[36] In the result, I would propose the following order:

1. The appeal is upheld and the order of the magistrate is set aside.
2. The matter is remitted to the magistrate for reconsideration in accordance with this judgment.
3. The parties are given leave to supplement their papers to the extent necessary.
4. No order as to costs.

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N P BOQWANA

Judge of the High Court

I agree and it so ordered.

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E D BAARTMAN

Judge of the High Court

APPEARANCES

For the Appellant: Adv. K Felix

Instructed by: Jean-Claude Barrish Attorneys, Mowbray

For the Respondent: Adv. L F Wilkin

Instructed by: O'Neal & Visser Attorneys, Worcester