IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 9401/2021

In the matter between:

ROCHELLE ADAMS Applicant

and

SHARIEF MANUEL First Respondent

ALL OTHER PERSONS RESIDING WITH
THE FIRST RESPONDENT AT
1[…] A[…] S[…] ROAD,
HOUT BAY, CAPE TOWN Second Respondent

Coram: Justice J Cloete

Heard: 31 January 2022

Delivered electronically: 3 February 2022

JUDGMENT

CLOETE J:

[1] This is an opposed application for eviction. The following salient facts are common cause or cannot be disputed by the respondents, who contented

themselves with bald denials in relation thereto, and thus failed to meet the test in *Wightman.*[1]

[2] The applicant is the single mother of a minor child. The first respondent (to whom I shall refer as "the respondent" unless otherwise indicated) is her former boyfriend. The applicant and respondent became romantically involved in June 2018. From late 2018 the applicant began making enquiries about available land in the Hangberg/Harbour area of Hout Bay on which to erect a home for herself and her child. She approached the local City councillor as well as the area's community-led organisation for assistance but was not successful.

[3] In about June 2019 an old friend, Ms Rukaya Davids, granted the applicant "permission" to erect a home on an empty plot (in the area) which had previously been occupied by herself and her husband. It would seem that they had dismantled the structure erected on the plot in which they had resided when they moved elsewhere.

[4] Both parties are under the impression that the plot may be situated on land owned by the Department of Public Works ("the Department"), although there is no official record of ownership (the Department does own land in the area). Neither Ms Davids nor the applicant were ever formally allocated the plot by the Department (or whoever the owner is or was), but it had previously been occupied by Ms Davids and her husband for some years.

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[1] *Wightman t/a J W Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) at para [13].

[5] Although the Department is apparently aware of the fact that a number of individuals occupy its land in the area, no further steps have been taken by it to have them evicted since an unsuccessful attempt in about 2017 which led to an uprising in that community.

[6] The applicant then set about purchasing materials for the house she would erect. From her founding affidavit it is clear that, given her financial constraints, she had no option but to build (with the assistance of a builder) in stages, relying on loans and monies that she was able to scrape together. This process commenced in June 2019 and by June 2020 she was able to purchase roof sheets with monies loaned from her former employer. She annexed objective proof of her financial contributions to its construction.

[7] During 2019 and when the parties were still romantically involved, the applicant invited the respondent to reside with her and her child on the property once it was fit for occupation. At the time both lived with their respective mothers in the area (the applicant and her child in extremely overcrowded conditions).

[8] The relationship between the applicant and the respondent ended in about July 2020. The reasons for its termination are not relevant for present purposes, although the applicant attributes this to the respondent's verbal and emotional abuse. There would seem to be merit in this assertion when one has regard to the personal attacks made on the applicant's character as well as the unnecessary vitriol which permeated the respondent's answering affidavit.

[9] At the time their relationship terminated the applicant informed the respondent that he was no longer welcome to take up residence with her once her home was completed. The respondent thereupon moved onto the plot. According to the applicant he told her that he was doing so only to protect the partially constructed dwelling from vandalism. She initially refused but subsequently consented to him doing so since, according to her, she had applied for a protection order against him in the magistrate's court, and was under the impression that he would be ordered to move out upon finalisation of those proceedings.

[10] However there is no allegation that she conveyed what she believed would happen in the magistrate's court to the respondent, and the interim protection order granted in her favour on 27 August 2020, which is annexed to her founding affidavit, directed the respondent *inter alia* not to enter the applicant's residence at a different address. The magistrate thus did not order the respondent to vacate.

[11] I accept that in her affidavit filed in support of the protection order the applicant dealt with the abuse to which she had allegedly been subjected, what the parties had previously discussed pertaining to the respondent taking up occupation with her at the dwelling, and that she also referred in the application itself to one of the direct consequences of the abuse being that she was *'…without a house I have built'.* However she did not claim that she resided there (correctly, because she did not), nor did she specifically seek the respondent's removal from the dwelling on the plot.

[12] To this must be added that on 26 January 2021 the applicant's attorney addressed a letter to the respondent informing him *inter alia* that *'…[y]ou are aware that our client has not given you permission to occupy or undertake any construction in her premises…'*. Accordingly this letter also did not inform the respondent that the applicant was revoking the consent which she had previously given to him.

[13] By all accounts, after he moved onto the plot, the respondent took it upon himself to complete the construction of the dwelling. He has resided in it ever since and has refused point blank to vacate it. Apparently his two minor children now reside there as well.

[14] The defences raised by the respondent on the merits varied. In response to a letter of demand his erstwhile attorney advised the applicant's attorney on 28 January 2021 that he is the *'sole owner of the structure'*. In response to service of the eviction application the respondent's current attorney advised the applicant's attorney in a letter dated 18 June 2021 that *'in our view there is no basis in fact or law for your client to bring the application'.*

[15] In his later answering affidavit the respondent acknowledged the applicant's financial contributions to the erection of the dwelling and did not take issue with the nature of the materials she had purchased. However he baldly alleged that he spent R295 000 thereon, which he maintained served as some sort of proof that therefore he is the owner of the structure.

[16] He chose not to attach any objective evidence of how the sum of R295 000 was allegedly expended because, according to him, it was *'too voluminous and unnecessary for purposes of this application'* but invited the court to peruse it if required. This too fails to meet the *Wightman* test. As far as can be gleaned from his affidavit no other defences were raised concerning his occupation, other than another bald assertion that he *'…started to erect a dwelling as I wanted to build a house for my family'.*

[17] However, the respondent raised two points *in limine*. The first is that the applicant lacks the necessary *locus standi* and the second is the non-joinder of the Department. During argument it was accepted, in light of *Ndlovu v Ngcobo; Bekker v Jika*,[2] that PIE[3] applies to the eviction of all unlawful occupiers, meaning persons who occupy land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy that land, (save for occupiers under ESTA[4], the Interim Protection of Informal Land Rights Act,[5] juristic persons, or those not using the subject property as a form of dwelling or shelter).

[18] Accordingly, it is necessary to determine whether the applicant enjoys *locus standi* under PIE. The applicant based her *locus standi* on the following allegation in the founding affidavit: *'As should be clear from the above, the land to build my home on was granted to me and I paid for the construction.'.*[6]

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[2] 2003 (1) SA 113 (SCA).
[3] Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.
[4] Extension of Security of Tenure Act 62 of 1997.
[5] 31 of 1996.
[6] Para 36 of the founding affidavit.

[19] Section 4(1) of PIE stipulates that *'(n)otwithstanding anything to the contrary contained in any law or the common law, the provisions of this section apply to proceedings by an owner or a person in charge of land for the eviction of an unlawful occupier'.* It is common cause that the applicant is not the owner of the land. The question which then arises is whether she qualifies as a "person in charge of land". Such a person is defined in s 1 of PIE as meaning *'…a person who has or at the relevant time had legal authority to give permission to a person to enter or reside upon the land in question…'*. (my emphasis)

[20] In heads of argument counsel for the respondent referred to Smith CP et al: Eviction and Rental Claims: A Practical Guide[7] where the authors state that a "person in charge of land" could be a lessee or a person acting as agent of the owner of the land. There is no suggestion that the applicant falls into the second category mentioned by the authors. The question which then arises is whether she may be considered to be a lessee.

[21] In *Mighty Solutions t/a Orlando Service Station v Engen Petroleum Ltd and Another*[8] the Constitutional Court stated that:

> *'[28] …As noted in* Boompret*, it is an established rule that when being sued for eviction at the termination of a lease, a lessee cannot raise as a defence that the lessor has no right to occupy the property. This flows naturally from the rule that a valid lease does not rest on the lessor having any title…'*

[22] However this reflects the common-law position, whereas in applications of the present nature the Supreme Court of Appeal has made clear that the

[7] Chapter 3 at para 3.4.
[8] 2016 (1) SA 621 (CC).

provisions of PIE apply. There is also no suggestion that the applicant *'leased'* the plot to the respondent. Indeed and in any event, on her own version, one of the essential elements of a lease is absent, namely payment of rental.[9] Nor does the applicant qualify as a "lessor" under a *precarium*, because Ms Davids is not the owner of the plot. As was explained in *Pezula Private Estate v Metelerkamp*:[10]

> *'[10] …The notion of a* precarium *is based on the application by one party for a concession which is granted by the other party; that other party reserving at all times the right to revoke that concession as against the grantee in terms of the particular conditions, to which the grant is subject. Put differently, a* precarium *is a legal relationship which exists between parties when one party has the use of the property belonging to the other on sufferance, by leave and licence of the other…'* (my emphasis)

[23] During argument it became apparent that the "legal authority" upon which the applicant seeks to rely is that of a *bona fide* possessor, and therefore she must be found to qualify as such before consideration can be given to whether a *bona fide* possessor constitutes a person with "legal authority" for purposes of PIE. The concept of a *bona fide* possessor encompasses various elements, namely (a) *bona fides*; (b) physical control; and (c) a particular mental attitude.

[24] In Wille's Principles of South African Law[11] the authors state that possession in good faith (*bona fide*) is when the possessor thinks, on reasonable or probable grounds, that he or she has some kind of ownership in the property

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[9] See *inter alia* LAWSA: 2ed Vol 14 Part 2 at 3.
[10] 2014 (5) SA 37 (SCA).
[11] 9ed at 452.

possessed. They quote *Levy v Maresky*[12] where the words *'on reasonable and probable grounds'* were added, but rejected in *Banjo v Sungrown (Pty) Ltd.*[13] In the latter decision the court found that:

> *'…the absence, otherwise, of reasonable grounds for belief may, indeed, provide cogent evidence that the belief did not exist.* Grant and Another v Stonestreet and Others *1968 (4) SA 1 (AD) at p21H. But the existence or otherwise of an honest belief remains a question of fact…'*

[25] In the present matter the applicant, on the evidence, did not believe that she had some kind of ownership of the land. What she believed is that the dwelling she was in the process of constructing on the land was her property. But the dwelling was not yet complete and, on both parties' versions, it was still uncompleted when the respondent moved onto the plot. There was thus no *'house I have built'* as she asserted, and the *bona fide* element has not been established.

[26] As to physical control, this must be sufficient and effective, judged objectively: Mostert *et al*: The Principles of the Law in South Africa.[14] The difficulty which the applicant faces is that her control over the property is too tenuous. She has never resided there. She consented to the respondent moving onto the property without conveying to him any attendant conditions. Again, the dwelling was not fit for occupation when she gave him that consent. This element is therefore also absent.

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[12] 1939 GWL 21 at 32.
[13] 1969 (1) SA 401 (N) at 406D-E.
[14] [2020] at 69.

[27] As far as her mental attitude is concerned, this must be appropriate to the factual context and is determined on the outward manifestation of that attitude, which approximates an objective judgement of physical control.[15] As the authors in Mostert *et al*[16] put it *'[i]n other words the mental attitude is taken as that which can be established by the outward appearance or conduct rather than by mere subjective personal testimony'.* It is not necessary to repeat the evidence already dealt with, save to state that, on her own version, the applicant has failed to show that there was an outward manifestation of the revocation of her consent *vis-à-vis* the respondent. This element too has not been established.

[28] I am therefore compelled to conclude that the applicant is not a *'person in charge of land'* for purposes of PIE, and therefore lacks the necessary *locus standi*. I acknowledge that this is a "hard luck" case, but cases do not fall to be determined on sympathy. As Harms JA put it in *Ndlovu*:

> *'[16] There is clearly a substantial class of persons whose vulnerability may well have been a concern of Parliament, especially if the intention was to invert PISA [Prevention of Illegal Squatting Act 52 of 1951]. It would appear that Schwartzman J overlooked the poor, who will always be with us, and that he failed to remind himself of the fact that the Constitution enjoins courts, when interpreting any legislation, to promote the spirit, purport and objects of the Bill of Rights, in this case s 26(3). The Bill of Rights and social or remedial legislation often confer benefits on persons for whom they are not primarily intended. The law of unintended consequences sometimes takes its toll. There seems to be no reason in the general social and historical context of this country why the Legislature would have wished not to afford this vulnerable class the protection of PIE. Some may deem it unfortunate that the*

[15] Mostert *et al* (*supra*) at 69.
[16] At 69.

Legislature, somewhat imperceptibly and indirectly, disposed of common-law rights in promoting social rights. Others will point out that social rights do tend to impinge or impact upon common-law rights, sometimes dramatically.'

[29] I accordingly leave open the question whether a *bona fide* possessor in the legal sense enjoys the protection of those *'in charge of land'* under PIE. It is also not necessary to deal with the second point *in limine*, save to mention that in my view it has some merit, nor is it necessary to condone the applicant's failure to comply with s 4(2) of PIE (although I would have granted condonation),[17] nor does one reach the stage of determining the matter in accordance with s 4(7) of PIE.

[30] Costs would, in the ordinary course, follow the result. However, in the present matter there can be little doubt that the respondent has throughout behaved in deplorable manner, and the applicant, although unsuccessful, has approached court for relief in good faith. In these circumstances it is appropriate that each party bears their own costs.

[31] **The following order is made:**

1. **The application is dismissed.**
2. **Each party shall bear their own costs.**

J I CLOETE

[17] See *inter alia Moela v Shoniwe* 2005 (4) SA 357 (SCA) at para [8].