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

Case number: 12205/2022

In the matter between:

W[…] M[…] R[…]	Applicant
and	
A[…] L[…] R[…]	First respondent
A[…] D[…]	Second respondent
THE MORAVIAN CHURCH OF SOUTH AFRICA	Third respondent
BERGRIVIER MUNICIPALITY	Fourth respondent

JUDGMENT DELIVERED ON 13 APRIL 2023

VAN ZYL AJ:

Introduction

1. This is an application in terms of section 4(1) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("PIE"). The applicant seeks the eviction of the first and second respondents from the property known as Erf 1[…] N[…], Goedverwacht, Western Cape ("the property").

2. The third and fourth respondents did not oppose the application, and no relief was sought against them. In what follows I shall thus refer to the first and second respondents collectively as "the respondents". The second respondent also did not

oppose the application but, on the first respondent's version, the second respondent is entitled to occupy the property because of her having given him consent to do so.

3. The section 4(2) notice was duly served on the respondents.

4. The grant or refusal of an application for eviction in terms of PIE (once the applicant's *locus standi* has been determined) is predicated on a threefold enquiry:

4.1 First, it is determined whether the occupier has any extant right in law to occupy the property, that is, is the occupier an unlawful occupier? If he or she has such a right, then the application must be refused.

4.2 Second, it is determined whether it is just and equitable that the occupier be evicted.

4.3 Third, and if it is held that it is just and equitable that the occupier be evicted, the terms and conditions of such eviction must be determined.[1]

The applicant's *locus standi*

5. The onus to prove *locus standi* for the institution of these proceedings is on the applicant.[2]

6. Section 4(1) of PIE provides 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 person in charge of land for the eviction of an unlawful occupier*". "Owner", insofar as is relevant, is defined in PIE as "*the registered owner of land*". "Person in charge", in turn, means "*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*".

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1 *Transcend Residential Property Fund Ltd v Mati and Others* 2018 (4) SA 515 (WCC) at para [3].

2 *Kommissaris van Binnelandse Inkomste v Van der Heever* 1999 (3) SA 1051 (SCA) at para [10].

7. Goedverwacht Village is a Moravian settlement located on private land which belongs to the third respondent ("the Church"). The property at the core of this dispute is situated in the Village, and thus belongs to the Church. Residents may occupy houses in the village but cannot obtain ownership of the land. All that may be purchased and sold is the structure erected on an erf, but not the erf itself. Although residents do not have ownership of their properties, they do have long-term rights to the use of land in the Village. Goedverwacht is administered as a private village in accordance with the Church's constitution, and is managed by the Overseers' Board ("die Opsienersraad"), associated with the Church. The Board is charged with the approval and revocation of the right of residence and the allocation of erven within the village.

8. In terms of the Church's constitution, each household must, save in exceptional circumstances, live in a separate dwelling.

9. The applicant is the holder of a perpetual right of *habitatio* granted to him by the Church. It is common cause that the applicant purchased the structure erected on Erf 1[…] and made application for the allocation of the erf to him so as to exercise his right of *habitatio* during 2007. He made substantial improvements to the property over the years. The first respondent states that she contributed to some of the improvements, but has not given any details in relation to these improvements.

10. Be that as it may, the applicant's *locus standi* to bring this application is clear. He is the "*person in charge*" as contemplated by section 1, read with section 4(1), of PIE.

<u>The respondents are unlawful occupiers</u>

11. Coupled with the first issue (as is clear from section 4(1)) is whether the respondents are in fact "unlawful occupiers" in terms of PIE, in other words, persons "*who occup[y] 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, …"*

12. In *Wormald NO and others v Kambule*[3] the Supreme Court of Appeal held at para [11] that an "*owner is in law entitled to possession of his or her property and to an ejectment order against a person who unlawfully occupies the property except if that right is limited by the Constitution, another statute, a contract or on some or other legal basis. Brisley v Drotsky 2002 (4) SA 1 (SCA) …. In terms of s 26(3) of the Constitution, from which PIE partly derives (Cape Killarney Property Investments (Pty) Ltd v Mahamba and Others 2001 (4) SA 1222 (SCA) … at 1229E ..), 'no one may be evicted from their home without an order of court made after consideration of all the relevant circumstances'. PIE therefore requires a party seeking to evict another from land to prove not only that he or she owns such land and that the other party occupies it unlawfully, but also that he or she has complied with the procedural provisions and that on a consideration of all the relevant circumstances (and, according to the Brisley case, to qualify as relevant the circumstances must be legally relevant), an eviction order is 'just and equitable'*."

13. The applicant and the first respondent were previously married. Their marriage was terminated by divorce on 12 December 2019. The divorce settlement agreement, the terms of which were incorporated in the decree of divorce, includes the following in clause 5:

> *"5.3 The Plaintiff utilized his right of habitatio to lease the property from the Moravian Church, Goedverwacht and as such will retain his right of habitatio to continue to lease the property from the Moravian Church, Goeverwacht.*
>
> *5.4 The Defendant will have no further claims against the Plaintiff in respect of the immovable property.*"

14. It is clear from this provision that the right to reside in the property was awarded to the applicant by agreement between the parties, and confirmed by the order of divorce. The first respondent has, because of the order, no right to reside in the property.

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3 2006 (3) SA 563 (SCA).

15. Despite their divorce, the parties continued to cohabitate the property. According to the applicant, the parties orally agreed after their divorce that the first respondent could continue to reside in the property until such time as their (then) minor daughter had completed her matric examinations. Given that their daughter is now in her twenties and has long since completed the matric examinations, the applicant contends that the first respondent's right to occupy the property has lapsed.

16. The position was thus that the first respondent occupied the property with the applicant's consent, subject thereto that such consent would be revoked once the parties' daughter had completed her matric examinations. The consent was granted subject to a resolutive condition. The condition (the completion of the daughter's matric examinations) has been fulfilled, and the informal agreement reached between the parties has fallen away.[4]

17. The first respondent denies the existence of the agreement. She states that the parties ignored the provisions of the clause 5 because she had not agreed to vacate the property. This is also the reason why the parties had deleted clause 11 form the settlement agreement, which clause provided the first respondent with five months within which to vacate the property after the date of divorce. This allegation is, however, in direct contradiction to the specific provisions of the decree of divorce, which have not been challenged. It is in any event improbable given the fact of the parties' divorce.

18. When one has regard to the relevant clauses of the Church's constitution and the correspondence filed of record, it is clear that an inhabitant of the Village over the age of 21 years is entitled to a right of *habitatio* which may be exercised over a property allocated to the inhabitant by the Overseers' Board. In the present case, the applicant was allocated Erf 1[…] in the exercise of his own right of *habitatio*. The first respondent was, as a result of the parties' marriage at the time, entitled to occupy the property with him. She did not at that stage exercise her own right

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4 *Amoretti v Tuckers Land and Development Corporation (Pty) Ltd* 1980 (2) SA 330 (W) at 332H-333B.

arising from her status as an inhabitant of the Village over the age of 21 years. As the Church puts it (I translate from the original Afrikaans): "*The Overseers' Borad confirms that [the applicant] already exercised his right to habitation and that he does not claim a right in relation to any other erf. We confirm further that [the first respondent] still has a right of habitation and may therefore make application for an erf*".

19. The Church further confirms that it is not satisfied with the current co-habitation of the parties, who are by reason of the divorce no longer regarded as one "household" as contemplated in the constitution.

20. Despite several written demands, the first respondent refuses to vacate and continues to occupy the property. The second respondent, who is the first respondent's adult son from a previous relationship, also resides at the property. The applicant avers that the second respondent never had the applicant's consent to reside at the property. This is not disputed.

21. The first respondent's defence is that the original right to "purchase" the property in 2007 from the previous "owner" in fact vested in her, but that it was concluded in the applicant's name due the patriarchal system of the Church which the first respondent deems to be unconstitutional. There is, however, no constitutional attack on the system employed by the Church before this Court for consideration. All the first respondent states in this regard is that it "*cannot be said that the termination of a marital relationship can end the right of a person who enjoyed rights of habitation in respect of specific property for 12 (twelve) years. This is in itself an unfair practice and goes against the right to adequate housing enshrined in the Constitution …*"

22. Even should one notionally accept the first respondent's version that she was destined to be the holder of the rights to the property, this has since been overtaken by the provisions of the decree of divorce, which specifically ordered that, by agreement between the parties, the applicant would retain sole possession of the property. If one were therefore to construe the first respondent's version as a lawful

defence to the application, it would have the effect of ignoring the unequivocal provisions of a court order. A court order cannot be treated as a *brutum fulmen*.

23. The first respondent enjoyed the benefit of legal representation when the divorce settlement was concluded. If the divorce settlement did contain an error in relation to the allocation of the property to the applicant, one would have expected the first respondent to have long since applied for its amendment or rectification. No such an application was ever launched in the more than three years since the divorce order was granted.

24. I agree with the submission made on the applicant's behalf that the first respondent's version is also flawed in logic. She concedes that it is untenable for them as divorcees to co-habit, given the many domestic disputes between them (she even alleges that she had to apply for a protection order against him), yet does not recognise the inherent contradiction by refusing to vacate the property. If this application is not granted, then the parties will potentially have to continue their co-habitation in perpetuity in conflict with the court order. It is an untenable situation.

25. Insofar as the first respondent is relying on the alleged improvements she had effected to the property, I have already mentioned that she has not specified the nature or quantified the costs of the improvements. A person relying on a lien must provide the actual expenses she had incurred and prove the extent of the other person's enrichment. Moreover, a lien does not entitle the possessor to use the property which is the subject of the lien.[5] Any reliance on a lien as a basis for the continuation of her occupation is thus without merit.

26. The first respondent has also not instituted a claim for reimbursement of the costs of the alleged improvements. Even if such a course of action were open to her such claim has probably prescribed by this time. Her version is, in any event, contradicted by the provisions of the divorce settlement agreement.

27. The second respondent did not oppose the application. The first respondent

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5 Harms *Amler's Precedents of Pleadings* (8ed) at page 249.

states that she had given him permission to occupy the property. It follows that, if the first respondent's occupation is unlawful, then the second respondent's is too.

28. In all of these circumstances, I agree with the applicant's submission that no valid defence to the eviction application has been raised, and that the respondents' occupation of the property is unlawful. They are unlawful occupiers as contemplated in PIE.

Alternative housing and a just and equitable order

29. Section 4(8) of PIE provides that if *"the court is satisfied that all the requirements of this section have 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 vacate the land under the circumstances; and (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)*".

30. Although the Courts, in determining whether to grant an eviction order, must exercise a discretion based on what is just and equitable, and although special consideration must be given to the rights and needs of vulnerable occupants, this cannot operate to deprive a private owner of its property arbitrarily or indefinitely. If it did, it would mean that occupants are recognised as having stronger title to the property, despite the unlawfulness of their conduct. An owner would in effect be deprived of his property by a disguised form of expropriation.[6]

31. In the context of a private landowner, the focus should rather be on the date of eviction, as opposed to whether the unlawful occupiers should be evicted.[7]

32. The Bergrivier Municipality has delivered a housing report setting out, in detail, the manner in which housing issues are dealt with within its jurisdiction, as well as the availability of emergency accommodation. It has indicated that it has no

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6 *Mainik CC v Ntuli and others* [2005] ZAKZHC 10 (25 August 2005).

7 *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 (6) SA 294 (SCA) at para [20].

land available for the respondents, not only because there is in fact not any land available for the purpose, but also because the first respondent is not registered in the National Housing database. It refers, too, to the fact that the first respondent can apply to the Church for the provision of land.

33. The respondents do not say what steps they have taken to source or investigate the availability of alternative accommodation. The first respondent's affidavit is replete with bare denials. She puts the applicant "to the proof" of her personal circumstances, even though those circumstances obviously fall within her own knowledge. Denials of this nature does not meet the criteria of the relevant case law on this aspect.

34. In *Wightman t/a JW Construction v Headfour (Pty) Ltd*[8] the Supreme Court of Appeal held as follows in relation to this manner of pleading:

> "*A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied…. when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect*

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8 2008 (3) SA 371 (SCA) at para [13].

such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter."

35. In *Patel N.O. And Others v Mayekiso and others*[9] the Court recognised the obligation of an occupier alleging potential homelessness, and by extension any further prejudice, to place the necessary information before the Court: "*But the Mayekisos have not attempted to show how their eviction would render them homeless save to say that all the assets were tied up in the insolvent estate. This is not sufficient. What they had to show was how they have tried and failed to find alternative accommodation within their available resources*."

36. The first respondent is, in any event, in a different position than many unlawful occupiers who are destitute. There is alternative accommodation available to her in Goedverwacht, but the first respondent does not wish to move to such accommodation because it is not up to her standard. In addition, her mother lives in the Village. The first respondent does not explain why she cannot reside with her mother.

37. The Constitutional Court has recently confirmed that a private owner has no obligation to provide free housing and, although one has a constitutional right to housing, this right does not afford an unlawful occupier the right to choose where she wants to live.[10]

38. The Church itself has indicated that the first respondent has a right of *habitatio* in the Village and may therefore apply for the allocation of a plot to her. The first respondent is thus entitled to her own accommodation in Goedverwacht. All she has to do is to apply for it in accordance with the Church's constitution. She will be entitled to consent to the second respondent, her son, residing with her. She is, moreover, employed as a manager at Foschini and is earning about R14 000,00

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9 WCC 3680/2016, delivered on 23 September 2016 at para [33]. See also *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and others* 2001 (4) SA 759 (E) at 770C-F.

10 *Grobler v Phillips and others* 2023 (1) SA 321 (CC) at para [36].

per month.

39. The first respondent also received the sum of R794 369,10 as part of the divorce settlement three years ago. Although she denies that she has been paid the full amount, there is no explanation as to why any outstanding funds have not been claimed from the applicant. She retained the full benefit of her share dividend pay-outs which she received after her resignation from her previous employer, Mr Price. Although the applicant was entitled to half of the share dividend pay-out, he forewent his claim as a compromise in the settlement agreement in exchange for sole rights to the property. This appears from clause 7 of the divorce settlement agreement.

40. It can, in these circumstances, not seriously be contended that the respondents would be rendered homeless should an eviction order be granted in this matter. The first respondent's version is untenable on the papers.

The applications for postponement

41. It is necessary to record the manner in which the respondents' case was conducted shortly prior to and at the hearing of the application. Legal Aid South Africa, having initially assisted the respondents, gave notice of its withdrawal as attorneys of record in a notice formally delivered on 24 February 2023, three days before the hearing. On the same day, another firm of attorneys came on record. The attorneys did not contact the Court to inform it of the respondents' intentions as regard the hearing.

42. I pause to mention that the respondents had previously been dilatory in the delivery of their answering affidavit. A chamber book application to compel the delivery of papers was required to progress the application towards a hearing.

43. In any event, on the day of the hearing (Monday, 27 February 2023) the Court was met with an oral application for postponement made from the Bar. I was not inclined to grant a postponement, given that the papers are short and the issues

in dispute straightforward. The respondents had been aware of the date of set-down well in advance. I was, however, persuaded to postpone the application to a day later in the week (to the afternoon of Thursday, 2 March 2023), so as to enable counsel who appeared on the respondents' behalf and who indicated that he would be available to deal with the matter, to prepare for argument.

44. On 2 March 2023 the respondents' attorney appeared, informing the Court (again without any forewarning either to the Court or to the applicant's representatives) that counsel had to attend to another matter that day. No explanation was given for the impermissible double-booking. A further postponement was accordingly sought for the purposes of appointing new counsel. Given the pattern that had started to emerge, I refused a postponement, but stood the matter down until the next day. I warned the respondents' attorney that he should be in a position to make submissions on the merits in the event of counsel not having been appointed by the time of the hearing.

45. As things turned out, no counsel appeared for the respondents the next day. Their attorney was in court, but was not prepared to make any submissions on the merits. He mentioned, for the first time, that the first respondent wished to change or elaborate on some of the evidence contained in her answering affidavit, and that the Court's attitude in refusing a postponement was prejudicing the respondents' case. At this time, not only was there no application for postponement before the Court, but also no application for leave to submit additional evidence. There was, in fact, no explanation as to why (or contrition for the fact that) the attorneys had not done any substantial work in relation to the application up to that stage; when they accepted the brief they were undoubtedly aware of the court date. I was not inclined to grant a further postponement *mero motu*.

46. I accordingly heard the matter on the basis of the papers filed of record by both parties and the submissions made on the merits by the applicant's counsel.

Conclusion

47. In all of these circumstances, I am satisfied that a proper case has been made out for the relief sought. Given the parties' particular circumstances, and to allow for sufficient time for the first respondent to make application for the allocation of an erf to her by the Church, I intend granting a lengthier period for the vacation of the property than would normally be the case.

Costs

48. The party who succeeds should generally be awarded costs. There is no reason to depart from the general rule in the present matter.

Order

49. In the premises, it is ordered as follows:

(a) The first and second respondents and all those occupying through them ("the occupiers") are ordered to vacate the immovable property situated at Erf 1[…], Goedverwacht, Western Cape, by no later than Friday, 30 June 2023.

(b) Should the occupiers fail to vacate the property by the date set out in paragraph (a), the Sheriff of this Court or the Sheriff of the Magistrate's Court or their deputies are authorized and directed to evict the occupiers by Monday, 3 July 2023.

(c) The first and second respondents are to pay the costs of this application jointly and severally, the one paying, the other to be absolved.

P. S. VAN ZYL
Acting judge of the High Court

Appearances:

For the applicant: J. P. Steenkamp.
Instructed by Kemp & Associates

For the respondent: M. Nompandana,
Instructed by De Wee & Associates