6 March 2008
Not reportable

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(1) RAPPORTEERBAAR: JA/NEE.
(2) VAN BELANG VIR ANDER REGTERS: JA/NEE.
(3) HERSIEN.
6/3/2008
DATUM HANDTEKENING

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: 6263/2008

In the matter between:

FREDRIC MERCIA BLAKE

Applicant

And

ZELDA BUITENDAG

1ST Respondent

ALBERTS BUITENDAG

2ND Respondent

And/or other persons occupying or residing on the property together with, alternatively in association with the respondent, alternatively illegal occupants of the immovable property situated at 791 B Wistaria Street, Marble Hall

And

THE GREATER MARBLE HALL DISTRICT MUNICIPALITY

3 RD Respondent

JUDGMENT

LEDWABA, J

[1] The applicant is the owner of property 791 B Wistoria Street Marble Hall in the Limpopo district (the property)and seeks an eviction order on urgent basis against the first and second respondents.

[2] On 12th February 2008 the court postponed this application to the 19th February 2008 and ordered that the applicant to comply with **Section 4(2) of the PIE Act 19 of 1998** (PIE) by serving the relevant notice on the respondents. Applicant complied with the court order.

[3] The first and second respondents filed opposing affidavits wherein they challenged the urgency and the merits of the application. There are some factual disputes about the details of the oral lease agreement between the parties. However, it is common cause between the parties it is alleged that in about September 2007 the applicant entered onto on oral lease agreement with the first and second respondents in terms whereof applicant leased to the first and second respondents the property. The rental agreed upon was R3 400 per month and the respondent had to pay a deposit of R3 500 in three monthly instalments.

[4] The applicant in her founding affidavit on paginated page 15 alleged that the further terms of their lease agreement were that:

"7.5 The deposit would under no circumstances be used as rent.

7.6 The first respondent would supply a list of faults within seven days from occupation of the immovable property.

7.7 The first respondent would be obliged to give thirty days written notice of cancellation of the lease agreement, the period of thirty days to run from the first day of the month subsequent to the month on which notice was given and similarly myself would be obliged to give thirty days notice of cancellation of the lease agreement as set out before."

[5] The first and second respondents in their opposing affidavits alleged that when the lease agreement was concluded the applicant gave them an option to buy the properly together with a property adjacent to it. She further agreed to repair the rented property as soon as possible and

should she fail to repair the house, the first and second respondents would be entitled to fix the damages and deduct the costs from the monthly rental.

[6] The applicant further alleged that after the first and second respondents were informed that the lease was cancelled they agreed to vacate the property on or before 31st January 2008 and she arranged for them alternative accommodation to rent with one Mr Stephen Pansegrouw. On the contrary, the first and second respondents denied that they agreed to vacate the property and furthermore stated that Mr. Pansegrouw's property was not suitable for their needs.

[7] The grounds of urgency set out in paragraphs 16-20 of the applicant's founding affidavit are the following:

"16. To date hereof the first respondent is in arrears with rent in the amount of R6 800 and only an amount of R1 133 was paid as a deposit. A schedule of the rental amounts payable and payments made by the first respondent is annexed hereto as annexure "H" for above honourable Court's attention, confirming same.

17. Due to the fact that the first respondent agreed to vacate the immovable property and relocate to the house of Pansegrouw in terms of a further lease agreement, a lease agreement was reached between myself and Mr and Mrs Steffen to lease the immovable property. Mr and Mrs Steffen are both pensioners.

18. They would have taken occupation of the immovable property on the 1st February 2008 and all arrangements were made in order to move into the immovable property.

19. Trailers were rented by Mr and Mrs Steffen in order to facilitate the move, and all their possessions have already been loaded by the time that the first respondent once again refused to vacate the

immovable property. The conduct of the respondents and persons residing in the immovable property resulted therein that they had no alternative but to cancel the move to the immovable property. The fact however, remains that, notwithstanding the cancellation, they still had to pay the costs of the move.

20. Due to the fact that the first respondent agreed that they would vacate the immovable property on the 31st January 2008, new tenants moved into the house that Mr and Mrs Steffen occupied previously. I was obliged to provide them with alternative accommodation at my own costs pending the finalisation of this application.

21. It is clear from annexure "G" hereto that the respondents and the persons occupying the immovable property with them now intends to occupy the immovable property at the expense of various people while refusing to pay the rent in terms of the agreement.

22. The first respondent in fact conveyed to me that I should feel free to launch an application for eviction against herself and the persons occupying the immovable property at present due to the fact that she has been through the whole exercise before and intends to oppose the application and therefore knows that such an application will take several months, if not longer, to finalize."

[8] The first and second respondents counsel Mr Ben Stoop argued eloquently that the application should be dismissed because applicant failed to satisfy the court that the aspects mentioned in **section 5(1) of PIE** were satisfied. **Section 5(1) of PIE** reads as follows:

*'**Urgent proceedings for eviction***

5. (1) Notwithstanding the provisions of section 4, the owner or person in charge of land may institute urgent proceedings for the eviction of an unlawful occupier of that land pending

the outcome of proceedings for a final order, and the court may grant such an order if it is satisfied that—

(a) there is a real and imminent danger of substantial injury or damage to any person or property if the unlawful occupier is not forthwith evicted from the land;

(b) the likely hardship to the owner or any other affected person if an order for eviction is not granted, exceeds the likely hardship to the unlawful occupier against whom the order is sought, if an order for eviction is granted; and

(c) there is no other effective remedy available.'

[9] Mr. P. de Klerk argued vigorously, on applicant's behalf, that the applicant's application is not brought in terms of **section 5(1) of PIE** but **section 4(1) of PIE** and **Rule 6(12) of the Uniform Rules**. He further referred the court to **FHP Management (Pty) Ltd v/s Theron and Another 2004 (3) SA 392,** the head-note on page 393 paragraph C-F reads as follows:

> "*In terms of s4(7) of the Prevention of Illegal Eviction from and Illegal Occupation of Land Act 19 of 1998 (PIE), read with s 26(3) of the Constitution of the Republic of South Africa Act 108 of 1996, it is not necessary for an applicant in proceedings to evict an unlawful occupier from such applicant's property, to place more before the court by way of evidence than that such applicant is the owner of the property in question and that the respondent is in unlawful occupation thereof. It is then up to the occupier to disclose to the court 'relevant circumstances' to show why the owner should not be granted an order for the eviction of the occupier. Unless the occupier opposes and discloses circumstances relevant to the eviction order; the owner; in principle, will be entitled to an order for eviction. 'Relevant circumstances' are nearly without fail within the exclusive*

knowledge of the occupier. It cannot be expected of an owner to negative in advance facts not known to him and not in issue between the parties."

[10] Mr de Klerk submitted that the first and second respondents should be evicted from the property because applicant had proved that she is the owner and that the respondents were in unlawful occupation because the lease agreement was lawfully cancelled.

[11] Despite the legal semantics used by Mr. de Klerk disputing that the application before me should not be adjudicated in terms of **section 5(1) of PIE,** it is clear that the applicant brought an urgent application for eviction and she seeks a final relief. Even if a final order is sought I do not see a reason why the provisions of **section 5(1) of PIE** should be disregarded. I have further noted what was said in **Ubunye Co-operative Housing (Association Incorporated under section 21 v Mbele and Others [2006] JOL 17317 (N)** when the court said:

"*Clearly modifications to the practice must be made. In making these changes one must not lose sight of the fact that in terms of Rule 6(12) of the Rules of Court an applicant is entitled to bring an urgent application in the sense that the forms and service laid down in Rule 6 can in certain circumstances be dispensed with. An applicant can make out a case for the time periods laid down in the Rules for the delivery of affidavits and the like to be abbreviated (see 5.1.3 of the Practice Rules of the Natal Provincial Division). In my opinion it is possible for an applicant in eviction proceedings as well to make out a case of urgency, for example, that the property in question is being damaged by the occupant and that there are therefore circumstances of urgency demanding his/her eviction. (This apart from the provisions of section 5 of PIE which envisages the obtaining of an urgent interim order for eviction). The bringing of an urgent application in these circumstances is in my opinion not inconsistent with section*

4 of PIE and the Cape Killarney judgement, supra. At page 1229 Brand JA envisaged that a case for urgency can be made out in terms of Rule 6(12)."

[12] The issue in the matter before me is not regarding the modification to be made to Form 2(a) of the first schedule.

[13] The first and second respondents stated that they parties specifically agreed with the applicant that they could reduce the rental with the amount that they incurred in repairing the damages. On the contrary, applicant denied that she undertook to repair any defects to the property and that she once told the respondents that they could phone a certain Mr. Andre Rhilling to repair the cupboards in the kitchen.

[14] In my view, between applicant and first and second respondents version, it cannot be determined on the papers which version should be acceptable as reflecting the proper terms of the lease agreement between the parties. Since, ownership of the property is not an issue, it is crucial to determine if on the papers, the applicant has succeeded in proving that the first and second respondents breached the contract, if the contract was properly cancelled and if the respondents occupation is unlawful.

[15] In paragraph 9 of applicant's founding affidavit the applicant made the following allegation:

"Notwithstanding the terms of the lease agreement, the first respondent failed and/or neglected to pay the full deposit and rent in terms of the lease agreement. Due to this fact, and on the 13th December 2007, notice was given to the first respondent of termination of the lease agreement between us and notice was given to the first respondent to vacate the immovable property by 31st of January 2008 at 12h00. A copy of such letter is annexed hereto as annexure "C" for above Honourable Court's attention."

[16] In paragraph 19.3 of the replying affidavit applicant contradicted what was stated in the founding affidavit and the following allegations were made:

"19.3 That in any event is not the reason why the notice annexed to my Founding Affidavit as Annexure "C" was given to the respondents. The reason therefore is that I had a lease agreement with the respondent on a month to month basis. The neighbours were complaining about the respondents, the garden was neglected by them and my husband and I were bitten twice by their dogs when we went to close the taps from my property which they were regularly using unlawfully as there is no fence between the two immovable properties. They also unilaterally decided not to pay any rent for the month of November 2007."

[17] Now applicant added various reasons why the agreement was cancelled. Respondents also gave various reasons why they are in lawful possession.

[18] In determining whether applicant made out a case of urgency under Rule 6(12), I will take into consideration that there is a dispute regarding the other terms of the lease agreement between the parties, that the applicant has an alternative claim for damages against the respondents and that the applicant has not, in my view, proved that she will suffer irrepararable harm if the final order is not granted on urgent basis.

[19]] In considering all the relevant facts, the fact that the applicant brought the application on urgent basis and the provisions of section 26 of the Constitution, I am of the view that it would not be just and equitable to make an order of eviction on urgent basis.

[20] **I therefore, make the following order:**

(i) Application is struck from the roll.

(ii) Applicant is ordered to pay respondents' costs.

A. P. LEDWABA
JUDGE OF THE HIGH COURT

Date of hearing: 21 February 2008
Counsel for Applicant: Advocate P. de Klerk
Instructed by: Roets & Van Rensburg Inc.
Counsel for First Respondent: Advocate B. Stoop
Instructed by: André Van Rensburg Incorporated