IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A3022/2019

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

..... 04/03/2021
.....

SIGNATURE **DATE**

In the matter between:

TROLLIP, ISMAIL BOETIE **Appellant**

and

DAVIS, CLARENCE DESMOND **First Respondent**

DAVIS, ADELINA CC **Second Respondent**

Eviction from residential housing dispute.

JUDGMENT

DE VILLIERS, AJ:

Introduction

[1] This is an appeal from the Magistrate's Court for Ekhurhuleni Central, held at Palmridge. On 31 May 2018 the learned magistrate Hlubi granted an order evicting the appellant and all those who occupy the property through him by no later than 31 August 2018; six months after the order. The Sheriff was authorised to evict the occupants from 7 September 2018. The property in issue is situated in Honda Street, Eden Park Extension 4, Alberton.

[2] The appellant avers that the learned magistrate erred in the application of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("*the PIE Act*"). A question in this appeal, addressed later herein, are the obligations of the parties to plead and prove a case that the eviction sought would have been or would not have been just and equitable in compliance with the PIE Act.

The PIE Act

[3] It was common cause in the appeal that the respondents had complied with the procedural requirements of sections 4(2) to 4(5) of the PIE Act and duly served a notice on the appellant advising the appellant of the proceedings. The appellant did not as a result thereof, seek to place on record matters pertaining to, for instance, his risk of homelessness. Such evidence as was presented on behalf of the appellant, was presented in affidavits in the eviction application, prepared by the appellant's lawyers.

[4] The appellant had been in occupation of the dwelling for more than six months, and as such under the PIE Act, the learned magistrate had to consider sections 4(7) to 4(9) of the PIE Act (underlining added):

> "*(7) If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings 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 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 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.*

> *(8)* *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-*
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> *(a)* *a just and equitable date on which the unlawful occupier must vacate the land under the circumstances; and*
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> *(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).*
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> *(9)* *In determining a just and equitable date contemplated in subsection (8), the court must have regard to all relevant factors, including the period the unlawful occupier and his or her family have resided on the land in question*."

[5] The learned magistrate had to address three matters:

[5.1] The first question is whether the appellant was a lawful or unlawful occupier of a property as contemplated in the PIE Act. In issue in this case was only the first part of the question, whether the appellant was in unlawful occupation;

[5.2] If the appellant was in unlawful occupation of the property, the next question is whether it would be just and equitable to evict the appellant and his family. The PIE Act lists some of the factors a court could consider. It is material at this leg of the inquiry to bear in mind that the respondents are private individuals and that it is the state that has a constitutional obligation to provide access to adequate housing. It is also at this point where the respondents' constitutional right to ownership must be considered; and

[5.3] If the appellant was in unlawful occupation and if it would be just and equitable to evict him and his family, the last question is when such an order must be given effect to.

Pleading and proving a case

[6] At the centre of this appeal is therefore once again the principles pertaining to the pleading and proving of a case in motion proceedings, and the unenviable position a magistrate finds her/himself in when having to decide a

matter that has been prepared inadequately. As these principles are trite, this judgment merely refers briefly to some of the leading cases on pleading and proving a case.

[7] The Constitutional Court stated in *Genesis Medical Aid Scheme v Registrar, Medical Schemes and Another* 2017 (6) SA 1 (CC) para 171 dealt with the obligation to make out a case in the affidavit itself (underlining added):

> "*[171] The fact that the second judgment got the point about the auditor's assurance report from an annexure to one of the affidavits and not from the respondents' answering affidavit raises the question whether it is permissible in our law to decide a matter on the basis of a point contained in, or based on, an annexure to an affidavit but which is not covered in the relevant affidavit. The answer is No. In Minister of Land Affairs and Agriculture v D & F Wevell Trust*[1] *the Supreme Court of Appeal said:*
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> > *'(T)he case argued before this court was not properly made out in answering affidavits deposed to by Andreas. The case that was made out, was conclusively refuted in the replying affidavits as I pointed out in paras [18] to [20] above. It is not proper for a party in motion proceedings to base an argument on passages in documents which have been annexed to the papers when the conclusions sought to be drawn from such passages have not been canvassed in the affidavits. The reason is manifest — the other party may well be prejudiced because evidence may have been available to it to refute the new case on the facts. The position is worse where the arguments are advanced for the first time on appeal. In motion proceedings, the affidavits constitute both the pleadings and the evidence: Transnet Ltd v Rubenstein [2006 (1) SA 591 (SCA)in para 28], and the issues and averments in support of the parties' cases should appear clearly therefrom. A party cannot be expected to trawl through lengthy annexures to the opponent's affidavit and to speculate on the possible relevance of facts therein contained. Trial by ambush cannot be permitted.'*[2] *[Own emphasis.]*
>
> *If a litigant is not permitted to engage in a trial by ambush, it follows that a court may also not do so*."

[8] See too the summary by the Supreme Court of Appeal in *MEC for Health, Gauteng v 3P Consulting (Pty) Ltd* 2012 (2) SA 542 (SCA) para 28 on the trite principles about pleading and proving a case. The Supreme Court of

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[1] "133 *Minister of Land Affairs v D & F Wevell Trust supra n105*", being a reference to *Minister of Land Affairs and Agriculture and Others v D & F Wevell Trust and Others* 2008 (2) SA 184 (SCA) para 17.
[2] "*134 Id para 43*".

Appeal approved the summary of the law in *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (T) at 323F to 324C and in *Prokureursorde van Transvaal v Kleynhans* 1995 (1) SA 839 (T) at 849B, including that this duty to plead and prove a case (or a defence), also applies to constitutional disputes (which would include the rights to property and housing as set out herein).

[9] Heher J in *National Director of Public Prosecutions v Phillips and Others* 2002 (4) SA 60 (W)[3] at para 36 stated (underlining added):

> "*[36] In motion proceedings the parties' affidavits constitute both their pleadings and their evidence. Triomf Kunsmis (Edms) Bpk v AE & CI Bpk en Andere 1984 (2) SA 261 (W) at 269; Johannesburg City Council v Bruma Thirty-Two (Pty) Ltd 1984 (4) SA 87 (T) at 92; Radebe and Others v Eastern Transvaal Development Board 1988 (2) SA 785 (A) at 793; Aetiology Today CC t/a Somerset Schools v Van Aswegen and Others 1992 (1) SA 807 (W) at 824; Commissioner of Customs and Excise v Bank of Lisbon International Ltd and Another 1994 (1) SA 205 (N) at 225; Prokureursorde van Transvaal v Kleynhans 1995 (1) SA 839 (T) at 848; International Executive Communications Ltd t/a Institute for International Research v Turnley and Another 1996 (3) SA 1043 (W) at 1050. There is no reason why that rule should be mitigated in the context of an application which relies upon the exercise of a statutory power. …*"

[10] One could add to "*the exercise of a statutory power*" the exercise of a statutory power such as the one under the PIE Act to order the eviction of an unlawful occupier. Once a case has been pleaded and proven properly, and factual disputes arise, onus in motion proceedings play less of a role in deciding matters on the affidavits themselves. This does not mean that onus plays no role; It is addressed next.

Establishing the facts and onus

[11] The relief sought and obtained before the learned magistrate was based on the respondents' ownership of the immovable property in issue. In essence, such an approach could only address the first of the three questions the

[3] Overturned on appeal but not on this summary of the law, see *National Director of Public Prosecutions v Phillips and Others* 2005 (5) SA 265 (SCA).

magistrate had to consider (lawful or unlawful occupation), but only if there is no other basis for occupation of the property.

[12] The bald reliance on ownership for an eviction order in the founding papers, met the test determined by the Supreme Court of Appeal in *Chetty v Naidoo* 1974 (3) SA 13 (A) for an eviction under the Common Law. In that case the owner sought to evict a tenant from a property and did not plead the lease agreement. The court held at 20A-E that this was sufficient, as the tenant had to establish the lease agreement (underlining added):

> "*The incidence of the burden of proof is a matter of substantive law (Tregea and Another v Godart and Another, 1939 AD 16 at p. 32), and in the present type of case it must be governed, primarily, by the legal concept of ownership. It may be difficult to define dominium comprehensively (cf. Johannesburg Municipal Council v Rand Townships Registrar and Others, 1910 T.S. 1314 at p. 1319), but there can be little doubt (despite some reservations expressed in Munsamy v Gengemma, 1954 (4) SA 468 (N) at pp. 470H - 471E) that one of its incidents is the right of exclusive possession of the res, with the necessary corollary that the owner may claim his property wherever found, from whomsoever holding it. It is inherent in the nature of ownership that possession of the res should normally be with the owner, and it follows that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner (e.g., a right of retention or a contractual right). The owner, in instituting a rei vindicatio, need, therefore, do no more than allege and prove that he is the owner and that the defendant is holding the res - the onus being on the defendant to allege and establish any right to continue to hold against the owner (cf. Jeena v Minister of Lands, 1955 (2) SA 380 (AD) at pp. 382E, 383). It appears to be immaterial whether, in stating his claim, the owner dubs the defendant's holding "unlawful" or "against his will" or leaves it unqualified (Krugersdorp Town Council v Fortuin, 1965 (2) SA 335 (T)). But if he goes beyond alleging merely his ownership and the defendant being in possession (whether unqualified or described as "unlawful" or "against his will"), other considerations come into play*."

[13] Since *Chetty*, the law has changed, as the PIE Act came into effect. Originally the question of an onus in obtaining an eviction under the PIE Act, was left open. See *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA) para 19 (underlining added):

> "*[19] Another material consideration is that of the evidential onus. Provided the procedural requirements have been met, the owner is entitled to approach the court on the basis of ownership and the respondent's unlawful occupation. 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 facts within the exclusive knowledge of the occupier and it cannot be expected of an owner to negative in advance facts not known to him and not in issue between the parties. Whether the ultimate onus will be on the owner or the occupier we need not now decide*."

[14] However, in *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others* 2012 (6) SA 294 (SCA) the Supreme Court of Appeal came to a different conclusion and found that the owner in fact bears an onus to address as best it can those facts that might be largely in the knowledge of the occupier as referred to in *Ndlovu* but which the court must consider (underlining added):

> "*Onus*
>
> *[28] The City submitted that it is the duty of the occupiers to place any necessary relevant information before the court. It contended that the common-law position, that an owner can rely simply on its ownership of the property and the occupation of the occupiers against its will, is applicable to applications governed by s 4(7) of PIE. It relied on the cases where it has been held that the landowner may allege only its ownership of the property and the fact of occupation in order to make out a case for an eviction order, to which the occupiers must respond and establish a right of occupation if they wish to prevent an order from being made.*[4] *It argued that the only effect of PIE was to overlay the common-law position with certain procedural requirements.*
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> *[29] This is not an issue that has been resolved in the cases and to some extent it has been obscured by cases in which a less conventional approach to the function of the court has been espoused. The enquiry into what is just and equitable requires the court to make a value judgment on the basis of all relevant facts. It can cause further evidence to be submitted where 'the evidence submitted by the parties leaves important questions of fact obscure, contested or uncertain'.*[5] *That may mean that 'technical questions relating to onus of proof should not play an unduly significant role'.*[6] *However, I do not think that means that the onus of proof can be disregarded. After all what is being sought from the court is an order that can be granted only if the court is satisfied that it is just and equitable that such an order be made. If, at the end of the day, it is left in doubt on that issue it must refuse an order. There is nothing in PIE that warrants the court maintaining litigation on foot until it feels itself able to resolve the conflicting interests of the landowner and the unlawful occupiers in a just and equitable manner.*

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[4] "*45 Chetty v Naidoo 1974 (3) SA 13 (A) approving the approach in Graham v Ridley 1931 TPD 476 at 479*."
[5] "46 Port Elizabeth Municipality, supra, para 32" being a refence to Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC)
[6] "47 Ibid"

> *[30] The implication of this is that, in the first instance, it is for the applicant to secure that the information placed before the court is sufficient, if unchallenged, to satisfy it that it would be just and equitable to grant an eviction order. Both the Constitution and PIE require that the court must take into account all relevant facts before granting an eviction order. Whilst in some cases it may suffice for an applicant to say that it is the owner and the respondent is in occupation, because those are the only relevant facts, in others it will not. One cannot simply transpose the former rules governing onus to a situation that is no longer governed only by the common law but has statutory expression. In a situation governed by s 4(7) of PIE, the applicant must show that it has complied with the notice requirements under s 4 and that the occupiers of the property are in unlawful occupation. On ordinary principles governing onus it also has to demonstrate that the circumstances render it just and equitable to grant the order it seeks. I see no reason to depart from this*. …"

[15] Although *Changing Tides* could foresee a case where it would be sufficient to state that someone is in unlawful occupation, the present matter is clearly not such a case. The appellant and his family reside in dwelling built on the property that was built by themselves (as will appear below). As reflected in *Changing Tides*, the Constitutional Court did indeed espouse "*a less conventional approach*" with regard to the role of a court in determining if it would be just and equitable to order an eviction under the PIE Act. This was done in *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 32,[7] and 36,[8] and later in *Occupiers, Berea v De Wet No and Another* 2017 (5) SA 346 (CC) para 47[9] and para 52.[10]

[16] This less conventional approach changed the role of the magistrate to one from mere adjudication to a more proactive one, to ensure that the correct facts are before the court before an eviction is ordered. In *Occupiers, Berea,* para 47 the court also makes the point that there is duty on the

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[7] *"… In securing the necessary information, the court would therefore be entitled to go beyond the facts established in the papers before it. Indeed, when the evidence submitted by the parties leaves important questions of fact obscure, contested or uncertain, the court might be obliged to procure ways of establishing the true state of affairs, so as to enable it properly to 'have regard' to relevant circumstances. 'Just and equitable'*".

[8] "*The court is thus called upon to go beyond its normal functions and to engage in active judicial management according to equitable principles of an ongoing, stressful and law-governed social process*. …"

[9] " … *It is a consideration of justice and equity in which the court is required and expected to take an active role*. …"

[10] " … *The just and equitable enquiry is an innovation under the Constitution and PIE, which requires the court to be proactive to establish the relevant facts*. …"

representatives of all parties, thus including legally represented occupiers, to place material facts before the court.[11] Accordingly, in a case where parties are legally represented, the more active role of a magistrate could be curtailed. In such a case, if the parties deliberately do not address material matters, they may have to face the consequences of a deliberate strategy and there would be no need for the magistrate to play an active role to discover facts deliberately concealed. Often, it would not be clear if a deliberate strategy of concealment is followed. In such a case, a magistrate may again be called upon to play a more active role.

The respondents' original case

[17] The founding affidavit was three pages long, and attached thereto was the respondents' title deed to the property. The alleged unlawful occupation of the property was pleaded tersely in the founding affidavit. The following were the only averments about three matters arising for decision by the magistrate, namely (a) the appellant's alleged unlawful occupancy, (b) why it would be just and equitable for the appellant to be evicted, and (c) to be evicted by a certain date (underlining added):

> "*7 Subsequent to taking transfer of the premises I requested first respondent on several occasions to vacate same but he refuses to do so."*

No primary facts pertaining to the demands made were pleaded, and if in writing, they were not proven. The number of and dates of demands were not pleaded. The dates may well have been material, as the first demand was allegedly made "*subsequent to taking transfer of the premises*", which might have been a long time ago. It was not explained how the appellant came to be in occupation of the property (even before transfer).

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[11] "… *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*. …"

"8 The premises is a dwelling as defined in Act 50 of 1999.[12]

9 First respondent occupies the premises without consent or any other right at law thereto and is in unlawful occupation thereof."

Here the suggestion is that at no stage was permission given for the occupation.]

"10 …

12 First respondent has wrongfully erected structures on the said erf without consent."

No details of the structures erected were pleaded, and no factual basis for a conclusion that the structures were wrongfully erected, was pleaded. The alleged wrongfulness could mean erection in breach of building regulations and/or erection without consent. A court should not have to speculate upon facts pleaded inexactly.

"13 …

14 First applicant and I are not aware of first respondents present personal legally relevant circumstances if any."

An inference from the founding papers is that as the appellant is named, he is not a stranger to the respondents. No version was pleaded as to how the respondents came to know the identity of the appellant so as to shed light on their alleged lack of knowledge of his personal circumstances. A suggestion is that the respondents knew him for some time before they launched the application. Nothing was pleaded about the identity of any other known occupants of the property or why the respondents did not know this fact. No version was pleaded about any attempts made by them to obtain the information. The statement "*First applicant and I are not aware of first respondents present personal legally relevant circumstances if any*" does not reveal if previously personal circumstances were known, or any circumstances not deemed legally relevant. The statement that the respondents "*are not aware of* (the appellant's) *present personal legally*

[12] The PIE Act applies as the eviction was sought from a "*building or structure*" as defined in section 1 of the PIE Act.

relevant circumstances if any" is insufficiently bald. The Supreme Court of Appeal in *Changing Tides* held in para 31 that:

> "… *most applicants for eviction orders governed by PIE will have at least some knowledge of the identity of the persons they wish to have evicted and their personal circumstances. They are obviously not required to go beyond what they know or what is reasonably ascertainable*."

The court in *Changing Tides* held in para 31 and 32 that the applicants for eviction must make enquiries, address how the occupation commenced, address how long the occupation has been, address why they delayed bringing the application, and address the risk of homelessness. The specific steps would be case dependent.

[18] If benevolently approached, one could add to the bald facts pleaded as consideration that it would be just and equitable to evict the appellant, two possible inferences:

[18.1] The respondents have a constitutional right to property.[13] There is obvious tension between the constitutional right to ownership and the constitutional right to housing (which includes the right to evictions being subject to a court considering all the relevant circumstances).[14] and

[18.2] The appellant must have had access at some stage to some financial resources to build unspecified structures on the property, however, structures that constitute a dwelling.

[19] The primary facts upon which such inferences could be drawn were not properly pleaded to alert the appellant to the case he had to meet. The founding papers also did not address any conclusion to be drawn from the date of purchase, the date of transfer, or the purchase price. Such facts were not alleged in the founding affidavit, despite readily apparent from the title deed attached thereto. If a court should have had regard thereto, despite the failure to plead such facts, it appears from the title deed that the respondents acquired the property in 1993 from the State, namely the Town Council of

[13] Section 25(1) of the Constitution.
[14] Section 26 of the Constitution.

Alberton, at a purchase price of only R7 137.60. The agreement of sale was concluded on 30 July 1991. The unanswered question is whether the respondents have at any stage taken actual possession of the property (such as by maintaining it), and whether they pay rates or other municipal charges in respect thereof.

[20] On appeal the respondents sought to argue a point about a condition in the title deed that gave a right of first refusal to the Town Council of Alberton. This case was not pleaded in the answering affidavit and as such stands to be rejected.

[21] On the pleaded facts, although a case was pleaded that the appellant was in unlawful occupation of the property, no case was pleaded or proven that eviction would be just and equitable. As such, viewed in isolation, default judgment could not and should not have been granted on the founding papers. The appellant did, however, not take this point.

The appellant's original case

[22] The answering affidavit, prepared by attorneys, is equally unhelpful. It is about four pages long and is terse. No real attempt was made to place the material facts before the court. The material parts of the answering affidavit read (the paragraphs were not properly numbered):

> "*It is denied that we are in unlawful occupation or that the applicant has a lawful basis to bring this application. I purchased this property lawfully from the First and Second Applicant. Find attached copy of the Deed of Sale Agreement mark as annexure (LWS 1)*";

These averments lack the obvious details about when, where, and represented by whom the agreement was concluded. Also lacking, are averments about compliance with the agreement, and the reason why the agreement itself would or did afford a right to lawful occupancy. The answering affidavit also does not set out a right to occupancy on some other basis, such as a lien. If a court should have regard to the attached sale agreement, it raises more questions. The sale agreement is undated. Reflected therein is that the sale price was R9 000.00, that occupation would be given only on transfer, that risk and benefit would pass only on transfer,

and that Wright Rose Innes, the seller's attorneys, would attend to transfer. The agreement has a non-variation-except-in-writing clause. Witnesses included J Allies and S Hopton - both signatures consist of legible writing.

> "*.... It is correct that I refuse to vacate the property because I bought the property and paid for it in full. I was unable to proceed with the transfer as the Applicants moved to Cape Town and could not be contacted to sign the transfer documents. Find attached letter from the conveyancer marked as annexure (LWS2]*";

These averments lack the obvious details about when, where, and how the payment or payments were made. The conveyancer is not identified. A letter by a third person constitutes inadmissible hearsay evidence, and the failure to prove the averments therein properly, was not explained. Indeed, attached to the affidavit is a letter, dated 7 April 2015, by Wright Rose Innes. If admissible, it reflects that the firm could not contact the first respondent to sign transfer documents, that the appellant (has informed them) that he has located the first respondent in Cape Town, that they would contact him to sign the transfer documents, and that they would apply for clearance figures from the Municipality. That was six years ago.

> "*Save to admit that a three bedroom house has been erected on the vacant land purchased from the Applicants; The First Respondent denies that it was erected without consent*."

Consistent with the trend throughout the various affidavits, these averments likewise lack the obvious details about when, where, and how the alleged consent was given.

[23] No attempt was made to plead and prove the personal circumstances of the appellant and any other occupants, or even to identify them in the answering affidavit. One could find that, based on the averments in the founding and answering affidavits, the appellant is in unlawful occupation of the property. On his own version he has no real right to the property, as he has not taken transfer. He has not pleaded or proven a case that he occupies the property with consent, and the document relied upon by him is to the effect that he is not entitled to occupation before transfer. This would have been a proper application of *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

[24] Such a finding of unlawful occupation may be incorrect, had the facts been pleaded properly, alternatively there clearly were additional facts available regarding the question of whether an eviction would be just and equitable. The existence of some of those facts appear from the record. In breach of the obligation on how to plead and prove a case, the answering affidavit contains additional annexures not referred to in the answering affidavit. The answering papers also did not address any conclusion to be drawn from these annexures thereto. If a court should have had regard thereto, despite the failure to plead such facts, it appears even more clearly that material facts have not been addressed in the answering affidavit. The annexures include:

[24.1] A number of receipts. The receipts are all difficult to read and of course mean nothing without an explanation in the answering affidavit. They include receipts from Wright Rose Innes from 19 December 1994 to 13 January 1995, Ranko Attorneys dated 18 May 2013, and a variety of over-the-counter receipt book receipts in the period 4 September 1994 to 1 August 2000. One cannot readily ascertain whether the respondents purportedly received these payments, save for one receipt that contains the first respondent's name. No confirmatory affidavits by Wright Rose Innes and Ranko Attorneys were produced. The alleged payments exceed the total purchase price by R1 500.00, paid over nine years, and no explanation is proffered therefore;

[24.2] Several photographs. They are probably intended to reflect the house the appellant avers he built. It is off course not a permissible manner to plead and prove such a fact. The photographs are of poor quality, but they reflect a formal, suburban home built with face brick, gutters, and a garden wall. It is a middleclass home, not a home that would have been built by someone in desperate financial position;

[24.3] A tax invoice of the municipality dated 18 April 2008. It reflects that the immovable property has no improvements.

The further affidavits and a report by the municipality

[25] A six-page replying affidavit followed, still not addressing material facts for a finding that the eviction order would meet justice and equity. In short, the material averments therein were:

[25.1] The respondents denied the sale agreement, and stated that it was fraudulent. In any event, had it been valid, (a) it gave no right to occupy to the appellant in its express terms, and (b) any right to claim transfer of the property, had it existed, allegedly has prescribed. The respondents accused the appellant of hijacking an unimproved stand;

[25.2] The respondents denied receiving any money from the appellant, denied the receipts, and stated that the receipts were fraudulent;

[25.3] The respondents denied having been represented by Wright Rose Innes or Ranko Attorneys, who purportedly gave receipts; and

[25.4] The respondents admit having resided in Cape Town "*for a while*", but give no details. They did not address the photographs attached to the answering affidavit.

[26] If indeed the property was sold to the appellant, the appellant paid the purchase price, and the appellant built the dwelling on the property, justice and equity may point away from an eviction order under the PIE Act, and from an eviction order for a long time. If one adds thereto alleged occupation by consent, this matter demanded a proper exchange of affidavits properly addressing the material facts, or an oral hearing, whatever the legal arguments on interpretation of the agreement and prescription (all of which, once properly pleaded, could be decided).

[27] The matter did not end here. The appellant delivered a further affidavit, in the normal course, impermissibly so. It is not clear that he obtained leave from the court to deliver the affidavit. He made the following additional statements:

[27.1] He alleged that the sale agreement was concluded in September 1994 with the respondents, but still gave no further details;

[27.2] He submitted (incorrectly in law) that he has a real right to the property having purchased it and that the respondents' rights to the property have prescribed;

[27.3] He alleged that the respondents verbally consented to his occupation, but still gave no further details;

[27.4] In a version that conflicts with his version that he admits demand and refusal to vacate, he alleged that he has been in occupation of the property "*for a period of almost 23 years without any person objecting*";

[27.5] He stated-

> "*It is my further submission that the First Applicant gave consent to my application to the Ekurhuleni Metropolitan Municipality for the municipality to provide water service and sanitation as well as electricity and at all material time the municipality bill was issued in my name and not in the name of the First and Second Applicant*";

There is a material difference between making a submission and alleging and proving facts. Again, the affidavit does not address the obvious required details of when, where, and how.

[27.6] He further stated-

> "*Save to admit that the First Respondent does have consent to occupy the premises and to erect a house thereon. The First Respondent has a real right in the said property and has paid the full purchased price to the First and Second Applicant*".

The purported admission is not an admission of any averment made by the respondents. In addition, as a matter of law, a real right does not arise prior to transfer of the property.

[28] The respondents did not object to the further affidavit, but then saw fit to deliver yet a further affidavit, normally inadmissible too. It is not clear that they too obtained leave from the court to deliver the affidavit. The above

further version by the appellant was denied and evidence was introduced in the form of two affidavits by the two signatories to the sale agreement to the effect that they deny their signatures on the sale agreement and knowledge of the sale. Added was this bald statement: *"Applicants did not know for how long first respondent has been in occupation of the property".*

[29] The appellant delivered a yet further affidavit. He sought to introduce two letters of demand dated 15 September 2014 and 13 October 2014 purportedly sent by the respondents. The letters are not common cause.

[30] A further material event occurred. The municipality delivered a report before the hearing. It reflected the following information about the municipality's investigation, matters that the parties ought to have addressed in affidavits:

[30.1] The appellant allegedly built a home with seven rooms on the property after 1993;

[30.2] The appellant allegedly was on sick leave due to a work injury and earned less than R3 500.00 per month;

[30.3] The appellant allegedly stays at the property with his wife and four children who, in December 2017, ranged in ages from a child attending creche to a scholar in grade nine;

[30.4] The municipality does not have readily available resources to accommodate the appellant and his family, even on a temporary basis.

[31] This report called for a response from the respondents, if the facts were disputed. None was delivered.

[32] On these facts, baldly pleaded as they were, there were factual disputes and no finding could be made, inter alia, that:

[32.1] The appellant had consent to occupy the property and build the dwelling, or not;

[32.2] The property was sold to the appellant, or not;

[32.3] That the purchase price for the property has been paid, or not;

[32.4] That the respondents demanded vacant occupation, or not;

[32.5] Eviction would negatively impact on the minor children, or not;

[32.6] If accommodation would be available to someone earning R3 500.00 per month, or not;

[32.7] If homelessness would follow upon an eviction, or not.

[33] These matters impact on the two-stage inquiry that the learned magistrate had to undertake after a finding that the occupation was unlawful. See *Changing Tides* para 25. In the absence of material facts, the learned magistrate could have dismissed the application as the respondents had failed to address the material facts upon which it would be just and equitable to order an eviction. Alternatively, in the light of the available evidence, he could have ordered the parties to deliver yet more affidavits (properly addressing the material facts), or could have referred the matter to oral evidence or to trial. If this was resisted by the respondents, he was duty bound to have refused the application. See *Occupiers, Berea* para 51, the following was said:

> "*In brief, where no information is available, or where only inadequate information is available, the court must decline to make an eviction order. The absence of information is an irrefutable confirmation of the fact that the court is not in a position to exercise this important jurisdiction*."

Judgment by the learned magistrate

[34] Instead, the learned magistrate determined the facts on probabilities and granted the eviction order based on erroneous reasoning. The learned magistrate reasoned as follows:

> "*Having considered the needs of the elderly, the contents of the Municipality Report as well as the personal circumstances of the respondent, the court also finds that the Defendant did not discharge the onus by not placing sufficient and relevant circumstances on record*."

[35] With respect, this is a wrong application of the law. The onus was on the then applicants (now the respondents on appeal), who failed to allege or prove essential or material facts to obtain an eviction order. The onus was not on the appellant. Having dealt with the matter from a wrong application of the law, no more need to be said about the learned magistrate's determination of factual disputes seemingly without applying *Plascon Evans*.

[36] A considerable amount of effort was spent in the papers before us to seek condonation for non-compliance with the rules of court. The appellant approached the matter with a lackadaisical approach to the obligations to prosecute an appeal, resonant of the way the appellant's affidavits were prepared. The appeal was noted late, security for costs was given late, the appeal record was in a state of disarray (three appeal records were delivered and the papers contain much duplication) and included even a transcription of argument. In this whole process the appellant in effect ignored numerous letters about these matters. What is glaringly missing is a statement by the appellant's attorney that takes accountability for the defective work. Under different circumstances the appeal may well have been held to have lapsed, at the prejudice of the appellant. The merits of the appeal however compel us to grant condonation despite these facts, and to take them into account in the costs order.

[37] Costs of the application for condonation ordinarily should follow the result. In this matter, that success is catered for in the costs order made in respect of the appeal.

[38] Accordingly, the eviction order stands to be set aside. The question is what relief should come in its place? Should this court refer the matter back to the magistrate with directions to the parties to supplement their affidavits to bring them in line with the authorities referred to herein? Such relief was granted in *inter alia* in *Petersen v Van Wieling and Others* [2019] ZAWCHC 70. The lapse of time, the improper manner in which the case has been presented, and the multitude of affidavits already delivered, point away from a referral back to the learned magistrate for yet more sets of affidavits. The finding in this matter is not a final determination of the parties' rights, and the

respondents would be entitled to bring an action or application for eviction properly pleading and proving their case. Once those facts are known, the magistrate would have the facts available to grant or refuse an eviction order.

[39] Costs of the appeal ordinarily should follow the result. Much of the costs were wasted costs caused by the appellant not properly prosecuting the appeal and by the application for condonation by the appellant. It seems to me that the appellant should be limited to a recovering 40% of the costs of the appeal.

[40] The position in which the learned magistrate found himself was also the result of both the respondents and the appellant not properly having placed material facts before the court. Under the circumstances no order as to costs would be appropriate.

[41] Accordingly, I propose that the following order be made:

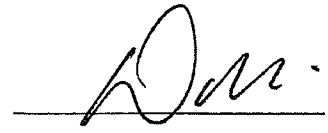
1. The appellant's application for condonation is granted and the appeal is reinstated;

2. The appeal is upheld;

3. The respondents are ordered to pay 40% of the costs of the appeal;

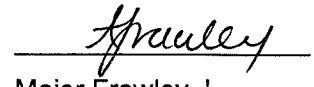
4. The order of the court *a quo* is set aside and replaced and substituted with the following Order:

"1. The application is dismissed."



DP de Villiers AJ

I agree. It is so ordered.



Maier Frawley J

Heard on: 18 January 2021

Delivered on: 4 March 2021 by uploading on CaseLines

On behalf of the Appellant:	Adv T Mosikili
Instructed by:	Molefe-Dlepu Attorneys
On behalf of the Respondents:	Mr B Shull
Instructed by:	Stabin Gross & Shull