IN THE HIGH COURT OF SOUTH AFRICA /ES

(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NO: 10499/2004

DATE: 22/4/2010

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/~~NO~~.

(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~.

(3) REVISED.

22 April 2010
DATE

SIGNATURE

IN THE MATTER BETWEEN

JACOBUS MARTHINUS OELOFSEN N.O.	APPLICANT
AND	
EMILY BHACILE GWEBU	1ST RESPONDENT
WALTER SENOKO	2ND RESPONDENT
MASTER OF THE HIGH COURT	3RD RESPONDENT

JUDGMENT

POSWA, J

BACKGROUND

[1] The applicant is a trustee of the insolvent estate of the first respondent, who is married, by customary law, to the second respondent. The first and second respondents are business people. The applicant seeks to evict the first and second respondents and all parties occupying through them out of the property situated in Nelspruit, it being part of the first respondent's insolvent estate. It is common

cause that the first and second respondents, their children and another family member occupied the premises.

[2] In opposing the application, the respondents aver that the property is still registered in the name of the first respondent and that, accordingly, the respondents are entitled to continue in occupation thereof. They also aver that the second respondent is unable to provide suitable alternative accommodation for himself, the first respondent and the others mentioned, due to his unhealthy financial situation.

[3] The applicant submits that it is just and equitable that an eviction order be granted, the respondents' contentions notwithstanding. In paragraph 13, more pertinently subparagraphs 13.1 to 13.17, the applicant details reasons for his submissions. It is, in my view, not necessary to restate these reasons in this judgment. Suffice it to say that, for those reasons, the applicant prays that an order be granted in terms of the notice of motion.

[4] The application is based on the provisions of the Prevention of Illegal Eviction from and Unlawful 0ccupation of Land Act, No 19 of 1998 ("PIE"), to which I shall return shortly in the judgment.

[5] It is common cause that the respondents have resided on the property far in excess of a period of six months. That, therefore, qualifies the application to be dealt with in terms of the provisions of s 4(7), which reads as follows:

> "***4. Eviction of unlawful occupiers.*** *- (1) Notwithstanding 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. ...*
>
> *(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 (**sic**) 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.*"

[6] This matter has an unfortunate history of delays. Some of the delays were due to the usual mistake made by legal representatives when estimating the duration of their matters, which often results in inadequate time being allocated. Mr M P van der Merwe, who initially represented the applicant, spent the entire allocated time for addresses for the respective parties arguing, on the applicant's behalf. He

addressed the Court for the entire day, from morning to close of day. Costs for that day were specifically reserved, in view of the fact that the applicant, through Mr Van der Merwe, had introduced, for the first time, the transcript of some *ex parte* proceedings between the parties submitting that they were of crucial relevance to the making of a decision in the present matter. Ms 0mar did not object to the introduction of that transcript in evidence.

17 0ther delays were in consequence of misunderstanding or disagreement as to what the next step would be when the matter resumed after a postponement and, which is part of the same question, what precisely had been achieved at the previous hearing. The Court, although unavoidably so, also contributed towards these regrettable delays. It is not advisable, for purposes of this judgment and in the light of the need to produce it as expeditiously as possible, to dwell on the causes of these regrettable delays. It must also pertinently be mentioned that the fact that a different legal representative, on behalf of the respondents, took over from another, of the same firm of attorneys, who had initially conducted the proceedings on behalf of the respondents, added substantially to the delay during the proceedings. I refer to Mr 0mar, who took over from Ms Y 0mar. It became evident that Mr 0mar had not had ample time to acquaint himself with all that Ms 0mar had done during the initial cession of the hearing of the application. Consequently, he brought up new submissions which could not, in the interest of justice, be dismissed on the basis that they had not initially been raised by

Ms 0mar. They were foreshadowed in, or were not inconsistent with, the respondents' answering affidavit.

[8] It is common cause that the first respondent and the other occupants mentioned above, excluding the second respondent, have resided at the property, 18 Von Braun Street, Nelspruit, since about 1997. It is also common cause that, on or about 4 November, 2002, the applicant attempted to sell the property. According to the applicant, the sale was intended to raise funds for the benefit of the insolvent estate's creditors. The applicant submits that he gave the first respondent notice, on 26 September, 2002, to vacate the premises by 31 0ctober, 2002. He noticed, on about 29 0ctober, 2002, that the first respondent and the other occupants were making no efforts to vacate the premises as notified.

[9] In paragraph 10 of his founding affidavit, the applicant details the various steps he took thereafter, through his legal representatives, to see to it that the first respondent and the other occupants of the premises left by 31 0ctober, 2002. It should be pointed out that, according to the applicant, the second respondent was also resident on the property. Although he has not given his place of residence (in paragraph 3 of the respondents' answering affidavit), the second respondent, speaking as deponent to the first and second respondents' answering affidavit, denies that he was residing on the property. That notwithstanding, the second respondent admits having resided on the property at some stage prior to

the commencement of the application. In subparagraph 8(4) of the answering affidavit the following is stated:

> *"Several days after the 26th September 2002, First Respondent and I approached members of our family and friends and enquired whether they were able to provide us with accommodation. None of our family members or friends were able to provide accommodation that will house First Respondent, Mrs Mirriam Nkwane, our minor children* ***and I as a family****. The alternative would be for my family and I* ***to be separated from each other*** *which should be harmful especially as my minor children are of tender age. I have recently enquired from members of my family whether they have suitable alternative accommodation to accommodate me. Members of my family have been unable to do so"* (emphasis added).

[10] It makes no difference, in my view, whether the second respondent also resided on the premises or not, for purposes of this judgment. What is clear from the answering affidavit is that it is alleged that the respondents could not obtain alternative accommodation, an allegation that is strongly disputed by the applicant. Presently, I am of the view that it is not necessary for me to resolve that dispute, for purposes of this judgment. The gravamen of the case is that the respondents, whether they include or exclude the second respondent, did not vacate the premises as required by the applicant. They, thus, ostensibly, became illegal occupants of the property, hence the applicant's current application.

[11] When the application resumed, more than two years later, Mr 0mar, as I have already stated, replaced Ms 0mar as the respondents' legal representative.

[12] Mr 0mar raised two points *in limine*, on the respondents' behalf. The first point *in limine* was the applicant's alleged non-compliance with s 4(2) of PIE, which reads thus:

> *"(2) At least 14 days before the hearing of the proceedings contemplated in subsection (1) [an application for the eviction of an unlawful occupier], the* ***Court*** *must serve written and* ***effective notice*** *of the proceedings on the unlawful occupier and the municipality having jurisdiction*" (emphasis added).

It transpired, during the hearing that the applicant had already obtained permission, from this Court, during an *ex parte* application by him, in terms of s 4(1) of PIE, for the eviction of the respondents. Neither party had annexed papers in respect of such application, not even as much as the order made therein. It was whilst Mr 0mar was on his feet, addressing the Court on the first point *in limine*, that he was handed a copy of that order, by Mr Van der Merwe.

[13] Nothing turns on the handing of such copy to Mr 0mar only at that stage, in my view. He, after all, should have obtained a copy thereof prior to addressing the Court on an aspect that would necessitate reference to it. That order was made by SALDUKA, AJ, as she then was, on 18 December, 2004. It was on the basis of that order that the applicant commenced the current eviction proceedings against

the respondents. The order in question was made under case no 33015/2004, whereas the current proceedings are under case no 10499/2004. From the citations, it is quite evident that the parties concerned in the two applications, whilst under two different case numbers, are the very parties before this Court in the present application. The substance of the order is also in respect of the issue before this Court.

[14] Although the application in respect whereof SALDUKA, AJ made her order directing service of the notice to the respondents and the local municipality is under a different case number, the former application is specifically mentioned in the current application, with the order therein being attached to the current notice of motion. In my view, the applicant complied with the requirements of s 4(1), (2) and (3) of PIE, with regard to the need to first obtain authorisation from the Court before proceeding to have the notice served to the respondents and the local municipality. The first point *in limine* is, therefore, dismissed.

[15] The second point *in limine* related to the notice, as per SALDUKA, AJ's order being only in Afrikaans. Mr 0mar submitted that it was imperative that the notice be in Afrikaans and English. He was unable to furnish authority for that submission and eventually abandoned it.

[16] After both parties had addressed me, I raised with them the question as to whether the applicant should not have cited the local municipality, apart from the s 4(2)

notice served on it. The Court's request for such submissions was based on the provisions of s 7 of PIE. It reads thus:

> "***7. Mediation.*** *– (1) If the municipality in whose area of jurisdiction the land in question is situated is not the owner of the land the municipality* ***may****, on the conditions that it may determine, appoint one or more persons with expertise in* ***dispute resolution*** *to facilitate meetings of interested parties and* ***to attempt to mediate and settle any dispute*** *in terms of this Act: Provided that the parties may at any time, by agreement, appoint another person to facilitate meetings or mediate a dispute, on the conditions that the municipality may determine.*
>
> *(2) If the municipality in whose area of jurisdiction the land in question is situated is the owner of the land in question, the member of the Executive Council designated by the Premier of the province concerned, or his or her nominee,* ***may****, on the conditions that he or she may determine, appoint one or more persons with expertise in* ***dispute resolution*** *to facilitate meetings of interested parties and* ***to attempt to mediate and settle any dispute*** *in terms of this Act: Provided that the parties may at any time, by agreement, appoint another person to facilitate meetings or mediate a dispute, on the conditions that the said member of the Executive Council may determine.*
>
> *(3) Any party may request the municipality to appoint one or more persons in terms of sub`sections (1) and (2), for the purposes of those subsections.*

(4) A person appointed in terms of subsection (1) or (2) who is not in the full-time service of the State may be paid the remuneration and allowances that may be determined by the body or official who appointed that person for services performed by him or her.

(5) All discussions, disclosures and submissions which take place or are made during the mediation process shall be privileged, unless the parties agree to the contrary." (Emphasis added.)

It is s 7(1) that is applicable in the present application, because the local municipality is not the owner of the land in question. It is evident from the heading of s 7 that the legislature introduced "*mediation*" as an option for settling disputes in cases of eviction of unlawful occupiers.

[17] In his heads of argument, Mr Omar submitted that the local municipality should have been joined as "*a necessary party*" in the manner contemplated in, *inter alia*, ***Amalgamated*** *Engineering v Minister of Labour* 1949 (3) SA 637 (A). FAGAN, AJA, stated the position as follows, at 659:

"*Indeed it seems clear to me that the Court has consistently refrained from dealing with issues in which a third party may have a direct and substantial interest without either having that party joined in the suit or, if the circumstances of the case admit of such a course, taking other adequate steps to ensure that its judgment will not prejudicially affect that party's interests.*"

Mr 0mar did not deal, pertinently, with s 7 of PIE. He submitted that a local municipality, as an organ of State, has a constitutional obligation to give proper content to the foundational values of the Constitution of the Republic of South Africa, 1996 ("the Constitution") and the Bill of Rights contained therein, more specifically s 26(3) of the Constitution. (See *Ritama Investments and Three 0thers v Unlawful 0ccupiers of Erf 62 Wynberg and Four 0thers* – TPD, case No 2005/30782, an unreported judgment, at page 8.)

[18] In his heads of argument, Mr Leathern responded to this submission as follows:

> "*5.1.2 It is denied that the municipality has a direct and substantial interest in the order made by the Court. Absolutely nothing is set out to indicate what such substantial interest would be or why the granting of such an order would effect* ***(sic)*** *any rights of the municipality.*"

Mr Leathern went further to submit as follows in paragraphs 5.2.2 and 5.2.3 of his heads of argument:

> "*5.2.2 The fact that the PIE Act and in particular sections 4(6) and 4(7) enjoin the Court to consider all the relevant circumstances before granting an order of eviction does not place any obligation on the municipality to be a party to the application or any obligation on the Applicant to make the municipality a party to the application.*

5.2.3 It is significant that the legislature chose not to place any obligation on the municipality to either report where the provisions of Section 4(7) of the Act are applicable or at all."

Mr Leathern submitted that no obligation exists, in PIE, on a municipality to report anything whatsoever to the Court.

[12] Mr Leathern pertinently dealt with the provisions of s 7 of PIE. He discussed, in detail, the case of *Cashbuild (SA) (Pty) Ltd v Scott and 0thers* 2007(1) SA 332 (T). It is my judgment. He submitted that *Cashbuild* is distinguishable on the basis that, *inter alia*:

"In the present instance it is quite clear that there is a dispute between the parties which dispute could not be resolved by the municipality, such dispute only having been fully ventilated in an application which has run since 2004 but which was previously ventilated in an application launched in 2002."

He further submitted that, in any event, *Cashbuild* is incorrect. Firstly, he disagrees with what is stated in paragraphs [24] and [25], at 339C-F. Those paragraphs read thus:

"[24] Section 7(1) clearly contemplates the existence of a 'dispute' which a municipality ***must attempt*** *to mediate and settle. In the manner in which the subsection is worded, it might appear as though the municipality has an option whether or not 'to attempt to mediate*

and settle any dispute' that it finds to be in existence. The relevant portion reads:

> *'(T)he municipality then ... **may**, on the conditions that it may determine, appoint one or more persons with expertise in dispute resolution to facilitate meetings of interested parties and attempt to mediate and settle any dispute in terms of this Act.' (Emphasis added.)*

[25] ***It appear to me unlikely that the legislature would have intended to give a municipality in whose area of jurisdiction there is a dispute between the owner of land and the occupants thereof an option whether to resolve such dispute or otherwise.*** *Even if, however, the municipality is given that option there is no doubt in my mind that s 7(1) contemplates the municipality's being given the opportunity to make a decision whether in the first place a dispute exists, and if it does, whether or not to mediate and settle it*" (emphasis added).

[20] With the benefit of hindsight and further reflection, I tend to agree with Mr Leathern that the first sentence in para [25] is incorrect. There is no doubt that the municipality is given an option whether or not to take steps to have an identified dispute mediated and settled. That option, however, arises, in my view, only after the municipality has gone into the exercise of determining whether or not there is a dispute between the owner of land and the occupant thereof. The

municipality simply must make that determination. Such dispute may include, for instance, the occupant's insistence that he or she is not occupying the land unlawfully or that there was an agreement between him or her and the applicant, which agreement entitles him or her to remain on the property for a given period.

[31] Mr Leathern's submissions in paragraphs 4.3, 4.4 and 4.5 of his heads of argument, which I quote in full hereafter, indicate that he has lost sight of what I consider to be the import of s 7 of PIE and the basis on which *Cashbuild* was decided, viz., that local municipalities must always be joined. His submissions read as follows:

> "*4.3 It is significant that nowhere in the Act does it prescribe that any application must be served on the municipality or that the municipality must be a party thereto and only Section 4(2) refers to service of the Notice of the proceedings on the municipality having jurisdiction.*
>
> *4.4 It can only be assumed [in the present case] with respect that a municipality having been served with a Notice in terms of Section 4(2) and the papers in an application for an eviction clearly relating to land situated within its jurisdiction has chosen not to intervene in such application and in particular chosen not to appoint a mediator in terms of Section 7(1) of the Act.*
>
> *4.5 The municipality having been properly served with all the papers is in precisely the same position as it would have been had it been*

*joined as a party in the application and, as would in any event be the case in the application, no relief was sought against it. It would not be any under (**sic**) obligation whatsoever to file any papers or even report to the Honourable Court as there is no statutory provision obliging it to do so nor would it be obliged to do so in terms of the Rules of Court.*"

[22] From my personal experience, from my own research and from what various counsel have submitted in matters before me, there is no known case in which, before *Cashbuild*, a municipality ever acted in terms of the provisions of s 7, by appointing an expert or experts to consider whether or not to mediate between an owner of land and an "*unlawful*" occupant thereof. That is, precisely, because municipalities feel that they are, as Mr Leathern submitted, "*under [no] obligation whatsoever to file any papers or even to report to the ... Court as there is [according to them] no statutory provision obliging [them] to do so nor would [they] be obliged to do so in terms of the Rules of Court*". Mr Leathern makes a very liberal assumption that the municipality, in the present case, "*has chosen not to intervene*", as if it has bothered to consider that aspect, in the first place.

[23] As already pointed out in this judgment and in *Cashbuild*, indications are that local municipalities totally ignore the notices sent to them in eviction proceedings. Indeed, Mr Leathern submits that such municipalities are under no obligation to take heed of such notices. The question then arises why, quite apart from the

requirements of s 7, it is necessary for these notices to be forwarded to local municipalities. What are they expected to do about the notices if they are under no obligation to take heed of them? The further question is why it was necessary for the legislature to enact s 7, which applies in respect of both short term and long term "*illegal*" occupiers. If, as it is in my view the case, the introduction of s 7 of PIE was not ornamental, the question then arises as to how a local municipality will be called upon to heed the provisions of the section if it is not a party to the action or application. Furthermore, how is the legislature to know that the provisions of s 7 are being implemented by the statutory bodies to whom they are addressed, i.e., the municipalities?

[24] As it is a local municipality's obligation, and not that of the Court, to exercise the discretion contained in s 7, it would be inappropriate, in my view, for the Court to suggest what aspects may be in dispute in this matter. The joinder of a local municipality should not depend upon identification, by a court or the parties, of possible disputes between the parties. It should, in my view, be based entirely upon the legislature's intention, when enacting s 7 of PIE. As earlier stated herein, the legislature introduced the element of mediation which was, hitherto, non-existent as part of the eviction process. That new concept should not be permitted to atrophy, simply because municipalities have ignored it.

[25] It appears that Mr Leathern has overlooked another important aspect in this regard, viz., that procedural aspects contained in the Rules of both the High Court

and the Magistrates Court have not been ousted by PIE. For instance, in subsection 4(3), "*the serving of notices and filing of papers is as prescribed by the rules of the Court in question*". Joinder of parties is a procedural aspect. It would not have been expected of the legislature to prescribe, in PIE, that certain parties should be joined and when that should be done. I agree with Mr Omar that a local municipality has an interest where the obligations of s 4(7) are applicable. It has already been stated, in this judgment, that s 4(7) places an obligation on a court hearing an application in which unlawful occupation exceeds six months – where other specified conditions permit – to grant an order for eviction, if satisfied, *inter alia*, that

> "***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*", (emphasis added).

The emphasised portion indicates clearly, in my view, why a local municipality, in such circumstances, has an interest in the outcome of an eviction application. As stated in *Amalgamated Engineering*, at 660,

> "*Mere non-intervention by an interested party who has knowledge of the proceedings does not make the judgment finding on him ...*"

[26] In my view, even in the case of an eviction governed by the provisions of section 4(b) of PIE, the local municipality is under some obligation, in terms of

the provisions of s 7. Section 4(6) refers to the position of an occupier who has been on the land for less than six months, in respect of whom there is no obligation on the municipality, such as there is under s 4(7), to provide alternative "*land*" for the "*unlawful occupier*" who is about to be evicted. Even in respect of the s 4(b) situation, however, the municipality is under an obligation to determine, in terms of s 7(1) of PIE, whether "*any dispute in terms of this Act*" exists and, if it does exist, to exercise its mind as to whether or not to "*appoint one or more persons with expertise in dispute resolution to facilitate meetings of interested parties and to attempt to mediate and settle any [such] dispute*". The obligation on the local municipality, in terms of s 7(1) is, as earlier pointed out, not only in respect of short term unlawful occupiers. The only condition stated in the subsection, upon which the municipality may not appoint a person or persons described is if, as earlier stated, the local municipality is the owner of the land from which an alleged unlawful occupier is to be evicted (s 7(2)) or where, although it is not the owner, there is no dispute requiring settlement (s 7(1)). If the local municipality is not the owner of such land, the provisions of s 7 apply, regardless of whether the occupier has been on the land for less or longer than six months. The municipality cannot, in such circumstances, merely assume that there is no dispute requiring mediation. It is obliged, in my view, to take steps to determine whether or not such a dispute exists.

[27] Concerning the assertion by Mr Leathern that the local municipality –

"would not be any under (sic) obligation whatsoever to file any papers or even report to the ... Court as there is no statutory provision obliging it to do so",

I repeat, without quoting, the sentiments expressed at paras [26] to [32], at 339H-340I-J, in *Cashbuild*, where a similar submission by counsel for the applicant in that case was being dealt with.

[28] On further reflection, especially in the light of submissions made by Mr Leathern in para 4.5 of his heads of argument – cited above – an appropriate order to a joined local municipality, where the provisions of s 7(1) apply, should include an instruction that it reports to the Court that it applied its mind to the facts of the case in respect whereof it is joined as a respondent and has taken a deliberate decision either to appoint or not to appoint a person or persons of the expertise described in s 7 of the Act. Where the municipality has decided not to appoint such person or persons, it must report to the court that no dispute calling for settlement exists, according to its investigation.

[29] Although it is not strictly necessary to mention this in this case, I think it will do no harm for me to round up my view of the implications of s 7 of PIE. Section 7(2) deals with the scenario in which the local municipality is the owner of the land in respect whereof the eviction proceedings are brought. Nothing is demanded of the municipality in such circumstances. The task to determine whether there is a dispute that calls for an attempt to settle it, falls on a Member of

the Executive Committee ("MEC") designated by the Premier of the Province concerned. For the same reasons for which the local municipality must be joined where it is not the owner (s 7(1)), the Premier must, in my view, be joined where the local municipality is the owner of the land (s 7(2)).

[30] As must, by now, be obvious, I have arrived at the conclusion that this application cannot proceed without the local municipality being joined. In the circumstances, it is not necessary, in my view, to deal with many other submissions made by the parties' legal representatives. Such submissions will be relevant only after the local municipality has been joined. I am in agreement with Mr Leathern that the proper course is not to dismiss the application.

[31] In the circumstances I make the following order:

1. The local municipality of Nelspruit is hereby joined as the fourth respondent for the purpose of enabling it to exercise its discretion in terms of s 7(1) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("PIE").
2. Service of this order and any consequential amendments to the applicant's papers shall be effected on the local municipality of Nelspruit.
3. Service of the notice of motion, founding affidavit and annexures thereto upon the local municipality of Nelspruit is not necessary.

4. The local municipality of Nelspruit shall file a report with the Registrar of this Court and serve copies thereof on the first and second respondents, in which report it will:

   (a) state whether it has established whether or not a dispute or disputes requiring attempted settlement exists or exist between the applicant and the respondents;

   (b) if such a dispute or disputes exists or exist, give details of a person or persons contemplated in s 7(1) of PIE and appointed by it to attempt mediation; and

   (c) if it has appointed a person or persons contemplated in s 7(1) of PIE, simultaneously file a report on the outcome of mediation proceedings conducted by such persons, if finalised, or, if such mediation proceedings are still in process, a report on the expected duration thereof.

5. The report alluded to in paragraph 4 hereof should be filed and served within two months from the date of service of this order upon the local municipality of Nelspruit.

6. The application is postponed *sine die*.

7. The applicant is hereby authorised to approach the Court on these papers or supplemented papers after the filing and service of the local municipality of Nelspruit's report.

8. The applicant is ordered to pay costs occasioned by its opposition to the joinder of the local municipality of Nelspruit.

J N M POSWA
JUDGE OF THE NORTH GAUTENG HIGH COURT

HEARD ON: 03 DECEMBER 2007

FOR THE APPLICANT: ADV LEATHERN

INSTRUCTED BY: RUDMAN ATTORNEYS

FOR THE 1ST & 2ND RESPONDENTS: MR OMAR

INSTRUCTED BY: ZAHIR OMAR ATTORNEYS

FOR THE 3RD RESPONDENT: UNREPRESENTED