

IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION. PRETORIA DIVISION.)

CASE NO: A 888/2015

Reportable: Yes

Of interest to other judges: Yes

Revised.

29/5/2017

TEBOGO MOSES MATHIBA

APPELLANT

and

SAMANCOR CHROME LIMITED

RESPONDENT

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JUDGMENT

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LEGODI. J

[1] No one may be evicted from their home, or have their home demolished without an order of court made after considering all the relevant circumstances. It is desirable that the law should regulate the eviction of unlawful occupiers from land in a fair manner, while recognising the right of land owners to apply to a court for an eviction order in appropriate circumstances. Special consideration should be given to the rights of the elderly, children, disabled persons and particularly households headed by women, and that it should be recognized that the needs of those groups should be considered.<sup>1</sup>

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<sup>1</sup> See Preamble under PIE Act 19 of 1998.

[2] PIE Act was introduced to provide for the prohibition of unlawful eviction, to provide for proceedings for eviction of unlawful occupiers, and to repeal the Prevention of Illegal Squatting Act, and other obsolete laws, and to provide for matters incidental thereto.<sup>2</sup> "Unlawful occupier", means a person who occupies 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...<sup>3</sup>

[3] Section 4 of PIE deals with the eviction of unlawful occupiers. At least 14 days before the hearing of eviction proceedings..., the court must serve written and effective notice of the eviction proceedings on the unlawful occupier and the municipality having jurisdiction.<sup>4</sup>

[4] The procedure for the serving of notices and filing of papers is as prescribed in the rules of the court<sup>5</sup> and if a court is satisfied that service cannot conveniently or expeditiously be effected in the manner provided in the rules of court, service must be effected in the manner directed by the court, provided that the court must consider the rights of the unlawful occupier to receive adequate notice and to defend the case.<sup>6</sup>

[5] This appeal is about an eviction order granted by Mohlamonyane AJ in terms of which an order against the appellant, Mr Tebogo Moses Mathibe was made as follows:

*"21.1 The Respondent and any person occupying through the Respondent house number [...] A. Avenue, Mooinooi, North West Province, be and are hereby directed and ordered to vacate the property.*

*21.2 The eviction as set out in paragraph 21.1 above shall take place within thirty (30) calendar days after the granting of this order.*

*21.3 The Respondent is ordered and directed to pay to the Applicant the sum of R26 750.00 plus R176. 73 per day for each day after the 31<sup>st</sup> May 2014 that the Respondent remains in occupation up to and until his date of eviction.*

*21.4 The counter-application is dismissed with costs*

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<sup>2</sup> See long title of PIE Act.

<sup>3</sup> See section 1(ix) of PIE

<sup>4</sup> Section 4(2)

<sup>5</sup> Subsection (3) of section 4

<sup>6</sup> Subsection (4) of section 4

*21.5 The Respondent is ordered to pay the costs of the main application and counter-application.”*

[6] In his practice note, Counsel for the respondent, Samancor Chrome Limited (Samancor), identified the issues to be determined in this appeal as follows:

6.1. Whether or not failure to join the appellant's wife is fatal to the claim by Samancor to evict the appellant from the residential premises.

6.2. Whether or not failure to serve the section 4(2) of the PIE Act notice upon Municipality is fatal to the application to evict the appellant.

6.3. Whether or not it would be just and equitable to evict the appellant.

[7] For the reason which follows hereunder, I do not find it necessary to deal with the issues identified in paragraphs 6.1 and 6.2 above, more so, that these issues in a way overlap with the issue under paragraph 6.3 considering the intended purpose in section 4(2) and (7) or (6) of PIE.

#### Just and equitable requirement

[8] If an unlawful occupier has occupied the land in question for more than six months at the time when the eviction 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 whether land has been made available or can reasonably be made available by the municipality or other organs of the state or another land owner for the relocation of the unlawful occupiers, and including the rights and needs of the elders, children, disabled persons and households headed by women<sup>7</sup>.

[9] The appellant and his wife occupied the premises or home in question by virtue of a lease agreement concluded on 1 November 2010 between the appellant and his employer, Samancor. They took occupation of the property in question many years before 19 June 2014 when the eviction proceedings were initiated in this Division under case number 45209\14. The suggestion that they had occupied the premises for less

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<sup>7</sup> See subsection (7) of section 4 of PIE.

than six months before the 19 June 2014 has no substance. 'Occupation or occupied' is the operative word and not when the appellant and his family came to be the 'unlawful occupiers' as it was suggested by counsel on behalf of Samancor. The attempt to categorise the appellant and his family under subsection (6) of section 4 therefore misses the point. In terms of subsection (6), 'if an unlawful occupier has occupied the land in question for less 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 the rights and needs of the elderly, children, disabled persons and households headed by women.'

[10] '*Considering all the relevant circumstances*' in subsection (6), is wide enough not to exclude consideration of alternative accommodation which is specifically spelled out in subsection (7) as one of the factors to be considered in eviction proceedings particularly from a home.

[11] The court a quo in its judgment inter alia, expressed itself as follows:

*"[18] The issue of alternative accommodation does not arise in this case. It is my view that the eviction will not render the Respondent, his wife and child, homeless."*

[12] The statement above was preceded by the findings of court a quo articulated as follows:

*["16] The facts that I found to have been proved, or are common cause, between the parties are the following:*

- 16.1. The Applicant is the owner of the property i.e. house at number [...] A. Avenue, Mooinooi.*
- 16.2. The respondent applied for company accommodation which was granted to him.*
- 16.3. For reasons unrelated to this application the Respondent was dismissed from his employment on 01 December 2013.*
- 16.4. Written notice to vacate the property was given by the Applicant to the Respondent on 20 March 2014.*
- 16.5. The Respondent fell in arrears with his monthly rentals.*

[17] *The immediate question is whether the Respondent should be ordered to vacate the property, and if so, will such order be one which is just and equitable."*

[13] 'Courts cannot necessarily restrict themselves to the passive application of PIE. Courts are obliged to probe and investigate the surrounding circumstances when an eviction from a home is sought. This is particularly true when the prospective evictee is vulnerable'.<sup>8</sup>

[14] Furthermore, the court a quo in its judgment expressed itself as follows:

*"[8] Another point in limine raised by the Respondent is that of non-joinder of his wife.*

*According to him he lives with his wife and one of his children, who is three years old ... He contends that failure on the part of the Applicant to serve the application on his wife, who has a substantial interest in the matter, was irregular. I must point out that there are instances in which a party (who may have a substantial interest in the case) may not necessarily be joined. That party may only be asked to comment, if needs be, about the proceedings. In my view, there is no irregularity committed by the Applicant, by not serving the application papers on the Respondent's wife, who was not a party to the agreement upon which this application turns. This point in limine is accordingly dismissed".*

[15] As I said, it is not my intention to deal with the fatal nature or not of the non-compliance with the provisions of section 4(2) regarding service of the notice of the eviction proceedings and the application itself on the appellant's wife or municipality because of the interlinked connection between subsections (2) and (6) or (7) of section 4. However, it is important to emphasise the principle set out as follows: *"The application of PIE, is not discretionary. The Court must consider PIE in eviction cases. PIE was enacted by Parliament to ensure fairness in and legitimacy of eviction proceedings and to set out factors to be taken into account by a court when considering the grant of an eviction order. Given that eviction naturally entail conflicting*

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<sup>8</sup> Pitjje V Shibambo & Others 2016 ZACC 5 para19.

*constitutional rights, these factors are a great assistance to the court in reaching constitutionally appropriate decisions.<sup>9</sup> That the High court authorized the eviction without having regard to the provisions of PIE is inexcusable. PIE is of great importance given that there are still millions of people in our country without shelter or adequate housing and who are vulnerable to arbitrary evictions.<sup>10</sup>*"

[16] So, the statement, '*...eviction will not render the Respondent, his wife and child homeless*', was flawed insofar as it was made without consideration of any of the relevant factors. It is a statement which was made apparently in the context of what is quoted in paragraph 12 of this judgment. Similarly, the statement: '*...the issue of alternative accommodation does not arise in this case*', as quoted in paragraph 11 of this judgment, was therefore wrongly made by not alluding to any relevant factors as the court was so enjoined to do.

[17] But seen in context, the court a quo seems to have relied on its findings as quoted in paragraph 12 above. What is referred to in paragraph [13] above is relevant to how the court a quo should not and or should have approached the issues before him. That is, it restricted itself to the application of PIE, when in actual fact it was supposed to probe and investigate the surrounding circumstances to avoid the likelihood of rendering the appellant's wife and child of three years' old homeless. They are both vulnerable and it was therefore incumbent on the court a quo in the exercise of its judicial oversight to seek for more information about the child, its mother and of course whether the municipality or any organ of state is in a position to provide an alternative home or accommodation even if it was to be on a temporary basis.

[18] Being proactive, probing and investigating relevant factors, instead of being passive in eviction proceedings, particularly from primary residence or home, even when parties are remiss in doing so, would enable the court to properly adjudicate on what is just and equitable. The issue was put succinctly in the case of *Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC)* at para 32 as follows:

*"The obligation on the court is to 'have regard to' the circumstances, that is, to give*

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<sup>9</sup> *Machete & Others v Mailula and others* 2016(2) SA 257 CC para 14

*them due weight in making its judgment as to what is just and equitable. The court cannot fulfil its information at its disposal. It needs to be fully apprised of the circumstances before it can have regard to them. It follows that, although it is incumbent on the interested parties to make all relevant information available, technical questions relating to onus of proof should not play an unduly significant role in its enquiry. The court is not resolving a civil dispute as to who has rights under land law; the existence of unlawfulness is the foundation for the enquiry, not its subject-matter. What the court is called upon to do is to decide whether, bearing in mind the values of Constitution, in upholding and enforcing land rights, it is appropriate to issue an order which has the effect of depriving people of their homes. Of equal concern, it is determining the conditions under which, if it is just and equitable to grant such an order, the eviction should take place. Both the language of the section and the purpose of the statute require the court to ensure that it is fully informed before undertaking the onerous and delicate task entrusted to it. 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 properly to 'have regard' to relevant circumstances.* (My emphasis)

[19] For example, the court *a quo mero motu* could have enquired and directed to be provided with evidence or information relating to the age of the wife, any health difficulties on her part or child, any relative in the surroundings or somewhere else, any alternative accommodation in the event of the eviction and if not, whether the municipality can provide an alternative accommodation and for how long, whether the appellant or his wife has funds for relocation and whether there are relatives willing to accommodate them and for how long.

[20] I also do not think that the counter-application was irrelevant to the question of just and equitable consideration. If serious consideration was given to the provisions of subsection (7) of section 4 referred to in paragraph [8] of this judgment, in all probabilities interim stay of the eviction order pending finalization of the labour dispute

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<sup>10</sup> See Machete supra at para 15.

would have been considered. The labour dispute which is still pending in my view, is also not irrelevant to consideration of the just and equitable requirement. The appellant in his opposing affidavit in the court a quo put it this way:

*"34.1 My failure to pay rental, as set out under paragraph 8 of the founding affidavit was a direct consequence of my unfair (sic) and for that matter, unlawful dismissal. I intend to remedy this alleged breach immediately upon my reinstatement should I be afforded such relief by the labour Court."*

[21] The Appellant was facing a well-grounded apprehension of irreparable harm. That is, being thrown in the street with his family without accommodation and employment. *'Section 38 of the Constitution empowers any competent court, to grant appropriate relief if approached by a person alleging that a right in the Bill of Rights has been infringed or treatment'*.<sup>11</sup> All what was required of the appellant in his counter application was to show that irreparable harm, which was to be weighed against any irreparable harm that Samancor may suffer were the execution of the eviction order to be stayed pending finalisation of the labour dispute in the labour court. The question whether the appellant and his family were to suffer irreparable harm if the execution of the eviction order was to be carried, is what the court a quo was enjoined to investigate and decide on. Failure to have persued this investigation, in my view, resulted in failure of justice. The appeal ought to succeed. That does not however mean that Samancor would not be entitled to bring the application afresh when properly supplemented and also to serve the notice as contemplated in section 4 (2).

[22] Consequently an order is hereby made as follows:

22.1. The appeal is hereby upheld with costs.

22.2. The order 21.1 and 21.2 quoted in paragraph 5 above are hereby set aside and substituted as follows:

*"22.2.1 The applicant's application is hereby dismissed with costs for lack of information on "just and equitable" requirement.*

*22.2.2 The applicant (Samancor) is hereby entitled to bring the application for*

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<sup>11</sup> See Machete supra par 34.



*eviction afresh properly supplemented as applicant might deem it necessary and possible".*

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**M F LEGODI**  
**JUDGE OF THE HIGH COURT**

I AGREE;

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**CP RABIE**  
**JUDGE OF THE HIGH COURT**

I AGREE;

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**H FABRICIUS**  
**JUDGE OF THE HIGH COURT**