

IN THE MAGISTRATES COURT FOR THE DISTRICT OF ILEMBE

HELD AT KWADUKUZA

CASE NO: 2627/2022

In the matter between:

DR U.N NAIDOO

APPLICANT

And

DAWOOD DESAI

FIRST RESPONDENT

ETHEKWINI MUNICIPALITY

SECOND RESPONDENT

JUDGMENT

Delivered on 28 July 2023

(1) This is an application in terms of the Prevention of Illegal Eviction and Unlawful Occupation of Land Act, 1998. The papers were properly served on both the first and second Respondents. The first Respondent opposed the application and filed opposing affidavits, whereas the second Respondent did not oppose nor respond to the application as has become the norm in this court's jurisdiction in such applications. However there is a report from the second Respondent filed in terms of Section 4(7) of PIE Act, 1998.

The applicant seeks an order for:-

- (a) the ejectment/eviction of the first respondent and any other person claiming occupation through him from the premises described as 1A JN Naidoo Centre, 133 Mahatma Gandhi Street, Kwadukuza.
- (b) That in the event of the first Respondent and any other person occupying through or under him, failing to comply with the order set out in paragraph 1 hereof, the Sheriff of this court is authorised and directed forthwith to eject the First Respondent and any and all persons occupying by, through or under him, from the property and to hand vacant possession thereof to the applicant.
- (c) That the First Respondent is ordered to pay the Applicant's legal Costs on a party and party scale
- (d) Further and or alternative relief.

(2) The applicant's representative submitted that:

"this is an application in terms of section 4 of the PIE act, which is opposed. The facts not in dispute are inter alia; firstly that the first respondent resides in Flat 1A, JN Naidoo centre, secondly that the first Respondent concluded a lease with the Applicant; thirdly that the receipt of the breach notice was received by the first Respondent and fourthly that the first Respondent does not dispute that he is in arrears with rental.

The disputed facts are inter alia; Firstly, whether there was a verbal lease agreement between the applicant and the first Respondent and it was cancelled on 29 July 2022. Secondly, whether the Applicant is a non-existent Applicant. Thirdly whether the matter is properly before court, being that the return date does not reflect on the Notice of Motion. Fourthly whether the Applicant owns the property . Fifthly, whether Cheryl D was authorised to act on behalf of the Applicant.

- (3) It was argued that the first Respondent's representative is not familiar with the process followed in PIE applications, the incidental date is allocated by the clerk of court, the return date is not inserted. On the date of appearance the return date is inserted by the court, its inserted in the first order prayed which was served by the Sheriff. It was further argued that at all material times the first Respondent was duly represented, i.e. an Attorney was present on his behalf. It was also submitted that to claim on a date that was not inserted is unreasonable.
- (4) It was further submitted that the matter is properly before court. On the return date the first respondent's attorney was present at court. The 14 day period was complied with, or observed. It was the Magistrate who gave or allocated the return date. If the matter had not been proper before court, the first Respondent would have raised a point in limine, which he did not despite being legally represented.
- (5) It was submitted that in respect of the specific dates the return date was 10 February 2023 and the first document was served on 17 January 2023 giving the first Respondent enough time, asks the court not to indulge this aspect.
- (6) It was submitted further, on whether the applicant is a non-existent applicant by virtue of not being cited or mentioned properly on the papers, it was stated that this defence is ludicrous as the first respondent in his answering affidavit states that he entered into an agreement with the applicant. It was submitted that the Applicant was properly signed in terms of Rule 5. There was contradiction in first respondent's answering affidavit and supplementary affidavit where he says he does not know the applicant. It was submitted that there was proper citation of the applicant and sufficient information given as to who the Applicant was.

- (7) It was further submitted that the third dispute is whether the verbal agreement was indeed cancelled. It was stated that if one looks at the whatsapp messages there is nothing to suggest that a new agreement was entered into. It was further submitted that the first Respondent is liable for the holding over damages and rentals as the cancellation of 9 July 2022 still stands.
- (8) It was further submitted that there is sufficient proof to show that the Applicant owns the property, the proof of ownership was attached to the founding Affidavit.
- (9) It was further submitted that there is a Power of Attorney showing that Cheryl D was duly authorised. It was stated that the first Respondent is using delaying tactics to delay the matter, the court should not entertain him. The first respondent is a businessmen and has measures to pay but chooses not to.
- (10) Mr Singh argued for the first respondent that apart from the points in dispute raised by the Applicant's legal representative the first issue is whether the Application is defective on the ground that the prerequisites as set out in case law have not been complied with.
- (11) It was submitted that the court is tasked to go beyond its normal function. The question is how is the first respondent's occupation unlawful. The whatsapp messages prove there was an agreement to occupy.
- (12) Various cases were quoted by Mr Singh in support of his contention that the applicants have not complied with the procedure followed in bringing the application in terms of PIE Act. The first case being that of Ubunye Co-Operative Housing (Association incorporated under section 21) v Joice N. Mbhele & Others, 2005.

- (13) Mr Singh argued that no date of hearing was inserted in the relevant space provided in the Section 4(2) Notice that was served on the first Respondent therefore the application is defective and should be dismissed by the court.
- (14) Mr Singh further argued further that the whatsapp messages exchanged between the first Respondent and the applicant's Agent novated the cancelled agreement and he was therefore in lawful occupation.
- (15) The PIE Act of 1998 defines an unlawful occupier as "a person who occupies the 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, excluding a person who is an occupier in terms of the ESTA, 1997, and excluding a person whose informal right to land, but for the provisions of this Act, would be protected by the provisions of the Interim Protection of Informal Land Rights Act, 1996 (Act No 31 of 1996)".
- (16) Section 4 subsection 7 of PIE, 1998 states that: "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 in 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 person and households headed by women".

- (17) Having considered the papers filed of record in particular the Notice in terms of Section 4(2) relied on by the Applicant, it indeed does not have the date of hearing as pointed out and contended by the first Respondent. There has been no application made to court previously or even on the date of argument to request that the date be inserted alternatively that the lack thereof be condoned by the court.
- (18) The procedure in bringing the eviction application was set out in a plethora of cases in particular the case of Cape Killarney Property Investments (PTY) Ltd v Mahamba 2001 (4) SA 1222, which was quoted in Ubunye Co-Operative Housing v Joyce N. Mbhele & Others, 2005. The other relevant and most recent case is that of Occupiers of Ompad Farm v Green Horizon Farm (PTY) LTD, 2014.
- (19) This court has no power to overrule the procedures outlined by the superior court and or set out its own procedure in dealing with PIE applications. The date of hearing ought to have been inserted on the section 4(2) Notice irrespective of whether there is a court order date or the date of hearing is allocated by the court. In essence the argument by the applicant that the date of hearing was contained in the court's directive order is not what was envisaged in the case law quoted above.
- (20) I am therefore of the opinion that the application should fail for non-compliance with the peremptory provisions and or requirements of the section 4(2) notice as contemplated in the Ompad decision. It is unfortunate for the applicant that this was not an error on his/her part but of the legal representative and maybe of the Presiding officer who granted the directives on the first date of enrolment of the matter, however I am not in a position to pronounce on that aspect, it can only be done by a Judge.

- (21) Consequently I find that it would not be just and equitable to grant an order for eviction in this matter, the first Respondent raised this issue in his answering affidavit, it was not rectified and or no application was brought to rectify same.
- (22) On the question of whether or not the first Respondent is an unlawful occupier, I am not convinced that he is, he is known to the applicant and the Agent to the property, he has contested the arrears owing on the property by filing a rescission of judgment application which was granted by this court.
- (23) Having considered the submissions made by the attorneys representing the applicant and those made by the respondent's attorneys, respectively herein, this court is not satisfied that the first Respondent is an unlawful occupier as defined in the PIE Act, for the simple reason that there was tacit consent of the Applicant or the Agent to the first Respondent's continued occupation of the premises, through the applicant's Agent continuous demands for rental to be paid, which the first Respondent did comply with.
- (24) In terms of section 26 (3) of the Constitution, 1996, the court is duty bound to consider all relevant circumstances prior to making an order for eviction, the above reasons for finding that respondent is not an unlawful occupier are such relevant circumstances which this court has considered.
- (25) Secondly, the court has to determine if it is just and equitable to grant an order for eviction in this matter.

- (26) According to a decision handed down by the Constitutional Court on the 8th June 2017 in the matter of Occupiers of Erven 87 and 88 Berea v Christian Frederick de Wet N.O. and others (CCT 108/16), the obligation of municipalities in eviction matters is to file a report on what steps they have taken, what steps they intend or are able to take in order to provide alternative land or emergency accommodation in the event of parties being evicted and when the alternative land or accommodation can be provided.
- (27) In this matter the report has been filed by the Municipality however the said report appears to be a proforma report filed in all matters in this jurisdiction, in fact the said report does not even contain the name of the first Respondent or his details, which shows that no investigation was done onto his circumstances. In any event the dispute between the parties emanates from a lease agreement it does not appear that the second Respondent would have much input in this matter in view of the circumstances surrounding this matter.
- (28) The PIE ACT, 1998 states clearly in the Preamble that: "No one may be evicted from their home or have their home demolished without an order of court made after considering all relevant circumstances".
- (29) The relevant circumstances that this court has considered in this matter have been set out in the preceding paragraphs.

(30) This court therefore finds that an order for eviction of the first Respondent at this stage would not be just and equitable in the circumstances.

ORDER

In the result, the following order is made:-

The application for the eviction of the first Respondent and those who occupy through or under him is dismissed with each party to pay their own Costs.



IB BLOSE

Additional Magistrate – Kwadukuza (Stanger)

