

SOUTH AFRICA / JUDGMENT

Masoga and Others v Sweetnam and Another (A263/2018) [2019] ZAGPPHC 184 (21 May 2019)

[2019] ZAGPPHC 184

COURT

North Gauteng High Court, Pretoria

BEFORE

AC Basson, B Rangata

CASE / FILE NUMBER

A263/2018

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REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA
(1)

REPORTABLE: NO
(2)
OF
INTEREST TO OTHER JUDGES: NO
(3)
REVISED.
CASE NO: A263/2018
21/5/2019
In

the matter between: JOHANNA
MASOGA & OTHER OCCUPANTS
Appellants
and
RAYMOND
SWEETNAM
First Respondent
CITY
OF TSHWANE
Second Respondent

JUDGMENT

AC BASSON, J

- [1] This is an appeal against the judgment and order handed down by Magistrate Swanlow on 30 April 2018 in the Magistrates Court for the District of Tshwane held at Pretoria North.
- [2] In terms of the order granted by the learned Magistrate, the first applicant and all persons occupying through her ("the occupiers" or "the appellants") were evicted from the property situated in Pretoria North. Further in terms of the order, the occupiers were ordered to vacate by no later than 30 June 2018 failing which the Sheriff of the Court is authorised to carry out the eviction order.
- [3] This matter concerns two important issues: The first issue relates to evictions in the absence of any information regarding alternative accommodation. The second issue relates to the role of Organs of State in eviction proceedings in terms of section 4(7) of Prevention of Illegal Eviction from and Unlawful Occupation of Land Act[1] (hereinafter referred to as the "PIE Act").

Condonation application

- [4] The appellants apply for condonation for the late filing of the Notice of Appeal. The application for condonation is not opposed.
- [5] The eviction order was granted on 30 April 2018. Lawyers for Human Rights obtained formal instructions on 31 May 2018. The notice of appeal was filed on 26 June 2018.
- [6] Although the appeal is late, I am satisfied that the delay in filing the Notice of Appeal was not caused by a wilful disregard of the Rules. The appellants explain that they have approached Lawyers for Human Rights to assist them after Legal Aid indicated that they are not proceeding with an appeal against the eviction order. When the matter was taken over by Lawyers of Human Rights, they could not, being a pro bona legal service to indigent individuals and communities, attend to the matter immediately. They did, however, attend to the matter at the earliest possible time.
- [7] The delay is not excessive particularly in light of the explanation for the delay. Although there is some measure of prejudice towards the first respondent, this should be weighed up against the prejudice that would be suffered by the appellants if the appeal is not entertained: The appellants are indigent families consisting of women headed households and minor children who would be rendered homeless should the eviction order be left unchallenged. I am therefore of the view that the real risk of homelessness faced by these vulnerable persons outweighs any prejudice to the respondents occasioned by the delay in filing the notice of appeal.

[8] The application further has prospects of success. Lastly, it is, in my view, manifestly in the interests of justice to grant condonation. See in this regard: *Grootboom v National Prosecuting Authority & Another*[2] where the Constitutional Court succinctly set out the requirements in considering an application for condonation:

"[50] In this court the test for determining whether condonation should be granted or refused is the interests of justice. If it is in the interests of justice that condonation be granted, it will be granted. If it is not in the interests of justice to do so, it will not be granted. The factors that are taken into account in that enquiry include:

- (a) the length of the delay;
- (b) the explanation for, or cause for, the delay;
- (c) the prospects of success for the party seeking condonation;
- (d) the importance of the issue(s) that the matter raises;
- (e) the prejudice to the other party or parties; and
- (f) the effect of the delay on the administration of justice.

Although the existence of the prospects of success in favour of the party seeking condonation is not decisive, it is an important factor in favour of granting condonation.

[51] The interests of justice must be determined with reference to all relevant factors. However, some of the factors may justifiably be left out of consideration in certain circumstances. For example, where the delay is unacceptably excessive and there is no explanation for the delay, there may be no need to consider the prospects of success. If the period of delay is short and there is an unsatisfactory explanation but there are reasonable prospects of success, condonation should be granted. However, despite the presence of reasonable prospects of success, condonation may be refused where the delay is excessive, the explanation is nonexistent and granting condonation would prejudice the other party. As a general proposition the various factors are not individually decisive but should all be taken into account to arrive at a conclusion as to what is in the interests of justice."

Relevant facts

[9] The appellants comprise of about 16 families which include femaleheaded households, elderly persons and minor children. They all moved onto the property on various dates.

[10] The first respondent (and a Mr De Sousa) bought the property on 30 August 2015. The property was registered in both their names on 17 December 2015. In terms of the written sales agreement, it was agreed that the seller will remove all tenants occupying the property before registration would take place. Registration did, however, take place notwithstanding the fact that the tenants were not removed by the seller. The second respondent is the City of Tshwane the municipality in whose area of jurisdiction the property in question is situated ("Tshwane" or "the municipality").

- [11] The first appellant has been residing on this property since January 1994. She resides with her grandchild. The first appellant is a contract worker and earns about R 3 410.88. She uses her salary towards her grandchild's school fees, transport, food and water. She states that she cannot afford to rent a place around Pretoria North because of financial constraints. Some of the other households on the property are also headed by women and some of the children are attending school. The other applicants have occupied the premises on various dates.
- [12] In the answering affidavit, the appellants express their willingness to vacate the property provided that the municipality provide them with alternative accommodation as they have been occupying the premises for more than six months and in light of the fact that they would be rendered homeless as a result of their eviction.
- [13] The first respondent admits that initially there was a verbal rental agreement with the tenants. According to the first respondent the last rent was received on 4 March 2014. Initially there was a verbal agreement between the previous owner of the property (Ms Grabie) and the appellants in terms of which the appellants had to pay an amount of R 400.00 towards water and electricity. The appellants allege that Ms Grabie's son had to collect the rental and because he failed to pay the water and electricity, the services were terminated. According to the appellants they continued to pay their rent. The appellants then state that there was a further agreement to reduce the amount to R 200.00 per month. There is, however, no proof of this agreement. What does appear from the papers is the fact that the last amount in respect of rental was received in March 2015.
- [14] The first respondent disputes that any rent is being paid by the appellants as he is not receiving any payments. The first respondent demanded payment for the outstanding rent and rental monies from the occupants. When this was not paid, he cancelled the agreement and demanded that the appellants vacate the property.
- [15] Although it is one of the grounds of appeal that the Magistrate erred in declaring that the appellants are unlawful occupiers, it nonetheless appears to be common cause that the appellants are unlawful occupiers. This much can be deducted from the opposing affidavit wherein it is stated that the occupiers do not refuse to vacate the property so long as the municipality is involved.
- [16] Despite the fact that the papers have been served on Tshwane, the Municipality dismally failed to participate in the proceedings. Also, despite the fact that a subpoena was served on the municipality, it still neglected to participate in the proceedings as it clearly should have done. The court a quo therefore granted the eviction order without the benefit of any information indicating whether alternative accommodation had been made available or could reasonably have been made available by the municipality for the relocation of the occupiers.

Brief exposition of the legal position

[17] Central to this matter is the conflict between the respondent's right to property;[3] the right to have access to adequate housing and the appellants' right not to be evicted from the place they call home unless evicted

in terms of a court order after a court has considered all relevant circumstances.[4] The appellants in this matter allege that if they are evicted, they will be rendered homeless.

[18] It is not in dispute that the PIE Act is applicable. Section 4 of this act prescribes the procedure that must be followed when seeking the eviction of unlawful occupiers.[5]

[19] Central to this appeal is the question whether the court a quo gave proper consideration to the allimportant question whether it was just and equitable to grant the eviction in light of the

considerations set out in section 4(7) of the PIE Act.

[20] The application of the PIE Act is not discretionary and a court must have regard to all the relevant considerations. The Constitutional Court in *Machele and Others v Mailula and Others*[6] explains:

"[14]In *Port Elizabeth Municipality v Various Occupiers* this court said the following:

'The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) was adopted with the manifest objective of . . . ensuring that evictions, in future, took place in a manner consistent with the values of the new constitutional dispensation. Its provisions have to be interpreted against this background.'

[15] The application of PIE is not discretionary. Courts 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 evictions naturally entail conflicting constitutional rights, these factors are of great assistance to courts in reaching constitutionally appropriate decisions.

[16] That the High Court authorised 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."

[21] The courts thus play a vital overseeing role in eviction proceedings. Section 26(3) of the Constitution provides that "[n]o one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances" . This section is given substance by the provisions of the PIE Act and specifically section 4 thereof. The PIE Act directs courts to only order an eviction "if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances" as contemplated in section 4(6) and (7) and section 6(1)." The Constitutional Court in *Port Elizabeth Municipality v Various Occupiers*[7] emphasised that courts must take an active role in evaluating the merits of an application for eviction:

"[36] 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 lawgoverned social process. This has major implications for the manner in which it must deal with the issues before it, how it should approach questions of evidence, the procedures it may adopt, the way in which it exercises its powers and the orders it might make. The Constitution and PIE require that, in addition to considering the lawfulness of the occupation the court must have regard to the interests and circumstances of the occupier and pay due regard to broader considerations of fairness and other constitutional values, so as to produce a just and equitable result."

[22] A court must therefore probe all the relevant circumstances in exercising the discretion whether it is just and equitable to evict. The Supreme Court of Appeal in *City of Johannesburg v Changing Tides 74 (Pty) Ltd* referred to the two questions that must be considered by a court presiding over an application to evict:

"[25] Reverting then to the relationship between ss 4(7) and (8), the position can be summarised as follows. A court hearing an application for eviction at the instance of a private person or body, owing no obligations to provide housing or achieve the gradual realisation of the right of access to housing in terms of s 26(1) of the Constitution, is faced with two separate enquiries. First it must decide whether it is just and equitable to grant an eviction order having regard to all relevant factors. Under s 4(7) those factors include the availability of alternative land or accommodation. The weight to be attached to that factor must be assessed in the light of the property owner's protected rights under s 25 of the Constitution, and on the footing that a limitation of those rights in favour of the occupiers will ordinarily be limited in duration. Once the court decides that there is no defence to the claim for eviction and that it would be just and equitable to grant an eviction order it is obliged to grant that order. Before doing so, however, it must consider what justice and equity demands in relation to the date of implementation of that order and it must consider what conditions must be attached to that order. In that second enquiry it must consider the impact of an eviction order on the occupiers and whether they may be rendered homeless thereby or need emergency assistance to relocate elsewhere. The order that it grants as a result of these two discrete enquiries is a single order. Accordingly it cannot be granted until both enquiries have been undertaken and the conclusion reached that the grant of an eviction order, effective from a specified date, is just and equitable. Nor can the enquiry be concluded until the court is satisfied that it is in possession of all the information necessary to make both findings based on justice and equity." [8]

[23] These sentiments are echoed in *Port Elizabeth Municipality v Various Occupiers* [9] where the court cautioned that courts should be reluctant to grant an eviction order in the absence of reasonable alternative accommodation for them "even if only as an interim measure pending ultimate access to housing in the formal housing programme":

"[29] The availability of suitable alternative accommodation will vary from municipality to municipality and be affected by the number of people facing eviction in each case. The problem will always be to find something suitable for the unlawful occupiers without prejudicing the

claims of lawful occupiers and those in line for formal housing. In this respect, it is important that the actual situation of the persons concerned be taken account of. It is not enough to have a programme that works in theory. The Constitution requires that everyone must be treated with care and concern; if the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test. In a society founded on human dignity, equality and

freedom, it cannot be presupposed that the greatest good for the many can be achieved at the cost of intolerable hardship for the few, particularly if, by a reasonable application of judicial and administrative statecraft, such human distress could be avoided."

- [24] Even though the municipality did not participate in these proceedings and omitted to place any facts before the court a quo regarding the availability of suitable alternative accommodation, this does not absolve a court from having to consider this factor. A court cannot abdicate this important function simply because the municipality did not participate in the proceedings: After all, we are dealing here with vulnerable citizens who may be rendered homeless if the eviction order is granted.
- [25] Should eviction have been granted in the circumstances of this matter? If an unlawful occupier has occupied the land in question for more than six months, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so but only after considering all the relevant circumstances including but not limited to 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 after having considered the rights and needs of the elderly, children, disabled persons and households headed by women.
- [26] If a 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
- (a) a just and equitable date on which the unlawful occupier must vacate the land under the circumstances; and
 - (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).
- [27] In determining a just and equitable date in section 4(8) of the PIE Act, a court must have regard to all relevant factors, including the period the unlawful occupier and his or her family have resided on the land.

- [28] It would appear from the papers that the first respondent has complied with the procedural requirements provided for in the PIE Act. It also appears from the papers that the appellants did not raise a valid defence. In fact, they declare that they are prepared to vacate the property provided that the municipality provide them with alternative accommodation. What the court a quo did not consider was the availability of alternative accommodation. This is fatal.
- [29] I must, however, point out that the parties before Court are ad idem that the court a quo ought to have considered the issue of alternative accommodation but that the court did not do so. They are also ad idem that the appeal should succeed and that the matter should be remitted to the court a quo for reconsideration. Counsel on behalf of both parties have also proposed that the remittal should be accompanied with a directive to the municipality to submit a report to the court a quo addressing specifically the issue of alternative accommodation. I am in agreement with this submission and have accordingly included a directive to this effect in my order.
- [30] Lastly in respect of cost. Both parties were ad idem that the appeal could have been avoided had the municipality complied with its duty and provided the court a quo with the necessary information regarding alternative accommodation. Both parties further submitted that it would be unfair to saddle the appellants and the first respondent with the costs necessitated by the lodging of this appeal. I am in agreement: The municipality must pay the costs of both parties. In addition, hereto, the municipality is directed to also pertinently address in its report why it should not be directed by the court a quo to pay the costs consequent upon the rehearing of the matter before the magistrate's court.
- [31] In the event, the following order is made:
1. Condonation for the late filing of the application for leave to appeal is granted.
 2. The appeal is upheld and the order of the Magistrate's Court for the District of Tshwane North and dated 30 April 2018 is set aside.
 3. The application is remitted to the Magistrate's Court for reconsideration.
 4. The second respondent is ordered to pay the costs of this appeal in respect of both the appellants and the first respondent.
 5. The second respondent is directed, within 30 days of the date of this order, to submit a report to the Magistrate's Court for the District of Tshwane North addressing the issue of alternative accommodation for the appellants in this matter.
 6. The second respondent is directed to make written submissions in its report why it should not be ordered by the court a quo to pay the costs of the appellants and the first respondent consequent upon the rehearing of the matter before the magistrate's court.

AC BASSON

JUDGE OF THE HIGH COURT

I agree

B RANGATA

ACTING JUDGE OF THE HIGH COURT

Appearances:

For the appellants: Adv M Coetzee

For the first respondent: Adv J de Swart

[1] Act 19 of 1998.

[2]

(2014) 35 ILJ 121 (CC). Quoted from the minority judgment penned by Zonda, J (as he then was).

[3] In terms of section 25 of the Constitution.

[4] In terms of sections 26(1) and 26(3) of the Constitution.

[5] "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. (2) At least 14 days before the hearing of the proceedings contemplated in subsection (1), the court must serve written and effective notice of the proceedings on the unlawful occupier and the municipality having jurisdiction. (3) Subject to the provisions of subsection (2), the procedure for the serving of notices and filing of papers is as prescribed by the rules of the court in question. (4) Subject to the provisions of subsection (2), if a court is satisfied that service cannot conveniently or expeditiously be effected in the manner provided in the rules of the 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. (5) ... (6) ... (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 (a) a just and equitable date on which the unlawful occupier must vacate the land under the circumstances; and (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). (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] "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.
- (2) At least 14 days before the hearing of the proceedings contemplated in subsection (1), the court must serve written and effective notice of the proceedings on the unlawful occupier and the municipality having jurisdiction.
- (3) Subject to the provisions of subsection (2), the procedure for the serving of notices and filing of papers is as prescribed by the rules of the court in question.
- (4) Subject to the provisions of subsection (2), if a court is satisfied that service cannot conveniently or expeditiously be effected in the manner provided in the rules of the 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.
- (5) ...
- (6) ...
- (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
 - (a) a just and equitable date on which the unlawful occupier must vacate the land under the circumstances; and
 - (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).

- (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."
- [6] 2010 (2) SA 257 (CC).
- [7] 2005 (1) SA 217 (CC).
- [8] My emphasis.
- [9] Supra note 7 .

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