

SOUTH AFRICA / JUDGMENT

Ndabankulu v Ndabankulu and Another (CA&R33/2018) [2018] ZAECMHC 45 (17 August 2018) [2018] ZAECMHC 45

COURT

Eastern Cape High Court, Mthatha

BEFORE

M.J. Lowe, N. Mlomzale

CASE / FILE NUMBER

CA&R33/2018

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE LOCAL DIVISION, MTHATHA

CASE

NO: CA&R33/2018

Date

heard:

15

August 2018

Date

delivered:

17

August 2018

In

the matter between: VELISO
 FAGAN
 NDABANKULU Appellant
 and
 NKOSIYABO
 NDABANKULU First
 Respondent
 INGQUZA
 HILL LOCAL
 MUNICIPALITY Second
 Respondent

JUDGMENT

LOWE, J

BACKGROUND

- [1] In this matter Appellant applied of an order evicting first respondent from Site [...] FLAGSTAFF with ancillary relief and costs against First Respondent.
- [2] It was clear and indeed common cause that the provisions of The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (“PIE”) was applicable.
- [3] The Magistrate in due course dismissed the application with costs finding that the Applicant had failed to demonstrate locus standi to evict as either owner or person in charge as envisaged in PIE and secondly had failed to comply with the procedural provisions of s 4 of PIE. He also dismissed a rule nisi that had been issued in the matter without costs.
- [4] Appellant appeals against the Magistrate’s orders to this Court.
- [5] Mr Hobbs for Appellant correctly submitted that there were only two issues for determination being locus standi and the PIE procedural issues.
- [6] First respondent agreed but argued that Appellant failed on both issues.

THE

FACTS

- [7] In summary the Appellant contended that Site [...] had been registered in his father’s name in terms of Proclamation 26 of 1936 and that upon his death had been allocated to him as the only surviving male heir. In point of fact he makes no reference to the Proclamation but in the context of the papers and annexures this must be understood to be his intention. As appears below, apart from a registration document in terms of the Proclamation to his father in 1974 he produces only a letter from the Veterinary District Office purporting to record him as owner dependent on the original allocation to his father. His relevant

allegations and annexures appear below:

“7.

At all material times I am the only surviving son and child of the late Sityu Mdedelwa and Masikanisweni Jane Ndabankulu (my late parents). By virtue of being the only biological son and the only surviving son, I am in law the only heir to inherit my parents common homestead namely Site No. [...] at Mangquzu Location, Sipaqeni Administrative Area, Flagstaff better known or commonly referred to as Wesa.

8.

My late parents died interstate leaving behind myself and my late sister Nozimatsha Ndayi (Born Ndabankulu).

9.

The property or Site No. [...] aforesaid is my late father's property and was registered in his own name. My parents had died living no other male issue except me and in terms of the customary law I am the only heir to my late parents homestead as a result the Site No. [...] was transferred to me after my parent's demise. I annex hereto a letter from the Department of Rural Development And Agrarian Reform and the Permission to occupy the land marked annexure “VFN 2 & VFN 3” respectively.

10.

I together with my late parents aforesaid had been staying in the aforesaid property and we developed it to be what it is today without any assistance from anyone.”

[8] VFN 2 reads as follows:

“Province of the

EASTERN CAPE

DEPARTMENT OF RURAL DEVELOPMENT AND AGRARIAN REFORM.

3RD Floor Office No 37.

Tel: 047 5027741 Fax: 047 5319059

P/Bag x5002, Mthatha 5099.

This is the confirmation to the information of residential site

According to our records Mr Veliso F. Ndabankulu appears as the owner of Site No [...], at Mangquzu, Sipageni Administrative Area at Flagstaff service center at NGQUZA HILL Local Municipality in O.R. Tambo District It also appears that the site was officially Allotted/demarcated on 02-03-1971 from father P.T.O attached

(Signed)

25/01/2016

SIGNATURE

DATED

(Stamped)

RURAL DEPARTMENT AND

AGRARIAN REFORM

2016-01-26

VETERINARY DISTRICT OFFICE

(OR TAMBO DISTRICT)

P.O. BOX 501 FLAGSTAFF, 4810

[9] The Respondent disputes this and states as follows:

“6.

Ad paragraphs 7, 8, 9, 10, 11, 12, 13, & 14

6.1 I categorically deny that in accordance with the customary law of Amampondo and culture, applicant is the heir to inherit the homestead of his parents.

In amplification, according to the customary laws and the culture of Amampondo the person entitled to inherit the homestead of the grandparents is their grandson which is myself in the circumstances.

6.2 I further dispute categorically that site [...] was transferred to the applicant in his own version applicant correctly states that site [...] is registered in my grandfather's name as shown in annexure “VFN3”.

6.3 Further I am advised that annexure “VFN2” constitutes inadmissible hearsay evidence, a legal argument shall be presented in court in this regard.

6.4 I wish to place it on record that when applicant left for a new site for his new wife he organized a family meeting where he announced to all members of Ndabankulu family that is now leaving and is leaving me as the head of the homestead in site no. [...] and I took full control of the homestead which by customary laws of Amampondo belongs to me.”

[10] Applicant in reply attached an affidavit by Gcininkosi Zilwa which states inter alia as follows:

“3.

I am an adult male employed by the Department of Rural Development and Agrarian Reform, Eastern Cape as an Agricultural technician with office at Room 41, Third Floor, Botha Sigcau Building, Mthatha.

4.

I depose to this affidavit to explain the reason why the permit to occupy (PTO) the Residential Allotment or Site No. [...] Mangquzu Location, Flagstaff could not be issued to the site owner Mr. Veliso Fagan Ndabankulu (ID No: 421210 5497 082) by our office which is the custodian of all the files and information concerning the Rural Areas for the then former Transkei.

.....7.

The issue of allocation of site and/or issuing of permits is now the prerogative of the Department of Land Affairs and not the Department Rural Development and Agrarian Reform, which is my Department.

Although we had been issuing the permit to occupy residential allotment in the past years, due to disputes over the land along the coast which disputes culminated to various court cases, it was resolved that the Department of Rural Development and Agrarian Reform which our department should only service the land and not allocate sites and should not issue the permits to occupy the land instead if anyone needs a permit, we should write him or her a letter confirming that indeed he or she is the owner according to the records at our disposal.

As a result we are no longer issuing permits to occupy land as that now is the prerogative of the Department of Land Affairs.

...

11.

In a nutshell the letter issued to Mr. Ndabankulu dated the 25 January 2016 suffices to confirm that indeed Mr. Veliso Fagan Ndabankulu is the owner of Site [...] at Mangquzu Location, Flagstaff according to the records with us.”

[11] In summary Appellant fails entirely to set out any proper basis for concluding that in terms of the Proclamation (Section 9(2)(a)) as appears below, Site [...] was registered in his name, nor does he suggest when, how, by whom or where he became owner of or registered holder of the allotment (Site [...]), in any way at all. In short, it is upon the above facts which are placed in issue, that Appellant’s locus standi must stand or fall. It almost goes without saying that the supporting Affidavit of Zilwa annexed in reply takes the matter no further, this being the word of a technician in an alternative department, who does no more than confirm the letter adverted to above, and which fails to set out any purported allocation to Appellant in terms of the Proclamation.

THE LAW

[11] The relevant Proclamation provides:

“PROCLAMATION NO – 26 OF 1936

LOCATION REGULATIONS: UNSURVEYED

DISTRICTS: TRANSKEI TERRITORIES

....

2.(1) Each magistrate shall keep a register in a form approved by the Minister in which shall be entered particulars of all permissions granted under the provisions of section four, and of all transfers, cancellations, and temporary arrangements for the use of allotments.

(2) All entries shall be signed by the magistrate.

(3) A duplicate of each entry of permission signed by the magistrate shall be issued free of charge to the allottee.

Permission to Occupy Homestead and Arable Allotments

4.(1) Subject to the provisions of the Transkei Agricultural Development Act, 1966 (Act No. 10 of 1966), of any soil conservation scheme in force under that Act and of section 19 of these regulations, the magistrate may grant permission –

(i) to any person to remain in occupation of such homestead and arable allotments as were in his lawful but unregistered occupation immediately prior to the commencement of the Transkei Land Amendment Act, 1968;

(ii) to any person domiciled in the district, who has been duly authorized thereto by the tribal authority, to occupy in a residential area for domestic purposes or in an arable area for agricultural purposes, a homestead allotment or an arable allotment, as the case may be;

(iii) to any missionary society duly authorized thereto by the tribal authority, to hold a homestead allotment in a residential area or an arable allotment in an arable area for occupation by any full-time minister of religion, preacher or evangelist in its employ.

.....

(3) The permission to occupy allotments under paragraph (iii) of subsection (1) shall be liable to cancellation and the allotment shall revert to commonage –

(i) if the post in respect of which the allotment is held is abolished or remains vacant without good cause shown to the magistrate, for any period in excess of one year;

(ii) if the allotment is used without the prior approval of the magistrate, for a period exceeding three months by any person other than the incumbent of the post;

(iii) if the rental shall be in arrear for more than two years.

Transfer of Allotments

7.(1) Subject to the approval of the magistrate any [person] may transfer any allotment in his lawful occupation to any other [person] domiciled in the district. If the allotment to be transferred has already been registered, transfer shall be effected by entry in the land register opposite the entry of allotment to the transferor and by endorsement on the duplicate thereof and if no such registration has taken place, permission to occupy shall be issued to the transferee.

(2) In considering any such application the magistrate shall have regard to the conditions prescribed in paragraph (ii) of subsection

(2) of section four.

Expropriation of Allotment

8.(1)

9.(1)

(2)(a) Upon the death of an allotment holder his right to occupy such allotment shall ipso facto be cancelled and, subject to the provisions of the Transkei Agricultural Development Act, 1966 and of any soil conservation scheme in force under that Act, such allotment shall become available for re-allotment to a widow or other member, including any other

female member, of the previous holder's family selected for the purpose by the tribal authority.

(b) In the absence of any such re-allotment, the allotment shall revert to commonage.

(3) An allotment holder temporarily absenting himself from an administrative area may with the permission of the magistrate leave his allotment in charge of some person for a period not exceeding two years, which may be extended for a further period not exceeding two years. If an allotment holder absents himself for more than one year without such permission or if, upon expiration of the authorized term, the allotment holder shall not have returned to the administrative area, he shall be deemed to have removed therefrom.

(4) In the cases provided for in paragraphs (c) to (j) inclusive of subsection (1), cancellation shall not take place until the allotment holder shall have been warned by notice at his last known place of residence in the district to appear before the magistrate to show cause why the cancellation should not take place.

(5) Cancellation and reversion to commonage unless otherwise provided for in these regulations shall take effect from the date of entry of the same in the land register."

[12] The Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998, provides:

“To provide for the prohibition of unlawful eviction; to provide for procedures for the eviction of unlawful occupiers; and to repeal the Prevention of Illegal Squatting Act, 1951, and other obsolete laws; and to provide for matters incidental thereto.

...

1 Definitions

In this Act, unless the context indicates otherwise—

‘building or structure’ includes any hut, shack, tent or similar structure or any other form of temporary or permanent dwelling or shelter;

‘consent’ means the express or tacit consent, whether in writing or otherwise, of the owner or person in charge to the occupation by the occupier of the land in question;

‘court’ means any division of the High Court or the magistrate’s court in whose area of jurisdiction the land in question is situated;

‘evict’ means to deprive a person of occupation of a building or structure, or the land on which such building or structure is erected, against his or her will, and ‘eviction’ has a corresponding meaning;

‘land’ includes a portion of land;

‘Minister’ means the Minister designated by the State President;

‘municipality’ means a municipality in terms of section 10 of the Local Government Transition Act, 1993 (Act 209 of 1993);

‘organ of state’ means an organ of state as defined in section 239 of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996);

‘owner’ means the registered owner of land, including an organ of state;

‘person in charge’ means a person who has or at the relevant time had legal authority to give permission to a person to enter or reside upon the land in question;

‘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,

....

2 Application of Act

This Act applies in respect of all land throughout the Republic.

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) The notice of proceedings contemplated in subsection (2) must—
 - (a) state that proceedings are being instituted in terms of subsection (1) for an order for the eviction of the unlawful occupier;
 - (b) indicate on what date and at what time the court will hear the proceedings;
 - (c) set out the grounds for the proposed eviction; and
 - (d) state that the unlawful occupier is entitled to appear before the court and defend the case and, where necessary, has the right to apply for legal aid.

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.

9 Jurisdiction of magistrate's court

Notwithstanding any provision of any other law, a magistrate's court has jurisdiction to issue any order or instruction or to impose any penalty authorised by the provisions of this Act."

[13] Erasmus Superior Court Practice, Eviction under PIE[1] sets out the purpose and effect of PIE relevant to this matter as follows:

“The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (‘PIE’), which came into operation on 5 June 1998, provides for procedures for the eviction of unlawful occupiers of land.[2] In Ndlovu v Ngcobo; Bekker and Bosch v Jika[3] the Supreme Court of Appeal, in a majority judgment, held that PIE disposed of certain common-law rights relating to eviction. The majority judgment can be summarized as follows:

- (a) PIE has its roots, inter alia, in s 26(3) of the Constitution of the Republic of South Africa, 1996.
- (b) The definition of an unlawful occupier in s 1 of PIE relates to a person who occupies land without the express or tacit consent of the owner or person in charge of such land. In its ordinary meaning the definition of an unlawful occupier means that PIE applies to all unlawful occupiers, irrespective of whether their occupation of such land was previously lawful.
- (c) PIE does not protect buildings and structures that do not perform the function of a form of dwelling of shelter for humans (eg commercial properties) or that are occupied by juristic persons.
- (d) The effect of PIE is not to expropriate private property. What PIE does is to delay or suspend the exercise of a landowner’s full proprietary rights until a determination has been made whether it is just and equitable to evict the unlawful occupier and under what conditions.
- (e) PIE invests in the courts the right and duty to make the order which, in the circumstances of the case, would be just and equitable, and it prescribes some circumstances that have to be taken into account in determining the terms of the eviction. In other words, the court, in determining whether or not to grant an order or in determining the date on which the property has to be vacated, has to exercise a discretion as to what is just and equitable. The discretion is one in the wide, and not the narrow sense.

Consequently, the court does not have a free hand to do whatever it wishes.

- (f) Provided the procedural requirements laid down in PIE have been met, a landowner is entitled to approach the court on the basis of ownership and the occupier’s unlawful occupation. In this regard the occupier bears an evidential onus (‘weerleggingslas’).

A draft Bill to amend certain definitions and to qualify the application of PIE was published under GN2276 of 27 August 2003.

In s 1 of PIE the word ‘court’ is defined as ‘any division of the High Court or the magistrate’s court in whose area of jurisdiction the land in question is situated’.

Section 4(1) of PIE provides that, notwithstanding anything to the contrary contained in any law or the common law, the provisions of that section apply to proceedings by an owner or person in charge of land for the eviction of an unlawful occupier. The word 'proceedings' may, of course, bear different meanings in different statutory provisions. It is submitted that in the context of PIE it includes action as well as application proceedings.

If the defendant is an unlawful occupier of land, as defined in PIE, written and effective notice of the proceedings must be served on both the unlawful occupier and the municipality having jurisdiction at least fourteen days before the hearing of the proceedings for the eviction of the defendant. The purpose of this requirement is to provide protection to occupants by alerting them to the threat to their occupation and the basis thereof; alerting them to the provisions of and the protections and defences afforded to them by PIE; advising them of their rights to legal representation; and informing them of the date and place of the hearing and 'to afford the respondents in an application under PIE an additional opportunity, apart from the opportunity they have already had under the Rules of Court, to put all the circumstances they allege to be relevant before the court. In addition, the period of notice provided for permits the municipality and the occupants concerned to investigate the availability of alternative accommodation or land and to explore the possibility of mediation in terms of s 7 of PIE.

The notice requirement applies even to proceedings leading to the grant of a rule nisi against occupants.

If the defendant has been in occupation of the land for less than six months, the 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. In addition to these requirements the court is required to consider whether land has been made available or can reasonably be made available by a municipality or other organ of state or another landowner for the relocation of the defendant, if the latter has been in unlawful occupation for longer than six months. The period of occupation is calculated from the date that the occupation becomes unlawful.

If the requirement of s 4 of PIE are satisfied and no valid defence to an eviction order has been raised, the court 'must', in terms of s 4(8), grant an eviction order. When granting such an order the court must, in terms of s 4(8)(a) of PIE, determine a just and equitable date on which the unlawful occupier or occupiers must vacate the premises. The court is empowered, in terms of s 4(12) of PIE, to attach reasonable conditions to an eviction order. The date that the court determines must be one that is just and equitable to all parties.

... The order that it grants as a result of those 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 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."

- [14] In this matter procedurally the application was launched by way of the usual Notice of Application and Supporting Affidavit, which failed in almost all respects to comply with the provisions of Section 4(2) –
- (5) of PIE, although being served on Appellant and the Municipality, Second Respondent, by the Sheriff.
- [15] Some seven months later a Notice in terms of Section 4 of PIE was prepared and delivered to Appellant's Attorneys and purportedly the Municipality (Second Respondent) but in respect of the Municipality was "received" by an unknown person whose capacity to receive lawful process for the Municipality was not demonstrated – most certainly not being service in terms of the Rules or PIE by the Sheriff.
- [16] The notice itself in point of fact as to its content complied with Section 4(5) of PIE. It failed however to have been authorised by the Court, and neither the Notice of Application nor the Section 4 Notice thus complied with Section 4(2) of PIE. In the circumstances relevant to procedure, the process was deficient in the context of the authorities unless substantial compliance could nevertheless be shown to have been achieved.
- [17] In this regard and relevant to the above enquiry in *Moela v Shoniwe*[4] the following was stated:

"[7] This Court held in Cape Killarney Property Investments (Pty) Ltd v Mahamba 2001

- (4) SA 1222 (SCA) that these provisions are peremptory (paras [11] and [17]). In respect of the notice required by s 4(2) it held that it must be effective notice; that it must contain the information stipulated in ss (5); and that it must be served 'by the court'. The latter requirement it interpreted to mean that the contents and the manner of service of the notice must be authorized and directed by an order of the court (para [11]).
- [8] In the as yet unreported judgment of this court in *The Unlawful Occupiers of the School Site v The City of Johannesburg* (case No 36/2006), referring to the fact that the requirements of s 4(2) were peremptory, Brand JA said (para [22]):

'Nevertheless, it is clear from the authorities that even where the formalities required by statute are peremptory it is not every deviation from the literal prescription that is fatal. Even in that event, the question remains whether, in spite of the defects, the object of the statutory provision had been achieved (see for example *Nkisimane and Others v Santam Insurance Co Ltd* 1978

(2) SA 430 (A) at 433H-434B; *Weenen Transitional Local Council v Van Dyk* 2002

(4) SA 653 (SCA) para [13]).'

- [9] Here the contents and manner of service of the notice had not been authorised and directed by an order of court. However, the object of s 4(2) is clearly to ensure that the unlawful occupier and municipality are fully aware of the proceedings and that the unlawful occupier is aware of his rights referred to in s 4(5)(d). It may well be that that object, in appropriate

circumstances, may be achieved notwithstanding the fact that service of the notice required by s 4(2) had not been authorized by the court. That may, for example, be the case if at the hearing it is clear that written and effective notice of the proceedings containing the information required in terms of s 4(5) had in fact been served on the unlawful occupier and municipality 14 days before the hearing. Whether it would, need not be decided by us as there is no basis upon which it can be found that the municipality had been notified of the proceedings at all or that the municipality had any knowledge of the proceedings.

[10] The respondent's summons containing his particulars of claim had not been served on the municipality. The notice of application

for summary judgment was addressed to the Registrar of the Court a quo, to the appellant's attorneys and to 'the Germiston Municipality having jurisdiction' next to which someone indicated by a signature that he had received a copy of the document. It is not known who the person is, what his relationship with the municipality is, where he received a copy of the document and whether he had authority to receive documents on behalf of the Germiston Municipality. The Court a quo therefore erred in finding that there was proof of service on the municipality.

[11] There has been no compliance whatsoever with the provisions of s 4(2) insofar as the municipality is concerned; it is not known whether the municipality had any knowledge of the proceedings; and there can, therefore, be no question of the object of the section, insofar as it requires service of the notice on a municipality, having been achieved. It follows that the Court a quo should have dismissed the application for summary judgment."

[18] In *Theart v Deon Minnaar NO* (483/08) and *Senekal v Winskor 174 (Pty) Ltd* (007/09)[5] the following was stated:

"[6] I pause to observe that the appellants in both appeals did not dispute the merits of their respective cases. They confined themselves to an attack on the procedures which had been adopted by the respondents. In Theart the objection was that although two notices had been issued separately they were served simultaneously. In Senekal, on the other hand, the objection was that there was only one hybrid notice issued, which embodied the information required by s

4. Both appellants contended that the failure to have two notices served separately on them infringed their rights to procedural and substantive justice expressly provided for in s 4(2), read with s 4(5) of PIE. They contended that a proper interpretation of s 4(2) required that two separate notices be issued and served on them separately. Their principal submission was that this procedure was intended to give them an additional opportunity apart from that ordinarily accorded them by the rules of the magistrates' courts to consider their positions and put all relevant facts before the court for its consideration. Reliance was placed on *Cape Killarney Property Investments (Pty) Ltd v Mahamba and Others* 2001

(4) SA 1222 (SCA) for this contention.

[7] It is useful to quote the relevant part of the judgment in Cape Killarney paras 11 and 12 where Brand AJA stated the following:

'[11] Section 4(1) makes it clear that the provisions of the subsection that follow are peremptory. It also defines the "proceedings"

to which the section applies, namely proceedings for the eviction of an unlawful occupier. Section 4(2) requires notice of such

proceedings to be effected on the unlawful occupier and the municipality having jurisdiction at least 14 days before the hearing

of those proceedings. Section 4(2) further provides that this notice must be effective notice; that it must contain the information

stipulated in ss (5) and that it must be served by the court. The term "court" is defined in s 1 of the Act, as the "High

Court or the magistrates' courts". Although s 4(2) could have been more clearly worded, it is obvious in my view that the

Legislature did not intend physical service of the notice by the court in the person of a Judge or magistrate. On the other hand, mere issue of the notice by the Registrar or clerk of the court would not suffice. What is intended, I believe, is that the contents and the manner of service of the notice contemplated in ss (2) must be authorised and directed by an order of the court concerned.

[12] Section 4(3) provides that notice of the proceedings must be served in accordance with the rules of the court in question. Accordingly, for purposes of an application in the High Court, such as the one under consideration, s 4(3) requires that a notice of motion as prescribed by Rule 6 be served on the alleged unlawful occupier in the manner prescribed by Rule 4 of the Rules of Court. It is clear, in my view, that this notice in terms of the Rules of Court is required in addition to the s 4(2) notice. Any other construction will render the requirement of s 4(3) meaningless.

And in para 15 he said:

'Section 4 does not indicate how the court's directions regarding the s 4 notice are to be obtained. The common-sense approach to the section appears to dictate, however, that the applicant can approach the court for such directions by way of an ex parte application.'

[8] It is clear to me that the appellants failed to appreciate the fine but crucial distinction between the procedures for applications in the high court in contrast to the magistrate's court. Rule 55(1) of the magistrates' courts rules reads as follows:

'Except where otherwise provided, an application to the court for an order affecting any other person shall be on notice, in which shall be stated shortly the terms of the order applied for and the time when the application will be made to the court. Delivery of such notice shall be effected in the case where the State is the respondent, not less than 20 days and in other cases not less than 10 days before the date of hearing.'

[9] Unlike the procedure prescribed by rule 6 of the uniform rules, rule 55(1) of the magistrates' courts rules does not create a procedure whereby an application in opposed matters has to be set down by way of a notice after all the papers have been filed as in the high court. On the contrary, in terms of rule 55(1), upon the issue of the application, such application must state the terms of the order sought and the date and time when the application will be heard. The result is that on being served with the application, a respondent will be fully informed of the nature of the application, the order sought, the date, time and court when and where the application will be heard. Section 4(2) in itself does not require an additional notice. All it requires is that written and effective notice of the proceedings be served on the unlawful occupier and the municipality 14 days before an order for eviction could potentially be granted. It follows logically that Cape Killarney is no authority for the proposition that s 4(2) requires two separate notices to be served on a respondent in the magistrates' courts.

[12] In the present appeals both applications were properly served by the sheriff on the two appellants in a manner approved by the court concerned. Both appellants understood what the applications were all about and duly instructed legal representatives to represent them. In opposing the applications both appellants filed affidavits setting out their defences to the applications. Significantly both appellants were represented by legal representatives when their applications were heard. There is no doubt that the object of s 4(2) to give the occupiers sufficient and effective notice of the intended eviction was achieved. Notwithstanding this the appellants contend that both applications should have been dismissed on the simple basis that there was no additional notice served on them. However, counsel for the appellants (the same counsel appeared for the appellants in both cases) was unable to point to any section in PIE which requires an additional notice. For the reasons I have given, I find this argument untenable. But there is an additional reason why neither appeal could succeed even if the provisions of s 4 of PIE and/or the rules of

the magistrates' court had not been strictly complied with. The considerations underlying this additional reason appear from the

dicta that follow. In *Moela v Shoniwe* 2005 (4) SA 357 (SCA) para 9, Streicher JA said:

'Here the contents and manner of service of the notice had not been authorised and directed by an order of court. However, the object of s 4(2) is clearly to ensure that the unlawful occupier and municipality are fully aware of the proceedings and that the unlawful

occupier is aware of his rights referred to in s 4(5)(d). It may well be that that object, in appropriate circumstances, may be achieved notwithstanding the fact that service of the notice required by s 4(2) had not been authorised by the court. That may, for example, be the case if at the hearing it is clear that written and effective notice of the proceedings containing the information required in terms of s 4(5) had in fact been served on the unlawful occupier and municipality 14 days before the hearing. . . .'

And in *Unlawful Occupiers, School Site v City of Johannesburg* 2005

(4) SA 199 (SCA) para 24 where Brand JA stated:

'The question whether in a particular case a deficient s 4(2) notice achieved its purpose, cannot be considered in the abstract. The answer must depend on what the respondents already knew. The appellant's contention to the contrary cannot be sustained. It would lead to results which are untenable. Take the example of a s 4(2) notice which failed to comply with s 4(5)(d) in that it did not inform the respondents that they were entitled to defend a case or of their right to legal aid. What would be the position if all this were clearly spelt out in the application papers? Or if on the day of the hearing the respondents appeared with their legal aid attorney? Could it be suggested that in these circumstances the s 4(2) [notice] should still be regarded as fatally defective? I think not. In this case, both the municipality's cause of action and the facts upon which it relied appeared from the founding papers. The appellants accepted that this is so. If not, it would constitute a separate defence. When the respondents received the s 4(2) notice they therefore already knew what case they had to meet. In these circumstances it must, in my view, be held that, despite its stated defects, the s 4(2) notice served upon the respondents had substantially complied with the requirements of s 4(5).'

[14] Viewed against the main purpose of PIE, the real issue is not so much whether or not there are two separate notices. The real and proper enquiry should be whether there has been effective notice of the proceedings on the occupier in the sense that a court is satisfied that the occupier has been fully informed of the impending eviction, the grounds therefor, the date and place of hearing and the right to appear in court and be represented. This is exactly what happened in the two appeals. Accordingly I am satisfied that effective notice was given to the appellants. To hold otherwise would promote slavish adherence to form above substance”.

[19] Against the above, the two issues for determination must be decided as more fully set out below.

LOCUS STANDI/STANDING TO EVICT

[20] Against the facts and legal position as elucidated above, and on application, Appellant has entirely failed on his own allegations, let alone those of First Respondent, to demonstrate that he is the owner let alone person in charge of Site [...]. It is unnecessary to traverse First Respondent's allegation that he was given the property at a family ceremony, there being no concession that the Proclamation vested ownership or an entitlement to utilize Site [...]. In

the circumstances it seems to me that the Magistrate was perfectly correct in his conclusion in this regard albeit that I have reached the same conclusion by way of a different route. I conclude on the allegations and the Proclamation that Appellant has failed to demonstrate standing to evict either as a matter of common law and/or PIE.

THE PROCEDURAL REQUIREMENTS OF PIE

- [21] It follows also from what I have set out above, that Appellant failed to comply with the necessary procedural requirements of PIE, considering both the Notice of Application and the Section 4(2) Notice aforesaid. Whilst the Section 4(2) Notice set out the necessary content as per Section 4(5) of PIE, it was not authorised by the Court nor was it served or shown to be served upon the Municipality in a manner required simply being received by someone indicating by signature receipt of the document, it not being known who the person is, what his relationship with the Municipality is, where he received a copy of the document and whether he had authority to receive the document on behalf of the Municipality, or even in fact that he worked for the Municipality or that the document was in fact received at the Municipality.
- [22] In the result again, the application was thoroughly deficient there being no substantial compliance even indulgently viewed, the application being fatally flawed as it came before the Magistrate.

CONCLUSION

- [23] In the result, and inasmuch Appellant has failed on both legs, the only order that could have been made would be to dismiss the application. The Magistrate in this regard made the correct order both in respect of the application and the Rule nisi, although again approaching the matter differently than I have done. There is no room accordingly for the submission made by Mr Hobbs, that the Magistrate should have postponed the application affording the Applicant an opportunity of curing the procedural difficulties.
- [24] In the result, the appeal is dismissed with costs.

M.J. LOWE

JUDGE OF THE HIGH COURT

MLOMZALE, AJ

I agree.

N MLOMZALE

JUDGE OF THE HIGH COURT (ACTING)

Obo the Appellant: Adv Hobbs

Instructed by: Linyana & Somacala Inc, Flagstaff

C/o Manithana Tshozi Attorneys, Mthatha

Obo First Respondent: Mr Msindo

Instructed by: Messrs V V Msindo & Associates, Mthatha

[1] Second Edition, Volume 2, D9-1 to D9-9.

[2] PIE has to be interpreted, and its governing concepts of justice and equity have to be applied, within a defined and carefully calibrated constitutional matrix. The starting and ending point of the analysis of PIE must be to affirm the values of human dignity, equality and freedom (Port Elizabeth Municipality v Various Occupiers [2004] ZACC 7; 2005

(1) SA 217 (CC) at 225A-229G). See also Machele v Mailula 2010 (2) SA 257 (CC) at 262A-B.

[3] 2003 (1) SA 113 (SCA). See further 2003 (March) De Rebus 14-17, 18-20 and 22-24; 2003 (July) De Rebus 44; 2004 (July) De Rebus 57-60 and 2016 (October) De Rebus 24-26.

[4] 2005 (4) SA 357 (SCA) at 362C-363A

[5]

[2009] ZASCA 173 (3 December 2009)

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Prepared on 14 October 2026 · Esheria