

SOUTH AFRICA / JUDGMENT

Shabangu v Senwamadi and Others (2020/12954) [2024] ZAGPJHC 428 (2 May 2024) [2024] ZAGPJHC 428

COURT

South Gauteng High Court, Johannesburg

BEFORE

J J Meiring

CASE / FILE NUMBER

2020/12954

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, JOHANNESBURG

1.

REPORTABLE: NO.

2.

OF INTEREST TO OTHER JUDGES: NO.

3. REVISED:

NO.

CASE

NO.: 2020/12954

In

the matter between:

PHUMULANI
ISHMAEL SHABANGU Applicant
and
LERATO
SENWAMADI First
respondent
ALL OTHER UNLAWFUL
OCCUPANTS OF
ERF 1[...] B[...]
M[...] W[...] D[...]
JIYANE
SECTION, TEMBISA
Second respondent
EKHURULENI
METROPOLITAN MUNICIPALITY
Third respondent
This judgment was
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JUDGMENT

MEIRING, AJ:

INTRODUCTION

- [1] This is an application under the Prevention of Illegal Eviction from and the Unlawful Occupation of Land Act, 1998 (to which I refer below as the PIE Act), for the eviction of the first respondent and all those who hold through or under her from a property in Tembisa, which she occupies with her minor children.

THE FACTS

How the applicant became the owner of Erf 1[...]

- [2] On 4 August 2016, in Centurion, the applicant, Mr Phumulani Shabangu, and the executor of the estate of the late Ms Sophia Mondo Mpolwane concluded a deed of sale over Erf 1[...] B[...] M[...] W[...] D[...], J[...] Section, Tembisa. The purchase price was R250,000.00.
- [3] At the time that the deed of sale was concluded, Ms Senwamadi, the first respondent, was in occupation of Erf 1[...]. The executor of Ms Mpolwane's estate apprised Mr Shabangu that Ms Senwamadi would vacate the property by the end of August 2016.

- [4] Thereupon, it seems, Mr Shabangu was asked for an indulgence for the first respondent to find alternative accommodation. He says he agreed that she might stay on until the property came to be registered in his name, by when, in his words, “she should have secured alternative accommodation”.
- [5] On 5 July 2017, the property was indeed registered in Mr Shabangu’s name. Yet, Ms Senwamadi did not vacate the property.
- [6] Despite attempts that he made “numerous times to solicit a favourable response” from the first respondent, she remains in situ, preventing him from using or enjoying the property, while he remains liable under the loan that he obtained from Capitec to acquire the property, and for municipal charges.
- [7] In late 2017, Mr Shabangu first tried to evict Ms Senwamadi. On 11 December that year, an application of this sort, bearing the case number 47102/2017, was served on her. Yet, owing to various deficiencies, in due course it was aborted.

The first respondent’s position

- [8] In her answering affidavit, of 21 October 2021, the first respondent says that Erf 1[...] had belonged to her deceased father, Mr Alfred Mogale Mpolwane. On an unnamed date, he had married Ms Sophia Mpolwane, who then moved onto the property. Her children accompanied her.
- [9] Once Ms Mpolwane and her children had moved in, Ms Senwamadi observes: “We were always staying together as one family in the house with my late father, late mother and my half brothers and sisters.”
- [10] On 7 March 2011, Mr Mpolwane passed away. “[S]ince she was married to [the first respondent’s] late father in community of property”, Ms Mpolwane inherited the property. This, the first respondent says, was when “[h]er problems began”.
- [11] In October 2014, Ms Mpolwane passed away. Her eldest child, it appears, became the executor of the deceased estate. She “proceeded to put the house for sale” without the consent of Ms Senwamadi, “as one of the surviving children of our late parents”.
- [12] Ms Senwamadi did not know, she says, that the property had been sold to Mr Shabangu.
- [13] For all these reasons, Ms Senwamadi considers that she is being evicted unlawfully from “the property of [her] late father”. In her answering affidavit, she says: “I confirm that I am the lawful occupier of the property described as Erf 1[...] B[...] M[...], W[...] Street, J[...] Section, Tembisa.”

This application

- [14] This application has followed a tortuous path. In what follows, I set out the main steps.

- [15] In June 2020, the application was issued. On 27 August 2020, the sheriff served it on the first respondent personally. On 29 October 2020, the sheriff served it on the third respondent.
- [16] On 16 February 2021, the sheriff effected personal service on the first respondent of a notice under rule 4(2) and ancillary documents. The date indicated in the notice was 16 March 2021. On that date, the application was postponed and the first and second respondents were directed to deliver their answering affidavit.
- [17] Indeed, on 14 March 2021, on behalf of the first and second respondents, the firm Tsiqui Zebediela Incorporated had delivered a notice of intention to oppose the application.
- [18] On 26 August 2021, a further notice under section 4(2) and ancillary documents were served on the third respondent. On 1 September 2021, they were served on the first respondent. The date indicated in the notice was 21 October 2021. On that date, the first respondent delivered her answering affidavit, and this court directed the first and second respondents to present themselves to the third respondent within ten days of the order so that it might investigate the “facts and position” pertaining to the first and second respondents, especially concerning a likelihood of homelessness. At that virtual hearing (coram Adams J), the first and second respondents were represented by counsel.
- [19] There is no indication whatsoever that the first respondent complied with the order of Adams J.
- [20] On 28 January 2022, the applicant delivered his replying affidavit. He seeks condonation for its late delivery. In my view, since there can be no prejudice in these circumstances, it is proper and in the interests of justice to condone it. In that affidavit, the applicant provided the e-mail address and telephone number of both the Gauteng Department of Human Settlements in the Ekurhuleni region and the “Legal Department of Ekurhuleni” should the first respondent remain concerned about potential homelessness.
- [21] Then, more than a year later, on 4 October 2022, this court granted an order compelling the first and second respondents to deliver their heads of argument, list of authorities, chronology and practice note within three days of the date of service of that order.
- [22] There was no compliance and this court was deprived of the benefit of the argument that the legal representatives of the first and second respondents might have made.
- [23] In the second half of October 2023, the applicant’s attorneys took various steps to alert the respondents of the allocated hearing date of 13 November 2023.
- [24] On 18 October 2023, the applicant served a notice of set-down for 13 November 2023 as well as a notice under rule 4(2) on the third respondent.
- [25] On 26 October 2023, it did so to the e-mail address m[...], belonging to Tsiqui Zebediela Incorporated (which, I might add, is an e-mail address that was invited to the CaseLines file of this application). The applicant’s attorney received an electronic signal that delivery to that electronic address was complete. On 27 October 2023, the applicant’s attorney sent a

message to that same e-mail address, from which a delivery-complete signal was again received, seeking to extract from Tsiqui Zebediela Incorporated the delivery of heads of argument and participation in the preparation of the required joint practice note. There was no response.

[26] Accordingly, there was, in my view, compliance with the peremptory requirements of section 4(2). Indeed, since March 2021, the first respondent was legally represented, yet her participation in these proceedings, drawn out as they have been, has been thin. She flouted even the order of Adams J, which was fashioned to protect her and her children if there was indeed a real threat of homelessness.

[27] At the hearing, no-one appeared for the first and second respondents.

THE LAW

[28] An eviction application under the PIE Act comprises two enquiries.[1]

[29] First, the court must decide whether it is just and equitable to grant an eviction order having regard to all relevant factors, including, on these facts, those framed in section 4(7), namely the availability of alternative accommodation and the rights of the elderly, children, disabled persons, and households headed by women. The weight to be attached to those factors must be assessed in the light of the property owner's rights under section 25 of the Constitution, and on the footing that a hemming in of those rights in favour of the occupiers will ordinarily be limited in duration.

[30] If a court were to decide 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.[2]

[31] The second enquiry entails what justice and equity demand in relation to the date of implementation of the order. The court must consider what conditions

should be attached to the order. Under this enquiry, the court must consider the impact of an eviction order on the occupiers and whether they might thus be made homeless and whether they might need emergency assistance to be relocated elsewhere.[3]

[32] Both enquiries are necessary before the court can determine whether the eviction sought is just and equitable. Nor can this 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.[4] Where information is not before the court, the enquiry cannot be conducted and accordingly no order may be granted.[5]

[33] In Berea, the Constitutional Court held:[6]

"It deserves to be emphasised that the duty that rests on the court under section 26(3) of the Constitution and section 4 of PIE goes beyond the consideration of the lawfulness of the occupation. It is a consideration of justice and equity in which the court is required and expected to take an active role. In order to perform its duty properly the court needs to have all the necessary information."

- [34] Section 4(7) gives guidance on the considerations of which account might be taken when a court exercises its discretion to determine whether it is just and equitable to grant an eviction order:

“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 household.”

- [35] In Berea,[7] the Constitutional Court examined section 4(7):[8]

“[W]here there is a risk that homelessness may result, the availability of alternative accommodation becomes a relevant circumstance that must be taken into account. A court will not be able to decide the justice and equity of an eviction without hearing from the local authority upon which a duty to provide temporary emergency accommodation may rest. In such an instance the local authority is a necessary party to the proceedings. Accordingly, where there is a risk of homelessness, the local authority must be joined.”

- [36] On the question of how a court is to embark upon the enquiry into matters that fall uniquely in the knowledge of the respondent, in Ndlovu v Ngcobo; Bekker v Jika,[9] the Supreme Court of Appeal held:[10]

“Provided the procedural requirements have been met, the owner is entitled to approach the court on the basis of ownership and the respondent’s unlawful occupation. Unless the occupier opposes and discloses circumstances relevant to the eviction order, the owner, in principle, will be entitled to an order for eviction. Relevant circumstances are nearly without fail facts within the exclusive knowledge of the occupier and it cannot be expected of an owner to negative in advance facts not known to him and not in issue between the parties.”

[emphasis added]

- [37] As to section 4(8), in Msibi v Occupiers of Unit 67 Cedar Creek,[11] this division recently held:

“Simply put, a court must order an eviction once all procedural requirements which are those contemplated in sections 4(2) to 4(7) of the PIE Act and the findings on the lack of a defence by the unlawful occupier and justice and equity.”

- [38] On what a “valid defence” under section 4(8) might be, the Berea court held:[12]

“[A] defence directly concerning the justice and equity of an eviction, not necessarily the lawfulness of occupation, must be taken into account when considering all relevant circumstances. To limit the enquiry under section 4(6) and (7) to the lawfulness of occupation would undermine the purpose of PIE and be a reversion to past unjust practices under the Prevention of Illegal Squatting Act. The enquiry is whether it is just and equitable to evict. This is a more expansive enquiry than simply determining rights of occupation.”

[39] In *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another*,^[13] the Constitutional Court held that “a private owner has no obligation to provide free housing” and that “[u]nlawful occupation results in a deprivation of property under [section] 25(1) of the Constitution.”^[14]

[40] In *Grobler v Phillips*,^[15] the Constitutional Court held that, in eviction proceedings, “the competing interests of both parties” must be determined and balanced. With approbation, that Court referred to its previous judgment in *Hattingh*:^[16]

“In my view the part of [section] 6(2) that says: balanced with the rights of the owner or person in charge calls for the striking of a balance between the rights of the occupier, on the one side, and those of the owner of the land, on the other. This part enjoins that a just and equitable balance be struck between the rights of the occupier and those of the owner. The effect of this is to infuse justice and equity in the inquiry.”

[41] The reference to section 6(2) is not to the PIE Act, but to the Extension of Security of Tenure Act, 1997. Nevertheless, the Court found the balancing exercise in *Hattingh* is applicable also to the eviction enquiry under the PIE Act.

[42] It is in the light of those principles that the relief sought here is to be appraised.

[43] I add that section 4(2), read with section 4(5)(b), requires that unlawful occupiers who are facing eviction be given at least 14 days “written and effective notice” of the date on which proceedings for their eviction will be heard. This notice is in addition to the ordinary service of the application papers or combined summons that institute the eviction proceedings.^[17] The form and manner of service of the notice must be approved by a court.^[18] Here, the section 4(2) notice was approved and served within the provisions of the PIE Act.

[44] Against the background of these principles, I turn to consider the defence on the merits of the first and second respondents, as well as the two interlinked questions relating to a just and equitable order.

THE DEFENCE

Merits

[45] Like the rest of her answering affidavit, which spans a total of eight pages, the part in which Ms Senwamadi sets out her legal defence is vague, lacking in detail, and hard to grasp.

[46] Under the heading “THE INTESTATE SUCCESSION RULES”, she says this:

“I have been advised that the intestate succession Act 81 of 1987 applies wherein the deceased is survived by a spouse and descendants.

It is common cause that the late Ms. Sophia Mpolwane survived my late father together with me and the other children.

I have been further advised that according to the rules of intestate succession Act, if the deceased (my late father) is survived by a spouse as well as descendants, the spouse will inherit the greater of R250 000.00 or a child's share and the children will inherit the balance of the estate. As one of the descendants, I submit that I am entitled to share in the intestate estate of our late parents.

My late stepmother left the estate in the hands of the descendants by virtue of her marriage to my late father. I therefore submit that I am entitled to the share in the estate of our late parents and it would be unfair for the law to only allow the children of the late Sophie [sic] to be the sole beneficiaries of the estate.”

[47] The above exposition seems to suggest that, upon the death of Ms Sophia Mpolwane, under the Intestate Succession Act, 1987, the first respondent ought as a descendant to have inherited from her. Yet, on the first respondent's own version, she was not a descendant in the sense contemplated in the Act. She does not say that Ms Mpolwane had adopted her.

[48] While this account is consistent with the first respondent's earlier averment that Ms Mpolwane had inherited the property from her late husband, the father of the first respondent, it does not provide a cognisable defence to the applicant's claim.

[49] Indeed, under the next heading in the answering affidavit, namely “THE SALE OF THE PROPERTY”, the first respondent goes on to say: “It is common cause that the property under the dispute was sold to the Applicant by the children of my late stepmother without my consent.” It is not clear that this is indeed common cause. It is also not clear that the first respondent's consent was required.

[50] The applicant says that he bought the property from the executor of the estate of the late Ms Mpolwane, who happened to be her eldest child. The question of consent on the part of the first respondent would then not arise.

[51] The first respondent then says: “I admit that the Applicant bought the property under the mistaken belief that all the owners of the property consented to the sale

thereto.” Again, the first respondent's version is that the property resided in the deceased estate of Ms Mpolwane.

[52] The first respondent adds this:

“I therefore submit that I was entitled to consent to the sale of the property and consequently to the proceeds of the sale.

I further submit that I am entitled to the proceeds of the sale of the property and that I should not be evicted from my late father's

property until I am properly compensated."

- [53] Here, the first respondent raises a different point that puts paid to her defence, such as it is. If the first respondent has difficulties with how the estate of the late Ms Mpolwane was wound up, her remedies lie elsewhere. If she claims to have a right to share in the proceeds of the sale of the property, she should pursue the allegedly errant executor.
- [54] What cannot be assailed is that the applicant bought the property bona fide and that he has for several years been prevented from benefitting from it.
- [55] What is clear is that the first respondent is aggrieved that what had originated as her father's estate had, in the wake of his marriage in community of property with Ms Mpolwane, become merged with her estate, and that, once Ms Mpolwane passed away, she did not inherit even a part of what she considers to have belonged to her late father.
- [56] While one understands someone being aggrieved over an unrequited expectation of an inheritance, the first respondent's account fails to raise a defence as a matter of law. What is not said is that there is a basis upon which to impugn the sale to Mr Shabangu. The first respondent does not dispute that he is the registered owner of Erf 1[...], nor that he is a bona fide purchaser.
- [57] Accordingly, the first respondent has put up no cognisable legal defence to the eviction order.

A just and equitable remedy

- [58] In two short paragraphs under the heading "NO ALTERNATIVE ACCOMMODATION", the first respondent says the following.
- [59] First, she says that she has no alternative accommodation and that she lives with her "three kids aged between eleven (11) and five Months". She deposed to her answering affidavit in October 2021, which would mean that the eldest of these three children would now be about 13, and the youngest, about 3 years. She goes on to say that she is unemployed.
- [60] The second respondent then says the eviction "will make [her] homeless" since she has no relatives "to which I can stay with my kids". Then, she says something slightly different: "I am unmarried and it will be difficult for me to get accommodation for my kids."
- [61] As my recounting of it in the previous paragraphs shows, the first respondent's version is very thin indeed. The facts relating to her situation are uniquely within her own knowledge. Yet, while legally advised at the time that she deposed to the affidavit, she has failed to take the court into her confidence.

- [62] Several questions arise. They include whether the first respondent has previously or latterly been gainfully employed. If she has not, the question surfaces as to how she has managed to provide for herself and her children.
- [63] The first respondent could and should have provided the court with chapter and verse on her situation. Yet, not only did she not do so, but she disregarded the order of this court that she present herself to the third respondent so that it might consider her position and provide whatever assistance it can.
- [64] The conclusion is irresistible that, had the first respondent indeed been threatened by homelessness, she would have adopted a very different approach to this litigation, not least to the order that she should seek out the help of the third respondent, handed down at a hearing in which she had been represented by counsel.
- [65] On the other side of the coin is the applicant who has incurred considerable expense to acquire a property that he has not been able to use. The first respondent has lived rent-free in the property for well-nigh six years.
- [66] Accordingly, on a conspectus of everything before me, I find that the eviction order sought is just and equitable. The interrelated question, then, is what a just and equitable date would be upon which to direct that eviction.
- [67] While the first respondent has chosen to provide this court with scant information, I accept that she is the mother of three young children who likely attend local schools and whose lives ought to be disrupted as little as possible.
- [68] Accordingly, I am of the considered view that making the date of the eviction three months hence would give the first respondent sufficient time to make alternative arrangements that do not unduly unsettle her life and that of her children.

COSTS

- [69] I see no reason why the costs should not follow the result.

ORDER

1. It is declared that the first and second respondents are in unlawful occupation of Erf 1[...] B[...] M[...] W[...] D[...], J[...] Section, Tembisa;
2. The first and second respondents and all those claiming occupation through and under one or the other or both of them are evicted from and are directed to vacate Erf 1[...] B[...] M[...] W[...] D[...], J[...] Section, Tembisa, within three (3) months of the service of this order;

3. If the first and second respondents and all those claiming occupation through and under one or the other or both of them fail to vacate Erf 1[...] B[...] M[...] W[...] D[...], J[...] Section, Tembisa, within the period set out in paragraph 2 above, the sheriff or his lawful deputy is authorised, directed, and empowered to carry out the eviction order on the first day after the period set out in paragraph 2 above;
4. The sheriff or his lawful deputy are authorised to elicit the assistance of the South African Police Service to enforce this order, should this be strictly necessary; and
5. The first and second respondents are directed to pay the costs of this application, jointly and severally, the one paying, the other to be absolved, including the costs of counsel.

J J MEIRING

ACTING JUDGE OF THE HIGH COURT

JOHANNESBURG

Date of hearing:

16 November 2023

Date of

judgment:

2 May 2024

APPEARANCES

For the first applicant: Adv W Naudé

Instructed by:

ODBB Attorneys

For the respondent: No appearance

Instructed by:

Tshiqi Zebediela Inc. are on record, but were absent

[1] Occupiers, Berea v De Wet N.O. 2017

(5) SA 346 (CC).

[2] City of Johannesburg v Changing Tides 74 (Pty) Ltd 2012 (6) SA 294 (SCA), at para 25.

[3] Changing Tides, at para 25.

[4] Changing Tides, at para 25.

[5] Berea, at para 46.

- [6] At para 47.
- [7] 2017
- (5) SA 346 (CC).
- [8] See para 61 with reference to Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele 2010 JDR 0300 (SCA) and Changing Tides, at para 38.
- [9] 2003
- (1) SA 113 (SCA).
- [10] At para 19.
- [11] 2022 JDR 3495 (GP), at para 18.
- [12] At para 65.
- [13] 2012
- (2) SA 104 (CC), at paras 31 and 37 consecutively.
- [14] Grobler v Phillips 2023 (1) SA 321 (CC), at para 37.
- [15] 2023
- (1) SA 321 (CC), at para 39.
- [16] Hattingh v Juta 2013 (3) SA 275 (CC), at para 32.
- [17] Cape Killarney Property Investments v Mahamba 2001
- (4) SA 1222 (SCA), at paras 13 and 14. See PZL Properties (Pty) Limited v Unlawful Occupiers of Erf [....] Judith's Paarl Township (053569/2022)
- [2023] ZAGPJHC 59 (30 January 2023).
- [18] Cape Killarney, at paras 11 and 16.

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