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**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG**

**CASE NO: 4209/2022**

**NOT REPORTABLE**

**NOT OF INTEREST TO OTHER JUDGES**

**REVISED**

**24.04.23**

In the matter between:

**NKOSINATHI SHEZI**

**APPLICANT**

**And**

**L. V. L.**

**FIRST RESPONDENT**

**EKURHULENI MUNICIPALITY**

**SECOND RESPONDENT**

Neutral Citation: *NKOSINATHI SHEZI v L. V. L. & EKURHULENI MUNICIPALITY* (Case No: 4209/2022) [2023] ZAGPJHC 373 (24 April 2024)

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**JUDGMENT**

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**Delivered:** This judgment and order was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to Parties / their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the order is deemed to be the 24<sup>th</sup> April 2023.

**Summary:** *Application for eviction under PIE – Unlawful occupation – Consent to occupy – just and equitable to grant the order – failure of unlawful occupier to provide facts relevant to the eviction fatal – eviction order granted with costs.*

## **TWALA J**

[1] This is an application launched by the applicant for the eviction of the respondent from the property known as [...], Alberton in terms of the Prevention of Illegal Eviction and Unlawful Occupation of Land Act, 19 of 1998 (*“PIE”*). The applicant seeks an order in the following:

- 1.1 Evicting the first respondent and all persons claiming any right or interest to occupation under the first respondent from the premises situated at number [...], Alberton within thirty (30) days after service of this order on the first respondent;
- 1.2 Authorising the Sheriff to evict any person who does not within thirty (30) days after service of this order vacate the premises situated at [...], Alberton.
- 1.3 That the first respondent pays the costs of this application.

[2] The application is opposed by the first respondent. The parties engaged in several other applications flowing from this application as would appear hereunder. It is noted that the second respondent is not participating in these proceedings and therefore I propose to refer to the first respondent only as the respondent.

[3] The foundational facts in this case are largely undisputed. On the 16<sup>th</sup> of September 2021 the applicant purchased the property described in the Deed of Transfer number T000055525/2021 as Erf [...] Meyersdal Nature Estate Extension 1, Registration Division IR, Province of Gauteng from B. and B. M., who are described therein as married in community of property, for the purchase consideration of R10 million. The registration of transfer of the property into the

name of the applicant was effected on the 20<sup>th</sup> of December 2021. The property is situated at [...], Alberton (*"The Property"*).

- [4] It is common cause that on the 9<sup>th</sup> of January 2022 the applicant served the respondent with a notice, either to pay a monthly rental in the sum of R100 000 or to vacate the property. The respondent did not heed the notice with the result that the applicant instituted these proceedings on the 3<sup>rd</sup> of February 2022. On the 17<sup>th</sup> of March 2022, the respondent launched an ex parte vindication application against the applicant and obtained the following order: that the applicant restore possession, occupation, access and the use of the property to the respondent; that the applicant restore electricity to the property; that pending the finalisation of the main application for the eviction of the respondent, the applicant is interdicted from in anyway interfering with the respondent's peaceful possession of the property and other ancillary orders.
- [5] The respondent testified in her answering affidavit that in May 2009 she got married to B. M. (*"Mr M."*) by customary law and as such their marriage is in community of property. Although the property was not registered in both their names, by virtue of her marriage being in community of property, so it was contended, she is entitled to a half-share in the property. Therefore, so it was contended, her estranged husband should have sought her consent before selling the property because it is an asset of the joint estate between them, but he did not. She would have given her written consent had her husband sought it from her.
- [6] The respondent further contended that the property has since become a subject in the divorce proceedings between herself and her estranged husband, Mr M.. Furthermore, it is submitted that the respondent is challenging the lawfulness of the agreement of sale - thus she has brought an application to join the applicant in the divorce proceedings. It was contended further that the respondent's prospects of success are good with regard to its application to join the applicant and of the challenge against the lawfulness of the agreement of sale of the property. It is not just and equitable for her and her minor children, so the argument went, to be evicted from the property.

- [7] It is contended by the applicant that on the 9<sup>th</sup> of January 2022 he dispatched a letter to the respondent demanding that she should pay a monthly rental in the sum of R100 000 or vacate the property but the respondent has refused to do so – hence this application for eviction. Furthermore, so the argument went, the respondent is in unlawful occupation of the property and does not pay the rates, taxes, water and sewer accounts to the Local Municipality. It was submitted that the issues of her marriage with the seller have no bearing in this case. The applicant bought the property from its rightful owners who are described on the title deed as married in community of property. Although the respondent has launched an application to join the applicant in the divorce proceedings, there is no merit in the application for the proprietary rights in the divorce are determined by the type of marriage they entered into, if they are in fact married.
- [8] It has long been established that the jurisdictional requirement which trigger an eviction under PIE is that the person sought to be evicted must be in unlawful occupation of the property within the meaning of PIE at the time when the eviction proceedings are launched. Therefore, for an applicant to be successful in evicting a person from its property it should be able to prove that it is the owner to the land or the property; that the occupier is in unlawful occupation of the property and that it is just and equitable that the occupier be evicted from the property.
- [9] At this stage, it is opportune to restate the provisions of PIE which are relevant in this case which provide as follows:

*“Section 1 (ix)*

*Unlawful occupier means occupier 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, excluding a person who is an occupier in terms of Extension of Security of Tenure Act, 1997, and excluding a person whose informal right to land, but for the provisions of this Act, would be protected by the provisions of the Interim Protection of Informal Land Rights Act, 1996 (Act No.31 of 1996).*

## Section 4

### *Eviction of unlawful Occupiers*

- 4(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) *.....*
- (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 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.”*

[10] In *Davidan v Polovin N O and Others* (167/2020) [2021] ZASCA 109 (5 August 2021) the Supreme Court of Appeal stated the following:

*“Paragraph 12: The starting point is whether the appellant is an unlawful occupier under PIE. The key question is whether the appellant enjoyed a right of occupation? PIE applies not only to occupants who occupied land without the initial consent of the owner or person in charge, it also applies to occupants who had consent to occupy but such consent was subsequently terminated. In both instances the occupants would be unlawful occupiers within the meaning of PIE. Consent in eviction applications is a valid defence.”*

- [11] I do not understand the respondent to be disputing that the applicant is the owner of the property nor to be saying that she has the express or tacit consent of the applicant to occupy the property. The respondent bemoans the fact that she did not consent to the sale of the property as a co-owner in terms of her marriage to the seller, Mr M.. All she testified in her answering affidavit is that, as a result of her customary marriage to Mr M., she was supposed to have been consulted and her consent sought regarding the sale of the property to the applicant. Furthermore, she stated that she would have consented to the sale had she been approached by her estranged husband.
- [12] It is patently clear from the papers that the respondent did not occupy the property with the consent of the applicant who is the new owner of the property in terms of the title deed number T000055525/2021. Nowhere does it appear in the papers that there was any engagement between the respondent and the applicant regarding her occupation of the property except when the applicant sent her a demand to pay R100 000 monthly rental or vacate the property. The respondent refused to pay the rent of R100 000 per month and refused to vacate the property. It is my respectful view therefore that the respondent was an unlawful occupier of the property within the meaning of PIE as at the time when these proceedings were instituted.
- [13] There is no merit in the argument that the respondent is the co-owner of the property in terms of her marriage to the seller, Mr M., and therefore she is entitled to remain in occupation of the property because her consent to sell the property was not sought by Mr M.. If she was married to Mr M. as contended, the proprietary rights of her marriage are to be determined by the divorce court and once so determined, she may have recourse against her husband. The applicant is on record that he is opposing the application to be joined in the divorce proceedings for he has no interest in those proceedings. It cannot be right that an innocent and lawful purchaser of the property from its rightful owners in terms of a title deed and through a deed of sale, the applicant in this case, should be burdened with the marital problems of an unlawful occupier of his property – that

would be tantamount to expropriation of the land or property of a lawful private owner.

[14] It is my understanding that the ex parte order obtained by the respondent on the 17<sup>th</sup> of March 2022 is an interim order pending finalisation of this application for eviction of the respondent. The difficulty facing the respondent is that she has not launched any other application to stay these proceedings pending the finalisation of her divorce action with Mr M. or set aside the deed of sale. I am of the considered view therefore that, even if the respondent had launched the application to stay the proceedings, it would have constituted an abuse of the process of the court since it would be designed as a ploy to obstruct a lawful owner from evicting an unlawful occupier from his property. Put differently, it would, in this instance, be obstructing a lawful order for eviction being granted. The claim of the respondent herein, in my view, is nothing more than an attempt to drag and protract the litigation with the applicant in an endeavour to avoid the inevitable.

[15] The pertinent question that the Court must consider in the circumstances of this case is whether it is just and equitable for the respondent to be evicted from the property of the applicant. It has been decided in a number of cases that the effect of PIE is not to expropriate private landowners of their land, but that it delays or suspends the owner's rights to exercise control over their property until a determination has been made as to whether an eviction will be just and equitable and if so under what circumstances.

[16] In *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others (SCA) [2012] ZASCA 116; 2012 (6) SA 294 (SCA) (14 September 2012)* the Supreme Court of Appeal stated the following:

*“Paragraph 11: In terms of s 4(7) of PIE an eviction order may only be granted if it is just and equitable to do so, after the court has had regard to all the relevant circumstances, including the availability of land for the relocation of the occupiers and the rights and needs of the elderly, children, disabled persons and households headed by women. If the*

*requirements of s 4 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) to attach reasonable conditions to an eviction order."*

[17] The applicant took transfer of the property into its name on the 20<sup>th</sup> of December 2021 and commenced with the eviction proceedings against the respondent on the 3<sup>rd</sup> of February 2022. The applicant contended that the respondent is not paying the municipal bills for rates, taxes, water and sewer and refuses to pay rent for the property. Conversely, the respondent says it will not be just and equitable for her and her minor children to be evicted from the property.

[18] I hold the view that the respondent has failed to take the Court into her confidence in that she has not proffered any or sufficient facts as to why it will not be just and equitable to grant the eviction order. There is no evidentiary burden on the applicant to state the facts that are unknown to him about the respondent but it is for the respondent to show to the satisfaction of this Court that her personal circumstances and that of her household are of such a nature that warrants the eviction order not to be granted. She has not provided any defence to the claim of the applicant except that she is married to the seller, Mr M. and that the property is a subject of the divorce action. It is my respectful view therefore that the eviction proceedings are within the perimeters of PIE and that it is just and equitable to grant the order evicting the respondent from the property of the applicant.

[19] In *Ndlovu v Ngcobo, Bekker and Another v Jika (1) (240/2001. 136/2002) [2002] ZASCA 87; 4 All SA 384 (SCA) (30 August 2002)* the Appeal Court stated as follows:

*"Paragraph 19: Another material consideration is that of the evidential onus. 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. Whether the ultimate onus will be on the owner or the occupier we need not now decide."*

[20] The respondent testified in her affidavit that she would be prejudiced if the eviction order was to be granted. However, she does not state why would she be prejudiced by the order. She has been living on a property which was sold by her estranged husband for R10 million. This, in my view, shows that the respondent and her husband are persons of adequate means. Her eviction from the property would not render her homeless since she has other remedies available against her husband to provide her with accommodation. Put in another way, the respondent has the means to procure and secure alternative accommodation. Unlike the applicant who has laid out so much money and for the past seventeen months has been unable to enjoy the benefits of the property and is still faced with the municipality bills accumulated by the respondent.

[21] The conclusion is therefore that the applicant has succeeded in making out a case for eviction and is therefore entitled to the order as prayed for in the notice of motion.

[22] In the circumstances, I make the following order:

1. The first respondent and all persons claiming any right or interest to occupation under the first respondent are evicted from the property situated at number [...], Alberton.
2. The first respondent and all those persons who have rights on the property through the first respondent are to vacate the property mentioned in 1. above within 30 days of service of this order on the first respondent.

3. The sheriff of the court is authorised to evict any person who does not within 30 days after service of this order vacate the property mentioned in 1 above.
4. The first respondent is liable to pay the costs of this application.

**TWALA M L**

**JUDGE OF THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG LOCAL DIVISION**

<b>Date of Hearing:</b>	<b>17<sup>th</sup> April 2023</b>
<b>Date of Judgment:</b>	<b>24<sup>th</sup> April 2023</b>
<b>For the Applicant:</b>	<b>Advocate E Gwebu</b>
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