



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 4902/2019

In the matter between:

THE RESIDENTS OF MOOIDRAAI FARM, SASOLBURG Applicant

and

METSIMAHOLO LOCAL MUNICIPALITY 1st Respondent

SHERIFF OF THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, SASOLBURG 2nd Respondent

SOUTH AFRICAN POLICE SERVICE 3rd Respondent

JUDGMENT BY: MHLAMBI J,

HEARD ON: 28 NOVEMBER 2019

DELIVERED ON: 19 DECEMBER 2019

MHLAMBI, J

[1] On 24 October 2019 Naidoo, J granted an order which provided that:

“1. The Respondents are interdicted and restrained from:

1.1 evicting, removing and displacing the applicant from Mooidraai Farm, Sasolburg;

1.2 dismantling and/or demolishing structures or structures of the Applicants on aforementioned property;

1.3 removing any material placed on the aforementioned property.

*2. The order in paragraph 1 shall operate as an interim order pending the final determination of **the status, validity and/or interpretation of the order granted by this Court under case number 4916/2016;***

*3. The Applicants are granted leave to file a supplementary affidavit on the interpretation, status and/or validity of the order issued by this Court under case number **4916/2016** on or before **FRIDAY, 1 NOVEMBER 2019;***

*4. The First Respondent is granted leave to file a further supplementary affidavit on the interpretation, status and/or validity of the order mentioned above on or before **8 NOVEMBER 2019;***

*5. The application is postponed to the opposed motion roll on **28 NOVEMBER 2019***

6. The costs are reserved.”

- [2] The order referred to above was granted by Jordaan, ADJP on 9 March 2017 in the matter between: Metsimaholo Local Municipality (the first respondent) v Selloane Motjeane, Economic Freedom Fighters and the Potential Unlawful Occupiers of Mooidraai, Sasolburg, Free State Province as the three different respondents. The order reads as follows:

“PART B:

- 2.1 *The respondents restore applicant’s possession of Mooidraai farm, Sasolburg on or before **17 November 2016**, alternatively a date determined by the Court, failing which the Sheriff is authorised to demolish all structures erected thereon and to restore applicant’s possession thereof;*
- 2.2 *Confirmation of the rule nisi contained in Part A of the Notice of Motion;*
- 2.3 *Respondents is (sic) to evacuate Mooidraai farm Sasolburg on or before **17 November 2016**, alternatively a date determined by the Court;*
- 2.4 *The Sheriff is authorised, in the event of respondent’s (sic) failing to evacuate the land in issue referred to in paragraph 3 above on or before the date determined by the Court, to evict respondents there from;*
- 2.5 *The court order to be served as is provided for in paragraph 5.3 to 5.5 of Part A of the Notice of Motion;*
- 5.6 *Respondent (sic) is to pay the costs of this application.”*

[3] Both parties filed supplementary affidavits as ordered. In essence, the applicant submitted that, in its interpretation of the order of 9 March 2017, the court must be informed by:

3.1 The injunction in section 26(3) of the constitution that no one may be evicted from their home or have their home demolished without an order of court made after considering all the relevant circumstances;

3.1 The purpose of the Prevention of Illegal Eviction and Unlawful Occupation of Land Act ("the PIE Act") that enjoins that an eviction order may only be granted where it is just and equitable. Justice and equity are informed by the facts of each case;

3.3 The rights of the applicants to be heard before an adverse order is made against them.

3.4 In conclusion, the applicant prayed for an order declaring the court order granted under 4916/2016 on 9 March 2017 to be inoperable as against the applicants.

[4] The first respondent submitted that the word "*Potential unlawful occupiers*" could only refer to possible, likely, prospective or would-be unlawful occupiers and that there could be no doubt that the court order of 9 March 2017 related to all unlawful occupiers, present at the time of the order and such unlawful occupiers that might occupy the farm Mooidraai in future. The present applicants, although they went by a different name or description, remained unlawful occupiers and fell within the definition of the

Third Respondent as cited in that order. The order was both valid and enforceable as it was neither rescinded nor appealed against. It could therefore not be disregarded and the first respondent was entitled to execute thereupon.

[5] A brief background leading to the order granted by Naidoo J is that the 1st respondent approached the court on an urgent basis on 15 August 2019 under case number 4916/16 seeking relief in line with the order of 9 March 2017, that the respondents vacate Mooidraai Farm by no later than 19 August 2019. The Sheriff to be authorised to demolish all the unauthorised structures erected thereon. In the founding affidavit deposed to by the Municipal Manager on 14 August 2019, it was stated that the 2nd and the 3rd respondents were indeed evicted from the farm¹, but, in breach of the order of 9 March 2017, the 2nd and 3rd respondents unlawfully occupied the farm with effect from 9 August 2019. The affidavit was filed to seek guidance from the Court on the effective date of the enforcement of the order of 9 March 2017 in the light of the latest invasions and the date of the demolition of the shacks on the farm².

[6] It is evident that the application (as indicated by the averments of Mr Molala's founding affidavit in the 2017 application, which was attached and incorporated to this application) was based on the circumstances that prevailed in 2016 and 2017 when that order was granted³. On 8 August 2019, a member of the second respondent started allocating stands to the third respondents,

¹ Para 6 of the founding affidavit

² Para 8 of the founding affidavit

³ Para 19 of the founding affidavit

which was a contempt of the order of 9 March 2017⁴. As at the date of the deposition of the affidavit on 14 August 2019, the Municipal Manager did not know the names and addresses of the third and fourth respondents⁵. Based on the above, the first respondent sought the eviction of the respondents⁶.

- [7] The preamble to the PIE Act, as starting point, provides for the prohibition and the procedures to be followed for the eviction of unlawful occupiers. An unlawful occupier is defined as 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 with certain exclusions. Eviction has a corresponding meaning to “*evict*”, which 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.
- [8] Section 4 of the PIE Act provides that the court must serve written and effective notice of the proceedings on the unlawful occupier and the municipality having jurisdiction at least 14 days before the hearing of the proceedings. 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. The court must consider the rights of the unlawful occupier to receive adequate notice and to defend the case. Such notice must indicate on what date and at what time the court will hear the proceedings; set out the grounds for

⁴ Para 20 Of the founding affidavit

⁵ 3rd respondents being the unlawful occupiers of Mooidraai farm and 4th respondents being the potential unlawful occupiers of Mooidraai Farm

⁶ That application and a subsequent one were withdrawn before the order of 24 October 2019

the proposed eviction; 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.

[9] If an unlawful occupier has occupied the land in question for less 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 the rights and needs of the elderly, children, disabled persons and households headed by women.⁷

[10] The order by Jordaan, ADJP, should be seen in the light of the factual background and the circumstances as they obtained as at the time of the granting of the order. If the court is satisfied that all the requirements of this section have been complied with and that no valid defence was raised by the unlawful occupier, it must grant an order for the eviction of the unlawful occupier, and determine a just and equitable date on which the unlawful occupier must vacate the land under the circumstances; and 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 determining a just and equitable date, 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 question⁸.

[11] In the light of the above, it is clear to me that the order of 9 March 2017 was given in accordance with the provisions of the PIE Act and that a proper consideration was given to the

⁷ Section 4(6) of the PIE Act

⁸ Section 4(8) and (9); Ekurhuleni Metropolitan and Another v Various Occupiers, Eden Park Extension 5 [2014] 1 All SA 386 (SCA)

circumstances as they were presented to the court. It would be improper to expect of the court to take into account circumstances of unlawful occupiers who were not in occupation of the land then, but only in the future. How would the court have been expected to implement the provisions of the Act to persons and situations which were, as yet, not in existence or arisen? It would be a gross violation of the rule of law, the PIE Act and the Constitution for the court to apply the circumstances relevant to the unlawful occupiers of land in 2017 to the applicants, who only occupied land during 2019, without giving the latter the right of audience in accordance with the *audi alteram partem* rule.

- [12] I am grateful to Mr De La Rey, who acted on behalf of the first respondent, who referred me to paragraph 6 of the decision by Mocumie, J (as she then was) in **Potential Unknown Occupiers of Erf, Mantsopa Municipality and another vs. Mantsopa Local Municipality**⁹ which reads as follows:

“[6] The first point in limine must fail on the simple basis that the municipality on its own case obtained the court order under case number 525/2014 against the same unidentified/unknown potential unlawful occupiers. The interim order was even served on someone by the name or surname of Damane but it’s not clear whether that person occupied the land in dispute. In any event, even after the municipality identified the unlawful occupiers, as per the communication attached to the papers between the Municipal manager and the community at various meetings, the municipality nonetheless proceeded on the same papers with the respondents cited as ‘potential unlawful occupiers’. This argument is simply disingenuous and cannot hold water. In any event there is no such person as ‘a potential unlawful occupier’ in terms of PIE.” (My emphasis).

⁹ (1381/2015) [2015] ZAFSHC 162 (28 August 2015)

[13] I agree with the sentiments expressed in this paragraph, especially the reference to potential unlawful occupiers. In **Wormald N.O and Others vs. Khambule**¹⁰, it was held that an owner seeking to evict an unlawful occupier, must comply with the procedural provisions of PIE and on a consideration of all the relevant circumstances, an eviction order was just and equitable. In terms of section 26(3) of the Constitution, from which PIE partly derives, no one may be evicted from their home without an order of court made after consideration of all the relevant circumstances¹¹. The procedural requirements of section 4 (1)-(5) are peremptory and an original order cannot be obtained on an *ex parte* basis.¹²

[14] It is clear that the “*potential unlawful occupiers*” espoused by the first respondent does not fall within the ambit of the PIE Act as the unlawful occupiers of Mooidraai farm, as at June or August 2019, were not the unlawful occupiers of the same farm as at 2016 or 2017 when the initial proceedings were instituted. Viewed solely from the fact-sensitive nature of the Act, the order of 9 March 2017 could never serve as notice or replace any of the requirements set out in section 4 of the PIE Act. In my view, that order is what it purports to be: a valid order of court, duly executed upon and discharged as it had served its purpose. It does not follow that the Municipality, as a result of the above, is

¹⁰ 2006 (3) SA 562 (SCA)

¹¹ Wormald, supra, 568G at para 11; Cape Killarney Property Investments (Pty) Ltd v Mahamba and Others 2001 (4) SA 1222 (SCA)([2001] 4 All SA 479) at 1229E (SA)

¹² Cape Killarney, supra para 18

without a remedy as it may approach the court in strict compliance of the requirements of PIE, for the necessary relief.

[15] I have come to the conclusion that the order of 9 March 2017, was a valid order, which served its purpose and was duly discharged. As such, it could neither serve as a notice as required by the PIE Act nor serve as a basis for an ex parte against the applicants. The applicants have shown good cause for the granting of the relief sought. The application must therefore succeed.

[16] The applicants, as the successful party, are entitled to the costs.

[17] In the result I grant the following order:

Order:

1. It is declared that the court order granted under case number 4916/16 on 9 March 2017 is inoperable against the applicants;
2. The interim order is made final;
3. The first respondent is to pay the costs of this application which shall include the costs of the application heard on 24 October 2019 including the costs of counsel.

MHLAMBI, J

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