



**IN THE HIGH COURT OF SOUTH AFRICA  
KWAZULU-NATAL DIVISION, DURBAN**

**REPORTABLE**

**CASE NO: AR440/2019**

In the matter between:

**KEVIN NAIDU**

**FIRST APPELLANT**

**LINGA NAIDU**

**SECOND APPELLANT**

and

**POONSAMMY MOODLEY**

**FIRST RESPONDENT**

**KWADUKUZA MUNICIPALITY**

**SECOND RESPONDENT**

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**ORDER**

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**On appeal from:** KwaDukuza Magistrate's Court, KwaDukuza (R. Sepeng, sitting as court of first instance):

1. The appeal is dismissed;
2. The eviction order of the KwaDukuza Magistrates' Court is confirmed;
3. The appellants are ordered to vacate the first respondent's premises within three months of the date of this order;
4. The matter is remitted to the KwaDukuza Magistrates' Court with the direction to determine whether or not the second respondent can provide an alternative accommodation to the appellants, when they are being evicted.
5. The appellants are directed to serve on the second respondent within five days of this order, a copy of this judgment and order.

6. The second respondent is directed to file, on notice to the appellants and first respondent within 30 days of this order of the receipt of the judgment and order referred to paragraph 6 above, a report confirmed by an affidavit of a suitable official as to:
  - (a) Whether the second respondent can provide alternative accommodation for the appellants in the event of their being evicted from the property, they presently occupy, if so by when;
  - (b) If the second respondent is unable to provide such alternative accommodation, what steps it has taken and what steps it intends or is able to take in order to provide alternative accommodation to the appellants in the event of their being evicted, and when such alternative accommodation can be provided.
7. The appellants and the first respondent may, within 15 days of delivery of the second respondent's report, file affidavits to such report, if they deem it necessary to do so.
8. Each party pays its own costs.

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## JUDGMENT

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### **Madondo DJP (et Hadebe J concurring)**

#### **Introduction**

[1] The appellants appeal against the order of the learned magistrate, Ms R. Sepeng, of KwaDukuza Magistrate's Court, she granted, on 7 May 2019, under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE Act),<sup>1</sup> an order evicting the appellants and all others occupying through or under the appellants from the property, described as Erf 4367 previously Sub 95 (A sub 26) Lot 14 No 1679, and previously described as Lot 95 of Lot 12 and 14, Glenhills, Stanger, KwaZulu-Natal, on or before 31 October 2019. The appellants ground their appeal on that since the first

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<sup>1</sup> Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

respondent is not the registered owner nor a lawful possessor of the property in question, he lacked the requisite *locus standi* to institute eviction proceedings against them.

[2] The appellants had been the respondents in two different matters in which the applicant was the same and so was the property. The two matters were, by consent between the parties, consolidated into one. The appellants had taken occupation of the property, namely Erf 4367, on different occasions. The first appellant took occupation of the property during September 2014 and the second appellant a while later. However, both have been in occupation of the property for many years.

### **Factual background**

[3] The first respondent, Vinayagum Ekambaran and Perumal co-owned Erf 4367 in undivided shares. Perumal is deceased and Vinayagum lives in Australia and has been living there for many years. The first respondent, forty years ago, erected a building on 1/36<sup>th</sup> share in Erf 4367, and it was agreed between the first respondent and other two co-owners that first respondent would be entitled to deal solely with such building and to derive any and all of the benefits therefrom.

[4] During December 2014 the second respondent expropriated Erf 4367 and the property was then transferred and registered in the name of the second respondent. The portion occupied by the first respondent, the 1/36<sup>th</sup> share, was previously described as Lot 12 of Lot 95 of Lot 14. After the expropriation and registration of transfer of Erf 4367 in the name of the second respondent, the second respondent compensated the first respondent only for a share of the vacant portion of the property, and granted the first respondent the entitlement to use and occupy the existing building on the 1/36<sup>th</sup> share and to benefit from any rental derived therefrom. The second respondent undertook to transfer the portion of the 1/36<sup>th</sup> share to the first respondent in due course. In return, the first respondent pays the rates and municipal service charges in respect of the premises and is responsible for the maintenance and upkeep of the existing building on the 1/36<sup>th</sup> share of the expropriated property.

[5] The first respondent avers that by virtue of what is stated above, the second respondent waived its right and that, accordingly, the first respondent is the lawful possessor, alternatively, a person in charge of the premises in question. On that basis, the first respondent, contends that he therefore had the necessary *locus standi* to institute eviction proceedings.

[6] Subsequently, the first respondent and the appellants entered into an oral agreement of lease in terms of which the first respondent let to the appellants the building (the leased premises) on Erf 4367, according to the first respondent, at a rental of R1 500 per month. The rental was and has been payable solely to the first respondent and not to the other former co-owners. The appellants have been in occupation of the leased premises for a period in excess of six months.

[7] The appellants breached the lease in that they, despite demand, failed to pay the monthly rental and they are presently in arrears with their rental since 1 July 2017. As a result of the appellant's breach, the first respondent terminated the lease. The first respondent then gave the appellants a calendar months' notice to vacate the leased premises and to restore the possession thereof to first respondent on or before 31 December 2017. The appellants failed to vacate the leased premises and to hand over such premises to the first respondent. The appellants have since been in unlawful occupation of the leased premises. The first respondent submits that the appellants' continued unlawful occupation of the leased premises prevents the first respondent from letting the premises to other tenants.

[8] On 24 August 2018 the first respondent commenced eviction proceedings in KwaDukuza Magistrates' Court by causing the notice in terms of s 4(2) of the PIE Act to be issued against the appellants that the first respondent intended to institute eviction proceedings against them at the KwaDukuza Magistrates' Court on 28 September 2018 on the grounds that they were in unlawful occupation of the leased premises. The appellants opposed the eviction on the basis that Erf 4367 was expropriated by the

second respondent on 11 December 2014 and that, therefore, the leased premises belongs to the second respondent and the first respondent did not have any *locus standi injudico* to institute eviction proceedings, nor did he have any right over the leased premises. The appellants went on to argue that prior to the expropriation of the property, the property was co-owned by the first respondent and his two brothers, Vinayagum, Ekambaran and Perumal. The first respondent had failed to put up any confirmatory affidavit either by the executor or representative of the deceased's estate.

[9] Before this court, it is common cause that the property Erf 4367 was, prior to its expropriation by the second respondent, in 2014 co-owned by the first respondent together with his two brothers, in undivided shares. Subsequent to its expropriation, the property was registered in the name of the second respondent. This had the effect of terminating prior ownership to it by the first respondent and his two brothers. Thereafter the second respondent granted the first respondent the right to the use and occupation of the property in question, with the right to let it and derive all the benefits from it.

[10] It is common cause between the parties that the first respondent and the appellants entered into an agreement of lease in terms of which the first respondent let the building erected on Erf 4367 to the appellants. In consideration of the use and enjoyment of the building the appellants would pay a monthly rental of R1 000. However, there has been a dispute as to the exact amount of rental that was payable by the appellants to the first respondents. But, the exact amount payable by appellants as rental is not relevant for determination in this matter.

[11] It is not in dispute that the appellants did not pay rental to the first respondent in terms of the lease agreement for a lengthy period of time. As a result, as at 1 July 2018 both appellants were in arrears with their rental in the sum of R36 000 and R37 000 respectively. According to the appellants, their failure to pay rental did not constitute a breach of the lease agreement since such rental was not due to the first respondent, as he did not have any right to the property at all. Instead, the second respondent was the owner and, nor was the first respondent the lawful possessor of the property in

question. The appellants based their contention on that the first respondent had expropriated the property and became its registered owner. The purpose for such expropriation was to initiate residential development in the area.

[12] It is common cause that the first respondent would in due course receive transfer of the property in question from the second respondent. It is also against this backdrop the appellants contend that the institution of the eviction proceedings was premature.

### **Issues**

[13] The issues for determination in this appeal are whether:

- (a) the first respondent had the requisite *locus standi* to institute eviction proceedings against the appellant;
- (b) the institution of the eviction proceedings was premature; and whether
- (c) the eviction of the appellants from the property in question will render them homeless.

### ***Locus standi***

[14] Under PIE Act, it is only the owner or a person in charge who is entitled to initiate eviction proceedings. The PIE Act defines the owner as the 'registered owner of land, including an organ of state', and the person in charge as a '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.'<sup>2</sup> The second respondent has become the owner of the property Erf 4367 through expropriation, and upon registration of transfer of property in its name the second respondent acquired a real right in relation to the property in question.<sup>3</sup> In terms of s 8(1) of the Expropriation Act,<sup>4</sup> the ownership of the property expropriated in terms of the provisions of that Act passes to the state or other juristic person on behalf of whom expropriation took place, on the date of expropriation mentioned in the notice of expropriation.<sup>5</sup> This means that even if the registration of transfer had not taken

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<sup>2</sup> Section 1 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

<sup>3</sup> See s 16 of the Deeds Registries Act 40 of 1937.

<sup>4</sup> Expropriation Act 63 of 1975.

<sup>5</sup> Section 7(2)(b) of the Expropriation Act.

place, the ownership of the property in question had already passed onto the second respondent. The buildings erected on the expropriated land in law acceded to it, and as a result such buildings have become the property of the second respondent as the registered owner of the land on which they are erected.<sup>6</sup>

[15] Of all real rights the right of ownership in its unrestricted form confers the most comprehensive control over a thing. In essence, a real right bestows on the holder thereof a direct power or absolute control over a thing.<sup>7</sup> A real right is enforceable against the whole world (against all other persons), that is, against any person who seeks to deal with the thing to which a real right relates in a manner, which is inconsistent with the exercise of the holder's entitlement to control it.

[16] The second question for decision is whether the first respondent is the person in charge of the property in question. After expropriation of the property the second respondent directed a letter to the first respondent, dated 7 February 2017, in which the second respondent confirmed that it had only acquired a vacant portion of the first respondent's property and that the houses on the land still belonged to the first respondent. The second respondent went on to state that, accordingly, the tenants who were then residing in such houses were 'obliged and required to continue paying rentals' to the first respondent. Further, the second respondent stated that the first respondent as the owner of the houses erected on the expropriated property would in due course be given a title deed for a piece of land on which the houses are erected. The letter in question is annexed to the first respondent's papers as annexure "A1". In annexure "B", dated 19 April 2017, the second respondent elaborated on the first respondent's dealing with property Erf 4367 and states that the first respondent is entitled to the use and occupation of the buildings erected on the land in question and to receive rental derived therefrom. In consideration thereof, the first respondent is required to pay rates and municipal charges for the services the second respondent

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<sup>6</sup> G Muller, R Brits, J M Pienaar and Z Z Boggenpoel *Silberberg and Schuman's: The Law of Property* 6 ed (2019) para 8.3.2.2 at 166.

<sup>7</sup> *Denel (Pty) Ltd v Cape Explosive Works (Pty) Ltd and another: Cape Explosive Works Ltd v Denel (Pty) Ltd and others* 1999 (2) SA 419 (T) 433J.

provides on the premises and to be responsible for the maintenance and upkeep of the buildings in question.

[17] For a person to be said to have possession of a thing, two requirements must be satisfied: The person needs to be in effective physical control of the thing and needs to have to derive some benefit from the possession.<sup>8</sup> The first respondent is in effective control of the property in question and he derives rental as a benefit therefrom. It therefore follows that the first respondent is in possession of the property in question, and a person in charge of the property in terms the PIE Act. In this regard, Mr Chetty for the appellants argued, that the second respondent, as the municipality, had not properly obtained authority to permit the first respondent to deal with the property as he saw fit. According to Mr Chetty, the second respondent did not follow the procedure which would enable it to acquire such authority. The authority of the second respondent to do so, was never an issue at the court a quo. It is therefore not necessary for this court to determine whether or not the second respondent acted ultra vires when it bestowed the first respondent powers to deal with the property as he pleases.

### **Was the institution of the eviction proceedings premature?**

[18] The next question for decision is whether the institution of the eviction proceedings by the first respondent against the appellants was premature. Mr Chetty, for the appellants, has argued that the first respondent should have waited until the registration of transfer of the property into his name had taken place. In Mr Chetty's argument at the time of the institution of the eviction proceedings the ownership in the property had not yet passed onto the first respondent. The second respondent bestowed extensive powers to the first respondent to deal with the property and to derive any benefits there from as he sees fit. The first respondent therefore falls squarely within the ambit of the definition of the 'person in charge', in s 1 of the PIE Act, as found above.

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<sup>8</sup> See *Scholtz v Faifer* 1910 TS 243 at 247; *Cape Tex Engineering Works (Pty) Ltd v SAB Lines (Pty) Ltd* 1968 (2) SA 528 (C) at 531.



[19] The appellants have also argued that the first respondent had co-owned the property together with his two brothers and he had not obtained authority from such brother, to institute eviction proceedings. Since the property had been expropriated and its ownership duly transferred in the name of the second respondent, the two brothers also ceased to be the co-owners of the property in question and, accordingly, the first respondent did not need their authority to institute eviction proceedings against the appellants. More so, it had solely been the first respondent who had given the appellants the right to the temporary use and enjoyment of the property, and in return for such use and enjoyment of the property the appellants were obliged and required to pay rental to the first respondent. By virtue of the power vested in him by the second respondent the first respondent was entitled to receive such rental. In *Ex parte Van der Horst: In re Estate Harold*,<sup>9</sup> the court held that in order to fulfil the physical element requirement, (i) there should be no third party with a better physical relation to the thing than the possessor, and (ii) the person in question should manifest the power at his or her will to deal with the thing as he or she likes and to exclude others. The person in physical control must have the mental capacity to form such intention.

[20] In the present case, after expropriation of the vacant land, the ownership in respect of the buildings erected on it remained vested in the first respondent. Further, the second respondent entitled the first respondent to collect rentals from the tenants residing in the buildings. It is within the first respondent's right and discretion to determine who stays on the property and the amount payable as rental in consideration of such stay. In *Hendricks v Hendricks*,<sup>10</sup> the appellant was at the time of the eviction the person in charge of the property and her legal authority emanated from her servitude right of habitation to the property. The Supreme Court of Appeal held that she was a person in charge as defined in s 1 of the PIE Act. In this case there is no other person who has a better right to the buildings other than the first respondent, and according to Mr Chetty only the passing of the ownership in the property to the first respondent would entitle the first respondent to institute eviction proceedings against

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<sup>9</sup> *Ex parte Van der Horst: In re Estate Harold* 1978 (1) SA 299 (T) at 301F-H.

<sup>10</sup> *Hendricks v Hendricks* [2015] ZASCA 165; 2016 (1) SA 511 (SCA) para 9.

the appellants. In my view, such transfer of ownership was not a prerequisite in this matter as the second respondent had categorically stated that the ownership in respect of the buildings had remained vested in the first respondent and had authorised the first respondent to deal with the property in question as he saw fit. In terms of such authority the first respondent was also entitled to derive any benefit from the property. The first respondent was, even after the expropriation and transfer of the specified property in second respondent's name, authorised to continue receiving rental for the property. In consideration of such entitlement, the first respondent is required to pay rates and all municipal charges, and to be responsible for the maintenance and upkeep of the property in question at his own expense. In the circumstances, the first respondent need not wait until the actual transfer of the property in his name since he already had the necessary *locus standi* to evict the appellant's from the property, as outlined above.

[21] It has also been argued on behalf of the appellants that there was a dispute in the court a quo as to whether a breach of the lease agreement had occurred. Mr Chetty argued that in the premises, before the court a quo granted an eviction order, it ought to have first determined whether the breach had taken place. According to Mr Chetty that did not happen.

[22] Payment of rent is an essential element of a lease.<sup>11</sup> If a tenant is in breach of the lease agreement, the landlord may then have the tenant 'ejected by the legal process, or claim for damages for breach of contract'.<sup>12</sup> In terms of common law, 'a landlord is entitled to seek eviction of a tenant where there has been a valid termination of the lease in terms of which the tenant occupied the property but the tenant is holding over'.<sup>13</sup> Only when the landlord has validly terminated the lease is he or she 'entitled to take the next step of repossession of the premises with an order of' court.<sup>14</sup> The appellants breached the lease agreement sometime before the institution of the eviction proceedings against them by failing to pay rental. As of 1 July 2018 the first appellant

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<sup>11</sup> Southernport Developments (Pty) Ltd v Transnet Ltd 2005 (2) SA 202 (SCA) para 6 .

<sup>12</sup> Nedcor Bank Ltd v Withinshaw Properties (Pty) Ltd 2002 (6) SA 236 (C) para 38.

<sup>13</sup> Kendall Property Investments v Rutgers [2005] 4 All SA 61 (C) at 70a-b.

<sup>14</sup> Kendall Property Investments v Rutgers fn 13 at 70c-g.

was in arrears with his rental in the sum of R36 000 and the second appellant of R37 000, respectively. The appellants were given notice of the termination of the lease agreement and requested to remedy the breach, and they failed to do so. The first respondent then gave the appellants a one -month notice to vacate the property, and the appellants failed to vacate the premises as per the notice. The first respondent as a result terminated the lease agreement. The appellants did not challenge such termination on the grounds of their failure to pay rental. Instead, they contended that since the property had been expropriated and transferred into the second respondent's name, the first respondent was therefore not entitled to evict the appellants from the property. The non-breach of the lease agreement was never an issue before the court a quo. The court a quo could not, therefore, be faulted for not determining whether or not there was a breach of the lease agreement. The appellant's response can be interpreted as that they were in fact challenging the first respondent's right to collect rental from them and to evict them from the property for failure to pay rental.

### **Will the eviction of the appellants render them homeless?**

[23] Whether the eviction of the appellants from the property would render them homeless has no longer been an issue before this court. Seeing that a risk of homelessness resulting from the granting of the eviction order is too great, and in the interest of justice, this court has invited the counsel for the parties to address it on the risk of homelessness and the provision of alternative accommodation, when such event occurs. The first appellant and his wife are old aged pensioners suffering from various illnesses and their monthly income (jointly) is R2 400. The second appellant does not have a formal employment, and living with his wife and a child. The rental for accommodation in the neighbourhood of where the appellants presently reside ranges from R2 700 to R3 900 per month which is far above the means of the first appellant and his wife, in particular. Ms Bhika, for the respondents, has conceded that a reconsideration of the social consequences should only be done in respect of the first appellant and wife only.

[24] On the facts, it is apparent that after eviction the likelihood of the appellants ending up on the street is too great. While it is just and fair that the appellants must be evicted in order to allow the owner or the person in charge of the property to fully exercise his or her rights, their evictions must be linked to an order that the second respondent provide them with accommodation.<sup>15</sup> The municipality's duty in relation to housing must be determined with reference to the Constitution of the Republic of South Africa (the Constitution)<sup>16</sup> and various other enactments. Chapter 7 of the Constitution, sets out the functions and powers of local government, s 152 of the Constitution states the objectives which municipalities should strive to achieve. Section 153(a) of the Constitution provides that a municipality must 'structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community.' The principal instruments enacted to give effect to the constitutional obligations of the various organs of State in relation to housing are Housing Act,<sup>17</sup> and the National Housing Code, 2009. Section 9 of the Housing Act obliges

'(1) Every municipality, as part of the municipality's process of integrated development planning, take all reasonable and necessary steps within the framework of national and provincial housing legislation and policy to —

(a) ensure that —

(i) the inhabitants of its area of jurisdiction have access to adequate housing on a progressive basis'.

[25] These functions must be considered with reference to the functions and responsibilities of municipalities set out in the Local Government: Municipal Systems Act (Municipal Systems Act).<sup>18</sup> In terms of s 8(2) of the Municipal Systems Act 'a municipality has the right to do anything reasonably necessary for, or incidental to, the effective performance of its functions and the exercise of its powers'. Section 73(1)

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<sup>15</sup> *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and another* [2011] ZACC 33; 2012 (2) SA 104 (CC) para 3.

<sup>16</sup> Constitution of the Republic of South Africa, 1996.

<sup>17</sup> Housing Act 107 of 1995.

<sup>18</sup> Local Government: Municipal Systems Act 32 of 2000.

places a general duty on municipalities to give effect to the provisions of the Constitution and to

- ‘(a) give priority to the basic needs of the local community;
- (b) promote the development of the local community; and
- (c) ensure that all members of the local community have access to at least the minimum level of basic municipal services.’

[26] Chapter 12 of the National Housing Code, enacted under s 4 of the Housing Act, provides for assistance to people who find themselves in a housing emergency for reasons beyond their control. Section 4 of the PIE Act, concerning eviction of unlawful occupiers by an owner or a person in charge of land, provides that courts may only grant an order for eviction if it is just and equitable to do so, after considering all relevant circumstances. Where an unlawful occupier has occupied the land for more than six months, those circumstances include the availability of all alternatives where the occupier may be relocated.<sup>19</sup> Apart from attending to the rights and needs of the elderly, children, disabled persons and households headed by women,<sup>20</sup> the municipality must make land available for the relocation of the unlawful occupiers.

[27] The crucial question before this court is whether it is just and equitable to evict the appellants, considering all the circumstances, more particularly the availability of alternative land or accommodation, as well as the date on which the eviction must take place. In determining whether the eviction of the occupiers will be just and equitable, it is necessary to address; the rights of the owner in a constitutional and PIE era, the obligation of the local authority to provide accommodation, the sufficiency of the local authority’s resources, the constitutionality of the local municipality’s emergency housing policy, and an appropriate order to facilitate justice and equity in the light of the conclusion on the earlier issues, an indefinite delay in evicting the appellants would amount to arbitrary deprivation of property, in violation of the rights set out in s 25(1) of the Constitution. The protection against arbitrary deprivation of property in s 25 of the Constitution is balanced by the right of access to adequate housing in s 26(1) and the

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<sup>19</sup> Section 4(7) of the PIE Act.

<sup>20</sup> Section 4(7) of the PIE Act.

right not to be evicted arbitrarily from one's home in s 26(3) of the Constitution. The Constitutional Court in *First National Bank of SA Ltd t/a Wesbank v Commissioner; South African Reserve Service and another*,<sup>21</sup> said:

'The purpose of s 25 has to be seen both as protecting existing private property rights as well as serving the public interest, mainly in the sphere of land reform but not limited thereto, and also as striking a proportionate balance between these two functions.'

[28] A private owner has no obligation to provide for free housing whereas the local authority has. Unlawful occupation results in a deprivation of property under s 25(1) of the Constitution. In *Port Elizabeth Municipality v Various Occupiers*,<sup>22</sup> it was stated that the court is required to 'balance out and reconcile the opposed claims in as just a manner as possible, taking account of all the interests involved and the specific factors relevant in each particular case.'

[29] The PIE Act allows for eviction of unlawful occupiers only when it is just and equitable to do so. In *Port Elizabeth Municipality* the court stated:

'Thus, PIE expressly requires the court to infuse elements of grace and compassion into the formal structures of the law. It is called upon to balance competing interests in a principled way and to promote the constitutional vision of a caring society based on good neighbourliness and shared concern. The Constitution and PIE confirm that we are not islands unto ourselves.'<sup>23</sup>

[30] In certain circumstances an owner may have to be somewhat patient, and accept that the right to occupation may be temporarily restricted. An owner's right to use and enjoy the property at common law can be limited in the process of the justiciable and equity enquiry mandated by the PIE Act. In order to conclude whether eviction by a particular date would in the circumstances of this case be just and equitable, it is mandatory to consider 'whether land has been made available or can reasonably be

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<sup>21</sup> *First National Bank of SA Ltd t/a Westbank v Commissioner, South African Reserve Service and another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC) para 50.

<sup>22</sup> *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 23; *Occupiers, Berea v De Wet NO and another* [2017] ZACC 18; 2017 (5) SA 346 (CC) para 79.

<sup>23</sup> *Port Elizabeth Municipality v Various Occupiers* fn 22 para 37.

made available'.<sup>24</sup> The just and equitable enquiry requires the court to be proactive to establish the relevant facts.<sup>25</sup>

[31] The court a quo rightly found that the first respondent is a person in charge of the property, and that the appellants are in unlawful occupation of the property in question. The appellants have been in occupation of the property for many years. However, it would not be just and equitable to grant an eviction order, without provision of an alternative accommodation, if the order would result in homelessness.<sup>26</sup> In the present matter, it is not in dispute that a risk of homelessness resulting from the eviction is too great. The second respondent, as municipality, is therefore required to fulfil its duty to provide alternative accommodation.<sup>27</sup> The local authority has a duty to provide temporary emergency accommodation to all persons being evicted who have no alternative accommodation. This duty is read together with s 4(7) of PIE Act, which provides that one of the circumstances which may be relevant to the just and equitable enquiry is 'whether land has been made available or can reasonably be made available by a municipality or the organ of state or another land owner for the relocation of the unlawful occupier.'<sup>28</sup>

[32] Where a risk that homelessness may result, the availability of alternative accommodation becomes a relevant circumstance that must be taken into account. The risk of homelessness triggers the second respondent, as the municipality, to provide alternative accommodation.<sup>29</sup> The eviction would create an emergency situation in terms of Chapter 12 of the National Housing Code, 2009, and in which event the second respondent is obliged to provide a temporary accommodation. In the present matter 'we

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<sup>24</sup> See s 4(7) of the PIE Act; see also s 26(3) of the Constitution.

<sup>25</sup> *Occupiers, Berea v De Wet NO* fn 22 para 52.

<sup>26</sup> *Port Elizabeth Municipality v Various Occupiers* fn 22 para 28; *Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* 2010 (9) BCLR 911 (SCA) para 16; *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, amici curiae)*; *President of the Republic of South Africa and others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, amici curiae)* 2004 (4) SA 40 (SCA) para 26.

<sup>27</sup> *Occupiers, Berea v De Wet NO* fn 22 para 59; Chapter 4 of the National Housing Code, 2009; *Baron and others v Claytile (Pty) Ltd and another* 2017 (5) SA 329 (CC) para 38.

<sup>28</sup> *Occupiers, Berea v De Wet NO* fn 22 para 50.

<sup>29</sup> *Occupiers, Berea v De Wet NO* fn 22 para 61.

are not satisfied that there had been extensive consideration of the relevant circumstances', the health conditions of the first appellant and his wife, in particular, their ages and their monthly income show that the possibility is looming large that they can end up sleeping on the street after their eviction. Nor can it be said that the second appellant will afford them any alternative accommodation. Such circumstances, make it imperative on the second respondent to make land or an alternative accommodation available for their relocation.

[33] In an effort to prevent the appellants from ending up being homeless, we are of the view that this matter be remitted to the court a quo for reconsideration of the social consequences of the eviction with a view to cushioning the effects thereof. In the premises, the eviction of the appellants must be linked to an order that the second respondent provide them with an alternative accommodation. Under the circumstances, this court has also to determine the just and equitable date on which the appellants must vacate the first respondent's property.<sup>30</sup> While being mindful of the need to allow the first respondent to fully exercise its rights to the property, the second respondent should also be afforded adequate opportunity to provide an alternative accommodation for them.

### **Order**

[34] In the result I make the following order:

1. The appeal is dismissed;
2. The eviction order of the KwaDukuza Magistrates' Court is confirmed;
3. The appellants are ordered to vacate the first respondent's premises within three months of the date of this order;
4. The matter is remitted to the KwaDukuza Magistrates' Court with the direction to determine whether or not the second respondent can provide an alternative accommodation to the appellants, when they are being evicted.
5. The appellants are directed to serve on the second respondent within five days of this order, a copy of this judgment and order.

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<sup>30</sup> See s 4(8) and s 4(9) of PIE Act.



6. The second respondent is directed to file, on notice to the appellants and first respondent within 30 days of this order of the receipt of the judgment and order referred to paragraph 6 above, a report confirmed by an affidavit of a suitable official as to:
  - (a) Whether the second respondent can provide alternative accommodation for the appellants in the event of their being evicted from the property, they presently occupy, if so by when;
  - (b) If the second respondent is unable to provide such alternative accommodation, what steps it has taken and what steps it intends or is able to take in order to provide alternative accommodation to the appellants in the event of their being evicted, and when such alternative accommodation can be provided.
7. The appellants and the first respondent may, within 15 days of delivery of the second respondent's report, file affidavits to such report, if they deem it necessary to do so.
8. Each party pays its own costs.

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**MADONDO DJP**

I agree

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**HADEBE J**

Date reserved: 14 August 2020

Date delivered: 22 September 2020

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