Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Regional Magistrates:	YES / NO
Circulate to Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA

(Northern Cape Division, Kimberley)

Saakno / Case number: **2086/2016**
Datum verhoor/Date heard: **03 / 05 /2017**
Datum gelewer/Date delivered: **13 / 06 /2017**

In the application for leave to appeal in:

SOUTH AFRICAN SWEDEN INTERNATIONAL HOUSING COMPANY	**Applicant**
and	
SOL PLAATJE LOCAL MUNICIPALITY	**First Respondent**
PIETER MOKITINI	**Second Respondent**
VICTOR TAKU	**Third Respondent**
JOHAN MOTSHWANAYSI	**Fourth Respondent**
GODFREY MOTLOTENG	**Fifth Respondent**
LUCKY SEEKOEI	**Sixth Respondent**
ISAAC MOSHOETE	**Seventh Respondent**
NCEBO MAMLELI	**Eighth Respondent**
SKILPAD MICHAEL MOKALE	**Ninth Respondent**
SEIPATI TSELE	**Tenth Respondent**

MPHO MAGDELINE **Eleventh Respondent**

ALL THE UNLAWFUL OCCUPIERS, TRESPASSERS AND MINERS OF THE LAND BETTER KNOWN AS THE OF ERF NO 33738 AND ERF NO 32196, KIMBERLEY, SOL PLAATJE MUNICIPALITY, KIMBERLEY, NORTHERN CAPE PROVINCE **Twelfth Respondent**

Coram: **ERASMUS AJ**

JUDGMENT IN THE APPLICATION FOR LEAVE TO APPEAL OF THE 7TH to 12th RESPONDENTS

ERASMUS AJ

[1] On or about 5 October 2016 the applicant lodged an application in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, No 19 of 1998 ('PIE') for the eviction of second and further respondents and/or any persons occupying, trespassing and/or mining through them from the property known as Erf 33738, in extent 32,1216 Hectares, as well as the property known as Erf No 32196, in extent 58,1939 Hectares, situate in the Sol Plaatje Municipality, district Kimberley, Province Northern Cape ('the properties').

[2] The application firstly sought directions from the Court in respect of the manner in which service of the application papers and the prescribed notices in terms of PIE was to be effected. The application for the eviction of the second and further respondents, had been set down for 2

December 2016. The application papers, including the Notices in terms of s4(2) and s4(5) of PIE, had been properly served in accordance with the directions issued by the Court, as contained in the respective Court Orders.

[3] The applicant thereafter received a letter from Richard Spoor Attorneys, indicating that they intended to oppose the application in respect of some of the respondents. Subsequently, on 30 of November 2016, a notice of intention to oppose was served and filed on behalf of the second to sixth Respondents. This notice made no mention of any of the other respondents' intention to oppose the application. This led to the application being postponed on 2 December 2016, to 9 December 2016. There was no appearance for the first, seventh and further respondents on 2 December 2016.

[4] On 9 December 2016, again in the motion court, there had been no appearance for the seventh and further respondents and the applicant sought their eviction and incidental relief, as per the notice of motion. Having heard argument on behalf of the applicant, I granted the order for the eviction of the seventh and further respondents and/or all persons occupying, trespassing and/or mining through them from the properties, with effect from 15 January 2017 and further relief to give

effect to such eviction order and costs, as sought in the Notice of Motion.

[5] I had further given directions pertaining to the service of the Court Order of 9 December 2016 on the seventh and further respondents. The eviction application in respect of the second to sixth respondents was postponed to the opposed motion court roll of 3 February 2017. At that stage no answering papers had been filed on behalf of the second to sixth respondents.

[6] On 4 January 2017 the seventh to twelfth and further respondents, through Richard Spoor Inc Attorneys, filed their application for leave to appeal the Court Order that had been granted in the motion court on 9 December 2016. The names of the seventh to eleventh respondents appeared from the heading of the notice of application for leave to appeal. For the sake of convenience the applicants herein will be referred to as the occupiers and the respondent herein as owner of the properties.

[7] The occupiers applied for leave to appeal to the Supreme Court of Appeal, alternatively, to the full bench of this Court, against the whole of my judgment and order. During argument, it was submitted that, should I grant

leave to appeal, it should be to the full court of this Division.

[8] In essence, it was argued on behalf of the occupiers that I had erred in granting an eviction order on the papers before me on 9 December 2016. The grounds of appeal appear from the Notice of Application for Leave to Appeal. It was averred that I had erred in the following:

8.1 Granting an eviction order against unnamed respondents and which cannot be objectively measured or implemented with certainty that only particular and presently unnamed and unknown number of respondents are affected;

8.2 Finding that granting an eviction order was just and equitable, after considering the relevant circumstances;

8.3 Finding that I had sufficient information on the relevant individual circumstances of each affected unknown respondent before it to reach a finding on whether granting an eviction order was just and equitable;

8.4 Failing to uphold the statutory duty to proactively ensure that all relevant individual circumstances were placed before the Court, particularly in circumstances where it is clear from the papers that the seventh to further respondents are poor and face the prospect of homelessness, as set out in *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* [2010] 4 All SA 54 (SCA) at para 15;

8.5 Finding that the applicant was entitled to an eviction order in circumstances where it had not made an effort to meaningfully engage with the respondents with a view to resolving the dispute;

8.6 Finding that the applicant's papers establish that all of the seventh to further respondents have alternative accommodation;

8.7 Failing to find that some or all of the seventh to further respondents would be rendered homeless by the order of eviction, and are therefore entitled to emergency alternative accommodation prior to the execution of an eviction order;

8.8 Failing to find that no order of eviction could be made until identified and serviced land had been made available by the first respondent or another organ of state or another land owner for the relocation of seventh and further unknown respondents;

8.9 Failing to find that the matter was not ripe for hearing as the whole application was opposed by the second to sixth respondents and could not be granted until their grounds of defence were heard;

8.10 Finding that the period within which the respondents are to vacate the properties was sufficient;

8.11 Ordering the respondents to pay the applicants costs.

[9] The test to be applied when adjudicating an application for leave to appeal is whether there is a reasonable prospect that another court would come to a different conclusion to that reached in the judgment that is sought to be taken on appeal. The use of the word "would" in s17(1)(a)(i)[1] is indicative of a raising of the threshold

[1] Superior Courts Act, No 10 of 2013

since previously, all that was required for the applicant to demonstrate was that there was a reasonable prospect that another court might come to a different conclusion.[2]

[10] From the grounds of appeal, as set out in the Application for Leave to Appeal, it appears that the occupiers do not take issue with the preliminary proceedings and service of the application papers and Court Orders.

[11] S4(7) of PIE deals with the situation where an unlawful occupier had been in occupation for more than six months, as in this instance. In terms thereof, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after having considered all the relevant circumstances. The relevant circumstances to be considered include whether land has been made available or can reasonably be made available by a municipality, other organ of State or another landowner for the relocation of the unlawful occupier and also include consideration of the rights and needs of the elderly, children, disabled persons and households headed by women.

[12] S4(8) of PIE reads as follows:

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[2] *Seatlholo and Others v Chemical Energy Paper Printing Wood and Allied Workers Union and Others* (201) 37 ILJ 1485 (LC)

"If the court is satisfied that all the requirements of this section have been complied with and that ***no valid defence has been raised by the unlawful occupier, it must grant an order for the eviction of the unlawful occupier****, and determine—*

(a) a just and equitable date on which the unlawful occupier must vacate the land under the circumstances; and
(b) 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 paragraph (a)." (My emphasis)

[13] In the case of *Nelie Smith Mansuitrusters (Edms) Bpk v Herbst and others* Rampai J, stated that a valid defence in this context "*refers to a defence that would entitle an occupier to remain in occupation as against the wish of the owner or person in charge of the property".* [3] In paragraph [32] he stated further:

"... *However, where the owner or the person in charge of the property denies any entitlement of the occupier to be in occupation, the onus rests on the occupier to prove the grounds upon which (s)he contends (s)he is entitled to remain in occupation of the property (see Ndlovu v Ngcobo; Bekker and another v Jika 2003 (1) SA 113 SCA [also reported at [2002] JOL 10161 (A) – Ed] at paragraph [131])."*

[14] Where an eviction takes place at the instance of an owner of property and not an organ of State, such as in this instance, it was said that the effect of PIE is not to expropriate private property.[4]

[3] [2017] JOL 37421 (FB) at par [30] and [31]

[4] *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others (Socio-Economic Rights Institute of South Africa as amicus curiae)* 2012(11) BCLR 1206 (SCA) par [16]

[15] In *Ndlovu v Ngcobo; Bekker and Another v Jika*[5] Harms JA stated the legal position to be as follows:

> "*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.*" (My emphasis)

[16] The occupiers had neither given notice of their intention to oppose the application, nor raised any defence by 9 December 2016 when the matter served before me in the Motion Court. The occupiers had failed to file opposing affidavits, wherefore the owner's allegations, as set out in the founding papers, stood uncontested and the matter was adjudicated on the facts as set out in the founding papers.[6] The uncontested facts, as set out in the founding affidavit, were the following:

16.1 The applicant in the main application is the owner of the properties;

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[5] 2003(1) SA 113 (SCA) at par [19]; See also *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another (Lawyers for Human Rights as Amicus Curiae* 2012(2) BCLR 150 (CC)

[6] *Boxer Superstores Mthatha and Another v Mbenya* 2007(5) SA 450 (SCA) at 425F-G

16.2 The occupiers are unlawful occupiers, as defined in section 1 of PIE;

16.3 The occupiers have invaded the properties to conduct illegal mining operations and they do not reside on the properties permanently;

16.4 The occupiers reside elsewhere and only occupy the structures on the properties while conducting their illegal mining activities and will therefore not be rendered homeless in the event of their eviction;

16.5 The unlawful occupation of the properties is not only prejudicial to the owner, but also to the rightful occupiers of the houses on and in the vicinity of the properties;

16.6 The portion of the properties occupied by the occupiers is not serviced and there are no water pipes and/or taps, electricity or sanitation services;

16.7 The portion of the properties occupied by the occupiers is situated under an electricity pylon which renders it unsafe and unfit for occupation;

16.8 The types of structures and their position create a danger not only to the occupiers, but also to other residents in the vicinity;

16.9 The owner's existence and the continuation of its social housing projects are being threatened by the unlawful occupation and conduct of the occupiers;

16.10 The occupiers are conducting illegal activities on the properties.

[17] As the occupiers had failed to place any circumstances before me, I was satisfied that, in this instance, it was just and equitable to grant the order for the eviction of the unlawful occupiers. I thereafter determined a date which I had deemed just and equitable upon which the occupiers were to vacate the properties of the applicant, being more than a month after the date of the order.

[18] The occupiers, through their legal representatives, gave notice of their intention to apply for leave to appeal on 4 January 2017. Although there is nothing in law that prevented the occupiers applying for leave to appeal, their application must be considered on the application papers as it had served before me on 9 December 2016.

[19] The eviction order, granted on 9 December 2016, had been granted by default. The occupiers could have applied for the rescission of my order, subsequent to having obtained legal advice.[7]

[20] When applying for rescission, the occupiers would have been required to show good or sufficient cause as to why the judgment should be rescinded[8]. This would have entailed giving a reasonable explanation of their default, showing that their application is made *bona fide* and showing that, on the merits they have a *bona fide* defence, as required in terms of s4(8) of PIE, which *prima facie* carries some prospects of success. If they had chosen to apply for rescission, they would have been in a position to place evidence before Court pertaining to

[7] *Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* [2010] 4 All SA 54 (SCA)
[8] *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills Cape* 2003 (6) SA 1 (SCA) at 9C

their circumstances and/or the effect eviction would have on them.

[21] The occupiers elected not to apply for the rescission of my order. It was argued on their behalf that such an application for rescission would not have suspended my order and thus not have prevented their eviction.

[22] Section 18(1) of the Superior Courts Act[9] provides for the automatic suspension of the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal. No provision is made for the automatic suspension of the operation and execution of a decision which is the subject of an application to rescind. It appears that it had not been the intention of the legislature to also automatically suspend the operation and execution of such a decision, as it would then have been expressly included in the relevant section.

[23] This does not mean that the occupiers, had they applied for rescission of my order, would have been without remedy. They could have approached this Court under rule 45A to suspend the execution of the order pending the finalisation of an application for

[9] Act 10 of 2013

rescission. [10]

[24] Despite the fact that the occupiers had chosen to seek leave to appeal my Order and not to apply for rescission, and leave to appeal is to be granted, there is nothing in law prohibiting the occupiers to apply for rescission of my order and by doing so, placing their defence and/or circumstances before Court. By placing such information before the Court, the Court hearing the application for rescission, and also the first respondent, would be able to identify occupiers, if any, to whom the first respondent owes its Constitutional obligation and to ensure that the needs of such persons are catered for.

[25] As I need to adjudicate the application for leave to appeal of the occupiers, I am required to decide whether there is a reasonable prospect that another court would come to a different conclusion on the papers before it.

[26] Although each case is to be adjudicated on its own facts, the landmark decision of the Constitutional Court, *Occupiers of erven 87 & 88 Berea v Christiaan Frederick De Wet N.O.*[11], delivered on 8 June 2017, provides clear guidance and instructions in respect of the obligations of

[10] *Erstwhile Tenants of Williston Court and Another v Lewray Investments (Pty) Ltd and Another* 2016 (6) SA 466 (GJ)
[11] [2017] ZACC 18 at paragraphs [39]-[65]

a presiding officer when dealing with eviction applications. It was held that in eviction proceedings, even where an unlawful occupier has purportedly consented to his or her eviction, the Court is not absolved from the obligation to consider all relevant circumstances before ordering an eviction. I accept, for purposes of the adjudication of this application for leave to appeal, that this duty of the Court extends also to unopposed applications for evictions.

[27] Having considered the judgment referred to above, I am satisfied that there is a reasonable prospect that the Court dealing with the appeal would come to a different conclusion and/or consider remitting the application to the Northern Cape Division of High Court of South Africa to issue further directions to the occupiers and/or the first respondent to file a report with the High Court pertaining to further steps to be taken in order to provide alternative land or emergency accommodation to the occupiers, in the event of the eviction of the occupiers.

[28] It follows that leave to appeal should therefore be granted. This being so, I do not deem it necessary to deal with the grounds for leave to appeal, referred to in paragraph 8.1, 8.10 and 8.11 *supra*.

[29] I find no reason why the costs of this application should not be ordered to be costs in the appeal

I therefore make the following order:

1 LEAVE TO APPEAL AGAINST THE ORDER OF THIS COURT UNDER CASE NUMBER 2086/2016, ISSUED ON 9 DECEMBER 2016, IS GRANTED TO THE FULL COURT OF THIS DIVISION.

2 COSTS OF THE APPLICATION FOR LEAVE TO APPEAL SHALL BE COSTS IN THE APPEAL.

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ERASMUS, SL

ACTING JUDGE

On behalf of the Applicant (Respondents):	Adv. T. Mosikili (oio Yolande Koen Attorneys)
On behalf of Respondent (Applicant):	Adv. A.G. van Tonder (oio Van de Wall Inc).