IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

Case number: 12094/2024

In the matter between:

PETER JOHN BUTTNER	Applicant
and	
CHARLENE MEGAN VAN WYK	First Respondent
ALL PERSONS OCCUPYING THE PROPERTY REGISTERED AS ERF 1[…], DURBANVILLE, KNOWN AS Z[…], BUILDING NO. […], UNIT 6[…], B[…] ROAD, DURBANVILLE, CAPE TOWN, WESTERN CAPE PROVINCE, THROUGH THE FIRST RESPONDENT	Second Respondent
DURBANVILLE MUNICIPALITY	Third Respondent

Coram: Acting Justice P Farlam

Heard: 5 August 2024

Delivered electronically: 20 August 2024

JUDGMENT

FARLAM AJ:

[1] The applicant, Mr Peter Buttner, and the first respondent, Ms Charlene van Wyk, were, respectively, the lessor and lessee of a unit in the Z[…] sectional title scheme in Durbanville, Cape Town (the **property**) from May 2016 to 30 June 2023, when their lease agreement came to an end at the instance of Mr Buttner (the landlord / lessor). As a result of the landlord's termination of the lease (pursuant to a notice dated 25 May 2023), Ms Van Wyk was contractually obliged to vacate the property before 1 July 2023. She has however refused to do so. Mr Buttner has accordingly been required to approach the court for an order directing Ms Van Wyk and any persons occupying under her to vacate the property; alternatively authorising the Sheriff to evict her and any other occupants from the premises.

[2] Ms Van Wyk has not suggested that she has any entitlement to continue to occupy the property. Nor could she have made any such assertion. Mr Buttner was lawfully entitled to terminate their agreement of lease; and also anyway could have cancelled what was then a month-to-month lease in June 2023, after Ms Van Wyk had failed to remedy her repeated failure to pay the monthly rental (then R7,700 per month), which had, as of 25 May 2023, resulted in her being R30,800 in arrears, and, as at 2 June 2023, caused her to owe her erstwhile landlord R38,500.

[3] Ms Van Wyk has however contended that it would nevertheless not be "just and equitable" to evict her and her 11-year-old son from the property, and that the court should therefore, in the exercise of its discretion under section 4 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998 (**PIE**), refuse to grant such an order at the instance of Mr Buttner.

[4] The applicant has served the notice required by subsections 4(2) and 4(5) of PIE, and also otherwise complied with the service provisions referred to in subsection 4 of PIE. What therefore falls to be considered is whether an eviction order should be granted in the light of section 4 of PIE, and if so, what a just and equitable date for the vacation of the property by Ms Van Wyk and her son would be.[1]

Whether the eviction of Ms Van Wyk and her child would be just and equitable

[5] A key factor when considering whether to make an eviction order under section 4 of PIE is the length of time that the unlawful occupier has occupied the land in question. It is particularly relevant whether the unlawful occupation has been for less than six months or more than six months at the time that the proceedings are initiated, as that determines whether subsection 4(6), or the more onerous subsection 4(7), is applicable.

[6] In this instance, Ms Van Wyk had resided in the property from 13 May 2016, and thus for some seven years and two months when the present application was launched on 24 July 2023. As the applicant's counsel pointed out with reference to the Supreme Court of Appeal decision in *Ndlovu v Ngcobo*,[2] what is however relevant for purposes of subsections 4(6) and 4(7) is the length of the unlawful occupation, not the total occupation; and, even if one takes the date of the service of the application (15 August 2023) as the date on which these proceedings were initiated, Ms Van Wyk had only been in *unlawful occupation* of the property for less than two months when the application was brought. In the circumstances, ss 4(6), not ss 4(7), is the operative provision. I am consequently required to assess whether an order for eviction would be just and equitable "after considering all the relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households

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[1] As noted by the Supreme Court of Appeal in *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others* 2012 (6) SA 294 (SCA) para 25, a case such as the present involves these two discrete enquiries, which, when both concluded, should result in single order.
[2] *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA) para 17.

headed by women" (ss 4(6)); but need not consider "whether land has been made available or can reasonably be made available by a municipality or other organ or state or another land owner for the relocation of the unlawful occupier" (as ss 4(7) enjoins the court to take cognisance of when the period of unlawful occupation has exceeded six months).[3]

[7] In this case, the household is headed by a woman (Ms Van Wyk) and a child (Ms Van Wyk's 11-year-old son) also resides there. Ms Van Wyk also alleged that she is unemployed and an "elderly sick woman", whose mother lives in a small town in the Northern Cape. She has further alleged that "[n]one of my siblings are in a position to assist me and my son with accommodation".

[8] Ms Van Wyk has not however indicated how many siblings she has, or where they live, or what their financial status is. Nor is it correct that she is "elderly": as her own affidavit stated, she is currently 47 years old, and was 46 when the application was brought. Her vague statements regarding her medical condition are also unsubstantiated and entirely uncorroborated. Furthermore, as pointed out by the applicant, Ms Van Wyk has been singularly unforthcoming with regards to whether, for example, she has sought alternative accommodation; why she could not stay with family or friends even on a temporary basis; what exactly her financial position is; and whether or not her son's father contributes to his maintenance, and if so, how much he pays. Ms Van Wyk's explanation as to why she did not complete the City of Cape Town's housing questionnaire was also unsatisfactory, as were her statements about the causes of Legal Aid South Africa's withdrawal as her attorneys of record barely three months after agreeing to be appointed as such.

[9] As the Constitutional Court observed in *Occupiers, Berea v De Wet*,[4] PIE was not intended to have the effect of expropriating the rights of landowners for

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[3] See *Jacobs v Communicare NPC and Another* 2017 (4) SA 412 (WCC) para 9.
[4] *Occupiers, Berea v De Wet N.O. and Another* 2017 (5) SA 346 (CC) para 80, endorsing *Ndlovu v Ngcobo supra* fn.2 para 17.

the benefit of unlawful occupiers. That would essentially be the consequence of refusing to grant Mr Buttner an order evicting Ms Van Wyk. This is all the more so as Ms Van Wyk has given no indication that she will pay anything for the property, let alone discharge her overdue indebtedness, which is by now considerable, and she has at no stage even evinced a willingness to discuss a payment plan with Mr Buttner. Balancing the rights and interests of the property owner (Mr Buttner) against the rights and interests of the unlawful occupier (Ms Van Wyk), with specific reference to the facts of the present case, there is no doubt in my mind that it would be just and equitable to order that Ms Van Wyk and her son vacate the property, and in the alternative (and in the event of Ms Van Wyk not doing so voluntarily) that they be evicted.

A just and equitable date for the vacation of the property, alternatively their eviction therefrom

[10] In terms of subsections 4(8) and (9) of PIE:

> *"(8) 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 –*
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> *(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).*
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> *(9) In determining a just and equitable date contemplated in subsection (8), 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 question."*

[11] What consequently remains to be considered is what a just and equitable date for the vacating of the property would be, as well as what date should be set for an eviction in the event of Ms Van Wyk not vacating voluntarily by that date.

[12] The applicant sought an order giving Ms Van Wyk and her son a month to vacate the property, while acknowledging that the time afforded the first respondent to leave the property was something for the court to decide upon in the exercise of its discretion. Ms Van Wyk, for her part, did not contend for any specific period for which she should be permitted to extend her unlawful occupation of the property (contenting herself with a submission that she should not be ordered to vacate), though she did seek to make something of a hospital procedure which she alleged, without any substantiation or corroborating documentation, was due to take place in October 2024.

[13] When the application was brought in the second half of July 2023, Ms Van Wyk had already resided in the property for six months without paying rent. At this juncture, she has occupied the property rent-free for some nineteen months, and has remained there unlawfully (i.e., without any legal right) for over a year. Mr Buttner has thus derived no income from the property for more than a year-and-a-half, while having to incur costs in relation to the property (in the forms of levies, rent and utilities). This application has also already been unduly delayed as a result of the actions and inactions of Ms Van Wyk.

[14] Had Ms Van Wyk been residing in the property on her own, I would thus have been inclined to order that she vacate within a month of the date of the court's order. I might add that Ms Van Wyk's allegations about her upcoming medical procedure – introduced for the first time in a further answering affidavit filed on 1 August 2024[5] – would not in my view have warranted any different outcome, given their vagueness and the absence of any supporting documentation.

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[5] Insofar as it was necessary to do so, this further affidavit was admitted into evidence at the hearing.

[15] I am however mindful of the fact that the High Court is the upper guardian of minor children and accordingly required to consider what is in the best interests of a child;[6] and, as mentioned, the property is currently occupied by both Ms Van Wyk and her 11-year-old son. The deliberations regarding a just and equitable date for the vacation of the property must therefore be centrally informed by considerations of the consequences of an eviction order for Ms Van Wyk's minor child.

[16] Almost nothing was said by Ms Van Wyk in her two affidavits about her son. Significantly, she did not allege that his learning or participation at the school he was attending would be compromised were they to be evicted from the property. Indeed, she said nothing about his education or well-being at all. In line with the Constitutional Court's holding in *Mpofu*[7] that, when establishing what is in the best interests of the child, the court is "not bound by … the limitations of the evidence presented, or contentions advanced or not advanced, by respective parties",[8] I nevertheless considered it appropriate to make a few enquiries in court of Ms Van Wyk (who represented herself) with regard to her son. Ms Van Wyk informed the court in response that her son was in Grade 6 at the E[…] S[…] School in Durbanville. She also said that he could probably stay with a classmate during the time she had alleged she would be in hospital in October 2024.

[17] The property (in B[...] Street, Durbanville) is only a few kilometres, and less than ten minutes' drive, away from the E[…] S[…] School . It would thus seem relatively easy for Ms Van Wyk's minor child to get to and from school at present. There is no cogent evidence that Ms Van Wyk – who, as mentioned, has provided no objective or verifiable information about her financial position

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[6] *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC) para 64; see, too, *Kotze v Kotze* 2003 (3) SA 628 (T) at 630G, and *Ex parte Kedar and Another* 1993 (1) SA 242 (W) at 244E.
[7] *Mpofu v Minister of Justice and Constitutional Development and Others (Centre for Child Law as Amicus Curiae)* 2013 (9) BCLR 1072 (CC) para 21.
[8] As the Supreme Court of Appeal observed in *Changing Tides supra* fn.1 at para 27, a more proactive approach may anyway be appropriate in eviction cases.

– would not be able to afford suitable alternative accommodation in Durbanville for herself and her son if obliged to leave the property in relatively short order; and that her son could therefore not continue to attend E[…] S[…] School without difficulty in that eventuality.[9] It is nevertheless unclear on the available information where Ms Van Wyk could find accommodation if ordered by court order to vacate the property, and more particularly whether she could find a new residence sufficiently close to her son's school before the end of the current school year. Despite the absence of any allegations by Ms Van Wyk of prejudice in this regard, I thus cannot be sure that Ms Van Wyk's Grade 6 son's education would not be unreasonably disrupted were they to have to move home so late in the school year. It might even be that her son would no longer be able to remain with his mother and also attend his current school if I were to direct that both should vacate the property by the end of September 2024. And an eviction order with a date of, say, 31 October 2024 could well prejudice the learner with his year-end exams.

[18] In the circumstances, I have concluded that a just and equitable date for Ms Van Wyk and her minor son to vacate the property would be as soon as reasonably possible after the end of the current school year, which ends on Wednesday, 11 December 2024 in the case of Western Cape schools (including E[...] S[...]). Taking into account public holidays and festivals, as well as the fact that Mr Buttner should ideally be able to rent out the property to new tenants from 1 January 2025, I accordingly determine that Ms Van Wyk should vacate the property, together with her son, by Tuesday, 17 December 2024; and that, if they fail to vacate the property on that date, they may be evicted by the Sheriff or his or her deputy on Thursday, 19 December 2024, or as soon as possible thereafter.

[19] I appreciate that effectively prolonging Ms Van Wyk's unlawful occupation of the property for another four months would exacerbate the prejudice

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[9] I might add that the tuition fees for a Grade 6 scholar at the E[…] S[…] School were, according to publicly available information, over R60,000.00 in 2023, which is on its face incompatible with Ms Van Wyk's protestations about her inability to pay rent.

sustained by the applicant. But I am concerned that an earlier eviction date would, in all the circumstances, potentially cause even greater harm to Ms Van Wyk's minor son, whose interests for the remainder of the school year would, by contrast, be protected by the order I propose to make. Mr Buttner could also potentially pursue a claim for unpaid rental and damages against Ms Van Wyk. The eviction date would therefore seem just and equitable for all parties (and thus comply with the test laid down in *Changing Tides*[10]).

Costs

[20] The applicant asked for the costs occasioned by the application on a party-and-party scale. There is no reason to deprive the applicant of a costs order, and thus to depart from the general rule that a successful party should be awarded its costs. Indeed, the applicant has not only been constrained to institute these proceedings in an attempt to bring an end to the unlawful occupation of his property, but has also had to endure delays and incur further costs in this application as a result of acts and omissions of the first respondent which were at least in effect vexatious. There may accordingly have been a basis under the common law for the applicant to have sought costs on a punitive, attorney and client scale[11] – a costs order to which he may anyway have been entitled under clause 17.2 of the lease agreement – but it is unnecessary to consider that, as the applicant has merely asked for party-and-party costs, which, as indicated, I consider that he should be allowed to recover. Whether a costs order will be meaningful is unclear given the first respondent's failure to substantiate her financial position; but I cannot conclude on the available information that it would be futile.

[21] The costs order will include the costs which this court has already ordered the first respondent to pay:

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[10] S*upra* fn.1 para 12 (last sentence) [305B of the SALR report].
[11] See e.g., the well-known case of *In re Alluvial Creek* 1929 CPD 532 at 535.

(i) in relation to the chamber-book application which the applicant brought at the end of January 2024 to compel the first respondent to deliver an answering affidavit;[12] and

(ii) in connection with the postponement of the application on 29 April 2024.[13]

[22] No submissions were made as to the scale of counsel's costs; but this matter in any event appears to be one in which the default provision (Scale A) would be appropriate.

Order

[23] I accordingly make the following order:

1. The first respondent and all other persons occupying the property registered as erf 1[…], Durbanville and known as Z[…]l, Building No. […], Unit 6[…], B[…] Road, Durbanville, Cape Town (the "property") through the first respondent (collectively, the "occupiers") are hereby evicted from the property.

2. The occupiers must vacate the property on or before Tuesday, 17 December 2024.

3. Should the occupiers fail to vacate the property by 17 December 2024, the Sheriff or his/her deputy are authorised to evict the occupiers from the property on Thursday, 19 December 2024, or any day thereafter as close as possible to the aforementioned date.

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[12] That costs order was contained in paragraph 4 of the order granted by Samela J on 2 February 2024.
[13] In paragraph 2 of the order made on that date by Slingers J it was ordered that the "wasted costs of the postponement will be for the respondents' account".

4. The Sheriff or his/her deputy is authorised to engage the services of the South African Police Services (SAPS) to assist him/her in the execution of their eviction of the occupiers if the Sheriff or his/her deputy deems it necessary.

5. The first respondent shall pay the costs of the application on a party and party basis, with those costs including the costs of the applicant's chamber-book application and the wasted costs of the postponement on 29 April 2024. Counsel's costs are granted in accordance with Scale A.

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ACTING JUDGE P FARLAM

For applicant: Adv Paula Gabriel

Instructed by: Van Zyl Kruger Inc.

For first respondent: in person (Ms Van Wyk)