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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE
Case number : 36/2004

In the matter between :

THE UNLAWFUL OCCUPIERS OF THE SCHOOL SITE **APPELLANT**

and

THE CITY OF JOHANNESBURG **RESPONDENT**

CORAM : **SCOTT, STREICHER, BRAND, LEWIS JJA and MAYA AJA**

HEARD : **24 FEBRUARY 2005**

DELIVERED : **17 MARCH 2005**

Summary: Application for eviction of the appellants under s 6 of Act 19 of 1998 ('PIE') –whether authority to bring application on behalf of the respondent had been established – whether s 4(2) of PIE had been complied with – whether order granted by the court *a quo* impossible to carry out.

JUDGMENT

BRAND JA/

BRAND JA:

[1] This appeal has its origin in an application by the respondent municipality ('the municipality') in the Johannesburg High Court for the eviction of the appellants under the provisions of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998 (PIE). In the court *a quo* the matter came before Mlambo J who granted the order sought. The appeal against that order is with his leave.

[2] The municipality is the local authority responsible for the greater Johannesburg area. Situated within that area is the densely populated township of Alexandra. In London Road, Alexandra there is a property zoned for schools and referred to as the school site. It belongs to the Province of Gauteng. On the school site there are four schools accommodating about 5 000 pupils. It is, however, also the site of an informal settlement consisting of over 700 families. The appellants are part of that community. It is not in dispute that they have no permission to be on the site and that their occupation has always been unlawful.

[3] The informal settlement on the school site started more than 20 years ago, before any schools had been erected on the site.

Later on, when the schools were built, there was, so it seems, still enough room for everyone. However, as often happens with settlements of this kind, it kept growing as more and more people joined the community and erected their shacks wherever they found a vacant spot. Eventually, the shacks sprawled out onto the playgrounds of the schools to the extent that the children had virtually no place for recreation or play. What also happened was that, because the shacks were built right up to the edge of roads leading to the schools, children were compelled to walk in the road itself and were knocked down by passing traffic. On occasion children were also assaulted and molested while threading their way through densely built up areas on their way to school. In the end, both the municipality and the Province of Gauteng, as the authority responsible for the schools and the owner of the property, found the situation intolerable.

[4] At the same time, the office of the President took the initiative in a project for the general upgrading of the Alexandra township. For this project, officially referred to as the Alexandra Renewal Project, R1,3 billion was set aside and it was publicly launched by President Mbeki on 9 June 2001. Implementation of the project required the 'de-densification' of the township as a

whole and the consequent provision for alternative housing in other areas. To this end, formal houses built of brick and mortar were set aside for the school site community in a developed area called Bramfischerville which is situated in Roodepoort, some 37 kilometres from Alexandra. In the interest of the schools, the Province of Gauteng agreed to relax its standard qualifications for the allocation of provincial housing subsidies and to make these subsidies available essentially to every household on the school site. For all practical purposes, the occupiers of the school site were therefore offered the alternative of free formal housing in Bramfischerville.

[5] To facilitate both the allocation of houses and the allotment of housing subsidies, the municipality conducted a registration process. Part of this process was to provide each shack on the school site with a number. Heads of households were then requested to have their particulars registered by municipal officials with reference to their addresses thus established. In the end, the heads of households occupying 703 shacks, which constituted all but a small number of the shacks on the site, were registered.

[6] The municipality and the provincial authority decided that the relocation from the school site to Bramfischerville would take place

in December 2001. Over the preceding months the authorities actively sought community agreement to the relocation. To this end, a number of meetings were held with local civic organisations where the relocation was discussed. In addition two public meetings were arranged during November 2001. These meetings were advertised through the distribution of pamphlets. One of the pamphlets was annexed to the municipality's founding papers. Apart from advertising the date and place of public meetings, the pamphlet gave details about the relocation process. It also contained a succinct explanation why the relocation was thought necessary.

[7] These attempts by the authorities at persuading the community to relocate on a voluntary basis were largely unsuccessful. As a result, the municipality found it necessary to apply for an eviction order under PIE. Cited as respondents in the application were the 703 heads of households occupying the school site whose names and shack numbers appeared on the list compiled during its registration process. Of those respondents, 590 gave notice of their intention to oppose. They are the appellants in this matter; they were at all times represented by counsel and attorneys, both in this court and in the court *a quo.*

[8] PIE provides for essentially two different types of eviction applications, under s 4 and s 6 respectively. Both sections presuppose that those to be evicted are 'unlawful occupiers' as defined in s 1. The difference is that under s 4 the applicant must be 'the owner or person in charge' of the occupied land while s 6 contemplates that the applicant is an organ of state, such as a municipality, with jurisdiction over the area encompassing the occupied land. In its application papers, the municipality made no specific reference to s 6. At the same time, however, it did not claim to be the owner or person in charge of the school site. On the contrary, its relationship with the property was plainly set out in the founding affidavit. On these facts it was apparent that the application could only be founded on s 6. That is how the matter was understood and dealt with by everybody concerned, both in this court and in the court *a quo*.

[9] In the answering affidavits filed on behalf of the appellants, it was formally admitted that the appellants were 'unlawful occupiers' of the school site as defined by s 1 of PIE and also that the school site fell within the area of jurisdiction of the municipality. The first two jurisdictional requirements of s 6 were therefore common cause. With regard to the merits, the defence raised in the

answering papers turned largely on the further requirement in s 6(1), namely that an eviction order may only be granted if it is considered by the court to be just and equitable in all the circumstances.

[10] In the court *a quo* the appellant's central argument as to why the eviction order sought would not be just and equitable was that Bramfischerville was too far from the Alexandra area where many of them were gainfully employed and where their children were at school. The municipality did not deny that the relocation over a distance of some 37 kilometres would be the cause of inconvenience and, in many cases, even hardship to the appellants. Its answer was that this could not be avoided since it was simply impossible, both financially and practically, to find an area for relocation closer to Alexandra. The court *a quo* devoted a considerable part of its judgment to the weighing up of all the arguments and counter arguments on the merits. In the end it came to the well-reasoned conclusion that in all the circumstances, it was in fact just and equitable, within the meaning of s 6 of PIE, to grant the eviction order sought. This finding on the merits was not challenged on appeal. We therefore had to decide the matter on the basis that the relocation of the appellants from the school site

to Bramfischerville would be in the public interest and that in all the circumstances the eviction order would neither be unjust nor inequitable.

[11] The three grounds raised in the notice of appeal were all of a technical or procedural nature, namely that:

(a) The municipality had failed to prove that the deponent to its founding affidavit, Mr B M Lefatola, had the requisite authority to institute the application on its behalf.

(b) The eviction application did not meet with the procedural requirements of PIE.

(c) The order granted by the court *a quo* was not capable of practical implementation.

[12] As to the issue giving rise to the first ground of appeal, Lefatola's statement in the founding affidavit was confined to the following:

'I am duly authorised by delegated power to bring this application and to make this affidavit on behalf of the applicant.'

The response to this statement in the answering affidavit was equally bald. It read:

'I deny that … Lefatola is duly authorised to make the founding affidavit … or to bring proceedings for eviction on behalf of the applicant. The applicant is put to the proof thereof.'

In reply, Lefatola produced a resolution of the municipal council which authorised him to launch proceedings of the present kind on behalf of the municipality '*in consultation with* the Executive Director : Corporate Services or the Director : Legal Services'. (My emphasis.) With reference to this resolution Lefatola then stated that:

'I have consulted with the applicants' Director : Legal Services in respect of this application.'

[13] Based on these facts the appellants raised the argument that Lefatola had failed to prove that he had been duly authorised, because he did not say whether or not the Director of Legal Services agreed with him that the application should be brought. Support for this argument was sought in those cases where a distinction had been drawn between 'in consultation with' and 'after consultation with'. According to these authorities, a decision 'in consultation with' another functionary requires the concurrence of that functionary while a decision 'after consultation with' another functionary requires no more than that the decision must be taken in good faith, after consulting and giving serious consideration to

the views of the other functionary (see eg *Premier Western Cape v President of the Republic of South Africa* 1999 (3) SA 657 (CC) para 85 note 94 and *President of the Republic of South Africa and others v South African Rugby Football Union and others* 1999 (4) SA 147 (CC) para 63)

[14] At the hearing of the appeal, counsel for the appellants conceded that she could not support this ground of appeal. I think the concession was fairly made. The issue raised had been decided conclusively in the judgment of Flemming DJP in *Eskom v Soweto City Council* 1992 (2) SA 703 (W), which was referred to with approval by this court in *Ganes and another v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA) 624I-625A. The import of the judgment in *Eskom* is that the remedy of a respondent who wishes to challenge the authority of a person allegedly acting on behalf of the purported applicant, is provided for in rule 7(1). The *ratio decidendi* appears from the following *dicta* (at 705D-H):

'The care displayed in the past about proof of authority was rational. It was inspired by the fear that a person may deny that he was party to litigation carried on in his name. His signature to the process, or when that does not eventuate, formal proof of authority would avoid undue risk to the opposite party, to the administration of justice and sometimes even to his own attorney.

…

The developed view, adopted in Court Rule 7(1), is that the risk is adequately managed on a different level. If the attorney is authorised to bring the application on behalf of the applicant, the application necessarily is that of the applicant. There is no need that any other person, whether he be a witness or someone who becomes involved especially in the context of authority, should additionally be authorised. It is therefore sufficient to know whether or not the attorney acts with authority.

As to when and how the attorney's authority should be proved, the Rule-maker made a policy decision. Perhaps because the risk is minimal that an attorney will act for a person without authority to do so, proof is dispensed with except only if the other party challenges the authority. See Rule 7(1).'

And (at 706B-D):

'If then applicant had qualms about whether the 'interlocutory application' is authorised by respondent, that authority had to be challenged on the level of whether [the respondent's attorney] held empowerment. Apart from more informal requests or enquiries, applicant's remedy was to use Court Rule 7(1). It was not to hand up heads of argument, apply textual analysis and make submissions about the adequacy of the words used by a deponent about his own authority.'

[15] These remarks by Flemming DJP must be understood against the background that rule 7(1) in its present form was only introduced by way of an amendment in 1987. Prior to the amendment an attorney was obliged to file a power of attorney whenever a summons was issued in an action, but not in motion

proceedings. The underlying reason for the distinction, so it was said, was that in motion proceedings there is always an affidavit signed by the applicant personally or by someone whose authority appears from the papers (see eg *Ex Parte De Villiers* 1974 (2) SA 396 (NC)). On the basis of this reasoning it is readily understandable why, before 1987, the challenge to authority could only be directed at the adequacy of the averments in the applicant's papers and pre-1987 decisions regarding proof of authority should be read in that light.

[16] However, as Flemming DJP has said, now that the new rule 7(1)-remedy is available, a party who wishes to raise the issue of authority should not adopt the procedure followed by the appellants in this matter, ie by way of argument based on no more than a textual analysis of the words used by a deponent in an attempt to prove his or her own authority. This method invariably resulted in a costly and wasteful investigation, which normally leads to the conclusion that the application was indeed authorised. After all, there is rarely any motivation for deliberately launching an unauthorised application. In the present case, for example, the respondent's challenge resulted in the filing of pages of resolutions annexed to a supplementary affidavit followed by lengthy technical

arguments on both sides. All this culminated in the following question: Is it conceivable that an application of this magnitude could have been launched on behalf of the municipality with the knowledge of but against the advice of its own director of legal services? That question can, in my view, only be answered in the negative.

[17] For their second ground of appeal, based on the contention that the procedural requirements of PIE were not met, appellants relied on s 6(6) read with s 4(2) of the Act. Though the application was brought under s 6, it was expressly rendered subject to the procedural requirements of s 4 by the provisions of s 6(6). With reference to the procedural requirements in s 4, the appellant's objection primarily focussed on s 4(2) as interpreted by this court in *Cape Killarney Property Investments (Pty) Ltd v Mahamba* 2001 (4) SA 1222 (SCA). According to this interpretation, s 4(2) requires that, apart from the service of the eviction application prescribed by the rules of court, an additional notice be served upon a respondent at least fourteen days before the date upon which the application is to be heard. This notice, so it was held in *Cape Killarney Properties* (at 1227G-H), must conform with the previously obtained directions of the court, with reference to both

its contents and the manner in which it is to be served. Furthermore, s 4(2) stipulates that this notice must be 'written and effective' while s 4(5) provides that:

'The notice of proceedings contemplated in subsection (2) must –

(a) state that proceedings are being instituted in terms of subsection (1) for an order for the eviction of the unlawful occupiers;

(b) indicate on what date and at what time the court will hear the proceedings;

(c) set out the grounds for the proposed eviction; and

(d) 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.'

[18] I revert to the facts pertaining to this issue. On 14 November 2001 the application papers were served by the sheriff on those respondents who were identified in his return with reference to their names and the numbers of their shacks. Thereupon an attorney, acting on behalf of 590 of the respondents (now the appellants), gave notice of their intention to oppose. Answering affidavits were filed on their behalf to which the municipality responded in its replying affidavits.

[19] After all this, the municipality, in an obvious attempt to give effect to the judgment of this court in *Cape Killarney Properties*, approached the court *a quo* for its prior approval of the contents of the proposed s 4(2) notice which it intended to serve for directions as to the manner in which this notice was to be served. On 20 March 2002 the court (Gautschi AJ) granted the following order:

(1) That the form and contents of the draft notice in terms of s 4(2) of [PIE] annexed to the founding affidavit as 'X' be authorised by this court.

(2) The applicant is authorised and directed to serve the notice in terms of s 4(2) of [PIE] on the respondents occupying the shacks on the school site, London Road, Alexandra by service at each shack as follows:

2.1 by handing a copy thereof to any person found at that shack and who is apparently over the age of 16 years; or

2.2 by affixing to the principal door of such shack; or

2.3 by sliding a copy thereof under the principal door of such shack.'

Annexure X to the founding affidavit referred to in para 1 of the order read as follows:

'BE PLEASED TO TAKE NOTICE THAT proceedings have been instituted in terms of s 4(1) of [PIE], for the eviction of the above named Respondents.

TAKE NOTICE FURTHER THAT the hearing of such application will be heard by the above named Honourable Court, situated at: Pritchard Street,

Johannesburg on Monday 8 April 2002 at 10h00 or so soon thereafter as the matter may be heard.

TAKE NOTICE FURTHER THAT the eviction application is based on the fact that the Respondents are in unlawful occupation of properties surrounding four schools situated in London Road, Alexandra and that the Applicant requests an order of the Honourable Court to relocate the Respondents from the School Site property to Bramfischerville.

TAKE NOTICE FURTHER THAT any Respondent is entitled to appear before the court in order to defend the case, and if necessary, have the right to apply for legal aid.'

[20] According to the return of service filed by the sheriff, s 4(2) notices were served on 20 March 2002, in a manner prescribed by the court order, on 587 respondents who were identified in the return with reference to their names and shack numbers. The matter was then heard by the court on the date referred to in the notice, ie 8 April 2002. The order eventually granted by Mlambo J specifically provided that it would only apply to those respondents who were:

(a) listed in the register prepared by the municipal officials; and

(b) served with copies of the application; and

(c) served with copies of the s 4(2) notice.

[21] The appellants' objection to the contents of the notice and the manner in which it was served was threefold. First, that, according to the notice, the application had been brought under s 4(1) of PIE whereas it was common cause that it was brought under s 6. Second, that the notice did not comply with s 4(5)(c) since only one ground for the application was stated, namely that the occupiers were in unlawful occupation of the land, whereas it was obvious that the municipality relied on other grounds as well. Third, that the notice was only in English and only conveyed in written form while the overwhelming majority of the community occupying the school site spoke one or other indigenous African language and many of them were functionally illiterate.

[22] As to the first and second objections pertaining to the contents of the notice, it is clear that the reference to s 4(1) of PIE was a mistake. To that extent the notice was therefore defective. I am also in agreement with the contention that the grounds for the application stated in the notice were too sparse to meet with the requirements of s 4(5)(c). The respondents should at least have been told that their eviction was alleged to be in the public interest. As the appellants also correctly pointed out, it was held in *Cape Killarney Property* (1227E-F) that the requirements of s 4(2) must

be regarded as peremptory. Nevertheless, it is clear from the authorities that even where the formalities required by statute are peremptory it is not every deviation from the literal prescription that is fatal. Even in that event, the question remains whether, in spite of the defects, the object of the statutory provision had been achieved (see eg *Nkisimane and others v Santam Insurance Co Ltd* 1978 (2) SA 430 (A) 433H-434B; *Weenen Transitional Local Council v Van Dyk* 2002 (4) SA 653 (SCA) para 13).

[23] The purpose of s 4(2) is to afford the respondents in an application under PIE an additional opportunity, apart from the opportunity they have already had under the rules of court, to put all the circumstances they allege to be relevant before the court (see *Cape Killarney Property Investments* 1229E-F). The two subsections of s 4(5) that had not been complied with were (a) and (c). The object of these two subsections is, in my view, to inform the respondents of the basis upon which the eviction order is sought so as to enable them to meet that case. The question is therefore whether, despite its defects, the s 4(2) notice had, in all the circumstances, achieved that purpose. With reference to the appellants who all opposed the application and who were at all times represented by counsel and attorneys, the s 4(2) notice had

obviously attained the legislature's goal. However, there were also respondents who did not oppose and who might not have had the benefit of legal representation. It is with regard to these respondents that the question arises whether the s 4(2) notice had, despite its deficiencies achieved its purpose. In considering this question it must be borne in mind that, as a result of the way in which the order of the court *a quo* was formulated, it will only affect those respondents who had been served by the sheriff with both the application papers and the notice under s 4(2).

[24] The question whether in a particular case a deficient s 4(2) notice achieved its purpose, cannot be considered in the abstract. The answer must depend on what the respondents already knew. The appellant's contention to the contrary cannot be sustained. It would lead to results which are untenable. Take the example of a s 4(2) notice which failed to comply with s 4(5)(d) in that it did not inform the respondents that they were entitled to defend a case or of their right to legal aid. What would be the position if all this were clearly spelt out in the application papers? Or if on the day of the hearing the respondents appeared with their legal aid attorney? Could it be suggested that in these circumstances the s 4(2) should still be regarded as fatally defective? I think not. In this

case, both the municipality's cause of action and the facts upon which it relied appeared from the founding papers. The appellants accepted that this is so. If not, it would constitute a separate defence. When the respondents received the s 4(2) notice they therefore already knew what case they had to meet. In these circumstances it must, in my view, be held that, despite its stated defects, the s 4(2) notice served upon the respondents had substantially complied with the requirements of s 4(5).

[25] This brings me to the appellant's further objection to the s 4(2) notice which raised the issues of language and literacy. Support for this objection was sought in the judgment of the Cape High Court in *Cape Killarney Property Investments (Pty) Ltd v Mahamba* 2000 (2) SA 67 (C) where Hlophe DJP held that, in the circumstances of that case, where the overwhelming majority of the respondents were Xhosa speaking, a notice in the English language unaccompanied by a Xhosa translation was not 'effective' within the meaning of s 4(2) (see 75C-76G). He also held that, since a substantial proportion of the respondents were illiterate, the notice should have been conveyed, in Xhosa, by a loudhailer throughout the community (see 75C-G). In this court the appeal was dismissed on other grounds. It was therefore found

unnecessary to express any view on the correctness of these findings (see *Cape Killarney Properties Investments (Pty) Ltd v Mahamba* 2001 (4) SA 1222 (SCA) 1229F-G).

[26] As the factual foundation for the objection under consideration the appellants relied on a supplementary affidavit deposed to by Mr L L Monyela and filed on behalf of the appellants subsequent to the filing of the municipality's replying affidavits. After stating that he had been a member of the school site community for 21 years and that he knew the community well, Monyela alleged that 'the overwhelming majority of the members of the community occupying the school site are people whose primary language is an indigenous African language' and that 'very many of them do not speak or understand English well'. Moreover, he alleged, 'many of the members of the community are functionally illiterate and would not be able to read and understand a document such as [the s 4(2) notice].

[27] However, in a replying affidavit filed on behalf of the municipality it was said that:

'Past experience has taught us that the news of an application such as the present one spreads like wildfire in a high density informal settlement such as the one to which this application relates. I can confidently state that the fact

that this application is pending, is well known amongst all the residents in question.'

Neither Monyela nor anyone else responded to these statements which therefore stand uncontradicted.

[28] It is obviously desirable that, where practicable, the s 4(2) notice should be in a language and through a medium of communication which is most likely to be understood by its intended audience. In the view that I hold on this issue, it is not necessary for me to decide whether, in the circumstances of this case, it would be practicable to translate the notice into the unknown number of languages allegedly spoken by the members of the school site community. The question whether a s 4(2) notice was effective is not a question of law. It is a question of fact. More often than not it would only be capable of determination after the event. It follows that the question whether a notice in one language is sufficient or whether it should be translated into a number of languages is likewise a question of fact to which there can be no answer of general validity. It can only be answered, often with the benefit of hindsight, with reference to the facts of that particular case.

[29] According to the uncontradicted evidence presented by the municipality in this case, the pending application was well known amongst all the occupiers of the school site. In the light of that evidence, Monyela's affidavit raised more questions than answers. Why did he not dispute or even qualify the positive statement on behalf of the municipality that the respondents were aware of the pending application? Why did he resort to generalities and to a statement in guarded terms that many of the members of the community did not understand English *well*? Why is there no reference to a single respondent who indicated that he or she was unable to understand the notice?

[30] We know that the application had been preceded by a widely publicised campaign in which the prospect of relocation was the central issue. With the benefit of hindsight, we also know that the application was opposed by a substantial number of the respondents and that this opposition was coordinated to a large extent by the local area committee of the National Civics Organisation of which Monyela was the chairperson. In this light, the overwhelming probabilities seem to indicate that all the occupants of the school site would have been approached to join the local area committee in its opposition. In the circumstances I

agree with the court *a quo*'s finding that the s 4(2) notice was effective.

[31] This brings me to the third ground of appeal based on the contention that the order issued by the court *a quo* would be impossible to carry out. There is no merit in this contention. Though the implementation of the court order may be difficult, I cannot see why it would be impossible.

[32] It follows that the appeal cannot succeed. The municipality did not ask for its costs of appeal. There will accordingly be no order as to costs.

[33] The appeal is dismissed.

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F D J BRAND
JUDGE OF APPEAL

Concur:

Scott JA
Streicher JA
Lewis JA
Maya AJA