



IN THE MAGISTRATE'S COURT FOR THE DISTRICT OF EKURHULENI

HELD AT PALM RIDGE

Case no: 6888/22

In the matter between

GEORGE SKOSANA MOTSOANE

AND

THELMA MORONGOE MOTSOANE

ALL ILLEGAL OCCUPIERS OF PROPERTY SITUATED

At ERF 156 MOSHOESHOE TOWNSHIP

EKURHULENI GAUTENG PROVINCE

THE CITY OF EKURHULENI METROPOLITAN

MUNICIPALITY



APPLICANT

1ST RESPONDENT

2ND RESPONDENT

3RD RESPONDENT

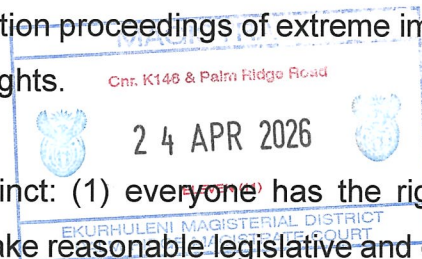
JUDGMENT

INTRODUCTION:

- 1) In redressing the past injustices and consequences of Apartheid laws the Court as an arbiter unintentionally perpetuates family feuds that may most likely will be inherited by the next generation simply because there has to be a victor and a loser in a dispute that just required

a family meeting. It is therefore devastating to witness siblings be at loggerheads over a property left by their parents who were never really “owners” as the harsh laws of Apartheid laws did not afford them this privilege.

- 2) This is an eviction application in terms of Section 4 (1) of the Prevention of Illegal from and Unlawful Occupation of land Act 19 of 1998. The Applicant is seeking an eviction order against the first and second Respondents from number 156 Mosheshoe section, Katlehong.
- 3) The following are common cause and are not in dispute. The Jurisdiction of this Court to hear the matter, the parties, the property details and ownership. What is in dispute is whether the 1st and 2nd respondents are unlawful occupiers as per the definition in the Act and further more if it is just and equitable to grant the eviction order against them.
- 4) The Court is obliged to take full cognisance of the Constitutional imperatives that are tied to evictions proceedings. Not only are eviction proceedings of extreme importance they bring to the fore Rights enshrined in the Bill of rights.
- 5) Section 26 of the Constitution is succinct: (1) everyone has the right to have access to adequate housing. (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.”
- 6) The Applicant is represented by Mr Molobyne and for the 1st Respondent is Ms Mashau.



FACTS:

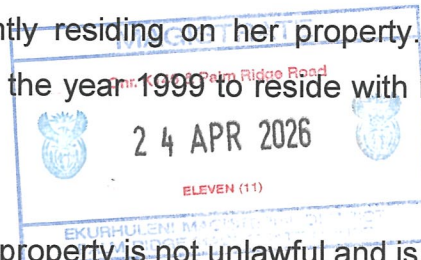
- 7) It is empirical at this juncture to give a brief account of the facts of this matter. In his brief application the Applicant submits that he is the owner of the immovable property in question and attaches proof thereof. He submits that the 1st and 2nd Respondents have been unlawfully occupying his immovable property for the past 23 years and that they have disturbed his possession. He explains that the 1st respondent will not be rendered homeless and that it is just and equitable to grant an eviction order against them.
- 8) The 1st respondent filed her answering affidavit. The court must note that the 1st respondent provided a history of the said immovable property in question and how ownership was acquired by the Applicant. She informs the court that the immovable property belonged to

their parents and upon their fathers passing their mother as a coloured woman could not acquire ownership of the property as the apartheid laws prohibited her from acquiring ownership.

9) She was informed she could either be relocated to a coloured township or nominate a child to be the primary permit holder. It was then where she nominated the Applicant as other siblings were disqualified either by their age or gender.

10) She explains that in 1985 the Applicant sought to enter into a 99 year lease agreement and that enabled the Applicant to be the owner of the property in question. She admits that she has been residing on the said property until the year 2021 when conflicts erupted between her and her brother who is the Applicant.

11) She submits that she has financially contributed to paying the rates and taxes of the said property until when conflict arose between her and the Applicant. She submits that she does not have alternative accommodation as her own property is not available because her daughter with her children are currently residing on her property. She denied that the Applicant moved out of the property in the year 1999 to reside with his sister in Dawn Park until the 2021.



12) She submits that her occupation of the property is not unlawful and is vested in her long term occupation as a descendant of the original owners. She states that she is an elderly frail woman with health challenges and being evicted from the said property would perpetuate the discrimination against women and as such it would not be just and equitable to grant an eviction order.

13) The Applicant filed his replying affidavit and made a few concessions. He conceded that the property was owned by their parents, he concedes that the municipality granted him the 99 year lease title he does not deny that the 1st Respondent does effect payment in as much as he also effected payments towards the rates and taxes. He only informs us in his replying affidavit that he moved out of the property due to the 1st Respondent's protection order being granted against him. He denies the substantial averments of the 1st Respondent and still maintains that they ought to be evicted as they are unlawful occupiers

ISSUES:

14) The Court has to ascertain whether the 1st and 2nd Respondents are indeed unlawful occupiers and if it is indeed they are, the second aspect would be to determine whether it would be just and equitable to grant an order of eviction against the 1st and Respondents and that the said eviction will not render the respondents homeless.

LAW:

15) The case of ***Dwele v Phalatse and others***¹ offers a guideline in what the PIE Act² entails in that it contains the substantive and procedural provisions:

“Essentially there are two inquiries mandated by these sections. In terms of section 4 (7) of the Act an eviction order may only be granted if it is just and equitable to do so, determined after the court has had regard to all the relevant circumstances, including the availability of land for the relocation of the occupiers and the rights and needs of the elderly, children, disabled persons and household headed by women. If the requirement of section 4 are satisfied and no valid defence to an eviction order has been raised, a ‘court’ must, in terms of section 4 (8) grant an eviction order. When granting such an order the court must, in terms of section 4(8) (a) of the PIE Act determine a just and equitable date on which the unlawful occupier must evict the premises (the next inquiry). The court is empowered in terms of section 4 (12) to attach reasonable conditions to an eviction order. The date it determines must be one that is just and equitable to all parties.”

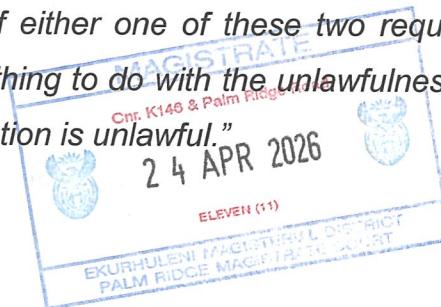
16) In ***Port Elizabeth Municipality v Various Occupiers***³ 2005 (1) SA 217 (CC) Sachs J said at para [32] said “that the obligation on the court to have regard to the circumstances requires that the court be fully appraised of all the relevant facts so that it can give them due weight in making its judgment as to what is just and equitable and that where the evidence submitted by the parties leaves important questions of fact obscure, contested or uncertain, the court might be obliged to procure ways of establishing the true state of affairs, so as to enable it properly to have regard to relevant circumstances.” And at para [36] “The court is thus called upon to go beyond its normal functions and to engage in active judicial management according to equitable principles of an ongoing, stressful and law-governed social process.”

¹ (11112/15) ZAGPJHC 146 (2017)

² Act 19 of 1998

³ 2005 (1) SA 217 (CC) paragraph 32

- 17) It is trite that an owner or person in charge of land who wishes to evict another person who resides on that land must comply with s26 (3) of the Constitution.⁴
- 18) In the case of *The Occupiers, Berea v De Wet No and Another 2017 (5) SA 346 (CC)*⁵ the Constitutional Court emphasised that: *“It deserves to be emphasized that the duty rests on the court under s 26(3) of the Constitution and section 4 of PIE goes beyond the consideration of the lawfulness of the occupation. It is a consideration of justice and equity in which the court is required and expected to take an active role. In order to perform its duty properly the court is required and expected to take an active role. In order to perform its duty properly the court needs to have all the necessary information. The obligation to provide the relevant information is first and foremost on the parties to the proceedings. As officers of the court attorneys and advocates must furnish the court with all the relevant information that is in their possession in order for the court to properly interrogate the justice and equity of ordering the eviction. The court will grant an eviction order only where: (a) it has all the information about the occupiers to enable it to decide whether the eviction is just and equitable; and (b) is satisfied that the eviction is just and equitable, having regard to the information in (a). The two requirements are inextricable, interlinked and essential. An eviction order granted in the absence of either one of these two requirements will be arbitrary. I reiterate that the enquiry has nothing to do with the unlawfulness of occupation. It assumes and is only due when the occupation is unlawful.”*



APPLICATION OF LAW TO FACTS:

- 19) This court is fortunate in that there are numerous case law that has shaped the jurisprudence regarding eviction. More recently there has been a spotlight on property rights attained through legislation under apartheid laws. The present case before this court is substantially similar to that of the High Court case of *Shomang v Motsose*⁶. The court will draw parallels from the same case as legislation promulgated under apartheid law discriminated against women, particular women of colour.
- 20) The 1st Respondent is correct to prove demonstrate to this court how the Applicant attained the ownership of the property. She brings the court into a history lesson of how apartheid legislation excluded her as a descendant to a property belonging to her parents. What is to be satisfied by

⁴ Grobler v Phillips & another (446/20) [2021] ZASCA at paragraph 24

⁵ 2017 (5) SA 346 (CC) paragraph 48

⁶ 2022 (5) SA 602 GP (24 May 2022)

the court is whether the 1st and 2nd Respondents are unlawful occupiers? It is not in dispute that ownership vests with the Applicant as he is the title deed holder. As trite law a title deed holder supersedes any purported ownership. The common law informs us according to the Deeds Registries Act⁷ the Applicant is the lawful owner of the property. The court refers to the case of **Shomang v Motsose**⁸ where it focused on the purpose of the Conversation Act and the Upgrading of Land Tenure Rights Act and held that:

“The ULTRA conversion process has also been the focus of the Rahube judgment, where the Constitutional Court set out the process in detail. Rahube dealt with situations where certain permits were automatically upgraded, and the discriminating effect it had on women, as the manner in which property rights were held by African people were distorted in favour of men under apartheid. It noted that the purpose of the Act is to redress the injustices caused by the colonial and apartheid regimes. Thus, the mischief that the Act wants to rectify is to provide for recognition and security of tenure rights that had previously been ignored or systematically devalued. Read with section 25(5) of the Constitution that obliges the state to take reasonable legislative and other measures, within available resources, to foster conditions to enable citizens to gain access to land on an equitable basis, the court made it clear that “[t]he quest to enable citizens to equitably access land must include attempts to strengthen rights in land that were previously held, such as the informal right that the applicant holds through her lengthy occupation of the property in question”. Thus, the Conversion Act read with ULTRA was meant to improve the precarious tenure position of black persons caused by apartheid laws. It, therefore, focussed on the occupational rights of occupiers. The fact that Ms Shomang had to approach the court to help protect her right in the family property indicates that property rights of occupiers of family homes still has precarious rights, as the rights in terms of which they occupy the property is at odds with the registered property rights of a single individual owner, with all these rights viewed through the lens of the common law.”

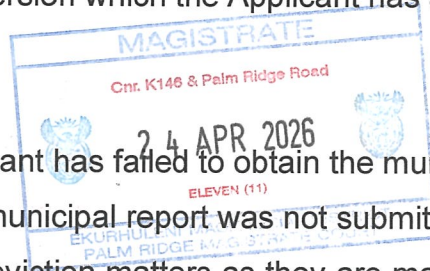
- 21) What the court now has to grapple with is whether the granting of the eviction order will be just and equitable? The case of court has to extensively balance all the factors presented before it. The 1st & 2nd Respondent have submitted that that this eviction will render them and the extended family homeless and thus it is against the rights enshrined in the Constitution. The 1st Respondent explained the history and process of how the Applicant acquired the ownership of the property, he the Applicant just offers a bare denial and does not challenge the version of the

⁷ Act 47 of 1937

⁸ Ibid 6 paragraph 39 & 40

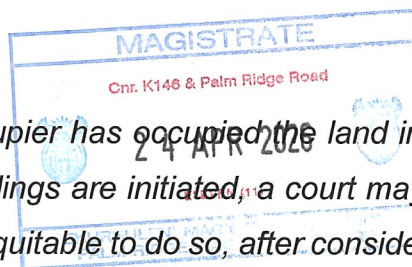
1st Respondent . It is clear the Applicant benefited from the privilege that flows from an apartheid legislation which consequently discriminates against women.

- 22) The court borrows from the case of **Rahube v Rahube**⁹: “ *African women under apartheid were systematically disenfranchised in a number of ways. It is important to recognise that the pervasive effects of patriarchy meant that women were often excluded even from seemingly gender-neutral spaces. The perception of women as the lesser gender was, and may still be, a widely-held societal view that meant that even where legislation did not demand the subjugation of women, the practices of officials and family members were still tainted by a bias towards men. The prioritisation of men is particularly prevalent in spheres of life that are seen as stereotypically masculine, such as labour, property and legal affairs.*”
- 23) This court cannot perpetuate an unjust law under our democratic dispensation. To further emphasis this view, this court is a creature of statute and it cannot do as it pleases. The high court have provided clear precedents that sought to remedy the past historical injustices. The 1st Respondent provided a crisp clear version which the Applicant has adequately failed to offer a reply.
- 24) The court has also noted that the Applicant has failed to obtain the municipal report. There was no explanation provided as to why the municipal report was not submitted. There is a pertinent reason why the municipality is cited in eviction matters as they are mandated by legislation to provide alternative accommodation.
- 25) The 3rd Respondent as the municipality has the general constitutional and legislative obligation to provide Temporary Emergency Accommodation (TEA) to the evicted unlawful occupiers and only to the extent that they are rendered homeless as a result of the eviction. The Municipality in this regard has to provide the said alternative accommodation and or emergency accommodation within its available resources to prevent and or alleviate the burden of homelessness on the said unlawful occupiers.
- 26) The case of **Shorts Retreat**¹⁰ instructed the Msunduzi Municipality to file a report as to amongst many: “(i) *what steps it had taken and what steps it intends or is able to take in order to provide alternative land and or emergency accommodation in the event of their being evicted and when*



such alternative land or accommodation can be provided; (ii) what the effects would be if the eviction would take place without alternative land or emergency accommodation being made available; (iii) what steps can be taken to alleviate the effects of the current occupation of the properties referred to above if the occupiers are not immediately evicted and pending alternative land or accommodation being made available.”

27) The 1st and 2nd Respondents only know the property in question as their only home. She explains that as a descendant of the then owners of the property she is entitled to occupy the property based on the discrimination she has suffered by the impugned legislation that has empowered the Applicant. She has firmly cemented her roots and is part of the community in which she resides. I refer to the case of ***Umnungwane Trading & projects (PTY) Ltd and Polongwane & others***¹¹ where it is emphasized that: *“The lawful owner of the property must discharge the onus of proof in eviction proceedings, to satisfy the court that the eviction would be just and equitable. In the same vein, to the extent that the unlawful occupiers alleged that an eviction order would render them homeless without alternative accommodation, the onus in that regard is placed on them.”*



28) Section 4 (7)¹² states that: *If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women.*

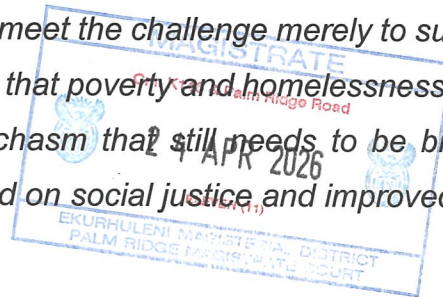
29) The Court cannot ignore the information provided by the 2nd Respondent that she is of elderly age and is frail due to her having health challenges. What should become of the said occupants should they lose their right to the property? It is also clear that the Applicant sort to exercise and wield his privilege once he realised that he is the owner of the property and want to retain occupation thereby evicting out his sibling to achieve the so called benefit of this privilege. He does not deny that there is conflict between him and his sister the 1st Respondent. In fact it is only after the 1st Respondent's answering affidavit that he takes the court into his own confidence

¹¹ Case no: 10429/19 South Gauteng Local Division judgment delivered on 2022/4/13 at paragraph 25

¹² Act 19 of 1998

that he vacated the said property due to a protection order granted against him by the 1st Respondent. The motive was surely not pure when he launched the said eviction proceedings against the 1st Respondent. In a nutshell the Applicant weaponised his “privilege” and used it against his own sister. The court has reiterated above that it will not be utilised as a conduit to further discriminate the 1st Respondent.

30) The Applicant cannot come before this court and ask this court to be complicit in rendering people and or the 1st Respondent homeless. The Court echo’s the same sentiments as the **Modderklip**¹³ case: *“The problem of homelessness is particularly acute in our society. It is a direct consequence of apartheid urban planning which sought to exclude African people from urban areas, and enforced this vision through policies regulating access to land and housing which meant that far too little land and too few houses were supplied to African people. The painful consequences of these policies are still with us eleven years into our new democracy, despite government’s attempts to remedy them. The frustration and helplessness suffered by many who still struggle against heavy odds to meet the challenge merely to survive and to have shelter can never be underestimated. The fact that poverty and homelessness still plague many South Africans is a painful reminder of the chasm that still needs to be bridged before the constitutional ideal to establish a society based on social justice and improved quality of life for all citizens is fully achieved.”*



31) The Court further shares the same sentiments as expressed in the case of In **City of Johannesburg v Rand Properties (PTY) LTD and Others**¹⁴ : *“Occupiers who have been occupying the buildings for some time (such as in the present instance) have to be looked at with far greater sympathy than those who deliberately invade the buildings with a view to disrupting a housing regeneration program contemplated by a municipality.”*

32) The court has a constitutional mandate with regard to not perpetuating homelessness. The 1st and 2nd Respondent are many who are living below the poverty line, who rely and depends on the state for assistance to survive. Homelessness attacks the dignity of an individual. A home is not only a shelter but it is a symbol of privacy and tranquillity for the poor. The court refers to the constitutional case of **Grootboom**¹⁵ in emphasis to the issues of homelessness: *“This case shows the desperation of hundreds of thousands of people living in deplorable conditions throughout the country. The Constitution obliges the state to act positively to ameliorate these*

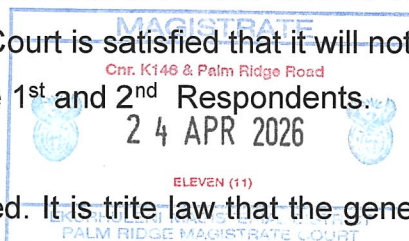
¹³ President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd [2005] ZACC 5; 2005 (5) SA 3 (CC)

¹⁴ 2007(1) SA 78 (WLD) paragraph 88A

¹⁵ Government of the Republic of South Africa v Grootboom [2000] ZACC 19; 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) (

conditions. The obligation is to provide access to housing, health-care, sufficient food and water, and social security to those unable to support themselves and their dependants. The state must also foster conditions to enable citizens to gain access to land on an equitable basis. Those in need have a corresponding right to demand that this be done. I am conscious that it is an extremely difficult task for the state to meet these obligations in the conditions that prevail in our country. This is recognised by the Constitution which expressly provides that the state is not obliged to go beyond available resources or to realise these rights immediately. I stress however, that despite all these qualifications, these are rights, and the Constitution obliges the state to give effect to them. This is an obligation that courts can, and in appropriate circumstances, must enforce.”

- 33) This court will not aid and assist the Applicant in its pursuit to render the respondents homeless. It will be going against the principals it ought to uphold with regard to the constitution.
- 34) Will the Respondent be rendered homeless if evicted? This question is pertinent as it is trite law that eviction should not be arbitrary and lead to homelessness. As stated above the answer is in the affirmative. In conclusion the Court is satisfied that it will not be just and equitable that an eviction order be granted against the 1st and 2nd Respondents.
- 35) The issue of cost must be considered. It is trite law that the general rule in matters of costs is that the successful party should be given his/her costs and this rule should not be departed from except where there are good grounds for doing so. The case of **Norwich Union Fire Insurance Society Limited v Tutu**¹⁶ which stated: *“There remains the question of costs. In this regard the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of the facts of each case, and in essence it is question of fairness to both sides.”*



RULING:

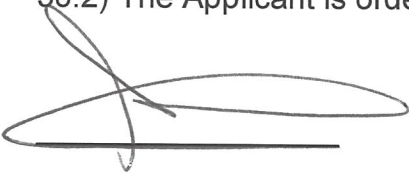
- 36) In considering all the facts placed before this Court, the Court is satisfied that the respondents are unlawful occupiers however it is not just and equitable to grant an eviction order against them.

¹⁶ 1960 (4) SA 851 (AD) 854 D

ORDER:

38.1) The Application is dismissed.

38.2) The Applicant is ordered to pay costs on a party and party scale.



K Mokoena

ADDITIONAL MAGISTRATE

MAGISTRATE COURT: Palm Ridge



