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

**REPORTABLE
CASE NO: 1926/2023**

In the matter between:

BLUE DOT PROPERTIES 391 (PTY) LTD

Applicant

and

H[...] G[...]

First Respondent

G[...] G[...]

Second Respondent

W[...] D[...] B[...]

Third Respondent

**ALL OTHER OCCUPIERS OF ERF 1[...],
BANTRY BAY**

Fourth Respondent

THE CITY OF CAPE TOWN

Fifth Respondent

Bench: P.A.L. Gamble, J Heard: 30 October 2023

Delivered: 1 November 2023

This judgment was handed down electronically by circulation to the parties' representatives via email and release to SAFLII. The date and time for hand-down is deemed to be 12H00 on Wednesday 1 November 2023

JUDGMENT

GAMBLE, J:

INTRODUCTION

1. This matter concerns the occupation of a luxury seaside mansion in Bantry Bay on Cape Town's Atlantic Seaboard. The property is registered in the name of the applicant (Blue Dot) and for about 35 years it was the home of Dr D[...] F[...], (the deceased) who died in 2021.

2. The deceased commenced occupation of the property in 1986 and was joined by the third respondent (the widow) in 1997, who became his life partner and later his wife - they were married shortly before his death in 2021. In 2019 the deceased fell ill and he and the widow invited her son by a previous marriage and his wife (the G[...]) to move in with them. The widow is an elderly woman and she required assistance in caring for the deceased and managing the large property, which includes two apartments which are rented out to third parties. The G[...] obliged and rented out their own property in the interim.

3. Ownership and occupation of the property was structured by the deceased's erstwhile financial adviser, Mr. Gamsu, who set up two trusts (one local and one off-shore) which held the shares in Blue Dot as to 26% and 74% respectively. The deceased was granted a registered usufruct over the property by the local trust and when this lapsed after 10 years he simply continued to occupy the property on the same terms and conditions as before. This intricate structure was said to have been created by Mr. Gamsu for purposes of estate planning and tax efficiency.

4. After the death of the deceased the widow subsequently re-married and now lives permanently on a luxury golf estate outside Stellenbosch. The G[...] stayed on in the property with their teenage son and Mr. G[...] continued to manage the property and in particular the two apartments, whose rentals he received in terms of written leases concluded in his own name, and whose expenses he allegedly

disbursed.

5. But as the saying goes, “where there’s a will there are relatives” and not long after the deceased’s demise his relatives began asking questions about the continued occupation of the property. While the deceased’s will nominates the widow as his sole heir it is evidently silent on her right to occupy the property.

6. Be that as it may, it seems that steps were subsequently initiated to dispose of the property to settle the indebtedness of Blue Dot to various of its creditors. And, when the marketing of the property was allegedly frustrated by the G[...], matters turned sour and litigation ensued in order to facilitate access to the property by estate agents mandated to market it.

7. Eventually, Blue Dot sought the eviction of the G[...] (as first and second respondents) and the widow (as third respondent) from the property in a PIE¹ application launched in February 2023. The founding affidavit was deposed to by Mr. Gamsu in his erstwhile capacity as sole director of Blue Dot and was decidedly short on fact. The thrust of the application was based on the principles of the *rei vindicatio* with the owner seeking to regain possession of its property from the occupants.

8. The respondents put up a lengthy answering affidavit and took a multitude of points, some of which are interesting but mercifully do not require determination on account of developments during the hearing of the matter on 30 October 2023. Mr. Gamsu took an age (around 4 months) to file the replying affidavit and when he did so raised a number of new points as well as others which ought to have been contained in the founding papers. To cap it all, when questions were asked about the probity of Mr. Gamsu’s conduct and the scheme devised to establish ownership of the property, he resigned as the director of Blue Dot.

CRITERIA FOR RELIEF UNDER PIE

9. In argument, Mr. Irish SC, who appeared with Mr. Robertson for Blue Dot,

¹ The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998 (the PIE Act)

cut to the chase and emphasized that there was just a pair of issues on the papers that arose for determination. Firstly, there is the *locus standi* of Blue Dot entitling it to seek an eviction under PIE and, secondly, there is the question of unlawful occupation on the part of the widow and the G[...]. Once these were established, said counsel, the Court had a discretion to order an eviction on terms which were considered to be just and equitable and invited the Court to do what it considered appropriate in the circumstances.

LOCUS STANDI

10. Mr. Pincus SC, who appeared with Mr. van der Berg on behalf of the widow and the G[...], sought to mount an argument suggesting that Blue Dot was not the real owner of the property but that some form of “beneficial ownership” thereof vested in the trusts. The argument ran into some difficulty on a number of fronts and eventually Mr. Pincus let matters be. The focus of counsel’s argument then turned to the question of the unlawful occupation of the property.

11. Mr. Irish observed that it was common cause that Blue Dot was the registered owner of the property. As such, it was submitted that the company has the requisite standing under s4(1) of PIE to seek an eviction order. That subsection entitles only the “owner” or the “*person in charge*” to seek an eviction order under PIE. “Owner” is defined in s1 of PIE as “*the registered owner of the land*” while a “*person in charge*” means “*a person who has or at the relevant time had legal authority to give permission to a person to enter or reside upon the land in question.*”

12. In the circumstances, there is manifestly no basis to challenge Blue Dot’s entitlement in law to seek the requisite relief under s4 of PIE to evict the widow and the G[...] from the property. Its ownership is an undisputed matter of fact. But, even if that fact is contested, “*the person in charge*” at the relevant time was Mr. Gamsu and there is no suggestion that he was not entitled to move the application to evict.

UNLAWFUL OCCUPATION

13. Turning to the question of occupation of the property, in the answering affidavit Mr. G[...] notes (and the widow confirms) that his mother has remarried and now lives on the De Zalze Golf Estate outside Stellenbosch with her new husband. He points out that the widow, quite understandably, has strong emotional ties to the property which was her home for so many years. Evidently, the widow has a penchant for painting and when she and the deceased co-habited, one room in the house was used as her studio. Apparently that room still contains some of her artist's materials and the like. It is said that the widow occasionally visits the property (no doubt to visit her son and daughter-in-law) and still enjoys painting in her enclave in the house.

14. Mr. Pincus mounted an argument based on these facts to suggest that the widow still occupies the property as she did with the consent of her late husband. Counsel went on to contend that such occupation was not unlawful as contemplated under PIE², and that the widow was entitled to resist any attempt to evict her under PIE.

15. The first issue is then what constitutes occupation. Relying on Ghoor³ Mr. Pincus sought to argue that the presence of the widow's easel and palette was sufficient to render her a lawful occupier of the property for purposes of PIE. That case concerned the question of the presence in a building by members of a proscribed race group under the odious erstwhile Group Areas Act of 1957. What the judgment makes plain is that "occupy" and "occupation" have a plethora of meanings which will depend on the circumstances at hand and the context of the legislation (or legal principle) under scrutiny. In that matter the learned acting Judge considered that the legislation under which the appellants had been charged contemplated occupation in the form of "habitual physical presence."

16. Mr. Irish referred the Court to a number of decisions which deal with the

² An "unlawful occupier" is defined in s1 of PIE as "a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land, excluding a person who is an occupier in terms of the Extension of Security of Tenure Act, 1997, and excluding the person whose informal right to land, but for the provisions of this Act, would be protected by the provisions of the Interim Protection of Informal Land Rights Act, 1996"

³ R v Ghoor and others 1960 (3) SA 42 (C)

concept of occupation under PIE.⁴ South Point Properties is a useful point of departure in the present circumstances as it focused pertinently on the application of PIE. The case involved a group of students who occupied a university residence owned by a third party. When the owner attempted to obtain control of the residence at the end of the academic year for purposes of effecting repairs and maintenance during the vacation, it was met by a group of obstinate students who refused to move out. The owner of the residence then approached the court for relief relying on the *rei vindicatio*. In response thereto the students sought to invoke the protection of PIE to resist their eviction.

17. The Supreme Court of Appeal (SCA) refused to allow the students to rely on the protection afforded to occupiers under PIE for the following reasons.

“[6] PIE was promulgated to give effect to s 26(3) of the Constitution. Section 26(3) provides that ‘[n]o one may be evicted from *their home* . . . without an order of court made after considering all the relevant circumstances’. (My emphasis.)...

[9] Although the substantive provisions of PIE reference the occupation of land, it is plain that PIE gives effect to the constitutional protections against the peril of homelessness. It follows that, **if the occupation of land does not constitute the home of an occupier, PIE does not find application.** Further support for this proposition is found in Lester v Ndlambe Municipality and Another [2015 (6) SA 283 (SCA)]. There, this Court stated that s 26(3) needs to be read against the backdrop of s 26(1), that is, the right of access to adequate housing. It has been found that where one cannot demonstrate that one would be without alternative accommodation, and thus be rendered homeless, the protection of s 26(3) does not find application. (Emphasis added)

⁴ Ndhlovu v Ngcobo; Bekker and another v Jika 2003 (1) SA 113 (SCA); Kiepersol Poultry Farm (Pty) Ltd v Phasiya 2010 (3) SA 152 (SCA); Stay at South Point Properties (Pty) Ltd v Maqulwana and others

[10] What then is a home? This Court in Barnett⁵ held that the sensible and ordinary meaning of home is a place with ‘regular occupation coupled with some degree of permanence’. At para 37 it further said:

‘I believe it can be accepted with confidence that PIE only applies to the eviction of persons from their homes. Though this is not expressly stated by the operative provisions of PIE, it is borne out, firstly, by the use of terminology such as “relocation” and “reside” (in sections 4(7) and 4(9)) and, secondly, by the wording of the preamble, which, in turn establishes a direct link with section 26(3) of the Constitution (see e.g. Ndlovu v Ngcobo; Bekker and Another v Jika 2003 (1) SA 113 (SCA) paragraph 3).’

18. Having found that the students all had homes from whence they came, and to which they might return, the SCA overturned the order of the court *a quo* and evicted the students.

“[17] These features of the student accommodation made available to the respondents indicate that this accommodation is not a home. It is a residence, of limited duration, for a specific purpose, that is time-bound by the academic year, and that is, for important reasons, subject to rotation.

[18] It follows that PIE did not apply to the respondents’ occupation of the property. The appellant was thus entitled to evict the respondents in reliance upon the *rei vindicatio*. The high court’s refusal to order the respondents’ eviction was therefore in error. Accordingly, the appeal must be upheld. “

19. The studio is manifestly not the widow’s home and she will not be rendered homeless should she be ordered out of the property. The widow’s regular place of abode is her home at De Zalze where she permanently resides. In the circumstances, the widow’s occasional use of the studio in the property does not constitute lawful occupation of the property under PIE and she is liable to be evicted

⁵ Barnett and others v Minister of Land Affairs and others 2007 (6) SA 313 (SCA)

therefrom.

20. If I am wrong on my assessment on the question of unlawful occupation I consider in any event that the facts of the case show that, whatever the attitude of the deceased and/or Mr. Gamsu might have been over the years to the widow's presence on the property, she does not at present occupy with the consent (whether express or tacit) of Blue Dot, nor of "*the person in charge*" of the property – whether it be Mr. Gamsu or his successor in title - as the sole director of Blue Dot. In such circumstances, the widow's occupation is unlawful and she is liable to be evicted under PIE.

21. I deal next with the G[...]. Their case is that they originally occupied the property with the tacit consent of the deceased. I will accept that they thus entered upon the property lawfully in about 2019. With the demise of the deceased, Mr. Pincus argued that the G[...] are now on the property "at the invitation" of the widow. Given the finding that the widow is now in unlawful occupation, there is no basis in law upon which she might extend such an invitation.

22. When all was said and done, Mr. Pincus quite properly accepted that the G[...] need to move out of the property. It is really just a question of when. Mr. G[...] has fulfilled the function of managing the tenants in the apartments, by collecting rental and effecting the requisite disbursements in relation thereto. But that too has become the subject of some dispute with allegations of impropriety on his part emanating from the Blue Dot camp.

JUST AND EQUITABLE

23. It is by now trite that a court exercising the power to evict under PIE will be guided by questions of justice and equity after taking into account all relevant circumstances in determining what a suitable date will be for quitting the premises and, if necessary, under what circumstances⁶.

⁶ Grobler v Phillips and others 2023 (1) SA 321 (CC) at [33] *et seq*

24. Mr. Irish submitted that the respondents had had more than enough notice of the intention to evict them and that a month, at most, was sufficient. I consider that counsel is being a little niggardly in the circumstances. In my considered view, the widow should be given an opportunity to say her goodbye's and retrieve her remaining possessions from the house, while the G[...] should be afforded sufficient time to resume accommodation in the own home, if they so wish.

25. The Court was informed from the Bar that the G[...]’s home was subject to a lease to a third party. The parties were thus invited to attempt to negotiate the terms for the hand-over of the property and to consider a mechanism which would permit the marketing of the property during the upcoming summer season. In addition, Mr. G[...] was afforded an opportunity to file a short supplementary affidavit setting out the personal circumstances of the family, due regard being had to the fact that there is a teenage son who might be busy with end-of-year exams at present.

26. In the result, the parties were unable to conclude any suitable arrangement but during the afternoon of Tuesday 31 October 2023 Mr. G[...] filed the aforementioned supplementary affidavit. That document revealed that the G[...] own a house in Newlands which is currently being leased out to a third party. That lease terminates on 31 March 2024.

27. Further, the parties have a 14 year old son who attends school in the City Bowl but if the parties move back to their own dwelling, he might be required to change schools. The son is said to suffer from an anxiety disorder for which he is receiving medication. Concern is expressed that a sudden change of living arrangements and a potential change of schooling might have an adverse impact on the child’s health.

28. All things considered, I am of the view that the G[...] and the widow should be afforded a reasonable amount of time to vacate the property. Given the circumstances of the lease over the Newlands property, I consider that a suitable date for their eviction would be 31 March 2024. However, given that that date falls over the Easter weekend, I consider that the eviction should take place on

Tuesday 2 April 2024.

COSTS

29. There are various interlocutory costs orders which have already been made in this matter. What remains are the costs of the application itself and the wasted costs occasioned by the postponement of the matter on 31 August 2023. Mr. Irish upped the ante and asked for costs of the application on a punitive scale. Mr. Pincus, on the other hand, pointed out that the founding affidavit was sparse on detail which was material to the matter and which was withheld from the Court by Mr. Gamsu.

30. In addition, said counsel, the replying affidavit filed by the applicant was filed shortly before the scheduled hearing on 31 August 2023 – some 4 months late and without proper explanation - and contained a plethora of new matter which required an answer from the respondents. Thus, a postponement of the matter on that date was inevitable. As fate would have it, Mr. Pincus was indisposed after being injured during an overseas trip and was in no position to represent his clients on 31 August 2023. In such circumstances, it is not customary for counsel to seek costs orders against their opponents and Mr. Irish very correctly suggested that there should be no order regarding any wasted costs.

31. As to the costs of the application itself, they should ordinarily follow the result. However, the conduct of Mr. Gamsu in this matter leaves much to be desired and as an indication of the Court's displeasure therewith, the applicant will be deprived of its costs.

ORDER OF COURT

Accordingly, it is ordered that:

- A. The first, second and third respondents (and all other occupiers holding under them) are to be evicted from Erf 1[...] Bantry Bay, Cape Town (more commonly known as 9[...] K[...] Road, Bantry Bay, Cape Town) on

Tuesday 2 April 2024.

B. In the event that the respondents do not quit the property as aforesaid, the Sheriff of this Court is hereby authorized to enter upon the property on Friday 5 April 2024 and to take such steps at law as may be required to procure their eviction from the property,

C. There will be no order as to costs.

GAMBLE, J

APPEARANCES

For the Applicant: Mr. D. Irish SC
Mr. D. Robertson
Instructed by Van Rensburg & Co.
Cape Town.

For the Respondent: Mr. B. Pincus SC
Mr. W van der Berg
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