Republic of South Africa

REPORTABLE JUDGMENT

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No.: **12659/2009**

In the matter between:

SHANAAZ ARENDSE	Applicant
and	
MOEGAMAT SALIE ARENDSE	First Respondent
THE MAGISTRATE, GOODWOOD	Second Respondent
THE SHERIFF FOR THE MAGISTRATE'S COURT, GOODWOOD	Third Respondent
LEGAL RESOURCES CENTRE	*Amicus Curiae*

PRESIDING JUDGE	:	**Y.S. Meer J.**
Counsel for Applicant	:	**Adv. Peter Hathorn**
Instructed by	:	**Visagie Vos Attorneys (Ref: Dewald Viljoen)**
Counsel for Respondents'	:	**Adv. A Walters**
Instructed by	:	**Hickman Van Eeden Phillips Inc (Ref: A Phillips)**
Counsel for *Amicus Curiae*	:	**Adv. S. Wilson**
Instructed by	:	**Legal Resources Centre**
Date of Hearing	:	**5 June 2012 and 30 July 2012**
Date of Judgment	:	**20 August 2012**

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JUDGMENT: 20 AUGUST 2012

MEER J.

[1] The applicant seeks to review and set aside an eviction order obtained by the first respondent in the Goodwood Magistrate's Court on 22 May 2009 in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("PIE"). The order

evicted the applicant and her three children from the family home situated at 7 Cecil Rhodes Drive, Ruyterwacht ("the property"). In addition the applicant seeks a declaration that the eviction order infringed her rights in terms of Section 26 of the Constitution of the Republic of South Africa Act 108 of 1996, ("the Constitution").

[2] The eviction order has been suspended by this Court pending the final determination of this review application.

[3] The first respondent opposes the application. The second respondent, the magistrate who granted the eviction, order abides the decision of the court as long as no costs are awarded against him. He has furnished reasons for his decision. The third respondent, the sheriff for Goodwood, was in terms of the eviction order granted by the second respondent authorised to evict the applicant and her minor children from the property.

Point in Limine

[4] On behalf of the first respondent it was argued *in limine* that the review had lapsed. Mr Walters submitted that even though the applicant initially instituted the review proceedings within a reasonable time, she had failed to prosecute the proceedings within a reasonable time. This had caused considerable prejudice to the first respondent who in the meanwhile had to endure the applicant's unlawful occupation of his property. He argued that since at least 17 May 2010, being 10 court days after the service of her amended Notice of Motion on 3 May 2010, the applicant, being *dominus litis,* could have applied for a date for the hearing of the review application. She could, he submitted, have even applied after the service of the first respondent's supplementary opposing affidavit on 9 December 2011

but she did nothing. The date for the hearing of the review was requested by the first respondent, he submitted, merely to have the lapse of the pending proceedings confirmed or have it finalised. It is, he submitted, due to the applicant's clearly intentional failure to actively prosecute the review application that it has lapsed.

[5] Rule 53 (7) which deals with the setting down of reviews, states that the provisions of Rule 6 as to the set down of applications shall apply to the set down of reviews. Rule 6 (5) (f) in turn provides that an applicant may apply for the allocation of a date for the hearing of an application within 5 days of the delivery of his replying affidavit, or where no replying affidavit is delivered, within five days of the expiry of 10 days after service upon him of the answering affidavit. If the applicant fails to apply, then the respondent may do so immediately upon the expiry thereof. This is precisely what the first respondent did. He applied for the allocation of a date as is provided for in Rule 6. It cannot in the circumstances be argued that the review has lapsed.

[6] Mr Hathorn for the applicant submitted also that in view of the fact that the first respondent himself took all of 18 months to file a supplementary opposing affidavit , which he did on 9 December 2011, his complaint pertaining to the prosecuting of the review is spurious. I am inclined to agree.

[7] I note that it is in any event open to me to exercise my discretion to condone the delay in prosecuting the review. Given the nature of the constitutional rights and interests that are raised in this review, concerning as they do an eviction of a mother and her three minor children, it is appropriate that I exercise my discretion in condoning, insofar as it may be necessary, the delay in prosecuting the review. In view of all of the above, the point *in limine* is accordingly dismissed.

Background Facts

[8] From the affidavits filed in the review application before this Court, the following background facts emerge. The applicant is an unemployed single woman who lives with her three minor children on the property. The first respondent is the children's father and the applicant's ex-husband. He is a senior fire officer employed by Transnet. It is undisputed that the applicant suffers from a disability. She has been diagnosed with bipolar mood disorder and is epileptic. She has undergone two brain operations and her doctor says that she should not work again.

[9] The applicant married the first respondent according to Islamic law in 1995. The marriage certificate in respect of the Muslim marriage issued by the Muslim Judicial Council records *inter alia* as follows:

"MAHR – house"

It is undisputed that this is a reference to an undertaking by the first respondent to provide the applicant with a dowry of a house. The applicant married the first respondent in terms of civil law, in community of property, in 1996.

[10] In the late nineties the first respondent and the applicant purchased their first property at Aliwal Street, Ruyterwacht for an amount of approximately R140 000,00. The property was registered in both their names. The applicant paid the deposit of R16 000,00 from her earnings. It was agreed that the first respondent would pay the installments on the mortgage bond and that the applicant would assist if he was struggling to meet them.

[11] In April 2000 the parties had a civil divorce. In terms of the divorce order the applicant was awarded custody of the children. A consent paper entered into between the

parties recorded that the applicant would have custody of the children and that the first respondent would pay maintenance of R300,00 per month per child. According to the applicant the first respondent has not complied with his maintenance obligations. The consent paper also recorded that he would transfer his undivided share in the common home at Aliwal Street to the applicant whereafter she would be responsible for the mortgage bond repayments. He would also make a contribution of R13 000,00 to her in respect of the house.

[12] I pause to mention it is undisputed that the first respondent has not paid this amount of R13 000,00 to the applicant. It is also undisputed that the house was to be transferred to the applicant to enable first respondent to satisfy his obligation to provide her with the house in terms of the dowry. Applicant's stance is that this did not occur. There is a dispute between the parties as to whether or not the first respondent has fulfilled his maintenance obligations. Over the years according to the first respondent the applicant commenced maintenance proceedings against him on several occasions but then failed to appear in court to pursue her claims. On 9 February 2012 the first respondent succeeded in varying the original maintenance order and obtained an order that he was only required to pay the medical, educational and clothing expenses of the minor children.

[13] After the civil divorce the family continued to live together in the Aliwal Street house. In July 2001 the first respondent bought the property at Cecil Rhodes Drive for R140 000,00 and it was registered in his name. The deed of transfer reflected that the first respondent was married according to Muslim rites, a fact which the applicant confirms. He continued staying with the applicant and their children in the Aliwal Street home while they were looking for a buyer for that property. The applicant asserts that the intention was that

the Cecil Rhodes Drive house would become her dowry. The first respondent disputes this. As far as he was concerned the dowry issue was settled when she received the proceeds of the sale of the first property. Later in 2001 the applicant and the first respondent were divorced in terms of Islamic law. The family however continued to live together. The Aliwal Street house was eventually sold for R200 000,00 and after paying for the mortgage bond and other costs the applicant received a net amount of approximately R40 000,00 from the sale. She alleges that she contributed this amount to pay for the extensions to the Cecil Rhodes Drive house owned by the first respondent. This is denied by the latter.

[14] In 2003 the parties and their minor children moved into the Cecil Rhodes Drive house. According to the first respondent he agreed to have them move into the house with him for the sake of his children and only as a temporary arrangement. The applicant and the children lived in the front of the property whilst the first respondent lived in a separate building at the back which had a separate entrance. However, the family shared a bathroom and a toilet.

[15] In February 2009 following allegations that the first respondent had sexually molested their daughter Fatima, the applicant approached the Muslim Judicial Council for assistance in obtaining her dowry. A letter from Moulana Karaan of the Muslim Judicial Council dated 23 February 2009 records that the Mahr was a house, that no house has been handed over to the applicant and that the first respondent has indicated that he is not prepared to hand over the house in which he and the children are resident but "is prepared to negotiate with Mrs Arendse as to an alternate gift in equality of the house to be handed to her".

The Eviction proceedings in the Goodwood Magistrates Court

[16] On 27 March 2009 the first respondent, as applicant, instituted eviction proceedings in the Goodwood Magistrates Court against the applicant as respondent. In discussing those proceedings I shall continue to refer to the parties as they are in the review application before me, namely as applicant and first respondent. The basis of the application in the court *a quo*, as appears in the first respondent's founding affidavit, was in essence that the first respondent was the sole owner of the property at 7 Cecil Rhodes Drive, and that the applicant was allowed to stay in the house on a temporary basis on condition that she paid R800 per month towards rental and other expenses. She had failed to do so, consent for her to occupy was withdrawn on 9 January 2009 and she was an unlawful occupant.

[17] The first respondent's founding affidavit stated also that the applicant was diagnosed with epilepsy and bi-polar disorder, her behaviour was traumatizing the family, could no longer be tolerated and she needed to vacate the house in the best interests of all. Attached to the affidavit was a letter from a Dr Steyn confirming her diagnosis secondary to a stroke and stating that she is prone to impulsive behaviour e.g. excessive gambling. Attached also was a letter by the applicant to Sun International which makes mention of her gambling at Grand West Casino.

[18] The first respondent's affidavit went on to aver that the applicant has other family members who are in a better position to take care of her and who could accommodate her. He added that the applicant was financially independent as she had recently received a pension/provident fund pay-out of R63000.00 and could afford to rent her own place if necessary.

[19] In her opposing answering affidavit in the court a quo the applicant denied *inter alia* that there was any arrangement concerning rental, a denial which the first respondent did

not take issue with in his replying affidavit. The applicant stated that she was not financially independent, could not afford to rent her own residence and that it was in the best interests of the children that she not be evicted. She alleged that her presence in the house was the only constant that could keep the children safe as the behaviour of the first respondent was unpredictable. She stated also that the first respondent was indebted to her in terms of the "Mahr" or dowry to provide her with a house.

[20] In his replying affidavit in the Court a quo the first respondent submitted that the issue of the dowry was irrelevant as our law did not recognise Muslim marriages. He asserted also that the consent paper entered into when the divorce was granted had dealt with the patrimonial benefits of the marriage and that in terms thereof the previous house was awarded to the applicant.

[21] In a supplementary opposing affidavit which the applicant was allowed to hand in to court at the hearing, the applicant denied that the dowry issue had been finalised. She denied that the previous house was awarded to her. She stated that she had to purchase the previous house which "we later sold and the proceeds of the house was injected to our current home". She urged the court to consider the dowry issue as a relevant and material fact in determining the matter as it was still unresolved and the first respondent was indebted to her. She alleged that the first respondent has been trying to proclaim her as mentally unfit, unstable, psychotic and a threat to herself and others. These allegations she asserts arose only after she had raised the possible sexual abuse of their daughter by the first respondent. Finally, she asserted once more that she is not financially independent and cannot afford to rent her own place and it would not be in the interests of the children if

they are to be evicted. She points out that the minor children would have to leave with her as she has custody over them.

[22] At the hearing in the Court *a quo* on 22 May 2009 the applicant represented herself whilst the respondent was represented by an attorney. The applicant requested a postponement to apply for legal aid. The second respondent refused the postponement citing as reasons numerous remands, her doing nothing to obtain legal aid and because proper opposing papers had been filed by her attorney. After hearing submissions from the first respondent's attorney and from the applicant, he granted an eviction order against the applicant and all those who occupy with or under her. No reasons for his decisions were furnished at the time. Reasons were only furnished some eight months later on the 8th February 2010 when the second respondent was requested to do so after the launching of this review application.

[23] The second respondent's reasons indicate that he granted the eviction order on the finding that the first respondent was the registered owner of the property and that he had withdrawn his consent for the applicant to continue in occupation. In this regard he noted that the applicant could not dispute the first respondent's ownership of the house or that she was an unlawful occupier. He stated that once he had made this finding he went on to consider if it was just and equitable to evict the applicant.

[24] He questioned the applicant's claim that she was unemployed, referred to her gambling and made reference to her pension pay-out which she did not deny. On the question of alternative accommodation the second respondent stated that the applicant could not simply make a bare statement that she could not afford alternative

accommodation but had to place sufficient evidence that she could not, before court. He stated moreover and I quote:

"what was more problematic was the fact that she conceded that she can stay with her family but simply did not want to do that".

However, contrary to this, the following extract (concerning questions put to the applicant as respondent *a quo*) appears from the second respondent's notes on the arguments:

"Questions by Court to respondent:

Q: If applicant is such a problem as set out in your affidavits, why don't you leave the house?

A: I don't have another house. Not working at the moment and why must I go to my family. They don't want me to stay there for long periods."

[25] The second respondent found that he could not consider the dowry issue as Muslim marriages were not yet recognised in South African law. He however accepted that the previous house was transferred into applicant's name. On the question of maintenance the second respondent commented that the first respondent never indicated that he would not support his children, pointing out that the application was merely to remove the applicant from his house. The second respondent went on to pronounce that it would therefore indeed be fair and just for the applicant to be ordered to vacate the property. He added that this did not preclude her from proceeding with her monetary claims against applicant.

The situation after the granting of the eviction order

[26] Due to the suspension of the eviction order pending the final determination of the review application, the parties continue to reside in the property. The first respondent remarried in June 2011 and now lives with his wife in the back of the property. According to

the applicant the first respondent has knocked down a wall in the main house and consequently the applicant and the children live in one open plan room without ventilation. The applicant's stance is that she and the children would willingly leave the property if the first respondent were to provide alternative accommodation. According to her a suitable three bedroom flat would be available for rental at approximately R6 000,00 per month.

[27] In a supplementary affidavit the applicant states that at the time of the first respondent's re-marriage he threw her bed and bedroom suite outside and they are unusable. During the same time he closed up all the windows so that she and her children are deprived of natural light. She adds moreover that her doctor has recommended that as a result of her disability she should not work again. She is applying for a State disability grant which she understands is approximately R1 000,00 per month.

[28] The applicant contends that the first respondent is attempting through the eviction application to obtain *de facto* custody of the minor children by forcing her out of the property.

[29] It is not disputed that applicant's family did not wish to accommodate her for anything other than a temporary visit. From the record it is not clear whether they can or will accommodate her minor children.

Finding

[30] Sections 4(6) and 4(7) of PIE permit a Court to grant an order for eviction if it is of the opinion that it is just and equitable to do so and after considering all the relevant circumstances as specified. The sections state:

"Section 4(6) *If an unlawful occupier has occupied the land in question for less than six months at the time when the proceedings are initiated, the 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 the rights and needs of the elderly, children, disabled persons and households headed women.*

Section 4(7) of PIE states:

"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."

[31] In *Occupiers Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* 2010 (9) BCLR 911 (SCA) at paragraph 13, Theron J, commenting on the consideration to be given by a court to the aspect of alternative accommodation at sections 4(6) and 4(7) respectively, said:

"In terms of section 4(7) a Court is obliged, in addition to the circumstances listed in section 4(6), namely, the rights and needs of the elderly, children, disabled persons and households headed by women, to give due weight to the availability of alternative land. There is nothing to suggest that in an enquiry in terms of section 4(6), a Court is restricted to the circumstances listed in that section. The Court must have regard to all relevant circumstances. The circumstances identified are peremptory but not exhaustive. The Court may, in appropriate cases, have regard to the availability of alternative land. However, where the availability of alternative land is relevant, then it is obligatory for the Court to have regard to it."

[32] Mr Walters on behalf of the first respondent, relying on *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 SCA paragraph 17, submitted that it was Section 4 (6) and not Section 4 (7), as referred to on behalf of the applicant, which was the correct section

applicable to the circumstances in this case. The six month time period referred to at s 4(6) and 4(7), he submitted, commences from the date the occupancy becomes unlawful, which in this case was when the first respondent withdrew consent for the applicant to reside by giving her notice on 9 January 2009. She therefore had been an unlawful occupier for less than six months when the proceedings were initiated.

[33] Mr Hathorn for the applicant submitted that in the circumstances of this case the availability of alternative land/accommodation was crucially relevant and would have to be considered regardless of whether Section 4 (7) or Section 4 (6) of the Act was applicable. I agree. This must clearly be the case regard being had to the extract from the *Shulana Court* judgment quoted above, and moreover the unique circumstances of this case involving as it does the eviction of a mother and her three minor children by their father.

[34] A considerable body of jurisprudence has developed concerning the nature of the enquiry to be conducted by a court as directed by Section 4 of PIE. In *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 CC the Constitutional Court emphasised that the Constitution, read with the equitable enquiry required to be undertaken in PIE proceedings, grants our Court's a wide discretion in ensuring that justice and equity prevail in relation to all concerned. The Court at paragraph 22 said that Section 26(3) of the Constitution (which prohibits an eviction without an order of Court made after considering all the relevant circumstances) requires courts to seek concrete and case specific solutions to the difficult problems that arise in eviction proceedings. The following remarks made in the context of section 6 of PIE apply equally to the duty to consider relevant circumstances referred to in Section 4:

[1]"The obligation on the Court is to "have regard to" the circumstances, that is, to give them due weight in making its judgment as to what is just and equitable. The Court cannot fulfil its responsibilities in this respect if it does not have the requisite information at its disposal. It needs to be fully apprised of the circumstances before it can have regard to them. It follows that, although it is incumbent on the interested parties to make all relevant information available, technical questions relating to *onus* of proof should not play an unduly significant role in its enquiry. The Court is not resolving a civil dispute as to who has rights under land law; the existence of unlawfulness is the foundation for the enquiry, not its subject – matter. What the Court is called upon to do is to decide whether, bearing in mind the values of the Constitution, in upholding and enforcing land rights, it is appropriate to issue an order which has the effect of depriving people of their homes. Of equal concern, it is determining the conditions under which, if it is just and equitable to grant such an order, the eviction should take place. *Both the language of the Section and the purpose of the Statute require the Court to ensure that it is fully informed before undertaking the onerous and delicate task entrusted to it. In securing the necessary information, the Court would therefore be entitled to go beyond the facts established in the papers before it. Indeed when 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".*

[2]*". . . Given the special nature of the competing interests involved in eviction proceedings launched under Section 6 of PIE, absent special circumstances, it would not ordinarily be just and equitable to order eviction if proper discussions and, where appropriate, mediation, had not been attempted."*

[35] At paragraph 36 of the *Port Elizabeth Municipality* judgment reference is made to the Court being called upon to go beyond its normal functions and to engage in actual active judicial management, according to equitable principles. Similarly the Supreme Court of Appeal in *Occupiers of Erf 101, 102, 104 and 112 Shorts Retreat v Daisy Dear Investments*

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1 At paragraph 32

2 at paragraph 43

2010 (4) BCLR 354 (SCA) at paragraph 14 has held that Section 4 of PIE obliges Courts to be innovative and, if it becomes necessary, to depart from the conventional approach.

[36] The enquiry conducted in the court *a quo* in my view fell short by far of the standards described in the aforementioned cases and prescribed at sections 4(6) and 4(7). From the evidence before the second respondent it was clear that the order sought involved an eviction of children by their father, and a woman who, according to the medical evidence, suffered from'" bipolar mood disorder secondary to a stroke, following a sub-arachnoidal bleeding on the right side of her brain....." and a household headed by such a woman. Yet the second respondent did not consider the rights and needs of the children, the disabled applicant and the woman headed household as he was specifically enjoined to do by sections 4 (6) and 4 (7) of PIE. Nor did he consider whether alternative accommodation was available to them, a highly relevant consideration in all the circumstances. A consideration of such relevant circumstances is specified at section 4 as a prerequisite to a court arriving at the opinion that it is just and equitable to grant an eviction order. Without considering the rights and needs of the applicant and her children the second respondent could not have formed the opinion that it was just and equitable to evict them.

The rights and interests of the children

[37] At the very least the rights and interests of the applicant's children, faced with an eviction at the behest of their father who has parental obligations to them, ought to have loomed large in the extraordinary circumstances of this case. The scenario before the second respondent invoked *inter alia* the childrens' rights enshrined at section 28 of the Constitution, most obviously their rights to shelter at section 28 (1) (c), and also their rights to parental care (s 28 (1) (b)) and to be protected from neglect, abuse or degradation (s 28

(1)(d)). The situation in the court *a quo* also invoked the rights of the children not to be ill-treated or abandoned by their parent implicit in Section 305 (3)(b) of the *Children's Act* 38 of 2005. The section states that a parent who ill-treats or abandons a child shall be guilty of an offence. In *Government of The Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) at paragraph 77, the Constitutional Court held that the obligation imposed by the child's right to shelter at Section 28 (1) (c) of the Constitution falls on the child's parent or family in the first instance. Implicit in the first respondent's duty to maintain his children is the duty to provide a roof over their heads. In applying for the eviction of his children without regard for the availability of alternative accommodation and in all the circumstances of this case, the first respondent acted contrary to their legally protected rights. The second respondent appears not to have been astute to this, nor to the dictates of Section 28 (2) of the Constitution which states:

"A child's best interests are of paramount importance in every matter concerning the child".

[38] The order evicting the children was made without conducting any investigation into their personal circumstances and how *inter alia* their schooling would be affected by an eviction order. The speculative hope expressed by the first respondent in his answering affidavit that social workers would arrange for the placement of the children falls short by far of compliance with Section 28(2) of the Constitution.

[39] The second respondent simply failed to have regard to the interests of the children and to appreciate the proper scope of the first respondent's parental duties. In ordering the children's eviction the second respondent misconstrued the nature of the enquiry required by him and imperilled the children's well-being. I agree with the submission on behalf of the applicant that in all of the circumstances the failure to investigate what effect the eviction

order would have on the three children was a far reaching irregularity and in itself constitutes sufficient grounds for its setting aside.

Alternative Available Accommodation

[40] The Court failed to consider the glaringly obvious fact that an eviction would render the applicant and her children homeless. The statement in the second respondent's reasons, that the applicant conceded that she can stay with her family but simply did not want to do so, is clearly inconsistent with what is recorded on the Court file, namely, that her family did not want her to stay with them for long periods.

[41] This clearly indicates that neither the applicant nor her children had suitable alternative accommodation on a permanent basis. In any event, as is pointed out by Mr Hathorn for the applicant, the second respondent's enquiry was limited to the applicant, and failed to take into account the need to find alternative accommodation for the parties' three minor children. A proper enquiry would have made clear that an eviction order would render the applicant and her children homeless, a circumstance which could never be considered to be just and equitable. The applicant's and her children's rights of access to adequate housing were accordingly infringed and she is entitled to the declaration to that effect which she seeks.

The Applicant's Vulnerability

[42] Then there is the question of the applicant's vulnerability. It is not disputed that the applicant is, and was at the time of the eviction order, afflicted by a disability as was evident from the medical evidence before the court a quo and unemployed, if not unemployable. These circumstances warranted consideration and investigation by the presiding magistrate

as did the applicant's insistence that she is not financially independent and cannot afford to rent a residence. Instead the court a quo appeared to have been swayed by her pension pay-out even though there was no evidence that this enabled her to afford alternative accommodation. The second respondent's reasons for judgment focused on the first respondent's property rights at the expense of the circumstances of the applicant and her children. The position was compounded by the fact that the applicant was not represented at the hearing in the court a quo.

[43] Applicant's counsel contended correctly in my view that the second respondent failed to recognise or give effect to his duty to assist the applicant in presenting her case properly and fully. It would seem that he failed to have regard to the applicant's defences, in particular her denial that there was any agreement that she would pay rent of R800 to the first respondent, which alleged agreement the first respondent relied upon as a ground for her eviction, or that the eviction order would not be in the interests of her children as she had custody of them and they would have to leave with her. He moreover did not consider the applicant's submission that she had contributed the proceeds of the previous house to the property from which the first respondent sought to evict her.

[44] On the question of the dowry I am of the view that the agreement that the first respondent would provide the applicant with a house was a relevant circumstance which ought to have been taken into account in terms of Section 4 of PIE in determining whether it was just and equitable to evict the applicant and her three children. The second respondent erred in sidestepping this issue. I do not accept that the dowry issue was settled as per the consent paper incorporated in the decree of divorce in 2000, as the issue was very much alive in the proceedings before the Muslim Judicial council in 2009.

[45] Mr Wilson for the *amicus curiae* drew attention to new tools of enquiry which our Courts have forged in discharging their duty to act pro-actively in establishing the circumstances relevant to the exercise of their discretion in eviction cases. In the *Port Elizabeth Municipality* case *supra* at paragraph 39 the Court referred to encouraging the parties to engage with each other to find mutually acceptable solutions. See also *Occupiers at 51 Olivia Road, Berea Township and Others v City of Johannesburg and Others* 2008 (5) (BCLR) 475 (CC) and *Transnet t/a Spoornet v Informal Settlers of Good Hope and Others ("Transnet")* [2001] 4 All SA 516 (W). Mediation is also favoured. See *Lingwood v The Unlawful Occupiers of R/E of Erf 9 Highlands* 2008 (3) BCLR 325 (W). Then too there is assistance to the Court by way of a report from the municipality having jurisdiction where it appears that an eviction might lead to homelessness. See *Shulana Court supra* paragraph 14. The circumstances of this case, involving as they did, the unfortunate family dynamic of a father seeking to evict his 3 minor children together with their mother, cried out, one would have thought, for a solution by way of mediation and engagement short of going to court.

[46] The fundamental flaw in the second respondent's approach is that he appeared to give no consideration at all to any of the above options. He considered his role to be that of passive evaluator of evidence placed before court, as is evident from the following quote from his reasons:

"The Court needs to make a finding on all the relevant evidence, but that needs to be placed before the Court. The Court cannot keep on trying to obtain something in favour of either party if that is not placed before me".[3]

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This is diametrically opposed to the innovative role ascribed to our Courts in the cases mentioned above.

[47] Counsel for the first respondent placed some reliance on the decision of this Court in *Ives v Rajah* 2012 (2) SA 167 (WCC). In that case the applicant's alleged failure to find and identify her own alternative accommodation counted against her. The facts in *Ives* are however distinguishable from those in the instant case. In Ives the eviction of a single woman without dependents was sought. Attempts to negotiate with her had failed. The Court undertook an exhaustive enquiry into whether the municipality could provide her with alternative accommodation and an official of the municipality testified. Reliance on *Ives* is in my view accordingly misplaced.

[48] In view of all of the above the submission that the first respondent is entitled to an eviction order and that the continued occupation of the property by the applicant and their children amounts to an expropriation and a contravention of the first respondent's section 25 constitutional rights in respect of his property, cannot be sustained.

[49] I am accordingly satisfied that the applicant is entitled to an order reviewing and setting aside the eviction order. She is moreover entitled to a declaration that the eviction order infringed her rights in terms of Section 26 of the Constitution.

[50] I accordingly grant the following order:

1. The order for the eviction of the applicant and all those who occupy with or under her from the immovable property situated at 7 Cecil Rhodes Drive, Ruyterwacht,

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[7] Record page 297.

granted on 22 May 2009 in the Goodwood Magistrate's Court, is reviewed and set aside;

2. It is declared that the eviction order infringed the applicant's rights in terms of Section 26 of the Constitution of the Republic of South Africa Act 108 of 1996.

3. The first respondent shall pay the costs of this application, such costs being limited to the disbursements of the applicant's attorney.

Y S MEER

Judge of the High Court