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

CASE NO: A77/2020

In the matter between:

DANIEL SHEVEL	Appellant
And	
ALSON DEVELOPMENT SEA POINT (PTY) LTD	First Respondent
THE CITY OF CAPE TOWN	Second Respondent

Bench: P.A.L. Gamble & B.P. Mantame,JJ.

Heard: 27 November, 4 and 11 December 2020, and 22 January 2021.

Delivered: 27 January 2021.

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 10h00 on 27 January 2021.

JUDGMENT

GAMBLE, J:

INTRODUCTION

1. This is an appeal against an order by the Magistrate, Cape Town issued on 25 February 2020 evicting the appellant, Mr. Daniel Elyan Shevel, from Flat 701, The Atlantic, 1 Rocklands Road, Three Anchor Bay, Cape Town with effect from 31 March 2020.

2. The appellant took occupation of the flat on 1 February 2013 pursuant to a written lease agreement concluded with the first respondent on 13 January 2013. Thereafter, the appellant occupied the flat in terms of the lease with the rental (initially in the sum of R10 850,00) increasing annually in terms of an agreed escalation clause. By 31 January 2019 the rental payable to the first respondent stood at R17 450,00 per month. The appellant failed to pay the full rental for that month and fell into arrears in the sum of R3655,57.

3. On 14 January 2019 the first respondent informed the appellant in writing that the rental for the period 1 February 2019 to 31 January 2020 would escalate to the amount of R18 150,00 per month. The appellant accepted the escalation as aforesaid and continued to occupy the flat in terms of the lease. However, the appellant failed to pay the rent for the months of February, March and April 2019 and accordingly, after due notice had been given the first respondent cancelled the agreement on 30 April 2019. The outstanding rental then due to the first respondent was R 72 600, 00.

EVICTION APPLICATION IN THE COURT *A QUO*

4. The appellant failed to vacate the premises as he was obliged to do in terms of the lease and on 12 September 2019 the first respondent made application under s4(2) of PIE[1] to the Magistrate, Cape Town for an order declaring the occupation of the flat to be unlawful and consequently seeking the eviction of the appellant from the premises within two weeks of service of the order on him. The matter came before the Magistrate on 11 November 2019 and the appellant, responding to the s4(2) notice, appeared in person. The appellant opposed the matter, which was then postponed to 30 January 2020 with a timetable set for the filing of further papers.

5. The appellant initially represented himself because, he claimed, he could not afford the cost of an attorney. The appellant filed a voluminous answering affidavit (335 pages including annexures) and after the first respondent had filed a replying affidavit the matter came before the Magistrate, Cape Town again on 30 January 2020. By that stage, the appellant had availed himself of the services of a certain Ms. Rene Carstens (a Principal Legal Practitioner in civil matters with Legal Aid South Africa) who appeared on his behalf on the day. Ms. Carstens sought a postponement of the application in order to prepare heads of argument and the matter was duly postponed to 24 February 2020.

6. On that day, Ms. Carstens addressed the court in relation to the merits of the application and conceded that the appellant had not made out a case to resist eviction. She was alive to the issues which the appellant now claims should have been considered by the court *a quo* and she informed the Magistrate that in her view

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[1] The Prevention of Illegal Occupation from and Unlawful Occupation of Land Act, 19 of 1998 ("PIE")

these did not constitute a basis for the court not granting a just and equitable order under PIE. Ms. Carstens suggested to the court *a quo* that a period of three months to vacate the premises was reasonable in the circumstances.

7. While she was still busy with her address, Ms. Carstens informed the court that her mandate had been summarily terminated. The appellant confirmed to the court that he no longer wished to be represented by Ms. Carstens and that he would continue to represent himself in person, notwithstanding the fact that the Magistrate afforded the appellant the opportunity to consult another attorney from Legal Aid.

8. The Magistrate then suggested to the appellant that he should enter the witness box and address the court under oath. In my view, this was a sensible approach in the circumstances given that the appellant was likely to traverse the evidence during the course of his address. I pause to mention that that is exactly what happened in the appellant's address to this court on appeal.

9. The appellant was given a full opportunity to address the court and to place his version of events before it. In the result, all the essential elements of an order of eviction were admitted by the appellant, who claimed that he would be left homeless if evicted. The circumstances which the appellant claimed would give rise to that consequence were dealt with in detail before this court and I shall summarize them below.

10. I should pause to mention, at this stage, that the consideration by the court *a quo* of the possibility of homelessness arising from an eviction was not a factor

that was required under PIE: the appellant had been in unlawful occupation of the premises for less than six months when the application for eviction was launched and consequently the court a quo was then bound to observe only the provisions of s4(6) of PIE.[2]

11. The transcript of proceedings indicates that the Magistrate made extensive inquiries from the appellant as to his personal circumstances, and in particular what it was that had caused the appellant to fall into arrears - this was explained in detail (albeit in a convoluted manner) in the answering affidavit which the appellant had drawn himself. The appellant pleaded for "some latitude" from the Magistrate who pointed out to the appellant that he had already had 12 months rent-free accommodation in the respondent's flat. (The outstanding rental at that stage would have been not less than R217 800,00). In the result, the Magistrate afforded the appellant a month's grace to quit the premises. The appellant did not do so but noted an appeal to this court as he was entitled to do under the Magistrates' Court Act.

PROCEEDINGS BEFORE THIS COURT

12. The prosecution of the appeal before this court coincided with the various early stages of lockdown commanded by the Government in response to the

[2] "**S4(6)** If an unlawful occupier has occupied the land in question for less 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 the rights and needs of the elderly, children, disabled persons and households headed by women"

Covid-19 pandemic. When it appeared to the first respondent that the appellant had been tardy in setting the appeal down for hearing, it took steps itself to do so. In the result, the Registrar sent out a notice of set down to the appellant by registered post. The appellant claimed not to have received this notice, an allegation that this Court accepts given the poor state of the postal service generally and under the lockdown in particular.

13. The appellant failed to comply with the provisions of Rules 50(7)(c) and (d) and 50(9) of the Uniform Rules by not filing a complete record of the proceedings of the court *a quo*, failing to furnish the first respondent with two certified copies thereof and not filing his heads of argument timeously. The first respondent's attorneys were put to the task of procuring copies of the complete record and in the process Mr. Shevel's attention was drawn to the fact that the appeal had been set down for hearing on 27 November 2020 and that his heads of argument were outstanding.

14. When the first respondent's attorneys drew the date of set down to the appellant's attention, he scurried around to prepare and file his heads of argument that were then out of time. The appellant also immediately launched an application in terms of Rule 30 to set aside the notice of set down as an irregular step, claiming that he was entitled to proper notice of the date so as to have sufficient time to prepare for the hearing. More reams of paper flowed and when the matter came before this court on Friday, 27 November 2020, the appellant claimed that he had not had the requisite notice under the Rules and asked for a postponement as he claimed he required the time he was entitled to in order to prepare his case properly. The matter was thus

postponed for a week to this end - on the resumed date the appellant would have had the requisite period of notice under the Rules.

15. The matter did not proceed on Friday 4 December 2020 because the senior member of this Bench was indisposed. The matter was rolled over until the following Friday pending the return to duty of the senior judge. This did not occur due to ongoing illness and the matter was accordingly postponed to the first possible date after the summer recess.

16. On Friday, 22 January 2020, the matter proceeded before us with the appellant once again appearing in person and the first respondent represented through counsel, Adv. C Rogers, who had also appeared in the court *a quo*. The hearing was conducted virtually, with the appellant utilizing the video link provided to him by the registrar to this Bench's junior Judge. The appellant was afforded adequate opportunity to address the court and, as we observed, he coped admirably in the unfamiliar surroundings. His adaptation to the novelty of virtual proceedings was commendable.

FURTHER INTERLOCUTORY APPLICATIONS

17. After the postponement of the matter on 11 December 2020, the appellant noted three further applications. The first was an application to adduce further evidence on appeal while the second consisted of a batch of Third Party Notices designed to bring before the court a number of persons that the appellant sought to hold liable in delict for his apparent inability to pay his rent under the lease. Thirdly, the appellant made application to include in evidence before the court on

appeal, a without prejudice offer made to him by the first respondent after the postponement of the matter on 11 December 2020.

18. The application to adduce further evidence on appeal is an abuse of process as all the relevant evidence in support of the appellant's case had already been placed before the court *a quo.* It thus falls to be dismissed with costs.

19. The persons upon whom the appellant wished to serve Third Party Notices included his father, the JSE Share Trust (a family trust of which the appellant, his father and his father's accountant, Mr. Leonard de Vos, are trustees), Mr. de Vos personally (and the corporate entities through which he conducts his accountancy business), the Minister of Justice and the Master of the High Court.

20. At the commencement of the appeal hearing on 22 January 2021, the court dismissed the applications to serve the Third Party Notices on the basis that, firstly, such a step is only permissible (in terms of Rule 28A of the Magistrates Court Rules and Rule 13 of the Uniform Rules) in action proceedings. Secondly, the court observed that the issuing of such notices on appeal was impermissible.

21. Further, the application to admit a without prejudice offer of settlement by the first respondent (which was opposed by the first respondent), was also dismissed out of hand after Ms. Rogers had assured the Court that in her view the document was a genuine attempt to resolve the dispute between the parties. I should point out that when the matter was postponed on 27 November 2020, the court had urged the parties to attempt to settle the matter in the interests of coming to an amicable solution.

22. For the sake of convenience, I shall refer briefly to certain passages in the Third Party Notice, which the appellant sought to issue against his father and the family trust because they demonstrate the core of the appellant's case on appeal.

> "The appellant claims that you are delictually liable for this eviction, which you have caused through your criminal actions of fraud and forgery in the JSE Share Trust, Dr. EJ Shevel Inc.… as well as other trusts and legal entities currently under investigation by the Director of Public Prosecutions of Gauteng South. You have defrauded and stolen the appellant and his son, who are the tenants of the first respondent, into a state of financial destitution. You continue to illegally retain possession of the stolen assets and income that was supposed to be used to pay rent for the appellant and his son.
>
> You have committed these crimes in your personal capacity, and/or in the capacity as a trustee of the JSE Share Trust and/or in your capacity as director/trustee of the other legal entities listed above or mentioned in the attached annexure. You are therefore liable for the legal fees of the first respondent because you have caused this eviction with your criminal and/or intellectual actions. You and/or legal entities behind which you hide your criminal activities and stolen gains, are also liable directly for rentals to the landlord and/or for damages to the appellant from which rentals to the landlord are to be paid, on the grounds and in the amounts set forth in the annexure hereto…..
>
> One beneficiary of the JSE Share Trust, the appellant, stands to be left immediately homeless and at risk of violence, murder or intimidation in his capacity as a witness to your multiple crimes that constitute offences in terms of the Prevention of Organized Crime Act, The Prevention of Corrupt Economic Activities Act, and the Criminal Procedures (sic) Act. These are laid out in CAS 1140/12/2018, 1141/12/2018 and

857/1/2019 of Hillbrow, and other dockets. The relevant facts from these dockets are contained in the attached annexure, and linked to the applicable schedule in the Witness Protection Act."

THE ARGUMENT ADVANCED ON APPEAL

23. The appellant's argument on appeal focused on three issues. Firstly, he claimed that he had not had a fair trial in the court *a quo.* Secondly, he argued that the Magistrate had erred in relation to the appellant's earning capacity. Thirdly, the appellant argued that if this Court confirmed the order of the court *a quo,* he would be rendered homeless. I shall deal with the latter point in more detail below because it impacts on the new date of eviction that must be fixed in the event that this Court is minded to uphold the appeal. Linked to that issue is an aspect which the appellant did not traverse on appeal but which this Court is obliged to consider – the granting of an eviction order under the Covid-19 restrictions imposed by the State from time to time in regulations under the Disaster Management Act.

24. Turning to the first point, the appellant complained that Ms. Carstens failed to prepare adequately for the hearing and, further, did not adhere to his instructions to her. Having considered the record of proceedings in the court *a quo*, and in particular the detail traversed in her submissions to the court, I am of the view that the appellant's complaint in this regard is unfounded. Ms. Carstens addressed the court fully and made the necessary concessions which arose from the answering affidavit prepared by the appellant, as also the general exigencies of the case put up by him.

25. Moreover, when the appellant took over his defence in person, he placed before the Magistrate all the relevant (and I stress **relevant**), considerations which were required to be taken into account for a just and equitable order under PIE. I also take into account the fact that the Magistrate offered the appellant the opportunity to seek alternative legal advice from the offices of Legal Aid, South Africa. In the circumstances, I am unable to find that the appellant did not have a fair trial in the court *a quo.*

26. The next issue raised related to the appellant's earning capacity. As already indicated, the Magistrate specifically questioned the appellant regarding the circumstances which led to him falling into arrears with his rental. This was pursuant to a submission by Ms. Carstens that the appellant was, at that stage, "without any kind of income and any sort of support from family". Arising from the answering affidavit, mention had also been made by Ms. Carstens of an amount of AUD3000[3], which had been made available to the appellant by a friend. There was some confusion as to whether the amount was made available to the appellant in Australia or whether it was a gift (or loan) from an Australian friend.

27. The issues of both the appellant's earning capacity and the advance of the sum of AUD3000 were clarified through enquiry by the Magistrate, as the following passage from the record reflects.

> "COURT: And the funds that you, your assistance that you obtained from friends - what happened to that, to the money that you received from your friends?

[3] The current value thereof is in excess of ZAR35 000.

MR SHEVEL: I borrow from friends on a monthly basis whatever I can to get by.

COURT: What do you borrow? How much do you get?

MR SHEVEL: It changes from month to month. What ever I can…

COURT: Which is how much - average? Yes sir?

MR SHEVEL: I would say about R 15,000 - R 16,000 a month.

COURT: So you have been borrowing this amount of money since when?

MR SHEVEL: Well it goes to pay the maintenance for my son and now for his school fees that I have to pay. I've got to put him first. The applicant's going to get paid. I have to put my child first. I can't you know, please can I [inaudible].

COURT: And then you flew to Australia.

MR SHEVEL: No, a friend flew me to London because the Hawks was (sic) threatening to assassinate me - it has been recorded - threatened to assassinate me.

COURT: What is this, I see in your Affidavit, it says the…[inaudible] of '72, also for the first time in September I finally had not money whatsoever to get through the month for food, put food on the table for my son, very much less did I have the means to leave the country. A friend from Australia purchased a ticket for me and sent Aus$3,000…

MR SHEVEL: They sent it to London.

COURT: What did you do with that money?

MR SHEVEL: With what money?

COURT: This money - the Aus$ 3,000?

MR SHEVEL: They sent me out of the country because the Hawks threatened to assassinate me and I had to open charges against the Hawks.

COURT: No, I mean I understand that…

MR SHEVEL: That is the first thing. So they bought tickets with it and the other thing I did was pay maintenance for my son.

COURT: So your friend purchased you the ticket.

MR SHEVEL: Yes.

COURT: And then you got Aus$ 3,000…

MR SHEVEL: No, the money was used to buy a ticket to get me out of the country.

COURT: But you say here on page 111 a friend from Australia purchased a ticket for me, and…

MR SHEVEL: He gave me…

COURT: … and sent me Aus$ 3,000.

MR SHEVEL: Sorry about the wording. He gave me 2,000 dollars, Aus$ 3,000 – that Aus$ 3,000 was used to buy a ticket and to get me through the month.

COURT: So you said you were threatened and then you decided to leave.

MR SHEVEL: I am being threatened. The threat to me is increasing all the time."

28. The Magistrate delivered a detailed *ex tempore* judgment the following day (25 February 2020) wherein he observed twice that –

- "The respondent then has also testified that he received an income of approximately or +- R 15,000 a month which according to the respondent, he utilizes for certain responsibilities, financial responsibilities….

- "The respondent is earning R 15,000 per month - this Court is convinced that with that money he is able to find alternative accommodation…"

29. On appeal before us, the appellant complained that the Magistrate had misdirected himself insofar as he found that the appellant had an income of R15,000,00 per month and that he would be in a position to secure alternative accommodation should he be evicted. It is correct, as the appellant argued, that the Magistrate erred in finding that the appellant "earned" R 15,000 per month. The passages in the evidence to which I referred earlier do not sustain that finding as such. However, I do not think that the error is of such magnitude that it can be termed a misdirection as such.

30. What the evidence does demonstrate conclusively is that the appellant had relied on the alms and hand-outs of friends and that, by the appellant's own confirmation, the average thereof was around R15 000,00 per month. On the strength of that admission, I am satisfied that the Magistrate was correct in finding that there was sufficient money available to the appellant every month to enable him to find

alternative accommodation and the error in description of the source of such funds as “earnings” rather than “hand-outs”, is neither here nor there.

31. Lastly, on the issue of the appellant being rendered homeless, and not withstanding that this was not a criterion mandated for consideration under PIE, I am in agreement with the view expressed by the Magistrate that it is probable that the appellant is likely to be able to continue to rely on the support of the friends who looked after him in the past.

32. Given that it was common cause that the appellant had defaulted on his rent and that the lease had been lawfully cancelled as a consequence thereof, the first respondent was thus entitled to approach the court under s4(2) of PIE for an order that was just and equitable on the basis that the appellant was an unlawful occupier of the property in question. Of the specific criteria which the legislature stipulated for consideration by a court under s4(6) (the interests of the elderly, children, disability and households headed by women), it was only the issue of the appellant’s contact to his minor son that fell for specific consideration by the court *a quo.*

33. It was not in issue in the court *a quo* that the appellant (who is aged 47) and his divorced wife enjoy shared residency and contact to their 12-year-old son on the basis that he stays with each parent every alternate week. Nor was it in dispute that, if the circumstances so demanded, the son could live with his mother permanently and that his father’s contact arrangements would have to be revised accordingly.

34. The court *a quo* correctly observed that the appellant had, at that stage, already enjoyed a year's free accommodation at the expense of the first respondent in a smart, secure beachfront apartment, which the appellant himself accepted was located in a prime position with expansive views of the ocean and mountain. Further, the Magistrate carefully sought to balance the interests of both the unlawful occupier and the erstwhile landlord and gave consideration to the fact that the appellant had made no attempt to find alternate accommodation believing that he could simply stay on where it suited him, notwithstanding the absence of a lease agreement.

35. In the circumstance, I conclude that the Magistrate properly exercised his discretion under s4(6) of PIE in evicting the appellant and giving him just more than a month to quit. There is thus no reason to interfere with the order of eviction or the terms thereof.

FURTHER FACTORS FOR CONSIDERATION IN FIXING A NEW DATE FOR EVICTION

36. Given that the date which the Magistrate had fixed for quitting the flat has come and gone, this Court must consider a fresh date by which the appellant may be evicted. In considering that date the Court will be guided by what is just and equitable in the circumstances. In that regard there are in my considered opinion two further considerations to be taken into account.

37. The first factor for consideration is the appellant's personal safety. As foreshadowed in the extract from the Third Party Notice recited earlier, the appellant claims to be in fear of an imminent threat on his life. The almost paranoid reaction of

the appellant is evidently sourced in a family feud which began in about 2015. The appellant (who holds a Bachelor's Degree in Business Science and a Master's Degree in Business Administration) calls himself an entrepreneur. He ran a business in Johannesburg called "The Migraine Research Institute", which was associated with a business run by his father, a medical doctor, known as "The Headache Clinic". It appears that the funding/ shareholding for these businesses vested in the JSE Share Trust referred to earlier.

38. The appellant appears to have incurred the wrath of his father around 2015 when he made allegations that the latter was conducting illegal medical experiments on his patients. I conclude that this led to a breakdown of the family relationship with mutual recriminations being made either way. The appellant ended up reporting the matter to the police in the Johannesburg suburb of Hillbrow and this seems to have attracted the attention of the Hawks. The appellant claims to have proof of corrupt activities on the part of the Hawks in relation to these complaints and portrays himself as a potential target of an assassination by one or more members of the Hawks as he set them in his sights as well.

39. The appellant regards himself as a whistleblower and someone who is worthy of safeguarding under the State's witness protection scheme. Ideally, the appellant would like to be placed under witness protection in the very flat in which he has lived for the past seven years or more. It is a strange scheme which the appellant has concocted in his mind, given that persons placed in witness protection are usually removed from their customary places of residence, often afforded new identities and accommodated in secret elsewhere.

40. The appellant says that his apartment on the seventh floor of the block is ideally located because of the security in the block in general and the views that it affords him of the streets below so as to keep an eye out for any would-be assassin. So far, for a period of more than five years, the appellant has managed to evade the assassin's proverbial silver bullet. Indeed, he can point to no incident where any attempt has been made on his life or that of his son. At the moment, everything is in his mind.

41. When asked by this Court for how long the risk of assassination had endured, the appellant was decidedly evasive. Eventually he settled on a date around 2015. The appellant suggested that through his vigilance and foresight he had become very adept at avoiding any attempt on his life. He claimed that when the Disaster Management Act was implemented and the first Covid-19 lockdown was declared, he was ready for it and it had very little effect on his day-to-day life because, he said, he had for years been living in a state of virtual lockdown because of his security fears.

42. Yet, although the threat had existed for a number of years, the appellant was adamant that he remained in mortal danger of an imminent attack by what he emotively referred to as a gang of murderous thugs. He suggested that if the court were to order him to vacate his stronghold, he would become even more exposed to the threat of an imminent attack on his life.

43. There can be no doubt that we live in strange times in a country known for its violence and in a city with a high murder rate. After all, a prominent member of the Cape Bar was gunned down in cold blood as he dropped his son off at school

(Reddam House, Atlantic) on a spring morning in 2018. And, this occurred but a couple of kilometers from where the appellant resides. I suppose, therefore, that one ought to be cautious about dismissing the appellant's fears out of hand. However, the fact remains that he has emerged unscathed for years with no concrete evidence to bolster his fears which appear to this Court to be more apparent than real.

44. I cite but two examples of the ease with which the appellant evidently moves around the streets of Cape Town. This appeal was set down for a virtual hearing at 10h00 on Friday, 22 January 2021. The appellant claimed to be experiencing difficulty in logging on to the virtual platform from his flat. He was offered the opportunity to travel through to the High Court (some 5 km or so distant) and utilize the facilities of the registrar of the junior member of this Bench, the judge herself working from home. The appellant jumped in his car without more and made his way promptly to the High Court where he was escorted through to the registrar's office and, as already pointed out, where he participated in the hearing. The appellant at no time expressed any fear or concern to the Court about having to adopt a last minute change of plan.

45. On a more general level, when the appellant's son resides with him during alternate weeks, he is required to transport the child to his private school (Reddam House, Constantia) some 28 km from his flat. The appellant has to undertake this return journey twice a day, 5 days a week, which equates to around 20 trips in a month and probably around 200 trips in a year. And despite having done this "school run" for a number of years, the appellant has yet to report an attempt on his life.

46. That all having been said, it can never be a consideration in the just and equitable enquiry under s4(6) of PIE that an eviction order should be held in abeyance indefinitely to appease the security fears of the erstwhile tenant. That would place an undue burden on the lessor and amount to an effective expropriation of its property without compensation, which would manifestly not be fair, just or equitable in the circumstances.

LOCKDOWN REGULATIONS

47. There is one further aspect that this Court is obliged to consider when fixing a new date for eviction. We are currently restricted to a Level 3 Lockdown under the Disaster Management Act, 57 of 2002. In terms of the latest regulations issued by the Minister of Co-Operative Governance and Traditional Affairs on 29 December 2020 (Government Gazette No. 44044) imposing that level of lockdown, the eviction of persons from their places of residence is subject to ministerial regulation.

> "**Eviction and demolition of places of residence**
>
> 37(1) A person may not be evicted from his or her land or home or have his or her place of residence demolished for the duration of the national state of disaster unless a competent court has granted an order authorising the eviction or demolition.
>
> (2) A competent court may suspend or stay an order for eviction or demolition contemplated in subregulation (1) until after the lapse or termination of the national state of disaster unless the court is of the opinion that it is not just or

equitable to suspend or stay the order having regard, in addition to any other relevant consideration, to-

(a) the need, in the public interest for all persons to have access to a place of residence and basic services to protect their health and the health of others and to avoid unnecessary movement and gathering with other persons;

(b) any restrictions on movement or other relevant restrictions in place at the relevant time in terms of these Regulations;

(c) the impact of the disaster on the parties;

(d) the prejudice to any party of a delay in executing the order and whether such prejudice outweighs the prejudice of the persons who will be subject to the order;

(e) whether any affected person has been prejudiced in their ability to access legal services as a result of the disaster;

(f) whether affected persons will have immediate access to an alternative place of residence and basic services;

(g) whether adequate measures are in place to protect the health of any person in the process of a relocation;

(h) whether any occupier is causing harm to others or there is a threat to life; and

> (i) whether the party applying for such an order has taken reasonable steps in good faith, to make alternative arrangements with all affected persons, including but not limited to payment arrangements that would preclude the need for any relocation during the national state of disaster.
>
> (3) A court hearing an application to authorise an eviction or demolition may, where appropriate and in addition to any other report that is required by law, request a report from the responsible member of the executive regarding the availability of emergency accommodation or quarantine or isolation facilities pursuant to these Regulations."

48. These restrictions imposed on a lessor in relation to steps that may be taken under PIE have persisted throughout the series of lockdowns imposed with effect from March 2020, albeit in varying iterations. In my considered view, and having regard to the circumstances of this matter, it would not be just and equitable to suspend the operation of the order granted by the court *a quo* until the suspension of the current state of disaster.

49. Firstly, while the country has entered the so-called "second wave" of infections, there is apparently no end in sight to the current pandemic and there is every reason to believe that we will be under lockdown for many, many more months to come. To deprive the lessor further of rental income during that period, in circumstances where there is little prospect of recovery of the arrears, would not be fair to it.

50. Secondly, this order was granted before the imposition of the state of disaster was announced in March 2020, at which stage the appellant had already been in unlawful occupation of the flat for more than a year. He has now been in unlawful occupation for almost two years and is indebted to the first respondent in an amount of not less than R435 600 (24 x R18 150), with little prospect of it recovering any of this amount soon, if at all.

51. Thirdly, the flat which the appellant occupies is, as he himself says, located in a prime position and commands a commensurate rental. It goes without saying that if he is financially stretched the appellant should seek cheaper rental accommodation, whether in the same area or in a less expensive neighbourhood. After all, the appellant is a single person capable of living on his own if needs be and his monthly financial obligations are not as demanding as that of a family.

52. Importantly, the evidence demonstrates that the appellant has taken no steps to secure cheaper alternate accommodation: a step that any reasonable person in his situation would have been expected to take. Rather, he has brazenly sat back and expected the first respondent to provide a roof over his head in the vague and unrealistic expectation that he might recover delictual damages one day from the persons/entities he regards as the cause of his alleged impecuniosity.

53. Further, when the limitation on evictions was first introduced (with the initial Level 5 Lockdown) the movement of persons outside of their places of residence was severely impacted. The Minister would thus have taken into account that it would have been more difficult then for persons to go out and seek fresh accommodation, and well-nigh impossible to move one’s belongings, hence the

necessity to control evictions beyond the purview of PIE. However, we have moved beyond those initial restrictions and house-hunting and/or moving house is now much as it was before the initial lockdown. Indeed the appellant has made no complaint on that score.

54. Fifthly, I have found that the Magistrate was correct in his assessment of the appellant's source of income. That situation is not likely to change in the short-term, and it is fair to infer that the alleged benevolence of the appellant's friends will not dry up. After all, he has been able to maintain himself and his son for the last two years, has been able to run a car and fund the disbursements in this matter, which are not insignificant if one has regard to the cost of preparing the record and the many hundreds of pages that have made up his case.

55. However, even if the benevolence were to dissipate, there is no reason to suggest that the appellant, who has a residual earning capacity in light of his qualifications and work experience, could not find a source of employment to sustain himself in straitened circumstances. And even if that failed, the appellant would be able to avail himself of local accommodation at any number of facilities such as the Salvation Army or night shelters in and around the city.

CONCLUSION

56. Having considered the various criteria under the lockdown regulations, I am satisfied that it will be just and equitable to order the appellant to vacate the flat within 4 weeks of this court's order.

57. As regards the issue of costs, clause 20.2 of the lease provides that costs relating to the lease are payable on the scale as between attorney and client. There is no reason to deviate from the scale of costs which the parties agreed upon when they concluded their agreement. However, the costs of the interlocutory applications are only to be recovered on the party and party scale as these are ancillary to the litigation and not the lease.

ORDER OF COURT

Accordingly, it is ordered that:

A. The application to lead new evidence on appeal is dismissed with costs on the party and party scale.

B. The appellant is to pay the costs of opposition incurred by the first respondent in relation to each of the Third Party Notices issued by the appellant, such costs to be taxed on the party and party scale.

C. The appellant is to pay the costs of opposition incurred by the first respondent in relation to the application to admit the without prejudice offer made by the first respondent, such costs to be taxed on the party and party scale.

D. The appeal is dismissed with costs on the scale as between attorney and client.

E. The appellant (and any persons holding under him) is directed to vacate Flat 701, The Atlantic, 1 Rocklands Road, Three Anchor Bay, Cape Town ("the property") by not later than 16h00 on Friday 26 February 2021.

F. In the event that the appellant and all those holding occupation under him fail to comply with the order contained in para E above, the Sheriff is hereby authorized and directed to evict the appellant and all those holding occupation under him from the property on Monday 1 March 2021 or any day thereafter

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GAMBLE, J

MANTAME, J

I agree.

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MANTAME, J