

REPORTABLE

IN THE SOUTH GAUTENG HIGH COURT

(JOHANNESBURG)

CASE NO 10/04599

DATE: 17/02/2011

REVISED: 21/02/2011

EAGLE VALLEY PROPERTIES 250 CC

APPLICANT

and

UNIDENTIFIED OCCUPANTS OF

RESPONDENTS

ERF 952, JOHANNESBURG SITUATED AT

124 KERK STREET, JOHANNESBURG

In re

UNIDENTIFIED OCCUPANTS OF

APPLICANTS

ERF 952, JOHANNESBURG SITUATED AT

124 KERK STREET, JOHANNESBURG

and

THE CITY OF JOHANNESBURG

RESPONDENT

JUDGMENT

SPILG J

INTRODUCTION

1. The Applicant is the registered owner of commercial property in the Johannesburg CBD. The buildings on the property form part of the “*Better Building Project*” initiative in what is identified as the Fashion District within the Inner City.
2. In February 2010 the Applicant sought the eviction of those occupying the buildings. The application was brought under the provisions of section 4(1) of the Prevention of Illegal Eviction from Unlawful Occupation Act 19 of 1998 (*PIE*).

3. After notice was given under section 4 (2) of PIE , the occupiers, claiming to number 140, conceded that their occupation was unlawful and contended that consequently they were protected against eviction under PIE until such time as the City of Johannesburg (*the City*) secured adequate temporary accommodation for them.
4. Aside from filing an answering affidavit to the main application, the occupiers also brought an application to join the City as a party.
5. The occupiers contended that the City had an interest in the relief they sought. In view of the position taken by the City in subsequently opposing the application for joinder it is necessary to set out the substance of the orders the occupiers wish to obtain against the City. These comprise orders;
 - a. declaring that the City is constitutionally obliged “ *to provide suitable relief* “ and also provide “ *temporary emergency shelter*”, for those “... *such as the respondents, who upon eviction would have no suitable alternative accommodation available to them and would be in a crisis or intolerable situation*”;

- b. declaring that the City is obliged to ensure that indigent persons faced with eviction from privately owned property, such as themselves, “ .. *have access to adequate housing on a progressive basis*”;
 - c. ordering the City to take the necessary steps needed to comply with its aforementioned constitutional and statutory obligations;
 - d. requiring the City to prepare a report under oath stating the steps it has taken, and those it intends taking, to comply with these alleged obligations;
 - e. that once the report is provided, and the parties have had an opportunity to comment on and reply to it, the court will be asked to determine such further relief as may be appropriate.
6. By agreement between the owner and the occupiers , on 30 April 2010 Randerá AJ granted the postponement and directed the delivery of a notice and an answering affidavit should the City wish to oppose.
7. After I dealt with a number of technical points, the City filed an answering affidavit on 7 October 2010 opposing the application for joinder .

ISSUES FOR DETERMINATION

8. The City's main objection is that no purpose would be served in joining it in the proceedings.
9. Principally, *Mr Pullinger* argues that the City has already submitted the report sought by the occupiers. The report, which the City claims is comprehensive, was prepared pursuant to the judgment in *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg and others* 2008 (3) SA 208 (CC). The report has been produced in numerous court applications and is readily available. Its contents are well known to those litigating in this field. Indeed, in the present proceedings the landowner had already filed the report under an accompanying notice.
10. The second substantive challenge is that the attempt to join the City is misplaced, since it is one of three spheres of government, the others being the Province and National government, and that they should have been included in the application for joinder.

WHETHER JOINDER SERVES ANY PURPOSE

11. In my view the argument does not address the substantive relief sought by the respondents; namely that the City has a constitutional and statutory obligation to provide temporary shelter for those who qualify for assistance as an initial step to a permanent housing solution. It is based on a claimed right under section 26 (1) and (2) of the Constitution and under the provisions of the National Housing Act 107 of 1997 (and also other delegated legislation such as Chapter 2 of the National Housing Code dealing with Emergency Housing Policy) of access to adequate housing on a progressive basis and the implementation of necessary programs to secure that end. Compare *Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC)* at paras [41] and [42] and see Ngcobo CJ in *Residents of Joe Slovo Squatter Community, Western Cape v Thubelisha Homes and others* [2009] ZACC 16 at para [226].

12. This is to be contrasted with the fact finding order sought which call for a report which is based on an application of section 4(7) of PIE . The City's argument is confined only to this portion of the relief claimed.

13. I am also not satisfied that the Report adequately addresses key issues. In *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue and ano (2)* [200] JOL 25031 (GSJ) I directed the City to provide a report regarding the numerous unoccupied inner city buildings and , if State or City owned, whether they were being deliberately moth-balled under other urban renewal initiatives. Moreover, the Report does not address whether the removal of those illegally controlling buildings abandoned by their true owners (for whatever reason) can provide additional shelter or simply provides some financial relief for those already impoverished. While some areas covered by the report are detailed, it is unfortunately superficial in others, particularly with regard to projected growth or decline of indigent people and their dependants based on proper demographic projections and risk management profiles on the one hand and the realistic number of temporary and permanent shelters that can be provided having regard to fiscal ,capacity and other infra-structural constraints on the other.

THE SPHERES OF GOVERNMENT ARGUMENT

14. The second attack on joinder appears to be two pronged. The first adopts the City's argument in *Blue Moonlight (2)* that it only has a passive constitutional obligation, an issue which I assume is still to be argued in the appeal of that case. The other argument is that the occupiers are non-suited because they were obliged to join all three spheres of government, not just local government.
15. The first part of the attack must await the outcome of the *Blue Moonlight (2) appeal*. However the second aspect remains open for consideration.
16. Since I declined to allow a joinder of the Provincial Government in *Blue Moonlight (2)* it is necessary to explain why that decision does not necessarily affect the present case.
17. The short answer is that in *Blue Moonlight(2)* I exercised a discretion by weighing a number of competing considerations and interests most of which are not present in the case before me. Moreover the City's argument in that case proceeded from the proposition that the City only had a passive constitutional obligation and that it was Provincial Governments duty to provide the funding sought.

18. The essential features concerning joinder in *Blue Moonlight (2)* that are absent in the present case may be summarised as follows;

- a. the City sought to join the Provincial Government on the basis that the latter was obliged to provide the housing, and the program and the funding for it
- b. the inordinate delay of some four years before seeking joinder when the matter was otherwise ripe for hearing and the anticipated future retardation of the case if joinder was allowed, in circumstances where the Provincial Government *prima facie* demonstrated a conscious decision not to become embroiled (see at para [48] to [51]);
- c. the concern that different spheres of government are obliged to exhaust mediation and other alternative dispute resolution mechanisms before their issues with each other could be dealt with in court, thereby creating further potential delay and prejudice to both the landowner and the occupiers.

19. What does remain common to both cases is my view that the City is not constitutionally a passive functionary and that joinder of other state organs may result in delay during the dispute resolution phase.

20. These factors must be weighed together with the landowner's and occupiers' positions. They are not adverse to the joinder of other spheres of government particularly at this relatively early stage of proceedings where only the occupier has delivered an answering affidavit on the merits.

21. There are also more fundamental considerations that have surfaced since the decision in *Blue Moonlight (2)*. They are relevant to the City's argument that the occupiers should also have sought the joinder of both the National and the Provincial Governments.

22. The one is that PIE, and presumably the constitutional provisions relevant to the development of the law around it, are intended to be confined to victims of past racially discriminatory laws and practices. The other is that the provision of adequate housing on a progressively implemented basis is not attainable.

23. This arises from the reaction of some local governments and also statements attributed to the Minister of Housing Settlements in the National Assembly after the *Blue Moonlight (2)* decision. Unfortunately hard copies of Hansard have not been printed for some years and the

online Hansard is limited and selective. I am grateful to both by the staff of the SGHC library and the subsequent efforts by the Johannesburg Bar library to assist after my own attempts proved unsuccessful.

24. Unfortunately the Minister's oral reply could not be located. Accordingly it would be best to deal with the significant issues that they and comments by local governments appear to have raised and why they may have a profound effect on the already difficult task of fashioning an effective remedy should there be an infringement of the constitutional right of access to adequate housing on a progressive basis.

25. It is perhaps best to commence by re-affirming the value to the citizen of constitutional recognition being accorded to the socio-economic rights contained in our Constitution and, in many cases, given further content in complimentary legislation.

26. This is to be found in the terse statement contained in section 7 (2) of the Constitution that “ *the state mustpromote and fulfill the rights in the Bill of Rights*” . Little could be clearer. It is reinforced by the acknowledgement contained in Section 1(a) that the foundational values include human dignity and the achievement of equality.

The *Preamble* similarly expresses the goal driven purpose for recognising the series of socio-economic rights enumerated in the Constitution:

We therefore adopt this Constitution as the supreme law of the Republic so as to –

Improve the quality of life of all citizens and free the potential of each person” (emphasis added)

27. So too Section 39 of the Constitution which provides the interpretational framework for understanding the content of and purpose for recognising the Chapter 2 rights. It requires that these rights must be interpreted in a manner which “ ... *promote[s] the values that underlie an open and democratic society based on human dignity, equality and freedom* “. For present purposes the operative terms are “*human dignity*” and “*equality*”.

28. Within the context of housing rights, section 26 of the Constitution is not limited to redressing the degrading and impoverishing consequences of past racially discriminatory laws or practices. The right to have access to adequate housing on a progressive basis, having regard to available resources, is founded principally on the fundamental and enduring right to dignity. The pervasiveness of the right to dignity within our constitutional

framework and its “... *importance ... as a founding value of the new Constitution cannot be over-emphasised* “ (per O’Reagan J in *S v Makwanyane and another* 1995 (3) SA 391 (CC) at para [327].

29. Sections 4 (7) and 6 (3) of PIE expressly recognise the existence of unlawful indigent occupiers within South Africa and the obligation of the State (including a municipality) to provide occupation on land that it can reasonably make available. This provision in PIE makes no distinction between whether their status arose as a consequence of past racial or other inequalities, or simply the current socio-economic climate, or that in other countries, which has led to their present hardships and that of their dependants. The provision is founded most directly on the right to dignity. I refer again to O’Reagan J in *Makwanyane* at para [329]; “ *Thus recognition and protection of human dignity is the touchstone of the new political order and is fundamental to the new Constitution*” .

30. Socio-economic rights, such as housing, are given substance by reference to a constitutional requirement that they be realised. *A fortiori* this presupposes that they are attainable , progressively within the limitation of available resources, but attainable nonetheless. This assumption is at the core of recognising socio-economic rights such as housing. All spheres of government and other organs of state including the

courts, through our judgments, are obliged to give content to these rights. This is effected by securing the progressive attainment of these constitutional objectives, within the accepted limitations proscribed by the Constitution.

31. Conversely, should it be argued that any of these rights cannot be attained then for so long as the socio-economic right in question remains in the Constitution the courts are constitutionally obliged, particularly under sections 8(1) to (3), to investigate if the breach goes to a systemic failure within an organ of state despite its consequences to the separation of powers unless another non-invasive enquiry and effective remedy can be fashioned to secure the attainment of the right. Similarly, for so long as the right is contained in the Constitution, organs of state are similarly required to comply with their constitutional obligations to secure the attainment of the right progressively within the limitation of available resources.

32. The context in which a claimed lack of financial and other resources is to be understood in regard to socio-economic rights such as housing, was clarified as follows by Sachs J in *Joe Slovo Community* at para [348]:

"The Constitution deals expressly with the duties of Councils towards disadvantaged sections of our society. It states that the objects of Local Government include ensuring "the provision of services to communities in a sustainable manner" and "promot[ing] social and economic development", and that a municipality must "structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community."

With particular reference to housing, at para [350], Sachs J referred to section 2(1) of the Housing Act which *"... requires all spheres of Government to give priority to the needs of the poor in respect of housing development"*.

33. It must therefore be accepted that the issue of providing shelter for the indigent who are subject to eviction is not contained in legislation solely focused on alleviating the consequences of past racially discriminatory laws and practices. The broader objective to be attained by the legislation is to give content to the core values of our Constitution, which include the right to dignity and equality (See sections 10 and 8 respectively. See also Schedule 4(I) and (V) of the Interim Constitution and Chapter III of Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996 (4) SA 744 (CC) especially at para [78]).

34. The effect is that the realisation of socio-economic rights for all our people is an obligation imposed on each organ of state. In the context of housing there is only one constitutionally acceptable outcome- the realization of adequate housing on a progressive basis. Case law from *Grootboom* at paras [44] and [82-83] to *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) at paras [29] and [39] and onwards has confirmed that the State is obliged to ensure the provision of services to communities in a sustainable manner.

35. Accordingly PIE should not be approached on the basis that it is limited to alleviating the plight of indigent people affected by past racially discriminatory laws and practices. The number of occupiers affected by PIE and to which the provisions of section 7 and 26 of the Constitution relate are significantly more numerous.

36. The second, and perhaps more concerning, issue that needs to be addressed, is the apparent contention that the objective of achieving adequate housing for all is unattainable. Since the constitutional requirement is to realise that objective in the long term and alleviate the plight of those currently living in abject poverty (on my understanding of case law concerning PIE such as *Joe Slovo*), the need to properly address this contention is essential before a court can consider fashioning

an appropriate and *effective* remedy. In the present case it is perhaps the single most important factor in weighing whether the City is correct in contending that other spheres of government should also have been joined, particularly bearing in mind the early stage in these proceedings when the point arose.

37. Earlier, when considering the question of whether the courts may have unduly extended a law that it is suggested was meant for the limited purpose of alleviating the socio-economic consequences of apartheid injustices, I also covered the question of the constitutional responsibilities of the executive, the judiciary and all organs of state to attain the progressive realisation of socio-economic rights.

38. I believe that all court decisions proceed, even if unarticulated, on the basis that the socio-economic rights are realistically attainable, albeit on a progressive realisable basis.

39. The recent concerns, as also expressed by the City in the present proceedings, suggest that this may not be the case. The question is then whether households can ever be released from the cycle of poverty created historically by apartheid or by the circumstance of birth and which

effectively deny them and preclude their children from enjoying their fundamental rights and freedoms. This issue becomes more pressing as our informal settlements and genuine slums expand as they absorb increasing numbers of destitute people both from outside and as a result of the natural population growth within the area. The Constitution envisaged that we would not allow the creation in our country of Rio de Janeiro or Mumbai type slums where present and future generations have little prospect of escaping the scourge of poverty.

40. It therefore appears necessary for the courts to be provided with a more holistic appreciation of the housing crisis and the resources, available and projected, to deal with it. It appears necessary for courts to be provided with far more detailed reports which incorporate;

- a. sufficient information based on informed statistical projections of the anticipated number of indigent households in order to ascertain the number of shelters that must be provided on the requirement side of the equation; and
- b. on the capacity side of that equation, what budget and other essential resources are being and can be provided (including possibly job-creation and community self-upliftment programs); and

- c. such other information as is necessary to establish what objectives in real terms can be attained in the short, medium and long terms relevant to the City's contention that it is unable to obtain, or secure from the other spheres of government, the resources necessary to provide temporary emergency shelter to unlawful occupiers of privately owned properties.

41. If, after receipt of the reports, it is contended that the constitutional objectives are not attainable, the question would then arise whether the separation of powers would be infringed if the courts were to enquire into the rational need for other expenditure and establish from the Auditor-General whether revenues are being squandered elsewhere or budgets are being under-utilised or inefficiently appropriated in respect of the provision of housing and other socio-economic constitutionally identified priorities.

42. Clearly a court could not interfere in policy decisions regarding the utilisation of funds as long as there is some rational basis for it. There will always remain protagonists for and against the Gautrain project even as there were against the London Underground. But the recent confirmation that some R90 million should not have been approved by the City for a Miss World pageant may be a matter, which if timeously brought before a

court, could be the subject matter of interdictory relief based on irrationality and constitutional prioritisation.

43. The need to achieve the constitutional objective under section 7(2) of promoting and fulfilling the realisation of housing rights brings into issue, on the one hand, the extent and justification of judicial intervention if the limited resources are not otherwise rationally utilised, and on the other the possibility of judicial activism already cautioned against in *Grootboom*:

"A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable."

44. In *Blue Moonlight (2)* I was concerned with an appropriate remedy once I found that there had been an infringement of a constitutionally protected right. In the case of the occupiers I fashioned a remedy that was intended to compel the City to implement a constitutionally sound policy and provide the occupiers with accommodation against pain of paying constitutional damages if it did not do so within a reasonable time. In that case I found on the facts that the City had for two fiscal years budgeted for a substantial excess and the cost of procuring a number of buildings to house indigent people facing eviction from privately owned dwellings was

relatively nominal (see paras [54], [164] and [173], particular when considering the concern expressed that departments within the Provincial Government might not be exercising proper fiscal discipline.

45. In the present circumstances, where many local governments including the City (and possibly even National Government) suggest that it is not possible to meet housing shortages even on the progressively realisable basis as envisaged in the Constitution, it appears necessary for a court to obtain a complete picture of what is feasible and attainable in order to decide what is just and equitable, as it is required to establish within the context of section 4(7) of PIE, and so too under section 6(3)(c) of PIE where State land is involved.

46. If regard is had to the broader nature of the issues that the court may now have to consider, especially if the City persists with its current position that even the provision of temporary shelters for the indigent homeless population within its area is unattainable, it appears eminently desirable that National Government and Provincial Government should be joined. In many other cases they are cited and they have not suggested a mis-joinder even where the issues may have been narrower.

47. In the case of National government , the Department of Human Settlements now plays a decisive role in formulating policy, implementing the delivery of housing and also the provision of additional funding. Since the establishment of the Ministerial portfolio of Human Settlements (previously the Housing Ministry) in May 2009 the Department's objective is to meet , and I refer to its Accounting Officer's overview on its website, “
... government's constitutional responsibility of ensuring that every South African has access to permanent housing that provides secure tenure, privacy, protection from the elements, and access to basic services.

48. In my view the establishment of the Ministry of Housing Settlements, having regard to its objectives, its apex position, its ability to consider all issues that may affect the provision of adequate housing holistically and engage other Ministries in formulating strategies, programs or incentives, makes it the appropriate Ministry to represent National Government's interests. More so, as the issue has taken on dimensions that now transcend the capacity of local government and may involve broader national policy concerns as diverse as rural incentivisation, self-upliftment and job creation policies as well as immigration control policies.

49. Since there may a meaningful contribution played by the Gauteng Province in regard to funding and programs, it similarly *prima facie*

appears to be an interested party if, unlike my finding in the case of *Blue Moonlight*(2), the City is able to demonstrate that it is not now able to provide even temporary shelter for indigent homeless people within its area.

50. In the matter before me the occupiers sought the joinder only of the City. In my view, albeit for different reasons, I agree with Mr Pullinger's submission that *prima facie* other spheres of government should have been subject to joinder in the present case, or at least be heard on the issue at this stage.

51. Leaving aside constitutional considerations, this court has jurisdiction to order joinder *mero motu*. Accordingly while the point appears *prima facie* to be well taken in the present case, it does not non-suit the occupiers.

52. Clearly neither National Government nor Provincial Government has been heard on the issue. I therefore do not consider it appropriate to direct their joinder without affording them an opportunity to be heard on the issue.

53. Moreover the framework of the possible joinder, as appears from my order, is to ensure that there is a *lis* between all the original parties to the application on the one hand and each of the spheres of government that may be joined on the other . The reason for this is to ensure that there is a *lis* not only between the occupiers and the other Respondents that are joined, but also between them and the Applicant. See *Blue Moonlight (2)* at para [83] to [85].

54. It will be recalled that in matters of this nature a court originally took it upon itself to require a report from various organs of state. The issue is of a constitutional nature and affects the validity of legislation as well as programs and policies of both National and Provincial Governments.

55. It appears *prima facie* that they have a real and substantial interest in the issues before this court. Indeed the report to which reference was made earlier attributed the Minister of Human Settlements to have requested that the position of his Ministry is made known to the courts.

56. Once the issue of joinder is settled then consideration can be given to the nature of the reports that should be provided by the other spheres of government. At the least, and if joined, the reports should deal with the capacity of National, Provincial and Local government to provide adequate shelter for indigent people facing eviction from both State and privately

owned land in the short, medium and long term within the City's area of control (bearing in mind both the "*queue jumping*" argument and the "*unattainable*" arguments that are foreshadowed), and insofar as it affects the ability to provide temporary shelter to the First Respondents.

ORDER

57. I accordingly order that;

- a. The main application is postponed *sine die*
- b. The City of Johannesburg ("*the City*") is joined as a party in the proceedings as the 2nd Respondent to the main application and as a Respondent in the counter application.
- c. The papers in the main application and the joinder application are to be served by the original Respondent in the main Application being the occupiers of Erf 952 (now the 1st Respondent in the main application) on the Minister of Human Settlements ("*the Minister*") and the Gauteng Provisional Government ("*Gauteng Government*") by no later than 1 March 2011.
- d. Both the Minister and the Gauteng Government are to show cause to this Honourable Court on 5 April at 10am or so soon thereafter as the matter can be heard why an order should not be made joining each of them

(respectively) as Respondents to the main application and as Respondents to the counter application of the Occupiers of Erf 952;

- e. The City is to pay the costs of the 1st Respondents' application for the joinder.

SPILG J

LEGAL REPRESENTATION;

FOR APPLICANTS in MAIN APPLICATION (Eagle Valley):

Counsel: Adv B Bodhania;

Attorneys: Mahomed's Inc.

FOR RESPONDENTS in MAIN APPLICATION (Occupiers)

Counsel: Adv E Botha

Attorneys: Eversheds

FOR THE RESPONDENTS IN APPLICATION FOR JOINDER (City of Johannesburg)

Counsel : Adv AW Pullinger

Attorney: Moodie and Robertson