

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case No: 2019/18156

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

SIGNATURE

DATE

In the matter between:

RYCKLOFF-BELEGINGS (EDMS) BEPERK

Applicant

and

OCCUPIERS OF ERF 791 OF THE FARM
RANDJESFONTEIN

1st – 71st Respondents

CITY OF JOHANNESBURG METROPOLITAN
MUNICIPALITY

72nd Respondent

EXECUTIVE MAYOR, CITY OF JOHANNESBURG
MPHO PHALATSE

73rd Respondent

CITY MANAGER, CITY OF JOHANNESBURG
FLOYD BRINK

74th Respondent

DIRECTOR OF HOUSING, CITY OF JOHANNESBURG
PATRICK PHOPHI

75th Respondent

JOHANNESBURG PROPERTY COMPANY

76th Respondent

INTERNATIONAL COMMISSION OF JURISTS

Amicus Curiae

JUDGMENT

WINDELL, J:

INTRODUCTION

[1] On 26 April 2022, this court issued an order directing the 76th respondent, the Johannesburg Property Company (“JPC”), to hand over a list of its properties to the legal representatives of the applicant and the occupiers. The order is attached to the judgment.¹ These are the reasons for the order.

[2] Context is everything. It is ultimately the common cause background facts that informed the decision of this court.

RELEVANT BACKGROUND FACTS

[3] On 21 May 2019, the applicant, Ryckloff-Beleggings (EDMS) Beperk, instituted eviction proceedings against the “occupiers” (the 1st to 71st respondents), in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998 (“PIE Act”). The applicant’s property is situated at Portion 971 of the Farm Randjiesfontein, which fall in Region A of the City of Johannesburg. The property

¹ Annexure “A”.

where the occupiers reside is on a vacant piece of land adjacent to the International Business Gateway Business Park 1, located at the corner of New and Lever Road in Midrand. The property forms part of Sanlam Life Insurance Limited's commercial property portfolio.

[4] It is common cause that the occupiers are informal reclaimers or waste pickers, that have been living on the applicant's property for the past 7 years.

[5] The occupiers opposed the application and are represented by the Socio Economic Rights Institute of South Africa ("SERI"). After the launch of the eviction application, the International Commission of Jurists ("ICJ"), a non-governmental organisation advocating for human rights, was admitted as *amicus curiae* with the consent from all the parties involved.

[6] The matter first came before me on 1 March 2021. The City of Johannesburg Metropolitan Municipality (hereinafter referred to as "the City"), is also party to the proceedings, and is cited as the 72nd respondent. The City has been joined in this application by virtue of its general constitutional and legislative obligation to provide temporary emergency accommodation ("TEA") to prospective evictees from land within the City's area of jurisdiction. The City acknowledged that it has procedural obligations in eviction proceedings instituted by private persons under section 4(7) of the PIE Act to investigate and report to the court, *inter alia*, on the personal circumstances of the occupiers and whether, in the considered view of the municipality, the eviction is likely to result in homelessness. If the eviction will lead to homelessness it must also report on what steps it proposes to put in place to provide TEA to the evictees.

[7] The occupiers and the amicus' main contention, as far as TEA is concerned, is that in the absence of the provision of **alternative accommodation or land suitable for the waste pickers' work**, an eviction order would amount to a violation of, *inter alia*, their rights to adequate housing and to earn a living, and would thus not be just and equitable in the circumstances of this case. (Emphasis added)

[8] The City's position, as far as TEA is concerned, was set out in its report (the first report), filed on 7 September 2020 and authored by Mr Patrick Phophi, the Executive Director of Housing. The City's stance was the following:

1. The City recognises and accepts its constitutional obligation to take all reasonable measures within its available resources to provide TEA to persons evicted from their homes, which are in dire need and who face homelessness as a result.
2. It is the City's view that upon the court granting an order for eviction some of the respondents may be faced with homelessness. There is, however, a large number of respondents which the City determined that had not made out the case for TEA based on their immigration status, but who will likely be faced with homelessness when the eviction order is granted.
3. The State of Disaster arising from COVID-19 has placed tremendous pressure on the availability of the City's resources for matters such as the present. All the resources and policies of the State including those of the City were redirected to the relief required for the State of Disaster. This state of affairs had not changed as at the date of hearing of the matter on 1 March 2021.
4. The only policies and resources which the City could prioritize were those that have been urgently put in place in response to the COVID-19 for the duration of the National State of Disaster. Therefore, despite its best efforts to provide

TEA in this case, it has no resources available to provide TEA to any of the prospective evictees.

5. Even if there was no COVID-19 pandemic, there is no evidence of any special or exceptional circumstances which prevail in this matter which warrants any immediate allocation of TEA to the occupiers. The City currently does not have any TEA available to accommodate the occupiers in the event that the court grants an eviction.
6. There are matters in which, due to unavailability of resources, the parties have still not received TEA. These orders go as far back as 1992.
7. There is a great deal of inflexibility attached to the particular TEA required in this case. Firstly, the City has been required to provide TEA within Region A, where factually there is not much land available in the area even from private owners. Secondly it must be in close vicinity to the companies which the respondents feed with recycling material. The area is very closely built. No land has been identified wherein the City can engage resources to develop a property for the respondents.
8. The City is in the process of acquiring 6 additional properties for TEA, but none of the properties are in Region A where the respondents live.
9. At the present moment the City does not have available TEA for the occupiers in all its Regions, including Region A, which is the region in which the occupiers in casu reside. Going forward, another TEA facility in Region A needs to be built.
10. The City will have to do a property audit in order to establish whether it owns property in Region A which may be suitable for the creation of a TEA facility. If it does not own property, then it will have to source property from the owner of

that property and either purchase or expropriate same. After this procurement process, the City will have to embark on refurbishment of the property in order to make the property fit and proper for TEA purposes.

11. The City will take at least 3 (three) years, from the date of the order which this court hands down, for the City to identify, acquire, refurbish and appoint a manager for TEA facility. This is because the required TEA in this case, which provides for the respondents' accommodation and vicinity needs, has not yet been developed.

12. If this court is inclined to grant eviction, that such order be suspended for a period of 3 years (beginning calculating from the last day of National Lockdown) in order for the City to procure, develop land to comply with its constitutional duty to provide TEA to the occupiers.

[9] The City was represented by counsel, Ms Mpho Muchenje on the day of argument. After hearing argument from all the parties, it was common cause that the court could not grant a final order for eviction because no TEA had been identified. The parties therefore consented to a court order ("the March Order"), that can be divided into three sections: First, it required the City to obtain a list of the occupiers who are living on the property (paragraph 1). Second, the City must meaningfully engage with the occupiers regarding the availability of land that would allow the occupiers to continue to earn a living (paragraph 2). Thirdly, the City must file a report which will provide the court with the necessary information regarding the provision of TEA (paragraph 3).

[10] For purposes of this judgment only the relevant parts of the March Order are quoted:

"2. The City is to meaningfully engage with the occupiers regarding the land identified and accommodation that would permit them to continue earning a living by 30 April 2020.

3. The City is directed to file a report by 30 August 2021. The report must address:

3.1 The availability of properties in Region A and F. In particular, the result of the audit, procurement and refurbishment of properties in Region A it undertook to do in its report of 8 September 2020 (paragraph 182).

3.2 The availability of accommodation that will permit the occupiers to continue collecting and sorting waste.

3.3 A reasonable date of when the accommodation will be made available.

3.4 The basis on which it would not be reasonable to provide the occupiers with accommodation that permits them to continue earning a living.

3.5 The progress it has made in providing alternative accommodation to the occupiers.

3.6 The City is to provide information regarding the meaningful engagement and the availability of alternative accommodation.

4. The Executive Director or Acting Executive Director: Housing of the City of Johannesburg Municipality is requested to personally oversee and take all the necessary steps to assure compliance by the City with the orders granted in this report.

5. The City's attorney of record is directed to bring the contents of this order to the attention of the Director."

[11] The matter was postponed to 23 September 2021. Either party was, however, permitted to set the matter down on 10 days' notice in the event of non-compliance with the March Order.

[12] On 7 June 2021, BMK Attorneys, the attorneys on behalf of the City, addressed a letter to court in which it stated that the City has not been able to identify land or accommodation that will permit the occupiers to continue with their recycling business. As a result, the City advised that it was not possible for it to meaningfully engage with the occupiers on the identified land, as there was no land available. The City also indicated that it is planning to engage other stakeholders and its housing regional managers to investigate if there is any piece of land that can be made available for the occupiers.

[13] On 31 August 2021, the City filed its report ("the second report") authored by Mr Phophi. The salient features of the second report are the following;

1. There are only 78 occupiers left on the property.
2. The City was required to meaningfully engage with the occupiers regarding the land identified and accommodation that would permit the occupiers to continue with recycling. In term of the March Order this engagement should have happened by 30 April 2021. At the time when the court granted this order (on 23 March 2021), the City had not identified any land and by 30 April 2021, the situation was still the same. For this reason, it was impossible for the City to engage the occupiers on the 'identified land' or accommodation.
3. On 1 July 2021 the attorneys for the City, BMK Attorneys, had a meeting with SERI, in terms of which BMK Attorneys indicated that the City was looking at integrating the occupiers within Diepsloot informal settlement since there is no land or TEA available to accommodate the occupiers. At this stage, SERI was informed that the City had not identified any specific portion of land.

4. The City subsequently investigated whether occupiers could be integrated in the Diepsloot informal settlement. The City found that the Diepsloot informal settlement was full and the occupiers could not be integrated into that informal settlement. On 27 August 2021, BMK Attorneys addressed a letter to SERI advising them that it is impossible to move the occupiers to Diepsloot.

5. The City does not have TEA or land available in region A or around Midrand to accommodate the occupiers. Save that the unlawful occupiers have no legal entitlement to the land that permits them to reside and continue with recycling, currently the City does not have the budget or financial capacity to secure land that will permit the occupiers in this case to reside and continue with recycling.

6. It would not be reasonable for the City to provide accommodation that permits the occupiers to continue with recycling for the following reasons:

6.1 The occupiers are not legally entitled to such relief (provision of alternative accommodation that caters for both housing and recycling);

6.2 Providing accommodation that caters for recycling activities will create a bad precedent in our law and its execution will be unfeasible and financially burdening on the State. This was not the intention of the legislature and our courts in the authoritative case law.

6.3 The City does not have programmes and the budget to provide a business area for any evictees as sought by the occupiers and cannot be ordered to do so.

7. The City does not have available land and even if such land were to be made available such provision will lead to queue-jumping, as there is a long waiting

list of other evictees who are waiting for the provision of alternative accommodation from the City.

8. The applicant and the occupiers did not make any meaningful contribution except to enquire whether the City has identified land. The applicants and the occupiers have not made any good suggestions or recommendations on how the City should deal with the occupiers in the absence/unavailability of land.

[14] On 16 September 2021, a week before the matter was to be heard, the occupiers, *inter alia*, filed an application to join the office bearers responsible for the City's housing obligations and a finding of contempt against Mr Phophi, for failure to comply with paragraphs 2 and 3 of the March Order.

[15] On 21 September 2021, the occupiers launched an application for a postponement of the eviction application as a result of the City's failure to comply with the court order as well as for the joinder application to be properly ventilated. On 23 September 2021, and after hearing the parties, everyone was in agreement that the matter could not proceed. Firstly, the City made a vague offer to the occupiers to reside in Diepsloot and store their materials at a depot in Midrand, but subsequently revoked this offer. Secondly, the City has not identified any land for the relocation of the occupiers, let alone land that will accommodate and allow the occupiers to continue making a living. Consequently, if evicted now, the occupiers will be rendered homeless. Thirdly, the City has prejudged the outcome of the case and takes the view that the occupiers are not entitled to accommodation in the region where they stay nor to accommodation that would permit them to continue making a living. Fourthly, it does not appear from the City's report what process, if any, it used to identify whether there is **any** land available (emphasis added). Fifthly, despite the City's acceptance that that

it would have to undertake an inventory of its land, it has failed to undertake the necessary inventory or audit of its properties.

[16] The main application was postponed *sine die*, and the City was ordered to pay the wasted costs. The joinder application was set down for hearing on 13 October 2021.

[17] On 13 October 2021, the court heard argument in the joinder application. The City opposed the application. The City was represented by Advocate Pullinger. After hearing the parties, the court joined the Municipal Manager, the Mayor and the Executive Director of Housing ("the officials") to these proceedings as the seventy-third, seventy-fourth and seventy-fifth respondents in the Eviction Application. The court bemoaned the functionaries' objections to their joinder, and ordered the City to pay the cost of the application.

[18] Thereafter, a case management meeting was held on 15 October 2021. Amongst other things, the need to amend the March Order was discussed at length. After hearing the parties, the March order was amended. The amended order ("the October Order") read as follows:

1. The City is to meaningfully engage with the occupiers regarding the land identified and accommodation that would permit them to continue earning a living no later than 6 December 2021.

2. The City is directed to file its amplified report by 21 January 2022. The report must address:

*2.1 The availability of properties and/or land in Region A and Region F, **as well as all other properties and/or land within the City of Johannesburg's jurisdiction to be used as alternative accommodation for the unlawful occupiers.** In particular, the*

result of the audit, procurement and refurbishment of properties in Region A it undertook to do in its report of 8 September 2020 (paragraph 182).

2.2 The availability of accommodation that will permit the occupiers to continue collecting and sorting waste;

2.3 A reasonable date of when the accommodation will be made available.

2.4 The basis on which it would not be reasonable to provide the occupiers with accommodation that permits them to continue earning a living.

2.5 The progress it has made in providing alternative accommodation to the occupiers.

2.6 The City is to provide information regarding the meaning engagement of the availability of alternative availability of alternative accommodation.

3. The seventy-second to seventy-fifth respondents are directed to file a progress report to the Court on steps to be taken to comply with order 1 to 2.6 above on a monthly basis, commencing on 18 November 2021.

4. The seventy-third, seventy-fourth and seventy-fifth respondents are ordered to personally oversee and take all the necessary steps to assure compliance by the City with the orders granted. The seventy-third, seventy-fourth and seventy-fifth respondents are directed to report to the Court on the steps they have taken to comply with this court order by 21 January 2022.

5. The matter is set down for hearing on 21 March 2022 to 25 March 2022.

(Emphasis added)

[19] During the case management meeting the court reminded the parties that the March Order and October Order were not final orders. Section 26(3) of the Constitution and the PIE Act provides a number of essential procedural protections to unlawful occupiers who face evictions. Firstly, section 26(3) provides that no one may be

evicted from their home or have their home demolished without a court order authorising such an eviction after having due regard to "all the relevant circumstances". The PIE Act expands on this requirement by stating that a court may not grant an eviction order unless the eviction sought would be "just and equitable" in the circumstances. The court cannot decide what is just and equitable without being provided all the necessary information to enable it to make such decision.² The purpose of the amendment of the March Order was to place the court in a position to consider **all** available TEA options, which will include, land, properties, and accommodation, not only in Region A and F, but in the whole of the City's jurisdiction.

[20] On 18 November 2021, the City filed its progress report (the third report). Mr Phophi, the deponent of the report stated that he met with the City's legal team and the City's officials whose portfolios are impacted by the October Order on 11 November 2021. At this meeting, the attendees discussed, amongst others, the order and the way in which the City would set about to meet the requirements of the order. Pursuant to the meeting, the City's Regional Housing Heads have been instructed to identify all and **any land within existing informal settlements on City owned land** into which the occupiers may be integrated (emphasis added). The City's property management company, the JPC, has also been engaged to assist in this process. The City intends to have completed this exercise on or before 6 December 2021. It further intends to engage with the occupiers, through their attorneys, regarding the land that might be available. The City indicated that the issue of the City's available resources is being considered in conjunction with the identification of appropriate land. The

² See *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC)

identification of suitable land in an existing informal settlement will inform the question of what capital expenditure would be necessary to provide TEA to the occupiers.

[21] On 17 December 2021, there was a meeting held between the legal representatives of SERI and the City. The City, *inter alia*, stated that it was willing to tender Kya Sands, which is situated in Region C, as alternative accommodation and that SERI should allow the City to make presentation on Kya Sands in order to commence the meaningful engagement process on the 'land identified'. SERI was not happy with the City's approach on the identification of Kya Sands informal settlement and stated that it was not clear what informed the decision to identify Kya Sands. It was also emphasised that the City ought to have first conducted an audit of the available properties in Region A and F and all the regions within its jurisdiction and give clear indication on why the occupiers could not be integrated into these regions. SERI expressed its concerns about the distance of Kya Sands from recycling depots in Midrand and that Kya Sands was likely to take away the occupiers' ability to make a living. SERI further reiterated that the October Order directed the City to identify land that will permit recycling activities and that Kya Sands is most likely not to cater for such activities which will constitute a breach of the court order. It was resolved that the next meeting would be held on site, at Kya Sands with the residents and the City officials on 11 January 2022.

[22] On 11 January 2022 and 15 January 2022, the parties held two further meetings. The purpose of the first meeting was to advise SERI on the land/accommodation identified by the City namely Kya Sands informal settlement. A member of the community, Mr Mapholoba, raised a concern that the Kya Sands area was far removed from their area of work where they were able to collect high value waste and explained that when performing waste picking and refuse material resale they have formed

networks that enable them to sustainably continue making a living. He indicated that most areas have existing groups of waste pickers that would not take kindly to another group encroaching on their territory. Therefore, being relocated to Kya Sands was not conducive to the continued livelihood of the community. Another member of the community, Mr Sithole, suggested that the City could consider relocating them to certain parcels of land they had identified as vacant and suitable for their relocation within the Midrand area and near their waste reclaiming and sorting site. The City, in response, accepted the suggestion and advised that the City would make its legal representatives available to go and conduct a viewing of the identified parcels of land together with the occupiers' legal representatives (SERI).

[23] On the second meeting (15 January 2022) the City confirmed that it had gone to view the parcels of land identified by the occupiers and had returned to report back to the occupiers on the outcome of its preliminary assessment. The identified parcels of land were privately owned and, as such, the City would have to follow the process prescribed by the Spatial Planning and Land Use Management Act 16 of 2013, the Water Services Act 108 of 1997, and the Land Survey Act 8 of 1997, among others. The timeline for this process, is outlined by the 2017 Project Process Guide for Human Settlement Projects, and could span a minimum of three years, and subsequent processes would take up to five years as well as awaiting the approval of the budget to effect the acquisition of either of the land identified, relocate the occupiers, as well as develop the land. The process timeline is, however, not limited only to the estimated five years and could take much longer. The City suggested that it may be necessary to meet again in order for everyone to go view the proposed area of relocation, which is Kya Sands. 19 January 2022 or 20 January 2022 was proposed as possible dates to view the available property in Kya Sands.

[24] On 14 February 2022, the City filed a further report (the fourth report). The salient facts from the report were the following:

1. The City, assisted by the JPC, had conducted an audit of land owned by it in Region A. In conducting the aforesaid audit, the Department of Housing Asset Register was scrutinised by members of the City's Housing Department. There are diverse properties ranging from buildings to undeveloped land. The collaborative effort undertaken by JPC and the City's Housing Department revealed that the pockets of land owned by the City in Region A have either been invaded by other unlawful occupiers who have established informal settlements thereon, or are not habitable by virtue of geological conditions being, predominantly, wetlands. The City does not have land available in Region A for the relocation of the occupiers.
2. The City's investigation revealed that none of the parcels of land identified by the occupiers as vacant and suitable for their relocation is owned by the City. The occupiers were informed that the process of acquiring land could potentially be long and onerous and involves adherence to several government policies and legislation.
3. The City has identified the Kya Sands Informal Settlement as suitable land for providing accommodation to the occupiers. Kya Sands is a recognized informal settlement and was established in 2004. It is approximately 25km from Johannesburg CBD and approximately 32km from where the occupiers currently reside. The City's strategy for Kya Sands is the redevelopment of the site into an integrated residential development comprising of a mix of low-density residential units.

4. The City anticipates that it will take a period of 1 year to negotiate with the community members, community leaders and various other stakeholders as well as to erect structures and to install the services.

5. A site inspection of Kya Sands did not take place because the Ward Councillor was not available. The City was hopeful that a further date for the inspection will be arranged and that the parties would continue to engage meaningfully with each other.

6. The demand for TEA in the City's area of jurisdiction is large and there is a large number of unlawful occupiers who face eviction and possible homelessness. The City currently does not have any TEA facilities in its area of jurisdiction available to accommodate the occupiers.

[25] The occupiers responded to the report by filing a supplementary affidavit on 8 March 2022. The occupiers stated that they have identified at least 4 pieces of land owned by the City within Region A. Relocation to any of these sites would enable the occupiers to continue to earn a living. Two of the four of these sites are vacant, and one is occupied by an existing reclaimer community who have indicated their willingness to welcome the occupiers. They are all members of the African Reclaimers' Organisation. The occupiers were unable to check all the City owned properties in the region but they suspect that there could be more. The occupiers stated that it was not clear why these did not appear on the City's search. It is contended that the City's conclusion that it owns no land and/or properties in Region A that is suitable, means one of two things: Either the City did, in fact, not undertake an audit of properties (as it has stated repeatedly during meaningful negotiation) or the City did undertake the audit and excluded properties unilaterally and unreasonably. Either way, the occupiers

do not believe the City has played open cards with the properties it does own in Region A. The occupiers contended that the relocation to Kya Sands cannot practically be implemented, as Kya Sands is, according to the City, situated on private land. The City cannot therefore tender it as accommodation to the occupiers. In addition, the process used to identify Kya Sands is at odds with the process mandated by the court orders. The City did not investigate a broad range of options, and the City's proposal does not permit the occupiers to carry on their business activities.

[26] The occupiers submitted that the City, from the outset, in conflict with the court order, limited the properties it would consider as TEA to informal settlements. The occupiers noted their objection in writing to the City in a letter of 1 December 2021. The letter stated that the City's decision to limit meaningful engagement to informal settlements is a breach of the October Order. In addition, the decision to limit engagements to informal settlements undermines the entire meaningful engagement process. In addition, the City has not once during the engagement undertaken to do the audit. There has been a consistent unwillingness by the City to conduct an audit despite several pleas by the occupiers' representatives that this must be undertaken. The City has stated that an informal settlement is probably where "the occupiers will end up". It is submitted that the sense is that the City would not seriously consider or investigate anything else. The City has therefore not played open cards with the court or the occupiers on which properties were identified and why they were excluded. The City pleaded a subjective conclusion rather than to provide the court with the necessary information.

[27] In the affidavit the occupiers also referred the court to paragraph 4 of the October order that ordered officials that were joined to personally oversee and take all the necessary steps to assure compliance by the City with the orders granted. They were

also directed to report to the court on the steps they have taken to comply with this court order by 21 January 2021.

[28] It was subsequently discovered by the occupiers that there was, in fact, no audit that had been undertaken of the properties in Region A. Mr Tshepo Makataka states in an email dated 14 March 2022, *“that the properties have not been audited”*. Mr Phophi’s statement that a land audit had been undertaken and that none of the properties were suitable, is therefore untrue.

[29] As stated earlier, the main application was set down for the week of 22 March to 25 March 2022. On the day of the hearing the City applied for a postponement of the matter for a period of 21 days. No substantive application had been launched and the application for postponement was brought from the bar. The City was represented by Advocate Mokutu SC (the third counsel on record for the City at the time). The reasons for the postponement were set out in the heads of argument of the City and can be summarized as follows:

1. The City has not complied with the court order and the matter cannot be finalized before the City has not furnished the necessary information to the court.
2. The City has also appointed new counsel in the matter, which has not had the opportunity to familiarize himself with all of the papers that have been filed in the matter and seeks an opportunity to do so.
3. Counsel has brought it under the attention of his client (the City) that the City is failing in its duties as an organ of the State and that it should comply with the order.

4. As a result, a committee (a task team) has been established to give effect to the order.

[30] The application for postponement was, in principle, not opposed. The applicant as well as the occupiers agreed that the City had not complied with the court order and that the court had not been placed in possession of all the information it sought when the matter was postponed in October 2021. Because the postponement sought was only for a short period of time, this court granted the postponement. The question was what was the court to do with a recalcitrant municipality? A municipality that has stubbornly refused to give effect to any of the previous orders of this court? It was my view that the only option available to the court was to find the City in contempt of the October Order and to possibly hold the responsible functionaries liable.

[31] At the time it was, however, common cause that two of the functionaries, the Mayor as well as the City Manager had been replaced following the outcome of the Local Municipal Elections held during October 2021. The only functionary that could therefore be ordered to give reasons why he, in his personal capacity, should not be held in contempt was the City Manager, the 75th respondent Mr Patrick Phophi. As a result, the following order was made:

1. *The matter is postponed to 13 May 2022 at 9:00.*
2. *It is declared that the City of Johannesburg Metropolitan Municipality is in contempt of the 26 October 2021 order.*
3. *The sentencing of the City of Johannesburg Metropolitan Municipality is suspended on condition that City of Johannesburg Metropolitan Municipality complies with the 26 October 2021 order and files its further amplified report on or before 22 April 2022.*

4. *The City of Johannesburg Metropolitan Municipality in its further amplified report, must include a list of all the waste disposal sites in its jurisdiction and must also indicate in which region such waste disposal sites are located.*
5. *Mr Jolidee Matongo, the 73rd respondent, is hereby substituted with Ms Mpho Phalatse, who is hereby joined as the 73rd Respondent.*
6. *Mr Ndivhoniswani Lukhwareni, the 74th Respondent, is hereby substituted with Mr Floyd Brink, who is hereby joined as the 74th Respondent.*
7. *The 75th Respondent, Mr Patrick Phophi, is ordered to file an affidavit and furnish reasons why he should not be held in contempt of the 26 October 2021 order in his personal capacity, on or before 22 April 2022.*
8. *The City of Johannesburg Metropolitan Municipality must furnish the court with a list of all properties it owns on or before 24 March 2022 at 12:00.*
9. *In the event that the City of Johannesburg Metropolitan Municipality fails to comply with the order made in 8 above, the 73rd to 75th Respondents are ordered to appear before this court on 25 March 2022 at 10:00 to provide reasons for its non-compliance.*
10. *The Applicant, the 1st — 71st Respondents and the Amicus Curiae are directed to file affidavits in response to the City of Johannesburg Metropolitan Municipality's further amplified report by 9 May 2022.*
11. *The parties are directed to file supplementary heads of argument by 11 May 2022.*
12. *The City of Johannesburg Metropolitan Municipality is directed to pay the wasted costs occasioned by the postponement on an attorney and client scale, which includes the costs of the employment of two counsel, one of which is senior counsel, for the days of 22, 23, 24 and 25 March 2022.*

[32] On 24 March 2022 the City sent a letter to the court. I was informed that the City, despite its undertaking to do so on 21 March, would not be able to provide the list. The reason given was that the list of properties rests with the JPC, which is a juristic person and, in law, has been incorporated as such in terms of the Companies Law of the

Republic of South Africa. I was informed that the JPC has, notwithstanding, the City's repeated requests to do so, refused to make the said list available to the City. I was further informed that although the City is the sole-shareholder of JPC, JPC has its own board of directors who exercises independence insofar as the affairs of the JPC are concerned and, as a matter of law, the shareholder (the City) cannot dictate to the board of directors (of JPC) on how the affairs of the company should be run, more so as the JPC was not cited in the eviction proceedings at hand. The letter further stated that the JPC has requested an opportunity to address the court on 25 March 2022 and to explain that it should have been cited as a respondent since it is a matter of law and public knowledge that it (the JPC) manages and develops the City's properties on behalf of the latter.

[33] As a result, and in compliance with paragraph 9 of the order, the officials were ordered to appear before the court on 25 March 2022 to provide reasons for its non-compliance. Mr Phophi, the 76th respondent was present as well as a representative of JPC, Mr Hleza, who is the JPC's General Manager Legal Services. Both testified under oath.

[34] After hearing the parties, the court *mero moto* joined the JPC as the 76th respondent. In addition, the court suspended paragraph 8 of the order of 22 March 2022, (ordering the City to provide the list) pending the filing of an affidavit by the JPC in opposition to providing the list. The court further ordered that the affidavit had to set out the reasons why the list of all the properties owned by the City should not be provided to the applicant and the occupiers' legal representatives with the necessary confidentiality safeguards. The determination of this issue was set down for hearing on 14 April 2022. The JPC was ordered to provide a list of all the properties owned by

the City, to the City by 25 March 2022 on or before 16:00 to enable the City to finalise its further amplified report (due on 22 April 2022)

[35] On 14 April 2022, the court heard argument on whether the list should be made available to the occupiers and the applicant. The main objection against providing the list was that the occupiers were not entitled to a list in terms of section 26 of the Constitution and if the list becomes public it will lead to a surge of land invasions motivated by the knowledge that the City owns these properties. The JPC, in the alternative, contended that if the list must be provided, it should be done subject to certain safeguards. After hearing the argument, the court reserved judgment on this issue for mainly two reasons: One, the list has now been provided to the City who will now deal with the list in its amplified report, and two, the City will file its amplified report in the next seven days. Therefore, in light of the concerns raised by the JPC, it was my view that the City should first be given the opportunity to play open cards with the court and the other parties and sufficiently deal with the list in its report, before a decision is made to provide the list to the other parties. It was clear to everyone that if the City sufficiently deals with the list in its amplified report it would not be necessary for the list to be made available to all the parties. To make sure that the City complies, I ordered that the list be made available to the court to enable me to ascertain whether the City dealt with the list sufficiently so in its report.

[36] The City filed its report on 22 April 2022 (the fifth report). It did not sufficiently deal with the list (which contains approximately 28 000 properties), but only identified one property that was available for TEA, namely Portion 46, Houtkoppen.³ It further failed

³ The property is no longer available.

to comply with paragraph 3 of the order dated 14 April 2022, namely that the City must comply with the October Order.

[37] As a result, the court ordered the JPC on 26 April 2022 to furnish the legal representatives of the occupiers and the applicant with the list of properties it owns, within 48 hours, under very strict conditions. It was ordered that the list will remain sealed and will not form part of the public court file and should be used solely for the purpose of these proceedings as a confidential document.

THE REASONS

[38] As stated in the beginning, aside from the legal principles at play, the facts of this matter informed the decision of this court in ordering the JPC to provide the list. Factually, the provision of the list was ordered to move the matter forward, because the matter has been stalled for four years. In my view, the deadlock is caused by the City's repeated failures to comply with the court orders and to identify TEA for the occupiers.

[39] The court's hands are therefore tied until the City has complied with the court orders and identify land in accordance with the court orders. Several steps have already been taken by this court to ensure that the matter proceeds: case management, joinder of the functionaries, supervisory orders, interdicts, engagements with the officials directly, contempt and costs orders. Despite these steps, more than a year later, the City has not identified TEA for the occupiers.

[40] The JPC's opposition to the provision of the list was premised on two contentions: One, the occupiers are not entitled to the list in terms of section 26 of the Constitution, and two, in the alternative, *"should this court not be inclined to evict the unlawful occupiers and to order them to be relocated to the land and/or accommodation which*

has already been made available to them, that the court provide limited access to the list”.

[41] In its opposition to provide the list, the JPC, firstly, ignores the factual matrix of the matter. The City has not complied with the court orders and has not identified land in accordance with the court orders. This much was conceded by the City on 21 March 2022. In fact, the court was informed that a special task team has now been appointed to give effect to this court's orders. It is not the occupiers that are refusing to accept TEA, it is the City that has not as yet, identified any suitable land.

[42] Secondly, in terms of section 172(1)(b) of the Constitution, it is within a court's power, when deciding a constitutional matter to may make any order that is just and equitable. The Constitutional Court (“CC”) in *Pheko and Others v Ekurhuleni Metropolitan Municipality*,⁴ referred with approval to *Fose v Minister of Safety and Security*⁵ where it was held:

*“(a)ppropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, **the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights.**”* (Emphasis added).

[43] In *Port Elizabeth Municipality v Various Occupiers*,⁶ the CC stated that “*the procedural and substantive aspects of justice cannot always be separated*” and that

⁴ 2012 (2) SA 598 (CC).

⁵ 1997 (3) SA 786 (CC).

⁶ 2005 (1) SA 217 (CC) at [39].

court, in exercising their managerial functions to ensure just and equitable evictions courts may have to be more "innovative" in sculpting their remedies.

[44] In *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Other*⁷ the CC said, that although the Constitution does not guarantee a person a right to housing at government expense at the locality of his or her choice, in deciding on the locality, the government must have regard to the relationship between the location of residents and their places of employment. The City was under an obligation to show it had considered the particular circumstances of the occupiers in identifying land. The City has not done so. It has pleaded its general policies and programmes and not anything in particular to these occupiers. The City's report indicates that it has unilaterally determined that the occupiers' need to continue to earn a living, is not a relevant consideration. This is despite the fact that there is a court order (to which the City consented to) that ordered the City to do so. In *Schubart Park*,⁸ the conditional tender made by the City of Tshwane, in terms of which residents who met certain criteria and agreed to certain terms, were offered temporary accommodation, was held to form an inadequate basis for proper engagement. Specifically, the CC criticised the "top-down" premise from which the City proceeded, in terms of which the City had unilaterally pre-determined all the conditions.

[45] The City is unilaterally imposing conditions of alternative accommodation which ignores its duty entirely. The City's refusal to even **consider** if it is possible to house people in a manner that does not increase their financial dependency on the state, is unreasonable.

⁷ 2010 (3) SA 454 (CC) at [254].

⁸ 2013 (1) SA 323 (CC).

[46] This court has ordered, on three occasions, that the City must identify land that permits the occupiers to continue to earn a living. After the first of these rulings the City mentioned the informal settlement of Diepsloot. The occupiers' representatives asked the City which exact piece of land the City had in mind for the occupiers. The City did not identify the exact piece of land, and when pressed further by SERI, the City unilaterally withdrew the offer to relocate the occupiers to the informal settlement. This tender was done before establishing if there was, in fact, land available to accommodate the occupiers. The City could not provide any specific piece of land because it had not established whether there was, in fact, land available in Diepsloot. When pressed to identify a piece of land, the City conceded that there was no land available to accommodate the occupiers. Consequently, when the matter came before court in October 2021, the City had not identified a piece of land at all.

[47] The court again, on 23 October 2021, ordered the City to identify land and accommodation that will permit the occupiers to continue to earn a living. The City in the engagement meeting of 2 December 2021 indicated that "*the City will tender Kya Sands informal settlement, located in Region C of the City of Johannesburg as an area where the unlawful occupiers will be integrated or located to*". During none of the five subsequent meetings did the City give the occupiers any sense of which area of land it was proposing to the occupiers as TEA. No site. No stand number. No actual land identified at all. The occupiers repeatedly indicated their willingness to look at the proposed land. However, the City's ward councillor was not available to show the occupiers the proposed piece of land. Therefore, at present no land has been identified by the City.

[48] In *Port Elizabeth*, the CC stated that an effective method of obtaining reconciliation between parties in a dispute would be to "*encourage and require the parties to engage*

with each other in a proactive and honest endeavour to find mutually acceptable solutions". It is clear from the City's report, that the City, in conflict with the court orders, limited the properties it would consider to informal settlements. The occupiers noted their objection in writing to the City in a letter of 1 December 2021. The letter stated that the City's decision to limit meaningful engagement to informal settlements is a breach of the court order of 29 October 2021. In addition, the decision to limit engagements to informal settlements undermines the entire meaningful engagement process. Then, instead of engaging with the occupiers, at the meeting of 2 December 2021, the occupiers were informed of the City's unilateral decision to move the occupiers to an unidentified piece of land in Kaya Sands.

[49] The City's stance that it is not required to consult with the occupiers in the process of identifying land evinces a failure to appropriately consider the nature, scope and purpose of the element of "meaningful engagement" ordered by this court. In *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others*⁹, the CC held that:

"Engagement is a two-way process in which the City and those about to become homeless would talk to each other meaningfully in order to achieve certain objectives. There is no closed list of the objectives of engagement. Some of the objectives of engagement in the context of a city wishing to evict people who might be rendered homeless consequent upon the eviction would be to determine— (a) what the consequences of the eviction might be; (b) whether the city could help in alleviating those dire consequences; (c) whether it was possible to render the buildings concerned relatively safe and conducive

⁹ 2008 (3) SA 208 (CC) at [14].

to health for an interim period; (d) whether the city had any obligations to the occupiers in the prevailing circumstances; and (e) when and how the city could or would fulfil these obligations."

[50] In line with the principles set out in *Olivia Road*, "meaningful engagement" requires all parties to *"talk and listen to each other, and try to understand each other's perspectives, so that they can achieve a particular goal"*. To this effect it is crucial that a meaningful engagement process is "well structured, coordinated, consistent and comprehensive and not be misleading", and must "enable individuals or communities to be treated as partners in the decision-making process".

[51] The City's approach to the identification of land falls short of the requirements of openness and reasonableness at the core of the purpose of meaningful engagement. The City has failed time and again to place the relevant facts before the court. It still does not provide this court with adequate information about: what the identification process entailed, how many other regions exist within the area of jurisdiction of the City that were considered and how many were not considered, and why some regions rather than others were considered. Overall, it fails to communicate and justify why the suggested place of relocation is appropriate and/or more appropriate than the other places that were considered. Ultimately, the court is left without a full picture. As a result, this court is prejudiced because the report as it currently stands, lacks the detail required by its order, and prevents it from evaluating whether, and the circumstances under which, granting an eviction order would be just and equitable in all relevant circumstances.

[52] In ensuring that it is sufficiently informed, a court may insist on being provided with more information. In fact, if the evidence presented before a court fails to address

crucial issues, courts may have to go beyond the evidence and find innovative ways of obtaining the information necessary "to enable it to *have regard* to relevant circumstances".¹⁰ Courts are therefore empowered to compel municipalities to provide certain information in relation to alternative accommodation and their ability to provide it to occupiers who need it.

[53] As stated repeatedly, the City had not been complying with the court orders and failed to meaningfully engage with the occupiers. It is therefore not surprising that the occupiers, in an attempt to assist and presumably out of sheer desperation, did a desktop analysis using the City's Corporate Geo-Informatics, which is available on the City's website. They identified eight properties in Region A through this process followed by an on-site visit. According to the occupiers there are at least four properties owned by the City in Region A. Three of the properties were visited by SERI. One of the eight identified properties has reclaimers living on the property already and would welcome the occupiers as, they are all members of a reclaimers organisation.

[54] It is clear from all the facts set out above, that there is a need for the City to play open cards with the parties and address the issue of the availability of land. The City, on numerous occasions indicated the need to conduct an audit of its properties. It has not done so. The City agreed to an order to provide the list. It then reneged on its promise. It is unlawful for the City to outsource its core functions to a company and then hide behind the company when it does not meet its obligations. It creates a constitutional crisis where this is permitted.

¹⁰ *Port Elizabeth Municipality* supra at [32].

In any event, the JPC's spokesperson, Mr Hleza, who testified before court under oath, agreed that the proposal by the applicant (that the list be given to the parties with the necessary safeguards) would be sufficient.

[55] The City was given a chance to deal with the list in its latest report and take the court into its confidence. Except from stating that some properties were not available and that one should be considered, the City has failed to meaningfully deal with the JPC list in the report. Moreover, the City has still not complied with October Order in its latest report. The stance taken by the City in this matter, is prejudicing the applicant and the occupiers. It is inconceivable that, since 23 March 2021, this court is still hamstrung by the City in finalizing the application

[56] The order against the JPC provided the necessary safeguards in order to alleviate the JPC's concerns. In the spirit of meaningful engagement, the parties might consider applying for an amendment of the order to accommodate each other, if it would assist in the finalization of this matter.



L. WINDELL
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

(Electronically submitted therefore unsigned)

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines.

APPEARANCES

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Instructed by:	Socio-Economic Rights Institute of South Africa
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Counsel for the 76 th respondent:	Advocate J. Langa
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Counsel for the <i>amicus curiae</i> :	Advocate M. Marongo
Instructed by:	Lawyers for Human Rights
Date of order:	26 April 2022
Date of written reasons:	5 June 2022.