



IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case no: 1290/2023

In the matter between:

**THE MINISTER OF THE DEPARTMENT OF
AGRICULTURE, LAND REFORM AND
RURAL DEVELOPMENT**

First Applicant

THE MANGAUNG LOCAL MUNICIPALITY

Second Applicant

KGOSI GABOILELWE MOROKA N.O.

Third Applicant

and

MOUNTAIN VIEW COMMUNITY – THABA ‘NCHU

First Respondent

ALL UNLAWFUL OCCUPIERS

Second Respondent

CORAM: **P R CRONJÉ, AJ**

HEARD ON: **8 MAY 2023**

DELIVERED ON: 12 JUNE 2023

JUDGMENT BY: P R CRONJÉ, AJ

This judgment was handed down electronically by circulation to the parties' representatives by email, and release to SAFLII. The date and time for hand-down is deemed to be 15h00 on 12 June 2023.

I INTRODUCTION

- [1] The Applicants launched an urgent application under the Prevention of Illegal Occupation and Unlawful Occupation of Land Act 19 of 1998 (PIE), for eviction of approximately 1500 Respondents from Portion 14 of the farm Thaba 'Nchu Townlands "A" No. 605, Thaba 'Nchu RD; the Remainder of the farm Thaba 'Nchu 404, Thaba 'Nchu RD; and the farm Dubbeldam no. 688, Thaba 'Nchu RD.
- [2] Only Mr Moticoe, also known as Mr Wiseman (Mr Wiseman), one of the Respondents, deposed to an answering affidavit. He notionally represents the balance of the respondents. None of the other respondents deposed to affidavits, either to place their personal circumstances before Court or to confirm the allegations in the opposing affidavit.
- [3] Mr Wiseman sees his role as to assist and regularize the occupation and have it sanctioned by the Applicants.¹ He states: "*I encourage the people who opted into those negotiations to indicate by joining the community and erecting their structures.*"²

¹ Pleadings, page 219, para 53

² Pleadings, page 219, para 55

- [4] I requested supplementary heads which was received on 24 and 31 May respectively.

II THE PARTIES

- [5] The First Applicant is the Department of Agriculture, Land Reform and Rural Development ("the Department"). The Department claims to be the lawful custodian of the properties.
- [6] The Second Respondent is the municipality in whose jurisdiction the land falls.
- [7] The Third Applicant acts in her capacity as regent of the Barolong Boo Seleka traditional community, a tribe recognised as such under the Free State Traditional Leadership and Governance Act, 8 of 2005. She acts as the custodian of the communal land described as Remainder of the farm Thaba 'Nchu 404, Thaba 'Nchu RD and the farm Dubbeldam no. 688, Thaba 'Nchu. The properties were allocated to her by the MEC responsible for Corporate Governance, Traditional Affairs and Human Settlements.

III THE APPLICATION TO COURT – URGENCY AND COMPLIANCE WITH THE PREVENTION OF ILLEGAL EVICTION AND UNLAWFUL OCCUPATION ACT (PIE)

- [8] The Respondents took issue with the urgent basis on which the application was brought. It was issued on 14 March 2023 and would be moved on 31 March 2023. Condonation was sought for non-compliance with service and timeframes.
- [9] The application came fore the Court on urgency on 31 March 2023 and was removed from the roll. The Court ordered that costs stand over for later adjudication.

- [10] A list pertaining to service of the application forms part of the record. On 15 March 2023, twenty five (25) Respondents were served, on 16 March 2023, thirteen (13) Respondents and on 17 March 2023, “*service was effected inside the shacks*”.³ There is no indication that the balance of the Respondents obtained personal notice of the application.
- [11] Disposal of the application on this basis would be the easy way out, but would not address the legitimate interests of all parties to the litigation.
- [12] The Respondents initially objected to the section in PIE under which the application was brought but during argument abandoned the objection.
- [13] Considering the period of engagement between the parties since August 2022, and the clear indication that the Respondents would not accede to the request to vacate the land, there does not appear any compelling reason for the application to have been brought on an urgent basis.
- [14] The application was thus not urgent and the Applicants should pay the costs of the postponement of on 31 March 2023.

IV THE LAND

- [15] During 2012, the Department identified Portion 40 of the farm Thaba ‘Nchu no. 404 to be donated to the municipality for purposes of human settlement development. The Minister approved the donation for housing purposes. The land has not yet been registered in the name of the municipality.
- [16] After town-planning processes were conducted, the municipality developed Portion 40 and as a result thereof Moroka Extension 40, Thaba ‘Nchu, was established.

³ Pleadings, page 162

- [17] On 24 May 2013, the boundaries of the traditional council of Morolong Boo Seleka was published in the Provincial Gazette⁴. The land is kept in custody by the Council.

V PROTECTION AGAINST ILLEGAL EVICTION, THE RIGHT TO PROPERTY AND LIMITATION OF RIGHTS - THE CONSTITUTION OF SOUTH AFRICA, 108 of 1996

- [18] Section 25 provides that no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property. The State must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.
- [19] Section 26 protects the right to have access to adequate housing and obliges the State to take reasonable legislative and other measures within its available resources, to achieve the progressive realization of the right.
- [20] Section 36 provides that the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.

VI THE HOUSING ACT, 107 of 1997

- [21] The principle instruments enacted to give effect to the constitutional obligations is the Housing Act and the National Housing Code.
- [22] The Housing Act provides for a comprehensive framework in terms of which, *inter alia*, the progressive realization of provision of housing is to be effected:

⁴ Pleadings page 128

“9. Functions of municipalities.—(1) Every municipality must, as part of the municipality’s process of integrated development planning, take all reasonable and necessary steps within the framework of national and provincial housing legislation and policy to—

(a) ensure that—

- (i) the inhabitants of its area of jurisdiction have access to adequate housing on a progressive basis;*
- (ii) conditions not conducive to the health and safety of the inhabitants of its area of jurisdiction are prevented or removed;*
- (iii) services in respect of water, sanitation, electricity, roads, storm-water drainage and transport are provided in a manner which is economically efficient;*

(b) set housing delivery goals in respect of its area of jurisdiction;

(c) identify and designate land for housing development;

(d) create and maintain a public environment conducive to housing development which is financially and socially viable;

(e) promote the resolution of conflicts arising in the housing development process;

(f) initiate, plan, co-ordinate, facilitate, promote and enable appropriate housing development in its area of jurisdiction;

(g) provide bulk engineering services, and revenue generating services in so far as such services are not provided by specialist utility suppliers; and

(h) plan and manage land use and development.

VII THE HOUSING CODE

[23] It contains, *inter alia*, the Integrated Residential Development Programme (IRDP) that provides for a phased approach to provide for:

- “a) Land acquisition where required;*
- b) Township planning and municipal engineering services design;*
- c) The provision of municipal engineering services to all the stands where no alternative funds are available;*
- d) Township establishment;*
- e) The sale of the stands not identified for subsidised housing created in the township; and*

- f) *The construction of houses by registered contractors for housing subsidy beneficiaries who chose contractor built houses. This can be achieved through a variety of contracting options.*

Where the need has been identified for the construction of rental housing on the stands created through the IRDP and or where beneficiaries elect to construct their own houses through the People's Housing Process, the rules applicable to those specific programmes will apply to projects to be undertaken in the township."

VIII THE NATIONAL HOUSING NEEDS REGISTER

- [24] The concerns about the reliability of waiting lists were addressed in a press release⁵ by the Department of Human Settlements of Mpumalanga. I accept that the sentiments therein and the application can be applied to all provinces. It states:

"The ever increasing housing backlog and demand in the country has resulted in many challenges, amongst them a need in ensuring that there is a fair and transparent allocation of housing opportunities to communities. In consultation with all provinces, the National Department of Human Settlements created an electronic system to register the records of all persons who require any form of shelter / housing opportunity assistance. This comes about after many complaints on the identification of potential beneficiaries by municipalities. There were no structured waiting lists and allocations/identification of potential beneficiaries were left in the hands of individuals. This has led to complaints of nepotism and queue jumping. "The National Housing Needs Register (NHNR) is a web based application to record the details of all persons that may require any form of shelter assistance from government i.e. RDP houses, serviced sites, rental units, FLISP and even those outside the subsidy threshold. This system is designed to be transparent and auditable", ..., In terms of a policy directive, the NHNR is the sole database from which potential beneficiaries will be sourced, and the roles of the various role players are clearly spelt out therein. "The Department encourages all persons who may require any form of shelter assistance to register their needs with their local municipality. Also if persons have already

⁵ 7 March 2022 - (mpg.gov.za). A document by the Free State Department of Human Settlements can be found at <https://www.humansettlements.fs.gov.za/wp-content/uploads/2019/05>. It does not contain a full exposition.

registered their needs, and their details/ circumstances have changed they need to update their details at their local municipality”.

IX LOCAL GOVERNMENT: MUNICIPAL SYSTEMS ACT, 117 OF 1998

- [25] Section 19 of the Systems Act places an obligation on Municipalities to undertake developmentally orientated planning in order to ensure that they achieve the objects of local government in Section 152 of the Constitution, to give effect to their developmental duties in Section 153 of the Constitution and together with other organs of state to contribute to the progressive realization of fundamental rights contained in sections 25 and 26 of the Constitution. The challenges in addressing these needs were referred to in *Soobramoney v Minister of Health (Kwazulu-Natal)*⁶ as far back as 1997.

X THE ALLOCATION OF RESIDENTIAL LAND

- [26] After the municipality demarcates land for residential purposes, it avails the land to the Provincial Human Settlement Department for the building of houses. The municipality thereafter allocates the houses. In identifying beneficiaries who qualify, the municipality uses a waiting list on the municipality's National Housing Needs Register (“NHNR”). Sites are allocated on a first come, first serve basis.
- [27] The NHNR is a central database that offers households the opportunity to register their needs for adequate shelter by providing information about their current living conditions, household composition and to indicate the type of housing assistance they require. Households are able to update their information to ensure that their details are relevant to their current situation.

⁶ (CCT32/97) [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (27 November 1997)

- [28] An extract of the National Housing Needs Register was appended to the founding affidavit.⁷ The purpose of the register is stated to be a consolidation of various waiting lists/demand data basis contained from municipalities and Provincial Departments to improve the quality of the records received and to determine if these records adhere to the minimum requirements; that households not on waiting lists/demand data basis have the opportunity to register their need for adequate shelter, by providing information about their current living conditions, household composition and to indicate the type of housing assistance they require from Government; that the allocation of housing opportunities that are created through the various programs contained in the National Housing Code is done in a fair, transparent and auditable manner by selecting households from relevant geographical areas based on the agreed criteria eg, preference, employment and income status, etc. and; information about households are utilized during the planning and budgeting of human settlement projects as the information per household is area-based.⁸
- [29] By using the NHNR system, the municipality ensures that the allocation of housing opportunities that are created through the various programs contained in the National Housing Code is done in a fair, transparent and auditable manner.
- [30] Applicants are categorized as per their needs from the low, middle to high costs and rental units.

XI THE NATURE OF THE LAND IN QUESTION

- [31] A preliminary geotechnical assessment for Portion 14 of the farm Thaba 'Nchu was prepared and published on 17 February 2023.⁹ In the summary and recommendations it is stated that in order to determine the feasibility of

⁷ Pleadings, page 146

⁸ Pleadings, page 148

⁹ Pleadings, page 106

the project area for human settlement and possible future construction activities, a detailed site specific geotechnical investigation will have to be undertaken.¹⁰

XII THE APPLICANTS' CASE

- [32] The Applicants state that there are illegal immigrants between the occupiers who *inter alia* use the land as hideout whilst continuing with their illegal activities¹¹, some persons took more than one site for purpose of selling same, that the area is designated for tourism, that the occupiers must return to their original homes and follow the orderly process that government uses.
- [33] The land that the respondents invaded is land that has heritage sites, including a wetland that will be preserved for environmental purposes for the public at large in terms of the National Environmental Management Act, 107 of 1998.
- [34] The respondents are infringing the right to equality of other citizens as those who are legitimately entitled to the land are denied their right.
- [35] By occupying the land, the respondents are hampering the municipality's mandate to provide basic services to the public.
- [36] It states that when the application was drafted, there were "*no elderly people and children seen throughout all the engagement with the Respondents*". The rights of elderly people will not be infringed if eviction is ordered. The Respondents were in occupation for less than six months when the application was drawn.¹²

¹⁰ Pleadings, page 119, para 5

¹¹ The Immigration Act, 13 of 2002 provides remedies

¹² The founding affidavit was signed on 3 March 2023 and the application issued on 14 March 2023

- [37] More people are moving onto the land and other residents who lawfully reside in the vicinity are willing to take the matter into their own hands if the Department fails to take steps.

Engagement between the role players – August 2022

- [38] On 31 August 2022, the municipality called a meeting with persons who have been allocated sites in Moroka Extension 40. The purpose was to inform and introduce the persons to Eskom's contractors who would electrify the houses in the extension. It is the Applicants' version that the meeting was gate-crushed by other members of the community who include the First and Second Respondents. Members of the community demanded that they also be given houses and if not acceded to, they would allocate the land that were allocated to the Third Respondent and that around Moroka Extension 40 to themselves.
- [39] Mr Mojake, the Acting General Manager: Informal Settlement and Beneficiary Management, addressed the community and informed them that the land does not belong to the municipality but to the Department and that the municipality is unable to develop the land for the community. They were informed that part of the land that was targeted by the community was not demarcated for residential occupation. Town-planning has to take place and the waiting list on the NHNR system is used.
- [40] Those dissatisfied were encouraged to approach the municipality's offices and register on the system. The municipality would not be able to provide services should unlawful occupation take place. Registering on the NHNR will assist in preventing corruption and jumping of queues. They were advised that persons who invade the land will be putting their lives and properties at risk.
- [41] The attendees raised various issues regarding the allocation of sites. Officials from the Human Settlements Department or Councillors were suspected of manipulating the waiting lists. It was stated that a new program was

introduced by the Department, which is controlled nationally although capturing of the persons still takes place at the municipality.¹³

- [42] Twenty five (25) persons' names appear on the list for Moroka Extension 40.¹⁴ In a letter dated 1 February 2023, it is stated that a combined number of 193 sites were allocated in Moroka Extension 40 for the years 2018 to 2022.¹⁵

Engagement between the role players – January 2023

- [43] On 16 January 2023, a meeting was held by the Third Respondent to establish first-hand what the current developments of illegal occupation are in order to make a proper assessment and take decisions. Mr Wiseman stated that he is the leader of the illegal occupants in the area that they now named Mountain View. He was initially an ordinary illegal occupant but when challenges emerged, he assumed leadership responsibilities for the occupiers. The biggest problem was the ever-increasing number of illegal occupants that are now approaching the foot of the mountain. He condemned people who were taking monies from people for the sites. He admitted that there were problems that they did not anticipate. The Third Respondent conveyed that there was no way that the occupation could be left alone and that the area was meant to be a tourist attraction for the benefit of the community. The request for illegal occupation would not be acceded to and the illegal occupants were requested to return to their original homes.
- [44] In a communique under the hand of Mr Wiseman on behalf of the unlawful occupiers it was *inter alia* noted:

“1. The reason advanced for vacating the property was stated to be that the area was not safe/habitable for human life but the committee found it “funny” that there were other buildings and that this was not a problem for them.

¹³ Pleadings, page 112

¹⁴ Pleadings, page 100

¹⁵ Pleadings, page 93

2. *The concerns about the type of soil and a number of other issues, according to the committee, did not hold any water as to why they should move.*
3. *There were no promises of alternative land, should the occupiers vacate. The Council was willing to consider other options.*
4. *The Council had to deliberate and would revert to the occupiers.*
5. *Minutes and documents from the meeting would be provided.”*

[45] The communique continued:

“The committee therefore plead with all members, to stop panicking and listening to any other news or rumours. Let us remain resolute and united. Let us not fight amongst ourselves. Together we will win. Let’s keep a united front. For now, the committee assure you that all plans remain the same. Asijiki! (freely translated – we will not back down). We do not deviate from the mandate. We will update you of the outcomes of the follow-up meeting regarding alternative land. Committee will issue out an official action plan for this week building up to our collective meeting this coming Sunday.”¹⁶

[46] On 26 January 2023, Mr Wiseman sent a letter to the Third Respondent stating that the Committee will be done with registrations, audit and allocations by the 7th of February 2023. They requested a meeting to deal with administrative issues of Mountain View and to draft a memorandum of understanding between all parties involved.¹⁷

[47] On 25 January 2023, Mr Wiseman prepared a letter to the Mountain View community wherein he reminded them of the action plan. It is *inter alia* noted:

“We would like to remind all members that registrations are underway daily. We have two categories viz: Those with sites and those without sites (waiting list). Closing date for all registration is Saturday 28 January 2023 at 14:00. We need to finalize and audit all sites before Sunday the 5th February, our closing date for completion of

¹⁶ Pleadings, page 141

¹⁷ Pleadings, page 142

dwelling (Shacks), as per our agreement all those who would not have completed their cabins (Small Shacks) after the closing date will automatically forfeit/lose their sites.

After the closing date (5th February 2023) every Resident will sign an acknowledgment form or temporary certificate. This certificate will serve as evidence that you were a resident of Mountainview and you will reside at Mountain View. We are busy in negotiations and applications with different stakeholders. We are hoping that we will all celebrate Valentine's Day in our new homes as proud residents of Mountain View.

If we all cooperate and play our roles, we will win this, let us continue to have faith and keep on praying. Modimo o re rata kao fela. We as the committee we want to assure you that we remain resolute and firm. Asjiki !! On our mission. We must restore the dignity of our people through land.”¹⁸ [my emphasis]

- [48] It is not clear who this committee is, how it was elected and whether they are mandated to speak on behalf of all the unlawful occupiers. Mr Wiseman persisted to encourage members of the community to continue taking up the land and occupying it unlawfully.

XIII THE RESPONDENTS' VERSION:

- [49] The answering affidavit was deposed to by Mr Wiseman. He does not state any of his personal particulars or a place of residence.
- [50] Save to aver that the property is not suitable for human habitation, the Applicants have not demonstrated real and eminent danger. Some of the community members lived on the property since August 2022 and no danger materialized since then. To buffer their case, they state that immediate eviction was not sought, however, the community is granted thirty (30) days to vacate.

¹⁸ Pleadings, page 145

- [51] It has not been shown that alternative accommodation or land is available. They also accuse the Applicants for not taking the Court in their confidence regarding the circumstances under which the occupiers took occupation of the land despite having several engagements with the occupiers since August 2022.¹⁹
- [52] Mr Wiseman avers that “*some of the community members have been on the waiting list since the early 2000’s.*”²⁰ The Applicants deny this and state that no confirmatory affidavits of those persons are attached. They state that only six (6) persons are on the waiting list and two (2) not. One of the persons listed by Mr Wiseman, one Kresie Jeremiah Ncutle owns property under Title Deed no. T16674/2010. The six (6) other persons on the waiting list does not have the right to invade the land without following due process.²¹
- [53] With reference to the persons on the Respondents’ lists, Mr Wiseman states that: “*these community members have made different means to rent accommodation or stay with relatives for brief periods in far-flung rural areas, while they awaited their land allocations. Their long wait has not yielded any results and the short-term arrangements they have made over the years for accommodation have proven unsustainable.*”
- [54] Not only were no supporting affidavits appended to the opposing affidavit, but no attempt was made to place any personal circumstances before Court. No pressing need was advanced by any occupier, in any affidavit and under oath, to occupy the land.²²
- [55] Mr Wiseman states: “Most of the community members are unemployed and simply cannot afford to rent property, and the homes of their relatives cannot

¹⁹ Pleadings, page 208

²⁰ Pleadings, page 208, para 13

²¹ Pleadings, page 273

²² Pleadings, page 209, para 14

accommodate them, their spouses, and their children indefinitely." [my emphasis]

[56] There is no reference to which of the occupiers specifically this relate and it also does not indicate any pressing need to occupy alternative land.

[57] The Respondents complain that people who enrolled on the waiting list recently received undue priority and speedier housing allocations. They complain about corruption in the housing allocation system.²³

[58] There are no particulars provided in respect of who these occupiers are. To justify the occupation it is stated: "*however, given the desperate position that the community members are in, coupled with egregious corruption, that they witnesses in the municipality 's allocation of housing, when they identified the vacant Property they had little option but to move onto it as a safe space to erect their current homes.*"²⁴

[59] The Respondents advance five (5) grounds which, according to them, militate against eviction:

59.1 The occupiers moved onto the property at different intervals and the earliest being August 2022. They have nowhere else to go and an eviction order would render them homeless;

59.2 The occupiers establish a community which currently consists of about 1 500 people;

59.3 The occupiers consist, *inter alia*, of elderly people, children, households headed by woman, and people living with disabilities;

²³ Pleadings, page 209, para 16

²⁴ Pleadings, page 209, para 17

59.4 The property accommodates occupiers adequately and it is within walking distance of amenities, schools, essential services and the job market. The closest town is no more than a walk of 15 minutes; and

59.5 The property is unoccupied and is appropriate for occupation by the occupiers. It is surrounded by other residential areas and properties.²⁵

[60] They state that they have gone to great lengths to engage with the Applicants to regularize their occupation, alternatively to have alternative accommodation allocated. They complain that the Applicants did not engage with them in good faith. They appended photos to show that the structures are not on a dangerous mountain slope but on flat ground close to land that the Applicants have allocated for housing other persons.

[61] In respect of the geotechnical assessment, they state that it is a generalized study which does not relate to the property.²⁶ Notwithstanding stating that after Mr Mojake allegedly refused to assist them, they continued to seek assistance to obtain the necessary rights to stay at the property lawfully. They do not state how that can be done. The Respondents deny that there is a heritage site situated on the land and notes that there is no support in the form of studies or reports to substantiate the allegation that the property is situated on a wetland.²⁷

[62] He continues to state that some of the structures had not yet been occupied and the persons do not have the finances to complete their structures into habitable homes.²⁸

[63] The Respondents admit that the occupiers have varying circumstances and submit that it is inappropriate that the matter be heard on an urgent basis

²⁵ Pleadings, page 210, para 18.1 – 18.5. See also: Pleadings, page 214, para 37

²⁶ Pleadings, page 216, para 40

²⁷ Pleadings, page 218, para 52

²⁸ Pleadings, page 220, para 58

when such is not known.²⁹ They state that the occupiers should be given reasonable opportunity to place their personal circumstances before the Applicants in the ordinary course as directed by the Act to avoid a blanket, one size fits all approach, which characterizes the application.³⁰

- [64] The Respondents use generalized references such as “nowhere to go”, “shared desperation” and “being on a waiting list for several years”. Nothing concrete support those generalizations.³¹

- [65] It is stated that the occupiers have repeatedly reaffirmed their willingness to move off the property should the Applicants make suitable alternative land available to them.³²

- [66] They state that the urgency of the application did not give the occupiers a reasonable opportunity to investigate any possible suitable alternative accommodation.³³ Save to state that “*several*” of their households have family members and are headed by women, that there are persons living with disabilities, there are unemployed persons, there are persons relying on Government social grants and that there are elderly people, no specifics were provided.³⁴ They also failed to state who exactly stays on the land for more than six (6) months.

- [67] They appended lists that show house numbers, surnames, names, in some instances identity numbers, employment status, marital status, the number of persons in the household, whether they are disabled, whether they receive SASSA grants and previous residential addresses.

²⁹ Pleadings, page 221, para 62

³⁰ Pleadings, page 221, para 63

³¹ Pleadings, page 221, para 64

³² Pleadings, page 222, para 70

³³ Pleadings, page 223, para 71

³⁴ Pleadings, page 223, para 73

[68] It is statistical data that does not tell much about the persons.

XIV PREVENTION OF ILLEGAL EVICTION FROM AND UNLAWFUL OCCUPATION OF LAND ACT, 19 OF 1998

[69] It is common cause that the Respondents do not have title or consent to be in occupation of the land and they are unlawfully occupying the land.

[70] I quote only the relevant provisions of section 4 of the Act:

- “(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.*
- (7) If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women.*
- (8) If the court is satisfied that all the requirements of this section have been complied with and that no valid defence has been raised by the unlawful occupier, it must grant an order for the eviction of the unlawful occupier, and determine—*
 - (a) a just and equitable date on which the unlawful occupier must vacate the land under the circumstances; and*
 - (b) the date on which an eviction order may be carried out if the unlawful occupier has not vacated the land on the date contemplated in paragraph (a).*
- (9) In determining a just and equitable date contemplated in subsection (8), the court must have regard to all relevant factors, including the period the unlawful occupier and his or her family have resided on the land in question.”*

[71] Ms Thembi Ntoane, who appeared for the Applicants, referred to *Mangaung Local municipality v Mashale and another*³⁵ as authority that an organ of state has to bring the application in terms of section 4 of PIE as the State is the owner. In *Mangaung* it was also held:

“[12] Although this is disputed by applicant, I accept for purposes hereof that second respondent represents the interests of people that are homeless in the true sense of the word. It is undisputed that applicant has put in place a particular procedure for the purpose of making available land to homeless persons for the purpose of low-cost housing. In terms of this procedure, although such persons may of course be represented by some organisation, each applicant must complete the prescribed application form in person and in the process provide the information required for considering the application. Applications that comply with the requirements are placed on a waiting list. Land available for purposes of low-cost housing is allocated to people on the waiting list on a first come first served basis at minimal cost. Unfortunately this waiting list is a very long one, as the availability of land for this purpose is subject to financial constraints. It was not contended on behalf of respondents that these are not reasonable measures within applicant's available resources within the meaning of s 26(2) of the Constitution of the RSA.

[13] It follows that respondents had no right to enter onto the land in question and to erect the aforesaid structures thereon. In fact, respondents deliberately took the law into their own hands in an attempt to prove a point. ...”

[72] In *Government of the Republic of South Africa and Others v Grootboom and Others*³⁶ it was held:

“It required the State to devise a comprehensive and workable plan to meet its obligations. However, subsection (2) also made it clear that the obligation imposed upon the State was not an absolute or unqualified one. The extent of the State's obligation was defined by three key elements (a) the obligation to “take reasonable

³⁵ 2006 (1) SA 269 (O)

³⁶ [2000] JOL 7524 (CC); [2000] ZACC 19 (CC); 2000 (11) BCLR 1169 (CC)

legislative and other measures”; (b) “to achieve the progressive realisation” of the right; and (c) “within available resources.” [my emphasis]

XV LACK OF INFORMATION

[73] As alluded to in the introductory part of this judgment, the Respondents did not, except for statistical data, place sufficient information before Court regarding their personal circumstances. The list is wholly insufficient for this purpose. The Applicants are, however, not blameless.³⁷ It approached court on urgent basis and did not allow the Respondents with sufficient time to do so. Considering the attitude adopted by Mr Wiseman, the question whether more time would have made a difference is debateable.

[74] the question on whether there is an onus on any one of the parties to place information about the Respondents before Court, was left open in *Ndlovu v Ngcobo; Bekker and another v Jika*³⁸. The court however did state:

“[19] Another material consideration is that of the evidential onus. Provided the procedural requirements have been met, the owner is entitled to approach the court on the basis of ownership and the respondent’s unlawful occupation. Unless the occupier opposes and discloses circumstances relevant to the eviction order, the owner, in principle, will be entitled to an order for eviction. Relevant circumstances are nearly without fail facts within the exclusive knowledge of the occupier and it cannot be expected of an owner to negative in advance facts not known to him and not in issue between the parties. Whether the ultimate onus will be on the owner or the occupier we need not now decide.”

³⁷ *Molusi and Others v Voges N.O. and Others* (CCT96/15) [2016] ZACC 6; 2016 (3) SA 370 (CC); 2016 (7) BCLR 839 (CC) (1 March 2016); See also: *ABSA Bank Bpk v Murray and Another* 2004 (2) SA 15 (C) at para [41] – [42] where, on the facts that are different to the merits of this application, it was not required; *Pillay and another v Ramzan* [2022] JOL 53085 (GJ) at para [24] – [25].

³⁸ [2002] JOL 10161 (SCA); [2002] ZASCA 87 (SCA); 2003 (1) SA 113 (SCA)

[75] In *Madulammoho Housing Association NPC vs Nephawe and Another; Final Housing Solutions (Pty) Ltd v Lukhanya and Others*³⁹ it was held:

“13. Even where an eviction application is unopposed, if it appears that an eviction might lead to homelessness, a court is entitled neither summarily to evict an unlawful occupier, nor summarily to dismiss the application. It is required to act “proactively” to ensure that it is “appraised of all relevant information in order to enable it to make a just and equitable decision” (Shulana Court, paragraph 15). Its principal method of obtaining the necessary information will be to require a local authority to investigate the circumstances of the unlawful occupiers, and to report to the court on a range of matters, including whether and to what extent an eviction order may lead to homelessness, what steps the local authority will take to provide any necessary alternative accommodation, and when those steps will be taken (see, in this respect, *Changing Tides*, paragraph 40).

14. That is why applicants for eviction orders that may lead to homelessness are required to join the relevant local authority from the outset (*City of Johannesburg v Blue Moonlight Properties 39 (Pty) Ltd 2012 (2) SA 104 (CC)* (“*Blue Moonlight*”) paragraph 45).⁴⁰ Where they fail to do so, a court will rectify that failure by joining the relevant local authority, and, if necessary, other organs of state concerned with the provision of housing. The court will

³⁹ (22/023954 ; 21/40262) [2023] ZAGPJHC 7 (10 January 2023); See also *Molusi and Others v Voges N.O. and Others* (CCT96/15) [2016] ZACC 6; 2016 (3) SA 370 (CC); 2016 (7) BCLR 839 (CC) (1 March 2016) at para [6]; *Msibi v Occupiers of Unit 67 Cedar Creek and another* [2022] JOL 57135 (GP): “[36] Courts are now called upon to have regard to the circumstances of the occupier and to pay due regard to considerations of fairness in order to come up with a just and equitable solution. ... There is no report from the second respondent on the availability of alternative accommodation which is fatal to an eviction application. This is especially in circumstances such the present one where there is a real risk of homelessness. An eviction is just and equitable if alternative accommodation is made available.”

⁴⁰ The Court in *Blue Moonlight* did not impose a direct and positive obligation on a private person to continue to house illegal occupiers. See also: *Daniels v Scribante and Another* (CCT50/16) [2017] ZACC 13; 2017 (4) SA 341 (CC); 2017 (8) BCLR 949 (CC) (11 May 2017)

generally require a report to be filed addressing the need for and provision of alternative accommodation (Sailing Queen Investments CC v Occupants of La Colleen Court 2008 6 BCLR 666 (W) and Occupiers of ERF 101,102, 104 and 112, Shorts Retreat, Pietermaritzburg v Daisy Dear Investments (Pty) Ltd [2009] 4 All SA 410 (SCA)).

15. *Once that report is filed, a court will generally be in a position to make an order directing alternative accommodation to be provided where it is needed, and setting a timetable for the provision of the accommodation and for the eviction of the unlawful occupiers who do not or are not entitled to relocate to it.*
16. *Sometimes, however, local authorities may unreasonably refuse to provide alternative accommodation, or provide information that is of such a generalised nature as to be of little or no assistance in resolving the specific case before a court. In those circumstances, a court may order the local authority to produce further specific information (see Blue Moonlight Properties 39 (Pty) Ltd v Occupiers Saratoga Avenue 2009 (1) SA 470 (W)), or it may direct a local authority simply to provide the accommodation by a given date, linking that date to a date on which an eviction order may be executed (see Blue Moonlight, paragraph 97).*
17. *PIE does not enjoin a court automatically to dismiss an eviction application merely because it might result in homelessness. There are cases where the facts require the dismissal of such an application, but they are rare (see, for example, Ekurhuleni Metropolitan municipality v Various Occupiers, Eden Park Extension 5 2014 (3) SA 23 (SCA), All Builders and Cleaning Services CC v Matlaila [2015] ZAGPJHC 2 (16 January 2015) and Fischer v Unlawful Occupiers 2018 (2) SA 228 (WCC)).*
18. *Instead, a court will normally seek to craft an eviction order that may only be executed once alternative accommodation is objectively available to the unlawful occupiers, and which allows the local authority to be compelled, if necessary, to provide the accommodation if it fails to do so promptly (see, for example, City of Johannesburg Metropolitan municipality v Hlophe [2015] 2 All SA 251 (SCA)).” [my emphasis]*

[76] I am faced with the dilemma that Mr Wiseman and his committee (whoever they are) have clearly led the rest of the Respondents believe that their case will be properly presented. This has not happened. The data sheets are of

little, if any, assistance. One may be tempted to hold that the Respondents made their bed with him. Ordering eviction under these circumstances will not be in the interest of justice. It is, however, not the end of the matter.

XVI THE CHOICE OF ACCOMMODATION

[77] In *Grobler v Phillips and Others*⁴¹ the preference of accommodation of the unlawful occupier was addressed as follows by the Constitutional Court:

“[36] ... The question whether the constitutional rights of the unlawful occupier are affected by the eviction is one of the relevant considerations, but the wishes or personal preferences of the unlawful occupier are not relevant. An unlawful occupier such as Mrs Phillips does not have a right to refuse to be evicted on the basis that she prefers or wishes to remain in the property that she is occupying unlawfully. In terms of section 26 of the Constitution, everyone has the right to have access to adequate housing. The Constitution does not give Mrs Phillips the right to choose exactly where in Somerset West she wants to live. [my emphasis]

[78] I referred to the five grounds on which the Respondents rely for their continued occupation. Except for considering the 6-month period in the Act, the intervals of relocation is not in itself determinative.

[79] There is only the say-so of Mr Wiseman that they have nowhere else to go and that an eviction order would render them homeless.

[80] Their number is also not determinative. The Act applies to any number of occupants.

[81] What is material is that there may be elderly people, children, households headed by woman, and people living with disabilities. This is the primary consideration for the order that I intend to make.

⁴¹ (CCT 243/21) [2022] ZACC 32; 2023 (1) SA 321 (CC) (20 September 2022)

[82] That the property accommodates them adequately, that it is within walking distance of amenities, schools, essential services and the job market is not determinative. In my view, these are factors of convenience. There is no obligation on the State to provide accommodation which is convenient to unlawful occupiers.

[83] The limited number of photos of the area leaves doubt whether it is appropriate for occupation.

[84] In the matter of *City of Johannesburg Metropolitan municipality v K2016498847 (Pty) Ltd*⁴², the Court dismissed the application for eviction. It inter alia held:

“24 I see no principled reason why the requirements the Constitutional Court⁴³ has imposed on local authorities seeking to evacuate dangerous buildings in terms of the Building Standards Act should not be extended to local authorities who seek to enforce compliance with a Land Use Scheme through an interdict that is to be implemented through an eviction. It follows that in seeking relief to give effect to its Land Use Scheme by removing people who reside on property in breach of that Scheme from their homes, the City is required to demonstrate that it has engaged meaningfully with each of the affected individuals, and that it will provide alternative accommodation to those individuals where it is reasonable to do so. In my view, it is reasonable to provide alternative accommodation where an occupier would be left homeless without it.

25 To put it another way, I hold that the City cannot demonstrate a clear right to an interdict which enforces its Land Use Scheme through an eviction unless it has shown that it has meaningfully engaged the occupiers of the property in question, and offered to provide alternative accommodation where it is reasonably needed.”

XVII ALTERNATIVE DISPUTE RESOLUTION

⁴² (38634/19) [2021] ZAGPJHC 460; 2022 (3) SA 497 (GJ) (29 September 2021)

⁴³ *Occupiers, 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* [2008] ZACC 1; 2008 (3) SA 208 (CC)

[85] In my preparation for hearing of the application, I considered the provisions of section 7 of PIE which provides for mediation. Ms Ntoane for the Applicants submits that section 7 is not applicable as the land belongs to the municipality.⁴⁴ The Act defines an owner as the registered owner, including an organ of State. She refers to *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others*⁴⁵ for a submission that it would in any event be of no avail as there have been various engagements and in essence advances the argument that both parties must act reasonably and in good faith, which on her submission, the Respondents lack. I pause to state that a letter from the Acting Head: Human Settlements, of the municipality dated 22 May 2023, was appended to the supplementary heads of argument. The Respondents, in a letter from their attorneys objected against this. I did not consider the letter as it did not form part of the papers and was not before me when I heard the application.

[86] Mr Sangoni, for the Respondents, referred me to *Port Elizabeth municipality v Various Occupiers*⁴⁶, where the Constitutional Court, as far back as 2004, considered whether the use of mediation is indicated in resolving matters of this nature. The land in question in that application did not belong to the municipality. I quote extensively from the case as it addresses a number of important principles. The Court held:

“III. Mediation

[39] *In seeking to resolve the above contradictions, the procedural and substantive aspects of justice and equity cannot always be separated. The managerial role of the courts may need to find expression in innovative ways. Thus one potentially dignified and effective mode of achieving sustainable reconciliations of the different interests involved is to encourage and require the parties to engage with each other in a pro-active and honest*

⁴⁴ Supplementary Heads of Argument, para 4

⁴⁵ (24/07) [2008] ZACC 1; 2008 (3) SA 208 (CC) ; 2008 (5) BCLR 475 (CC) (19 February 2008)

⁴⁶ [2004] JOL 13007 (CC); [2004] ZACC 7 (CC); 2005 (1) SA; See also *Occupiers, Berea v De Wet NO and Another* [2017] ZACC 18 (CC); 2017 (8) BCLR 1015 (CC)

endeavour to find mutually acceptable solutions. Wherever possible, respectful face-to-face engagement or mediation through a third party should replace arms-length combat by intransigent opponents.

[40] *Compulsory mediation is an increasingly common feature of modern systems. It should be noted, however, that the compulsion lies in participating in the process, not in reaching a settlement. In South Africa, mediation or conciliation are compulsory in many cases before labour disputes are brought before a court. Mediation in family matters, too, though not compulsory, is increasingly common in many jurisdictions.*

[41] *Thus, those seeking eviction should be encouraged not to rely on concepts of faceless and anonymous squatters automatically to be expelled as obnoxious social nuisances. Such a stereotypical approach has no place in the society envisaged by the Constitution; justice and equity require that everyone is to be treated as an individual bearer of rights entitled to respect for his or her dignity. At the same time those who find themselves compelled by poverty and landlessness to live in shacks on the land of others, should be discouraged from regarding themselves as helpless victims, lacking the possibilities of personal moral agency. The tenacity and ingenuity they show in making homes out of discarded material, in finding work and sending their children to school, are a tribute to their capacity for survival and adaptation. Justice and equity oblige them to rely on this same resourcefulness in seeking a solution to their plight and to explore all reasonable possibilities of securing suitable alternative accommodation or land.*

[42] *Not only can mediation reduce the expenses of litigation, it can help avoid the exacerbation of tensions that forensic combat produces. By bringing the parties together, narrowing the areas of dispute between them and facilitating mutual give-and-take, mediators can find ways round sticking-points in a manner that the adversarial judicial process might not be able to do. Money that otherwise might be spent on unpleasant and polarising litigation can better be used to facilitate an outcome that ends a stand-off, promotes respect for human dignity and underlines the fact that we all live in a shared society.*

[43] *In South African conditions, where communities have long been divided and placed in hostile camps, mediation has a particularly significant role to play. The process enables parties to relate to each other in pragmatic and sensible ways, building up prospects of respectful good neighbourliness for the future. Nowhere is this more required than in relation to the intensely emotional and historically charged problems with which PIE deals. Given the special nature of the competing interests involved in eviction proceedings launched under section 6 of PIE, absent special circumstances it would not ordinarily be just and equitable to order eviction if proper discussions, and where appropriate, mediation, have not been attempted.*

[44] ...

[45] *In my view, section 7 of PIE is intended to be facilitative rather than exhaustive. It does not purport, either expressly or by necessary implication, to limit the very wide power*

entrusted to the court to ensure that the outcome of eviction proceedings will be just and equitable. As has been pointed out, section 26(3) of the Constitution and PIE between them give the courts the widest possible discretion in eviction proceedings, taking account of all relevant circumstances. One of the relevant circumstances in deciding whether an eviction order would be just and equitable would be whether mediation has been tried. In appropriate circumstances the courts should themselves order that mediation be tried.”

[87] Neither section 7 of PIE, nor Rule 41A of the Uniform Rules of Court, obliges a party to mediate a dispute. I am unaware whether the parties served Rule 41A notices as these notices are not, in terms of the Rules, filed in the Court file. I am convinced that the views in *Port Elizabeth municipality* is nevertheless sound.

[88] To conclude on the use of mediation, I quote from *Port Elizabeth municipality supra*:

“[61] It remains only to be said that this decision in no way precludes further efforts to find a solution to a situation that is manifestly unsatisfactory to all concerned. In cases like the present it is particularly important that the municipality not appear to be aligned with one side or the other. It must show that it is equally accountable to the occupiers and to the landowners. Its function is to hold the ring and to use what resources it has in an even-handed way to find the best possible solutions. If it cannot itself directly secure a settlement it should promote a solution through the appointment of a skilled negotiator acceptable to all sides, with the understanding that the mediation proceedings would be privileged from disclosure. On the basis of this judgment a court involved in future litigation involving occupiers should be reluctant to accept that it would be just and equitable to order their eviction if it is not satisfied that all reasonable steps had been taken to get an agreed, mediated solution.”

[89] I revert to a salient aspect in *Port Elizabeth municipality* ⁴⁷ where the Court stated: “[T]hose who find themselves compelled by poverty and landlessness to live in shacks on the land of others, should be discouraged from regarding themselves as helpless victims, lacking the possibilities of personal moral

⁴⁷ Para [41]

agency. The tenacity and ingenuity they show in making homes out of discarded material, in finding work and sending their children to school, are a tribute to their capacity for survival and adaptation. Justice and equity oblige them to rely on this same resourcefulness in seeking a solution to their plight and to explore all reasonable possibilities of securing suitable alternative accommodation or land.” The Respondents cannot be absolved from taking positive steps to improve their situation. Unlawful occupation is not a positive and constructive step.

XVIII CONCLUSION

[90] I considered dismissing the application due the scarcity of information provided by the Applicants and some material facts which were not sufficiently addressed. The Applicants would be entitled to bring a new application. There is sufficient case law that provide for guidelines on what must be placed before the Court. The municipality is a party to the litigation and should have done more. The application was brought on an urgent basis whilst it was evident by January 2023 that the Respondents did not intend to heed the warnings.

[91] The Respondents, on the other hand failed to place anything material before the Court. I cannot accept that the photos show the full extent of the development, that the area is suitable for occupation, that there are no other needs and uses for the land or that there are no environmental, health and safety issues pertaining to the land. The attitude evidenced by Mr Wiseman leaves much to be desired. One senses defiance and to some extent arrogance. This does not serve the rest of the Respondents well.

[92] A balanced approach where recognition is given to the legitimate rights and interests of the Applicants and the interests of the Respondents is needed.⁴⁸

⁴⁸ *Port Elizabeth Municipality v Various Occupiers* para [36]

There are often criticism against the reliability of systems. Nothing is perfect. The National Housing Needs Register (NHNR) is at least a *bona fide* and legitimate system which regulates the provision of housing in an orderly fashion. The conduct of the Respondents is exactly the opposite. They forced their own interests and wishes upon the Applicants and against those who are registered on the system. Accusations against the register, the system and officials do not lie well in the mouths of the Respondents. For this reason, I intend to make an order that those who wish to be provided with housing and alternative accommodation have to register. If they do not, it may come back to haunt them.

[93] I deem it in the interest of justice that the application be postponed to enable the Court to have all the material facts to exercise a discretion.

IX COSTS

[94] It takes two to tango and the parties failed to ensure that all the instruments are ready for the dance. For this reason, I exercise my discretion and order that each party pays its own costs, other than the costs of 31 March 2023.

[95] I make the following order:

ORDER

1. The Applicants pay the costs of the Respondents occasioned by the removal of the application from the urgent roll on 31 March 2023.
2. The application is postponed to 24 August 2023.
3. The municipality is directed within 15 days of this order, to file a report, confirmed on affidavit, in order to report to the Court on:

- 3.1 what steps it has taken and what steps it intends or is able to take in order to provide alternative land in the event of the Respondents being evicted and when such alternative land or accommodation can be provided;
- 3.2 what the effects would be if the eviction would take place without alternative land or emergency accommodation being made available;
- 3.3 what steps can be taken to alleviate the effects of the current occupation of the properties referred to above if the occupiers are not immediately evicted and pending alternative land or accommodation being made available.⁴⁹
4. Leave is granted to the Applicants and the Respondents to file supplementary affidavit/s, if any, within 20 court days after receipt of the report of the municipality.
5. All Respondents who seek accommodation and who are in occupation of the land, shall apply to be registered on the National Housing Needs Register ("NHNR") within **40 calendar days** of this order.
6. Each party shall pay its own costs, other than the costs in paragraph 1 above.

⁴⁹ See: *Occupiers of ERF 101,102, 104 and 112, Shorts Retreat, Pietermaritzburg v Daisy Dear Investments (Pty) Ltd and Others* (245/08) [2009] ZASCA 80; 2010 (4) BCLR 354 (SCA); [2009] 4 All SA 410 (SCA) (3 July 2009); *Msibi v Occupiers of Unit 67 Cedar Creek and another* [2022] JOL 57135 (GP); *Occupiers of erven 87 & 88 Berea v De Wet NO and others* [2017] JOL 38039 (CC)

P R CRONJé, AJ

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