

IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY

Case number: 1773/2021

Date Heard: 05/08/2022

Date delivered: 16/09/2022

Reportable: YES/NO

Circulate to Judges: YES/NO

Circulate to Regional Magistrates: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:-

GA-SEGONYANA LOCAL MUNICIPALITY

APPLICANT

and

**ALL UNIDENTIFIED AND UNKNOWN PERSONS
OCCUPYING OR INTENDING TO UNLAWFULLY
OCCUPY ERF [...], KURUMAN (DEPICTED ON
ANNEXED AERIAL PHOTOGRAPH
BY POINTS A, B, C, D, E, F AND G)**

FIRST RESPONDENT

“CHIEF SITLHODI”

SECOND RESPONDENT

Coram: Stanton, AJ

JUDGMENT

INTRODUCTION:-

[1] This application was issued on an urgent and *ex parte* basis in terms of the provisions of section 5(2) of the Prevention of Illegal Eviction and Unlawful Occupation of Land Act, Act 19 of 1998 (“the Act”) for the purpose of obtaining the following relief:-

1.1 Firstly, for the Court to furnish directions pertaining to the notice that should be given to the illegal occupants to advise them of the applicant’s intention to obtain eviction orders as well as to obtain urgent relief to interdict the respondents from invading municipal land; and

1.2 Secondly, to obtain final relief in respect of the interdict and to evict the respondents from the land.

[2] The applicant approached the Court on the grounds contemplated in sections 6(1)(a) and (b) of the Act.

[3] The rule *nisi* was granted on 27 August 2021.

[4] The applicant now seeks a final order for:-

4.1 The first and second respondents to demolish and remove all structures and other properties (including building material) erected on the Portion of Erf [...], Kuruman, marked and depicted by the figures “**A**”, “**B**”, “**C**”, “**D**”, “**E**”, “**F**” and “**G**” on annexure “FA2” to the Notice of Motion (“the land”);

4.2 The first and second respondents to vacate the land and demolish and remove all structures and/or buildings erected thereon, including building materials and their belongings; and

4.3 the Sheriff of this Court to be authorised, with the assistance of the South African Police Service, or a contractor employed by the Sheriff, if needs be, and in the event that the first and second respondents fail to comply with the orders set out in paragraph 4.1 and 4.2, to evict the first respondents from the land and to demolish and remove all structures and buildings erected and constructed on the land.

GROUND OF OPPOSITION:-

[5] The first respondents ostensibly opposed the application and an answering affidavit, deposed to by Mr Oageng Thubisi, was filed on their behalf.

[6] The gist of the first respondents’ opposition is that:-

6.1 The applicant is not the registered owner of the land;

6.2 The land is incorrectly identified and includes Erven [...] and [...]. As a result, the applicant is seeking orders that could effectively evict all the occupiers immediately adjacent to Erf [...], Kuruman, including the occupants of Erven [...] and [...];

6.3 27 families or households have been occupying the land since the beginning of January 2021, which land includes the broader “*Promise Land Informal Settlement*”, the “*current Prison Site Promise Land*” and Erven [...] and [...], based on the consent granted by the applicant during 2011;

6.4 The applicant is responsible to place the personal circumstances of the occupants before the Court, which it did not do, and accordingly, the applicant failed to substantiate the allegations referred to in section 4 of the Act.

POINT IN LIMINE - LOCUS STANDI:-

[7] In reply, the applicant raised a point *in limine* that Mr O Thubisi does not have the requisite *locus standi* to oppose the application, in his personal capacity, or on behalf of the first respondents, by virtue of the following:-

7.1 Mr O Thubisi is a resident on an adjacent portion of land and can therefore not be affected by the relief claimed in the application; and

7.2 Mr O Thubisi does not confirm that he was authorised by the Prison Site Promise Land Informal Settlement Committee to depose to the affidavit on the first respondents' behalf. Furthermore, he failed to prove that he is the duly authorised representative of this committee or that the committee is the representative of the persons identified as the first respondent.

[8] According to Mr O Thubisi, he resides on "*Promise Land Informal Settlement*", which is referred to by the community as "*Prison Site Promise Land Informal Settlement and it is situated on the Portion of Erf [....] that is relevant for the purposes of this application.*" In the written motivation by the South African Human Rights Commission, attached to the respondents' condonation application, it is, however, stated that:-

8.1 Mr O Thubisi resides at [....] Promise Land Kuruman; and

8.2 The land, which he and his community "*believe*" is Promise Land and which they have been occupying since 2009, belongs to the second respondent, who gave them consent to occupy. Mr O Thubisi, in the answering affidavit, however, denies that the first respondents are occupying

the land as a result of the consent granted to them by the second respondent.

[9] The applicant describes the land in question with precision as *“The Portion of Erf [...], marked and depicted by the figures “A”, “B”, “C”, D”, “E”, “F” and “G”” on annexure “FA2” to the Notice of Motion*”, which is situated between the Kuruman Prison and the informal settlement known as “Promise Land”.

[10] In support of the allegation by the first respondents that the applicant is seeking orders that could effectively evict all the occupiers immediately adjacent to Erf [...], Kuruman, including Erven [...] and [...], reference is made to a *“map obtained from the Surveyor General website indicating that the portion marked A, B, C and D are part of two separate properties. The one property is known as Erf [...] which is adjacent to Erf [...] and the other property is known as Erf [...]. See map marked OT1 annexed hereto.”*

[11] The first respondents, however, failed to attach the map to the answering affidavit and, at the date of the argument of the matter, still had not provided the Court with a copy thereof.

[12] Mr O Thubisi has failed to present any evidence that he is an occupant of the land or that he would be affected by the relief sought. In my view, the land accordingly does not include *“Promise Land”* or the *“Promised Land Informal Settlement.”*

[13] Mr O Thubisi states that he deposes to the affidavit on behalf of himself and his family and that he *“was authorised to act as a representative ...of the respondents at the 26 November 2021 proceedings.”* The failure to attach the minutes of the 26 November 2021 meeting or the resolution authorising Mr O Thubisi to depose to the answering affidavit on behalf of the respondents, is fatal to this allegation.

[14] I accordingly find that Mr O Thubisi lacks the necessary *locus standi* to oppose the application in his personal capacity or on behalf of the first respondents.

[15] Despite my finding above, I deem it necessary to deal with the merits of the application.

APPLICABLE LAW:-

[16] The applicant launched this application based on the provisions of sections 6(1)(a) and (b) of the Act.

[17] An unlawful occupier who may be evicted in terms of the provisions of the Act, is defined as *"a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land."* An owner is defined as *"the registered owner of land, including an organ of state"*¹

[18] The Act balances two interests that are in conflict, namely the ownership rights of land owners and the right of access to housing of those in occupation of premises. The touchstone for the balance is the concept of justice and equity. What is just and equitable must relate not only to those who occupy land unlawfully, but also to the owner of the land.

[19] The Act provides guidance to the courts in determining the approach to evictions now required by section 26(3) of the Constitution. Its central operative provisions are section 4, which deals with evictions sought by owners or persons in charge of property, and section 6, which is concerned with eviction proceedings brought by Organs of State.

[20] Sections 4(6) to 4(9) of the Act state as follows:-

"(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.

¹ Section 1 of the Act.

(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."

[21] Section 6 of the Act provides that:-

"(1) An organ of State may institute proceedings for the eviction of an unlawful occupier from land which falls within its area of jurisdiction, except where the unlawful occupier is a mortgagor and the land in question is sold in a sale of execution pursuant to a mortgage, and the court may grant such an order if it is just and equitable to do so, after considering all the relevant circumstances, and if-

(a) the consent of that organ of State is required for the erection of a building or structure on that land or for the occupation of the land, and the unlawful occupier is occupying a building or structure on that land without such consent having been obtained, or

(b) it is in the public interest to grant such an order.

(2) For the purposes of this section, "public interest includes the interest of the health and safety of those occupying the land and the public in general.

(3) In deciding whether it is just and equitable to grant an order for eviction, the court must have regard to -

(a) the circumstances under which the unlawful occupier occupied the land and erected the building or structure;

(b) the period the unlawful occupier and his or her family have resided on the land in question; and

(c) the availability to the unlawful occupier of suitable alternative accommodation or land."

[22] The Constitutional Court, in the matter of **Port Elizabeth Municipality v Various Occupiers**², with regard to the factors that should be considered when a court deals with section 4 and 6 of the Act, held that:-

"Simply put, the ordinary prerequisites for the Municipality to be in a position to apply for an eviction order are that the occupation is unlawful and the structures are either unauthorised, or unhealthy or unsafe. Contrary to the pre-constitutional position however, the mere establishment of these facts does not require the court to make an eviction order. In terms of section 6, they merely trigger the court's discretion. If they are proved, the court then may (not must) grant an eviction order if it is just and equitable to do so. In

² [2004] JOL 13007 (CC).

*making its decision it must take account of all relevant circumstances, including the manner in which occupation was effected, its duration and the availability of suitable alternative accommodation or land."*³

"There is nothing in section 6 to suggest that the three specifically identified circumstances are intended to be the only ones to which the court may refer in deciding what is just and equitable. They are peremptory but not exhaustive. It is clear both from the open-ended way in which they are framed and from the width of decision-making involved in the concept of what is just and equitable, that the court has a very wide mandate and must give due consideration to all circumstances that might be relevant. Thus the particular vulnerability of occupiers referred to in section 4 (the elderly, children, disabled persons and households headed by women) could constitute a relevant circumstance under section 6. Similarly, justice and equity would take account of the extent to which serious negotiations had taken place with equality of voice for all concerned. What is just and equitable could be affected by the reasonableness of offers made in connection with suitable alternative accommodation or land, the time scales proposed relative to the degree of disruption involved, and the willingness of the occupiers to respond to reasonable alternatives put before them.

The combination of circumstances may be extremely intricate/ requiring a nuanced appreciation of the specific situation in each case. Thus/though there might be a sad uniformity in the conditions of homelessness and desperation which lead to unlawful occupations/ on the one hand, and the frustration of landowners at being blocked by intruders from enjoyment of their property¹ on the other, the actual details of the relationships involved are capable of infinite variation. It is not easy to classify the multitude of places and relationships involved. This is precisely why, even though unlawfulness is established, the eviction process is not automatic and why the courts are called upon to exercise a broad judicial discretion on a case by case basis. Each case accordingly has to be decided not on generalities

³ Paragraph [25].

*but in the light of its own particular circumstances. Every situation has its own history, its own dynamics/ its own intractable elements that have to be lived with (at least for the time being) and its own creative possibilities that have to be explored as far as reasonably possible. The proper application of PIE will therefore depend on the facts of each case/ and each case may present different facts that call for the adoption of different approaches. "*⁴

EVALUATION OF THE EVIDENCE:-

[23] It is evident that the applicant is the registered owner of the land, which it holds by virtue of deed of transfer T94/1924. Furthermore, the applicant is also an organ of state that may approach the Court for relief in terms of section 6 of the Act.

[24] It is undisputed that:-

24.1 The respondents do not have the applicant's consent to erect buildings and structures on the land or to occupy the land, as is required by the Spatial Planning and Land Use Management Act, Act 16 of 2013, read with the provisions of the National Building Regulations and Building Standards Act, Act 103 of 1977; and

24.2 The occupation of the land is a health and/or environmental risk as the land is not serviced with water, electricity and sewerage, which exposes the first respondents to health and hygiene hazards.

[25] On 25 August 2021, the applicant ascertained that 22 structures had been erected on the land, seven of which appeared to be occupied. The occupants, however, refused to disclose their names and identities, despite the applicant attempting to verify same.

[26] According to the respondents, 12 households are headed by women, 15 are unemployed, five occupants are on pension, seven are employed in unskilled, temporary and low income earning positions, one female occupant is 49 years old

⁴ Paragraph [30].

and disabled, the youngest household head is 22 years old, the oldest occupant is 76 years old and approximately 20 occupants are children attending nearby schools. The first respondents do not disclose the names of the respective occupants, but attach four confirmatory affidavits in support of these allegations. Ms E Isaacs, one of the deponents, confirms that she resides in the Promise Land Informal Settlement, whilst the other three deponents confirm that they reside on Prison Site Promise Land Informal Settlement.

[27] I can come to no other conclusion than that neither Mr O Thubisi nor the deponents to the confirmatory affidavits reside on the land. Therefore, none of the actual occupiers opposed the application. Despite the statement in the answering affidavit that *“an eviction will be severely traumatic... and may cause temporary homelessness, undue hardship and inconvenience”*, no personal circumstances were disclosed to assist the Court. The actual occupants elected not to respond to the evidence by the applicant that there are no elderly or disabled people occupying the land or households headed by women. No evidence has been placed before the Court to show that the first respondents do not have alternative accommodation available to them. None of them claimed to be destitute or to have no alternative land to reside on.

[28] I am satisfied that no valid defence has been raised by the first respondents and that it is just and equitable to order their eviction.

DATE OF THE EVICTION ORDER

[29] I am enjoined by the provisions of section 4(8) of the Act to, once I am satisfied that the requirements of the Act have been complied with and that no valid defence has been raised by the unlawful occupiers, grant an eviction order and determine a just and equitable date upon which an occupier or occupiers must vacate the land.

[30] In determining a just and equitable date, the Court must have regard to all relevant factors, including the period that the unlawful occupier or his or her family has resided on the land in question. In this regard, I take into account that the first

respondents or at least some of them, have been in occupation since July 2021. I also take into account the rights of children. Even though there is no information in this regard before me, it must be assumed that there are elderly and disabled persons amongst the said families. One should furthermore be mindful of the social consequences of the occupants being evicted from the land and having to find alternative accommodation within the Kuruman area within a relatively short space of time. Under the circumstances, I am of the view that it would be just and equitable to grant the first respondents a reasonable opportunity to find alternative accommodation and that, in the circumstances, a two-month period would suffice

COSTS:-

[31] Insofar as costs are concerned, the applicant requested a cost order against the respondents in the event of opposition. However, Mr Louw, on behalf of the applicant, submitted during argument that costs should follow the event. In view of my finding that the first and second respondents are not before court, it is appropriate that no order as to costs be made.

WHEREFORE THE FOLLOWING ORDERS ARE MADE:-

1. The first and second respondents are ordered to demolish and remove all structures and other properties (including building material) erected on the Portion of Erf [...], Kuruman, marked and depicted by the figures **“A”, “B”, “C”, D”, “E”, “F” and “G”** on annexure “FA2” to the Notice of Motion (“the land”), within 60 (sixty) days after the date of this order;
2. The first and second respondents are ordered to vacate the land and to demolish and remove all structures and/or buildings erected thereon, including building materials and their belongings within 60 (sixty) days after the date of this order; and
3. In the event that the first respondents fail to comply with the orders set out in paragraph 1 and 2, the Sheriff of this Court is authorised, with the assistance of the South African Police Service, or a contractor employed by

the Sheriff, if needs be, to evict the first respondents from the land and to demolish and remove all structures and buildings erected and constructed on the land.

**STANTON A
ACTING JUDGE
NORTHERN CAPE HIGH COURT**

On behalf of the Applicant:

Mr. M.C. Louw

(oio Van de Wall & Partners)

On behalf of the 1st and 2nd Respondents:

Mr R.L. Kruger

(oio Legal Aid Northern Cape)