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

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

SIGNATURE DATE: 29 September 2021

Case No: 38634/19

In the matter between:

CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY Applicant

and

K2016498847 (PTY) LTD Respondent

JUDGMENT

WILSON AJ:

1 The central question in this case is whether a local authority is entitled to an interdict on common law grounds restraining the use of property as an accommodation establishment in breach of its Land Use Scheme, in circumstances where the effect of the interdict sought would be to evict individuals residing on the property and to impound their possessions.

The property

2 The applicant ("the City") seeks an interdict against the respondent ("the company") in restraint of the company's use of 1 Willow Place, Kelvin, Johannesburg ("the property") as an "accommodation establishment" in breach of the City's Land Use Scheme, 2018 ("the Scheme"). The Scheme neither defines nor uses the term "accommodation establishment", so it is difficult on the papers to establish the exact nature of the contravention of which the City complains.

3 The essence of the City's case, however, is that the property is being let out to multiple households. There are two buildings on the property, and each has been subdivided into single-room apartments. Each of the rooms is in turn home to a particular household. The City does not say how many occupiers there are on the property, but a site inspection report compiled by Ms. Ndivhuho Thamagane, one of the City's Law Enforcement Officers, states that there are "children all over the property".

4 The City states that the letting of the property out in this manner is contrary to the way the property is zoned under the Scheme. The property is zoned "Residential 1". The primary permitted use of a "Residential 1" property under the Scheme is that of a "dwelling house". There are a number of secondary uses also permitted. These include using the property for "religious purposes", as a "place of instruction", as a "child care centre", for "social halls", for "institutions", as "residential buildings (excluding hostels)," as "special buildings", for "sport and recreational clubs", as "public or private parking areas", for "medical consulting rooms" as a "tavern" or "shebeen" or as a

"guesthouse". The Scheme prohibits the use of a "Residential 1" property for any purpose other than these prescribed primary and secondary uses.

5 It is not clear to me exactly how it breaches the Scheme to let the property out in the manner the City alleges it has been. An "accommodation establishment", though not defined in the Scheme, is, in its most natural sense, a business that provides a person with somewhere to stay in return for a fee. The term usually refers to hotels, guesthouses and other short-term rental arrangements, but could stretch to longer-term tenancies. The use of the property for these purposes falls well within the secondary uses permitted in a Residential 1 area. There is no suggestion that the property is being used as a hostel. Other than that, the use of the property for "residential" purposes, or as a "guesthouse" is a permitted secondary use in terms of the Scheme.

6 The City's true complaint is probably that the property is being employed for its secondary uses without the City's consent, but that is not the case made out in the papers. There is an allegation on the papers that the City has not consented to the use of the property as an accommodation establishment, but the mainstay of the City's case is that the Scheme simply does not allow for the use of the property as an accommodation establishment.

7 Notwithstanding the obscure way in which the City has chosen to make out its case, I shall accept for present purposes that the use of the property as an accommodation establishment is in breach of the Scheme, because the City's consent is required for that use, and has not been obtained.

Effect of the relief sought

8 At first blush, then, the use of the property as an "accommodation establishment" is unlawful. It follows that all those living in the accommodation establishment are doing so unlawfully, in breach of the Scheme.

9 The City seeks an interdict restraining the company from continuing to use the property as an accommodation establishment, and directing that the company must forthwith use the property only for the purposes the Scheme permits. In the event of the company not complying with the Scheme within 15 days of the service of the order directing it to do so, the City asks that the Sheriff be authorised to "take all necessary steps for purposes of giving effect to" the interdict. These steps are to include permitting the Sheriff to take into their custody "all that is found at the property" and "to keep such goods / instruments / tools / utensils / apparatus" that the company is using to conduct an accommodation establishment, pending payment of the City's "reasonable fees and disbursements" incurred in the execution of the order.

10 There can be little argument that what the City seeks is, in effect, an order evicting everyone who lives on the property, and sanctioning the seizure of their possessions. The order sought also authorises the seizure of the company's property, insofar as it is used "for conducting an accommodation establishment". The City's notice of motion provides that the company must then pay the City and the Sheriff for the trouble they went to in seizing its property before the company can get its property back. There is no indication of how, if at all, the occupiers will be entitled to the return of their possessions.

11 I can appreciate that there may be a rational connection between the removal of the occupiers from the property and the need to enforce the Scheme.

12 However, there is no rational connection, in my view, between the need to enforce the Scheme and the seizure of the occupiers' possessions or those of the company. Besides being an order of some cruelty, relief of that nature would constitute an arbitrary deprivation of property, contrary to section 25 (1) of the Constitution, 1996. There is no legally cognisable link between the need to enforce a town planning scheme, and the seizure of the household goods of those who are letting their homes from an entity that may be in violation of that scheme. (On the need for a sufficiently close link between a deprivation of property and the regulatory purpose it is meant to serve, see *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC), paragraph 100).

Eviction relief incompetent

13 The larger problem, though, is that the City seeks the eviction of the occupiers in breach of the constitutional and statutory framework that has been constructed to regulate the grant of relief of that nature.

<u>The relief sought is, in substance, the eviction of the occupiers</u>

14 Mr. Ralikhuvhana, who appeared for the City, readily conceded that the goal of the relief sought is to have the occupiers of the property evicted. That concession was well-made. Although the order does not explicitly authorise eviction, the conduct it does authorise amounts to the same thing. The

company is to be restrained from letting out the property, and is directed to comply with the Scheme that prohibits the occupiers from making their homes at the property. The Sheriff is empowered to "take all necessary steps" to enforce these orders in the event of non-compliance. In doing so, the Sheriff may seize the occupiers' possessions if the order is not complied with within 15 days. There can accordingly be little real doubt about what the order sought is meant to achieve.

15 In *Zulu v eThewkini Municipality* 2014 (4) SA 590 (CC), the Constitutional Court had to deal with the meaning and application of an interim interdict which restrained any person from occupying a series of properties in and around Durban, KwaZulu-Natal and directed the eThekwini Municipality and the Minister of Police to take all reasonable and necessary steps to enforce the interdict. The court held that, insofar as the effect of the relief was to prevent occupation of a property, it sanctioned the removal of existing occupiers from that property.

16 Here, the structure of the relief the City seeks is the same, although the words used and the individuals involved are different. The City seeks relief restraining the company from using the property as an "accommodation establishment", and directing the Sheriff to do what is necessary to achieve that result. This plainly encompasses the eviction of the occupiers.

17 Even if the relief the City seeks is capable of a narrower interpretation that would not exclude the occupiers from the property, the portion of the relief that permits the seizure of the occupiers' possessions constitutes a substantial interference with their use and occupation of the property. In *Motswagae v*

Rustenburg Local Municipality 2013 (2) SA 613 (CC), the Constitutional Court held that "an eviction does not have to consist solely in the expulsion of someone from their home. It can also consist in the attenuation or obliteration of the incidents of occupation" (paragraph 12). On any reasonable interpretation, the relief the City seeks constitutes a significant attenuation of the occupiers' possession of their homes on the property.

Non-joinder of the occupiers

18 Once it is accepted that the City in effect seeks the eviction of the occupiers, the fact that they have not been joined in these proceedings means that no relief can be granted. For that reason alone, the application cannot succeed.

19 However, it is, in my view, appropriate to consider the other requirements that apply to applications of this nature, since this matter is one of two substantially similar cases that appeared on my unopposed motion court roll over the course of a week. To the extent that obtaining interdicts of this nature is part of a broader practice directed at the enforcement of the Scheme, it is as well to point out the respects in which the enforcement of the Scheme requires adjustment.

20 Where the enforcement of the Scheme affects the rights of people living on property to which the Scheme applies, they are obviously necessary parties to any enforcement application, and must be joined. Where the City means to enforce the Scheme through the eviction of people living on the relevant property, further requirements are triggered.

Section 26 (3) of the Constitution, 1996

21 The principal requirement is compliance with section 26 (3) of the Constitution, 1996. Section 26 (3) provides that "[n]o-one may be evicted from their home without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."

22 In *Occupiers, 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* 2008 (3) SA 208 (CC) ("*Olivia Road*"), the Constitutional Court had to consider how section 26 (3) applied to an application to give effect to a notice to vacate a dangerous building issued by a local authority in terms of section 12 (4) (b) of the National Building Standards and Building Regulations Act 103 of 1997 ("the Building Standards Act"). The Supreme Court of Appeal, against whose judgment the Constitutional Court was considering an appeal, had held that section 26 (3) meant no more than that a court was bound to give effect to such a notice by means of an interdict restraining the occupation of the property. The "relevant circumstances" to be considered were, the Supreme Court of Appeal held, that the building in question was deemed to be dangerous, a notice to vacate had been issued, and the notice had not been complied with (see *City of Johannesburg v Rand Properties* 2007 (6) SA 417 (SCA), paragraph 41).

23 The Constitutional Court disagreed. The court held that it was, at the very least, relevant to the application that the local authority had not considered whether the enforcement of the notice declaring a property to be a dangerous building might render those living on the property homeless. If the enforcement of the notice would lead to homelessness, then the local authority had a duty

to engage with the occupiers in order to consider whether and what form of alternative accommodation might be appropriate to provide. Only once the local authority had made a real effort to engage meaningfully with those who would be affected by its decision to enforce the notice to vacate could it ask a court to issue an order giving effect to the notice. In its application, the local authority would have to provide a complete and accurate account of its efforts to engage with the affected individuals, set out what alternative accommodation, if any, it would provide to them, and justify both its engagement strategy and its decisions on how to respond to any expressed need for alternative accommodation (*Olivia Road*, paragraphs 9 to 22).

24 I see no principled reason why the requirements the Constitutional Court 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.

26 The City has, of course, not made out that case in this application. The application must accordingly be dismissed. It remains open to the City, however, to bring a fresh application which joins the occupiers of the property, and which addresses the requirements I have set out.

The Prevention of Illegal Eviction from, and Unlawful Occupation of, Land Act 19 of 1998 ("the PIE Act")

27 When this matter was called on my unopposed motion roll on 10 August 2021, I asked Mr. Ralikhuvhana whether this application should not have been brought as an eviction proceeding under the PIE Act. Mr. Ralikhuvhana submitted that the PIE Act is of no application to these proceedings because the City sought merely to compel the company to comply with its obligations under the Scheme. He also submitted that the PIE Act could not apply in circumstances where, as seems evident here, the company consents to the occupiers' presence on the property.

28 I reserved judgment on the application, but I afforded the City until 27 August 2021 to make further submissions and deliver further affidavits on the nature of the relief it seeks, whether the PIE Act applies, and on any other matter it deemed appropriate. No submissions were forthcoming, which is unfortunate.

29 Be that as it may, Mr. Ralikhuvhana's submissions in court deserve consideration. His submission that the City seeks "merely" to enforce the company's obligations cannot be sustained in circumstances where, as he

readily accepted, in the event of non-compliance, the City sought leave to remove the occupiers from the property and seize their possessions.

30 Mr. Ralikhuvhana's submission on the application of the PIE Act, is, however, of some substance. The PIE Act applies to "unlawful occupiers". An unlawful occupier is "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", and to whom no other tenure protection legislation applies. It follows that where a person occupies property with the consent of the owner or person in charge, they are not an "unlawful occupier" for the purposes of the PIE Act.

31 Section 6 of the PIE Act empowers a municipality to seek the eviction of people who are living in structures erected without its consent, or where it is otherwise in the public interest to evict a person or persons. But section 6 makes clear that a municipality may only evict "unlawful occupiers" in these circumstances.

32 On the face of it, then, section 6 of PIE does not apply where a municipality seeks to enforce its Land Use Scheme against individuals who are living on property in breach of that Scheme, but with the permission of the owner or the person in charge. That is the situation in this case.

33 I need not, however, finally decide the issue. Even if the PIE Act does not apply, section 26 (3) of the Constitution does. In this case, the requirements of section 26 (3) have not been met, and the application cannot succeed.

Order

34 In summary, the City has not demonstrated a clear right to the interdictory relief it seeks in this case, because the order it asks for would authorise the arbitrary deprivation of the company's and the occupiers' property, in breach of section 25 (1) of the Constitution; because it would authorise an eviction without the consideration of all the relevant circumstances, in breach of section 26 (3) of the Constitution; and because, in any event, the occupiers of the property, who are clearly interested in relief that would have these drastic consequences, have not been joined to the proceedings.

35 For all these reasons, the application is dismissed.

S D J WILSON
Acting Judge of the High Court

This judgment was prepared and authored by Acting Judge Wilson. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 29 September 2021.

HEARD ON:	10 August 2021
FURTHER SUBMISSIONS DUE ON:	27 August 2021
DECIDED ON:	29 September 2021
For the Applicant:	N Ralikhuvhana Instructed by BM Kolisi Inc
For the Respondent:	No appearance Sithathu and Stanley Attorneys