

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

21/02/2019

DATE



D Brand

CASE No. 58864/2017



In the matter between:

GAUTENG DEPARTMENT OF HUMAN SETTLEMENTS

Applicant

and

**PERSONS WHOSE IDENTITIES ARE UNKNOWN TO
TO THE APPLICANT AND WHO HAVE ATTEMPTED TO
OR ARE THREATENING TO UNLAWFULLY OCCUPY
THE LAND SITUATED ON THE REMAINDER OF THE
FARM OLIFANTSFONTEIN 410 JR, CLAYVILLE EXT 45**

1st Respondent

**THE UNLAWFUL OCCUPIERS OF THE LAND
SITUATED ON THE REMAINDER OF THE FARM
OLIFANTSFONTEIN 410 JR, CLAYVILLE EXT 45**

2nd Respondent

EKHURULENI METROPOLITAN MUNICIPALITY

3rd Respondent

JUDGMENT

Brand AJ

Introduction

- [1] The Applicant, a provincial government department, seeks the eviction of the 1st and 2nd Respondents from residential buildings under its control.
- [2] By the time this matter proceeded before me, all relief sought against the 1st Respondents had been disposed of so that the matter before me concerned only the 2nd Respondents' eviction. The 2nd Respondents are a group of 71 disabled persons who, some with families and dependents, occupy the residential units in question. They oppose this application in part through what they style as a 'collateral or constitutional challenge' to their eviction, seeking an order that the Applicant in seeking their eviction is in breach of its policies, national legislation, the Constitution of the Republic of South Africa, 1996 and international obligations to prioritise and advance people with disabilities.
- [3] The 3rd Respondent, being the local authority in whose area of jurisdiction the land in question falls, is cited by virtue of this fact, but did not participate in the proceedings.

Background

- [4] The Applicant is in the process of constructing a large scale mixed land use social housing development on the farm Olifantsfontein 410 JR, Clayville

Extension 45, Tembisa (Clayville). The development is a so-called Mega-Project, which will, when complete, comprise 1 421 so-called high density walk-up units (which I understood to be flats in multiple apartment blocks), 200 so-called RDP houses, 1 134 further 'finance-linked' houses and 420 high density rental units (a total of 3 175 housing units), covering approximately 364 hectares of land.

- [5] On 5 December 2017 the occupiers, lead in this by the deponent to their answering affidavit, Ms Minah Funani, occupied one unit in a block of high density units (Block 9) in Clayville. Their purpose initially was political: they sought to stage a sit-in to protest against what they claim to be the neglect of their housing interests as disabled people by the Applicant. They were resolved to remain in the unit until they were given a credible and firm undertaking by the Applicant that housing would be allocated to them.
- [6] Despite a number of meetings with officials from the Applicant, no such undertaking was forthcoming. Accordingly, in the face of various visits from the police and a constant presence of the applicant's on-site security detail, the 2nd Respondents remained in the unit they occupied. By 7 December, they posed an ultimatum to the Applicant: would they not be given the undertaking they sought by 8 December, they would invite the media to publicise their plight and would proceed to occupy as many units of the blocks in the vicinity of their sit-in as their number required.
- [7] Come 8 December, there had been no movement from the Applicant. The Respondents then invited the media to the site and in their full view proceeded to occupy all the units in Blocks 9, 10 and 11. Here they settled, making the units their homes.

[8] This prompted the Applicant to bring an urgent application on 15 December 2017 under a part A for an interim order prohibiting anyone else (then still the 1st Respondents) from occupying further units and under a part B for an order for the 2nd Respondents' urgent eviction in terms of section 5(2) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE).

[9] On 18 December 2017 the relief sought in part A of the urgent application was granted as a rule *nisi*, with a return date of 20 December 2017 and the part B (the eviction application) postponed for hearing also on 20 December. On 20 December the rule *nisi* was confirmed and the Part B eviction application postponed *sine die*. It is this Part B that I must now dispose of.

[10] There are two issues to decide:

- Whether or not to grant the application for the 2nd Respondents' eviction. Given that there is no complaint that the Applicant has failed to comply with any of the procedural requirements of the PIE Act, and given that the eviction application is for final relief, this boils down to a consideration of whether the 2nd Respondents' eviction would be just and equitable under the circumstances.
- Whether to grant the 2nd Respondents' 'collateral or constitutional challenge' and grant the declaratory relief they seem to seek through it.

It is convenient to proceed with the 'collateral challenge' first.

Collateral/constitutional challenge

[11] The 2nd Respondents seek to raise what they term a collateral or constitutional challenge to the Applicant's failure to comply with its housing-related duties in terms of national legislation, the Constitution and international law. For relief, to

the extent that it is ascertainable, they seem to pray for a declaratory order to this effect.

[12] This aspect of the 2nd Respondents' case was not pressed with conviction at the hearing before me, and it is just as well, because it does not get out of the starting blocks.

[13] A collateral challenge is raised against the enforcement of an invalid administrative act by an organ of state – it is, that is, a mechanism through which to prevent the consequences of an invalid administrative act that has not yet been set aside on review and so remains in force.¹

[14] The 2nd Respondents do not style their collateral challenge as such, explicitly or otherwise. They do not show in any manner why the administrative act that is sought to be enforced against them here – the Applicant's administrative decision to proceed with evicting them – is invalid in terms of the Promotion of Administrative Justice Act 3 of 2000 or the constitutional principle of legality. They would have been hard-pressed to do so had they tried. Their complaint is not that the decision to evict them is in some way unlawful, procedurally unfair or unreasonable, but in essence that the Applicant does not have adequate measures in place to see to the needs of impoverished disabled people's housing needs, within its area of jurisdiction. They ask for a declarator to this effect, coupled, perhaps, with a direction that such measures be devised. It is of course open to them to do so, but then they would have had to bring a counter application to that effect according to the ordinary processes and rules in that respect. This, they have not done.

[15] Accordingly, the 2nd Respondents' collateral or constitutional challenge must fail. This does not, of course mean that the information placed before this court

¹ *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) para [32].

in respect of the scope and nature of the Applicant's housing obligations for disabled persons and its failure in giving effect to those is irrelevant to the further conduct of this matter. As will become clear below, this information is eminently relevant to the question whether it just and equitable to grant the eviction order the Applicant seeks and to fashioning the terms of any order I issue. To this I now turn.

Would an eviction order be just and equitable under the circumstances?

[16] The application for the 2nd Respondents' eviction was initially in the Part B of the Notice of Motion brought in terms of section 5(2) of PIE – that is as an application for the urgent eviction of the 2nd Respondents. As such, it was brought on the basis of section 5(2) of PIE. Section 5(2) of PIE indeed provides for applications for urgent evictions. However, it provides only for applications for interim relief, pending determination of an application for a final order for eviction – it reads, that is, in relevant part that an 'owner or person in charge of land may institute urgent proceedings for the eviction of an unlawful occupier of that land *pending the outcome of proceedings for a final order*' (my emphasis). Applications for urgent evictions in terms of section 5(2) for that reason usually take the form of applications for interim relief, in which an order for eviction in the form of a rule *nisi* with a return date is sought.

[17] Whether an application is brought in terms of section 5(2) or section 4 of PIE is significant, because importantly different tests apply in terms of which to determine such applications. To succeed in terms of section 5(2) for interim relief, an applicant must show that:

(a) there is a real and imminent danger of substantial injury or damage to any person or property if the unlawful occupier is not forthwith evicted from the land;

(b) the likely hardship to the owner or any other affected person if an order for eviction is not granted, exceeds the likely hardship to the unlawful occupier against whom the order is sought, if an order for eviction is granted; and

(c) there is no other effective remedy available.

- [18] To succeed with an application for final eviction relief in terms of section 4 of PIE, an applicant must by contrast show that it would be just and equitable under the circumstances to evict its respondents.² This section is clearly intended to give effect to the constitutional command in section 26(3) of the Constitution of the Republic of South Africa, 1996, that no one may be evicted from their home without an order of court made after considering all the relevant circumstances.
- [19] Section 5 of PIE in turn allows for application for an urgent eviction order that may be granted without a court considering the justice and equity of the eviction in light of all relevant circumstances. The departure from the constitutional command in section 26(3) of the Constitution that no eviction from a home may be granted without a court having considered all relevant circumstances may be explained by the fact that section 5 allows for application only for an interim eviction order, that applies pending finalisation of an application for final eviction. There is no foregoing of consideration of the justice and equity of the eviction – this consideration is only postponed.
- [20] In this light, this application was from the outset improperly brought in terms of section 5(2) – it was always for final, rather than interim relief, so that section 4 rather than section 5 applied. In addition, the initial urgency of the matter has been overtaken by events, already in December of 2017 when the eviction application was postponed *sine die* and the matter later placed on the ordinary roll, as it appeared before me. For these reasons, this matter stands to be decided in terms of section 4 of PIE and not section 5(2), despite the terms of the notice of motion. It is also on this basis that the matter proceeded before me. I nevertheless, for the sake of completeness, refer to the provisions of section 5(2) in the process of determining the matter in terms of section 4 and

² PIE sections 4(6) and (7).

show that I would reach the same conclusion on that section as with section 4's justice and equity.

- [21] Given that the 2nd Respondents had at the time proceedings were initiated clearly occupied the units for less than six months the justice and equity enquiry must occur in terms of section 6(6), which enjoins me to decide whether an eviction order would be 'just and equitable ... [in light of] all the relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women.' It is trite that it is the Applicant that bears the burden to persuade me of justice and equity. The Applicant may not simply make allegations to this effect. It must persuade this court on the basis of facts.³

'Just and equitable' – the Applicant's case

- [22] The Applicant points out in this respect that the 2nd Respondents occupy the units in question unlawfully. It further alleges that the units they occupy had at the time of their occupation already been allocated to other beneficiaries living in informal settlements in the vicinity and that those beneficiaries had in fact in anticipation of taking occupation of the new units already vacated and demolished their then current dwellings, so that they were effectively rendered homeless by the 2nd Respondents' occupation of the units.
- [23] In short, the Applicant claims that the 2nd Respondents' occupation of the units amounted to them jumping the housing queue and that their queue-jumping had not only deprived others of taking their rightful place in new using units for which they have been waiting patiently, but had caused them already to forfeit their existing homes.

³ See eg *Dwele v Phalatse and Others* (11112/15) [2017] ZAGPJHC 146 (7 June 2017).

[24] This, if shown to be true on the facts, is a serious accusation that would go far in tilting the balance of justice and equity in favour of the Applicant. It cannot be gainsaid that the demand for housing is dire and that there are many thousands of people under the jurisdiction of the Applicant who are in desperate need of housing and have been waiting for placement in housing provided by the Applicant for extended periods of time. It is also not controverted by the 2nd Respondents that there are specific people who have already been promised allocation of housing units in the mega-project of which they have occupied some units. The 2nd Respondents' housing needs, however desperate they are, can simply not be regarded in isolation from the needs of others – it must be given effect to taking account also of the needs of others.

[25] But the Applicant's allegations in this respect to be determinative must be borne out by the facts. On what was placed before me in the papers, they are not. To start with the high-water mark of the Applicant's case, that the 2nd Respondents' occupation of the units effectively deprived others of their homes: the deponent for the Applicant states simply that '[t]he units which are unlawfully occupied have already been allocated by the Applicant to deserving beneficiaries who were moved from their shack dwellings in anticipation of relocation to the Property. Their shack dwellings had to be demolished for purposes of their relocation to the Property.' It simply defies belief that a responsible organ of state, engaged in an orderly process of provision of new housing to impoverished persons under its jurisdiction will require of housing recipients to vacate and demolish their existing homes before specific new units have been allocated to them and are available for them to move into directly. It equally defies belief that any person, and particularly persons who have dire experience of the exigencies of homelessness, would relinquish whatever existing shelter they have on a vague promise that alternative houses will be provided to them at some time, somewhere, without being sure that a specific house is in fact waiting for them, ready to occupy. This, most serious, allegation of the Applicant's, cannot be accepted in its face. Despite having been invited to do

so through filing of a supplementary affidavit, the Applicant was unsurprisingly unable to place any facts before the court to discount its inherent improbability. At the very least the Applicant could have acquired confirmatory affidavits from the persons involved; or a schedule detailing the process of vacating existing homes, demolishing them and moving into new ones such as must be available. No such substantiation was forthcoming. Thus, this allegation of the Applicant's cannot be considered in determining the justice and equity of any eviction.

- [26] The allegation that the 2nd Respondents had occupied specific units that had already been allocated to specific other beneficiaries – that is, that they had in fact pushed specific other people out of the housing 'queue' – is certainly not inherently improbable. But for it to be persuasive in this consideration the Applicant must provide facts that support the allegation, and be specific, rather than vague and general in its assertions.
- [27] In its founding affidavit, the Applicant's deponent simply makes the statement already related above, namely that '[t]he units which are unlawfully occupied have already been allocated by the Applicant to deserving beneficiaries...'. In its replying affidavit, the Applicant's deponent repeats this statement, but then provides a little more detail, indicating that of the 215 people on the Applicant's waiting list for units in the development, 77 people had been approved and were ready to move into their new homes by late November 2017, but were prevented from doing so in December 2018 by the presence in those very units of the 2nd Respondents. In support of these statements the Applicant provides only two Annexures (RA1 and RA2), the one being the waiting list for allocation of units in the project; and the other said to be the list of approved persons who had already been allocated specific units. Neither of these Annexures, but specifically not the list of approved persons who are said to have been allocated specific units at all indicate the allocation of specific units to specific people – the latter, being the relevant one, is simply a list of names of 77 people with their contact details, identity numbers and then current physical addresses.

- [28] Mindful of the fact that I am bound *mero motu* to ensure that all the relevant information be placed before me necessary to determine the issue of justice and equity, at the hearing of this matter I directed the Applicant to file a supplementary affidavit with information, if any, indicating a link between the 77 approved beneficiaries and the specific units occupied by the 2nd Respondents. The 2nd Respondent was given leave to file an answer to this supplementary affidavit.
- [29] The supplementary affidavit was indeed filed, but takes the matter no further. In it the Applicant's deponent simply repeats the allegation and again refers the court to the two annexures to the replying affidavit, clarifying only that it is RA1 that in fact contains the list of approved beneficiaries.
- [30] Accordingly, the Applicant's assertion of actual, physical queue jumping by the 2nd Respondents remains unsubstantiated and so, in the determination of the justice and equity of the eviction applied for, unpersuasive.
- [31] But more than that: as pointed out by Mr Mohapi, who appeared for the 2nd Respondents at the hearing and in his written heads of argument, the allegation that the 2nd Respondents through their occupation of the units had prevented others who had already been allocated housing from moving in faces another hurdle. Nowhere in the papers is it stated or implied that the three units occupied by the 2nd Respondents were at the time of their occupation the only units that were ready to move into. It is common cause that the project, being a mega-project, will provide access when completed to a far larger number of housing units of different kinds than is required to house even the longer waiting list of people contained in RA2 to the replying affidavit. At the time of institution of proceedings, 1 421 of the kind of units that the 2nd Respondents occupy were already complete. In its answer to the Applicant's supplementary affidavit the deponent for the 2nd Respondents points out that since November 2017 at least 11 additional blocks of between 20 and 40 units have become available. The

Applicant does not explain why the 77 approved beneficiaries, even had they been allocated the specific units occupied by the 2nd Respondents, could not simply be moved to other available units.

- [32] I belabour this point somewhat, because the allegation of queue-jumping levelled against the 2nd Respondents is a serious one. Few conventions in our society, as in others, are as strong as that you wait your turn and you don't jump a queue. Few others attract quite the same level of opprobrium when transgressed. For an organ of state such as the Applicant, tasked with providing access to housing to the impoverished people under its care to level an accusation of 'pushing in' without proper and full substantiation against desperate people who compete for access to resources with other desperate people through no choice of their own, is nothing short of gratuitous.

'Just and equitable' – the 2nd Respondents' case

- [33] Although they avoid engaging in a 'race to the bottom',⁴ the 2nd Respondent's case revolves around their peculiar position of vulnerability as disabled persons; the range of focussed and specific obligations that the State as a whole but specifically the Applicant bears toward them; and their desperation, born out of a history of allegedly unrequited engagement with the Applicant and other organs of state about their housing needs and rights.
- [34] It is common cause that all of the 2nd Respondents are disabled persons. Their disabilities, ranging from visual to mobility-related impairments, are all permanent and serious. They are all also impoverished: although housed in a range of forms, from informal to formal housing, their pre-occupation housing conditions were all dire and specifically inadequate for their needs as disabled persons. The Applicant makes much of the fact that the 2nd Respondents left housing that they had lawful access to in order to occupy the units where they now reside unlawfully. It did so to make the point that they were not homeless, and so in some way not as vulnerable as they claim to have been when they

⁴ *Dladla v City of Johannesburg* [2017] ZACC 42 para 89 (per Cameron J).

took the step of leaving their prior housing and occupying the units where they now reside. I can find nothing in the papers to support this point. It is clear that the position of the 2nd Respondents was so inadequate and dire that, after they had to their minds exhausted all lawful avenues through which to address those conditions through attempted negotiation with the Applicant and other state agencies, they took the desperate step of abandoning their existing housing and occupying that which they needed. This was a step of desperation, not cynical calculation. For the Applicant to suggest otherwise is, again, gratuitous.

[35] Importantly, whereas the applicants were all housed before they occupied the units in question, they have since all let that prior housing go. That is, should they be now evicted, they will have nowhere to go.

[36] That the law requires special consideration for people in the position of the 2nd Respondents (impoverished disabled persons) is trite. Mr Mohapi referred this court to copious material at the international, regional and domestic level to this effect. Chief among these in this context is of course section 4(6) of the PIE Act that specifically identifies the rights and needs of disabled persons as a circumstance that must be considered in deciding whether it would be just and equitable to order eviction.

[37] The 2nd Respondents detail a long history of attempted engagement with state agencies, including the applicant to address their plight. Due to what can at best be described as benign neglect, these all came to naught. Although this court should be careful not to encourage self-help under these circumstances for impoverished people it is not effectively gainsaid by the Applicant that the 2nd Respondents' self-help here was as an absolute last resort and follows extended attempts lawfully to resolve their plight. It also does well to remind that the simple fact that the 2nd Respondents' occupation is unlawful and that they occupied the units in question in full knowledge that their occupation would be unlawful is for all intents and purposes irrelevant to the consideration of the

justice and equity of their possible eviction – PIE's protections apply only to unlawful occupiers; and it has clearly been held to apply also to occupation that was unlawful from the outset.⁵

[38] In light of the foregoing I cannot but conclude that it would not be just and equitable to order the 2nd Respondents' eviction. In short, the impact of such eviction on the 2nd Respondents, being in the uniquely vulnerable position that they are, would be catastrophic; while the impact on the Applicant's operations and even on other impoverished intended beneficiaries of the housing project, should they be allowed to stay, would be negligible – it is clear from the numbers of units that are available already and that still stand to be constructed, as compared to the number of people on the applicant's waiting list, that at least for this particular project housing is not yet a zero sum game. Accommodation of the 2nd Respondents would require a negligible adjustment of plans involving less than 5% of the eventually available units.

[39] What remains to be determined is the form of my order. Mr Mohapi urged me to issue in addition to an order dismissing the application also one directing the Applicant to either formalise the 2nd Respondents' occupation of the current units or allocate and provide to them suitable alternative permanent accommodation. I do not accept that invitation: dismissing the application means that the 2nd Respondents are now entitled to remain in occupation of the units in the housing project. I am satisfied that the Applicant, as a responsible state agency mindful of its obligations toward this particular group of impoverished people will make the required effort to reach a suitable agreement with them.

⁵ *Ndlovu v Ngcobo, Bekker and Another v Jika* [2002] 4 All SA 384 (SCA).

[40] In the result, I order as follows:

The application is dismissed with costs.



JFD Brand

Acting Judge of the High Court

Appearances: -

For the Applicant : **Adv. S. Mahlangu**
Instructed by : Ningiza Horner Attorneys

For the Respondent : **Adv. S L Mohapi**
Instructed by : KMNF Attorneys

Date of Hearing : 29 October 2018
Date of Judgment : 21 February 2019