



IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, DURBAN

CASE NO: 6652/2014

In the matter between:

ETHEKWINI MUNICIPALITY

APPLICANT

and

BAZAMILE GERVASIA GUMBI

FIRST RESPONDENT

NHLANHLA GUMBI

SECOND RESPONDENT

THEMBELIHLE GUMBI

THIRD RESPONDENT

JUDGMENT

THATCHER AJ:

[1] The applicant, the eThekweni Municipality, is the owner of a tract of land in an area known as Umlazi Infill Part 4 Phase 1. Some years ago people settled on it and built informal dwellings or structures in which to live. In 2009, the applicant decided to develop this tract of land and to that end, in May 2009, nearly six years ago, concluded what is described as a Social Compact Agreement with ward committees representing those living on that land in terms of which the parties agreed to work together so that the land could be developed for the benefit of the community.

[2] The intention was that the applicant would demarcate sites on the land and allocate those sites to individuals who would receive ownership of them. Clause 6 of the

agreement provided that the allocation of sites would "be managed in accordance with the [applicant's] Housing Department's allocation policy and the DoH beneficiary qualification criteria." Sub-clause 5 of clause 7 of the agreement provided that all sites in the development would "be allocated in accordance with the Allocations Policy of the [applicant] at the time."

[3] The papers do not disclose what these policies and criteria are. However in paragraphs 13 to 15 of the founding affidavit, what appears to be some of the criteria are set out, and these paragraphs are not disputed.

[4] According to the applicant, once a site had been demarcated, if the site was occupied by two persons, the person who was the first to occupy it and who had dependants would be allocated the title to it. If the person who had been granted the title of the site also met certain criteria, the applicant would, at its expense, build him or her a low cost house and have it registered in his or her name. The other person who used to co-occupy the site would be moved to another site, and if he or she met the criteria, would also be given the same benefit, that is, the construction of a low cost house at the applicant's expense and have the site registered in his or her name.

[5] This application concerns two sites demarcated by the applicant, namely a site which has the address No. 1507 W Extension 2, Umlazi, Durban, and the other which has the address No. 1661 W Extension 2, Umlazi. It is common cause that the first and second respondents, who are married to each other, and their dependants, were allocated the latter site and that the applicant has built a house on that site which has been registered in the names of the first and second respondents. The former property (hereinafter called "the property") has been allocated to the Mchunu family. A building contractor has been contracted to construct a house on the property for them. According to the applicant, the respondents occupy the property. According to the third respondent, who is the daughter of the first and second respondents, she occupies the property with her daughter who was born on 16 May 2014. She states that her brother also lives on the property. (A copy of the birth certificate of the third respondent's

daughter indicates that the third respondent was born on 16 May 1993 and she is thus 21 years old.) She denies that the first and second respondents occupy the property, stating that they occupy the house at No.1661 W Extension 2, Umlazi. The first and second respondents confirm this.

[6] According to the applicant, the respondents occupy the property allocated to them, but in the evenings the third respondent repairs to an informal structure on the property. Her occupation of the property is preventing the applicant from causing construction of a formal house on the property to be occupied by the Mchunu family. In this application the applicant seeks an order ejecting the respondents and all those who occupy through them from the property.

[7] It is not disputed that the applicant has complied with the procedural requirements laid down in the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act, No.19 of 1998, hereinafter called “the Act”.

[8] Section 6 of the Act governs the matter. The relevant part of section 6 is as follows:

“6. Eviction at instance of organ of state.— (1) An organ of state may institute proceedings for the eviction of an unlawful occupier from land which falls within its area of jurisdiction ... 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.”

However the circumstances identified in section 6 are not the only circumstances to which the court may refer in deciding what is just and equitable. The court must give consideration to all circumstances that might be relevant including for instance those mentioned in section 4, namely the elderly, children, disabled persons and households headed by women. The application of the Act depends upon the facts of each case, and each case may require a different approach.¹ What is required is that the courts must have regard to the interests and circumstances of the occupier and pay due regard to broader considerations of fairness and other constitutional values so as to produce a just and equitable result.² Provided it acts reasonably, the applicant, like the State, must be afforded some leeway in the design and structure of housing.³

[9] According to the applicant, the property was, before the demarcation of the sites, first occupied by the Mchunu family and later the third respondent’s family occupied the same site. This is disputed by the third respondent who states that her uncle, one Wiseman Gumbi, and the Mchunu family took occupation of the site at the same time. She states that she lived with her uncle for the last five years on the site and that she has continued to do so after her uncle passed away. She does not however set out any dates in this regard, or disclose where the first and second respondents have been staying over the last five years.

[10] It is unclear on the papers precisely when the sites were demarcated by the applicant. The agreement was concluded in May 2009 and presumably planning for the demarcation commenced approximately at or soon after that date. The applicant

¹ Port Elizabeth Municipality v Various Occupiers 2005(1) SA 217 (CC) at 234F – 235E.

² Port Elizabeth Municipality v Various Occupiers (supra) at 237D.

³ Residents of Joe Slovo Community v Thubelisha Homes 2010(3) SA 454 (CC) paragraph [111] at page 494.

contends that the respondents have known since approximately August 2012 that there was a prospect of them having to move.

[11] It is common cause that a house has been constructed on No.1661 W, Extension 2, Umlazi, and according to the respondents is occupied by the first and second respondents. Given that this application was launched on 9 June 2014, it can be assumed that the first and second respondents have enjoyed occupation of their new home from a date prior to the launching of this application and in all probability at a time when the third respondent could validly be considered a dependant of her parents.

[12] It appears from the founding affidavit that the Mchunu family, to whom the applicant has allocated the property, are the children of Mr Mchunu who has apparently passed away. The children of Mchunu are described in the replying affidavit as orphans. According to the applicant, they meet its criteria entitling them to have a low cost house built by the applicant on the property and to have it registered in their names.

[13] It is the applicant's case that:

- (a) the property is still owned by it (the applicant);
- (b) the applicant has provided the respondents with a house at no cost to the respondents (while no date as to when the allocation of the sites was made is reflected in the papers, it is, as I have stated, safe to assume that the third respondent had not given birth to her daughter when the allocation was made);
- (c) a contractor is poised to commence construction of a house on the property but is unable to do so because the respondents, or at least the third respondent, occupies it;

- (d) the contract with the building contractor provides that the applicant is liable for any damages that the contractor may suffer as a result of delays in performing the contract which are not attributable to the contractor;
- (e) the applicant is unable to cause the property to be developed so that the Mchunu family have the benefit of occupying a formal dwelling, a benefit afforded the respondents.

[14] The first and second respondents oppose the application on the basis that they should not have been joined as respondents as they do not occupy the property. The third respondent opposes the application on the basis that she has resided on the property for a period in excess of five years and she is now a single parent of a minor child, having given birth to a girl in May 2014. She also states that the applicant has on its own version undertaken to identify a site for her but that undertaking has not been fulfilled.

[15] The question to be determined is whether in these circumstances it is just and equitable in terms of section 6 of the Act that an order be granted for the eviction of the respondents from the property.

[16] The applicant is endeavouring to upgrade the living environment of the occupants of Umlazi Infill Part 4 Phase One. The first and second respondents have benefited from the applicant's endeavour in that they have been allocated a site and had constructed for them a house in which they are now living. It is probable that at the time the allocation was made and their house constructed, the third respondent, if she was not a minor, certainly had no dependant, and was, not unreasonably, regarded by the applicant as being a dependant of the first and second respondents.

[17] Even if that assumption is incorrect, there is nothing on the papers to indicate that the third respondent does not have alternative accommodation. She has not disclosed any facts supportive of the notion that she is not able to live in the house where the first

and second respondents are living. While she may not regard this as ideal, her desire to have a house of her own must at this stage yield to the opportunity the Mchunu family have of benefiting in the same way in which the first and second respondents have benefited, namely by having a house constructed for them of which they can receive title and in which they can live. There is nothing in the papers to suggest that the Mchunu family has access to alternative accommodation.

[18] The applicant is trying to improve the quality of the lives of as many people as possible and has been trying to do so since 2009. It is no doubt faced with many competing claims for sites. In the circumstances of this case, the applicant has acted reasonably in reconciling the competing claims for the property by allocating a site and house to the first and second respondents and their family, and a site and house to another family, the Mchunu family. It is not unreasonable to expect the third respondent to share the house with her parents in those circumstances. It is thus just and equitable that the applicant obtains vacant possession of the property.

[19] The respondents contend that no order ought to be made against the first and second respondents as they do not occupy the property, a fact disputed by the applicant. The respondents have not incurred any legal costs in opposing the application and I do not propose to make any order for costs against the respondents in favour of the applicant. To avoid any uncertainty, I think it appropriate that an order issue that all of the respondents and any person occupying through them be ordered to vacate the property. The first and second respondents will suffer no prejudice if I make such an order.

[20] Insofar as the date by which the property has to be vacated is concerned, it is reasonable to afford the respondents a period of twenty (20) days of the service of this order upon them to vacate the property.

Accordingly I make an order in the following terms:

1. The respondents and any or all persons occupying through them are ordered to vacate the immovable property bearing the physical address No.1507 W, Extension 2, Umlazi, Durban, within twenty (20) days of the service of this order upon them.
2. In the event that the respondents and any or all persons occupying through them fail to comply with the order set out in paragraph 1 above, the Sheriff of this Court is authorised and directed forthwith to eject the respondents and any or all persons occupying through them, from the property, and to hand vacant possession thereof to the applicant.

Date of Hearing	:	6 March 2015
Date of Judgment	:	17 March 2015
Counsel for Applicant	:	Mr L.L. Ngumle
Instructed by	:	Gcolotela & Peter Incorporated
Counsel for Respondents	:	Ms T. Gopal
Instructed by	:	Durban Justice Centre