

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

Case No: 14264/10

In the matter between:

SOHCO PROPERTY INVESTMENTS (COMPANY
INCORPORATED UNDER SECTION 21)
(REGISTRATION NUMBER: 2002/003444/08)

Applicant

and

RAMDASS, N	1 st Respondent
MATLI, DIJENG PATRICIA	2 nd Respondent
MSIBI, NM	3 rd Respondent
NZUZA, NOLUTHANDO	4 th Respondent
MEMELA, NOLWAZI PRUDENCE	5 th Respondent
MNCUBE, THOBILE ZIBUYILE	6 th Respondent
MAYEKISO, LH	7 th Respondent
MKHIZE, GUGULETHU PETUNA	8 th Respondent
NDLOVU, NL	9 th Respondent
JEKE, BAPHIWE PRETTY	10 th Respondent
DANSTER, S	11 th Respondent
BASHE, LYNETTE	12 th Respondent
LUSHABA, DOREEN XOLISILE	13 th Respondent
NDEBELE, SICELO	14 th Respondent
NDLOVU, RONNIE ZWELITHINI	15 th Respondent
ZIBANE, KHANYISILE PRECIOUS	16 th Respondent
JOZANA, MAUREEN	17 th Respondent
KHUMALO, THABO BRIAN	18 th Respondent
MFUSI, TP	19 th Respondent
MDLULI, NONHLAKANIPHO BRIGHTNESS	20 th Respondent
MKHUNGO, NOMUSA	21 st Respondent
PLAATJIES, HAPPY JUDITH	22 nd Respondent
SHABALALA, SANDILE STANFORD	23 rd Respondent

BAMBALELE, PHILA CYPRIAN	24 th Respondent
DHLAMINI, RB	25 th Respondent
MAKHETHA, NOBULELO JOYCE	26 th Respondent
MKHIZE, AF	27 th Respondent
DLAMINI, XL	28 th Respondent
MOENTI, PR	29 th Respondent
GUMEDE, NOMUSA GUGU	30 th Respondent
MTHEMBU, BUSELAPHI	31 st Respondent
DLAMINI, NONHLANHLA MAUREEN	32 nd Respondent
CELE, PJ	33 rd Respondent
GWALA, PRICILLA AMANDA	34 th Respondent
HARBER, KEITH EDMOND MARK	35 th Respondent
BERNARD, PEARL PATRICIA	36 th Respondent
KHUMALO, SE	37 th Respondent
MALINGA, NONHLANHLA	38 th Respondent
NGONGOMA, NTOKOZO FREEDOM	39 th Respondent
MTHETHWA, HM	40 th Respondent
PILLAY, D	41 st Respondent
SIBIYA, LINDOKUHLE	42 nd Respondent
VEZI, IN	43 rd Respondent
MNGADI, THOBKILE	44 th Respondent
MBANJWA, SIFISO INNOCENT	45 th Respondent
THAKALI, NTLHOKOA GREGORIA	46 th Respondent
MAZUBANE, NOZIPHO	47 th Respondent
DUMA, NOKUBONGA THELMA	48 th Respondent
MFUNGULA, NONDUMISO MARITIME	49 th Respondent
KHUMALO, SANDILE SMART	50 th Respondent
GOVENDER, SAGARAN YOGAN	51 st Respondent
MPANZA, WINTER-ROSE MAKHOSAZANE	52 nd Respondent
MFEKA, BARBARA NTOMBENHLE	53 rd Respondent
DLOMO, BUSEPHI NIKEZIWE	54 th Respondent
MOFOKENG, PRUDENCE	55 th Respondent
MATHONSI, VUSUMUZI BHEKISISA	56 th Respondent
MBHELE, XOLISIWE	57 th Respondent

KHUMALO, SANELE STANFORD	58 th Respondent
NXELE, ZANELE	59 th Respondent
CELE, NJABULO FORTUNE	60 th Respondent
BUTHELEZI, PERCIVAL MDUDUZI	61 st Respondent
MVUBU, SV	62 nd Respondent
MAKHOBHA, NONTOBeko PATIENCE	63 rd Respondent
MZULWINI, FN	64 th Respondent
GABELA, TECLA JABULILE	65 th Respondent
MTHIMKHULU, EUNICE SUSAN	66 th Respondent
GUMEDE, SANELISIWE LINDA	67 th Respondent
GUMEDE, EVANGELINE	68 th Respondent
MLOTSHWA, SONTU PRECIOUS	69 th Respondent
NOMPUMZA, BULELWA RUTH	70 th Respondent
NGUBENI, ES	71 st Respondent
CEBEKHULU, NONTOBeko SINDISIWE	72 nd Respondent
GUMEDE, GUGULAMI FORTUNATE	73 rd Respondent
KHOZA, BALUNGILE NOMUSA	74 th Respondent
NDLOVU, NANA PENELOPE	75 th Respondent
SHOBA, SM	76 th Respondent
MADLALA, SBUSISO MICHAEL	77 th Respondent
LUTHULI, NOMBUSO PRIDE	78 th Respondent
MPANZA, JABULANI EUGENE	79 th Respondent
METEDAD, LEONARD CASSIM	80 th Respondent
SITHOLE, SV	81 st Respondent
RAKOMA, SSJ	82 nd Respondent
MDLADLA, LINDA SUNSHINE	83 rd Respondent
NAMEYI, THEMBA CHRISTOPHER	84 th Respondent
DLAMINI, NOMUSA NAOMI	85 th Respondent
CHILIZA, BONGI CHARLOTTE	86 th Respondent
MABUZA, XOLANI SYDNEY	87 th Respondent
SHANGASE, KM	88 th Respondent
MBOKAZI, PS	89 th Respondent
MWALE, HLENGIWE	90 th Respondent
MKHUNGO, SP	91 st Respondent

DLANGISA, ZC	92 nd Respondent
MAPHUMULO, TBT	93 rd Respondent
MASHABANE, ZC	94 th Respondent
MTOLO, ZR	95 th Respondent
SITHOLE, NK	96 th Respondent
MKHUNGO, ET	97 th Respondent
CONCO, NOMATHAMSANQA VIOLA	98 th Respondent
GOVENDER, D	99 th Respondent
NOGAYA, NOVANGELI	100 th Respondent
NZUZA, NOMFUNDO	101 st Respondent
ZIQUBU, ZP	102 nd Respondent
GUMEDE, MP	103 rd Respondent
HLELA, MICHAEL SIBUSISO	104 th Respondent
NDOKWENI, CELUMBUSO HENDRY	105 th Respondent
KHUMALO, WT	106 th Respondent
ABRAHAMS, ROWEN ISAAC	107 th Respondent
KHANYILE, SIHAWUKELE DENNIS	108 th Respondent
MTHEMBU, SLINDILE C	109 th Respondent
MKHIZE, ZANELE MAUREEN	110 th Respondent
DLUDLA, NONHLE NTOMBIKHONA	111 th Respondent
MBOMBO, AYANDA	112 th Respondent
MHLUNGA, NOMPUMELELO N	113 th Respondent
DLAMINI, NONDUMISO JANET	114 th Respondent
CHERRY, CHANELLE CARMEN	115 th Respondent
MOLELEKWA, PETRUS	116 th Respondent
MZINDLE, GUGU THABILE	117 th Respondent
NTSHINGILA, ZANILE NIKEZIWE	118 th Respondent
KGOMO, KEDIBONE ALBERTINA	119 th Respondent
NTENTESA, LUMKA	120 th Respondent
NDLOVU, YVONNE FAITH NOMATHAMSANQA	121 st Respondent
MABUYAKHULU, VUSI	122 nd Respondent
KHUZWAYO, SIFISO MORGAN	123 rd Respondent
BAHADUR, ASHVEER BAHADUR	124 th Respondent
MSELE, SIFISO MTHOKOZISI	125 th Respondent

MAHARAJ, CANDICE	126 th Respondent
NTOMBELA, SCELO PETROS SAKHISENI	127 th Respondent
SHEZI, REGINAH THULILE	128 th Respondent
ZULU, ZAMAZULU PAMELA	129 th Respondent
SITHOLE, NONHLE PRINCESS	130 th Respondent
ZONDI, RUTH SIBUSISIWE	131 st Respondent
MTHWANA, REBECCA	132 nd Respondent
JACA, NONJABULO HAPPINESS	133 rd Respondent
BHENGU, ZAKIYA	134 th Respondent
KHUBONI, NTOKOZO	135 th Respondent
MBUTHU, NTOMBIKAYISE ROTA	136 th Respondent
XULU, PRESENT PRINCESS	137 th Respondent
NGIDI, LYNN LONDIWE	138 th Respondent
NGCECE, SPHINDILE IGNATIA	139 th Respondent
GONIWE, NOLUTHANDO CAROL	140 th Respondent
NAIDOO, ANTONY TERENCE	141 st Respondent
MAJOLA, SLINDILE PORTIA	142 nd Respondent
MPUNGOSE, NTOMBIKHONA	143 rd Respondent
ZUMA, THULANI	144 th Respondent
CHAGI, BULELWA	145 th Respondent
MSIMANG, PALESA ABEGAIL	146 th Respondent
MSIBI, BHEKANI ALFRED	147 th Respondent
ZIKALALA, ELIZABETH DUDUZILE	148 th Respondent
MTHETHWA, ZANELE ANGELINE	149 th Respondent
MASONDO, CAROL NOMPUMELELO	150 th Respondent
MAPUMULO, THOKOZILE PRINCESS	151 st Respondent
JOLOZA, PRINCESS NONHLANHLA	152 nd Respondent
TSHONA, THOBEKA	153 rd Respondent
MBATHA, ZENI ANDRINA	154 th Respondent
SEBATANA, MPUMELELO GOODWILL	155 th Respondent
BOOYSEN, ANGELINE BEATRICE	156 th Respondent
GUMEDE, BONGINHLANHLA MUZIKHONA	157 th Respondent
KHUBONI, THULELENI NOMPUMELELO RENAY	158 th Respondent
MSOMI, SAKHILE CYRIL	159 th Respondent

XULU, CHARLOTTE NOKUKHANYA	160 th Respondent
NGUNDZE, NOSISA PATRICIA	161 st Respondent
STEENKAMP, NOLLEN PRALEEN	162 nd Respondent
SHABALALA, THABISILE	163 rd Respondent
ZONDI, PRIMROSE LUNGILE	164 th Respondent
MAZWI, MAVA LEARNT	165 th Respondent
RADEBE, THABISILE	166 th Respondent
NGEMA, STANLEY MBUSO	167 th Respondent
MBAMBO, NOMPUMELELO SYLVINAH	168 th Respondent
DANIEL, PRISCILLA	169 th Respondent
CHILIZA, SELBORN NJABULO	170 th Respondent
CHALA, PICTURE THANDIWE	171 st Respondent
NDUNGANE, NOMALUNGELO FLORENCE	172 nd Respondent
MTHEMBU, THULANI RAYMOND	173 rd Respondent
KHUMALO, PINKY WINNIE MATHOMBI	174 th Respondent
CHILI, NTOKOZO	175 th Respondent
MTSHALI, SICELO MONDLI IAN	176 th Respondent
ZULU, NHLANHLA COLLEN	177 th Respondent
NKOSI, NELISIWE WITNESS	178 th Respondent
NCUBE, SHEPERED KHEME	179 th Respondent
CELE, REBECCA SIBONGILE	180 th Respondent
MTHEMBU, LINDILE	181 st Respondent
MNGOMA, THABANI EUGENE	182 nd Respondent
MLALANDLE, MBUTHOKAZI YVONNE	183 rd Respondent
KHUZWAYO, SIYABONGA DENNIS	184 th Respondent
KUMALO, PROSPERITY PHUMULANI	185 th Respondent
METH, CHRISTIA BERNADETTE	186 th Respondent
NKOMO, GUGULETHU FORTUNE	187 th Respondent
MKILE, FIKISWA ETHEL	188 th Respondent
MKHIZE, STHEMBISO PHAKAMANI	189 th Respondent
NGUBO, DUMAZILE	190 th Respondent
NTOMBELA, PHINDI	191 st Respondent
ESBEND, FRANCINE	192 nd Respondent
BANDEZI, THOBEKA LUNGELWA	193 rd Respondent

MTUKUSHE, NTOMBASEKHAYA MOIRA	194 th Respondent
PILLAY, YANASUNDALA	195 th Respondent
KHUZWAYO, ZWAKELE MILLECENT	196 th Respondent
NGWENYA, THABILE THEODORA	197 th Respondent
JIKI, NY	198 th Respondent
NCOBELA, NP	199 th Respondent
MHLONGO, TP	200 th Respondent
NDLOVU, FM	201 st Respondent
THUSI, PT	202 nd Respondent
REX, R	203 rd Respondent
MSOMI, MNS	204 th Respondent
NZAMA, LT	205 th Respondent
MZILA, XP	206 th Respondent
CHILI, CK	207 th Respondent
SIBIYA, FORTUNATE VUSUMUZI	208 th Respondent
NDLOZI, ND	209 th Respondent
NKOHILA, THOZAMA	210 th Respondent
NAIDOO, DHAYALAN LEON	211 th Respondent
RADEBE, A	212 th Respondent
ZUNGU, VUMISILE CONSTANCE	213 th Respondent
NXUMALO, N	214 th Respondent
RADEBE, K	215 th Respondent
ZONDI, BW	216 th Respondent
MCHUNU, AYANDA ARETHA	217 th Respondent
SHEZI, BC	218 th Respondent
SIBIYA, TR	219 th Respondent
ZONDI, RT	220 th Respondent
SOKHULU, SW	221 st Respondent
SINDANE, CM	222 nd Respondent
TEMBE, BS	223 rd Respondent
MANCI, NP	224 th Respondent
SHANGE, JEANY	225 th Respondent
MNGUNI, BUSISIWE ANN-MARY	226 th Respondent
ZONDI, SIPHO BETHWELL	227 th Respondent

SHANDU, PL	228 th Respondent
MNOMIYA, YOLISWA	229 th Respondent
SIBIYA, SIPHO LAWRENCE	230 th Respondent
MBATHA, HENRY	231 st Respondent
THE FURTHER UNLAWFUL OCCUPIERS OF RIVER VIEW	232 nd Respondent

JUDGMENT

Delivered on: 15 January 2013

MNGUNI J

Introduction

[1] The applicant seeks an order evicting the respondents and all persons occupying through them, from the units in a social housing complex known as Riverview situated at Riverview, 50 Bramcote Road, Durban (immovable property). The respondents oppose the application.

[2] The applicant is a company registered not for gain in terms of section 21 of the Companies Act 61 of 1973 and is a social housing provider, providing accommodation for a family with a combined income of between R2 500 and R7 500. The immovable property is one of the social housing complexes which the applicant established and it comprises of some 330 two bedroom units development built as a two to four storey walk up blocks of flats. The immovable property is situated within the area of jurisdiction of this Court and within the jurisdiction of the Ethekewini City Council (city).

[3] The applicant's primary purpose is the development of quality affordable residential property for low income households. The funding to construct the development comes from a number of sources, including the National Department of Housing which provides an institutional subsidy to the applicant for rental units for qualifying beneficiaries in a family who do not earn more than R7 500 total income per month. The subsidy vests in the applicant and not in the individual. The applicant has also obtained bond finance through the National Housing Finance Corporation, an organization established to provide finance to organisations such as the applicant.

[4] One of the salient features of the scheme is the cross-subsidisation, which means that although the units are all of the same size, the rent payable by the tenant varies from tenant to tenant based on the individual tenant's income. Consequently, a tenant with a monthly family income of R7 500 would pay the highest rental bracket while another tenant with family income of R2 500 would pay the lowest rental bracket despite the fact that both tenants occupy an identical unit. Through this cross subsidisation, the applicant is able to provide decent accommodation for relatively low income earners.

[5] Because of the unique feature of the scheme, the prospective tenants for accommodation in the immovable property are carefully screened and allocated accommodation in the scheme on the matrix to ensure that there are sufficient tenants in various income groups to provide the cross subsidisation necessary in order to ensure that the project is economically viable. The

applicant does not subsidise the rentals and therefore it is vital for the continued well being of the scheme that all the tenants pay their rental in accordance with the matrix.

[6] Each of the respondent occupies the unit pursuant to a written lease agreement entered into with the applicant and these lease agreements are identical to each other save for the particulars of the respective respondents, the monthly rent payable and the identity of the unit let to the respective respondents. The relevant clauses appear below:

'2.2 The Lessee shall pay the rental without any deduction or setoff, in advance, before or on the first day of the month, commencing on the commencement date, by transfer directly to the Lessor's bank account.

2.2.1 Any failure by the Lessee to make payment will result in the termination in terms of Clause 11.

11. Termination

11.1 The agreement will, subject to Clause 11.7 below, remain in force for so long as the Lessee meets his/her obligations hereunder or until terminated by the Lessee on one (1) calendar month's written notice to the Lessor or until the Lessee has breached this agreement as set out below;

11.2 The Lessor may cancel the agreement without notice to the Lessee in the event of the Lessee:

- . Failing to make payment of the full rental on or before the 5th day of the month in respect of which the rental is payable in terms of this Lease Agreement.'

[7] Before turning to the merits of the matter, it is apposite to deal with four points in *limine* which the respondents raised. I propose to deal with them in the sequence in which they were raised.

[8] The first point in *limine* concerns the ownership of the immovable property. The respondents have denied that the applicant owns the immovable property. They assert that the applicant administers the immovable property and the units thereon within the scheme known as Riverview for which it receives subsidies from the Provincial and or Local Government in respect of each tenant who qualifies for such subsidy. Consequently, the applicant lacks the requisite *locus standi* to institute these proceedings. In reply to their allegation, the applicant furnished the title deeds which form annexure STAA to the replying affidavit. Annexure STAA confirms that the applicant is the registered owner of the immovable property. Unless reliance is placed on acquisitive prescription, ownership in immovable property can only be proved by producing the title deeds or an extract or affidavit authorised by statute (see *Geemenskaapsont wikkelingsraad v Williams and Other* (1) 1977 (2) SA 692 (W)). This point in *limine* has no merit.

[9] The second point in *limine* is predicated on the notion that the immovable property constitutes a dwelling place as contemplated by the Prevention of Legal Eviction from and Unlawful Occupation of Land Act No. 19 of 1998 (PIE). The applicant is, therefore, obliged to comply not only with the form of PIE but also with the substantive provisions contained in Section 4(7) and (8) of PIE as well as Section 5, which deals with the issue of

urgency. The applicant has simply served the notice in terms of Section 4(2) of PIE without having served the application upon the respondents. The respondents asserted that the applicant has failed to place before the Court any evidence or even a bald allegation to enable the Court to consider the factors raised in Section 4(7) and/or (8) of PIE with specific reference to the requirements of the rights and needs of the elderly, children, disabled persons and households headed by woman, and the availability of alternative land for accommodation. The applicant's evidence on the issue of service is that on 28 January 2011 when the matter came before Court the respondents were legally represented and it was agreed at Court by the legal representatives that, given the voluminous nature of the application papers, which included numerous annexures, Mr Nkosi would accept service of a copy therefore on behalf of all the respondents represented by him. In accordance with that agreement, service of the application papers was duly effected on all the respondents, by service upon their attorneys of record. In the circumstances I find it idle to contend against the applicant's evidence in this regard. On the alleged failure of the applicant to satisfy the requirements of sections 4(7) and/or (8), I can do no better than to repeat what was pronounced by Harms JA in *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 SCA at 124E-F when he stated:

'...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.'

This point in *limine* has no substance and it fails.

[10] In the third point in *limine*, the respondents contend that the applicant instituted these proceedings as an urgent application. They submitted that in doing so, the applicant has failed to serve the application on the respondents, in compliance with the requirements for urgent applications in terms of the section 5 (1) of PIE and to address any of the issues raised in the said subsection. For that reason, so the argument goes, the applicant's founding papers are defective for want of compliance with the substantive requirements of PIE on urgent applications. I have carefully considered the papers and it does not seem to me that the application was brought on urgent basis. Accordingly, I find no substance in this point and it fails.

[11] The final point in *limine* concerns the alleged failure of the applicant to join, as the necessary parties, the member of the Executive Council for Housing, KwaZulu-Natal and the EThekweni City Council (which the respondents collectively referred to as the Local Government). The respondents' contention is premised on the allegation that the applicant receives subsidies from the Local Government for each individual who qualifies for housing within the scheme which the applicant administers on their behalf, which subsidies should offset or at least reduce the rental payable by each of the respondents.

[12] It is to be observed that the applicant has given evidence on affidavit in detail as to how the scheme works. A similar point was raised before Swain J in the matter between the applicant and Prudence Sindisiwe Hlophe and 95 others, Case No 11474/10 and was dismissed. In paragraph 10 Swain J held:

‘The fact that the National Department of Housing provides the applicant with a subsidy does not give it a direct and substantial interest in a dispute between the applicant and the respondents, as to the entitlement of the respondents to remain in occupation of their respective homes. There is consequently no merit in the point in *limine*.’

This finding, in my view, applies with equal force on this point in *limine* and the point in *limine* therefore falls to fail.

[13] As to the merits. The applicant seeks the eviction of the respondents on the ground that it has validly cancelled all the lease agreements entered into with the respondents because of a failure to pay their respective rentals. Each of the respondents relies upon the defences raised in the answering affidavit deposed to by Njabulo Nxumalo (Nxumalo). The respondents’ attitude in this regard is made clear in the following extracts from Nxumalo’s answering affidavit:

‘ 55

I pause to mention the process by which the Applicant signed up the various Respondents to leases, namely:

- 55.1 the lease was prepared in English;
- 55.2 the Applicant’s representative, Quentin, would read out excerpts from the house rules which appear annexed to the applicant’s found affidavit;
- 55.3 the rental amounts were left blank and each tenant signed up was advised that the subsidy would cover the rental or subsidise it (i.e reduce it) to a large extent.

I respectfully refer the above Honourable Court to the various lease agreements ("the leases") attached to the Founding Affidavits and, in particular, to the rental clause which is filled in by hand, which Respondents contend took place after signature thereof.'

They allege as a consequence that they never agreed to pay the rentals specified in their respective leases and as a consequence have not paid rentals to the applicant for a substantial period of time.

[14] The respondents have formed a committee called Riverview Resident's Committee which seems to be a driving force behind their cause. The applicant's description of the respondents' conduct as a 'rent boycott' was found by Swain J in a similar matter between the applicant and Prudence Sindisiwe Hlophe, Case No 11474/10 to be a correct one. I have also assessed and considered the circumstances surrounding the non payment of the rent in this matter and I find myself in agreement with my brother's finding in this regard. In my view, such conduct amounts to the kind of self help that is inimical to our legal order.

[15] The letters of cancellation by the applicant to the respondents are dated 12 October 2010 and the applicant alleges that they were served to the respondents by Brian Siphesihle Shezi of Ihlokohloko Security Services. This fact is confirmed by the said Shezi in his supporting affidavit. Despite the mountain of evidence from the papers, the respondents deny the breach of the leases and consequently deny that the applicant was entitled to terminate the leases in respect of each of the respondents. I have considered this denial

and it seems to have no merit. In the result, I am satisfied that the applicant has established that the respondents became unlawful occupiers by no later than 12 October 2010.

[16] Notwithstanding the letters of cancellation of 12 October 2010, the respondents remain in occupation of the immovable property and are in unlawful occupation thereof. On perusal and consideration of the papers, I am satisfied that the applicant validly cancelled the lease agreements and that it has satisfied the procedural requirements provided for in PIE. The applicant initiated these proceedings on 1 December 2010 and therefore the respondents were unlawful occupiers for a period of less than six months at the time the present proceedings were initiated. For these reasons, I do not agree with Ms De Vos' contention that the respondents must have been in unlawful occupation in excess of six months before these proceedings were launched. I am satisfied that on the facts of this case, the additional requirements provided in section 4(7) of PIE are not applicable.

[17] In instances where the occupation was originally lawful, the time at which the occupation became unlawful, has important consequences in relation to the time within which steps are taken to evict the unlawful occupier. The period of occupation is calculated from the date the occupation becomes unlawful (*Ndlovu v Ngcobo*; *Bekker and another v Jika* 2003 (1) SA 113 (SCA) para 17). The PIE distinguishes between unlawful occupiers who have occupied for less than six months (section 4(6)) and those who have occupied for more than six months (section 4(7)). The distinction in these provisions lies

in that in terms of section 4(7) of PIE, when the proceedings are initiated, an additional consideration is whether the 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 household headed by women.

[18] In terms of section 4(6) of PIE 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.

[19] If the requirements of section 4 of the PIE are satisfied and no valid defence to an eviction order has been raised, the Court must, in terms of section 4(8) of PIE, grant an eviction order. In doing so, the Court must, in terms of section 4(8)(a) of PIE, determine a just and equitable date on which the unlawful occupier(s) must vacate the premises. The Court may, as envisaged in section 4(12) of PIE, attach reasonable conditions to an eviction order. In *Ndlovu v Ngcobo; Bekker and Another v Jika (supra)* para 19 Harms JA held:

‘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 respondents’ 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...'

[20] On 25 April 2012 Nxumalo deposed to a supplementary affidavit in which he contends firstly that the applicant is not entitled to an eviction order because it has not investigated the possibility of mediation to be facilitated by the City between the respondents and the applicant. The respondents allege that they would welcome an opportunity to enter into new written lease agreements with the applicant and remain open to the possibility of settlement with the hope of resolving the matter through negotiations. Ms De Vos, relied on *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 para 43 to in support of this contention.

[21] It is common cause that the applicant owns three distinct developments in the area of Durban, namely, Riverview, Port view and Valley view. The applicant's founding affidavit reveals that the occupiers of all three developments have embarked on a 'rent boycott'. The applicant's evidence is that the non payment levels on each of these developments have reached approximately 75%. In relation to this immovable property, 86 complainants approached the KwaZulu-Natal Rental Housing Tribunal (Tribunal) with a complaint that they had been made to sign leases that did not stipulate the amount of rental payable and the Tribunal considered the matter and found in favour of the applicant.

[22] Though the respondents concede that the matter was ventilated before the Tribunal, they contend that they did not receive a fair hearing before that

Tribunal because (as they allege) they were not legally represented at that hearing, and it became clear to them that they were being prejudice by the absence of the legal representation.

[23] It is to be observed from the papers that the respondents were not prepared to pay the rental amounts as set out in their respective lease agreements. The respondents' stance is evident from the following paragraphs of Nxumalo's answering affidavit:

'AD PARA 489

75.

The Respondents deny this paragraph. As I have stated previously, the Applicant is disingenuous in attempting to create an impression that it is not receiving payment when it is abundantly clear that it is receiving the subsidies from local government in respect in respect of each of the Respondents, which should cover the amount in which it alleges are outstanding.

76.

The Respondents deny that they received a fair hearing before the KwaZulu-Natal Rental Housing Tribunal ("the Tribunal"). The Respondents were not represented at that hearing before the Tribunal and it became abundantly clear that the Respondents were being prejudiced as a result thereof. The Respondents obtained representation when the Applicant instituted eviction proceedings in the Magistrate's Court.

AD PARA 490

77.

The Respondents deny this paragraph. In amplification thereto, the Respondents have been paying the lower amounts into the trust account of its attorneys of record herein, pending the resolution of the dispute.'

[24] It seems, and the evidence points to the fact that the respondents have arrogated to themselves the decision as to when, where and how to pay the rentals due in terms of their respective leases. Importantly, they have defied the finding of the Tribunal and have embarked on a deliberate strategy of non payment of the rent in order to force the applicant to reduce same. Having carefully considered the respondents' submission in this regard, and taking all the relevant circumstances of this matter into account, I can find no traces of facts which justify the referral of the matter for mediation. I am, therefore, satisfied that the path of travel chosen by the applicant is indeed the correct one.

[25] Secondly, the respondents contend that if the respondents were to be evicted from the immovable property, most of them would be rendered homeless. They submit that it is obligatory on the Court to require the City to take reasonable measures to ensure the progressive realization of their Constitutional Right to access to adequate housing which includes an obligation to provide them with emergency temporary shelter in the event that they are left without alternative accommodation as a result of eviction and whether the Court could provide emergency temporary shelter to them.

[26] In *casu*, the respondents have been in occupation of the immovable property for less than six months, and consequently the Court is not expressly obliged to investigate whether the City can reasonably make land available for the occupiers who might be evicted (section 4 (6) of the PIE). In *Occupiers of*

Mooiplaats v Golden Thread Ltd and Others 2012 (2) SA 337 at para 16

Yacoob J remarked:

'While this distinction is important, I do not think it is decisive to the justice-and-equity enquiry. This is because, if a court has before it a case in which the land occupation falls short of six months, it is obliged to consider all the relevant circumstances. In an enquiry of this kind a court should determine what the relevant circumstances are. Close to 200 families would have been evicted and in all probability rendered homeless consequent upon the order of the High Court. In the face of this consequence the question whether the City was reasonable capable of providing alternative land or housing was of crucial importance. And what is more, the High Court was alive to the fact that the City did indeed own land which was vacant and which might be made available for that purpose. It was impossible for the High Court to conclude that the eviction was just and equitable without investigating this aspect.'

[27] The just and equitable enquiry calls for the assessment of the competing interests and to balance out and reconcile them 'in as just a manner as possible, taking account of all of the interests involved and the specific factors relevant in each particular case' (see *Port Elizabeth Municipality (supra)* para 23).

[28] What can be gleaned from the applicant's founding affidavit is that most of the respondents have now been in arrears for at least the whole of 2010, an organised 'rent boycott' having been in place for the best part of that year and continues to date. The 4th, 12th, 19th, 20th, 21st, 31st, 38th, 39th, 44th, 48th, 55th, 56th, 59th, 60th, 80th, 92nd, 94th, 99th, 105th, 106th, 109th, 110th, 111th, 113th, 120th, 143rd, 155th, 156th, 158th, 161st, 170th, 172nd, 206th, 207th, 208th, 212th and 216th respondents (collectively referred to as unemployed respondents) have filed PIE affidavits in which they intimate that they are now

unemployed. The question, therefore, is whether the unemployed respondents' factors as contained in their PIE affidavits should be considered and measured differently from those of the other respondents. I do not think so, in my view, all respondents' factors should be considered, measured and balanced against the following factors enumerated in the applicant's founding affidavit:

'494.1 The Applicant is a Section 21 Company which does not seek to profit from its social housing development. Its stated objective is to provide and affordable quality home in the City in a safe and secure environment close to shops, clinics and schools.

494.2 The Respondents now owe the Applicant an amount exceeding R5, 461, 952.00 (Five Million Four Hundred and Sixty One Thousand Nine Hundred and Fifty Two Rand). Furthermore, the rental boycotts undertaken in the abovementioned Port View and Valley View complexes bring the total due to the Applicant to an amount exceeding R9, 508, 371.00 (Nine Million Five Hundred and Eight Rand Three Hundred and Seventy One Rand). It is impossible for the Applicant to bear this kind of loss. Although the Applicant has issued approximately 500 summonses out of the Magistrate's Court for recovery of the arrears and for eviction of the Respondents, postponements, rescission applications and applications to consolidate the Magistrate's Court matters have meant that despite spending significant sums on legal fees, the Applicant has made almost no progress in its attempts to recover the massive arrears. The Applicant has had to curtail maintenance, security and general service provision at the complex, now faces a real prospect that it may be unable to fulfil its financial obligations and may be forced into liquidation. The Applicant fears that this may be part of the Respondents' strategy: if the Applicant is forced into liquidation, there is no doubt that this will permit them to reside free of charge at the property for an extended period if not indefinitely.

494.3 As described above, the Applicant obtained a bond through the NHFC. The Applicant has been forced into arrears with its obligations to the NHFC and I annex hereto as **“ST-708”** a letter from the NHFC dated the 14th July 2010 advising that unless the arrears are rectified soon, the NHFC may be forced to institute legal action and foreclosure. The financial risk to the KwaZulu-Natal Province if the project fails is R6, 205, 927.00 (Six Million Two Hundred and Five Thousand Nine Hundred and Twenty Seven Rand) and to National Government of R9, 482, 800.00 (Nine Million Four Hundred and Eighty Two Thousand Rand Eight Hundred Rand). The Applicant provides accommodation for low earning families. Its system of cross-subsidisation means that it is able to provide quality accommodation to people who would not otherwise be able to afford it. No commercial entity would provide accommodation of such quality to people with the income levels of some of the Respondents and it would accordingly be a travesty if the Applicant was forced into liquidation and the accommodation units sold to commercially minded purchasers.’

There is no evidence placed before me that the circumstances in which the unemployed respondents are living indicate the likelihood that at least some of them might be rendered homeless as a result of their eviction. For that reason, I find that it is unnecessary to engage the City in the process before granting an eviction order.

[29] Mr Phillips, on behalf of the applicant, submitted that the withholding of rental by the respondents was a co-ordinated and well orchestrated strategy, which was a boycott, not borne of economic hardship or inability to pay even the minimum which on the respondents’ version was due. He submitted further that the rent boycott has left the applicant in a parlous financial situation. He continued and submitted that the action of the respondents has compromised the applicant’s programme of providing a cross subsidised

housing project for other deserving persons who would honour their agreements.

[30] I am mindful of the fact that the Constitution and PIE require that, in addition to considering the lawfulness of the occupation, the court must have regard to the interest 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. Thus, PIE expressly requires the court to infuse elements of grace and compassion into the formal structures of the law. It is called upon to balance competing interests in a principled way and to promote the constitutional vision of a caring society based on good neighbourliness and shared concern. (see *Port Elizabeth Municipality* (supra) paras 36 and 37).

[31] During argument, Ms De Vos relied on *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) BCLR 150 (CC) to advance her argument that it was not just and equitable to evict the respondents because that would result in homelessness. I have considered Ms De Vos' submission and in my view, *Blue Moonlight* is discernable from the present case. In *casu*, the respondents occupied the immovable property pursuant to the leases concluded with the applicant after the applicant had carefully assessed the total income of each of the family. The PIE affidavits of the respondents, save of those of the unemployed, demonstrate clearly that they are still gainfully employed. None of their affidavits is particularly informative save only to talk about their expenses. Having carefully balanced the competing interests, (as I am required to do) of the applicant and the respondents, and bearing in mind the Constitutional

vision as set out in *Port Elizabeth Municipality (supra)*, I am driven to conclude that the respondents have failed to disclose sufficient facts to persuade me that the interests of the applicant should yield to those of theirs. I have satisfied myself that it is just and equitable that an eviction order be granted against all the respondents in this matter.

[32] What now remains to be considered is a just and equitable date (section 4(8) of PIE) on which the respondents are to vacate the immovable property. Having regard to the number of the respondents who will be obliged to seek alternative accommodation, an appropriate date by which they should be obliged to vacate the immovable property, will be 28 February 2013.

In the result the following order shall issue,

1. The first to the two hundred and thirty two respondents together with all members of the respondents' families and any other person who occupies the immovable property, be and are hereby directed to vacate the said units by no later than 28 February 2013.
2. In the event that the respondents do not vacate the immovable property on the date referred to in paragraph 1 above, the Sheriff of the Court or his lawfully appointed Deputy be authorised and directed to evict the respondents from the property.

3. The respondents are interdicted and restrained from entering the property at any time after they have vacated the immovable property, or been evicted there from by the Sheriff of the Court or his lawfully appointed Deputy.
4. In the event that the respondents or any of them contravene the order contained in paragraph 3 above, the Sheriff of the Court or his lawfully appointed Deputy is hereby authorised and directed to remove them from the immovable property as soon as possible after their re-occupation thereof.
5. The respondents are directed to pay the costs of this application.

Appearances:

Date of hearing	:	17- 26 April 2012 and 22 August 2012
Date of Judgment	:	15 January 2013
Counsel for the applicant	:	Advocate D. Phillips
Instructed by	:	Du Toit Havemann & Lloyd
Counsel for the respondents	:	Advocate I. De Vos Advocate B.S.M. Bedderson
Instructed by	:	S M Ngwane Attorneys