

REPORTABLE

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

CASE NO: 2673/2011

In the matter between:

MAHOGANY RIDGE 2 PROPERTY OWNERS ASSOCIATION

(An Association incorporated under Section 21 of the
Company's Act, 1973)

Applicant

and

**THE UNLAWFUL OCCUPIERS OF LOT
13113 PINETOWN**

First Respondent

ETHEKWINI MUNICIPALITY

Second Respondent

MR MTSHALI

Third Respondent

BONGI KHUMALO

Fourth Respondent

NATHI NDLULI

Fifth Respondent

SEMZO WANDA

Sixth Respondent

DOUGLAS KHUMALO

Seventh Respondent

JUDGMENT

SISHI J

Introduction

[1] The applicant an association incorporated under Section 21 Company's Act of 1973¹, seeks an order for the eviction of Unlawful Occupiers from land owned by it, in terms of Section 4 of the Prevention of Illegal Evictions from and Unlawful Occupation of Land Act 19, of 1998 ('PIE').

[2] The group of occupiers are collectively described as the Unlawful Occupiers of lot 13113 Pinetown, the first respondent herein. The various Unlawful Occupiers are represented through the first respondent. They are opposing the eviction application.

Background

[3] The applicant is the owner of the property in terms of a consolidated title deed which reflects that applicant is the owner of the property as well as other erven held under that title deed which is attached to the founding affidavit.

[4] During the 1990's, an industrial township known as Mahogany Ridge 2 Industrial Park was established. Not all the land which constituted part of the township was sold and developed by individual property owners. Instead, some of the land was transferred to the applicant. Part of the land held by the applicant constitutes the property which is the subject matter of the present application. According to the applicant, it is intended to be a conservancy

¹ The Company's Act 61 of 1973.

area. It has never been planned for development and therefore, to use common parlance, is a 'green lung' within the natural township itself. The Mahogany Ridge 2 Industrial Park abuts the residential township called, the 'Emaus'.

[5] It is apparent from the title deed which is annexed to the founding affidavit that the property which the applicant owns was transferred to it in 1996 for a consideration of R300 being the declared value of the property. It is apparent from the a photograph filed by the second respondent that the identified land is very large and would ordinarily have a commercial value far in excess of R300.00.

[6] The title deed imposes certain limitations on structures that can lawfully be erected on the property.²

'Except with the consent of the Administrator, no building or structure whatsoever other than a fence, hedge or wall, which does not rise higher than 1.5 metres above the surface of the land on which it stands shall be erected on the land within a distance of 1.5 metres from the Road Reserve Boundary of main road 85 and 7.5 metres measured from the Road Reserve Boundary of main road 468'

[7] This condition means that the applicant may not use the property for any commercial purposes whatsoever, until such time that the condition has been removed.

² Main application papers p32, para c(iv) page 6 of the title deed.

Onus of proof

[8] The applicant bears the onus of proving that the eviction order would be just and equitable. The applicant must show that occupiers are Unlawful Occupiers and that it has followed all procedural requirements and that it is just and equitable to order eviction³.

[9] It appears to be common cause that the occupiers are Unlawful Occupiers, that the applicant has complied with the procedural requirements of Section 4 of PIE and that it has given due notice as required. The dispute between the parties relates to the merits of the eviction and not procedural concerns.

[10] The issues for determination in this application are whether it is just and equitable for an eviction order to be granted against the first respondent and if so, the just and equitable date of eviction.

Common Cause Facts

[11] It is common cause or not disputed that:

The applicant is the registered and lawful owner of the immovable property occupied by the unlawful occupiers. The unlawful occupiers invaded the applicant's property during the period 16 December 2011 to 10 January 2012. Eviction proceedings were instituted within six months of the aforesaid unlawful invasion. Unlawful occupiers have

³ *City of Johannesburg v Changing Tides 74(Pty) Ltd and others (735/2011)[2012] ZASCA 116 paras 30-34.*

erected unlawful structures on the property. Since the unlawful invasion, the applicant has secured a portion of the perimeter of the property with the erection of a temporary barbed-wire fence which is manned by security personnel. The unlawful occupiers have no legitimate right or title to occupy the applicant's property. The applicant, has incurred significant expenses as a result of the unlawful occupation, in order to allow the unlawful occupiers access to the fenced off area, the applicant constructed an access point to the property, manned by security personnel which has cost the applicant up to R655 765.22.

[12] The basis of the opposition by the Unlawful Occupiers are that:

- (a) the land in issue is effectively '*a green lung*' and is not being used by the applicant for commercial gain;
- (b) no specific reason is given by the applicant for requiring eviction;
- (c) no case is made out that the unlawful occupiers are in any way interfering with the '*legitimate affairs*' of the applicant.

[13] The municipality delivered the housing report and offered the Unlawful Occupiers an option that they be relocated to Emaus area, adjacent to the area now occupied by them. It was proposed that the second respondent would construct wooden corrugated structures upon concrete platforms for them. The municipality also proposed that the invoices for the materials bought in respect of the construction would be provided to the applicant and the applicant was willing to pay this amount. The Unlawful Occupiers have

not responded to the proposed alternative which is, according to the municipality eminently reasonable in the circumstances.

[14] The first respondent contends that the property of which the applicant is the owner is of no commercial value to the applicant, nor can it be put to any commercial use whatsoever. The second respondent, the municipality, has filed a report identifying three sites adjacent to the applicant's property on which it proposes to construct wooden corrugated iron structures upon concrete platforms. The first respondent has not yet been able to identify the sites proposed by the municipality and are consequently not in a position to commit themselves to the offer made by the municipality. The first respondent contends that they have not rejected the offer by the municipality nor has that offer been withdrawn since the date upon which it was made.

[15] In the heads of argument, the first respondent⁴ contends that the applicant acquired the property after paying transfer duty of a declared value of R300,00. There is no restriction on the disposal of the property contained in the title deed. According to the first respondent, the applicant could sell the property to the municipality at the price of R300,00 and the municipality would in those circumstances, be able to develop the land as an informal settlement. The property is ideally suited to be developed as an informal settlement adjacent to Emaus informal settlement as indicated in the plan. This aspect will be dealt with later in this judgment.

⁴ First Respondents' Heads of Argument paras 1, 9, 10 and 11.

The Legal Position

[16] The relevant sections of the PIE Act are set out below:

Section 4(6) provides;

"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"

Section 4(7) provides:

"If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably been made available by municipality or other organ of State or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women".

Section 4(8) provides:

"If the court is satisfied that all the requirements of this section have been complied with and that no valid defence has been raised by the unlawful occupier, it must grant an order for the eviction of the unlawful occupier, and determine –

- (a) A just and equitable date on which the unlawful occupier must vacate the land under the circumstances;*

(b) The date on which an eviction order maybe carried out if the unlawful occupier has not vacated the land on the date contemplated in paragraph (a);"

- [17] The PIE requires a party seeking to evict another from land to prove;
- ownership of land ;
 - that the other party occupies it unlawfully;
 - compliance with the procedural provisions of PIE;
 - that on the consideration of all relevant circumstances, the eviction is just and equitable⁵.

The first three requirements of PIE in this matter have been satisfied. Only the last requirement remains for determination by this court.

[18] The Court is indeed empowered in terms Section 4(12) of PIE to attach reasonable conditions to an eviction order.

[19] As indicated above, it is common cause that the applicant is the owner of the property in question, that the occupier's occupation is unlawful and that they have occupied the property for less than six months prior to the institution of this application.

⁵ *Wormald NO & Others v Kambule 2006(3) SA 562 (SCA), para 11.*

[20] The circumstances of this case falls squarely within the ambit of the provision of Section 4(6) of PIE as the Unlawful Occupiers have occupied the said land for less than six months prior to the institution of these proceedings.

[21] However, the availability to the Unlawful Occupiers of suitable alternative accommodation or land comes into play by virtue of the provisions of Section 6(3) of PIE, Section 6(3) of PIE provides:

"In deciding whether it is just an equitable to grant an order of eviction, the Court must have regard to:

- (a) The circumstances under which the unlawful occupier occupied the land and erected the building or structure;*
- (b) The period the unlawful occupier and his or her family have resided on the land in question; and*
- (c) The availability to the unlawful occupier of suitable alternative accommodation or land.*

[22] The Court has held that there is no unqualified constitutional duty on local authorities to ensure that there cannot be an eviction unless alternative accommodation has been made available⁶.

[23] The Constitutional Court held that an eviction order in circumstances where no alternative accommodation is provided is far less likely to be just and equitable than one that makes careful provision for alternative housing⁷.

⁶ *Port Elizabeth Municipality v Various Occupiers* 2005(1) SA 217(CC) para 28 (PE Municipality)

⁷ *Joe Slovo Community, Western Cape v Thubelisha Homes & Others (Center of Housing Rights and Evictions and another, (amici curiae)* 2010 (3) SA 454 (CC) para 131 per O'Regan J (hereafter Joe-Slovo community).

[24] Supreme Court of Appeal⁸ as per Wallis J has recently pointed out:

"In most instances where the owner of property seeks the eviction of unlawful occupiers, whether from land or buildings situated on the land and demonstrate a need for possession and that there is no valid defence to that claim, it will be just and equitable to grant an eviction order. That is consistent with the jurisprudence that has developed around this topic. In Ndlovu v Ngcobo; Berker & Another v Jika 2003 (1) SA 113 (SCA) at para 17, Harms JA made a point that ownership and a lack of any lawful reason to be in occupation are important factors in the exercise of the Court's discretion. In Modderklip Boerderay (Pty) Ltd v Modder East Squatters and Another 2001 (4) SA 385(W), Marais J carefully weighed the different factors and granted an eviction order. His order was upheld by this Court and not questioned by the Constitutional Court ..." (at para 19).

[25] The Court went on to say⁹:

"Where the eviction is sought by a private land owner, the availability of alternative land or accommodation assumes greater importance in the second enquiry, namely, what is just and equitable date for eviction. It is here that the Constitutional obligations of the appropriate arm of Government – in our cities this is inevitably, the municipality – come into focus and assume their greatest importance. The reason is that, even if it is just and equitable to grant an eviction order, that is not the end of the enquiry, because any eviction order must operate from a date fixed by the court and that date must be one that is just and equitable."

[26] The court further held¹⁰:

⁸ *City of Johannesburg v Changing Tides 74 (Pty) Ltd*, 2012 (ZA) SCA 116 (14 September 2012)(hereafter *City of Johannesburg*).

⁹ *City of Johannesburg* para 20.

¹⁰ *City of Johannesburg* para 25.

"A court hearing an application for eviction at the instance of a private person or body, owing no obligations to provide housing, or achieve the gradual realisation of the right of access to housing in terms of section 26 (1) of the Constitution, is faced with two separate enquiries. First, it must decide whether it is just and equitable to grant an eviction order having regard to all relevant factors. Under Section 4(7), those factors include the availability of alternative land or accommodation. The weight to be attached to that factor must be assessed in the light of the property owner's protected rights under section 25 of the Constitution, and on the footing that a limitation of those rights in favour of the occupiers be ordinarily be limited in duration. Once the court decides that there is no defence to the claim for eviction and that it would be just and equitable to grant an eviction order, it is obliged to grant that order. Before doing so, however, it must consider what justice and equity demands in relation to the date of implementation of that order and it must consider what conditions must be attached to that order. In that second enquiry, it must consider the impact of an eviction order on the occupiers and whether they may be rendered homeless or by or need emergency assistance to relocate elsewhere. The order that it grants as a result of these two discrete enquiries is a single order. Accordingly, it cannot be granted until both enquiries have an undertaking and a conclusion reached that the grant of an eviction order, effective from a specified date, is just and equitable. Nor, can an enquiry be concluded until the Court is satisfied that it is in possession of all the information necessary to make both findings based on justice and equity".

[27] Section 25(1) of the Constitution¹¹ provides:

"No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property".

¹¹ Constitution of the Republic of South Africa Act 108 of 1996 (the Constitution).

[28] Section 26 of the Constitution¹² deals with the right to have access to adequate housing and provides:

- (1) Everyone has a right to have access to adequate housing.
- (2) The State must take reasonable legislative and other measures, with its available resources, to achieve the progressive realisation of this right.
- (3) No one may be evicted from their homes or have their home demolished, without an order of Court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions"

[29] Section 28(1)(c) of the Constitution provides:

"Every child has a right to basic nutrition, shelter, basic health care services and social services".

PIE was enacted to give effect to these provisions of the Constitution.

[30] The South African Constitutional Order recognises the social and historical context of property and related rights. The protection against arbitrary deprivation of property in Section 25 of the Constitution is balanced by the right of access to adequate housing in Section 26(1) and the right not be evicted arbitrarily from one's home in Section 26(3). The Constitutional Court noted in FNB¹³ :

¹² *Ibid.*

¹³ *First National Bank of SA v Minister of Finance 2002 (4) SA 768 (CC) para 50, and Blue Moonlight Properties, infra, at para 34.*

"The purpose of Section 25 has to be seen both as protecting existing private property rights as well as serving the public interest, mainly in the sphere of land form but not limited thereto, and also as striking an appropriate balance between these two functions."

[29] The historical contexts are relevant to one's understanding of the constitutional protection against arbitrary deprivation of property and access to adequate housing. Apartheid legislation undermined both the right of access to adequate housing and the right to property. Section 25 prohibits arbitrary deprivation of property but also addresses the need to redress the grossly unequal social conditions. Section 26 highlights the transformative vision of the Constitution¹⁴.

[31] The owner's right to land is not virtually unlimited. The Constitutional Court¹⁵ held that ownership in South Africa is not as unrestricted:

"Of course, a property owner cannot be expected to provide free housing for the homeless on its property for an indefinite period. But in certain circumstances an owner may have to be somewhat patient, and accept that the right to occupation maybe temporarily restricted An owner's right to use and enjoy property at common law can be limited in the process of the justice and equity enquiry mandated by PIE"

[32] Where residents have been in occupation of land for less than six months, a Court is not expressly obliged to investigate whether a municipality

¹⁴ *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC) paras 34, 35 and 36, (*Blue Moonlight*) and *PE Municipality, supra*, para 17).

¹⁵ *Blue Moonlight*, para 40 and ¹⁵ *Occupiers of Mooiplaats v Goldren Thread Ltd and Others* 2012 (2) SA 337 (CC) at para 17). (hereafter *Occupiers of Mooiplaats*)

can reasonably make land available for people who might be evicted. (Section 4(6) of the PIE) On the other hand, a Court is enjoined to make the alternative land investigation if the occupation exceeds say six months, although this distinction is important, it is not decisive to the justice and equity enquiry. If a Court has before it a case in which the land occupation falls short of six months, it is obliged to consider all relevant circumstances¹⁶.

[33] It is trite law that compliance with the requirements of section 4 refers to both the service formalities and the conclusion under section 4(7) that an eviction order would be just and equitable¹⁷

[34] In the present matter, a housing report was delivered by the municipality to the applicant and to the first respondent on 4 April 2012. The report is in the form of an affidavit deposed to by the municipality's Senior Legal Advisor.

[35] It is appropriate to set out some relevant paragraphs of the housing report:

“3: The purpose of this affidavit is to report to the above Honourable Court with regards to the availability of alternative accommodation to house the occupiers currently occupying the applicant's property;

4: Pursuant to a meeting with the applicant, it was confirmed that seven households currently occupy the applicant's property within an arrear that has, since the occupier's arrival been fenced off by the applicant;

¹⁶ *Occupiers of Mooiplaats* paras 15 & 16.

¹⁷ *ABSA Bank Ltd v Murray & Another* 2004(2) SA 15(c) para 19.

5: As a result of that determination, the 'second respondent' has located sites in the Emaus area, which are suitable for the relocation of the occupiers. Annexed to marked "A" is a copy of the aerial photograph of the applicant's property as well as the Emaus area and annexed hereto marked "B" are the lots within Emaus area and which indicate the lots owned by the "second respondent" to which the occupiers will be relocated to;

6: The aforementioned plan by the 'second respondent' was communicated to the applicant's Attorney Garlicke & Bousfield and to Anand-Nepaul Attorneys, the attorney's representing the first respondents on 28 March 2012. Annexed hereto marked "C" is the copy of that letter.

7: As it is apparent from annexure "C", the proposal was that:

"7.1 The seven dwellings of the occupiers will be relocated to Lots within the Emaus area as identified by Housing Department of the (first) respondent (the Municipality);

7.2 The applicant was invited to make contribution of approximately R10 000,00 with regard to the relocation costs;

7.3 The relocation would be within a reasonable time".

8: There has been further, without prejudice, correspondence with the applicant with regards to the time frame. The (Municipality's) response to that without prejudice correspondence is annexed hereto marked "D".

9. As is apparent from annexure "D".

- 9.1 *the unlawful occupiers would be relocated within three months of the date of the receipt of payment of the contribution from the applicant;*
- 9.2 *during the three months period, consultations would be held with community members of the area into which the occupiers would be relocated to;*
- 9.3 *the invoice for the materials bought in respect of the construction would be provided to the applicant.*

For the sake of clarity, I point out that in the filing notice of the housing report and the report itself, the eThekweni Municipality is cited as the first respondent, whereas in the rest of the papers before court, the eThekweni Municipality is cited as the second respondent.

[36] As at the time of the hearing of the application, the Unlawful Occupiers had not responded to the offer made to them. Nor, is there any explanation provided as to why they have not responded to this offer.

[37] The answering affidavit to these proceedings is deposed to by one Nokukhanya Sharon Ndlamuka, who describes herself as an adult female and one of persons described in these proceedings as the first respondent. She alleged that she represents herself and 10 families residing on the said property. She further alleged that affidavits from the remaining families setting out their personal circumstances will be filed once their Attorneys have had an opportunity to obtain that information.

[38] As at the date of the hearing of this application, no other answering affidavits or confirmatory affidavits had been filed by the families referred to by the deponent. She further alleges that no reason is given by the applicant for requiring their eviction. She also contends that no case is made in the founding papers that they are in anyway interfering with the legitimate affairs of the applicant in regard to the property of the Association. The deponent alleges that she is a single mother residing in the house with her minor children and her mother. Her mother works at Kloof as a domestic worker. It is cheaper for her to commute between her place of employment and where they reside. The deponent is unemployed and cannot qualify for any form of employment. She has one of her children attending school at Motala Heights Primary School which is relatively close to where they stay. She receives grant in respect of her three children at the total of R860,00 per month. She alleges that the house which they occupy is conveniently situated to enable her mother to walk in and out without incurring big transport expenses and his son is able to attend school without too much inconvenience.

[39] The circumstances of the other families referred to in the housing report and/or those referred to by the deponent in the answering affidavit are not known to this court. In my view, they have been given more than enough opportunity to place their circumstances before this court.

[40] There has been meaningful engagement between the applicant and the second respondent, the municipality. That engagement resulted in the production of the housing report referred to above. In this report, alternative

land or accommodation is made available to the Unlawful Occupiers. The applicant has indicated its willingness to contribute financially towards the relocation of the Unlawful Occupiers. This, however, is an arrangement between the municipality and the applicant. The Unlawful Occupiers have, however, not responded to the offer of alternative accommodation made to them despite the fact that this offer was communicated to them on 28 May 2012. No explanation has been provided as to why the Unlawful Occupiers have not responded to the offer made which appears to be reasonable in the circumstances of this case.

Jacoob J stated¹⁸:

"It is of some significance in the context that Goldern Thread has not put the land to any use nor is there any evidence that it intends to subject the land to use in the foreseeable future. If this is true, there would be little prejudice to Goldern Thread if the applicants remain in occupation for some months longer until alternative land becomes available".

[41] In *Goldern Thread, supra*, the Constitutional Court set aside the High Court's finding under Section 4(6) of the PIE, that it was just and equitable to evict the occupiers. It did so on the ground that since the High Court had not investigated whether the second respondent could provide alternative land or housing, it had failed to comply with the duties under Section 4(6) of the PIE.

[42] The 200 families in the *Goldern Thread*, had occupied the relevant land for a period of less than six months. The facts of the present case can be distinguished from the facts of the *Goldern Thread* in that in the present case

¹⁸ *Occupiers of Mooiplaats v Goldern Thread Ltd and Others* 2012 (2) SA 337 at paras 18

there is a housing report which clearly indicates that alternative accommodation or land is in fact available, adjacent to the properties where the Unlawful Occupiers have erected their houses.

[43] The Unlawful Occupiers have, in my view, been given a reasonable opportunity to respond to the offer of alternative accommodation or land which is made available to them. There is no reason advanced by the Unlawful Occupiers as to why they have not responded to the said offer which is still open. This is so despite that the Unlawful Occupiers are legally represented in these proceedings.

[44] In the present matter there is no possibility that the eviction of the Unlawful Occupiers may result in homelessness as alternative accommodation or land has been identified and made available to them by the second respondent. Through their attorneys, the Unlawful Occupiers have been invited to respond to the offer of alternative accommodation or land but they have not done so.

[45] It is clear from the housing report that there are seven house holds which currently occupy the applicant's property and that the second respondent has located sites in the Emaus area which are suitable for the relocation of these Unlawful Occupiers. These sites are owned by the second respondent

[46] The fact that the land occupied by the Unlawful Occupiers has some restrictions relating to what can be built on the land and that at present is of no commercial use is neither here nor there. Those restrictions can be removed and the land be rezoned for any use including commercial use.

[47] It is common cause that the applicant has expended money on the land fencing the land and providing security on a daily basis. However, the prejudice suffered by the applicant is the deprivation of its own property and the financial prejudice in expending money on the security requirements.

[48] The Unlawful Occupiers are not only occupying the said property unlawfully but they have erected structures which are in themselves unlawful in terms of the restrictions of the title deed referred to earlier on in this judgment.

[49] I have already mentioned that they have no valid defence in the form of a lease or otherwise which entitles them to occupy the said property.

[50] In determining whether an eviction is just and equitable one has to take into consideration all relevant information. This is in terms of both the Constitution and the PIE. The need to ensure that all information is available has been echoed in a number of Court decisions¹⁹.

¹⁹ *Occupiers, Shulama Court v Steele* [2010] 4 ALL SA 54 SCA and *occupiers of Mooiplaats*, para 16.

[51] In my view, the information contained in the housing report in this matter and in the affidavits is the type of information contemplated in the City of Johannesburg²⁰, which information is sufficient and relevant to determine whether it is just and equitable to evict the Unlawful Occupiers.

[52] In the present matter, the structures or buildings from which the Unlawful Occupiers are sought to be evicted have been inspected by the municipality. There is no indication from the municipality's housing report that their continued occupation gives rise to health or safety concerns. This is also evident from a photograph annexed marked "B" to the answering affidavit of Nokukhanya Sharon Dlamuka, one of the Unlawful Occupiers, depicting the house in which she stays with her family.

[53] The second respondent has in its housing report confirmed that seven households occupy the applicant's property. It is also evident from the answering affidavit filed that some of the households are headed by women and that there are also children and elderly women in the households. No mention has been made of disabled persons.

[54] The second respondent has made provision for alternative accommodation for the first respondent, which is just adjacent from where they are to be evicted. The eviction order will therefore not result in homelessness.

²⁰ *City of Johannesburg*, para 40.

[55] The implications of the delay of the eviction to the owners is mainly that they are being unlawfully deprived of the ownership of the land, and that they suffer financial losses in providing security on the said property. There is no evidence that it intends to subject the land to use in the foreseeable future.

[56] As indicated above, the Unlawful Occupiers are legally represented in this matter. It is clear from the housing report, that the second respondent's plan relating to alternative accommodation, as contained in the housing report, has been communicated to the Unlawful Occupiers' legal representatives. In my view, this amounts to constructive engagement with Unlawful Occupiers by the municipality, (paras 6 – 9 of housing report *supra*). In any event, the eviction order sought by the applicant would not render the Unlawful Occupiers homeless.

[57] Counsel for the applicant pointed out that in the heads of argument for the Unlawful Occupiers, a new argument is raised and was also pursued in Court, namely, whether the Municipality should be ordered to purchase from the applicant the land now unlawfully occupied by the first respondent. Counsel for the applicants submitted, correctly in my view, that it is not open to the first respondent to raise this argument as there is absolutely nothing in the affidavits dealing with the proposition that the Municipality should purchase the land from the applicant. If the proposition that the municipality should purchase the said land or be ordered by Court to do so was revealed in the affidavits, I am certain that the second respondent, municipality would have responded thereto. The paragraphs referred to by Mr Broster on behalf

of the first respondent do not deal with this aspect. The case argued by Counsel for the first respondent was not properly made out in the answering affidavit. He was therefore not entitled to raise such an argument on this issue. The Court stated²¹ :

"The fundamental problems facing Transnet are two fold. In motion proceedings, the affidavit constitutes not only the evidence, but also the pleadings. Transnet's answering affidavit is deficient in both respects".

[58] In the result, it is therefore not permissible for the first respondent to advance this new argument which has not been dealt with in the affidavits.

[59] The first respondent disputes that this property is used as a "green lung" as contended by the applicants. In my view, this is not a material dispute of facts. This dispute is capable of being resolved without the aid of oral evidence. In my view, there is no need that this issue be referred to the hearing of oral evidence as contended by the first respondent.

[60] Having considered all the circumstances of this case, I am satisfied that the applicant has succeeded in showing that it is just and equitable to evict the first respondent from the applicant's property.

Just and equitable date of eviction

[61] This court now has to determine what is just and equitable date for the eviction.

²¹ *Minister of Land Affairs and Agriculture and Others v D & F Wevill Trust and Others* 2008 (2) SA 184 (SCA) at para 43, and in *Transnet LTD v Ruben Stein* 2006 (1) SA 591 (SCA) at para 28.

[62] It is trite that an eviction must operate from a date fixed by the Court and that date must be one that is just and equitable²².

[63] The availability of alternative land or accommodation becomes more important when one determines a just and equitable date for eviction.

[64] I have already dealt with the housing report wherein an offer was made to the Unlawful Occupiers, offering them reasonable alternative accommodation in a settlement area adjacent to the one they are unlawfully occupying, with a possibility, an offer of payment of resettlement costs by the applicant. However, the respondents have not responded to the offer made despite that the offer was made on 28 May 2012. Between that date and the date of the hearing of this application, the Unlawful Occupiers have had more than three months within which to do so.

[65] In the heads of argument, the first respondent has stated that they have not rejected the offer made by the municipality and that they will communicate with the municipality between the date of the heads of argument dated 4 September 2012 and the date of set down of the application (i.e. 10 September 2012) in an attempt to reach a satisfactory agreement. There is no indication anywhere that the first respondent has communicated with regard to the offer made by the municipality. The first respondent has not alleged anywhere in the papers that the accommodation provided to it by the municipality is not suitable for resettlement.

²² *City of Johannesburg case, supra, para 20.*

[66] In terms of the housing report, the municipality has identified seven households who unlawfully occupy the applicant's property. In terms of the report, the second respondent has identified suitable accommodation directly opposite the applicant's property where the Unlawful Occupiers could be relocated to.

[67] As indicated above, in the answering affidavit, it is alleged that the individual Unlawful Occupiers will file affidavits dealing with their circumstances. However, these affidavits were never filed until this application was heard and no application for an adjournment was made to enable the individual Unlawful Occupiers to file affidavits dealing with their personal circumstances. In my view, it would not be prudent to adjourn this application any further to enable the individual Unlawful Occupiers to file answering affidavits, they had ample opportunity within which to do so.

[68] It is essential that evictions must be carried out in a fair and orderly manner. The order I propose making I believe would be just and equitable and serve the interest of the applicant and the first respondent, the Unlawful Occupiers.

[69] In terms of the housing report, the municipality has identified lots owned by it where the seven households, unlawfully occupying the applicant's property, could be relocated. The housing report also refers to a contribution of R10 000,00 per family from the applicant, which is an arrangement

between the applicant and the Municipality. In terms of a further arrangement, the occupiers would be relocated within 3 months of the date of receipt of the payment of contribution from the applicant.

[70] Of importance in this housing report is that the Municipality intends to construct wood and corrugated iron structures situated upon concrete platforms in order to relocate the occupiers currently unlawfully occupying the applicant's property. In my view, the relocation of the first respondent as envisaged by the second respondent, the Municipality, would provide suitable alternative accommodation to the Unlawful Occupiers of the applicant's land.

[71] In my view, it would not be appropriate to authorise the immediate eviction of the unlawful occupiers prior to the construction by the Municipality of the contemplated wood and corrugated iron structures situated upon concrete platforms as contemplated in paragraph 10 of the housing report. To authorise immediate eviction may lead to homelessness. As indicated above, this Court is empowered in terms of Section 4(12) of PIE to attach reasonable conditions to an eviction order. The eviction of Unlawful Occupiers would be just and equitable if it is linked to the provision of alternative accommodation by the municipality, as in the present case.

[72] The date of eviction must be linked to the date on which the municipality provides alternative accommodation to the Unlawful Occupiers. The municipality is required to provide alternative accommodation 15 days before the date of eviction, this will allow the Unlawful Occupiers some time

and space to be assured that the order to provide them with accommodation was complied with and to make suitable arrangements for relocation.

[73] In my view therefore, it would be appropriate to allow some time for the second respondent to complete the construction of the wood and corrugated iron structures situated upon concrete platforms in the located sites in the Emaus area before the eviction is effected.

Costs

[74] With regards to costs, I am of the view that there is no reason to deviate from the general principle that the successful party should be entitled to its costs. The applicant has been substantially successful and is therefore is entitled to its costs. Furthermore, the second respondent was responsible for the adjournments of 25 November 2011, 20 January 2012 and 4 April 2012 and the second respondent should be ordered to pay those wasted costs occasioned by those adjournments.

[75] In the result, I make the following order:

- (1) All persons presently occupying Erf 13113 Pinetown (hereinafter referred to as "the first respondent) are ordered in terms of section 4(1) of the Prevention of illegal Eviction from and Unlawful Occupation of Land Act 1998 to vacate Erf 13113 Pinetown ('the property').
- (2) The persons referred to in paragraph 1 above are ordered to vacate the said property by 22 February 2013.

- (3) The second respondent (municipality) is ordered and directed to erect and construct the wood and corrugated iron structures situated upon concrete platforms in the located sites owned by the second respondent at Emaus area, as contemplated in their housing report dated 4 April 2012 to relocate and house the Unlawful Occupiers currently occupying the applicant's property.
- (4) The second respondent is given a period of three months from the date of this judgment within which to erect and complete the structures referred to in the preceding paragraph. The erection and construction of these structures shall be finalised on or before 7 February 2013.
- (5) In the event that the Unlawful Occupiers do not vacate the property in accordance with the provisions of paragraph 2 hereof, then, two (2) days following the day referred to in para 2 thereof, being 25 February 2013, the sheriff is authorised to evict any such persons remaining in occupation of the property and is further authorised to employ any necessary force in order to give effect to this order.
- (6) The second respondent is ordered to pay the wasted costs occasioned by the adjournments on 25 November 2011, 20 January 2012 and 04 April 2012.
- (7) Save for the costs orders in the preceding paragraph, the first respondent is ordered to pay the costs of this application, jointly and severally, the one paying, the others to be absolved.



SISHI J

APPEARANCES

Date of hearing	:	10 September 2012
Date of judgment	:	7 November 2012
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