

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION : MTHATHA**

CASE NO. 249/07

In the matter between:

**THE PREMIER IN THE EXECUTIVE
COUNCIL IN THE PROVINCE OF THE
EASTERN CAPE**

1st Applicant

**THE MEMBER OF THE EXECUTIVE
COUNCIL FOR PUBLIC WORKS,
EASTERN CAPE**

2nd Applicant

and

JOYCE MTSHELAKANA

13th Respondent

VUMANI MDLANZA

17th Respondent

TEMBA BUTHI

24th Respondent

PORTIA MBANGE

29th Respondent

RECHARD XOLO NDABENI

31st Respondent

AIY SOQASHE

42nd Respondent

BULELWA ZOZO

47th Respondent

NOSIPHO PLATJIE

48th Respondent

S. SIBONGISENI DLONGOLO

49th Respondent

M. S. MZOLI

52nd Respondent

JUDGMENT

GRIFFITHS. J.:

[1] The applicant sought an eviction order as against the 57 respondents together with certain ancillary relief. Subsequent to the launching of the application, a number of the respondents voluntarily vacated the premises concerned and when the matter came before me on opposed motion, only 11 of the original respondents remained in occupation and opposed the grant of the eviction order. These remaining respondents were represented by Mr. Mtshabe whilst the applicant was represented Ms. da Silva. For the purposes of convenience, these remaining 11 respondents shall be referred to in the balance of this judgment as "the respondents".

[2] It appears from the papers that the premises concerned are comprised of certain building in Lusikiki forming part of a cluster of buildings which were formerly administered by the Department of Education for the purposes of running the College of Education. When the College of Education closed down prior to 2003, the Department of Works took over the administration thereof. These buildings were then demarcated for use as government offices and certain of them were renovated for this purpose.

However, certain flats situated in what is referred to as "A Block" could not be renovated due to the fact that certain employees of the erstwhile college of Education had, without the consent of the Department, taken occupation thereof.

[3] After an application for eviction was launched in the Lusikiki Magistrate's Court, a number of these occupiers duly vacated the premises. However, it appears that a number of other persons whom the applicant has identified as being the respondents in this application, thereafter unlawfully took their places. Apparently certain meetings have been held with the occupants of A Block and rent has been demanded. According to the applicant, the respondents have been utilizing the water and electricity paid for by the government which services cannot be discontinued by the government as this would affect other lawful occupiers. The applicant has also alleged in its founding affidavit that some of the tenants are government employees such as teachers, principals, clerks, administration officers, social workers et cetera. It is alleged that they are paid by the government and can well afford to rent alternate premises for residential purposes but refuse to do so.

[4] In response, the respondents raised two points *in limine*. Firstly they raised the question of non-compliance with the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act ¹ ("PIE") and, secondly, they raised the question of *lis alibi pendens*. This latter point was not pursued by Mr. Mtshabe, presumably in view of the fact that the applicant maintained in its reply that the same respondents were not

¹ No. 19 of 1998

involved in the other application which had been targeted by this point *in limine* and that that application had, in any event, been withdrawn. The respondents also denied that the applicant administered the building in question which aspect was again canvassed in the replying affidavit and a letter was annexed indicating clearly that the Department of Works was responsible for administering this property. In any event, the applicant is the Premier of this province, and not the Department of Works and there can be little doubt on all the evidence before me that the property in question belongs to, and is administered by, the Provincial Government. During argument, Mr. Mtshabe indicated that his clients did not abandon this point but it was pointed out to him that he had not pursued this aspect in his heads of argument thus leading his opposition, and the court, into the belief that he was not pursuing it. In my view, in any event, there is absolutely no substance in this contention whatsoever.

[5] The only defence raised by the respondents with regard to the merits was that the Department of Education who, as indicated earlier, had previously administered this particular building, had entered into some form of lease agreement with the respondents. No indication was given as to precisely when such agreement was concluded although from the papers had there been any such discussions in this regard such must have taken place well before 2006 and probably before 2003 when the Department of Education had been responsible for the building. According to the respondents, despite this alleged agreement, there was no agreement as to the amount of rental to be paid or as to who was to pay for the services such as electricity and water. Indeed, during 2006 the Department of Education apparently attempted to deduct the sum of R1000 from each of the

respondents' salaries in lieu of rental for the premises. This triggered an application to court on the part of the respondents for an order, which they ultimately obtained, interdicting that Department from deducting these amounts from their salaries. This, so it is alleged by the respondents, was proof of the fact that they were in possession of the premises with the consent of the Department of Education.

[6] In argument before me Mr. Mtshabe attempted to pursue the 2nd point *in limine* which I have already dealt with. Apart from this, he argued the other point *in limine*, namely, that in terms of the provisions of section 4(2) of PIE there had been a non-joinder of the local municipality as, in his submission, such municipality had a direct and substantial interest in the matter. On the merits, he argued that it had been established that there was either a lease agreement with, or some form of consent to, the occupation of the premises given by the Department of Education.

[7] In expanding his argument relating to non-joinder of the municipality, Mr. Mtshabe maintained that PIE required not only effective service of the papers on the municipality pursuant to the provisions of section 4(2) but that it required, in all instances, that the relevant municipality be joined as a party to the proceedings. This, he maintained, is not only a requirement in circumstances where one is dealing with the poorest sectors of the community but when one is dealing with persons who, as in the situation of the respondents, are earning sufficient income to be able to afford to pay for their own accommodation. For this he relied on the provisions of section 6(3) of the Act and the following cases: *Port Elizabeth Municipality v*

*Various Occupiers*²; *Mzoli Diko v Umzimvubu Municipality and Others*³; and *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (PTY) Ltd. and others*⁴.

[8] From these, and other relevant cases, the following general principles may be distilled which are relevant to the matter at hand:

1. The pre-Constitutional dispensation in terms of which the rights of a landowner (or possessor) were paramount and the rights of an unlawful occupier were minimal or practically nonexistent has been swept away by the repeal of a cluster of statutes that gave effect to this state of affairs.
2. The Constitution, and in particular sections 25 and 26 thereof, has been given expression in this regard in the form of PIE, which "*not only repealed PISA*⁵ *but, in a sense, inverted it: Squatting was decriminalized and the eviction process was made subject to a number of requirements, some necessary to comply with certain demands of the Bill of Rights.*"⁶
3. In an eviction application, the courts are not entitled to remain supine but have a far more active role

² 2005 (1) SA 217 (CC)

³ Unreported: Mthatha case number 845/2002

⁴ Unreported: (3384/10) [2011] ZASCA 47 (30 March 2011)

⁵ The Prevention of Illegal Squatting Act 52 of 1951

⁶ Port Elizabeth Municipality v Various Occupies (supra) at paragraph 12

to play in ensuring that the principles enshrined in the Constitution are properly applied. In this regard, Sachs J. in the *Port Elizabeth Municipality v Various Occupiers* case had this to say⁷:

"The court is thus called upon to go beyond its normal functions and to engage in active judicial management according to equitable principles of an ongoing, stressful and law - governed social process. This has major implications for the manner in which it must deal with the issues before it, how it should approach questions of evidence, the procedures it may adopt, the way in which it exercises its powers and the orders it might make. The Constitution and PIE require that, in addition to considering the lawfulness of the occupation, the court 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"

4. In such matters, the courts are dealing with two diametrically opposed fundamental interests. Sachs J., in dealing with Horn J's judgment in *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter*

⁷ supra at paragraph 36

*and Others*⁸ dealt with this dynamic situation as follows⁹:

"On the one hand, there is the traditional real right inherent in ownership, reserving exclusive use and protection of property by the landowner. On the other hand, there is the genuine despair of people in dire need of adequate accommodation. It was with this regard that the Legislature had, by virtue of its provisions of PIE, set about implementing a procedure which envisaged the orderly and controlled removal of informal settlements. It is the duty of the court, in applying the requirements of the Act, to balance these opposing interests and bring out a decision that is just and equitable. He went on to say that the use of the term "just and equitable" relates to both interests, that is, what is just and equitable not only to the persons who occupied the land illegally but to the landowner as well. He held that the term also implies that a court, when deciding on a matter of this nature, would be obliged to break away from a purely legalistic approach and have regard to extraneous factors such as morality, fairness, social values and implications and circumstances which would necessitate bringing out an equitably principled judgment."

⁸ 2000 (2) SA 1074 (SECLD)

⁹ Port Elizabeth Municipality v Various Occupiers (supra) at paragraph 33

5. Within this framework however, each case must be decided on its own facts¹⁰.

6. In most of these cases the courts have dealt with situations relating to poor, landless persons who would previously have been referred to as "squatters". Yacoob J in the matter of *Government of the RSA and Others v Grootboom and Others*¹¹ differentiated between two groups of persons and the responsibilities of Government relating to each. He stated¹²:

"In this regard, there is a difference between the position of those who can afford to pay for housing, even if it is only basic though adequate housing, and of those who cannot. For those who can afford to pay for adequate housing, the State's primary obligation lies in unlocking the system, providing access to housing stock and a legislative framework to facilitate self built houses through planning laws and access to finance. Issues of development and social welfare are raised in respect of those who cannot afford to provide themselves with housing. State policy needs to address both these groups. The poor are particularly vulnerable and their needs require special attention. It is in this context that the relationship between ss 26

10 Port Elizabeth Municipality v Various Occupiers (supra) at paragraph 34

11 2001 (1) SA 46 (CC)

12 at Paragraph 36

and 27 and the other socioeconomic rights is most apparent. If under section 27 the State has in place programs to provide adequate social assistance to those who are otherwise unable to support themselves and their dependents, that would be relevant to the State's obligations in respect of other social economic rights."

7. The extent of the State's obligation in this regard *"usually telescopes into an enquiry concerning the State's resources to meet its constitutional obligations..... the precise form of the State's obligation to provide housing depends on the context within which the right is asserted by an aggrieved citizen."*¹³

[9] As I understand these cases, the function of a court in performing its judicial oversight is to examine the papers before it and determine therefrom whether or not there is an apparent abuse of a fundamental right or the rights of the respondent or respondents. In practically every case which has come before me in this regard it is generally clear from the papers as to whether or not this is the case. On the one extreme, there are the cases generally dealt with in the above-mentioned judgments involving extremely poor, landless people who are merely attempting to exercise the rights afforded them by the Constitution in claiming a small portion of land and erecting a modest shelter in order to protect themselves from the elements. On the other extreme, there are those cases where well-heeled tenants have remained in

¹³ City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (PTY) Ltd. and Another (supra) at paragraph 2

occupation of rented premises well beyond the rights accorded them in terms of the lease without paying rental therefor, despite be to position to do so.

[10] It seems to me that in the former case, and depending on the circumstances thereof, the court may well decide (in the exercise of its judicial oversight) that the local municipality should be joined as a party to the proceedings on the basis that it may in those circumstances have a direct and substantial interest in the proceedings in that it is obliged to ensure adequate accommodation for such persons in dire need of adequate shelter.

[11] In the latter case, however, it does not appear to me that the municipality would have a direct and substantial interest in the matter in that the respondent concerned would clearly have the means to be able to source accommodation elsewhere, either on a rental basis or by purchasing his or her own property. Thus, in such a case, there would be no obligation on the court to ensure that the municipality is joined as a party.

[12] In the present matter the applicant is an organ of state. Accordingly, the provisions of section 6 of the Act (as read with section 4) come into play. In particular, I am obliged in deciding whether it is just and equitable to grant an eviction order, to have regard to those factors mentioned in section 6(3). It is clear that when an eviction order sought by an organ of state under the provisions of section 6, the requirements are somewhat more onerous than in the situation of an eviction at the instance of a private person or institution¹⁴.

¹⁴ Mzoli Diko and Another v Umzimvubu Municipality and Others (supra)

[13] The respondents have not, being clearly aware of their rights in this regard, placed any evidence before me indicating that any one of them are not in a position to afford alternative accommodation or that such alternative accommodation is not available to them. On the contrary, the evidence appears to indicate that all of them are employed by the State in one form or another and are earning reasonable incomes. It appears, furthermore, that for many years they have not paid any rental whatsoever for their accommodation and have been provided with free services such as electricity and water which ought, had they been frugal, to have translated into considerable savings.

[14] The respondents have not, furthermore, indicated the exact period that they have been in occupation of the premises concerned or whether they have children or if in any instance the households are headed by women. They have not apprised me as to whether or not any infirm or elderly persons are involved. In fact, it is apparent from the answering affidavit that they have steered clear of these factors in all probability because they are aware that they can afford accommodation elsewhere without much difficulty. Their entire defence, apart from the points *in limine*, is based on their alleged right to occupy in terms of an agreement with the Department of Education.

[15] In all these circumstances, and having considered all the matters referred to in section 6(3) of PIE, it is my view that the local municipality do not have a direct and substantial interest in this matter and that they are not required to be joined in these proceedings as submitted by Mr. Mtshabe.

[16] The only aspect remaining is the question as to whether or not the respondents are in occupation by virtue of a right afforded them by the Department of Education. In my view this contention cannot hold any water. As alluded to above, the respondents have made extremely vague allegations in this regard which amount to nothing more than that the Department of Education, at the time when they administered the property prior to the Department of Works taking over, had indicated that the respondents could lease the premises. Absolutely no agreement was reached with regard to the amount of rental or as to who was to pay for the services such as electricity and water. Indeed, when the Department attempted to deduct rental from the salaries of the respondents, the respondents obtained a High Court interdict preventing them from doing so. In addition, the Department of Works, which has administered the property since approximately 2002, has indicated clearly that it does not wish to conclude lease agreements with the respondents.

[17] It seems clear to me that the *essentialia* for a lease agreement are therefore lacking. It is most improbable that any landowner would agree with its tenants that they could remain in occupation on a vague notion that their rental and other payments would be agreed upon some time in the future. Clearly no agreement was reached in this regard and the respondents have no right to remain on the property. This view is fortified by the fact that when this application was launched there were 57 respondents who were apparently all in the same situation. After the launching of the application the majority of those respondents voluntarily vacated or agreed to a court order to that effect. Had they been genuinely of the belief that they had a right to such occupation they would not have done so.

[18] In all these circumstances, I grant an order in the following terms. In this order, the term "respondents" refers to respondent numbers 13, 17, 24, 29, 31, 42, 47, 48, 49, 52 and 53:

- 1. The respondents are declared to be in unlawful occupation of the residential flats attached to the College of Education in Lusikisiki;**
- 2. The respondents are ordered to vacate the premises within 30 days of this order being granted;**
- 3. The Sheriff of the High Court and members of the South African police services, if necessary, are directed to evict the respondents in the event of them not vacating the premises within 30 days of this order;**
- 4. The respondents are ordered to pay the costs of this application, jointly and severally, the one paying the others to be absolved.**

JUDGE OF THE HIGH COURT

HEARD ON : 14 JUNE 2011

DELIVERED ON : 23 JUNE 2011

COUNSEL FOR APPLICANTS : Ms Da Silva

INSTRUCTED BY : State Attorney

COUNSEL FOR RESPONDENTS : Mr Mtshabe

INSTRUCTED BY : Messrs N. Z. Mtshabe