

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No. : 569/2005

In the matter between:

DIHLABENG LOCAL MUNICIPALITY

Applicant

and

NTHABISENG MAKHOTSA

First Respondent

MMAPULE MASEKO Second Respondent

JEREMANE MOFOKENG Third Respondent

RAMADIELA DLOMO Fourth respondent

MAHLAPANE H LAPANE

Fifth Respondent

HEARD ON:

15 SEPTEMBER 2005

JUDGMENT BY:

BLOEM AJ

DELIVERED ON:

22 SEPTEMBER 2005

- [1] The applicant is a local municipality. The five respondents are persons who are alleged to reside on a piece of land within the applicant's jurisdiction. That piece of land is owned by the applicant. I shall hereinafter refer to that piece of land as "the site". On 15 February 2005 the applicant

launched an application for the eviction of “the respondents and all unlawful occupiers and/or occupants” from the site. I shall hereinafter refer to the “unlawful occupiers and/or occupants” as “the unlawful occupiers”.

[2] The background of this application is set out in the affidavit of Vuyo Peach, the applicant’s legal advisor and Mantiti Mokoena, who is not a respondent but a person who resides on the site. She said that by virtue of being an occupier of the site she was “obliged to represent [her] interest and those of other co-occupiers”. Although she claimed to represent the respondents, there was no indication that she was authorised to represent the other unlawful occupiers. The first, fourth and fifth respondents confirmed the correctness of the allegations contained in Ms Mokoena’s affidavit insofar as they relate to the respondents.

[3] From the evidence it is apparent that on 29 August 2004 the respondents held a meeting with members of the community at a local stadium. At that meeting sites were allocated to

residents who claimed to have no accommodation. After that meeting persons started occupying the site. It is not in dispute that as at April 2005 there were more than two hundred households on the site. Ms Mokoena claimed that the unlawful occupiers are on the site because some of them were evicted from farms to which they could not return, some could not pay the rental in respect of the houses or rooms in which they lived before they occupied the site and some had to leave their homes because their families became too big to accommodate all of them. These averments are not disputed by the applicant. The unlawful occupiers are accordingly genuinely homeless.

- [4] On 15 February 2005 the applicant launched this application for the eviction of the respondents and the other unlawful occupiers from the site. Without notice and in the absence of the respondents or any of the other unlawful occupiers the applicant sought and on 24 February 2005 obtained an order from Hattingh J in the following terms:

“IT IS ORDERED THAT:

1. This Honourable Court effects service of a written notice of these proceedings as more fully appears from annexure “D” hereto upon the respondents in terms of the provisions of Section 4(2) of the Prevention of Illegal Eviction from an Unlawful Occupation of Land Act No. 19 of 1998.
2. The service of the aforesaid notice upon the respondents be effected by the Sheriff of the district of Ficksburg as prescribed by the rules of this Honourable Court as envisaged in Section 4(3) of the Prevention of Illegal Eviction from an Unlawful Occupation of Land Act, Act 19 of 1998.
3. The Registrar of this Court be ordered to enroll the application for hearing on the 17th March 2005 at 09h30 when applicant will pray for a *rule nisi* to be granted against the respondents in the following terms:
 - 3.1 that the respondents and all unlawful occupiers and/or occupants of the portion marked X (hereinafter called site), as more fully appear from annexure “A” hereto and marked “illegally Occupied Erf” be ordered to:
 - 3.1.1 forthwith vacate the said site.

3.1.2 forthwith remove any building and/or structures that the respondents erected upon the said erven which were occupied by the respondents on the aforesaid site.

3.2 that should the respondents and/or other unlawful occupiers and/or occupants and/or any of them refuse and/or neglect to vacate the said site, and be present thereupon on the 7th April 2005 that:

3.2.1 the Sheriff for the district of Ficksburg is ordered to forthwith on 11th April 2005 or as soon as possible thereafter evict the respondents and/or unlawful occupiers and/or occupants of the said site, as still may be present thereupon on the 11th April 2005 therefrom.

3.2.2 the Sheriff of the district of Ficksburg is ordered to forthwith on 11th April 2005, or as soon as possible thereafter, demolish and remove any buildings and/or structures erected upon the said site that were occupied by the respondents and/or unlawful occupiers and/or occupants and for this purpose to solicit the assistance of the South African Police Service or whom ever in the opinion of the Sheriff for the district of Ficksburg may be able and capable to assist him to so demolish and remove the aforesaid buildings and/or structures from the said site so as to ensure that such buildings and/or structures be demolished and removed therefrom.

3.2.3 the Sheriff of the district of Ficksburg is ordered, should it become necessary, to

request this Court in writing to authorize any person, including but not limited to the South African Police Services, for the district of Ficksburg to assist the Sheriff for the district of Ficksburg to comply with the order for the eviction of the respondents and/or unlawful occupiers and/or occupants of the said site and to demolish and/or remove such buildings and/or structures as may still be present upon the said site in the presence of the Sheriff for the district of Ficksburg and subject to such conditions as the Court may determine.

4. The respondent and any other occupiers of the land pay the costs of this application including any costs incurred by the eviction of persons or buildings therefrom.”

[5] The notice of motion, founding affidavits and the order which was issued on 28 February 2005 (hereinafter referred to as “the interim order”) were thereafter served on the respondents on 1 March 2005. Notice of intention to oppose the application was delivered on 15 March 2005. The answering affidavits, deposed to by Ms Mokoena and the

first, fourth and fifth respondents, were delivered on 13 April 2005. The applicant's replying affidavit was delivered on 26 July 2005. After four postponements the application was heard by me on 15 September 2005. At the conclusion of the hearing I requested Mr. Motloun, counsel for the applicant, and Ms Pretorius, attorney for the respondents, if she deemed it necessary, to file supplementary heads of argument on:

- 5.1 whether the interim order was not prematurely sought and granted;
- 5.2 whether I could evict the "unlawful occupiers and/or occupants" who were not given notice of the proceedings to evict them; and
- 5.3 whether I could evict the respondents and the "unlawful occupiers and/or occupants" despite the fact that there was no evidence regarding the availability of suitable alternative accommodation or land.

- [6] I have been furnished with the applicant's supplementary heads of argument. The respondents have decided not to reply to the applicant's supplementary heads of argument. I will deal with each of the above headings hereunder.

The interim order

- [7] Although paragraph 3 of the interim order stated that on the date of the hearing the applicant "will pray for a *rule nisi* to be granted against the respondents", it did not include a *rule nisi* directing the respondents to show cause why they should not be evicted from the site or why they should not remove their buildings or structures from the site. The application was accordingly argued on the basis that the applicant sought a final order in the terms set out in paragraphs 3.1 and 3.2 of the interim order.
- [8] As pointed out above, on 24 February 2005 Hattingh J authorised the service of the notice contemplated in section

4(2) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 1998 (Act No. 19 of 1998) (hereinafter referred to as “the Act”). Section 4(2) of the Act requires that notice of eviction proceedings should be effected on the unlawful occupier at least fourteen days before the hearing of such proceedings. In terms of section 4(5) of the Act that notice must:

- (a) state that proceedings are being instituted for an order for the eviction of the unlawful occupiers;
- (b) indicate on what date and at what time the court will hear the proceedings;
- (c) set out the grounds for the proposed eviction; and
- (d) state that the unlawful occupier is entitled to appear before the court and defend the case and, where necessary, has the right to apply for legal aid.

[9] The notice which was attached to the founding affidavit as annexure “D”, did not comply with the peremptory provisions of section 4(5)(b)(c) and (d) in that it did not indicate the date and time of the hearing of the main application, set out the grounds for the proposed eviction and state that the respondents and the other unlawful occupiers were entitled to appear before the court and defend the case and informing them of their right to apply for legal aid.

[10] I refer to **Cape Killarney Property Investments (Pty) Ltd v Mahamba and Others** 2001 (4) SA 1222 (SCA) wherein Brand AJA (as he then was) stated at paragraph [14] on page 1228 that, in High Court proceedings for eviction by way of application, the date of the hearing of the application will be determined only after all the papers on both sides have been served. It follows that it is only at that stage that the section 4(2) notice can be authorised and directed by the Court. The section 4(2) notice was authorised and directed by this court before the delivery of the opposing and replying affidavits and before the date of the hearing was known.

[11] It is not necessary for me to deal with this aspect of the case any further because of the conclusion at which I arrive and secondly because the respondents have, throughout these proceedings been represented by the Bloemfontein Justice Centre. They cannot, and they have not, claimed that they have been prejudiced by the applicant's apparent failure to comply with the provisions of section 4(2) as read with paragraph 4(5) of the Act.

Notice or absence thereof of the eviction proceedings

[12] The applicant has served the application papers and the interim order on the respondents. Three of the five respondents opposed the application but all five respondents were represented herein. The applicant wanted relief not only against the respondents. It also wanted the eviction of "other unlawful occupiers and/or occupants". It is not disputed that the application papers were not served on those unlawful occupiers. The applicant also did not serve a

notice in terms of section 4(2) of the Act on any one of those unlawful occupiers.

[13] During the hearing Mr. Motlounq submitted that the site is a confined area and that the persons who occupy the site are identifiable. There was no explanation from the applicant why there was no attempt to identify and to join the other unlawful occupiers as co-respondents.

[14] It is a trite principle of our law that a person with a direct and substantial interest in the outcome of a case should be afforded an opportunity to be heard in those matters. In

Amalmagated Enigneering Union v Minister of Labour

1949 (3) SA 637 (A) at 651 the following is stated:

“It was rather a subtle reasoning, which helped the Court to do what it no doubt regarded as substantial justice in the peculiar circumstances of that case, while at the same time enabling it to stand firm on the two essential principles of law that had to be borne in mind, viz. (1) that a judgment cannot be pleaded as *res judicata* against someone who was not a party to the suit in which it was given, and (2) that the

Court should not make an order that may prejudice the rights of parties not before it.”

[15] Rule 6(2) of the Uniform Rules of Court has also not been complied with. It provides that where it is necessary or proper to give any person notice of an intended application, the notice of motion shall be addressed to both the registrar and such person. Section 4 of the Act has also not been complied with in respect of the other unlawful occupiers in that they were not given notice of the eviction proceedings in terms of section 4(2) of the Act.

[16] Since the unlawful occupiers have not been notified of the applicant’s application to court to evict them, and since there was no evidence indicating that the pending application “is well known amongst all the residents” of the site, I find myself unable to make an order evicting them from the site. **Unlawful Occupiers, School Site v City of Johannesburg** 2005 (4) SA 199 (SCA) at paragraph [27]

Availability of suitable alternative accommodation or land

[17] To be successful in an application for eviction a municipality has to establish that the occupation is unlawful and the structures are either unauthorised, unhealthy or unsafe.

Once those facts have been established, the court may then grant an eviction order if it is just and equitable to do so. Ms Pretorius has readily conceded that the respondents' occupation is unlawful and that they live under unsafe conditions without running water or proper ablution facilities. The erection of the structures in which they live, has also not been authorised by the applicant.

[18] In **Port Elizabeth Municipality v Various Occupiers** 2005

(1) SA 217 (CC) at 232 Sachs J said that:

“... the ordinary prerequisites for the municipality to be in a position to apply for an eviction order are that the occupation is unlawful and the structures are either unauthorised, or unhealthy or unsafe. Contrary to the pre-constitutional position, however, the mere establishment of these facts does not require the court to make an eviction order. In terms of s 6, they merely trigger the court's discretion. If they are proved, the court then may (not must) grant an eviction order if it is just and equitable to do so. In making its decision it must take account of all relevant circumstances, including the manner in which occupation was effected, its duration and the availability of suitable alternative

accommodation or land.”

[19] Mr. Motloung submitted “that there is no need to find alternative accommodation if a person is an unlawful occupier for less than six months in terms of section 4(7) of PIE”. For that submission he relied on **Ndlovu v Ngcobo**; **Bekker and Another v Jika** 2003 (1) SA 113 (SCA) wherein Harms JA pointed out at 121 J – 122 A that in terms of section 4(6) of the Act unlawful occupiers who have occupied the land for less than six months have less rights than unlawful occupiers who have occupied the land for more than six months. (Section 4(7). The reliance on that case is, with respect, misplaced because this is an application by a municipality, an organ of state, for the eviction of unlawful occupiers. Section 6 of the Act provides for evictions at the instance of organs of state. In terms of that section, which is applicable to the facts of this case, the court may grant an eviction order if it is just and equitable to do so after considering all the relevant circumstances.

[20] Section 6(3) of the Act provides that in deciding whether it is just and equitable to grant an order for eviction, the court must have regard to:

- (a) the circumstances under which the unlawful occupier occupied the land and erected the building or structures;
- (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.

[21] Circumstances under which the respondents occupied the land have been placed before the court by Ms Mokoena. Those undisputed facts have been dealt with in paragraph 3 above. The respondents and the members of the approximately 200 other households have been on the land for not more than five months before the application was

launched. Facts covering section 6(3)(a) and (b) of the Act have been placed before the court. There are no facts covering section 6(3)(c) of the Act.

[22] In **Port Elizabeth Municipality v Various Occupiers**

(*supra*) Sachs J said the following at paragraphs 28 and 29 thereof:

“[28] Section 6(3) states that the availability of a suitable alternative place to go to is something to which regard must be had, not an inflexible requirement. There is therefore no unqualified constitutional duty on local authorities to ensure that in no circumstances should a home be destroyed unless alternative accommodation or land is made available. In general terms, however, a court should be reluctant to grant an eviction against relatively settled occupiers unless it is satisfied that a reasonable alternative is available, even if only as an interim measure pending ultimate access to housing in the formal housing programme.

[29] The availability of suitable alternative accommodation will vary from municipality to municipality and be affected by the

number of people facing eviction in each case. The problem will always be to find something suitable for the unlawful occupiers without prejudicing the claims of lawful occupiers and those in line for formal housing. In this respect, it is important that the actual situation of the persons concerned be taken account of. It is not enough to have a programme that works in theory. The Constitution requires that everyone must be treated with care and concern; if the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test. In a society founded on human dignity, equality and freedom, it cannot be presupposed that the greatest good for the many can be achieved at the cost of intolerable hardship for the few, particularly if, by a reasonable application of Judicial and administrative statecraft, such human distress could be avoided. Thus it would not be enough for the municipality merely to show that it has in place a programme that is designed to house the maximum number of homeless people over the shortest period of time in the most cost-effective way. The existence of such a programme would go a long way towards establishing a context that would ensure that a proposed eviction would be just and equitable. It falls short, however, from being determinative of whether and under what conditions an actual eviction order should be made in a particular case.”

[23] Reference is made to paragraph [56] in **Port Elizabeth Municipality v Various Occupiers** (*supra*) wherein Sachs J dealt with some of the duties and obligations which municipalities have and the factors which they need to consider before launching eviction proceedings.

[24] One of the grounds upon which this application was opposed, was that the applicant has failed to make suitable alternative accommodation or land available to the respondents and the other unlawful occupiers. Save for stating simply that "... the applicant's obligation to provide accommodation is limited. I submit further that the respondents do not fall within this category", the applicant did not state what limited its obligation to provide accommodation to the respondents and to the other unlawful occupiers. The applicant furthermore did not deal with the availability, or lack thereof, of suitable alternative land for the respondents and the unlawful occupiers. The extent of the limitation is also not clear.

[25] The applicant was the only party who could place evidence relating to the availability, or lack thereof, of suitable alternative accommodation or land before the court. In this case the applicant did not take any action between August 2004 when the unlawful occupiers occupied the land and 15 February 2005 when the application was launched. Had the applicant consulted with the unlawful occupiers it probably would have become aware of the nature and extent of their problems and it (the applicant) would have informed the unlawful occupiers of the availability, or lack thereof, of suitable alternative accommodation or land to the unlawful occupiers. Although the applicant was aware of the meeting which the respondents held on 29 August 2004 at which the unlawful occupiers were allocated sites by the respondents, the applicant took no steps to listen to and consider the problems of the unlawful occupiers before it launched the present application. On the facts of this case I have decided that it is not just and equitable to order the eviction of the respondents or the other unlawful occupiers from the site. I

accordingly cannot grant such an eviction order.

[26] The outcome of this application might have been different if it was established by the applicant that all the unlawful occupiers were aware of these proceedings and if the applicant had dealt with the issue relating to the availability, or lack thereof, of suitable alternative accommodation or land to the unlawful occupiers.

[27] Regarding costs, the general rule is that costs follow the event. In other words, the successful party should be awarded his costs. **Skotnes v South African Library** 1997 (2) SA 770 (SCA). This rule should be departed from only where good grounds for doing so exist. In my view, there are good grounds for departing from the general rule.

[28] In her affidavit Ms Mokoena stated that “we are aware of the history of that site. We even know that it was earmarked for development”. Unfortunately she did not state who she referred to when she used the word “we”. However, what is

clear is that at least Ms Mokoena and some of the respondents and perhaps some of the other unlawful occupiers were aware that the applicant earmarked the site for development. It must also be pointed out that no development has taken place on that site since the early 1980's when the applicant's predecessor earmarked it for development. In my view, the respondents should not be rewarded for their unlawful conduct. They did not deem it necessary to enter into negotiations with the applicant prior to them unlawfully occupying the site. Given the circumstances of this case, I am of the view that each party should pay its, his or her costs.

[29] In all the circumstances the application is dismissed with each party to pay its, his or her own costs.

G.H. BLOEM, AJ

On behalf of applicant:	Adv. S.E. Motloung
	Instructed by:
	Qwelane, Theron & Van Niekerk
	BLOEMFONTEIN

On behalf of respondents: L. Pretorius (Attorney)
Bloemfontein Justice Centre

/sp