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REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

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| (1) | NOT REPORTABLE |
| (2) | NOT OF INTEREST TO OTHER JUDGES |

CASE NUMBER: 47400/21

In the matter between:

ALWYN JOHANNES SMITH

Applicant

and

ZENZO KHUMALO AND ALL THE UNLAWFUL OCCUPIERS First Respondent
OF THE PROPERTY

CITY OF JOHANNESBURG METROPOLITAN
MUNICIPALITY

Second Respondent

Delivered: **13 May 2024** – This judgment was handed down electronically by circulation to the parties' representatives *via* email, by being uploaded to *CaseLines*. The date and time for hand-down is deemed to be 10h00 on 13 May 2024.

Summary: Eviction – Prevention of Illegal Eviction from and Unlawful Occupation of Land Act – relevant factors considered, weighing the interests of elderly impecunious property owner against interests of unlawful occupiers – two enquiries undertaken. Eviction order granted but implementation delayed. City ordered to find accommodation for minor children in women-headed households.

JUDGMENT

Turner AJ

- [1] The applicant applies to evict the occupants of Erf 7[...] T[...] Township, with street address 7[...] D[...] V[...] Street, T[...] (“the property”).
- [2] There is no dispute that the applicant owns the property and that the respondents have not been granted the right to occupy the property by the applicant. The applicant has given the required notice in terms of section 4(1) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (“PIE Act”) and now seeks a final order of eviction.
- [3] The respondents have no substantive grounds of defence. The sole basis on which they resist the application is that they do not have alternative accommodation. They contend that they should be allowed to remain on the property until the City of Johannesburg (“the City”) provides them with suitable accommodation. The City is cited as the second respondent.
- [4] The matter has had a chequered history and the applicant is justifiably frustrated by the difficulties experienced in obtaining an order. The matter was set down in October 2022 and November 2022. On 28 November 2022 the Honourable Justice Dippenaar made an order giving the respondents a final opportunity to obtain legal representation and to deliver their answering affidavits.
- [5] The matter was back in court in April 2023 when the Honourable Justice Keightley ordered that the first respondent file heads of argument dealing with all relevant factors in terms of section 4(7) of the PIE Act. The court also ordered that the City should file a report in respect of temporary emergency accommodation for the respondents and all related issues within 30 days of that order.

- [6] The City subsequently filed an occupancy audit dated 10 July 2023, prepared by Nchupetsang Inc and also delivered a temporary emergency accommodation (TEA) report in the form of an affidavit deposed to by Mr Patrick Phophi, the executive director of the Department of Human Settlements at the City.
- [7] In the TEA report, the deponent confirmed that the occupiers earns less than the qualifying threshold for TEA and that, in his view, an eviction from the property in question would render occupiers of the property homeless. The deponent acknowledged that the City is required to provide the occupiers with alternative accommodation.
- [8] The problem is that the City does not have accommodation available to receive the occupants. In his affidavit, the deponent requests that the respondents be given an extension of at least 24 months (from July 2023) to enable it to find alternative accommodation alternatively to enable the respondents, particularly the first respondent, to approach Joschco and apply for affordable rentals.
- [9] No details are given of the City's likely ability to find alternative accommodation for the occupiers. The evidence before me establishes that the City has a total of 1461 TEA units and that those are at full capacity. The City has plans to develop more TEA facilities but has not yet done so.
- [10] Mr Slatter appeared for the City but was unable to provide any details to indicate how the current position might change within 24 months, particularly in light of the City's statements that there is a "ever-growing demand for TEA" and that no additional facilities have yet been built.
- [11] The occupants have been identified in the occupancy report and TEA report as 8-households :
- a. The first household comprises 6 adults who have been residing at the property since 2021 and have no source of income.
 - b. The second household comprises 3 adults who have resided on the property since 2022 and do not have a source of income.

- c. The third household comprises 2 adults (one aged 63) who have been living on the property since 2010. The report records that neither of them appears to have a monthly income.
- d. The fourth household comprises one 28 year old female and three children. The adult is unemployed but receives a social grant for her children.
- e. The fifth household comprises 2 adults, one of whom is 64 and had been living on the property for nine years. No details of any income are recorded.
- f. The sixth household is headed by a 48 year old unemployed female who has lived on the property since 2010. This household comprises 3 adults and 3 children.
- g. The seventh household constitutes a single unemployed adult male.
- h. The eighth household comprises a single unemployed adult male.

[12] The report records that the living arrangements are “unfavourable” and “warranting legal attention”. Specific concerns have been raised regarding the welfare and well-being of the children who occupy the premises. In this regard, the report records that –

“The limited space within the room imposes significant challenges for the children’s physical, mental and emotional development. Overcrowding can result in compromised privacy, restricted movement and inadequate personal space for the minors, potentially affecting their overall quality of life. Additionally, this arrangement may impede their ability to engage in age-appropriate activities and hinder their access to educational resources and recreational opportunities. The unfavourable living conditions can also increase with the risk of accidents, injuries and the spread of contagious diseases within the confined space. Given the circumstances, it becomes essential to assess the situation from a legal perspective, considering the best interests of the children and ensuring their right to a safe, healthy and suitable living environment.”

- [13] The applicant is a retired pensioner who lives in Cosmo City Extension 5. He moved out of the property in 2005 and installed a tenant. Unfortunately, the affidavits do not clearly set out the sequence of events which followed the applicant's departure in 2005 but, from what I can glean, a tenant was installed in the property but subsequently forced to leave. (The affidavit does not say who forced the tenant to leave.)
- [14] When the applicant went to the property after the tenant departed [date unknown] he found the property occupied by unlawful occupiers and during a "tense verbal exchange", he was threatened with a gun and forced to leave the premises. After this confrontation, the applicant reported the matter at the local police station, sought help from the Housing Tribunal and was then sent to an office in Braamfontein which took his details but never reverted to him. The applicant says that he had no funds to pay for a lawyer and consequently found no lawful mechanism to protect his rights. Since then, the applicant has not had a house of his own and is forced to impose on friends and family for a place to live. He currently stays with friends in Cosmo City.
- [15] The applicant records that at the time of his dispossession, the property was in a clean upmarket state with all amenities intact. It is now in a state of dilapidation, ceilings have fallen in, fittings have been vandalised and power has been disconnected. As a result, the value of the property dropped significantly.
- [16] In July 2020, the applicant received an offer to purchase the property for R90,000. He identifies this as his only chance to salvage what is left of the property and to receive some benefit from his property that has been unlawfully occupied. As the applicant is elderly, does not have an income and stays with friends and family, he says that the ability to sell the property has brought a ray of hope to him, that will provide him with some funds to live on.

[17] The Constitutional Court in *Occupiers Berea*¹ confirmed the *dicta* of the SCA in *Changing Tides*², identifying the two separate enquiries that must be undertaken by a court when considering an application for eviction from residential premises:

- a. First the court must decide whether it is just and equitable to grant an eviction order having regard to all relevant factors;
- b. Second, if it decides that an eviction order should be granted, the court must apply principles of justice and equity in determining the date of implementation of that order and whether any conditions should be attached to that order.

[18] The applicant's rights to property are protected under section 25 of the Constitution. He has been unlawfully deprived of those rights. The applicant has no other source of income, no assets and is living off the charity of others. The unlawful occupation has deprived him of the ability to sell the property and receive income that may assist him in his retirement.

[19] As noted above, the respondents have no defence to the claim for eviction. The only question to be answered in the first enquiry then is whether, applying principles of justice and equity, the eviction order should be refused. The respondents have occupied the property without paying rent and without looking after the property. The property is over-crowded, has no sanitation and poses a safety and health threat to those who occupy it, particularly the children.

[20] The difficulty is that the occupants do not have funding to secure alternate accommodation and the papers do not reflect the existence of City-provided TEA being available now or at any foreseeable point in the future.

[21] What do the principles of justice and equity then require in the current situation? Put differently, what is fair and right?

¹ *Occupiers of Erven 87 & 88 Berea v CF de Wet NO and others* [2017] ZACC 18

² *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 (6) SA 294 (SCA) paras 11 - 25

- [22] The applicant launched this application in September 2022. From that date, the occupiers were given notice that the applicant was the owner and that he wanted occupation of his property. He wanted them to find alternative accommodation and to not occupy his property unlawfully. Therefore, at all times since at least September 2022, the respondents knew that the property belonged to the applicant, that he was elderly and did not have a home of his own and that he wanted them to leave. They also knew that they had no lawful right to occupy the applicant's property. From this point, at the latest, they knew that they were required to find alternate accommodation.
- [23] The prospect of finding accommodation in Johannesburg must be daunting for indigent people and I do not in any way seek to underestimate the difficulties involved in trying to do so. However, justice demands that an unlawful occupier who is given notice of eviction is obliged to act and take steps to find alternative accommodation. He cannot merely remain in the property and wilfully defeat the constitutionally protected rights of the property owner.
- [24] In this case, there is no evidence that any of the unlawful occupiers have taken steps to try to find alternate accommodation at all. There is no evidence that any of them have taken steps to respect the applicant's rights as property owner. Instead, they have delayed at every stage of the court process.
- [25] Notwithstanding the fact that the City has not yet identified alternative accommodation for the occupiers who qualify for such accommodation, it is, in my view, just and equitable after taking account of the interests of the applicant and the interests of the occupiers, to grant an eviction order.
- [26] This brings me to the second enquiry – what should the date of implementation of the eviction order be and what conditions should be attached to that order?
- [27] The fact that the property has been occupied for a long time and the absence of any allegation that the potential sale agreement will fall through on a particular date, this is not an eviction that requires implementation with extreme urgency.

In my view, the following factors should be taken into account in determining the date of implementation of the eviction order:

- a. The time of year, in that winter will soon be here. An eviction which exposes the occupiers to a harsh highveld winter is not justified.
- b. The City has undertaken to prioritise the allocation of accommodation to the qualifying occupiers. If the City has a little more time to do so, those qualifying occupiers may receive accommodation from the City on or before the date of the eviction.
- c. The occupiers, particularly the households with children, will benefit from a short period in which to find alternative accommodation and, if new schools must be found, an opportunity to enrol them at those schools.

[28] In the circumstances, it would be just and equitable for the eviction order to be implemented on 1 September 2024.

[29] I consider it appropriate that the following additional orders be made:

- a. The City is required to take steps, on an urgent basis, to find accommodation for the qualifying occupiers, particularly Ms TZ Khumlo and her children; and Ms L Mmquina and the children living with her. In this respect, the City is required to file an affidavit on or before 31 July 2024 recording the steps taken and the accommodation identified to receive these occupants.
- b. The City is also required, through its Department of Human Settlements, to visit the property once a month from May to August 2024. At those visits, the inspectors are required to evaluate the health and safety of the minor children and to report on the general living conditions to their superiors within the Department. Copies of the reports prepared prior to 31 July 2024 must be delivered with the affidavit referred to in (a) above.

[30] I note that the obligations imposed on the City by these two additional orders do not in any way undermine (or render conditional) the finality of the eviction order or the date on which that eviction may be implemented. The additional orders relate to the obligations of the City towards the occupants and not to the right of the applicant to have possession of his property restored to him.

[31] In addition to the above, I urge the adult occupiers to act responsibly and proactively to find alternative accommodation, including by approaching the City's Department of Human Settlements.

[32] Although the applicant has been successful in this application, the respondents are in a difficult position, where the City has been unable to secure alternative accommodation. None of the respondents has an income or any assets of value. Issuing a costs order against the respondents in these circumstances would merely place additional burden on them and deprive them of funds that would better be employed in finding alternate accommodation. In the circumstances, I make no order as to costs.

[33] In the circumstances, I make the following order:

(1) The first respondent and any persons occupying the property situated at Erf 7[...] T[...] Township, street address 7[...] D[...] V[...] Street T[...] ("the property") are evicted from the property.

(2) The respondents are required to vacate the property on or before 1 September 2024.

(3) Should the respondents or any other person occupying the property fail to comply with the order to vacate the property by 1 September 2024, the Sheriff for the area within which the property is situated is hereby authorised to do all things and take all steps necessary to give effect to the eviction of the occupiers.

(4) The City, through the Department of Human Settlements, is required to take steps, on an urgent basis, to find accommodation for the following occupiers: Ms TZ Khumlo and her children; and Ms L Mmquina and the children living with her.

(5) The executive head of the Department of Human Settlements is to ensure that employees in his department visit the property once a month from May to August 2024. At those visits, the employees are required to evaluate the health and safety of the minor children and to report on the general living conditions to their superiors within the Department.

(6) The executive head of the Department of Human Settlements is required to file an affidavit on or before 31 July 2024: recording the steps taken and the accommodation identified to accommodate the occupants identified in (4) above; and attaching copies of the reports prepared following visits made pursuant to (5) above.

(7) There is no order as to costs.

DA TURNER AJ

Gauteng Division, Johannesburg

HEARD ON: 25 January 2024

JUDGMENT DATE: 10 May 2024

FOR THE APPLICANT: T Mukwani (Attorney)

Applicant's Attorneys: T Mukwani Attorneys

FOR THE SECOND RESPONDENT: B Slatter (Attorney)

INSTRUCTED BY: Nchupetsang Inc