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**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

CASE NO: 6683/2023

In the matter between

**COMMUNICARE NPC
REGISTRATION NO: 1929/001590/08**

APPLICANT

And

**NCUMISA KHONZAPHI
IDENTITY NO: 9[...]
AND ALL THOSE HOLDING TITLE UNDER HER**

FIRST RESPONDENT

CITY OF CAPE TOWN MUNICIPALITY

SECOND RESPONDENT

JUDGEMENT

Van den Berg AJ

NATURE OF RELIEF

1. The applicant applies for an order requiring the first respondent and all those who hold title under her at the property situated at Erf 2[...] Cape Town more fully described as 05[...] R[...], Corner of K[...] Road, Diep Street, R[...] Street and F[...] Street, Brooklyn (*“the Property”*) be ordered to vacate the property on a date to be determined. Additionally, the applicant seeks an order that in the event of the first respondent and all those who hold title under her failing to comply with the eviction order, be evicted by the Sheriff of this Court as well as costs associated with the application.

2. The first respondent opposes the relief applied for, and the second respondent, the City of Cape Town Municipality, filed a Housing Report and affidavit on 6 February 2024.

SYNOPSIS AND CHRONOLOGY

3. The applicant is Communicare NPC, an incorporated association not for gain. The first respondent, Ms Ncumisa Khonzaphi is a 29-year-old female who shares the premises with her 2 (two) minor children, aged 4 years and 8 months of age, . and from which the applicant seeks to evict her.

4. In her answering affidavit, the first respondent states that she has a self employed partner who provides maintenance support but he does not share the residence with her.

5. It is common cause that the applicant and the first respondent concluded a written lease agreement on or about 28 February 2021, in terms of which the first respondent leased the property for residential purposes. The monthly rental is R4,000.00, with an annual increase.. The lease agreement was for an initial period of 8 (eight) months, which commenced on 1 March 2021.

6. In the event the first respondent does not pay rental or other monies due in terms of the lease agreement, the applicant shall issue a written notice calling upon

the first respondent to remedy such breach. Failing which, the applicant shall be entitled in its sole discretion and without prejudice to any other rights to either claim specific performance or cancel the lease agreement forthwith and claim arrear rental.

7. In terms of clause 27.1 of the lease agreement, any letter or notice given in terms of the lease agreement shall be in writing be posted by pre-paid registered post. It shall be deemed to have been received by the addressee on the fifth business day following the date of such posting or if transmitted by facsimile or e-mail be deemed to have been received by the addressee one calendar day after dispatch.

8. The first respondent's contact details are recorded in terms of paragraph 27.2, read with paragraph 1.17 of the lease agreement as follows:

"The Tenant's contact details

<i>Physical</i>	<i>K[...] River, D[...] and F[...] Streets, Brooklyn, Cape Town, 7405 ...</i>
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<i>Cellular</i>	<i>00276[...]</i>
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<i>Email</i>	<i>k[...]"</i>
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9. The applicant applied for and obtained a Court order in terms of section 4(2) of the Eviction from and Unlawful Occupation of Lands Act 19 of 1998, which order and notice were duly served upon the first respondent. It is not contested that the applicant has complied with the provisions of the PIE Act. .

THE FIRST RESPONDENT'S DEFAULT AND TERMINATION OF THE LEASE AGREEMENT

10. The applicant contends that the first respondent materially breached the terms of the lease agreement by failing or refusing to make payment of the monthly rental and other charges due in terms of the lease agreement. As of 1 October 2022, the

first respondent was in arrears in an alleged amount of R40,119.80. The first respondent disputed this amount of arrear rental. Annexure “RJ4” to the founding affidavit is a “*Tenant / Debtor Transactions Schedule*” for the period January 2019 to October 2022.

11. On 6 December 2022, the applicant’s attorneys emailed a written letter of demand to the first respondent at “k[...].”.

12. The applicant's attorneys despatched a further final demand and cancellation notice to the first respondent on 6 March 2023.

13. The applicant further contends that the tenancy was on a month-to-month basis and that the applicant, in its letters, gave 30 days' notice of the termination of the lease agreement. The lease agreement provides that either party may terminate the lease for any reason on 30 days' notice.

14. The applicant contends that the respondent is in unlawful occupation of the property.

15. In opposition to the relief sought, the first respondent denied that she received any of the notices or letters of demand. She states that she was never alerted to any breach of the agreement and avers that her email address was incorrectly recorded by the applicant. However, the first respondent admits that she fell into arrears due to reduced employment hours and her being off on maternity leave. According to the first respondent, the applicant has not attempted to mediate the dispute regarding her eviction in good faith. The first respondent states in paragraphs 10 and 11 of her answering affidavit that she consistently paid the agreed upon rent save for just a few months. No rent was paid for July, September and November 2022. During December 2022, March 2023, and April 2023, the first respondent admitted to paying less than the agreed upon rental amount.

16. The first respondent further contends in paragraph 13 of her answering affidavit that:

“... despite these short payments, there is clear indication that despite some past difficulties I have faced financially, I am genuinely and in good faith committed to ensuring that I continue to occupy the property.”

17. She further contends that the arrear amount could be easily settled.

THE LEGAL POSITION

18. Access to adequate housing remains one of the major challenges in South Africa. Our urban areas face a desperate shortage of adequate housing, exacerbated by increasing urbanisation.¹

19. It has become settled that the State is constitutionally obliged to provide relief to individuals who have no access to land, who are facing intolerable living conditions or crises, and lack access to land or shelter. Accordingly, the provision of emergency accommodation by the Government forms part of the right of access to adequate housing entrenched in section 26 of the Constitution.²

20. The provisions of the PIE Act apply to all persons irrespective of whether they lawfully occupied the property at an earlier stage. They qualify as “unlawful occupiers.”³ Section 4(7) of PIE provides guidance and specifies the factors and considerations to be taken into account when a Court exercises its discretion to determine whether it is just and equitable to grant an eviction order. It reads:

“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 in execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or

¹ Cape Town City v Commando 2023 (4) SA 465 (SCA) at par 1

² Government of the Republic of South Africa and others v Grootboom and others 2001 (1) SA 46 (CC)

³ Cape Town City v Commando 2023 (4) SA 465 (SVA) at par 6

³ Dekker and another v Jika 2003 (1) SA 113 (SCA) at par 11 at 122C to D

other organ of State or another landowner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disable persons and households headed by woman.”

21. Without considering the other pertinent factors, a determination that an occupant is in unlawful occupation does not automatically result in an eviction order. Whether granting an eviction would be just and equitable in light of the circumstances of the case is the final determination of the court. . If eviction is warranted, the court then determines a period of time that is both reasonable and equitable.⁴

22. Our Courts take a pro-active role when considering eviction applications. The fact that the eviction may result in homelessness places an obligation upon local authorities’ to provide temporary emergency occupation. This duty must be read in conjunction with the provisions of section 4(7) of PIE, that one of the circumstances which may be relevant to the just and equitable enquiry was whether land had been made available by a municipality or other organ of State or another landowner for the relocation of the unlawful occupier. A Court would therefore not be able to decide the fairness and equity of an eviction without hearing from the local authority upon which a duty is imposed to provide temporary emergency accommodation..⁵

23. In each case, the court is obligated to conduct an enquiry and r proactively gather information regarding all pertinent and relevant circumstances. ⁶ before rendering a just and equitable decision based on that information.

IS THE FIRST RESPONDENT IN UNLAWFUL OCCUPATION

24. The applicant caused 2 (two) notices of demand to be delivered to the first respondent’s email address as recorded in the lease agreement as well as another to be delivered by pre-paid registered post. The applicant has complied with the

⁴ Grobler v Phillips 2023 (1) SA 321 (CC) at 331C to G, par 28 and 29

⁵ Occupiers Berea v De Wet NO and Another 2017 (5) SA 346 (CC) at par 54 to 58

⁶ The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele 2010 (9) BCLR 911 (SCA)

terms of the lease agreement and in law the first respondent is deemed to have received such notice.

25. It is further undisputed that the first respondent received the notice of her arrears and the drastic relief sought against her when she received service of the main eviction application as well as the section 4(2) PIE Act notice and order.

26. Moreover, the first respondent's tenancy is month-to-month. The lease agreement stipulates that any of the parties may terminate the lease with 30 days' notice, which is precisely what the applicant did.

27. I therefore conclude that the lease agreement was lawfully terminated and that the first respondent is in unlawful occupation.

SECTION 4(7) OF PIE

28. The first respondent had occupied the property for more than 6 (six) months when the eviction proceedings were initiated. The Court may grant an order for eviction if it considers all of the relevant circumstances and finds that it is just and equitable.

29. The inevitability of rapidly escalating living expenses in comparison to meagre sources of income is a sombre but undeniable reality that impacts everyone. . Considering the evidence, it is uncertain if the first respondent can afford to pay the arrear rent or commit to the agreed rental with or without an escalation in the future. The answering affidavit was deposed to on 20 September 2023. The replying affidavit is dated 7 May 2024. Neither of these affidavits shed light on the current outstanding rent or what amounts have been paid to the date of the judgment.

30. In her answering affidavit, the first respondent offered to pay R4000 as rent per month with an additional R500 for the arrears. During the argument, Mr Nduli, who appeared on behalf of the first respondent, indicated that her offer was increased from R500 to R1000 for the arrears.

31. The first respondent attached copies of her bank statements to her answering affidavit. Mr Randall, who appears for the applicant, pointed to several entries on the bank statements of payments to the first respondent other than her salary income or maintenance. Mr Randall submitted that the applicant earns more money than what she disclosed.

32. Mr Nduli argued that the court should dismiss the eviction application because the applicant stands to suffer no prejudice. The applicant has a willing and able tenant who wishes to continue occupying the property.

33. In ***Beadica 231 CC and Others v Trustees, Oregon Trust and Others***⁷ the Constitutional Court per Justice Theron held at para 80 that:

“Our law has always, to a greater or lesser extent, recognised the role of equity (encompassing the notions of good faith, fairness and reasonableness) as a factor in assessing the terms and the enforcement of contracts. Indeed, it is clear that these values play a profound role in our law of contract under our new constitutional dispensation. However, a court may not refuse to enforce contractual terms on the basis that the enforcement would, in its subjective view, be unfair, unreasonable or unduly harsh. These abstract values have not been accorded autonomous, self-standing status as contractual requirements. Their application is mediated through the rules of contract law including the rule that a court may not enforce contractual terms where the term or its enforcement would be contrary to public policy. It is only where a contractual term, or its enforcement, is so unfair, unreasonable or unjust that it is contrary to public policy that a court may refuse to enforce it.”

34. It is further settled that the Court can not make an agreement for parties by way of an order of court.

⁷ 2020 (5) SA 247 (CC)

35. The first respondent further raised the possibility of mediation. None of the parties filed any notice in terms of Rule 41(A). Mediation is, in any event, a voluntary process. The Court can not compel parties to mediate. Despite this, I afforded the parties during the argument the opportunity to stand down to explore the potential for resolution of the dispute. No settlement could be reached.

36. Therefore, I am of the considered view that an eviction order should be granted.

JUST AND EQUITABLE PERIOD WITHIN WHICH AN EVICTION SHOULD TAKE PLACE

37. The second respondent, the City of Cape Town Municipality, filed the housing report on behalf of the City. The report confirms that the first respondent is an adult female who has 2 (two) dependent children. She is employed with a monthly household income of R9,500.00. She has been residing at the property for a period of 3 (three) years and will be rendered homeless if evicted. Apart from the 2 (two) minor children there are no disabled or elderly persons residing on the premises.

38. The City contends that the respondent can be provided with a so-called “*emergency housing kit*” as a last resort if she is not able to obtain accommodation through her own means. In paragraph 13 the City request the Honourable Court to grant a period of 18 (eighteen) months from the date of having received a complete acceptance form the first respondent to make a structure available for occupation at an emergency accommodation site. This is only applicable should the first respondent not be able to secure a site with the landowner's consent in writing for the construction of the so-called “*emergency housing kit*”.

39. The first respondent argues that her constitutional right to access adequate housing can only be achieved if the parties engage each other meaningfully.⁸ The first respondent pleads that the Court should allow the parties to find a mutually beneficial solution through mediation. The first respondent further alleges that the

⁸ Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg and others v City of Johannesburg 2008 (3) SA 208 (CC)

applicant charges different rental amounts for apartments of similar size. In this regard, the first respondent argues that the Court should not grant an eviction order until the City has taken reasonable and concrete steps to assist the first respondent with alternative accommodation.

40. The first respondent appears to be a hard-working mother who succeeds in earning a respectful income. She receives financial support and maintenance from her boyfriend. She has a family and does not appear to be destitute, although she is by no means prosperous.

41. The applicant presents uncontested evidence regarding the availability of similar accommodation in the area, although at higher monthly rentals. The first respondent did not answer to these allegations but merely persisted in contending that she would suffer prejudice should her children and she be forced to move.

42. What is then a just and equitable period within which an eviction is to take place? The applicant proposed 4 months. Mr Ndoli proposed 18 months in line with the City's housing report. The City's stance to be that all evictions should be halted for a period of 18 months is beyond my comprehension. Depriving the applicant, as owner, of any remedy for such an expanded period would also not be just and equitable.

43. I agree with the applicant that executing the eviction order should be suspended for four months.

COSTS

44. The applicant is cited as a Nonprofit Corporation (NPC) that provides housing to lower-income households. I accept that the applicant needs to protect its financial position just like any other landlord. On the other hand, the first respondent cannot afford to bear the costs of an opposed application. I have also mentioned that the parties could not mediate the matter despite the first respondent's offers. While I do not assign blame to any of the parties involved, the Court was left in the dark regarding the updated arrears owed by the first respondent and why the applicant

was unwilling to accept the first respondent's offer. The first respondent did not place any updated information before the court regarding the rental payment as she could have done in terms of Uniform Rule 6(5). I am inclined to order each party to pay their own costs, but this may be unfair to the applicant, who was substantially successful.

45. I intend to grant a cost order that aims to strike a balance between the applicant's substantial success and the first respondent's assertion that she wanted to settle the matter and did not intentionally breach the terms of the lease agreement⁹. It safeguards the applicant should the first respondent fail to vacate the property and lessens the harshness of the relief should the first respondent comply with the terms of the order.

RELIEF AND ORDER GRANTED

46. Considering the aforesaid an order is granted as follows:

[1] The first respondent and all those who occupy by, to or under them, at the property situated at **ERF 2[...] CAPE TOWN** more fully described as **05[...] R[...], corner of K[...], River Diep and F[...] streets, Brooklyn (hereinafter referred to as “the property”)** known as 05[...] R[...], Corner of K[...] Road, D[...] Street, R[...] Street and F[...] Street, Brooklyn shall vacate the property by no later than **30 September 2024**.

[2] Failing compliance with paragraph 1 above, the Sheriff and/or Deputy Sheriff is authorised to evict the first respondent and any other occupants and to remove their belongings on 1 October 2024, or so soon as is reasonably practically possible thereafter.

[3] The first respondent is ordered to pay the costs of the application, including the costs of counsel on Tarif A in terms of Uniform Rule 69(7),

⁹ Goodfin Properties (Pty) Ltd v Adriaanse and Others [2022] ZAWCHC 245

[4] The costs order in paragraph 3 is suspended and will only become effective if the first respondent does not vacate the property on or before 30 September 2024. If the first respondent vacates the property before 30 September 2024, each party shall pay its own costs.

VAN DEN BERG AJ
ACTING JUDGE OF THE HIGH COURT

HEARD ON 17 May 2024

JUDGMENT 21 May 2024

APPEARANCES:

FOR THE APPLICANT:

Instructed by

Adv R Randall

JKS Attorneys Inc

FOR THE FIRST RESPONDENT:

Instructed by

Adv B Nduli

Legal Aid

FOR THE SECOND RESPONDENT:

None