

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

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

Case No: 5453/2022

In the matter between:

CITY OF CAPE TOWN

Applicant

and

RUSHKA HEARNE

1st Respondent

RIANNA REYNECKE

2nd Respondent

LOURENCIA MAKER

3rd Respondent

MICHELLE BRANDT

4th Respondent

BRENDA MURPHY

5th Respondent

DANIELLE DU PLOOY

6th Respondent

MICHELLE CLOETE

7th Respondent

BRADLEY JACOBS

8th Respondent

REMUS SAAIMAN

9th Respondent

**ALL THOSE PERSON HOLDING TITLE
UNDER THE FIRST TO NINTH RESPONDENTS
AND/OR UNLAWFULLY OCCUPYING ERVEN
4[...], 4[...], 4[...], 4[...], 4[...], 4[...],
4[...], 4[...] AND 4[...] BELHAR,
WESTERN CAPE**

10th Respondent

Date of hearing: 7 June 2024

Date of judgment: 10 September 2024

JUDGMENT DELIVERED ELECTRONICALLY

PANGARKER, AJ

Introduction

1. The City of Cape Town seeks to evict various respondents and those holding title under them from the Pentech-Belhar Housing Project (the project) which is a low income housing project in Belhar, in terms of the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (the Act)¹. The application was brought in terms of sections 6 and 4 of the Act.

2. While the application was initially brought against nine respondents and their families, the first respondent had already vacated the unit by the time the application was argued. The respondents who still occupy the units are the second to eighth respondents, and Leonie Toll, who is identified as a tenth

¹ The Act is commonly referred to as “the PIE Act”

respondent.

3. The application involves several affidavits, more than one City Housing Report, affidavits from the successful beneficiaries of the units, and the record is almost 880 pages long. I do not intend to detail each and every affidavit filed in this matter so as to not overburden the judgment unnecessarily.

The City's case

3. The City is the applicant and the owner of the land upon which the Pentech housing project is developed. The City is an organ of State, and the requirements of section 6 of the Act are applicable. To place the application in context, it is important to note that the project involved 340 low income housing units forming part of the Government's housing subsidy programme which commenced in 2007. The intention of the project was to provide low income housing to qualifying persons in the areas of Bellville South, Ravensmead, Elsies River and Belhar. The requirement in respect of the project was that qualifying recipients of these units were to have applied for housing by the registering on the City's housing data base and undergoing a rigorous application process.

4. The evidence is that the City's housing allocation policy was approved in August 2009 and subsequently amended in 2013 and 2015, and it dictates the applications and allocations for the completely built units in the project. Furthermore, the project went through a public participation process and a Project Steering Committee (PCS) chosen by the communities in which the beneficiaries came from, was established to assist in the process. The requirement ultimately is that the beneficiary for a unit must have applied through registration, whereafter an assessment process occurs and verification by the City in terms of its housing allocation policy.

5. Construction of the units occurred in two phases in 2019. Firstly, 133 units

were completed and handed over to the qualifying beneficiaries in terms of the housing allocation policy. Thereafter, 207 units built by a second contractor experienced certain performance problems and by December 2021, only 101 of the 207 units were completed. The remainder of the units² are still to be completed. Significantly, in respect of the completed 101 units, 92 were fully occupied and handed over to beneficiaries by December 2021, but the remaining 9 units had not yet been handed over at that stage due to incomplete electrical infrastructure. It is these 9 units at the Pentech Belhar Housing Project which form the subject matter of this application.

6. The City's version is that the 9 housing units were unoccupied and despite employing security services in order to curtail vandalism and invasion, the units were nonetheless vandalised and invaded. Such incidents occurred between January to April 2021 and a security company employed by the City could not prevent these incidents from occurring with the result that the City's law enforcement unit was called in to assist but to little effect as the vandalism incidents continued.

7. On 16 May 2021, a crowd had gathered at Harvard Street in the Pentech project and demanded that 9 families from the area be allowed to occupy these units. It is common cause that the 9 families were not on the list of approved successful beneficiaries earmarked to receive and occupy these units. These 9 families were also unknown to the City and law enforcement then moved them and their belongings from the units. However, on the same day, these persons moved back and occupied the 9 units and remained in occupation thereof. These occupants together with their families are thus the respondents cited in this application and referred to above.

8. The City has, in its affidavits, provided a very detailed explanation as to how the qualifying process for low cost housing occurs. For purposes of the

² 106 housing units

judgment, I do not address it in so much detail. The respondents took no issue with the process of allocation in their initial answering affidavits though they address certain aspects in later affidavits filed herein. Suffice to point out at this stage that the housing allocation process comprises the following steps: application, selection, verification, vetting and finally, allocation.

9. Certain of initial beneficiaries intended to occupy the Pentech units in issue in this matter were eventually awarded housing elsewhere and as the litigation progressed, other successful beneficiaries replaced those who were at the outset meant to lawfully receive the Pentech housing units. The current beneficiaries according to the City's affidavits are:

Alec McDonald – registration date 31 August 1995

Moosa Abrahams – registration date 28 February 1996

Karel Juries – registration date 13 February 1996

George and Charmaine Witbooi – registration date 7 July 1999

Fiona van Zyl – registration date 20 July 1994

Marthinus Geswindt – registration date 26 January 1988

Errol Martheze – registration date 7 January 1991

Ellen Vearey – registration date 26 November 1991

10. From the above list, it is evident that some beneficiaries applied for housing allocation as far back as 1988 and remain on the housing list, awaiting their allocated units which they lawfully and properly applied for only to find that

the respondents occupy the units which are intended to be handed over to them. Generally, these beneficiaries are longer on the housing list than the respondents and some live in what can only be described as inhumane conditions. Mr Juries, for example, is 57 years old and has been living and sleeping in a pipe in Belhar for more than 20 years. He survives on the goodwill of the community and does occasional jobs. Mr Abrahams lives in a household of 10 people and two of his children have disabilities³. To add, Mr Martheze is 55, unemployed and is permanently disabled and should be using a wheelchair but is unable to do so as he lives in a zinc structure unsuited to wheelchair access and use.

11. The deponent to the applicant's founding affidavit is Phesheya Duke Gumede, employed as Programme Manager for the City, District North, Area 1, Human Settlements. Unless otherwise indicated, the reference to addresses and street names below is a reference to streets in Belhar.

12. According to the City's affidavits read with the admissions of the respondents against whom the City seeks an eviction order, the latter have been occupying the respective Pentech erven/units since at least 18 May 2021 when they took occupation. They were all served with notices to vacate the respective units but despite such notices, remain in occupation as at date of the application. In the paragraph which follows, I set out some of the details related to the respondents' occupation of the units.

13. **Riana Reynecke (second respondent)** occupies 1[...] H[...] Street, and previously lived at 4[...] H[...] Street. **Lorencia Maker (third respondent)**, occupies 1[...] H[...] Street and had a fixed address at the time at 3[...] J[...] Street. **Michelle Brandt (fourth respondent)**, occupies 1[...] H[...] Street and had a prior fixed address at 3[...] J[...] Street. **Brenda Murphy (fifth respondent)**, occupies 1[...] H[...] Street and had a fixed address and 5[...] E[...]

³ Par 25.2, p602 - Mr Abrahams son is hearing impaired and his daughter has a spinal complication

Drive. **Danielle Du Plooy (sixth respondent)**, occupies 1[...] H[...] Street and had a fixed address and place of residence at 6[...] A[...] Street, Extension 13. **Michelle Cloete (seventh respondent)** resides at 3[...] C[...] Street and lived in Belhar previously. **Bradley Jacobs (eighth respondent)**, occupies 3[...] C[...] Street and had a fixed address at 3[...] J[...] Street. **Leonie Toll (tenth respondent)**, occupies 3[...] C[...] Street and remains on occupation.

14. According to Mr Gumede, none of the respondents utilised the appeal process in respect of the City's housing allocation decision by appealing to the City Manager in terms of clause 8.7 of the Allocation Policy read with section 62 of the Municipal Systems Act 32 of 2000. It was argued quite vociferously during the hearing, that the respondents are all unlawful occupiers who opportunistically took occupation of the vacant Pentech units in May 2021.

15. Mr Gumede's view is that to allow and approve of the respondents' conduct would amount to a dangerous precedent which would have the effect of rendering the entire housing programme "*unworkable*" and also undermine the legal and fair allocation of housing in terms of the City's allocation policy⁴. The applicant's states that it is the lawful owner of the land and the respondents have jumped the queue by opportunistically taking occupation of the units.

16. Willie Desmond Jaftha is the Ward Councillor for Ward 12 which includes Belhar and Ryan Thomas is the Project Manager in the City's Human Settlement Implementation Department. Both men confirm the correctness of Mr Gumede's affidavit insofar that it relates to them. According to Mr Thomas, the Erven occupied by these respondents are properties which were subdivided from the mother plot, namely Erf 2[...] Bellville⁵. The General Plan number 2188/2013 of the remainder of Erf 2[...] indicates the City's ownership of the Erven and it is sated that the subdivided Erven are or were intended for transfer to the

⁴ Par 118, p32

⁵ Annexure B

successful beneficiaries once building work is completed and it is cleared for transfer.

17. Riana Pretorius, the City's Director: Informal Settlements, confirms that the eviction notices and application was effected on Ms Toll at 3[...] C[...] Street⁶. Ms Pretorius indicates furthermore that the respondents have their own accommodation and as they invaded the Pentech units *en masse*, they do not qualify for emergency and alternative accommodation. Furthermore, her affidavit confirms the respondents' details, their occupation since May 2021 and that they have neither the consent of the City nor any other right in law to occupy the Pentech units. As for Ms Toll, her previous residential address prior to the occupation of the unit was 1[...] V[...] Street, Extension 23.

18. Mr Gumede and Ms Pretorius confirm that the respondents jumped the queue, forcefully broke the law and invaded the almost completed units before they could be handed over for occupation to the qualifying and deserving beneficiaries. It is submitted that the beneficiaries qualified for the housing properly in terms of the City's housing allocation and that the respondents' unlawful actions and continued unlawful occupation thus prejudice these beneficiaries.

19. On behalf of the City, it is submitted that it will not be just and equitable to offer these respondents alternative accommodation at the State's expense as it would be unfair to applicants on the housing demand list but would also be tantamount to rewarding illegal conduct. Although Ms Pretorius' initial affidavit indicates that the respondents did not approach the City with a view to seeking alternative accommodation, as litigation progressed, it is so that they completed the necessary questionnaires regarding their personal circumstances and these form part of the record in the matter.

⁶ RP8 – this reference is Ms Toll is not specifically cited but falls under the tenth respondent

The respondents' opposition to the eviction application

20. In dealing with the opposition to the eviction application as contained in the initial answering affidavits, I point out that the respondents' versions as to how they came to occupy the units are virtually identical. In summary, their versions are that they were living either as backyard occupants in someone else's backyard or with family in wendy houses. They acknowledge that they were not the successful beneficiaries for the Pentech units. All the respondents acknowledge that they occupy the units intended for the successful beneficiaries listed above.

21. The respondents admit that the City is the owner of the units which they occupy. They were informed by City officials that the Pentech units would be earmarked for the indigent in the area but according to them, people from Kraaifontein and Wellington received the units. The respondents deny that they forcefully attempted to occupy the units and explained that on 16 May 2021, the community gathered in the Pentech streets, unhappy about the allocation of the units. Mr Jaftha explained to them that the units belonged to the successful beneficiaries on the housing allocation policy yet the respondents wished to know why people outside the target area, being Belhar, were the recipients of the units. At this juncture I point out that the City has explained that more than 60% of the Pentech recipients are from the target area.

22. The respondents state that the units were unoccupied for about two years and regularly vandalised and used for illegal activities. According to them, the security personnel tasked with protecting the units were unable to do so as the vandalism was ongoing. On 16 May 2021, while the Pentech community and law enforcement officials were out in the streets, the respondents rushed to the unoccupied units: some stood in the doorway of each unit and others stood outside the front door, seemingly intending to claim or appropriate the unit for him/herself. The law enforcement officials then escorted them from units and out

of doorways, back into the streets. The respondents then decided to sleep outside in the streets for two nights.

23. According to the respondents, Mr Gumede told them that they could not sleep outside with their children and gave them permission to move into the units but advised that they were not to inform anyone that he had given permission to occupy, that the City was going to fix the vandalised houses and that he would assist them in obtaining houses in Delft. Mr Gumede visited each of the respondents individually and, according to them, promised to return, regarding the Delft accommodation.

24. The respondents state that Mr Gumede never returned as promised while Mr Jaftha brought various beneficiaries to see the units. It also seems from the answering affidavits that the respondents held a view that the occupation by consent was a temporary arrangement until Mr Gumede returned to advise them regarding housing in Delft.

25. The respondents state that they took occupation of the units out of desperation. While they admit that they are unlawful occupants, they nonetheless persist with an argument that they were given consent to occupy. As for the right of appeal regarding the allocations and/or housing policy, the respondents state that they were not aware of this right of appeal to the City Manager.

26. The further defence, if it can be called that, is that the City demonstrated its consent that the respondents may occupy the units by its provision of water metres and water to each property, refuse bins for each unit and appointing a contractor to effect repairs to the units whereafter the respondents were handed the keys to the units (by the contractor).

27. The respondents further complain that there was no attempt to mediate the eviction matter amicably. Furthermore, all the respondents admit that they

were unhappy about their living conditions which included cramped living space, and living in wendy houses which leaked during winter. While they ask the Court for forgiveness for occupying the properties in the manner in which they did in that the units were earmarked for beneficiaries, they emphasise that they have made lives in these units and that their children attend school in the area. They question where they and their families would go if evicted, and state that the beneficiaries' right to housing is no greater than theirs. They seek a dismissal of the application with costs due to the absence of a housing report.

The City's reply and further affidavit

28. Mr Gumede denies that the beneficiaries are from Wellington and Kraaifontein and confirms that they are from Ravensmead, Bellville, Bellville South and Elsies River. He denies that the units were unoccupied for approximately two years and states that there were only vacant from December 2020 to May 2021 after the 92 units were handed over to beneficiaries. Mr Gumede furthermore denies stating that the respondents could enter the units and indicates quite clearly that he has or had no authority to give consent to the respondents to occupy the City's property. He explained to them that legal consequences would flow were they to occupy illegally and should they not vacate voluntarily. He denies saying that the houses would be fixed and that he would get back to them.

29. Mr Gumede clarifies that what he had said was that the respondents could apply for houses in Delft. He confirms visiting each of the respondents in order to obtain their details to determine whether they were on the housing needs database of the City. In addition, while he admits not returning to the respondents, he reiterates that he had explained that they were illegal occupiers. In his view there was/is no basis for deviation from the housing policy. The Pentech project is a Breaking New Ground (BNG) project⁷. As for the

⁷ Par 41, p268

respondents, the City maintains in reply that none of them offer a valid defence in law, that they are illegal occupiers and that mediation would fail as they persist with the illegal occupation of the City's property. At the time of deposing to his replying affidavit, the respondents had not provided information regarding their personal circumstances.

30. In his further affidavit deposed to as a result of the extensive engagement process between the City and the respondents, Mr Gumede details the respondents' personal details. Furthermore, the indication is that the engagement between the parties points to the respondents being of the view that they are entitled to remain in occupation until they are provided with similar housing opportunities as those they occupy in Pentech.

31. As for the beneficiaries, during December 2022 the eight successful beneficiaries were re-allocated by agreement with the Ward Councillor to completed units in the development.⁸ It is submitted on behalf of the City that a circumstance of the respondents' continued occupation of the units which are to be awarded to successful beneficiaries, is that the beneficiaries are longer on the housing allocation register than the respondents. Furthermore, Mr Gumede denies that the appointment of a contractor to attend to repairs to the units, and similarly the provision of utilities and a water supply, constitute the City's consent to the respondents to occupy and remain in the units.

The respondents' supplementary affidavits

32. Pursuant to the City's May 2024 housing report, the respondents delivered supplementary affidavits. The May report earmarked the Leonsdale site for allocation of units to house the respondents in this matter should the Court grant an eviction order and find that the respondents needed emergency

⁸ Par 45, p388

accommodation⁹. The final City report was filed in June 2024 report prior to the hearing.

33. The respondents all filed supplementary affidavits which yet again addresses the events of May 2021 and how they came to occupy the units. I must state that several paragraphs in these affidavits are spent addressing the affidavit of Mr Gumede¹⁰. While the content of these paragraphs in the supplementary affidavits do not specifically refer to paragraphs in Mr Gumede's reply, on my reading, what they purport to do is in fact to reply or address Mr Gumede's replying affidavit, and in doing that, provide a further response akin to what may be described as "*a second bite at the cherry*".

34. In my view, aside from addressing their personal circumstances and providing an update regarding alternative accommodation, the supplementary affidavits do not take the respondents' opposition any further and effectively amounts to an about-turn on certain admissions already made in the answering affidavit. In this regard, I agree with the City's submission that a slightly different case emerges when regard is had to the further affidavits of the respondents. However, my view remains that the respondents' admission of unlawful occupation as set out in the answering affidavit cannot be ignored.

Are the respondents unlawful occupiers?

35. The respondents' defence to the eviction application is to allege that they had Mr Gumede's consent and permission to occupy the units and relied on such consent. The second part of the defence is that by providing them, as occupants, with the keys to the units, sending contractors to fix the vandalised sections of the units, and handing over refuse bins and providing a water supply, the City indicated its consent that they may remain in the units.

⁹ Pages 68-685

¹⁰ See for example, Ms Maker's affidavit, pages 703-708

36. In the supplementary affidavits, this stance is repeated except that the respondents then seem to allude, in what I view as a vague and oblique manner, that because Mr Gumede was later suspended in relation to the Hangberg housing project, therefore there must be merit in their version that he provided them with consent to occupy the Pentech units even if he may not have had the necessary authority to do so at the time. The submissions on behalf of the respondents regarding consent were persisted with during argument, and it was advanced on the respondents' behalf that only after Mr Gumede made the promises, which the respondents relied upon, did they collect their belongings from their previously occupied accommodation or residences, and move it into the units.

37. The City maintains the denial of consent, not only in the answering affidavit but in Mr Gumede's further affidavit. In my view, the respondents' version of consent is problematic because even if, for argument's sake, Mr Gumede gave permission to occupy the City's property, he was not authorised to do so because a public official cannot lawfully act beyond the confines of his power as prescribed by law, as stated in ***Merifon (Pty) Ltd v Greater Letaba Municipality and Another***¹¹:

"[1] The doctrine of legality and the rule of law lie at the heart of the Constitution.¹² There are numerous reported decisions of our courts that have unequivocally affirmed the fundamental truism that the exercise of public power derives from the law. Accordingly, no organ of state or public official may act contrary to or beyond the scope of their powers as laid down in the law.¹³ This is one of the foundational values of our

¹¹ 2023 (1) SA 408 (SCA) - I have retained the footnotes as per the judgment in the above paragraphs of the SCA judgment in *Merifon*

¹² Section 1(c) of the Constitution of the Republic of South Africa Act 108 of 1996.

¹³ *Affordable Medicines Trust and Others v Minister of Health and Another* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) para 49 and paras 75 to 77; *Albutt v Centre for the Study of Violence and Reconciliation and Others* [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (2)

constitutional democracy.

[2] In *Nyathi v Member of the Executive Council for the Department of Health Gauteng and Another* [2008] ZACC 8; 2008 (5) SA 94 (CC); 2008 (9) BCLR 865 (CC) Madala J aptly put it thus:

*'Certain values in the Constitution have been designated as foundational to our democracy. This in turn means that as pillar-stones of this democracy, they must be observed scrupulously. If these values are not observed and their precepts not carried out conscientiously, we have a recipe for a constitutional crisis of great magnitude. In a state predicated on a desire to maintain the rule of law, it is imperative that one and all should be driven by a moral obligation to ensure the continued survival of our democracy.'*¹⁴

[3] Almost ten years previously, in *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC), the Constitutional Court was even more emphatic in underscoring the principle of legality. The Court said the following:

*'[A] local government may only act within the powers lawfully conferred upon it. There is nothing startling in this proposition - it is a fundamental principle of the rule of law, recognised widely, that the exercise of public power is only legitimate where lawful. The rule of law - to the extent at least that it expresses this principle of legality - is generally understood to be a fundamental principle of constitutional law.'*¹⁵

SACR 101 (CC); 2010 (5) BCLR 391 (CC) paras 49-50; *Electronic Media Network Limited and Others v e.tv (Pty) Limited and Others* [2017] ZACC 17; 2017 (9) BCLR 1108 (CC) paras 25, 110-112; *Minister of Constitutional Development and Another v South African Restructuring and Insolvency Practitioners Association and Others* [2018] ZACC 20; 2018 (5) SA 349 (CC); 2018 (9) BCLR 1099 (CC) paras 27-29.

¹⁴ Paragraph 80.

¹⁵ Paragraph 56 (Citations omitted).

(footnotes retained)

(my emphasis)

38. From the above, it is apparent therefore that Mr Gumede, as a public official for the City, had no authority to promise or allow the respondents or any other persons to occupy the City's property. Having regard to the various affidavits filed in this matter, and notwithstanding Mr Gumede's suspension in relation to a matter totally unrelated to this eviction and the Pentech project, I am more inclined to accept his version that he gave no permission to the respondents to occupy the units. I say this because in the original answering affidavits all the respondents admit that they are indeed unlawful occupants, that they were aware that the houses were earmarked for successful beneficiaries on the housing list, that they knew they had no right to occupy and they sought forgiveness for their actions. Thus, the recognition that their actions were unlawful was prevalent from the outset of their involvement in this litigation, and in my view, must also have been present when they physically occupied the units.

39. Furthermore, I must agree with the City's submission that even if Mr Gumede gave the respondents the green light on 18 May 2021 to occupy the units, or they understood his words to mean that consent was given, he lacked the required authority as a public official to provide consent as it was beyond his power to do so but also because legislation regulates the allocation of housing units to lawful beneficiaries¹⁶. In addition, the submission that the City is estopped from denying that Mr Gumede granted consent is also not sustainable because estoppel cannot be raised as a defence to an unlawful action. In other words, estoppel cannot be used to make legal what would otherwise be illegal or not permitted in law¹⁷. Thus, it is not a defence available to the respondents in respect of the averment and submission that Mr Gumede or Mr Jaftha gave the

¹⁶ Housing report, p404-417; Merifon supra

¹⁷ Trust Bank van Afrika Bpk v Eksteen 1964 (3) SA 402 (A)

respondents consent to occupy the units, as they were not authorised to provide consent.

40. Thus, in view of the above discussion, the defence of consent is unsustainable and must fail. There is a further aspect to this defence which must be emphasised and that is that if any suggested consent or permission were granted by Mr Gumede or Mr Jaftha, it was in any event revoked once the City gave notice of its eviction application to the occupiers, and therefore such purported consent came to an end, with the result that the respondents had no right in law to continue to occupy the City's property. In this regard, it is apparent from the judgment in ***Residents of Joe Slovo Community, Western Cape v Thubelitsha Homes and Others (Centre on Housing Rights and Evictions and Another, Amici Curiae)***¹⁸, that the City has the authority to revoke consent:

“Has the City revoked its consent?”

[157] All of this does not however mean that the owner's consent is irrevocable. The residents have never asserted any right to occupy other than the consent of the owner. They accept that there was no contractual obligation which binds the City to allow the occupiers to reside in Joe Slovo in perpetuity. In argument, the residents sought to persuade us that the legal nature of their right of occupation is an equivalent of the common law precarium which is possession or occupation which may be terminated at any time. It is, however, unnecessary, for the purposes of this case to characterise this right of occupation any wider than being a right to occupy with the express or tacit consent of the owner of the land in question and which may be terminated by the state organ concerned subject to its constitutional obligations in relation to providing access to adequate housing.”

¹⁸ 2010 (3) SA 454 (CC) par 157

(footnote omitted)

(my emphasis)

41. As for the revocation of consent, there is no issue that the respondents all received via the Sheriff, notices to vacate the units and that the procedural requirements of the PIE Act were complied with. The conclusion therefore, is that any consent, such as there may have been, was revoked at the end of January 2022 once the section 4 notices were served. However, my view remains that having regard to the first three sets of affidavits in this matter, the City's version that no consent was given by its official to take occupation and remain, is the more probable version, and in that instance, the authority of **Merifon** makes it clear that a public official cannot act beyond his authority.

42. In view of the above findings, the defence regarding consent must fail. The defences relating to the provision of refuse bins, keys provided by the contractors and provision of water and utilities, can be easily dispensed with: there can be nothing untoward about the City appointing a contractor to fix problems and attend to repair work on the units as a result of vandalism which occurred prior to the respondents' occupation of the units. I accept the City's explanation the keys were handed over by the community liaison officer for fear of the respondents breaking the locks to gain entry to the units. The provision of water and utilities at the units cannot be seen as granting some form of consent to occupy as these are utilities and benefits available to persons living in the low cost housing project. In this regard, I agree with the City's counsel that the respondents benefitted from these services through their occupation of the units.

43. In my view, the City's explanation as to why the keys were handed over once repairs were effected by the contractor is a reasonable explanation. The City took account of the respondents' conduct which, in my view, was to leave their residences because they were, for want of a better term, *fed up* with their circumstances, overcrowded residences and leaking wendy houses and acted in

an opportunistic manner by entering and appropriating for themselves, the Pentech units.

44. While there is no evidence that they forcefully or with violence entered the units, the respondents describe that they stood in doorways and in front of entrances to these units and were moved away by law enforcement officials. In my view, their conduct was indicative of persons who were motivated by opportunism, intending to stake their claim to the units earmarked for successful beneficiaries and in so doing, jumping the queue on the City's housing allocation list. The evidence and their admissions certainly indicate that they knew that they were acting unlawfully and that the units were intended for other persons.

45. Given their actions, and their admissions that they were unlawful occupants, fully knowledgeable that the units belonged to the City and were to be handed over to beneficiaries, it was reasonable for the City to expect that the respondents would take the law into their own hands and find a way to access the units once the contractor had finalised the repairs. The decision to hand over the keys in order to prevent vandalism, out of an abundance of caution, therefore cannot be seen to mean that the City consented to the respondents' occupation or gave them permission to occupy the units.

46. The averments and submissions that the respondents somehow did the City a favour by occupying the properties which had been vandalised while remaining unoccupied, is self-defeating. The fact is that the respondents acted unlawfully; they had no consent of the owner, the City, to occupy the units, and they did so knowing that the units were not allocated to them and that it was to be handed over to lawful beneficiaries, yet this did not deter them. They left existing residences as backyard dwellers to appropriate housing units to which they had no right in law to occupy.

47. Furthermore, the fact that some beneficiaries who originally were meant to

receive the units were, in time, provided housing elsewhere and other lawful, successful beneficiaries were moved up the proverbial housing queue in no way convinces me that the respondents have a lawful defence and/or were justified in their actions. It is evident from the affidavits filed together with the various City housing reports that the respondents were not amongst the people who were earmarked for the Pentech units which form the subject of this application. In the result, the defences raised in the respondents' affidavits are dismissed.

48. The remaining issues raised in the supplementary affidavits relating to Mr Gumede and the Executive Mayor's involvement in the matter, media reports and the idea that the respondents are to be made an example of, in my view, do nothing to detract from the important questions in this case. Firstly, whether the respondents are unlawful occupiers as defined in the Act, and secondly, whether it is just and equitable to evict them and all those who hold title under them? The first question, in my view, is that the respondents and all those holding title under them, are indeed unlawful occupiers as defined by section 1 of the Act as they have no right in law to occupy the Pentech units nor the City's consent to occupy. I turn now to answer the second question.

The "just and equitable" consideration

49. The eviction application was brought in terms of section 6 read with section 4 of the Act. In terms of section 6(1)(a) and (b), which applies to evictions at the instance of an organ of State, the Court may only grant an eviction order if:

49.1 it is just and equitable to do so;

49.2 after considering all relevant circumstances; and if

49.3 the consent of the applicant is required for the erection of a building or structure on that land or for the occupation of the land, and the

unlawful occupier is occupying a building or structure on the land without such consent having been obtained; or

49.4 it is in the public interest to grant such an order.

50. Section 6(3) sets out the factors which the Court must have regard to in determining whether it is just and equitable to grant an eviction order in favour of the organ of State. These factors are: the circumstances under which the unlawful occupier occupied the land and erected the building or structure; the period of occupation by the unlawful occupier and family, and the availability to the unlawful occupier of suitable alternative accommodation.

51. Section 6 envisages an exercise of the Court's discretion but the discretion, in my view, must be cognisant of the occupiers' interests and circumstances, especially *"broader considerations of fairness and other constitutional values, so as to produce a just and equitable result"*.¹⁹ In view of these prescripts, I reiterate that it has already been found above that all the remaining respondents and those holding under them are unlawful occupiers.

52. Having regard to the provisions of section 6, the facts indicate that none of the respondents erected any structures or buildings on the Pentech land and having found that they have (and had) no consent to occupy, my further finding is that the respondents have been unlawfully occupying the units since at least 18 May 2021, when they commenced their occupation.

53. As for the circumstances under which they occupied, this was addressed above under the preceding heading. Turning then to a consideration of *"all relevant circumstances"*, firstly I note from the various reports filed by the City, which have been updated, as well as the affidavits by Ms Pretorius and Mr Cader, the respondents' legal representative, that there was indeed engagement

¹⁹ Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC) par 36

between the parties and that the respondents provided details of their circumstances as per their supplementary affidavits, which I summarise below:

Riana Reynecke

Ms Reynecke occupies the unit with six others including four minor daughters, her unemployed sister and her minor son. She is the head of the household and receives a SASSA grant of R350 p/m and social security grants of R520 p/m per child for three children. Her sister similarly receives grants for herself and her child. Ms Reynecke has asthma for which she receives treatment. In her affidavit she states that she used to reside with her parents and siblings, but due to her brother's drug use and violence, the situation became intolerable and she cannot return to the property which also houses tenants.

Lorencia Maker

The total household income for herself, partner and four children was R6140 p/m, and expenses are R4187 p/m. One child attained majority; the respondent is unemployed and her partner Mr Filies, works casually in the building industry. As at May 2024, Ms Maker alleged that she only receives three SASSA grants x R520 p/m p/child plus Mr Filies' wage of R600 p/week. She cannot return to her previous place of residence at 3[...] J[...] Street.

Michelle Brandt

She cannot return to the backyard where she previously lived as the wendy house which she occupied was removed and a separate entrance was built on the owner's property. Her efforts at finding other backyard accommodation have proved fruitless as owners do not wish to accept occupants with children. She does not have the finances to afford rental. Ms Brandt is employed as a cleaner in N1 City; her husband and adult daughter are unemployed and her son (17

years) is in Grade 10 at B[...] High School. Her granddaughter is five years old. After deductions she earns R3800-R4000 per month, plus two SASSA grants per month.

Brenda Murphy

The wendy house she used to reside in was removed and the owners of the property wish to build on their plot. Thus, the backyard is no longer available to her. Her efforts at finding alternative accommodation are the same as Ms Brandt's. She is divorced. Her son Bradley no longer lives with her but lives in Atlantis and contributes to her expenses. The other son Brandon is employed as an intern²⁰. Her grandson attends a school within walking distance of the unit which she occupies. She describes herself as "*effectively disabled*" due to various operations on her foot. She intends to apply for a disability grant as advised by her doctor. The monthly income from Brandon is R3200 p/m plus a SASSA grant of R350.

Danielle du Plooy

The wendy house in which Ms Du Plooy lived prior to taking occupation in the Pentech unit was removed and her efforts at obtaining accommodation in a backyard proved unsuccessful as rental at R2000 - R3000 per month is unaffordable. Ms Du Plooy is separated from her spouse, uses a crutch and explains that she can hardly walk. She underwent a total hip replacement more than 20 years ago and receives a disability grant of R1700 per month. She is originally from Makhanda in the Eastern Cape but due to gangsterism in the area, relocated to Belhar where she lives for the past 26 years. Her adult son is employed and her daughter is unemployed. Her grandson (2 years old) also lives with her.

²⁰²⁰ No details are provided; see par 16, p817

Michelle Cloete

Ms Cloete is 50 years old and lives with her partner Herman and three adult children, aged between 22 to 32 years, and three grandchildren. None of the family members are employed. The respondent and her partner each receive R350 SASSA grants per month. She cannot afford rental for alternative accommodation.

Bradley Jacobs

Mr Jacobs investigations regarding his erstwhile backyard accommodation follows along the same lines as those of Ms Du Plooy. He cannot afford the rental of over R2000 per month for new accommodation. Mr Jacobs occupies the unit with his unemployed wife. He is a security officer, earning a maximum of R2200 per month, plus two SASSA grants for the two children and will apply for another SASSA grant for the other child. The twins attend a school in Belhar and Mr Jacobs has lived in the area for more than 30 years.

Leonie Toll²¹

Ms Toll occupies the unit with three minor children for whom she receives SASSA grants of R350 p/m per child. At paragraph 19 of her questionnaire, she states that her partner also receives a SASSA grant. She indicates in her answering affidavit that she would have no choice but to move to her mother's residence if evicted.

54. On consideration of averments made by the respondents and completion of their questionnaires and the content of their affidavits, it is apparent that they all allege that they would be rendered homeless if evicted and that their previous accommodation, which they left in May 2021 to occupy the Pentech units, are

²¹ Questionnaire dated 10 March 2023, p144-148

either no longer available or the rental is too steep and thus unaffordable. Furthermore, the respondents take issue that some units are allocated to people who, according to them, are either not indigent or should not be occupying units as they have other accommodation. Insofar as the Leonsdale alternative emergency housing site is concerned, the respondents say that they would be living in a gang infested area, the children would not be close to their schools and would be exposed to an unsafe area. All the respondents suggest a move to other areas in Belhar apparently owned by the City.

55. All the respondents have been in unlawful occupation for more than three years as at the date of this judgment, and a year at the time when the application was instituted. The respondents all make averments that they would be rendered homeless should an eviction order be granted but this averment requires closer scrutiny, having regard to the questionnaires, the supplementary affidavits and housing reports.

56. Ms Reynecke's daughter attained the age of majority yet no further details regarding her employment is provided. Furthermore, Ms Reynecke applied in 2019 for a housing subsidy from a private purchaser but by the time this was approved, the sale was concluded with someone else. Aside from the reference to receiving grants, she provides no further financial information and Ms Pretorius of the City raises a legitimate concern that Ms Reynecke was able to qualify in 2020 for a housing subsidy, thus it begs the question as to whether she indeed has access to a source of income or funding. She has not addressed this aspect, but it is noted that she applied for RDP housing. In my view, Ms Reynecke has not disclosed her full financial circumstances, and hence, the possibility exists that she may be able to afford or access alternative accommodation. My finding is that an eviction would not render her homeless. However, in an abundance of caution and having regard to section 26 of the Constitution and the City's role in providing alternative housing, I am of the view that should the respondent face being rendered homeless, then she should be provided with emergency housing

or an emergency housing kit.

57. Ms Maker has a source of income and her partner is employed. While Ms Pretorius points out that the income threshold for this household exceeds the threshold for an emergency kit, which is R5000, I note that Ms Maker indicates in her supplementary affidavit that she only receives grants for the children. There is no indication of family members in the area who can accommodate her and her family, yet she was able to afford rental before the unlawful occupation. Having regard to the documents filed plus the submissions, the possibility of alternative accommodation exists but, in the event, that the respondent is unsuccessful, she would be required to notify the City should emergency housing be needed.

58. Ms Brandt is the only breadwinner in her household and in addition to her salary, the household expenses are supplemented by grants. Having regard to the averments in the first housing report, I disagree with the City that the respondent is in a position to find alternative accommodation. In my view, an eviction order would render her and her family homeless and thus the City would be required to provide her and the family with an emergency housing kit where she is placed in a position to erect the kit on private land or emergency housing is to be provided for her at the Leonsdale site.

59. Ms Murphy receives a contribution from a son who works in the Western Cape Provincial Government, but she fails to disclose his contribution. I also question how her initial expenses of more than R4000 are paid. She is effectively disabled, as she states, and would apply for a disability yet the impression is that she is funded or supported by her sons, to a degree unknown to the Court. In my view, the financial disclosure is found wanting and the possibility of alternative accommodation indeed exists. She also does not address whether she is able to be accommodated by her family members.

60. Ms Du Plooy's physical condition is a concern in that she states that she can hardly walk. That said, her questionnaire indicates a monthly income of almost R9500 per month. In her supplementary affidavit, she does not disclose her son's contribution to the joint household income. In my view, the averments together with the financial detail indicate that the possibility of securing alternative accommodation cannot be excluded.

61. Ms Cloete's details are sparse. No indication is given why the adult children are unemployed and/or whether they are (even informally) contributing to the household expenses. She also takes care of her sister's disabled child who is an adult. It is unknown whether a disability grant is received for her nephew. With what seems to be a meagre financial situation, the possibility of homelessness exists if evicted. In the circumstances, the respondent and her family should be provided with emergency accommodation.

62. Mr Jacobs is employed, though his income and expenses seem to be equal. In my view there does not seem to be funds available for alternative accommodation and Mr Jacobs and his family should be afforded an emergency housing kit to erect on private land or be accommodated at the Leonsdale site.

63. Ms Toll's financial position is also dire but she has indicated that she would move to her mother, hence, there exists alternative accommodation for her and her family.

64. Having regard to the housing reports, the personal circumstances of the respondents, the affidavits and considering the submissions, I do not share the City's view that it can or should be concluded that because the respondents have not made a full disclosure, such disclosure must be construed as being deliberate. Certainly, questions arise in respect of certain of the respondents, as I set out above, but I am not in a position, in all fairness, to conclude that there is a deliberate non-disclosure of personal information. Ultimately, the questionnaires

must be read with the respondents' affidavits and the concerns raised by Ms Pretorius, as I have attempted to do. At best, the majority of the respondents face the looming possibility of homelessness but it cannot be excluded, looking at certain non-disclosures regarding income and accommodation by relatives, that there may well be a possibility of the respondents being able to secure alternative accommodation themselves.

65. This brings me to the City's submission that an eviction order be granted without providing alternative accommodation for the reasons that the respondents refuse to find alternative accommodation and left their initial residences to take over the Pentech units, thus the spectre of homelessness does not arise. I cannot agree with the City's submission on this aspect. In my view, the determination of homelessness if an eviction order is granted in this case must be made at the time or prior to the time that the order is to be granted; in other words, at this stage of the proceedings where the Court is about to grant an order. Casting a look back at the respondents' situation as it was in May 2021 is but a factor in the *just and equitable exercise* but not, in my view, in the determination of whether the respondents are now able to secure alternative accommodation. I say this because from the facts, their circumstances have changed and I have to consider such changes as I do above. Thus, in the event that it is so that an eviction order is granted, the City is required to provide emergency housing to such respondents, having regard to the various authorities which both counsel referred me to.

66. I have had regard to the submissions by the respondents' counsel that it is not just and equitable to evict the respondents based on the finding in ***Ekurhuleni Metropolitan Municipality and Another v Various Occupiers, Eden Park Extension 5***²². In this matter, the respondents also resorted to self-help, but in weighing up the just and equitable exercise, the SCA held that the Municipality's housing policy was compromised, but more importantly, the

²² [2013] ZASCA 162

respondents were given the assurance that they would be prioritised on the housing allocation list but were not²³. These findings resulted in the SCA dismissing the appeal of the Municipality.

67. In my view, **Ekurhuleni** may be distinguished from this matter. The respondents in this matter were not given assurances that they would be prioritised on the City's housing list and the reasons why they were not allocated for housing in Pentech is set out in detail in the housing reports, which explanation is reasonable and understandable. The allocations were clearly not randomly done and the City's detailed and thorough explanation of how the allocations are done, is accepted. The respondents, it must be remembered, also took no issue at all with the housing allocations in their answering affidavits and accepted the process, yet did an about turn later in the matter in their supplementary affidavits, by questioning why other persons are accommodated in the Pentech project, whom in their view, should not be beneficiaries of such units.

68. Having considered the respondents' submissions, in my view, **Ekurhuleni** cannot be relied upon for a finding that it is not just and equitable to evict the respondents because of an unfair or inconsistent housing policy for the reason set out above. Whilst I have read and considered the housing policy and allocation process during the course of preparing this judgment, there is no need to address or dissect it further herein.

69. Returning to section 6(3) of the Act: it requires a consideration of all relevant circumstances. Most of those circumstances relate to the respondents, but I need to sound a reminder that the actions of these respondents in helping themselves in May 2021 to housing units about to be allocated to beneficiaries who have been on the City's waiting list for as far back as 1988, seriously prejudiced the beneficiaries. They were the successful beneficiaries of these

²³ Ekurhuleni supra Para 27-29

units, some of whom have been waiting for more than 20 years for suitable low-cost housing subsidised by the City, only to have it snatched away from them by the respondents who took occupation unlawfully.

70. While I have great empathy for the respondents who found themselves in inconvenient, crowded accommodation prior to 16 May 2021, the fact is that they were indeed housed, some in wendy houses and living in someone's backyard. They were not, like two beneficiaries referred to above, living for years in a pipe and sleeping on a mattress or living in a zinc structure without the use of a much needed wheelchair. These beneficiaries have already been severely prejudiced by the interminable wait and delay in receiving their houses or units, and the continued occupation by the respondents of units intended for them, prolongs the prejudice and the ultimate indignity they suffer daily.

71. The beneficiaries' circumstances as submitted by the City are equally important and they, too, have a constitutionally entrenched right to housing which has remained unfulfilled. The fact that the City accommodated the initial beneficiaries elsewhere and that other beneficiaries, who are longer on the waiting list are the recipients of these units, is not a factor which militates against a finding that it is just and equitable to evict the respondents and those who hold under them.

72. Having regard to all relevant circumstances, and balancing of interests, I thus find that it is indeed just and equitable to grant an eviction order against the second to eighth respondents, and Ms Leonie Toll, and all those persons holding title under them. Having regard to the entire matter, to hold otherwise would be tantamount to giving the respondents and others who are like-minded, the sanction to jump the housing allocation queue above beneficiaries who went through a proper process and are longer on the waiting list for low cost housing. It would furthermore be a sign of approval of unlawful conduct and unlawful occupation, which is not what the Act allows.

Alternative emergency housing

73. Some respondents who cannot find alternative would by necessity have to be accommodated with emergency housing by the City. However, the respondents cannot demand that the City provides them with alternative accommodation in Belhar or in areas where they wish to move to, and this has been held to be the case in ***City of Cape Town v Commando and Others***²⁴:

“[53] For this contention to withstand scrutiny, a source of the duty had to be identified. The legislative measures and programmes taken by the government giving effect to s 26 of the Constitution do not impose a duty on it to provide temporary emergency accommodation at a specific locality. Nor have the line of cases since Grootboom interpreted the duties flowing from s 26 to oblige the government to provide emergency housing at a specific location. In fact, the opposite has been suggested. In Thubelisha, Ngcobo J observed that ‘the Constitution does not guarantee a person a right to housing at government expense at the locality of his or her choice. Locality is determined by a number of factors including the availability of land. However, in deciding on the locality, the government must have regard to the relationship between the location of residents and their places of employment’.”

(footnote excluded)

74. The proposed temporary relocation site (TRA) in Leonsdale is in terms of the City’s amended offer²⁵. Having regard to the site, it is surrounded by Epping, Elsies River and Parow, about 11 km from the Pentech site and about 3.3km from Voortrekker Road, which is a busy main road, and it runs off Halt Road,

²⁴ [2023] ZASCA 7

²⁵ May 2024 report

which is the main road in Elsies River. Having regard to the amended offer and report, it is apparent that Leonsdale is close to commercial hubs on Voortrekker Road and Elsies River, accessible to public transport and schools in the area, as well as a variety of local grocery stores and larger supermarkets²⁶.

75. As for the proposed emergency kit, the units measure 18 square metre, which is anything but ideal. Unfortunately, the harsh reality of an eviction especially at the instance of an organ of State such as the City, brings to bear that the available suitable emergency accommodation would be far less than what a respondent is used to at the Pentech units²⁷. I was informed that the City is amenable to considering providing material to erect a larger unit or provide two emergency housing kits, on application by the respondents.

76. In conclusion, I have had regard to the facts and circumstances of this matter, and in determining a just and equitable date for the respondents' eviction, I take account that the City requires a lead time of three months to break ground and start construction on the Leonsdale site which is also intended to house people involved in another matter. Furthermore, there are minor children who currently attend school, hence the period determined to vacate the units would be sufficient so as to not interrupt their schooling year.

77. I am satisfied that the City has fulfilled its Constitutional mandate in its current amended offer to the respondents. In the event that it unfortunately becomes necessary to carry out an eviction order, such execution must be performed with the necessary regard to the dignity of the respondents, their families, the elderly and disabled. Lastly, costs have not been pursued in this matter and rightfully so, as the respondents are represented pro bono.

Order

²⁶ Aerial photograph, p684 depicts the surrounding areas to Leonsdale

²⁷ Trustees for the time being of the PGW Trust and 2 Others v NW and 3 Others, WCHC case no. 87/2023, Holderness AJ delivered on 31 January 2014, par 115

1. The second to eighth respondents, Leonie Toll (tenth respondent) and all those holding title under them are ordered to vacate the following units at Belhar Pentech Housing Project **on or before 6 January 2025**:
 - 1.1 Erf 4[...] Belhar situated at 1[...] H[...] Street, Belhar;
 - 1.2 Erf 4[...] Belhar situated at 1[...] H[...] Street, Belhar;
 - 1.3 Erf 4[...] Belhar, situated at 1[...] H[...] Street, Belhar;
 - 1.4 Erf 4[...] Belhar, situated at 1[...] H[...] Street, Belhar;
 - 1.5 Erf 4[...] Belhar, situated at 1[...] H[...] Street, Belhar;
 - 1.6 Erf 4[...] Belhar, situated at 3[...] C[...] Street, Belhar;
 - 1.7 Erf 4[...] Belhar, situated at 3[...] C[...] Street, Belhar;
 - 1.8 Erf 4[...] Belhar, situated at 3[...] C[...] Street, Belhar.
2. In the event that the respondents and those holding title under them do not vacate the units by **6 January 2025**, the Sheriff of the above Honourable Court or his deputy is hereby authorised to evict them **on or after 7 January 2025**.
3. In the event that it is necessary for the Sheriff to evict the respondents as indicated in the preceding paragraph, the Sheriff and the applicant are directed to ensure that such eviction process is carried out in a dignified and respectful manner having due regard to the respondents' age, the interests and safety of their minor children, the elderly and any disabled respondents.
4. The applicant (the City) is directed to make suitable emergency housing available at Leonsdale to any respondents who request access thereto and who have accepted the City's offer within 30 days of date of this order. In the alternative, and should any of the respondents indicate such election, the City is directed to provide emergency housing kits to such

5. With due regard to the preceding paragraph, the respondents who accept the City's offer of emergency housing, and those who require a larger emergency unit or structure, are required to make application to the City simultaneously with their application referred to in the preceding paragraph, for consideration by the applicant.
6. No order as to costs.

ACTING JUDGE OF THE HIGH COURT

Instructed by: Cader & Co.
Ms Y Cader