REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT

JOHANNESBURG

CASE NO.: 2009/12111

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

21/9/12 .....

In the matter between:

EKURHULENI METROPOLITAN MUNICIPALITY	**1st applicant**
GAUTENG DEPARTMENT OF HOUSING	**2nd applicant**

and

VARIOUS OCCUPIERS	**Respondents**

Neutral citation: *Ekurhuleni Metropolitan Municipality & another v various occupiers*

Coram: SATCHWELL J

Heard: 18th and 18th April, 3rd August 2012

Delivered: 21 September 2012

JUDGMENT

SATCHWELL J:

INTRODUCTION

[1] The Ekurhuleni Metropolitan Municipality and the Gauteng Department of Housing ("the applicants") seek the eviction of the occupiers ("the respondents") of houses situate on portion 175 of the Farm Palmietfontein 141 IR Eden Park Extension 5 ("Eden Park 5").

[2] It seems to be common cause that the Department of Housing had procured construction of some eighteen hundred houses on land belonging to the municipality with the intention that certain identified beneficiaries would be accommodated therein. Some twelve hundred approved beneficiaries took occupation of completed houses. About six hundred houses were at various stages of completion when the respondents began to move onto and occupy the land and buildings.

[3] I am uncertain as to the exact number of householders and family members whom the applicants seek to evict. These occupiers comprise in excess of some fourteen hundred households consisting in approximately many thousands of men, women and children.[1]

[4] It is conceded by the occupiers that their occupation of the land and property was and remains unlawful in that they were not the designated or official beneficiaries to whom the Municipality or the Department had allocated such houses on this land. However, it must be noted that the applicants have, over time, indicated that some of the occupants have ceased to be respondents in that their eviction is no longer sought.

[1] There are over a thousand pages of annexures to the pleadings setting out the personal circumstances of all those men, women and children who are these occupiers. (See Bundles B 68 – 73 and C 413 – 5297).

THE PREVENTION OF ILLEGAL EVICTION ACT ("PIE")

Section 26 of the Constitution

[5] Section 26 of the Constitution states that everyone has the right to have access to adequate housing and requires the state to take reasonable measures to realize this right. Subsection (3) provides that:

> "No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."

[6] The PIE Act provides for and regulates the implementation of evictions in accordance with Constitutional principles. In *Occupiers of Portion R25 of the Farm Mooiplaats 355 JR v Golden Thread Ltd and Others* 2012 (2) SA 337 (CC) the court affirmed that "[t]he PIE Act was passed to give effect to section 26(3) of the Constitution with the result that its interpretation and application raise a constitutional matter."[2]

Sections 4 and 6 of the PIE Act

[7] Eviction proceedings by the "owner of land" are governed by section 4 of the PIE Act and by "an organ of state" are governed by section 6 of the PIE Act. In the present case, applicants argue only section 4 is of application whereas respondents argue, that, in these circumstances, both sections 4 and 6 are of application.

[8] Clearly the Legislature contemplated two categories of applicants or evictors – "an owner" and "an organ of state". Both applicants are "administrators in provincial or local spheres of government" and are therefore, in terms of section 239 of the Constitution, "organs of state". The PIE Act envisages that an "organ of state" may also be "an owner" which is defined as "the registered owner of land, including an organ of state". It is not in dispute that the second applicant is the registered owner of the land concerned known as Eden Park 5.

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[2] Para 3.

[9] I am of the view that this eviction is to be dealt with in accordance with the provisions of section 4 of the PIE Act. Firstly, section 4 applies to all owners and the PIE Act has specifically ensured that organs of state can be included within this definition of owners.[3] Secondly, section 6 spells out the circumstances where a non-owner organ of state would be empowered by and included within the ambit of the legislation ie where "the land falls within its area of jurisdiction". This clearly indicates that section 6 applies where the organ of state is not an owner. Thirdly, section 6 empowers the organ of state to procure eviction where its consent is "required for the erection of a building or structure on that land or for the occupation of the land" or "it is in the public interest" which circumstances are again contrasted with the circumstances of registered ownership.[4]

[10] It appears that the occupation of the land and houses took place on or about 9th October 2008 and thereafter.[5] Applicants instituted these proceedings on 19th March 2009 which documentation was served upon the respondents on 9th April 2009. Accordingly, these respondents had, in the main, occupied the land in question for a period of less than six months at the time when the proceedings were initiated.

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[3] Section 4(6)–(7) of the PIE Act reads: "Eviction of unlawful occupiers... (6) If an unlawful occupier has occupied the land in question for less 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 the rights and needs of the elderly, children, disabled persons and households headed by women. (7) 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 of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women."

[4] Section 6(1)–(3) of the PIE Act reads: "6. Eviction at instance of organ of state. (1) An organ of state may institute proceedings for the eviction of an unlawful occupier from land which falls within its area of jurisdiction, except where the unlawful occupier is a mortgagor and the land in question is sold in a sale of execution pursuant to a mortgage, and the court may grant such an order if it is just and equitable to do so, after considering all the relevant circumstances, and if— (a) the consent of that organ of state 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 that land without such consent having been obtained; or (b) it is in the public interest to grant such an order. (2) For the purposes of this section, "public interest" includes the interest of the health and safety of those occupying the land and the public in general. (3) In deciding whether it is just and equitable to grant an order for eviction, the court must have regard to— (a) the circumstances under which the unlawful occupier occupied the land and erected the building or structure; (b) the period the unlawful occupier and his or her family have resided on the land in question; and (c) the availability to the unlawful occupier of suitable alternative accommodation or land."

[5] Save for one person whom it is conceded took occupation in September 2008.

[11] The result is that the provisions of section 4(6) of the PIE Act provide, in addition to the directives of section 29 of the Constitution, that "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, include the rights and needs of the elderly, children, disabled persons and households headed by women".

[12] I note the broad and inclusive approach of the court in *Baartman and Others v Port Elizabeth Municipality* 2004 (1) SA 560 (SCA) where the court stated that the factors mentioned in section 6(3) are not a *numerus clausus* and I can see no reason why all relevant considerations should not be taken into account in determining what is "just and equitable" for purposes of an eviction enquiry in terms of section 4(6). However, the Legislature was careful to draw distinctions in the PIE Act between subsections 4(6) and (7) and section 6 and one should be careful not to concatenate all three different sets of circumstances – where the applicant is an owner and the respondents have been in occupation less than six months, where the applicant is an owner and the respondents have been in occupation more than six months, where the applicant is not an owner. Clearly the Legislature did intend a different approach to be taken and identified a different emphasis in the search for and assessment of "justice and equity" in each situation.

JUST AND EQUITABLE TO ORDER EVICTION

Approach

[13] In determination of what is "just and equitable" for purposes of this most drastic of remedies – eviction from one's home – our courts have stressed, on the one hand, the need for fairness, regard to the Constitution, the need to treat people with dignity and respect and, on the other hand, the responsibilities of government in providing housing and the purposes of the proposed evictions.[6]

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[6] See *Residents of Joe Slovo Community, Western Cape v Thebelisha Homes and Others* 2010 (3) SA 454 at para 191; *President of the Republic of South Africa v Modderklip Boerdery* 2005 (5) SA 3 (CC) at para 36; *Government of the Republic of South Africa and Others v Grootboom and Others* 2001(1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) at paras 82-8.

[14] As was said in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC):

> "In determining whether the eviction of the Occupiers will be just and equitable, it is necessary to address—(a) the rights of the owner in a constitutional and PIE era; (b) the obligations of the City to provide accommodation; (c) the sufficiency of the City's resources; (d) the constitutionality of the City's emergency housing policy; and (e) an appropriate order to facilitate justice and equity in the light of the conclusions on the earlier issues. The South African constitutional order recognises the social and historical context of property and related rights. The protection against arbitrary deprivation of property in section 25 of the Constitution is balanced by the right of access to adequate housing in section 26(1) and the right not to be evicted arbitrarily from one's home in section 26(3). This Court noted in *FNB*: 'The purpose of section 25 has to be seen both as protecting existing private property rights as well as serving the public interest, mainly in the sphere of land reform but not limited thereto, and also as striking a proportionate balance between these two functions.' Historical context is relevant to one's understanding of the constitutional protection against arbitrary deprivation of property and to access to adequate housing. Apartheid legislation undermined both the right of access to adequate housing and the right to property. Section 25 prohibits arbitrary deprivation of property, but also addresses the need to redress the grossly unequal social conditions. Section 26 highlights the transformative vision of the Constitution. PIE was adopted with the manifest objective of overcoming past abuses like the displacement and relocation of people. It acknowledges their quest for homes, while recognising that no one may be deprived arbitrarily of property. The preamble quotes sections 25(1) and 26(3) of the Constitution. In *PE Municipality* it was stated that the court is required 'to balance out and reconcile the opposed claims in as just a manner as possible, taking account of all of the interests involved and the specific factors relevant in each particular case.' Unlawful occupation results in a deprivation of property under section 25(1). Deprivation might however pass constitutional muster by virtue of being mandated by law of general application and if not arbitrary. Therefore PIE allows for eviction of unlawful occupiers only when it is just and equitable."[7]

Illegality

[15] Where a proposed eviction in terms of section 4 of the PIE Act is considered, by definition there is an averment of illegality or unlawfulness because, without same, the registered owner of the land would not be able to seek eviction of the occupier. Accordingly, illegality cannot be either decisive or the most significant factor in determination of any eviction

[7] Para 34–38.

application – it is simply an essential jurisprudential condition for the bringing of the application in terms of section 4.

[16] In *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC), the court referred to the "extremely intricate" combination of circumstances leading to unlawful occupations and affecting landowners' deprivation of land and concluded "[t]his is precisely why, even though unlawfulness is established, the eviction process is not automatic and why the courts are called upon to exercise a broad judicial discretion on a case by case basis" and "the existence of unlawfulness is the foundation for the enquiry, not its subject matter".[8]

Review of Housing programme

[17] It is common cause that applicants have embarked upon a process over a period of many years pertaining to provision of housing to those in need. What is not common cause is the transparency, integrity or fairness of this process.

[18] In 1996/1997 waiting lists were prepared and it seems that those persons who made applications at that time were (sometimes) issued with a "Form C". In 2003 a Directive was issued by the MEC for Housing. Municipal Minutes of November 2003 record a decision that, applicants must also be in possession of Form C and in receipt of income below R1500 per month as a criteria. Thereafter a final housing list was drawn up which had regard to the Housing Subsidy Scheme.

[19] Applicants have submitted that if the respondents are dissatisfied with or wish to challenge the various lists or the procedures followed, then they should have brought proceedings to review and set aside these procedures and lists but no such counter application has been launched. Absent such proceedings, applicants have submitted that this court should not have regard to the appropriateness or otherwise of the housing policy and programme of the applicants.

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[8] Paras 31 and 32.

[20] It is my view that a review application would not, at this stage, assist this court to come to a decision whether the eviction which is sought is "just and equitable".

[21] Some courts have been confronted with counter applications or applications for review but it does not appear that those courts perceived the existence of the counter applications as determinative of their giving consideration to the policies and programmes which gave rise and were relied upon to ground the evictions.[9]

The interests of the landowner and the approved potential occupants

[22] Applicants expressed concern that the land which had been set aside and the houses which had been completely or partially built had already been allocated to recognised beneficiaries in accordance with their policy and lists. Those approved beneficiaries have been denied the right to occupy those houses which had been promised to them.

[23] Amongst the people unable to access the properties allocated to them are, for example, Mrs Elizabeth Mbithi who is a pensioner living in a shack at the backyard of a main house with her orphaned granddaughter in dire circumstances and Mrs Njinji Mbatha who is a pensioner living in a shack with orphaned great-granddaughters in dire circumstances.[10]

[24] It is not in dispute that the respondents, the current occupiers of these properties at Eden Park 5, moved onto this land and either occupied completed or partially completed dwellings because they knew or believed that they had not been allocated this land or these houses. Their actions were performed in the knowledge that other persons, who had been so allocated, would now be unable to take occupation of that to which they were entitled by reason of their allocation. In short, one group of homeless or needy individuals displaced another group of homeless or needy individuals with the important qualification that the latter group had been approved as the next persons to be allocated land and houses and to move into Eden Park 5.

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[9] See *Residents of Joe Slovo* 2010 (3) SA 454 *supra* at para 131 where occupiers did not persist in the claims they made in the counter application.

[10] See Confirmatory Affidavits of Elizabeth Mbithi and Njinji Mbatha at pages 344 & 348 of applicant's bundle.

[25] Applicants believe that the respondents have jumped the queue whilst respondents dispute that the queue has been properly compiled.

[26] This is but one instance of that "extremely intricate" combination of circumstances to which Sachs J referred in *Port Elizabeth Municipality* 2005 (1) SA 217 (CC) *supra.* There are "conditions of homelessness and desperation" on the part of those allocated beneficiaries who have been deprived of enjoyment of the properties which they were promised and on the part of those who have unlawfully occupied them. There is also the "frustration of landowners", the applicants, who have developed a programme of land acquisition and building of houses and engaged in a process of assessment of those needing houses and preparation of waiting lists and whose entire programme is disrupted and who are then obliged to find additional land and funds by reason of these unlawful occupations.

[27] It is not surprising that the applicants bring this application, in part because they wish to "prevent self-help and restore order" because "...the eviction will assist the applicants in achieving their legislative mandate to provide state subsidized housing to those who qualify for such houses in an orderly manner...in addition the eviction ...will restore law and order in the relevant community and will send a strong message that the court will not tolerate unlawful occupation of state subsidized houses by people who have not yet been allocated their respective houses."[11]

The rights and needs of individuals and households

[28] Amongst the "relevant circumstances" to which this court must have regard in determining justice and equity are the rights and needs of the "elderly, children, disabled persons and households headed by women".

[11] Replying Affidavit page 142 at para 4.2

[29] The respondents have set out details of the identities of the occupiers, their ages, whether or not the adults in occupation are married or single parents, the employment circumstances of householders and occupiers, the schooling or special needs of children.

[30] I have carefully gone through the forms, annexures, schedules and portions of the affidavits which provide the personal details of the respondents. I note that the greater majority of households seem to be headed by women without husbands or partners; women who are single parents or even grandparents; women who seem to be wholly responsible for several children and sometimes grandchildren. It also appears that the greater majority of families are reliant upon social grants.

Policy, programme and housing lists

[31] It seems to be common cause that, over the past fifteen or sixteen years the applicants have instituted policies for determining both eligibility for public housing and the order in which those on the waiting lists will be allocated housing.

[32] The first stage of such policy was the compilation of a list of persons applying for housing which list has apparently been maintained by the Department since at least 1996 or 1997. However, according to the MEC for Housing there were "problems plaguing the waiting list".[12]

[33] The second stage of the policy was accordingly the Directive of 24 November 2003, issued by the Gauteng MEC for Housing, entitled "The Establishment of a Provincial Programme called the '1996 and 1997 Waiting List Beneficiaries'" which recorded that:

> "A new Provincial Programme: 1996 and 1997 beneficiaries, approved by the Housing Advisory Committee and MEC for Housing during October 2003, aims to eradicate the backlog in terms of the 1996 and 1997 beneficiaries on the Waiting List, as a matter of urgency.
> The following conditions will be attached to the new Programme in order to ensure that there are no further blockages prohibiting the 1996 and 1997 beneficiaries on the Waiting List to access subsidies:

[12] Founding Affidavit page 4 at para 58 and stated in the Provincial Directive.

a) All beneficiaries that are captured on the Gauteng Department of Housing's Waiting List as 1996 and 1997 applicants are eligible for housing assistance;
b) Beneficiaries that are subsidized in terms of this programme be exempted the R2479,00 financial contribution;
c) All beneficiaries within this programme that earned below R3500 per are eligible to receive the full subsidy; and
d) All beneficiaries are given preference in housing projects, especially where the top structure has been completed."[13]

[34] The third stage of the policy was the addition of a Municipal Resolution of 20th November 2003 which provided:

"2. That the following beneficiary qualification criteria for Eden Park Extension 5 BE NOTED and APPROVED in addition to the Provincial and National Housing subsidy qualification criteria:
(a) They shall be beneficiaries from Alberton, Thokoza and Eden Park (100 beneficiaries shall be from Eden Mews).
(b) They shall be beneficiaries who are in possession of Form C's dated between January 1996 to December 1999, including beneficiaries who are in possession of Form C's and already registered by Ntuli Noble and Spoor, but were not reflected on the waiting lists.
(c) The final beneficiary waiting list comprise of beneficiaries mentioned in (a) and (b) above with an income not exceeding R1500,00.
(d) The final beneficiary waiting list shall be published immediately upon the approval of the proposed criteria for a period of (30) thirty days."[14]

[35] The fourth stage was inclusion of persons on the National Housing List and the final stage was the inclusion of persons with reference to the HSS or Housing Subsidy System.[15]

[36] Respondents contend that the identification of "beneficiaries" on the various housing lists which have emanated from the applicants was unreasonable in many respects. Firstly, the 1996/1997 list was unreliable and the problems pertaining thereto, including missing or lost documents, were never resolved. Secondly, the applicants have given no indication how, pursuant to the MEC directive, "priority" was to be given to the 1996/1997 waiting list and the

[13] Founding Affidavit page 58.
[14] "AL2" Resolution supporting Directives page 227 and in Replying Affidavit page 141 at para 2.12.
[15] See Applicant's Reply to Booysen's Supplementary Affidavit page 278 at para 3.3, 3.4 and 3.5.

allocations of houses indicate that no such "priority" has been given. Thirdly, the municipal resolution had the effect of widening the scope of eligibility from the two year period 1996 to 1997 to a four year period of 1996 to 1999 which expanded the pool of competition for the same amount of scarce housing. Fourth, the "provincial waiting list" was not reconciled with the 1996/1997 applications because there are material differences apparent between the two lists. Fifth, the provincial list differs from the terms of the MEC directive. Sixth, application of the national list and the HSS have introduced both a new source of information and policy.

[37] Respondents have, in their personal details on each "occupier", indicated how and why they contend that they (and their families) should have been allocated properties. There are those who applied for housing and were on the 1996/1997 list. Some have been approved but not given possession of houses whilst others are still waiting allocation. Some applications are still pending and others have been rejected whilst it is suggested that documentation of still others has been lost. There are those who claim that they had been approved allocation at Eden Park and took occupation after hearing of such approval.

[38] Respondents have argued that the criteria for determining beneficiaries have been unclear both to the applicants and the respondents and that the allocation which has actually taken place to beneficiaries is not in compliance with even the publicized criteria. Respondents complain that the process of allocation of properties is not transparent, is neither clear nor coherent, has resulted in arbitrary and unjustifiable preference to some and prejudice to others.

[39] On my own perusal of the documentation it appears that there are instances in the respondents' papers where apparently qualified persons (on the waiting list since 1996/97 with Form C documents) have not been allocated properties. There are instances where properties have been allocated to persons who could not have been old enough to be on the waiting list of 1996/97 and where they are neither children nor is there an indication that these are child headed households.

Engagement and Dialogue

[40] Subsequent to the occupations of October – December 2008, the applicants launched these proceedings. I can appreciate that the applicants were concerned to proceed within the six month period envisaged in section 4(6) of the PIE Act and that negotiation was perhaps not the easiest course of action to begin at that time.

[41] It was the attorneys for the respondents who approached the applicants suggesting discussions on aspects other than merely relocation of the evictees and including such issues as the identity of the "rightful beneficiaries" to the houses in issue. Attorneys for the applicants were unable to commit to any "meaningful engagement" in the absence of certain information and subject to the conditions set.

[42] However, notwithstanding these preliminary skirmishes there were at least two processes of mediation – one before Advocate Molokomme and one before Attorney Bailey. On 9th May 2011 agreement[16] was reached that a significant number of the occupiers would not be evicted.[17]

[43] It would seem that there was some positive results from this process of dialogue although the majority of disputes were not resolved – not least the critique to the housing list and the allocation of housing.

[44] The value of such engagement has been stressed in many earlier judgments[18] – especially without limitation on subject matter[19] – which can be seen from the outcome in the process which did take place – some five hundred and seven householders and their families were now approved and not to be evicted.

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[16] Annexure "RA2" and "RA3".
[17] Replying Affidavit at para 4.6.1.
[18] See *Residents of Joe Slovo* 2010 (3) SA 454 (CC) *supra* at para 261; *Port Elizabeth Municipality* 2005 (1) SA 217 (CC) *supra* at 39,42, 43& 45.
[19] See *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC) at para 14.

Alternative Accommodation

[45] Applicants' counsel stressed that it was not sought to simply evict the respondents and send them to a "dumping ground".

[46] The only land to which the applicants had access was in Tsakane Extension 22. Funding in an amount in excess of R15 million was approved. The Municipality resolved[20] that "12m² temporary shelters" were to be provided in accordance with a contract agreed in August 2008 between the Municipality and Red Ants Security Services for demolition of structures, assistance with eviction, construction of structures,[21] provision of security and supplies, provision of a temporary water supply and temporary sanitation.[22]

[47] An undated Action Plan[23] for the "eviction of illegal occupants from Eden Park Extension 5" dealt with the responsibilities of the sheriff "for the eviction process" which was to include "request for temporary closure of Access Roads within the immediate vicinity in order to avoid interference from members of the public, supporters and the media". The Municipality was to receive the evictees and ensure "provision of a structure of 16m² constructed with the specifications in terms of Chapter 12 of the National Housing Code".

[48] Respondents attached to their answering affidavit the Tissington Report[24] which addressed a number of the "Socio-Economic impacts of relocation", distances between Eden Park, Tsakane and business districts, transport, schooling and other facilities in Tsakane.

[49] Only then, in reply, did applicants present the Schoeman Report[25] as a response to the Tissington Report. For the first time the applicants provided information on "the Location of the Site", "Schools and other Community Facilities", "Economic and Employment Opportunities" and "Infrastructural Services". Schoeman stated that Tsakane could not be described as

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[20] As per annexure "SA2".
[21] Structures "to a maximum size of 20m²".
[22] See Annexure "SA5" page 125 of Supplementary Founding Affidavit.
[23] Annexure "SA3" page 111 of Supplementary Founding Affidavit.
[24] Annexure "SAA32" page 5508 to respondent's answer.
[25] Replying Affidavit page 332.

"isolated", schools and other community facilities were in the area and infrastructural services (water, sewerage, roads and bulk infrastructure) would be completed by March 2011.

[50] Respondents have criticized the Schoeman Report as being vague in the extreme. For instance, there is no indication whether or not any of the schools is capable of admitting any of the children to be evicted; what transport facilities exist from Tsakane Ext 22 to urban developments; what temporary arrangements would be availed to the evictees pending the completion of infrastructure development anticipated to be in March 2011.

[51] At the hearing of this application I had a number of questions for applicants' counsel concerning the situation in Tsakane. The answers were not then available or were not satisfactory.

Application to lead new evidence

[52] An application was then heard in August 2012 for the applicants to supplement their papers and lead further evidence. Respondents opposed the application on the basis that this information had been available prior to and at the hearing of the application but that the applicants, failing to show respect for the potential evictees, had not thought to address important details of the alternative accommodation.

[53] I take the view that it is essential that I am provided with as much information as possible to enable me to determine what is just and equitable "after considering all relevant circumstances". To fulfil my responsibilities, I must ensure that I have all available and as much of the requisite information at my disposal. This court certainly "needs to be fully apprised of the circumstances before it can have regard to them."[26] In the recent judgment of *City of Johannesburg and Changing Tides 74(Pty) Ltd and others [2012] ZASCA 116 (14 September 2012)*, the Supreme Court of Appeal again affirmed "the need for courts to ensure that as far as

[26] *Port Elizabeth Municipality* 2005 (1) SA 217 (CC) *supra* at para 32.

possible they are fully informed of the relevant facts in order to properly discharge their function of determining whether an eviction order should be issued and if so on what terms".[27]

[54] Accordingly, I grant the application by applicants to lead new evidence and I have had regard thereto.

[55] The new evidence consists in an affidavit[28] repeating the "Action Plan" for the eviction, reports on proclamation of Tsakane Extension 22 as a township and the development of phase 1 which is intended for occupation by the evictees in this case. The bulk infrastructure development which has taken place is, in the main, intended to be for use of residents of other phases. For phase 1, details are given of chemical toilets, communal water stand pipes, refuse removal and size and materials for construction of residential units. The intention is ultimately to convert the temporary arrangement into a permanent arrangement subject to the occupiers qualifying in terms of criteria pertaining to citizenship, partnership, dependants, first time home ownership and so on.

RESPONDENTS

[56] The crucial question for myself throughout the hearing of this application and considering all facts and issues raised in the papers and in argument has been "which of the occupants are sought to be evicted?". It is my view that the applicants have displayed uncertainty and confusion in this regard.

[57] In March 2009, when the application was brought, the applicants identified the potential evictees as "the respondents are unlawful occupiers of six hundred and fifty one (651) houses"[29] being the occupiers of certain erven numbers[30] in Eden Park 5. The two groups of respondents filed their answering affidavits on 4th November 2010 and 6th December 2010 with full details of each and every person whose occupation at Eden Park 5 which was challenged by the applicants.

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[27] Para 21.
[28] Pages 1 – 179 of Application.
[29] Para 1.8 of Founding Affidavit.
[30] Annexure "FA2".

Notwithstanding provision of those details in the answering affidavits, in the course of the mediation, applicants required this documentation to be furnished yet again. On 10 June 2011, applicants furnished a replying affidavit in which is stated, at paragraph 4.6.1 thereof, that "certain occupiers were now approved and were not to be evicted".[31] This annexure comprises some 507 names of persons who appear to be householders as opposed to actual occupiers. This would mean that several thousand people have now been reprieved.

[58] This matter was set down for hearing as a special application on 18th and 19th April 2012. I was informed on the first day of the hearing that the applicants' legal representatives had handed to respondents' legal representatives yet a further list of occupiers whose eviction was no longer sought at all or who would be relocated to another extension in Eden Park. The first group is some 29 names of persons who appear to be householders as opposed to actual occupiers and the second groups is 21 such names. Again several hundred people have been reprieved.

[59] In the result, over a period of more than two years a considerable number of men, women and children were confronted with litigation seeking their eviction but are now no longer respondents and are safe in their homes. Yet a further group of men, women and children endured the possibility of eviction at the hands of the court for just over three years but are now no longer respondents and safe in their homes or will remain in Eden Park.

[60] The residence of many of these householders and their families has been in jeopardy throughout this litigation (from March 2009 to July 2012). It is difficult to conceive of an issue causing greater anxiety and distress than the possibility of homelessness and eviction. Such burden was inflicted upon these persons because the identity of and personal circumstances of "the respondents" had not been timeously individualised.[32]

[61] The process of preparing lists and making allocations to beneficiaries has clearly been doubtful and has remained uncertain even to this late date.

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[31] See annexure "RA3".This concession was apparently made as a result of the mediation process to which I have referred.

[32] See Ngcobo J in *Residents of Joe Slovo* 2010 (3) SA 454 *supra* at para 261 on the need for "relocation to be individualised".

[62] Documents have been prepared, information captured, lists compiled apparently in accordance with ever changing criteria. Some documents and/or information have been lost which calls into question the integrity of the process. For instance, the minutes of a meeting of 23rd September 2003 involving the Housing Department and Councillors from the Alberton area record that "...during 1998 and 2000 documents were not captured by the Council but were submitted to Province for capturing. The possibility of documents being lost during this period is not excluded".[33]

[63] The process which has been followed is claimed to have achieved a result where "all have been considered".[34] It is unclear how and on what basis data has been considered and criteria applied to have resulted in the final allocation. So unclear, that the identity and numbers of the respondents were changing until mid July 2012.

[64] In a further replying affidavit, the final list was supposedly compiled "following the guidelines of the MEC Directive and the Municipal Resolution and also took into account submissions from the Eden Park community" with the result that some would be accommodated, others will be prioritised on other projects and yet others were "not linked to stand numbers due to the limited number of stands".[35] I appreciate that the list is apparently the result of many inputs but do not comprehend why the applicants could not indicate why each respondent individually was not amongst the allocated beneficiaries of a stand. If the criteria and the lists are sufficiently clear and coherent, then they should have been explicable from the outset, certainly in the applicants' replying affidavit.

[65] As I commenced to read the court papers I was, of course, struck by the individual challenges to the allocation of properties to persons other than the then respondents. It was, I am sure, no accident that the deponent to the respondents' answering affidavit was Mr Hlatshwayo in possession of a Form C, who claimed to meet the criteria and that he drew my attention to other householders who apparently met the criteria. I must immediately make clear that I am not determining eligibility or otherwise for allocation of property and a dwelling. I am however,

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[33] Annexure "MB26" page 5165.
[34] Replying Affidavit para 2.10.
[35] Paragraphs 10 to 16 of Applicant's Replying Affidavit.

cognisant that some or much of that which is stated in the respondents' papers must be correct since in the region of 550 householders and their families are not going to be evicted from Eden Park because the application against them has now been effectively withdrawn.

[66] I do not know the full details why the application has been withdrawn against certain respondents but that is precisely the nature of the difficulty. The first withdrawal in 2011 must have been on some basis learnt by the respondents in the course of mediation. However, I was informed from the Bar in court that the second withdrawal in July 2012 was simply on the basis of a list handed by applicants' legal representatives to respondents' legal representatives. No reason has been given to me why approximately 60 householders and families are not to be relocated from Eden Park by virtue of a decision apparently reached at the doors of the court. Perhaps their occupation was not unlawful, perhaps they should always have been beneficiaries, perhaps they are amongst those to whom priority should have been given, perhaps their needs and circumstances are such to render them particularly vulnerable, perhaps allocated beneficiaries have been removed from the final list. I do not know which of the many permutations apply. Equally, importantly it appears that the respondents did not or do not know. That is neither an informed nor transparent process.

[67] It has not only been exclusion from the lists which have caused concern. One of the complaints about the list of approved beneficiaries had been that some of them could not, by reason of their age, have had the capacity to make application for housing in 1996/1997.[36] One such individual was Themba Eric Kwamba, listed as no 126 on annexure FA6, who was born on 16th April 1980 to whom stand 4090 has been allocated. On the 19th April 2012, at the close of his argument in reply, counsel for the applicants placed on record that it was now accepted that Themba Eric Kwamba was not supposed to be on the list of allocated beneficiaries and had been removed therefrom.

[68] This information about Mr Kwamba had been set out in respondents' answering affidavit at the end of 2010. It has taken until July 2012 for this error to be acknowledged. One can only question how many more persons are on the list(s) and have been allocated property and a

[36] Answering Affidavit page 53 at para 125.1.

dwelling who should not have been so allocated – as well as the earlier questions concerning those respondents who are now to be allocated.

[69] The identity of persons whose occupation of homes is perilous and whose entire neighbourhood and community is under threat has been characterised by lack of transparency, uncertainty and doubt. To my mind, a court should only grant an eviction where the circumstances of each person facing such a fate have been carefully determined. Potential evictees cannot be treated *en masse*. The personal circumstances of each individual must be considered in both the preparation of housing entitlements and lists resulting therefrom and in the litigation that may ensue.

[70] I am concerned that the order which is now sought by applicants is on an exclusionary basis ie eviction of all those in occupation save those now placed on certain lists and thereby excluded from the impact of the order. Two such lists now exist – both of them created subsequent to the institution of proceedings. And the list of those entitled to take occupation has also been amended in at least one respect known to me.

[71] Absent clarity and certainty on collection of documents, mode of consideration of applications in accordance with established criteria, ease in offering explanation for inclusion or exclusion on lists, ability to offer justification for allocation of property, I cannot exclude the possibility, indeed the probability, that there has been an arbitrariness to the process which renders it unacceptable.

[72] In the present case, the integrity of the listing and allocation process has been shown to have been compromised. I cannot find that evictions based on such process can be "just and equitable".

RELEVANT CIRCUMSTANCES

[73] The applicants have tried, over a period of time, to resolve the apparently insoluble problems of homelessness through determination of criteria and preparation of lists. The

applicants have not been heartless in carrying out their responsibilities. There have been plans and criteria, programmes and lists. There has been allocation of funds for housing for approved beneficiaries and for providing temporary accommodation for persons to be evicted. There have been discussions and mediation. The applicants have not embarked on this eviction application without regard for the law.

[74] However, in the flurry of concern about the occupation of Eden Park 5 and the preparation of this application, I believe that the individuals involved were not given the regard to which each should be entitled.

[75] The unlawfulness of occupation of applicants' land and dwellings cannot set such occupiers apart from all other South Africans who also desire the acknowledgment of their right to a dignified life. Homelessness is a combination of a multiplicity of factors, some structural and some personal. The homeless and even those who apparently acted unlawfully[37] may not be the beneficiaries of housing allocations but they are the beneficiaries of Constitutional and other rights.

[76] At the very least, the applicants must be able to show why the law requires each individual to be evicted and a court must know why it is "just and equitable" to order an eviction in respect of each respondent and family members. In the present case, I am not satisfied that such certainty exists.

ORDER

[77] In the result an order is made as follows:

The application is dismissed with costs.

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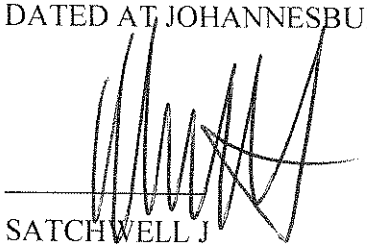
[37] I say "apparently" because, although the respondents apparently conceded unlawfulness in occupation, it has subsequently emerged that a significant proportion (perhaps a majority) of the respondents are to remain in lawful occupation in Eden Park 5.

DATED AT JOHANNESBURG ON THIS 21st DAY OF SEPTEMBER 2012



SATCHWELL J

JUDGE OF THE HIGH COURT

APPEARANCES

FIRST APPLICANT:	G I Hulley
	Instructed by AF Van Wyk Attorneys, Johannesburg
SECOND APPLICANT:	G I Hulley
	Instructed by TP Mabasa Attorneys, Johannesburg
RESPONDENTS:	BL Manentsa
	Instructed by Mdladlamba Attorneys, Johannesburg
	Tembeka Ngcukaitobi
	Instructed by Bell Dewar Inc, Johannesburg