REPUBLIC OF SOUTH AFRICA

IN THE SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

CASE NO A 5047/11

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

23 March 2012 .....

In the matter between

EMFULENI LOCAL MUNICIPALITY	APPLICANT
and	
BUILDERS ADVANCEMENT SERVICES CC	FIRST RESPONDENT
NANGALEMBE ALBERT MBALEKELWA	SECOND RESPONDNET
THE UNLAWFUL OCCUPIERS OF CERTAIN ERVEN IRONSYDE/DEBONAIR PARK	THIRD RESPONDENT
THE FURTHER UNLAWFUL OCCUPIERS OF IRONSYDE/DEBONAIR PARK	FOURTH RESPONDENT
THE INVADERS OF IRONSYDE/DEBONAIR PARK	FIFTH RESPONDENT

J U D G M E N T

VAN OOSTEN J:

[1] This is an opposed application for eviction under the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE), which comes before us in a somewhat unusual manner. The applicant, a local municipality, is the owner of the erven in a proclaimed township known as Ironside/Debonair Park, in the magisterial district of Vereeniging, consisting of 2058 serviced erven of between 800m² and 2000m² in size (the township). The township was earmarked for an upmarket residential area. Prior to the end of October 2009 the erven were vacant and unoccupied. At the end of October 2009 the applicant was advised of the purported unlawful sale of erven in the township by the first and second respondents to members of the public. An inspection of the township by the applicant's officials revealed that informal housing had already been erected on certain of the erven and that a further invasion of prospective buyers was imminent. As a consequence, the applicant launched an urgent application to this court on 8 December 2009, against the first and second respondents; the unlawful occupiers of 17 numbered erven in the township, as the third respondent; the "further unlawful occupiers of the township" as fourth respondent and the "invaders of the township" as fifth respondent, in essence seeking the eviction of the third, fourth and fifth respondents, and an interdict firstly, against the first and second respondents to sell any erven within the township and secondly, against the further invasion of the property and the erection of illegal structures on the erven. On 8 December 2009 the matter came before Kgomo J, who made an order providing for directions as to service and further granting the interdicts sought, pending finalisation of the eviction application. Service as ordered by the learned Judge was effected on the respondents and they opposed the application.

[2] The application eventually came up for hearing before Willis J. On 1 April 2010 the learned Judge made an order and subsequently furnished reasons for the order in a judgment (reported *sub nom Emfuleni Local Municipality v Builders Advancement Services and Others* 2010 (4) SA 133 (GSJ)). The order reads as follows:

> *(i)* *The application is postponed sine die;*
> *(ii)* *The applicant is to furnish the respondents' attorneys with copies of items 1 to 6 in the prepared index before the close of business on 6 April 2010;*
> *(iii)* *The respondents are given a further and last opportunity to file a proper set of answering affidavits by no later than Tuesday, 13 April, 2010;*

(iv) *The applicant is to file its replying affidavit by no later than Thursday, 29 April, 2010;*

(v) *In view of the controversy and sensitivity surrounding this matter, the Deputy Judge President is respectfully requested to appoint a full court consisting of three judges to hear the matter;*

(vi) *In view of the urgency of the matter, the Deputy Judge President is respectfully requested to arrange for a hearing of the matter as soon as reasonably possible;*

(vii) *The costs of this application incurred thus far are reserved.*

[3] The application, now, almost 2 years hence, serves before us. Before dealing with the application, I consider it necessary to comment firstly, on Willis J's "request", as part of the order, to the Deputy Judge President of this division, for the referral of this matter to a full court and secondly, the learned Judge's reasons for such referral.

[4] Section 13(1)(b) of the Supreme Court Act 59 of 1959 (the Act) provides for the referral "at any time" by a single judge of a division of "any matter which is being heard by him" to a full court of that division, constituted in accordance with the proviso in the preceding sub-section, which provides as follows:

> *'Provided that the judge president, or in the absence of both the judge president and the deputy judge president, the senior available judge of any division may at any time direct that the matter be heard by a full court consisting of so many judges as he may determine.'*

It is clear from the provisions of the section that the single judge is endowed with the power to refer a matter to the full court, but that such referral is subject to the direction of the Judge President, the Deputy Judge President or senior judge as to the composition of the court to which the matter is to be referred. A referral envisaged by s 13(1)(b) of the Act in my view, therefore, ought to be preceded by a consultation with the Judge President, the Deputy Judge President or senior judge, as the case may be, who will then, having been apprised of the circumstances of the matter to be referred, such as the urgency of the matter and the availability of judges to hear the matter, facilitate the constitution and composition of the full court and allocate a date for hearing. In the present matter the request was made evidently without prior consultation with the Deputy Judge President. Notwithstanding the urgency of the matter referred to in the order of Willis J, it mysteriously found its way amongst the ordinary appeals in the registrar's system awaiting allocation for hearing which resulted in the inordinate delay in the hearing of the matter of almost two years. The prejudice resulting to all the litigants is apparent: the applicant's development of the township has been thwarted,

the occupation of the erven by poor landless people has now reached some permanency and the realisation of the legitimate expectations of the persons entitled to those erven, have been delayed. These factors, no doubt, would have been considered by the Deputy Judge President had there been prior consultation concerning the referral of the matter.

[5] I turn now to the reasons furnished by Willis J for referring this matter to a full court. Section 13(1)(b) endows the single judge with the power to refer the matter before him or her to a full court. As a starting point it is instructive to refer to some instances where reasons were given for such referrals: where the Judge was faced with conflicting decisions (*Trade Fairs and Promotions (Pty) Ltd v Thomson and Another* 1984 (4) SA 177 (W)); where the case was considered to be of national importance (*Government of the Self-Governing Territory of Kwazulu v Mahlangu and Another* 1994 (1) SA 626 (T)); to ensure "consistency and develop a uniform practice" in certain matters and "to determine and provide guidelines on how similar applications should in future be dealt with" (*Ex Parte WH* 2011 (6) SA 514 (GNP) para [9], see also *Thuketana v Health Professions Council of South Africa* 2003 (2) SA 628 (T) [17] - [18], *Nedbank Limited v Mortinson* 2005 (6) SA 462 (W) ([2006] 2 All SA 506) para [4]) and where the question arose whether an appeal against a determination by the Commissioner of Customs and Excise made in terms of s 47(9) of Act 91 of 1964 should be heard by a single judge or full court (*Metmak (Pty) Ltd v Commissioner of Customs and Excise* 1984 (3) SA 892 (T)). The judgment in *Airoadexpress(Pty) Ltd v Chairman LRTB Durban and Others* 1984 (4) SA 593 (N) 606 D-H, provides an instance where a referral to the full court at the request of one of the parties, was refused. The ground advanced in support of the request was that a decision upon the legal point requiring determination in that matter would not only carry authoritative weight but would also be of great importance to the parties involved, as well as future litigants involved in applications of that nature. In refusing the request Kumleben J held that the fact that an important legal point was involved, in itself, was not a ground for referring the matter to a full court.

[6] Against this background it suffices to say that the single judge, in deciding whether to refer a matter to the full court, in the exercise of his or her discretion, will obviously consider all the circumstances of the case. It is impossible to list a *numerus clausus* of

circumstances that may justify a referral to a full court. Nor is it desirable to lay down all embracing criteria for such referral. Each case will depend on its own circumstances.

[7] Reverting to the present matter, it is quite apparent from the order made by Willis J that the learned Judge considered the "controversy and sensitivity surrounding this matter" as justification for the request for a referral to the full court. These considerations, in my view, in themselves, do not provide sufficient reason for a referral to a full court. Judges in the nature of their duties are required to, and often do, hear and decide controversial and sensitive cases. In his judgment Willis J expressed himself further on this aspect, as follows:

> 'I am bewildered and confused as to how a court is expected to deal appropriately with applications for eviction. As Mr *Ngqwangele* submitted, we need clarity. We also need much wisdom. We need practical, but nevertheless fair and just answers to some highly vexing issues. I hope that the order which I have made, may play some small part in setting us on the high road to economic prosperity and a better life for all.'

I do not think it is either appropriate or desirable for a full court to provide the clarity and guidance in the general terms sought by Willis J. In the nature of these applications it is hardly possible to do so. The well-known words of Innes CJ in *Cohen Brothers v Samuels* 1906 TS 221 at 224, are apposite:

> 'No general rule which the wit of man could devise would be likely to cover all the varying circumstances which may arise in applications of this nature.'

Each case must be adjudicated on its own merits. The presiding Judge in adjudicating eviction applications is assisted by guidelines and principles as they have developed and crystallised in the judgments of our courts (cf *SALJ* (112) 714). Complicated, emotional and vexing issues are a given in the conundrum of cases judges are required to deal with. And, finally, as for the clarity sought by the learned judge, I merely need to quote what Benjamin N Cardozo said, "[it is]...when the colors do not match, when the references in the index fail, when there is no decisive precedent, that the serious business of the judge begins" (Benjamin N Cardozo *The Nature of the Judicial Process* (1921) 21). I accordingly confine myself in this judgment to the application that is now before us.

[8] The respondents were not represented at the hearing before us. The notice of set-down of this application, as well as counsel for the applicant's heads of argument, were duly served on the respondents' attorneys of record, but no response was

forthcoming. Further attempts, at the instance of this court, to contact the respondents' attorneys, were unsuccessful. The matter accordingly proceeded in the absence of the respondents and their legal representatives.

[9] Counsel for the applicant sought the following relief: firstly, a final interdict against the first and second respondents by way of confirmation of the provisional order made by Kgomo J to which I have already referred and, secondly, an order for the eviction of the third respondent occupiers (the occupiers) affording them 30 days to comply failing which the order is to be executed. Counsel did not persist in the relief sought against the fourth and fifth respondents, primarily for the reason that they have not been properly identified. We have further been informed that subsequent illegal invasions of the township have occurred in respect of which further litigation is contemplated.

[10] I shall first deal with the interdicts sought against the first and second respondents. The second respondent is the sole member of the first respondent. The second respondent filed a second answering affidavit, pursuant to para (iii) of the order of Willis J, in which he also purported to act on behalf of the occupiers. In this regard, he states that they had authorised him to do so at a meeting of the residents of the township. He then refers to confirmatory affidavits of five residents, whose full names are given, but none of those were annexed to the affidavit. Instead, two other affidavits were attached, one deposed to by Ms Elizabeth Madintja Mofokeng and the other by Mr Theletsane Johannes. These are the very persons who, according to the applicant, had informed Mr Pretorius, who at the time was employed by the applicant, during his investigation at the township on 28 October 2009, that they had "purchased" erven from the second respondent on behalf of the first respondent, for R2 750.00 each. Pretorius, in response, advised them that the transactions were fraudulent and that their occupation of the erven was unlawful. They then proceeded to the De Deur police station where charges of fraud were laid against the first and second respondents. We have been informed by counsel for the applicant that the prosecution on these charges is still pending. Ms Mofokeng has made a statement in the form of an affidavit to the police, which is attached to the founding papers in this application. The contents of this statement confirm the version of Pretorius, to which I have referred. In Ms Mofokeng's affidavit attached to the second answering affidavit, she denies that a fraud had been

perpetrated concerning the sale of an erf to her, which is in patent contradiction with her statement to the police to which, significantly, she has made no reference. From this the inference of collusion, accordingly, is inescapable.

[11] The second respondent's version, apart from raising a number of irrelevant aspects, does not take the matter any further. He simply denied all allegations against him. The denial cannot stand and is rejected. It has been shown beyond question that the second respondent through the vehicle of the first respondent has defrauded the occupants in illegally selling erven to them, in which they, driven by their desperate need for housing, credulously participated. The requirements for the granting of a final interdict have all been shown: the applicant's clear right being the owner of the property, an apprehension of irreparable harm if the interdict is not granted and no alternative remedy in the circumstances of this case (*Setlogelo v Setlogelo* 1914 AD 221). For all these reasons the applicant is entitled to the interdict sought.

[12] This brings me to the application for eviction. At the outset it must be emphasised that this application does not concern an eviction of the residents of an informal settlement having resided there for an extended period of time. The applicant immediately, when it became aware of the unlawful invasion into the township, took all reasonable steps, without delay, to protect its land, in its capacity as owner and developer thereof (see *Mkontwana v Nelson Mandela Metropolitan Municipality and Another* 2005 (1) SA 530 (CC) 556 para [59]). Less than two months after the first invasion, the order of Kgomo J providing for interim relief, was issued which should have alerted the occupants and other unlawful invaders, at that stage already, that their occupation of the erven was unlawful and in jeopardy.

[13] The occupiers residing on 17 identified erven in the township were the unfortunate victims of a deliberate and orchestrated scheme, fraudulently devised by the second respondent for his own benefit. Nothing has been put up by way of a defence that would give the occupiers any right to, or to remain in, occupation of the erven (see *Ndlovu v Ngcobo, Bekker and Another v Jika* 2003 (1) SA 113 (SCA) 124 para [19], and *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and Others* 2000 (2) SA 1074 (SE)). This being an eviction, the court is required to act inquisitorially in the consideration of the possible need that may exist in regard to alternative

accommodation being provided for the occupiers (cf *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7; 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC) (*PE Municipality*), and *Residents of Joe Slovo Community Western Cape v Thubelisha and Others* [2009] ZACC 16; 2010 (3) SA 454 (CC); 2009 (9) BCLR 847 (CC)). None of the occupiers have asserted the need of alternative accommodation, or, for that matter, that the eviction will put them "*in an emergency situation that they are unable to address...*" (*per* Van der Westhuizen J, in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* [2011] ZACC 33 at para [81]). There is no evidence that the eviction will leave the occupiers genuinely homeless and in need (*PE Municipality* para [59]). In this regard it must be remembered that the occupiers, in the order of Willis J, were afforded the opportunity to file a further set of affidavits. At that stage they were duly represented and one must assume that the aspects I have referred to would have been raised, had they been considered necessary.

[14] Having considered all the circumstances of this case and having taken into account all the interests involved, I believe that an order for the eviction of the occupiers is just and equitable (*PE Municipality* para [23]; *Premier Eastern Cape and Another v Mtshelakana and Others* 2011 (5) SA 640 (ECM) 645 para [9]). Insofar as costs are concerned, I am of the view that the occupiers should not be mulcted in costs but that the costs should be borne by the first and second respondents who after all, were the parties having benefitted from the unlawful scheme. The employment of two counsel, having regard to the wide ranging aspects on which Willis J sought clarity and guidance, although not dealt with in this judgment, was clearly justified.

[15] In the result the following order is made:

1. The first and second respondents are interdicted and restrained from:

    1.1 Selling or purporting to sell erven within the Ironsyde/Debonair Park Township, Registration Division IR;

    1.2 Collecting monies in respect of such sales;

    1.3 Grading or causing to be graded any erven within the said township.

2. It is declared that the occupiers of erven 1070, 1046, 905, 897, 378, 1049, 888, 812, 488, 450, 267, 403, 898, 899, 911, 1484/36 and 1483/12, Ironsyde/Debonair Park, Registration Division IR, are in unlawful occupation of those erven.

3. The occupiers referred to in paragraph 2 above are ordered to vacate the said erven within 30 days of the service of this order on them, failing which the sheriff of the High Court, or his duly appointed deputy or sub-contractor or members of the South African Police Service, if necessary, are authorised and directed to evict the occupiers.

4. The first and second respondents, jointly and severally, the one paying the other to be absolved, are ordered to pay the costs of this application such costs to include the costs of two counsel where employed.

FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

I agree.

P COPPIN
JUDGE OF THE HIGH COURT

I agree.

SE WEINER
JUDGE OF THE HIGH COURT

COUNSEL FOR APPLICANT	***ADV J BOTH SC*** ***ADV AW PULLINGER***
APPLICANT'S ATTORNEYS	***ALLEN & ASS ATTORNEYS***

RESPONDENTS' ATTORNEYS	*JEGEH ATTORNEYS*
DATE OF HEARING	*15 MARCH 2012*
DATE OF JUDGMENT	*23 MARCH 2012*