

(Inlexso Innovative Legal Services) fvs

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 51418/2021

DATE: 2021.12.08

DELETE WHICHEVER IS NOT APPLICABLE (1) REPORTABLE: / NO (2) OF INTEREST TO OTHER JUDGES: / NO (3) REVISED
--

10 In the matter between

DEPARTMENT OF HUMAN SETTLEMENTS

Applicant

and

UNLAWFUL OCCUPIERS OF

GOLDEN GARDENS DEVELOPMENT

Respondent

J U D G M E N T

20 **VICTOR, J:** The Department of Human Settlements brought an urgent application to evict certain alleged unlawful occupiers in occupation of the Golden Gardens Development.

The deponent to the affidavit describes that the respondents are unlawfully occupying the premises. They are trespassing. The Golden Gardens Development which consists of certain

and completed RDP subsidised units. There is a waiting list and the respondents have allegedly, jumped the queue and simply took occupation without being allocated to them by the applicant.

The question is whether this matter was one of urgency. It is of importance to the Department of Human Settlement that the houses that they build are not unlawfully occupied. However, in that process, the process the allocation of the houses must be fair and it must be rational in the allocation of
10 houses. The applicant contends that the respondents should vacate the units by 29 October 2021, not many days after launching the application failing which they will be evicted by enlisting the services of the South African Police. The applicant explained that it was incumbent on it to deliver low-cost housing. It is a government department, and it is a project which is ground-breaking in nature.

Not only because of its magnitude but from a concept perspective but also from a socio-economic community upliftment perspective. As part of the project a total number of
20 189 RDP subsidised units were completed, and 108 of those had already been allocated to the intended beneficiaries. The ownership of the land is that of the applicant. The second respondent, that is the Emfuleni Local Municipality is in charge of the land and it also has an interest in this matter.

At issue here are the 81 subsidised units which have

now been occupied by what the applicant termed unlawful occupiers. The applicant claims that it is unfair on those, on the relevant waiting list to be able to take occupation of the said units. The applicant refers to the legislative framework in terms of section 7(2) of the Constitution, where the Bill of rights where the state must respect, protect, promote and fulfil the rights in the Bill of Rights.

The applicant also refers to section 26 of the Constitution, (1) Everyone has the right to have access to
10 adequate housing. (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. This is what the applicant is trying to achieve.

The applicant brings this application in terms of section 5 of the PIE Act and does so on the basis of urgency as I have already referred to and the applicant submits that it has made out in cases which does not require the issue of a notice in terms of section 4 of the PIE Act. The applicant also refers to the general principles applicable to housing development and
20 in this regard a full with the allocations policy was attached to the replying affidavit of September 2020.

The respondents submit in their answering affidavit that many of them are entitled to the houses. Since they have been on the waiting list for a very long time. On the question of urgency, the respondents submit that the units were left

without security measures in place and that the applicant, and the local councillor was aware from February 2021 and took no steps to engage with the respondents.

The respondents also point out that the units were empty and abandoned and were being vandalised by local criminals and their decision was to occupy the houses, so as to protect them and also they are the same people who have applied for housing and have been successfully approved yet not allocated. Some of the units are incomplete and they were
10 ready for allocation and therefore could not have been for the intended beneficiaries because of the incompleteness.

The respondents point out that the allocation process is flawed, even if one has regard to the policy which I have referred to. Some of the beneficiaries have been allocated subsidised units, come from as far away provinces such as KZN, North West, Free State and Soweto to mention a few. There is a submission that these people who were not from the area bribed some of the officials in order to get the allocation on the list and that the whole process was irrational and unfair.

20 The Court, is mindful that this is not a review application but in deciding whether the process was fair and whether it justifies the eviction of the respondents, the Court has to take into account a number of factors and weighs one against the other. In this case the alleged unlawful occupiers were not offered alternative accommodation and they would

have nowhere to move to.

Attached to the answering affidavit was an analysis of the allocation of the units and certainly some of the names of those to be evicted were names of the people who were lawfully allocated the units. In other words, the respondents in this case are not shirking their responsibility. They believe that they have a good and proper claim to be allocated the units in question.

The law.

- 10 The applicant has not complied with the provisions of PIE. The respondents submit that at the first hearing that this Court omitted to make an enquiry about the compliance with section 5(2) read with section 5(3) of the Act. I point out that at that stage I was still busy dealing with the facts in the absence of a timeous answering affidavit.

Section 5 of PIE provides

- 20 Urgent proceedings for eviction 5. (1) Notwithstanding the provisions of section 4, the owner or person in charge of land may institute urgent proceedings for the eviction of an unlawful occupier of that land pending the outcome of proceedings for a final order, and the court may grant such an order if it is satisfied that— (a) there is a real and imminent danger of substantial injury or damage to any person or property if the unlawful occupier is not forthwith evicted from the land; 6 5 10 15 20 25 30 35 40 45 50 55 (b) the likely hardship to the owner or any other affected person if an order for eviction is not granted, exceeds the likely hardship to the unlawful occupier against whom the order is sought, if an order for eviction is granted; and (c) there is no other effective remedy

available. (2) Before the hearing of the proceedings contemplated in subsection (1), the court must give written and effective notice of the intention of the owner or person in charge to obtain an order for eviction of the unlawful occupier to the unlawful occupier and the municipality in whose area of jurisdiction the land is situated. (3) The notice of proceedings contemplated in subsection (2) must— (a) state that proceedings will be instituted in terms of subsection (1) for an order for the eviction of the unlawful occupier; (b) indicate on what date and at what time the court will hear the proceedings; (c) set out the grounds for the proposed eviction; and (d) state that the unlawful occupier is entitled to appear before the court and defend the case and, where necessary, has the right to apply for legal aid.”

In terms of section 5(2) of Pie the following pertains: Before the hearing and proceedings contemplated in terms of section 5(1) of Pie the Court must give written and effective notice of the intention of the owner and or person in charge to obtain an order for eviction of the unlawful occupier and the Municipality in whose area the land is situated.

Section 5(3) provides that the notice of proceedings contemplated in sub-section (2) must state that the proceedings will be instituted in terms of sub-section (1) for an order for the eviction of the unlawful occupier indicate on what date and what time the Court will hear the proceedings. Set out the grounds for the proposed eviction and state that the unlawful occupier is entitled to appear before Court to defend that case and has the right to apply for Legal Aid.

The respondents contend that this case was brought

completely outside of the confines of section 5(2) of PIE. On behalf of the applicants, it was submitted that there had been substantial compliance and that the respondents were in fact before Court and that Mr Chabane was in fact appearing on their behalf. There is therefore sufficient compliance. On a close analysis it is clear that the provisions of section 53 were not compliant with.

It is very clear in its terms and that, more importantly, whilst the respondents were obliged to appear before Court, based on the notice of motion, of the urgent application they were not given an opportunity or a right to apply for Legal Aid.

The matter stood down for the filing of further papers and to sort out this list of 81 people whom the respondents were able to point out that some of them were already in lawful occupation and that the applicant have made a grave mistake in relation to the, to the allocation.

I was referred to the case of *Residents of Joe Slovo Community Western Cape v Thubelisha Homes and others* 2010 (3) SA 454 where the Court said the following:

“The Court held that it is apparent that section 5(1) sets out certain very stringent requirements to obtain an urgent eviction pending the determination of proceedings for a final order of eviction of the applicants. In proceedings, in terms of section 5 therefore any issue in relation to whether an order

for eviction should be granted and in particular whether it is just and equitable to grant the eviction order would be entirely irrelevant.”

In the case of *Residents of Joe Slovo* the High Court found that the applicants had clearly complied with the procedure laid down in section 5 of PIE on the basis that certain notices had been issued by that Court. Mr Chabane submitted to the Court that the facts are completely the opposite in this case. The Court has not issued any notice
10 that would have been sanctioned through an ex-parte application and that based on the *Joe Slovo* case there have not been compliance with section 5.

The respondents submit to the Court that the constitutional route has not been followed because:

1. The eviction is on an urgent basis.
2. There has not been compliance with section 5.

Moreover, there has been no alternative accommodation provided or even offered by the applicants. The respondents point out that on a balance of convenience they already took
20 occupation on 21 February 2021 and the applicants expect them to vacate within days. They submit that there would be no harm to the property because they are in fact occupying and guarding the property even prior to this application.

The respondents then pointed out the problem with the list. It is the submission of the respondent that it is not an

authentic list as the respondents were able to identify at least 26 beneficiaries who have already been allocated houses in the first phase of the project. The respondents were able to gather this information as they are part of the community, and they know some of the individuals. Therefore the 26 intended beneficiaries are not part of the unlawful occupiers.

That is one of the central problems with this application. In its replying affidavit the applicant tries to save their serious errors on the facts and to save the situation. The applicant
10 advises the Court that it has now sorted out the list of beneficiaries and that they have made the necessary adjustments. They also point out that no-one has advised the South African Police that the houses were being vandalised. They dispute the averments that the allocation is to unknown people, not residing in Ward 17 and they dispute that allegation.

Quite clearly then, in my view, there has been a mistake with at least 26 of the units and the applicant has not been able to place before me a proper explanation as to how their
20 records can be so poor and the process so flexible when houses are being allocated.

In the result I find that the application must be dismissed. It must be dismissed on the basis that section 5 of the PIE Act has not been complied with and that the lists that have been, prepared as persons who must be evicted is completely

unsatisfactory.

It is an inaccurate list, and the Court cannot be expected to evict persons on an inaccurate list and by an application who has not complied fully, and strictly, with section 5 of the PIE Act.

In the result the application is dismissed with costs on the party and party scale.

10



VICTOR, J

JUDGE OF THE HIGH COURT

DATE: 20 December 2021

20