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**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: 2017/45283

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

In the matter between:

CITY OF EKURHULENI METROPOLITAN MUNICIPALITY Applicant

and

DUNGA, SIPHO LIVIOUS First Respondent

NKUNA, BOMBA DONALD
(OCCUPIERS OF ERF [....] N [....] STREET,
LANGAVILLE, TSAKANE, BRAKPAN) Second Respondent

JUDGMENT

MOORCROFT AJ:

Order

[1] In this application I made the following order on 25 May 2022:

“1. The 1st and 2nd Respondents and all those claiming occupation of the property situated at ERF [....] N [....] STREET, LANGAVILLE, TSAKANE, BRAKPAN (“the property”) through them are in illegal occupation of the property;

2. The Respondents and all those claiming occupation of the property through them are evicted from the property and are hereby ordered to vacate the property within 120 days of this order;

3. *Should the Respondents and all those claiming occupation of the property above through them not vacate as ordered in (2) above, the Sheriff of the Court or his deputy are directed to evict the Respondents and all those claiming occupation of the property through them;*

4. *A warrant of ejectment is authorised against the Respondents and all those claiming occupation of the property through them;*

5. *The Respondents are to pay the costs of the application.”*

[2] The reasons for the order follow below.

Introduction

[3] This is an application for the eviction of unlawful occupiers of property situated at Erf [...] N [...] Street, Langaville, Tsakane, Brakpan. It is common cause that the applicant is the owner of the property.

[4] The application was served on an occupier, Mr. Nkoma, on 26 February 2018. The notice of set down was served on 24 May 2018 referring to a Court date of 27 June 2018. This notice of set down was served on Mr. Phetla Mokoena.

The applicant

[5] The applicant is a local authority established under the Constitution and with the rights, privileges, duties, and obligations of a local authority as set out in legislation.¹ *Inter alia*, it is authorised and obliged to provide municipal services to residents of Ekurhuleni. To this end, it must use its means to advance the rights of the community it serves.

¹ See Ch 7 of the Constitution, 1996; the Local Government: Municipal Structures Act, 117 of 1998: and the Local Government: Municipal Systems Act, 32 of 2000.

[6] The applicant is the owner of immovable property within its borders and is obliged to then use the property in the fulfilment of its functions. It is best placed to determine how it should use its property in the furtherance of community interests.

[7] In particular, the applicant is the owner of the property with which this application is concerned. The deponent to the founding affidavit alleges that unknown individuals have hijacked or invaded the property. They did so without the consent of the applicant as owner. They also erected unlawful structures on the land. The property is therefore not at the disposal of the applicant.

[8] Notice to vacate was given to the occupiers already in August 2017 but the occupiers ignored these notices. The applicant states that it needs the land for service delivery uses in order to benefit the community. It is prevented from doing so and from carrying out its functions by the illegal land invasions.

[9] To the best of the deponent's knowledge there were no elderly people, children, disabled people or households headed by women on the land.

The respondents

[10] On 7 March 2018 the attorneys acting for the respondents gave notice of their intention to oppose the application.

[11] In June 2018 answering affidavits were filed on behalf of two respondents, Siphon Livious Dunga and Bomba Donald Nkuna. This made the court date of 27 June 2018 redundant and the application did not proceed on that day.

[12] Both respondents acknowledged that they are in occupation of a portion of the property at Erf [...] N [...] Street. They were not identified in the notice of motion but their names and details have now been established and they are recorded as respondents in this judgment.

The first respondent

[13] Mr. Dunga states that he first occupied the property some 25 years ago when one Rasta occupied it. He states that the applicant turned a blind eye to his occupation of the property and impliedly acquiesced in his occupation. Mr. Dunga says that he brought about improvements to the value of R360 000.00. Some six years ago he build a brick and mortar dwelling on the property and he now requests that the applicant provide municipal services to his dwelling. He lives on the property with his three children and is 53 years old.

[14] In 2018 he had various meetings with representatives of the applicant and was promised that the property would be sold and transferred to him in due course. This never happened. Mr. Dunga says that he is prepared to purchase the property as he had already improved it, or to enter into a lease.

[15] He admits that the property is owned by the applicant but states that as a member of the public and a constituent of the applicant he qualifies to acquire or lease the property from the applicant.

The second respondent

[16] In his affidavit, Mr. Nkuna says that occupied the property since 1998 and that he was permitted by a committee administering the area to occupy the property and to conduct a business there. In 2016 and with the permission of the local committee he erected a structure used as a recreational hall and a church. His son and his girlfriend also reside at the property and have been doing so since about 2015.

[17] Mr. Nkuna is of the view that his occupation is not illegal. He has spent approximately R140 000 in constructing the hall and R84 000 in erecting business premises. He is willing to pay for municipal services but none are currently available at the property. He is also willing to buy the property from the applicant.

Applicant's replying affidavit

[18] The applicant filed a replying affidavit late in 2018.

[19] In the replying affidavit the applicant points out that the structures erected on the property are illegal structures that have been erected without submission of any building plans.

[20] Despite the respondents' allegations that the applicant only owned the property since about 2000, the deponent states that the property "*has always been applicant's property*". This was so even before amalgamation of the various municipalities now making up the applicant when the property belonged to its predecessors such as the Greater Brakpan Town Council. Nothing turns however on when the applicant became the owner of the property. It is municipal land and the inference is that it belonged to the applicant and before the establishment of the applicant, to its various predecessors.

[21] The deponent also makes it clear that the applicant is the only body authorised to deal with the land and that it has never assigned rights to permit occupation to any committee. If any committee was involved in discussions, it was not a committee of the applicant. One would of course expect a committee of the applicant to keep records and minutes, and none are available.

Analysis

[22] The respondents do not claim any real or personal rights to the property. It is the property of the applicant and its ownership is protected under section 25 of the Constitution.

[23] The respondents have indicated that they are willing to buy or lease the property from the applicant and have suggested that it be sold or let to them. They would be in a better position if they were to buy or rent property suitably zoned for their business and residential needs and in a place where municipal services are available. There is nothing in the answering affidavit to indicate why this specific property should be sold or let to them, and as it is vacant land intended for other uses it is simply not logical that the applicant sell or let this land to them. No firm written offers appear to have been made by either respondent willing to buy the property.

[24] In considering an eviction application a Court must have regard to, *inter alia*, section 4 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998. Section 4(7) to (9) read as follows:

(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.

(8) If the court is satisfied that all the requirements of this section have been complied with and that no valid defence has been raised by the unlawful occupier, it must grant an order for the eviction of the unlawful occupier, and determine-

(a) a just and equitable date on which the unlawful occupier must vacate the land under the circumstances; and

(b) the date on which an eviction order may be carried out if the unlawful occupier has not vacated the land on the date contemplated in paragraph (a).

(9) In determining a just and equitable date contemplated in subsection (8), the court must have regard to all relevant factors, including the period the unlawful occupier and his or her family have resided on the land in question.

[25] In heads of argument filed on behalf of the aforementioned respondents, the respondents take issue with the fact that not all the “*relevant facts required for the granting of an eviction order*” is before Court. It was submitted on behalf of the respondents that it is permissible for a respondent in an eviction application under

the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998 to adopt a passive attitude and to require the applicant to place facts before the Court. In support of this submission counsel relied primarily on the judgment by Mojapelo AJ² in the Constitutional Court in the matter of *Occupiers, Berea v De Wet NO*.³

[26] I do not understand the judgment to place the onus to provide information on the court itself or exclusively on one of the parties. Mojapelo AJ said:⁴

“[47] It deserves to be emphasised that the duty that rests on the court under s 26(3) of the Constitution and s 4 of PIE goes beyond the consideration of the lawfulness of the occupation. It is a consideration of justice and equity in which the court is required and expected to take an active role. In order to perform its duty properly the court needs to have all the necessary information. The obligation to provide the relevant information is first and foremost on the parties to the proceedings. As officers of the court, attorneys and advocates must furnish the court with all relevant information that is in their possession in order for the court to properly interrogate the justice and equity of ordering an eviction. This may be difficult, as in the present matter, where the unlawful occupiers do not have legal representation at the eviction proceedings. In this regard, emphasis must be placed on the notice provisions of PIE, which require that notice of the eviction proceedings must be served on the unlawful occupiers and 'must state that the unlawful occupier . . . has the right to apply for legal aid'.” [emphasis added]

[27] In this matter the respondents were represented by an attorney, and counsel rose to argue the matter. I am satisfied that the applicant placed before the Court the facts that it was aware of and that it was always open to the respondents to place additional facts before the Court. This the respondents in fact did in their answering affidavit prepared under the guidance of their attorney.

² The learned Judge was acting in the Constitutional Court but was then the Deputy Judge President of what is now the Gauteng Division of the High Court in Johannesburg.

³ 2017 (5) SA 346 (CC) paras 39 to 57. See also *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 36; *Machele v Mailula* 2010 (2) SA 257 (CC) para 15; *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 (6) SA 294 (SCA) paras 11 to 25.

⁴ *Occupiers, Berea v De Wet NO* 2017 (5) SA 346 (CC) para 47.

[28] The respondents complained that no “*further information regarding the financial position of the occupants of the properties*” is provided to the Court. These facts would be peculiarly within their knowledge and by extension, within the knowledge of their attorney. It was not argued on behalf of the respondents that there were relevant facts that they could place before the Court but neglected to do for some reason, or that they were prevented from doing so by the applicant or any third party.

[29] I conclude that an eviction order is just and equitable, and it remains to be decided what conditions must be attached to the order. The respondent need time to obtain alternative accommodation and to relocate. I consider that a period of 120 days would be an appropriate period for them to do so.

[30] Under the circumstances I granted the order in paragraph 1 above.

**J MOORCROFT
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG**

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **26 MAY 2022**.

COUNSEL FOR THE APPLICANT: MS S POOE

INSTRUCTED BY: G KGOPE ATTORNEYS

COUNSEL FOR RESPONDENTS: E COLEMAN

INSTRUCTED BY: ZAF KHAN ATTORNEY

DATE OF THE HEARING: 3 May 2022

DATE OF ORDER: 25 May 2022

DATE OF JUDGMENT: 26 May 2022