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

CASE NO: 2020/1348

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED: YES

7 November 2022

In the matter between:

EKURHULENI METROPOLITAN MUNICIPALITY Applicant

and

**MANDLENKOSI NKOSI AND 91 OTHERS
WHOSE NAMES ARE LISTED IN
ANNEXURE A TO THE NOTICE OF MOTION 1st to 92nd Respondents**

**NCUMISA NGCUKANA AND INDIVIDUAL
RESPONDENTS WHOSE NAMES ARE LISTED IN
ANNEXURE B TO THE NOTICE OF MOTION 93rd to further Respondents**

Coram: Mudau J

Heard: 3 October 2022: The 'virtual hearing' of the case was conducted as a videoconference on *Microsoft Teams*.

Delivered: 7 November 2022 – This judgment was handed down electronically by circulation to the parties' representatives *via* email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 11H00 on 7 November 2022.

Summary: Land - Unlawful occupation - Eviction from - Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) - Application for eviction by organ of State - Availability of land for relocation of unlawful occupiers - Availability of alternative accommodation being relevant circumstances to be taken into account in determining whether just and equitable to grant order of eviction.

Held, that under s 6 of PIE the Court exercised a discretion to grant an eviction order if it were just and equitable to do so after taking into account 'all relevant circumstances'.

Held, further, that it was in the instant case just and equitable to order the eviction of the occupiers in the interest of the general public and the development of a housing project.

J U D G M E N T

MUDAU, J:

[1] This is an application for an order for the eviction and relocation of the respondents, and all those who occupy the properties through them, in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("PIE Act") for purposes of a housing development project. It is trite, the PIE Act was enacted to prevent the arbitrary deprivation of property pursuant to section 26 (3) of the Constitution.

[2] The applicant is the City of Ekurhuleni Metropolitan Municipality, a Metropolitan municipality ("the Municipality") established under General Notice No. 6768 of 2000 (promulgated in Gauteng Provincial Gazette No. 141 of 1 October 2000), pursuant to section 12(1) read with section 14(2) of the Local Government Municipal Structures Act, 117 of 1998.

Background facts

[3] The facts are largely common cause. The Municipality is the owner of the properties known as the Van Dyk Park mining houses situated at Van Dyk Park Extension [...], Brakpan ("the houses"), that are occupied by the respondents. Historically, the houses were used as living quarters for employees of a mining company, DRD Gold ("DRD"). Some of the earliest structures were built prior to 1936. DRD had leased the property from the former Boksburg Council in terms of a land availability agreement. During 2009, pursuant to DRD closing down its mining operations in the area, the land availability agreement lapsed and DRD handed back the property with all improvements to the Municipality.

[4] DRD furthermore cancelled the oral lease agreements that it had entered into with its former employees and set about evicting them from the houses. Subsequently, on 2 September 2010, DRD notified the occupants of the houses that they 'have no right to the property' and gave them 30 days' notice of cancellation of the lease agreement. Some employees left the properties while others remained despite the houses having no water, electricity or sewage services. On 4 November 2010, DRD's manager sent a notice to the occupants of the houses reminding them that the 'Ekurhuleni Town Council is now the rightful owner of the Van Dyk land'. There are currently 49 houses, mainly in a dilapidated state, that have been illegally occupied for the past 10 years by various groups of people, including the current respondents in their guises as 'owners' or 'tenants'.

[5] Annexure 'A' lists the names and details of 92 respondents who have hijacked the houses (from numbers 7 to 85) and represent themselves as the 'owners' and 'landlords' of the houses. They have let rooms in the houses to families who are expected to pay them 'rent'. In some cases, they have allowed backyard dwellers to erect shacks on the property in exchange for the payment of 'rent'. Annexure 'B' lists the names and details of some of the respondents who are the 'tenants' living in the 49 hijacked properties and who pay 'rent' to the so-called 'owners' of the houses. Their full and further particulars are according to the Municipality, unknown. The Municipality avers that, it has been difficult, if not impossible, for the Municipality to

identify all the respondents in annexure 'B', the backyard shack dwellers, as their numbers fluctuate due to their personal circumstances.

[6] It is the case of the Municipality that it has never entered into any lease agreements with any of the respondents nor condoned their unlawful occupation of its properties. Notwithstanding this, the Municipality has, as part of its constitutional obligations, provided water to the illegal occupiers via a standpipe; the occupiers get electricity through prepaid metres. Since 2013, the Municipality has provided the respondents with basic services such as sanitation and waste collection in compliance with its constitutional obligation.

THE VAN DYK PARK HOUSING DEVELOPMENT

[7] During 2018, the Municipality Council decided to embark on a mega project to develop a mixed-use housing project that would fast track service delivery within the City of Ekurhuleni. This project, the Van Dyk Park Housing Development ("Housing Development Project") is to be constructed on land that has been re-zoned and proclaimed as a township to be known as 'Van Dyk Park Extension 2'. The applicant avers, which is undisputed, that the houses, are situated right in the middle of the project site. The Housing Development Project will see the construction of high, medium and low density housing; schools; business areas; community facilities; mixed use and parks and sports fields. It is envisaged that 1702 RDP houses will be built; 683 social housing units will be built for rental; 746 subsidised units will be built; as well as 342 bonded units to be built for people who are able to obtain bonds.

[8] According to a 'Status Report' compiled by Akwethu, an engineering and development company, dated 12 November 2019, the implications of the delay with the evictions are serious and far-reaching. The budget for the Housing Development Project is a conditional grant. If the funds are not spent in the current financial year, the money will be returned to Treasury; the risk of losing the funding is high due to the inability to relocate the residents and demolish the houses. The continuation of the development is dependent not only on the eviction and relocation of the respondents, but also on the demolition of the houses.

[9] Previously, a budget of R80 million was allocated for the Housing Development Project in the 2019/2020 financial year and an instruction to proceed with work ("IPW") was issued for bulk services in respect of water and upgrading road intersections. The Housing Development Project is ready to proceed to construction stage; however, it has come to a standstill as a result of the respondents' refusal to vacate the old mining houses. Due to the delay in relocating the respondents, R51 118 964.95 of the allocated budget of R80 million in 2019/20 was unspent and had to be returned to Treasury. The applicant contends that the respondent's unlawful occupation is negatively impacting on budget expenditure and the Municipality's obligations in respect of service delivery to its residents.

[10] It is common cause that the respondents were aware of the proposed Housing Development Project as early as 2015. The Municipality had regular engagements with the respondents since 2019 and 2020 about the proposed development. On 28 April 2019 and 11 May 2019, meetings were held with the respondents to discuss the Housing Development. On 26 November 2019, the Gauteng MMC for Housing met with the respondents to address their concerns about the Housing Development Project. On 28 January 2020, a public meeting was held to update the respondents on the Housing Development Project.

[11] On 27 and 28 February 2020, the Municipality and its social facilitation service provider, Kuhle Solutions, undertook a physical assessment and verification of the households. Kuhle Solutions produced a report which recorded that "301 households were living at the 49 mining houses" in the Van Dyk Park area. However, intimidation of both 'tenants' and the Municipality's officials by the 'landlords' resulted in a lack of any meaningful engagement regarding the Housing Development Project.

[12] The Municipality envisages that the eviction and relocation of the respondents, and all those who occupy the houses through them will proceed as follows: The respondents will be evicted from the houses in groups of 100 and transport will be provided for the respondents' possessions to be completed in three (3) days, which according to the municipality is a manageable number, as it will allow the respondents to be relocated to the transit site on the same day. In this way,

carrying out the eviction in stages will help prevent invasion of the transit site and the empty houses.

[13] The respondents will be relocated to the transit site, the old primary school site, Erf [...], located within the construction site, which can accommodate 370 families. According to the applicant, there is no other alternative land available to accommodate all the respondents close to the Van Dyk Park area and close to the respondents' schools and places of employment. Each family will be housed immediately in a structure measuring 12 square metres, which will be constructed from new material provided by the Municipality.

[14] It is envisaged that standpipes will be erected on the same day that the respondents are relocated and there will be 10 temporary toilets in place in each section. The respondents will have access to pre-paid electricity, but that will be installed once all the respondents have been relocated, within 12 days from the start of the eviction process. Light masts will be installed at intervals at the transit site to ensure the safety of the respondents. The respondents will be moved into RDP houses as soon as they are built and if they meet the beneficiary qualification criteria, which is likely to happen in less than three years.

[15] According to the Municipality, to ensure the respondents' health and safety while at the transit site, a contractor will be appointed to complete the construction of the housing development as soon as the eviction and relocation of the respondents is completed. The contractor will be required in terms of the Municipality's policies to produce a safety plan which must include the needs of the respondents living at the transit site. A health and safety officer will be on site at all times during the construction. The Municipality undertook, under oath, to submit to the Court, within 30 days of the eviction and relocation of the respondents, a safety plan to be implemented for the duration of the above respondents' relocation (provision has been made for this in the notice of motion).

[16] Initially, none of the respondents filed opposing affidavits; consequently, this application was set down for hearing on 26 August 2021 on the unopposed roll. However, on the eve of the hearing, on 25 August 2021, the 1st to 49th respondents

filed an answering affidavit almost a year after filing a notice to oppose; having been served with the application on 15 September 2020, resulting in the postponement of the matter, with costs reserved, without seeking condonation for the inordinate delay as required by rule 27(1) of the Uniform Rules.

[17] In the answering affidavit by the 1st to 49th respondents through their erstwhile attorneys (Peter Ramano Attorneys), there are three versions proffered in an attempt to justify their occupation of the houses. First, the allegation that they were granted permission to reside in the houses from various named people as per Annexure 'MN2'. However, there are no confirmatory affidavits that the houses belonged to the named people and that they were legally authorised to allow the occupiers to 'take over' the houses. Also, none of those who allege that they were employed by the mine have provided any evidence of their employment with DRD.

[18] Second, they claim that DRD told them that they 'would not be evicted and there are arrangements in place that the Municipality would take all the necessary steps to transfer ownership of these houses to the mine employees, their relatives and/or beneficiaries for their loyalty and hardworking'. Again, there is no evidence before this court that DRD in fact made such a statement. In any event, this is contradicted by notices sent by DRD in 2010 to its employees, seeking to evict them from the houses in question.

[19] Third, they allege without the support of a confirmatory affidavit, that 'there was never any lease agreement entered into between DRD Mining and its former employees' and deny that DRD told its former employees to 'evacuate the houses'. They claim that DRD informed them that 'we must continue residing in the houses/property pending them sorting out and handing over of title deeds to us'.

[20] In the replying affidavit, the applicant contends that the so- called owners do not come to court with 'clean hands' as they have not been open and honest with the court. At least seven of them are owners of other properties, including being beneficiaries of government subsidised housing. These are: Thelma Lungiswa Siko, occupying house [...]; Tonny Mahlakahla, occupying house [...]; Sodosi Elmon Sibiya, occupying house [...]; Mandlenkosi Nkosi, occupying house [...]; Tshepo

Frans Bonzo, occupying house [....]; Phindile Nellie Mabuza, occupying house [....] as well as Nokwanele Poporayi, occupying house [....]. The applicant emphasised that there is no allegation at all in the answering affidavit that any of the so-called owners will be rendered homeless upon eviction.

[21] As for the various demands by the respondents i.e. the demand for 'permanent suitable alternative accommodation', that they 'each be given a RDP house in the Housing Development', and the demand that the Municipality gives them 'an undertaking that once this project is complete, we will all automatically qualify at minimum for an RDP houses and/or lowest cost houses'; the applicant contends, with which I agree as it will become apparent that the demands are unreasonable. The Municipality also contends that this is nothing more than blackmail to which the Municipality will not give in or entertain. The Municipality points out that the housing beneficiary administration process is a competence of the Gauteng Province Housing Department. The respondents have been unapologetic about bringing this Housing Development Project to a standstill; they will vacate the houses only if their demands are met.

Second Answering Affidavit

[22] On the eve of hearing this application, 33 respondents introduced, without a condonation application, a second affidavit dated 23 September 2022. There is neither an application for leave to have the second answering affidavit admitted. Rule 6 (5) (d) (ii) of the Uniform Rules provides that

“any person opposing the grant of an order sought in the notice of motion must —

(ii) within fifteen days of notifying the applicant of intention to oppose the application, deliver such person's answering affidavit, if any, together with any relevant documents”

[23] If an affidavit is tendered both late and out of ordinary sequence, it is trite that the party tendering it is seeking not a right but an indulgence from the court. It

behoves such a party to explain why it is out of time and to satisfy the court that in all the circumstances of the case that the affidavit should be received. In *Gold Fields Limited and Others v Motley Rice LLC*, In re: *Nkala v Harmony Gold Mining Company Limited and Others*¹ this Court (per Mojapelo DJP) at para 122 and 123 put it thus:

“[122] The respondent is given one opportunity only, to deal with the applicant’s cause of action and present evidence in opposition in the answering affidavit. The applicant is then afforded an opportunity in the replying affidavit to reply only to what the respondent has stated and may not raise new matter or new issues. The three affidavits, founding affidavit, answering affidavit and replying affidavits (with such supporting affidavit as may be necessary for each) then conclude the essential affidavits, and thus close the pleadings and evidence in motion proceedings.

[123] There is no automatic right to file the fourth and further affidavits. Additional affidavits should be allowed only in exceptional circumstances and only with the leave of court.”

[24] The applicant contends in opposing the introduction of the second answering affidavit, that the 33 respondents in doing so acted irregularly and impermissibly by a raising a new defence (lack of meaningful engagement), which has been shaped to relieve the pinch of the shoe pursuant to the Municipality setting out substantively in the replying affidavit why their occupation is unlawful.

[25] The trite principle with regard to the wide powers of the court to condone non-compliance with its own rules is subject to the requirement, and safeguard, that good cause must be shown.² In principle, the discretion is to be exercised judicially with regard also to the merits of the matter seen as a whole.³ To permit the filing of a further answering affidavit severely prejudices the party, in this case the applicant,

¹ [2015] 4 All SA 299 (GJ)

² See *Mynhardt v Mynhardt* 1986 (1) SA 456 (T) at 463G-H; *Chasen v Ritter* 1992 (4) SA 323 (SE) at 329C.

³ See *Gumede v Road Accident Fund* 2007 (6) SA 304 (C) at 307C-I. See also *James Brown & Hamer (Pty) Ltd (previously named Gilbert Hamer & Co Ltd) v Simmons* NO 1963 (4) SA 656 (A) at 660D-H.

who has to meet a case based on those submissions. In the second answering affidavit, the respondents contend that there was no meaningful engagement with the Municipality as set out in by the Constitutional Court in the case of *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others*⁴ before litigation commences. However, this is not borne out by the common cause facts alluded to above. There is, accordingly, no proper case established for the admission of the second answering affidavit and it falls to be regarded as *pro non scripto*. As a consequence, the second answering affidavit is inadmissible.

[26] It is significant to point out that there is no allegation at all in the answering affidavit that an of the so-called owners will be rendered homeless upon eviction. The 1st to 49th respondents' version, I find, is clearly untenable, does not create any real disputes of fact.

[27] Section 26(1) of the Constitution guarantees the right to access to adequate housing and places a positive obligation on the state in section 26 (2) to realise that right within its available resources, which the applicant in this instance recognises. No one can be evicted without an order of court after proper consideration of all the relevant circumstances.

[28] The question that arises in this application is whether it is just and equitable, as envisaged by section 4(7) of PIE Act read with section 6 thereof, to grant an order directing the eviction of the respondents' consideration being had to all the relevant facts. Importantly, it is clear that the Municipality has never consented to the respondents' occupation of the houses nor has the Municipality ever entered into a lease agreement with any of the respondents. It is accordingly indisputable that their occupation of the houses is unlawful. Section 4(7) of PIE provides guidance on what considerations have to be taken into account, when a court exercises its discretion to determine whether it is just and equitable to grant an eviction order. Section 4 (7) reads:

⁴ 2008 (3) SA 208 (CC).

"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."

[29] In terms of section (6) (3) of PIE "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."

[30] In deciding whether it is just and equitable taking into account the rights and needs of the elderly, children, disabled persons and households headed by women to grant an order of eviction, I take into account that land has been made available by the Municipality for the relocation of the unlawful occupiers to fulfil its constitutional obligation to provide alternative accommodation. In this case the respondents do not deal with any hardship they are likely suffer should they move to the proposed site in any meaningful way.

[31] Recently, the Constitutional court⁵ stated:

"The question whether the constitutional rights of the unlawful occupier are affected by the eviction is one of the relevant considerations, but the wishes or personal preferences of the unlawful occupier are not relevant. An unlawful occupier ...does not have a right to refuse to be evicted on the

⁵ *Grobler v Phillips and Others* (CCT 243/21) [2022] ZACC 32 (20 September 2022) para 36.

basis that she prefers or wishes to remain in the property that she is occupying unlawfully.”

[32] In *Baron v Claytile (Pty) Ltd*⁶, the Constitutional Court reminds us that there has to be some offer by both parties, compromises have to be made, in order to reach a just and equitable outcome. In *City of Johannesburg City of Johannesburg v Changing Tides 74 (Pty) Ltd*⁷ the Supreme Court of Appeal held at para 15 that ‘an eviction order in circumstances where no alternative accommodation is provided is far less likely to be just and equitable than one that makes careful provision for alternative housing’. *Changing Tides 74* held, as in this case, that eviction is ordinarily just and equitable if alternative accommodation is made available.

[33] In *Port Elizabeth Municipality Vs Various Occupiers*⁸, the Constitutional Court held appositely, that “the public interest requires that the legislative framework and general principles which govern the process of housing development should not be undermined and frustrated by the unlawful and arbitrary actions of a relatively small group of people. Thus the well-structured housing policies of a municipality could not be allowed to be endangered by the unlawful intrusion of people at the expense of those inhabitants who may have had equal claims to be housed on the land earmarked for development by the applicant. Municipalities represent all the people in their area and should not seek to curry favour with or bend to the demands of individuals or communities, whether rich or poor. They have to organise and administer their affairs in accordance with the broader interests of all the inhabitants”. Footnote omitted. This such a case.

[34] I am satisfied that the respondents’ concerns raised in the second affidavit, even if I was to consider it, that the accommodation proffered is ill-suited have been addressed by the Municipality to the best of its financial abilities. I take cognisance that the duty is one of progressive realisation, and accordingly accept that the housing

⁶ 2017 (5) SA 329 (CC).

⁷ 2012 (6) SA 294 (SCA).

⁸2005 (1) SA 217 (CC) at para 26.

structures proffered qualify as suitable alternative accommodation which is provided by the Municipality within its available resources.

[35] With due regard to all the facts, I hold that it is just and equitable that all the respondents be evicted and that the relocation is undoubtedly in the greater public interest for the benefit of more families in need of housing pursuant to section 6 (3) (c) of the PIE Act. Eviction under the circumstances, is a reasonable measure to facilitate the Housing Development Programme by the Municipality. Should the applicants not comply with the order, the sheriff of the court is authorised to execute the eviction and if necessary, to request the assistance of members of the South African Police Service. Ordinarily, costs follow the result. Eviction matters however involve constitutional issues, and I accordingly in the exercise of my discretion, make no order regarding costs, including those previously reserved.

[36] Order

- 1) The applicant is granted leave to supplement its founding affidavit;
- 2) The supplementary affidavit deposed to by Selven Davey Frank dated 19 August 2021 is hereby admitted;
- 3) The first to 92nd respondents and the 93rd to further respondents, whose names are listed in annexures A and B attached to the notice of motion, including those who are occupying the properties through them:
 - 3.1 are to be evicted from the properties known as the Van Dyk Park mining houses situated at Van Dyk Park Extension 1, Brakpan.
 - 3.2 are to be relocated immediately upon their eviction, on the property described as Erf [...] situated at Bloubos Road, Van Dyk Park, Brakpan.
- 4) The applicant shall proceed with the eviction and relocation of the above respondents within 3 days from the date of this order in accordance

with the relocation plan set out in paragraphs 48—48.4.7 of the founding affidavit and annexure 'P' attached to the founding affidavit, as follows:

4.1.1 The respondents will be evicted from the houses in groups of 100 and relocated at the transit site on the same day.

4.1.2 Transport will be provided for the respondents' possessions.

4.1.3 The eviction of the respondents should be completed in three (3) days.

4.1.4 Each family will be housed immediately in a structure measuring between 12 square metres, which will be constructed from new material provided by the Municipality.

4.1.5 Standpipes will be erected on the same day that the respondents are relocated and there will be 10 temporary toilets in place in each section.

4.1.6 The respondents will have access to pre-paid electricity, to be installed once all the respondents have been relocated, within 12 days from the eviction.

4.1.7 Light masts will be installed at intervals in the transit site.

4.1.8 The transit site will have designated entrances.

4.1.9 The houses will be demolished on the same day if reasonably possible after each group of respondents has vacated the houses, alternatively, the applicant shall proceed with the demolition of the houses as soon as all the respondents have been removed from the houses and relocated to the transit site.

4.1.10 The eviction and relocation of the respondents shall be completed by the applicant within 7 days.

5) The applicant shall within 30 days of the eviction and relocation of the above respondents, submit to the Court, under oath, a safety plan to be implemented for the duration of the above respondents' relocation.

6) There is no order as to costs.

MUDAU J
[Judge of the High Court]

APPEARANCES

For the Applicant: Adv Georgiades SC

Adv U Dayanand-Jugroop

Instructed by: Nozuko Nxusani Incorporated

For the Respondent: Adv. L Mtshiyo

Instructed by: Dudula Attorneys

Date of Hearing: 03 October 2022

Date of Judgment: 07 November 2022