

IN THE KWAZULU HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

CASE NO: 3796/2012

In the matter between:

SHEPSTONE HOUSE TWO LTD

Applicant

and

MSUNDUZI MUNICIPALITY

First Respondent

THE OCCUPIERS OF SHEPSTONE HOUSE

Second Respondents

SUHEENA INVESTMENTS CC

Third Respondent

J U D G M E N T

KOEN J:

INTRODUCTION:

[1] This is an application in which the Applicant claims relief in the following terms:

1. That this matter be heard as one of urgency in terms of Rule 6 (12) and that the forms and services provided for in Rule 6 be and are hereby dispensed with.
2. That a Rule *nisi* be and is hereby issued calling upon the Respondent to show cause, if any, to this Honourable Court on the day of 2012 at 09h30 why an order in the following terms should not be granted:-
 - 2.1 That the Respondent, or any person through it be and are hereby interdicted and restrained from withholding or

switching off the electricity supply to the Applicant's premises situated at 5/8 Chancery Lane, Pietermaritzburg, KwaZulu-Natal, pending the finalisation of this application.

- 2.2 That the Respondent is directed to do all things necessary and incidental to restore the supply of electricity to the Applicant's premises situated at 5/8 Chancery Lane, Pietermaritzburg, KwaZulu-Natal.
- 2.3 That the Respondent and its employees are hereby interdicted from interfering with the electrical connections relating to the building described as Shepstone House and situated at 5/8 Chancery Lane, Pietermaritzburg.
- 2.4 That the Respondent be ordered to pay the costs of this application on an attorney and client scale.
- 2.5 Further and/or alternative relief.

[2] A Rule *nisi* with interim relief in terms of paragraphs 2.1 and 2.2 quoted above, as prayed in the Motion was granted on 11 May 2012.

[3] The interim relief granted was anticipated by the First Respondent, which in addition sought certain further relief in its counter application.

[4] Pursuant to the counter application, an order was granted on 24 May 2012 in the following terms:

- "1. The order granted on 11th May 2012 is amended by the deletion of paragraph 2 thereof (that is the paragraph providing for interim relief).
2. A rule *nisi* be and is hereby issued calling upon the Applicant to show cause on the adjourned return day of the Applicant's rule *nisi* why an order in the following terms should not be granted:-
 - 2.1 The Respondent be and is hereby authorized (though its officials) to:-
 - 2.1.1 enter the premises at 225 Longmarket Street, Pietermaritzburg (referred to as Nedbank Building) and inspect the Bulk Meter and electrical connection therein; and

2.1.2 terminate the municipal supply of electricity from whatever source to Shepstone House.

2.2 The Applicant be and is hereby ordered to vacate the premises known as Shepstone House, with the exclusion of the Ground Floor thereof.

2.3 The Sheriff of the High Court (assisted by Applicant's (it should read Respondent's) Fire and Disaster Management Department) be and is hereby directed and authorized to remove any persons occupying any floor in Shepstone House above the Ground Floor.

2.4 The Applicant be and is hereby interdicted and restrained from reoccupying the building above the Ground Floor or allowing tenants other than those listed in annexure SS11 to the affidavit of Surendra Singh deposed to on 23 May 2012 to occupy such premises until the relevant authority is issued by the Respondent.

2.5 The Applicant is to pay the costs of the application and this counter application on the scale as between attorney and client

3. The provisions of paragraphs 2.1, 2.2 and 2.4 be and are hereby granted as interim orders pending the final determination of this application.
4. All issues of costs are reserved.
5. The occupiers of Shepstone House are joined as a Second Respondent and Suheena Investments CC is joined as the Third Respondent in the counter-application."

[5] The interim relief which the First Respondents sought in terms of which occupiers occupying any floor other than the ground floor were to be removed, was not granted because at that stage these occupants were not party to the application. It was to cater for this that the court on that day ordered the occupiers of Shepstone House to be joined as the Second Respondents.

[6] The issues for determination in this application are according:

1. Whether the Rule *nisi* obtained by the Applicant should be confirmed;
2. Whether the Rule *nisi* obtained by the First Respondent on 24 May 2012 and subsequently extended, should be confirmed;

3. Costs.

BACKGROUND:

[7] The Applicant is the owner of the immovable property situated at 5/8 Chancery Lane, commonly referred to as Shepstone House. The building consists of shops on the ground floor, a parking area on the first floor and twelve floors of office space, five floors of which are used for residential accommodation with the balance apparently remaining vacant.

[8] The First Respondent is the Msunduzi Municipality which is the Municipality having jurisdiction over the property belonging to the Applicant and which is responsible for the provision of electricity to residents and others who reside within its boundaries, including responsibility for the provision of any electricity to the Applicant's premises.

[9] The Second Respondents are the occupiers of Shepstone House joined in terms of the order granted on 24 May 2012. They are represented by attorneys Surendra Singh and Associates, Mr Surendra Singh also having been the deponent to the Applicant's founding affidavit. The occupiers through one Mchunu delivered an affidavit in which they associate themselves with the version of the Applicant, but put up no further evidence of their own. They also rely on the provisions of the Prevention of Illegal Eviction from an Unlawful Occupation of Land Act, 1998 (hereinafter referred to 'PIE').

[10] The Third Respondent is Suheena Investments CC, the owner of the adjoining immovable property referred to as the Nedbank Building. Common to the ownership and control of both the Third Respondent and the Applicant is Mr Singh, the deponent to the founding affidavit on behalf of the Applicant.

[11] All the parties were represented by counsel at the hearing of this

application, the Applicant's counsel also representing the Third Respondent.

[12] A number of disputes arise on the papers. The following is however common cause;

- (a) On 7 February 2002 an order was granted in favour of the First Respondent against the Applicant and Mr Surendra Singh (The Third Respondent also having been a Third Respondent in that application) interdicting Mr Singh and the Applicant from conducting any building work or any alteration or erection of any kind whatsoever at Shepstone House until the First Respondent had approved plans for such building, alteration or erection in terms of s 14 of the National Building Regulations and Building Standards Act No 103 of 1977 (hereinafter referred to as 'the Building Act'). Mr Singh and the Applicant were also interdicted and restrained from occupying or using the said building until the First Respondent had issued a valid certificate of occupation in terms of s 14 of the Building Act. In addition the Applicant and Mr Singh were ordered to vacate the said building above the first floor by 15 March 2002 together with any other persons who occupy the building through one or both of them. The First Respondent was authorized to demolish all building work alterations or erections not authorised by it.
- (b) Six years later a further order was obtained under case No. 4914/08 which *inter alia* directed the occupiers of Shepstone House (excluding the commercial tenants who occupied the commercial premises on the ground floor) to vacate Shepstone House by 16h00 on 14 March 2008.
- (c) Both the aforesaid orders and interdicts are still current. Accordingly both the Applicant and Mr Singh are interdicted from occupying the building and persons in occupation of the floors other than the ground floor are to vacate the building.

- (d) On the Applicants own version it utilizes five floors of the building above the ground floor for residential accommodation.
- (e) No certificate of occupation in terms of s 14 (1) of the Building Act has been issued to the Applicant in respect of such accommodation;
- (f) At the time the application was brought, no power had been cut off by the First Respondent to Shepstone House. All the First Respondent was doing was investigating a potential unlawful supply of power from the Nedbank Building to Shepstone House, which on the Applicant's own version was the case, it contending that it had authority to do so, alternatively electricity was supplied in Shepstone House from a generator which had been installed by the Applicant;
- (g) The Applicant does not have an agreement with the First Respondent for the supply of electricity to the property on which Shepstone House is situated, the supply which previously was in place having been terminated at the Applicant's request during 2008;
- (h) The Applicant alleges that it had applied for a consolidation of "Shepstone House and Nedbank Building into one property for practical reasons". It is common cause that this request was never granted, on the Applicant's own version;
- (i) The Applicant concedes that since July 2011 it has utilized the supply of electricity to the Nedbank Building, which is situated on portion 3 of earth 2522 Pietermairzburg, to Shepstone House;
- (j) A copy of the application papers was, pursuant to the joinder of the Second Respondents, served by the First Respondent on the Second Respondents;
- (k) On 25 May 2012 the First Respondent's Attorneys addressed a letter to the Second Respondents advising that no certificate

of occupancy had been issued in respect of the building, that in the view of its safety officials, the occupation of the building posed a danger to them and that there is a risk of harm, injury or death if an emergency arises, that they were required to vacate the building with immediate effect and certainly by not later than the 4th June 2012, that they were invited to address any queries or make representations or communications to the First Respondent with the First Respondent's attorney and to engage meaningfully¹ with him before an order was sought for their eviction.

THE APPLICANT'S CONTENTIONS:

[13] The Applicant contends that the central dispute in the matter is whether the Applicant's building is safe and fit for occupation due to alleged defects in the fire and electrical system. It contends that in the light of the affidavits exchanged, there are factual disputes necessitating a referral to oral evidence in accordance with a draft order which was filed, raising issues *inter alia* such as whether the Applicant has complied with the electrical requirements of the First Respondent, whether the electrical system in the Nedbank building was bypassed to the Applicant, whether the Applicant has complied with the First Respondent's fire safety requirements, whether the fire detection system on the Applicant's premises is in working order and whether the First Respondent has applied its by-laws in an arbitrary and unfair manner with regard to any buildings owned by Mr Singh, whether personally or through juristic entities.

THE CONTENTIONS OF THE OCCUPIERS:

¹ As that duty was described in *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* 2008 (3) SA 208 (CC) at paragraphs [13] to [14].

[14] The Second Respondents have not raised any defences over and above that raised by the Applicant, save for the following:

- (a) They contend that the First Respondent must respect the provisions of PIE and proceed by way of PIE to remove tenants from the building; and
- (b) That a court with reliance on the dicta by Sachs J in *Port Elizabeth Municipality v Various Occupiers*², 'should be reluctant to grant an eviction against relatively settled occupiers unless it is satisfied that a reasonable alternative is available, even if it is an interim measure pending ultimate access to housing in a formal housing programme'.

Accordingly the contention is that the First Respondent has an obligation to provide alternative accommodation to the occupiers of Shepstone House³.

- (c) Second Respondents contend that the absence of a certificate of occupation is not through any fault of theirs and it is related to a problem between the Applicant and the First Respondent.

THE FIRST RESPONDENT'S CONTENTION:

[15] The First Respondent contends, correctly in my view, that the matter is capable of being decided on the undisputed common cause facts without any referral to oral evidence; indeed that it is capable of decision on the Applicant's version.

THE SUPPLY OF ELECTRICITY TO SHEPSTONE HOUSE:

[16] The Electricity supply bylaws of the First Respondent provide *inter alia*

² 2005 (1) SA 218 (CC)

³ *Blue Moonlight Properties v Occupiers of Seratoga Avenue* 2009 (1) SA 470 W;

that :

- '(10) (1) No person shall be entitled to a supply of electricity or to use or continue to use a supply of electricity unless he has entered into a contract with the Council.
- 2) ...
- 11) No person shall sell or supply electricity obtained from the Council for use on any premises other than those in respect of which he has entered into a contract with the Council, and no person shall knowingly permit or suffer any such sale or supply to be made.'

[17] The Applicant does not contend that it has an electricity supply contract with the First Respondent or Shepstone House, which is a prerequisite to requiring the supply of any electricity to those premises.

[18] All the Applicant contends is that Mr Singh was allegedly advised by Mr Dorfling to supply a bulk meter in the Nedbank Building, adjacent to Shepstone House, and that the bulk meter could service both buildings.

[19] Mr Dorfling however denies this. This is not a pertinent issue which the Applicant has sought to refer to oral evidence. However, and in any event, it is trite law that an official cannot override the provisions of a by-law.

[20] The Applicant has accordingly not complied with by-law 10 (1).

[21] The Applicant concedes that since July 2011 it has utilized the supply of electricity to the Nedbank building, to Shepstone House, which is situated on a different property.

[22] This would be in violation of by-law 11. The court was accordingly entirely within its rights to grant the order which it did on the 24 May 2012 allowing the First Respondent on an interim basis to enter the premises of the Nedbank

building and inspect the bulk meter and electrical connection therein.

[23] Notwithstanding the order of 24 May 2012 and the termination of the electricity supply from the Nedbank building to Shepstone House on 11 June 2012, on 13 June 2012 it was found that the electricity supply was restored, as confirmed on the 12 July 2012.

[24] Applicant has not shown any right to an electricity supply to Shepstone House. In addition it is unlawful for it to supply electricity to Shepstone House from the Nedbank building.

THE OCCUPANCY OF SHEPSTONE HOUSE ON THE FLOORS ABOVE THE GROUND FLOOR:

[25] Section 14 of the Building Act provides :

‘14. Certificates of occupancy in respect of buildings. ---

(1) A local authority shall within 14 days after the owner of a building of which the erection has been completed, or any person having an interest therein, has requested it in writing to issue a certificate of occupancy in respect of such building –

(a) issue such certificate of occupancy if it is of the opinion that such building has been erected in accordance with the provisions of this Act and the conditions on which approval was granted in terms of section 7, and if certificates issued in terms of the provisions of subsection (2) and, where applicable, subsection (2A), in respect of such building have been submitted to it;

[Para. (a) substituted by s. 7 (a) of Act No. 62 of 1989.]

(b) in writing notify such owner or person that it refuses to issue such certificate of occupancy if it is not so satisfied or if a certificate has not been so issued and submitted to it.

(1A) The local authority may, at the request of the owner of the building or any other person having an interest therein, grant permission in writing to use the building before the issue of the certificate of occupancy referred to in subsection (1), for such period and on such conditions as may be specified in such permission, which period and conditions may be extended or altered, as the case may be, by such local authority.

[Sub-s.(1A) inserted by s. 7 (b) of Act No. 62 of 1989.]'

[26] It is common cause that the Applicant does not have a certificate in terms of s 14 of the Building Act allowing the occupancy of the floors above the ground floor of Shepstone House. Accordingly it is unlawful for the building other than the ground floor to be occupied.

[27] The First Respondent specifically refuses to issue the certificate on the basis that the Applicant has not complied with the First Respondent's requirements relating to fire prevention and control.

[28] Whether the Applicant has complied or not, is not for this court to decide in these proceedings, where the ejectment of the occupiers is claimed on the basis that no certificate of occupancy has been issued. If a certificate of occupancy should have been issued and/or was wrongly withheld, then the Applicant should pursue a remedy either of a *mandamus* against the First Respondent pertinently raising this issue so that expert evidence can be adduced in respect thereof, alternatively to possibly consider some form of review due to the First Respondent's refusal to issue such a certificate.

[29] The fact that such certificate of occupation has not been issued, as also supported by the court orders of 2002 and 2008, renders any continued occupation of Shepstone House unlawful.

THE APPLICATION OF PIE:

[30] The Second Respondents contend that the First Respondent should first apply the provisions of PIE.

[31] The First Respondent argues that PIE has no application in this matter because the occupiers are in Shepstone House with the Applicant's consent and so are not unlawful occupiers as defined in PIE.

[32] PIE defines 'unlawful occupier' as 'a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land ...'. The occupiers have the consent of the Applicant to occupy Shepstone House. Accordingly, the further terms of this definition would seem to find no application. If that is correct then PIE would not find application.

[33] In any event, even if they were unlawful occupiers,⁴ the Second Respondents have not taken this court into their confidence by advancing any particular grounds which would militate against the court exercising a discretion to order their ejectment. Indeed, their ejectment might be in their own best interest and safety.

[34] The occupiers have been provided with a copy of the papers. They have had ample opportunity to consider and find alternative accommodation or to at least raise that aspect with the First Respondent or its attorney. The First Respondent's attorney has invited them to interact with him, but such invitation was not taken up. Although the occupiers have not provided any details of their occupancy and status, they do not appear to be homeless persons who have squatted on a vacant piece of land. They are tenants apparently paying

⁴ In the sense of them occupying a building in respect of which occupation is unlawful due to a certificate of occupation not having been issued.

commercial rentals, who would simply have to find alternative rental accommodation. There has been no suggestion by them that such rental accommodation would not be available in the greater municipal area of the First Respondent. Accordingly there is no basis, assuming PIE to apply, that I could exercise a discretion in favour of them remaining on in Shepstone House.

[35] Safety considerations in any event necessitate their removal. There is nothing more the First Respondent could do after having created an opportunity where the Second Respondent could have interacted with the First Respondent's attorney, but no such interaction was forthcoming.⁵

COSTS:

[36] I am in agreement with the submissions advanced by the First Respondent that:

- (a) The Applicant's behaviour has been egregious in that the Respondent's bylaws have been violated and/or ignored. The Applicant has also disregarded previous court orders;
- (b) The Applicant failed to disclose the existence of the two previous court orders when it approached this court to obtain the initial relief on less than one and a half hours notice to the First Respondent, which notice was wholly inadequate;
- (c) The Applicant failed to demonstrate even a *prima facie* case.

[37] It is accordingly appropriate that the Applicant pay the costs relating to the two applications (excluding reserved costs dealt with below) on the attorney and client scale.

[38] Where costs have previously been reserved it is appropriate that the

⁵ *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 CC at paragraph [14].

Applicant also be directed to pay such costs, but on a party and party scale.

THE ORDER:

[39] The order granted is as follows:

- (a) The Rule *nisi* issued on 11 May 2012 at the instance of the Applicant is discharged with costs on the attorney and client scale;
 - (b) The Rule *nisi* granted on 24 May 2012 at the instance of the First Respondent (which contains a prayer for costs on the attorney and client scale) is confirmed;
 - (c) The Applicant is directed to pay any and all costs that were reserved from time to time, not already covered by the costs orders granted in paragraphs 1 and 2 above, on the party and party scale.
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DATE OF HEARING: 27/7/2012

DATE OF JUDGMENT: 7/8/2012

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ASSOCIATES