IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case No: 102/08

In the matter between:

MINISTER OF LOCAL GOVERNMENT AND HOUSING FOR THE WESTERN CAPE	First Applicant
THUBELISHA HOMES	Second Applicant
SEAKAY ENGINEERING SERVICES (PTY) LTD	Third Applicant

and

VARIOUS UNLAWFUL OCCUPIERS OF HOUSES SITUATED IN PRECINCTS 4 AND 6, DELFT SYMPHONY	First Respondents
CITY OF CAPE TOWN	Second Respondent
COUNCILLOR FRANK MARTIN	Third Respondent

REASONS FOR ORDER GRANTED ON 6 FEBRUARY 2008

VAN ZYL J:

[1] On 6 February 2008 I granted an order directing the first respondents, being the unlawful occupiers of houses situated in precincts 4 and 6 of Delft Symphony, to vacate such houses by no later than 18h00 on Sunday 17 February 2008. On Friday 15 February 2008, being the last working day before the eviction order was to come into operation, the first respondents gave notice of request for reasons for the said order. On the same day they served a notice of application for leave to appeal against the order on the following grounds, namely that this court had erred: (1) in entertaining the application as

one of urgency in terms of the relevant rule or statutory provision; (2) in granting a final order in terms of section 5(1) of the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* 18 of 1998 (the PIE Act); (3) in failing, on various grounds to which I need not now refer, to take into account that it would not be just and equitable to order that the first respondents vacate the houses in terms of the order; (4) in failing to order that the parties should engage in mediation as contemplated in section 7 of the PIE Act instead of making an eviction order; alternatively (5) in failing to order mediation as a precursor to an order of eviction.

[2] I have certain reservations as to the good faith of the first respondents in seeking reasons for the said order at this late stage. If they were contemplating an appeal, they could have requested reasons the day after the order was made or as soon thereafter as possible. I was not in chambers when the notice requesting reasons was served on Friday afternoon and only this morning did I have sight thereof. In view of the urgency of the matter, however, I am prepared to give brief reasons for the order.

[3] The first applicant was represented by Mr M Donen SC, assisted by Ms H Rabkin-Naicker, the second to fourth applicants were represented by Mr S C Kirk-Cohen SC assisted by Mr T Masuku, and the first respondents were represented by Mr A Coetzee. There was no representation for the second and third respondents, who indicated that they would abide by the decision of this court. The court expresses its appreciation to the said counsel for their full heads of argument and presentation of the cases on behalf of the respective parties.

[4] This matter commenced on 16 December 2007, when some 1600 persons, to

whom I shall refer as the first respondents, occupied houses in various stages of completion and built under the national housing project colloquially referred to as N2 Gateway. On 24 December 2007, when I was on recess duty, the first respondents approached this court for an order interdicting their eviction from the said houses. I granted the order in chambers on the basis that the order in terms of which they were being evicted was stale in that it dated back to 23 October 2006 and had been granted by the Bellville Magistrate's Court at the instance of the second respondent. In addition I was of the view that it was inappropriate for any eviction to be executed on Christmas Eve. For these reasons I allowed the matter to stand down to 3 January 2008, on which date I set aside the stale order with a view to preventing its being used again for purposes of evicting any of the first respondents.

[5] The matter then stood down to 8 January 2008, when the applicants filed their application and brought an application for directions, in terms of section 5(2) of the PIE Act, regarding service of their proposed eviction application on the first respondents. I granted such order and the matter stood down once again to 15 January 2008, on which date, after hearing argument on behalf of the respective parties, it was postponed to 29 January 2008 for hearing. The respondents were to file answering papers by 21 January and the applicants were to reply thereto by 25 January 2008.

[6] The hearing commenced on 30 January 2008, when a group of unlawful occupiers, who were not represented by the attorney and counsel acting for the first respondents, requested a postponement to 6 February 2008 to enable them to join forces with the first respondents. They were given leave to deliver supplementary answering

affidavits by 1 February 2008, to which the applicants had to reply by 5 February 2008. After full argument had been heard, I granted the eviction order in terms of a draft prepared by the applicants. Although the applicants initially sought an order that the first respondents be evicted within forty-eight hours, I was not prepared to do so in view of the fact that their unlawful occupation of the houses in question had been instigated by the third respondent, who was, in terms of the order, interdicted from inciting third persons to take possession of or occupy the houses unlawfully. By ordering a much later date than usual for vacating the houses, I believed that this would give the first respondents sufficient time to arrange for returning to their previous homes or for acquiring alternative accommodation. I requested them urgently to exercise patience and to give cooperation to the authorities so that the next phase of the project could be completed as soon as possible and they could stand in line for future allocations, provided they qualified for housing.

[7] The first applicant participated in these proceedings in his official capacity as the representative of the provincial executive authority responsible for housing. The second applicant is a public company described as the implementing agent for the N2 Gateway project. In such capacity it contracted with the third and fourth applicants, being members of a consortium with which the second applicant contracted for building the said houses. It was not disputed that the third and fourth applicants were in undisturbed possession of the houses prior to the unlawful occupation thereof by the first respondents. That is also the basis on which such applicants have approached this court for a spoliation order inasmuch as they do not qualify to bring an application in terms of the PIE Act.

[8] The gist of the applicants' case was that the houses unlawfully occupied by the first respondents had been allocated, or were in the process of being allocated, to other parties, who were being severely prejudiced by the conduct of the first respondents. Much as this court and all other role players sympathise with the first respondents, many of whom had been on waiting lists for housing for long periods of time, this does not entitle them to take the law into their own hands. If this should be sanctioned by the courts, the rule of law would be gravely transgressed and anarchy would ensue, particularly if persons in authority, such as the third respondent, should instigate and incite such conduct.

[9] It is quite true that section 26(1) and (2) of the Constitution provide that everyone has the right of access to adequate housing and that the State is required to take such measures, within its available resources, as may achieve the progressive realisation of this right. Section 26(3) in turn provides that no one may be evicted from their home without an order of court. In the present case the first respondents left their existing homes, most of which were in backyards, and occupied the houses in question unlawfully. Such conduct cannot be justified and the unlawfully occupied houses cannot be regarded as homes for purposes of the said section.

[10] It is common cause that the first respondents are unlawful occupiers as defined in section 1 of the PIE Act. The first and second applicants have brought the present application in terms of section 5(1) of such Act. This provides that 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. The court may grant

such order if it is satisfied, firstly, that there is real and imminent danger of substantial injury or damage to any person or property if the unlawful occupier should not be evicted; secondly, that the likely hardship to the owner or other affected person exceeds that which the unlawful occupier might suffer should such order be granted; and, thirdly, that there is no effective alternative remedy available.

[11] I was quite satisfied, after reading the papers and hearing argument, that the first and second applicants have complied with all the requirements for an order in terms of section 5(1) of the PIE Act. The only question is whether a final order should have been granted. In this regard all the relevant facts were fully canvassed before me by way of founding, answering and replying affidavits. At no stage did the first respondents indicate, in their answering affidavits or during argument, that they wished, or intended, to place any further information before the court, be it by way of supplementary affidavits or otherwise. Section 5(1) allows for the granting of an interim order on the basis of the initial proceedings (notice of motion and founding affidavit) filed by the applicant. On the return day, after answering and replying papers have been filed, the order may be made final. In the present case no interim order was granted in view of the agreement of the parties as to the further conduct of the proceedings with regard to the filing of such further papers. There would have been no sense in granting an interim order if such papers have already been finalised.

[12] Even if the issuing of an interim order should be peremptory in terms of section 5(1) of the PIE Act, the applicants would, in my view, be entitled to make use of the provisions of section 4(6) thereof in that the first respondents had occupied the houses for

less than six months at the time the proceedings were initiated. When all the relevant circumstances placed before me are considered, I am satisfied that it is just and equitable for an eviction order to be granted against the first respondents. In this regard I should point out that the first respondents did not furnish any concrete facts relating to the rights and needs of the elderly, children, disabled persons and households managed by women, as mentioned in section 4(6). They clearly had more than sufficient time to do so.

[13] The gravamen of the case for the first respondents is that they feel aggrieved at the allocation procedure which has hitherto excluded them from acquiring housing. Such allocation procedure, they aver, is flawed, irrational and seriously prejudicial to their rights. They would be left homeless should they be evicted, thereby making the granting of the relief claimed unjust and inequitable. In this regard they allege that their personal circumstances have not been properly considered, especially in respect of women, children and the elderly, and that they are being discriminated against. The applicants should have offered them alternative accommodation and engaged in mediation discussions with them prior to bringing the present application.

[14] There may be justification for these grievances. They do not, however, constitute a defence against an application for eviction. As I mentioned during argument, mediation or, failing that, review proceedings could have been considered at the time the allocations were made. It is not the function of this court to make any decision or tender any views in this regard. It is likewise not the function of the court to order parties to submit themselves to mediation proceedings. That is not what section 7 of the PIE Act provides. At most a court may recommend such course of action.

[15] It follows that I am satisfied that the first and second applicants have made out a proper case for the relief claimed in terms of the PIE Act. I am likewise satisfied that the third and fourth applicants have made out a case for a spoliation order. The first respondents in fact offered no defence to counter this relief.

[16] It is for these reasons that I granted the aforesaid order of 6 February 2008.

D H VAN ZYL