



IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO.: 9643/2007

In the matter between

OMARJEE ESSOP MOHAMED OMAR N.O.

(in his capacity as trustee of the Essop Mohamed Omar Will Trust) Applicant

and

EBRAHIM ESSOP MOHAMED OMAR

First Respondent

AHMED ESSOP MOHAMED OMAR

Second Respondent

ANWA ESSOP

Third Respondent

LATIEFA EDRIES

Fourth Respondent

JANEY HALIM

Fifth Respondent

SHANAAZ SAMUELS

Sixth Respondent

MAGDALENE GEORGE

Seventh Respondent

REDIWAAN PHILANDERS

Eighth Respondent

MOGAMAT ABRAHAMS

Ninth Respondent

VERONICA BART

Tenth Respondent

NADIA ROSSIE

Eleventh Respondent

ALLIE RHODE

Twelfth Respondent

JUDGMENT GIVEN ON 1 NOVEMBER 2011

ASSHETON-SMITH, AJ

- 1 The background facts to the application are that during the 1940's the late Essop Mohamed Omar acquired certain immovable property described as erven 8504, 8505 and 8513 Cape Town, situate in an area known as District 6. The property is bordered by Nelson, Pontac and Aspeling Streets. A number of small dwelling houses stand on the property. These dwelling houses were occupied by certain of Mr Omar's family members and longstanding tenants. The property in issue is held by the Essop Mohamed Omar Will Trust ("**the Trust**") and the Applicant, who is the sole Trustee of the Trust requires the property to be vacated so that he can sell the property and distribute the proceeds of such sale to the residuary heirs and wind up the Trust in accordance with the Will of the late Essop Mohamed Omar. As the twelve Respondents cited in the application had refused to vacate the dwelling houses they occupied, the Applicant launched the present application against them in July 2007 in terms of section 4 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998 (the "**Pie Act**").

- 2 Judgment was granted in this matter by the Honourable Mr Acting Justice Binns-Ward (as he then was) on the 11th day of May 2010 (the "**Judgment**") and in terms thereof he granted an order that the First, Second, Third, Eighth and Ninth Respondents vacate the property. By the time of the hearing of the application the Fifth, Sixth and Twelfth Respondents had voluntarily vacated the property. The application against the Fourth, Seventh, Tenth and Eleventh Respondents was postponed by Binns-Ward, AJ on the terms set out in paragraph 5 of the Order handed down pursuant to the Judgment which reads as follows:

"The application against the Fourth, Seventh, Tenth and Eleventh Respondents is postponed sine die, with leave granted to the Applicant to apply to the Judge President for the set down thereof, on directions to be given as to the exchange of Affidavits and other procedures, for further consideration and determination on the basis of additional evidence concerning the availability of alternative accommodation for the said Respondents."

- 3 The application was then set down for hearing on 16 August 2010 by an order handed down by the Honourable Judge President on 15 June 2011. On 16 August 2010, the Honourable Judge President granted an Order that the application be postponed for hearing to 17 October 2011.
- 4 The Applicant seeks the eviction of the remaining Respondents being the Fourth, Seventh, Tenth and Eleventh Respondent (the "**Respondents**") from the properties described as Erven 8504, 8505 and 8513 Cape Town.
- 5 It is clear from the Judgment of Binns-Ward, AJ that there was insufficient information on the evidence placed before the Court, in order for the Court to assess in any meaningful way the prospect of the Respondents being able to obtain lodging in a home or if they could, in what conditions they could be housed.¹ It is also clear from the Judgment that the Court was unable on the information then to hand in the evidence to find that it would be just and equitable, in the sense contemplated by section 4 (7) of the PIE Act, to make an order for eviction at that stage.²
- 6 Binns-Ward AJ also made it clear in the Judgment that "*the postponement of the application does not have the effect of authorising [the Respondents'] continued occupation of the property: it denotes no more than that the court is not able on the information currently to hand in the evidence to find that it would be just and equitable, in the sense contemplated by Section 4(7) of the Pie Act, to make an order for their eviction at this stage.*"
- 7 The Respondents were also advised that it was expected of them that they should be pro-active in seeking to obtain such alternate accommodation. In this regard the learned Judge referred to what had been stated by Yacoob J in the matter of *Occupiers of 51 Olivia Road and 197 Main Street, Johannesburg v City of Johannesburg 2008 (3) SA 208* at page 217 G to I, as follows:

¹ See paragraph 58 of the judgment

² Paragraph 63 of the Judgment

"It must be understood that the process of engagement will work only if both sides act reasonably and in good faith. The people who might be rendered homeless as a result of an order of eviction must, in their turn, not content themselves with an intransigent attitude or nullify the engagement process by making negotiable, unreasonable demands. People in need of housing are not, and must not be regarded as a disempowered mass. They must be encouraged to be proactive and not purely defensive."

He also referred to what had been said by Harms JA (as he then was) in the matter of *Ndlovu v Mgcobo, Bekker and another v Jika* 2003 (1) SA 113 (SCA) at page 124 E to F which reads as follows:

"Another material consideration is that of the evidential onus. Provided that procedural requirements have been met, the owner is entitled to approach the court on the basis of ownership and the Respondents' unlawful occupation. Unless the occupier opposes and discloses circumstances relevant to the eviction order, the owner, in principle, will be entitled to an order for eviction. Relevant circumstances are nearly without fail facts within the exclusive knowledge of the occupier and it cannot be expected of an owner to negative in advance facts not known to him and not in issue between the parties. Whether the ultimate onus will be on the owner or occupier we need not now decide."

- 8 Binns-Ward AJ stated in the Judgment that section 26 of the Constitution does not afford a right to unlawful occupiers against eviction, even if that may result in homelessness. The effect of section 26(3) is, so he said, to afford a right against arbitrary eviction: if eviction is to occur, it must happen with regard to the evictees' human rights, more especially, their right to dignity. In dealing with this, he repeated that it "is the availability of alternative accommodation for [the Respondents] that is insufficiently dealt with on the evidence". He went on to say "On the contrary, if the court were to be satisfied that reasonable alternative accommodation was available to them it would be just and equitable that the owner of the property should be allowed to assert its entitlement to regain full possession thereof".

- 9 The Applicant supplemented its papers by filing a supplementary affidavit which was deposed to by Omarjee Essop Mohammed Omar on 15 December 2010.. The supplementary affidavit refers to a report prepared by Ms Abel, a social worker employed by the Applicant who conducted interviews with the Respondents in order to ascertain their personal circumstances, their means and to explore alternative accommodation options. The report of Ms Abel is dated 5 September 2010, and she recommended in her report that any suitable housing options identified by the Applicant through the Department of Social Development could be put forward to the parties, and she suggested that counselling be offered to help the parties adjust to their move. Various letters were also written to Respondents' attorneys inviting the Respondents to assist in the process. When I put to Applicant's counsel that the report was outdated and of no real assistance to the court regarding the present position of the Respondents and as to what alternate accommodation is actually available to them, it was argued by Applicant's counsel that the Applicant had done what it could in that: the Applicant had invited the Respondents through their attorney to embark upon a consultative process, which invitation was not taken up by the Respondents' attorney; and the Applicant appointed a social worker to interact with the Respondents and received little co-operation from the Respondents in this process. Applicant's counsel submitted that in the case of the Tenth Respondent, she refused to hold a discussion with Ms Abel, and simply referred the matter to her lawyers. His submission was that the Applicant had done all that it possibly could and what was required of it, and that it did so punctually and properly. He submitted that the Respondents' failure to engage with the Applicant and their failure to take any proactive steps in seeking to find such alternative accommodation should not be held against the Applicant by the court, by refusing to evict the Respondents. He further submitted that other than a belatedly filed supplementary affidavit from the Respondents (filed on the eve of the hearing, after heads of argument had been filed and to which I refer to below), if anything shows that (despite Binns-Ward AJ's advices to the Respondents in the Judgment referred to above), there have been no proactive attempts made by the Respondents to seek alternate accommodation, despite the elapse of a year and some 5 months since the Judgment.

- 10 The supplementary affidavit filed by the Respondents, other than referring to offers made to the Applicant for the purchase of the properties, only 18 old age homes from the list provided by the Applicant in an annexure to its supplementary affidavit were contacted by the Respondent's attorneys' offices, but no details are given as to when this contact occurred or details of such enquiries as to when accommodation may be available and/or the cost thereof. During argument, Applicant's counsel also pointed out that the Applicant could not make applications for alternate accommodation or make arrangements on the Respondents' behalf, and that the Applicant had thus taken the issue regarding the availability of alternate accommodation as far as the Applicant could.
- 11 The Applicant, however, in its supplementary affidavit, also does not identify exactly what accommodation is available, but simply refers to a list of possible accommodation, marked "E" to the said Affidavit. This takes the issue of what reasonable alternative accommodation is available to the Respondents no further. There is no further evidence of any other steps taken by the Applicant since the filing of Applicant's supplementary affidavit regarding it ascertaining whether there is alternative accommodation available to the Respondents.
- 12 As mentioned above, the Respondents filed a supplementary affidavit deposed to by the Seventh Respondent, on the eve of the hearing. I agree with counsel for the Applicant that this affidavit does not assist the court. It amounts merely to a criticism of the Applicant's supplementary affidavit on the basis that the Applicant therein fails to identify whether the old age homes and frail care centres listed by the Applicant (in Annexure "E" thereto) are available to the Respondents or affordable by them. This is certainly a valid criticism, but takes matters no further.
- 13 Paragraph 8 of the Respondent's supplementary affidavit is mere denial that the Respondents have made little or no attempt to find alternative accommodation. There are no averments at all to assist the court in determining whether or not alternative accommodation is available to the Respondents, and as to what steps Respondents had taken to seek alternative accommodation, nor as to whether any assistance could be obtained from friends and family and, if so, why accommodation with friends and family are not an option. No details are given in

support of such denial, and the only conclusion one can come to is that no explanation can be given by the Respondents as they simply did nothing to look for alternative accommodation.

- 14 In my view, this lack of proactiveness on the part of the Respondents is directly at odds with the thrust of the Judgment as to what was required of the Respondents. I find the fact that the Respondent's approach to the District 6 Beneficiaries Trust and attempts to buy the properties from the Applicant some indication that the Respondents did something, but by December last year, the Respondents knew that an offer by them would not be accepted by the Applicant. Nonetheless, the Respondents give no evidence of what they have done following this to seek alternate accommodation. The Heritage status of the property is also raised in the Respondents' supplementary affidavit, but I consider this aspect to be irrelevant to the issues to be considered in this matter. Although it was argued by the Respondents' counsel that if the application was further postponed and, in the interim, such Heritage Status was to be granted, that this would result in the properties having little or no commercial value, and as such, it is possible that these properties would then become available to the Respondents. I agree with submission made by Applicant's Counsel that this argument is clearly offensive to any sense of justice.
- 15 Both counsel for the Applicant and the Respondents conceded that the evidence that had been placed before this Court as to what alternate accommodation was available to the Respondents was extremely limited and certainly is lacking in the detail that I believe was envisaged by Binns-Ward AJ when he postponed the application in respect of the eviction of the Respondents in order to determine whether reasonable alternate accommodation was available to them. The question that then arises is who bore the onus to provide the court with such evidence.
- 16 The Respondents have presented no meaningful evidence that they have been proactive in seeking alternate accommodation, despite the elapse of considerable time since the Judgment, and despite the fact that the Applicant has since June 2007 been seeking their eviction. One would expect that if there was truly no

alternate accommodation available to the Respondents, they would have set out in detail the various steps and enquiries they had undertaken to ascertain this position. In my view the Judgment makes it clear that this is what was required of them. Instead they have chosen not to put any meaningful evidence before this Court to place it in a position for it to determine whether it is just and equitable for their eviction to be postponed any further. They have, instead, sought, on the evidence before the Court, not to engage with the Applicant, and not to take any proactive steps to seek alternate accommodation.

- 17 It seems that it would not be just and equitable for the Respondents to rely on their inaction to seek a further postponement of their eviction, alternatively, the dismissal of the Applicant's application for eviction against the Respondents, which is what the Respondents' counsel submitted the Court should find, based on what I understood to be an argument that neither the Applicant nor the Respondents had really placed much more information before the Court regarding the alternate accommodation available to the Respondents.
- 18 It is clear to me that the Respondents were afforded an adequate opportunity to be proactive and to provide this Court with further evidence as to why it would not be just and equitable to evict them, alternatively, that there is in fact no alternate accommodation available to them. They have failed to do so. As the Respondents are represented by an experienced attorney from a prominent firm, I can only conclude that there is no further evidence or facts than those presented to this Court by the Respondents. The Respondents have sought not to place any evidence or facts before the Court and, as such, the Court is constrained to deal with the facts before it in making a determination.
- 19 I was referred to by both counsel for the Applicant and the Respondents to the case of *ABSA Bank Ltd v Murray and Another* 2004 (2) SA 15 (C) and the principle espoused therein that a balance needs to be struck between the proprietary rights of the owner and the basic human rights of the occupier, and that the PIE Act does not provide for the negation of either class or category of rights, and leaves it to the Courts to endeavour to address the tension between

them justly and equitably.³ In this case guidelines to be employed by the Court in addressing this tension justly and equitably are summarised to the extent necessary below. The discretionary power of the judiciary to impinge on the property owner's common law right to obtain possession of the property is to the extent that considerations of justice and equity demand.⁴ In each case, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so in all of the relevant circumstances.⁵ This entails not only considerations of the rights and needs of the occupiers, which entails the right to a human dignity, (ie the right not to be treated in a cruel, inhumane or degrading way, and the availability of alternative accommodation, and the needs would be considerations of what would have to be satisfied to give substance to the rights aforesaid),⁶ but also the due recognition of the owner's common law and constitutional rights as well.⁷ An opinion as to what is just and equitable in the circumstances must, in a balanced even handed manner, take into account the rights and needs of both sides.⁸ In order to determine what may be just and equitable, the court requires evidence of the relevant circumstances. Although the Court referred to the Ndlovu decision and the fact that the Supreme Court of Appeal had held that the evidential onus of demonstrating circumstances meriting the limitation of the owner's right to possession was on the unlawful occupier and, in the absence of such evidence, the owner is entitled in principle to an order for eviction, it held that the court's decision on whom to fix the ultimate onus, should be decided by the court on the basis of all the relevant facts and circumstances available to it.⁹

- 20 In my view, The Respondents in the circumstances bore the *onus* to place evidence before the Court to demonstrate that it would not be just and equitable for the Court to evict the Respondents. It was also incumbent on the Respondents to take proactive steps to seek alternative accommodation. There is no evidence that the Respondents did so. Furthermore, the Respondents failed and/or refused to embark upon a process of engagement with the Applicant to

³ At paragraph 21

⁴ At paragraph 17

⁵ At paragraph 18

⁶ At paragraph 28

⁷ At paragraph 34

⁸ At paragraph 33

⁹ At paragraphs 37 and 38

seek alternative accommodation. In fact, as appears from Ms Abel's report, the Fourth and Fifth Respondents made it difficult for Ms Abel to complete her report.

- 21 It was submitted by Counsel for the Applicant that despite Respondents contention in paragraph 2 of Respondents' heads of argument that the personal circumstances of the Respondents had not changed, that this was not so, if one had regard to Ms Abel's report to which I was referred and which counsel for the Applicant submitted should be considered. These additional facts listed below were not placed in issue by the Respondents.
- 22 Having regard to Ms Abel's report, the further information available to the court regarding the position with respect to each of the Respondents is dealt with below.
- 23 The information that was available to the Court in respect of the Fourth Respondent at the time that the matter was heard previously by Binns-Ward AJ is dealt with in paragraph 46 of the Judgment. From the report prepared by Ms Abel, the Fourth Respondent is a 76 year old woman who lives alone. She maintains her position that she is a very independent person, able to live on her own, and does not want to go to an old age home. It appears that she unable to be accommodated by her son who lives in Grassy Park, and also does not want to live with anyone else, as she will lose her freedom. She was uncooperative when asked by Ms Abel what her son's economic situation was, and refused to disclose this. Abel reports that it was her impression that the Fourth Respondent was evasive and unforthcoming throughout the interview held with her, and further telephone calls to her did not illicit any further information regarding her son's position. On the face of it, it seems that the Fourth Respondent is in a position to find alternative accommodation if assisted by her son, but has failed to take any proactive steps to do so. In this regard, it seems by virtue of the fact that in doing so, she would lose her freedom. It also seems from Abel's report that the Fourth Respondent was not co-operative.
- 24 The factual position with respect to the Seventh Respondent at the time the Application was heard by Binns-Ward AJ is set forth in paragraph 47 of the Judgment which reads as follows:

"The Seventh Respondent, who was born on 23 December 1937, moved onto the property in or about 1980. At that time she was employed by the First Respondent at his 'strapping factory'. One of the Seventh Respondent's children, the Eighth Respondent, also lives on the property, at a different address. The Seventh Respondent's current income consists of an old age pension of R1 010.00 per month. She states that her health is poor and she has regularly to attend at Groote Schuur Hospital for treatment. In an update affidavit made on 19 April 2010, the Seventh Respondent pointed out that her husband had recently died. She stated further that she was 'very independent and do all my own chores, therefore I do not see myself living in an old age home. ... all my children are married and have their own families to take care of and cannot offer me accommodation. We have built up a very close-knit community and do not see ourselves living elsewhere. We live in close proximity to all amenities liked church, hospital, shops etc."

The Seventh Respondent is a 73 year old woman whose health is fragile. She currently lives on the property with her daughter (Darrelyn), her son in-law (David) and their two children, 25 and 21 years old respectively. She receives a pension of R1 010.00 and it appears from Ms Abel's report that it would be possible for her to move to alternative accommodation with her daughter and her family and that she would, through her pension, contribute to the household expenses, including rental. It thus appears from the information that is available to me, that the Seventh Respondent would be able to find alternative accommodation and live with her daughter and her daughter's family.

- 25 The salient facts pertaining to the Tenth Respondent as at the date upon which Binns-Ward AJ heard this application are set out in paragraph 51 of the Judgment which reads as follows:

"The Tenth Respondent is a recently retired school teacher. She has lived on the property her entire life. Her mother had moved to the property in 1915, when she was 7 years old, and had lived there ever since until her death in her late nineties, some time after the institution of these proceedings. As at 2007, just before her retirement, the Tenth Respondent expected to be in receipt of a R60 000.00 once off pension payout and thereafter to receive approximately R2 000.00 per month as a monthly pension. She pointed out that her family was

unable to offer her alternative accommodation and that she herself did not have the means to find reasonable alternative accommodation; certainly not in the area in which she had lived since was born. In an updated affidavit, made on 19 April 2010, the Tenth Respondent stated 'I do not see myself living in an old age home as I am totally independent and value my space. I involved in my church and community doing voluntary work using my teaching expertise and are called up very often to assist at the neighbouring school where I taught for 20 years. My two sons are married and they are not able to offer me accommodation as their houses are just big enough for their families'."

As appears from Ms Abel's report, the Tenth Respondent was not prepared to discuss matters with Ms Abel and, accordingly, no further information is available to the Court regarding the present position of the Tenth Respondent as the Tenth Respondent has two married sons and in the absence of any further facts and evidence on the face of it, the Tenth Respondent is in a position to find alternative accommodation and has two sons to assist her.

- 26 In relation to the Eleventh Respondent, she is an 82 year old woman living alone, and the salient facts pertaining to the Eleventh Respondent are dealt with by Binns-Ward AJ at paragraph 52 of the Judgement, which are not repeated here. As appears from Ms Abel's report, the Eleventh Respondent is averse to being put into an old age home as this would result in her losing her privacy, independence and feeling "controlled" by a set of institutional rules. She appears, however, still to be driving a motor vehicle and very close to her neighbours. As appears from Ms Abel's report, the Eleventh Respondent had been offered a home with her friend in Kraaifontein, but that a drawback of this option was that there were no shops nearby and that she would have to drive or rely on her friend to do her shopping. From the Respondent's Supplementary Affidavit this option is apparently no longer available, as the Eleventh Respondent's friend since passed away. It appears thus that the Eleventh Respondent had taken steps to procure alternate accommodation, and it seems that she could obtain alternative accommodation with her friend in Kraaifontein which option is no longer available

to her. She is alone with no children. On the face of it and without further evidence it appears that there are no family connections to support her. There is also no evidence that there is an old age home or frail care facility available to her as alternate accommodation.

- 27 Accordingly, the application in respect of the eviction of the Eleventh Respondent will be postponed *sine die*. The Applicant may set the postponed application down for hearing on supplemental papers with respect to the provision of alternative accommodation for the Eleventh Respondent, as there is clearly insufficient information in this regard. The Applicant is granted leave to set the postponed application down for hearing on such supplemented papers.
- 28 In relation to the Eleventh Respondent, I believe that she should be pro-active in seeking to obtain alternative accommodation, and if she does not demonstrate to this Court at the hearing of the matter in due course, the Court may, in such circumstances, be prepared to grant an order for her eviction at the instance of the Applicant. This is, however, a matter that I am, at this stage, not in a position to decide, and the Court will decide this matter in due course once it is placed in possession of sufficient facts in order to do so.
- 29 The Applicant should not proceed under the misapprehension that it does not have any obligation to take steps to identify suitable alternate accommodation for her, and should engage with the Eleventh Respondent in this regard.
- 30 As regards the Fourth, Seventh and Tenth Respondents, on the evidence that is before this Court, and the absence of any evidence to the contrary proffered by these Respondents, it appears that they can obtain alternative accommodation, and have family support to do so. In these circumstances, these Respondents and the persons occupying the property under them should be ordered to vacate the property. An order will be issued directing them and the persons occupying the property under them to vacate the premises by the end of February 2012, failing which the Applicant shall be entitled, as at 1 March 2012 to obtain and have executed a writ of execution and to recover the attendant costs from the

Respondents concerned. This period appears to be fair and reasonable in the circumstances.

31 It is noted, that the Applicant has tendered rent free accommodation at the current addresses of the Respondents, and a payment of R7 500.00 each to cover their relocation expenses shall apply to the Fourth, Seventh and Tenth Respondents. I consider this tender to be fair and reasonable.

32 It is ordered that:

32.1 The Fourth, Seventh and Tenth Respondents and the persons occupying the property under them are directed to vacate the property on Erven 8504, 8505 and 8513 Cape Town by no later than 29 February 2012.

32.2 Upon compliance by each of the Fourth, Seventh and Tenth Respondents with the provisions of paragraph 1 by the date stipulated therein, the Applicant shall thereupon pay to each such Respondent the sum of R7 500.00 (Seven Thousand Five Hundred Rand) by way of a contribution to each such Respondent's costs of relocation and re-establishment.

32.3 In the event of non-compliance by any of the Respondents or the persons holding under them with the provisions of paragraph 1 of this order, the Applicant shall be entitled, as from 1 March 2012, to obtain the issue by the Registrar and execution by the Sheriff of a writ of eviction to enforce the removal of the said persons from the property.

32.4 The application against the Eleventh Respondent is postponed sine die, with leave granted to the Applicant to apply to the Judge President for the set down thereof, on directions to be given as to the exchange of affidavits and other procedures, for further consideration and determination on the basis of additional evidence concerning the availability of alternative accommodation for the said Respondent.

- 32.5 Save that any Respondent against whom it is necessary to issue and execute a writ of eviction shall be liable for the Applicant's costs incurred in connection therewith, there shall be no order as to costs.



ASSHETON-SMITH, AJ