IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: 13700/14

In the matter between:

CITY OF CAPE TOWN Applicant

And

THOSE PERSONS OCCUPYING AND/OR

INTENDING OR ATTEMPTING TO OCCUPY OR

ERECT STRUCTURES ON ERF 18370, KHAYELITSHA Respondents

HEARD : MONDAY 9 NOVEMBER 2015

DELIVERED : MONDAY 14 DECEMBER 2015

JUDGMENT

Nuku, AJ

Introduction

[1] This is an application for an eviction in terms of the section of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ('the PIE Act').

[2] Applicant is the City of Cape Town, a metropolitan municipality established in terms of the Local Government: Municipal Structures Act of 1998 read with The Province of the Western Cape, Provincial Notice 479/1000 dated 22 September 2000. Applicant was represented by Ms R Williams, SC who appeared together Ms M Adhikari.

[3] Respondents are all the persons occupying erf 18370 Khayelitsha ("the property"). Ten of the respondents were represented by Ms R Nyman who appeared together with Mr A Mahomed. These are the respondents who referred to themselves as the executive committee of the New Castle Informal Settlement. The remainder of the respondents were not represented in these proceedings.

[4] Applicant seeks an eviction of respondents on the basis that respondents' occupation of the property is unlawful as applicant has not given respondents consent to occupy the property.

[5] Respondents oppose the application and have brought a counter - application seeking an order directing applicant to engage with each of the respondents

and staying the application for eviction pending the outcome of the engagement process.

[6] On 1 August 2014 the applicant launched an application for an urgent interdictory relief ('the interdict application') and simultaneously launched eviction proceedings in terms of the Pie act for the eviction of the respondents ('the eviction application'). The interdict was aimed at interdicting and restraining persons who intended to occupy the property and did not affect the respondents as they were already occupying the property.

[7] On 1 August 2014, Roux AJ granted an interim interdict in the form of a *rule nisi* with the return date being 24 November 2014. On 22 August 2014 Ndita J granted an order authorising the issue of the notice of eviction. The order also made provision for the service of the notice of eviction on the respondents. For some reason which is not apparent on the record, on 18 September 2014 Blommaert AJ extended the *rule nisi* to 10 October 2014. On 10 October 2014, Baartman J postponed the application to 31 October 2014. On 31 October 2014, Katz AJ postponed the application to 26 February 2015 and extended the *rule nisi* accordingly to the same date.

[8] On 26 February 2015, Hlophe JP granted an order making the interim interdict final and the application was postponed for hearing in the Fourth Division on 29 April 2015. On 29 April 2015, Gassner AJ postponed the application 11 May 2015. She erroneously extended the rule nisi to 11 May 2015 although it had already been made final by Hlophe JP on 26 February 2015.

It is not apparent from the record what transpired on 11 May 2015 as the next Court order postponing the application is dated 15 May 2015. On 15 May 2015, Gassner AJ, postponed the application for hearing in the Fourth Division on 26 August 2015. She also erroneously extended the *rule nisi* to 26 August 2015. It is not apparent from the record what transpired on 26 August 2015 as the next Court order postponing the matter is dated 28 August 2015. On 28 August 2015, Mantame J postponed the application for hearing in the Fourth Division on 9 November 2015. She also directed that the applicant to re-serve the Notice in terms of Section 4(2) of PIE Act that had been issued by Ndita J on 22 August 2014. On 13 October 2015, Blignault J granted an order authorising the Registrar of the Court to issue the Notice of Eviction Proceedings in terms of Section 4(2) and 4(5) of the PIE Act. The same order directed the manner in which the service of the notice was to be effected on the respondents.

[9] The Access to Justice Association of Southern Africa was admitted by the Court as an *amicus curiae* but they did not any file submissions.

Factual background

[10] Applicant is the owner of Erf 18370, Khayelitsha, ("the property") held under title deed number T10662/2002. The property is about 416, 1700 hectares in extent. There is a portion of the property over which there is an informal settlement known as Endlovini informal settlement. In respect of this portion of

the property the applicant provides shared water and ablution services to the current occupiers of the property. This portion is occupied with the consent of the applicant and there are negotiations to have the structures electrified with a view of eventually upgrading them into formal housing. There is also a portion of the property which is an open piece of land which applicant alleges is bio-diversity sensitive and dune area which cannot be developed. This is the portion that is occupied by the respondents.

[11] On 13 June 2014, the applicant's employee identified a new structure which was in the process of being erected. Thereafter more structures were erected between leading up to the end of July 2014 when about 78 structures had been erected on the property. Some of the respondents give a slightly different version regarding the date on which they moved onto the property as they say that they moved onto the property in May 2014. However, nothing turns on the exact date on which the respondents moved onto the property.

[12] It is common cause that the respondents moved into the property without the consent of the applicant. During the interdict proceedings the applicant undertook to provide the court with the personal details of the respondents as at that stage, so said the applicant, the respondents refused to provide their details, were hostile and threatening to the officials of the applicant. The applicant also undertook to supplement its papers so as to deal with the issue of alternative accommodation, in the event that the that the details of the respondents are obtained and they are to be genuinely homeless if evicted.

[13] The respondents filed an answering affidavit dated 29 December 2014 deposed to by Mxoliseni Zwayi. In the said affidavit the respondents consented to an order that would prevent further settlement. The respondents also raised the issue of having their structures modified in accordance with the tenents of what would be regarded as humane and habitable conditions for humans. The respondents also indicated their willingness to exit the land after a process of meaningful engagement and once adequate alternative accommodation was made available to them even if only as a reasonable temporary measure. The respondents also pointed out that the evictions would result in homelessness which could be obviated by a process of meaningful engagement.

[14] The applicant filed a replying affidavit dated 2 February 2015. In the said replying affidavit the applicant indicated that it would only be prepared to take submissions from the respondents as to what would constitute a just and equitable date for the vacation of the property, should the respondents be prepared to vacate the property voluntarily. The applicant also indicated that it had conducted a survey of the respondents which it had not been able to complete due to the fact that some of the structures were not occupied during the day and some of the respondents declined to take part in the survey. The applicant blamed the deponent to the answering affidavit for not placing the personal circumstances before the court and alluded to the fact that it will be extraordinarily difficult for the court to reach a just and equitable determination as to the relief sought by the applicant.

[15] In response to the invitation by the respondents to engage with them the Applicant took issue with the fact that the respondents had not provided detail as to the proposed parametres of the engagement sought. The attitude of the applicant was that it cannot meaningfully respond to the request by the respondents to engage with them. After setting out the applicant's constitutional obligations in regard to the provision of housing and bemoaning the fact that the respondents took the law into their hands by invading the property, the applicant indicated that it is, nevertheless, willing to meaningfully engage with the respondents. In response to the allegation that an eviction would result in homelessness, the applicant asserted that given that the respondents did not place their personal circumstances before the court, there is no evidence that there is no evidence upon which the Court may conclude that the eviction of the respondents would result in them being rendered homeless.

[16] The attorneys of record for the respondents withdrew between April and May 2015. Ashraf Mahomed Attorneys came on record only for 10 of the Respondents during June 2015. When they came on record they also filed a Counter-application in which they, once more, raised the issue of the lack of meaningful engagement. In the founding affidavit to the counter-application, the deponent, Mxoliseni Zwayi, clarified his authority to depose to the affidavit on behalf of the respondents. He advised that he was only authorised to depose to the affidavit in respect of the 10 respondents who are the members of the executive committee of the New Castle informal settlement. He advised that he had no authority to depose to the answering affidavit dated 29

December 2014 on behalf of the respondents. He placed on record his personal circumstances as well as those of the other 10 respondents in respect of which he is authorised to depose to an affidavit on their behalf. These respondents confirmed the authority of Mr Zwayi to depose to an affidavit on their behalf and also confirmed their personal circumstances on affidavit.

[17] On 26 August 2015 the applicant filed its replying affidavit to the respondents' answering affidavit which also served as an answering affidavit to the respondents' counter-claim. In response to the respondents' assertion that the applicant is under a legal obligation to engage reasonably and meaningfully with each of the respondents and affected residents to whom it is obliged in law to provide suitable alternative accommodation, the applicant denied that it is obliged to provide emergency accommodation to the respondents. The applicant advanced reasons why it had not engaged with the respondents and advised that it remains prepared to engage with the respondents as to a just and equitable date for their eviction.

The issues

[18] The main issue that arises in this application is whether it is just and equitable to order an eviction of the respondents. The applicant contends that it is just and equitable to order an eviction of the respondents. The respondents contend that because of the applicant's failure to engage with them, the

application should be stayed pending the outcome of the engagement process.

[19] There are a number of other issues that have been raised between the parties. These include the applicant's application for the late filing of its replying affidavit, the respondent's complaint relating to the service of the notice of proceedings on the respondents, the respondent's application to strike out an answering affidavit as well as the contention by the respondents that the application is not urgent.

The relevant statutory and constitutional framework

[20] The advent of the Constitution and the subsequent passing into law of the PIE Act, brought about a departure from the way in which the courts dealt with Evictions. The Constitution did this by dealing with evictions under the same category as the right to housing. Section 26 of the Constitution of the Republic of South Africa, 1996 provides that:

"*26. Housing- (1) Everyone has a right to have access to adequate housing*

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

(3) No one may be evicted from their home, or have their home demolished, without an order of the court made

after considering all the relevant circumstances. No legislation may permit arbitrary evictions."

[21] The relevant provisions of the PIE act are sections 4(6) and section 6(3) which, respectively, provide as follows:

"4(6) If an unlawful occupier has occupied the land in question for less than six months at the time of 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 the rights and needs of the elderly, children, disabled persons and households headed by women.

6(3) In deciding whether it is just and equitable to grant an order for eviction, the court must 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".

[22] In ***Ndlovu v Nxabo; Bekker & Another v Jika*** 2003(1) SA 113 (SCA) at para 3 the Supreme Court of Appeal observed that "*PIE has its roots, inter alia,in Section 26 (3) of the Bill of Rights, which provides that "no-one may be*

evicted from their home without an Order of Court made after consideration of all the relevant circumstances: …. It invests in the Courts the right and duty to make the order which in the circumstances of the case would be just and equitable and it describes some circumstances that have to be taken into account in determining the terms of the eviction".

[23] In ***Port Elizabeth Municipality v Various Occupiers*** 2005 (1) SA 217 (CC) at para 11 the Constitutional Court held that: "*The prevention of illegal eviction from an Unlawful Occupation of Land Act of 1998 (Pie) was adopted with the manifest objective with overcoming the above abuses and ensuring that evictions, in future, took place in a manner consistent with the values of the new Constitutional dispensation. Its provisions have to be interpreted against this background*".

[24] Regarding the enquiry as to whether it is just and equitable to grant an eviction order, the Supreme Court of Appeal held in ***Ekurhuleni Metropolitan Municipality & Another v Various Occupiers, Eden Park Ext 5*** 2014 (3) SA 23 (SCA) at 33 outlined some of the relevant considerations relevant to the determination whether it is just and equitable to grant an order for eviction as follows:

(i) *"The manner in which the occupation was effected; (ii) the duration of the occupation; (iii) the availability of suitable alternative accommodation or land; (iv) reasonableness of offers made*

connection with suitable alternative accommodation or land; (v) the timescales proposed relative to the degree; (vi) the willingness of the occupiers to respond to reasonable alternatives put before them; (vii) the extent to which serious negotiations have taken place with equality of voice for concerned; and (viii) the gender, the age, occupation or lack thereof and state of health of those affected…"

[25] One of the issues that has received consideration by the Courts is the engagement by the municipalities with those who are to be evicted. In ***Occupiers of 51 Olivier Road & 197 Main Street, Johannesburg v City of Johannesburg*** 2008 (3) SA 208 (CC) at 216, Jacoob J said the following,

"*[16] The City has constitutional obligations towards the occupants of Johannesburg. It must provide services to communities in a sustainable manner, promote social and economic development, and encourage involvement of communities and community organisations in matters of local government. It also has the obligation to fulfil the objectives mentioned in the preamble to the constitution to "improve the quality of life of all citizens and free the potential of each person". Most importantly it must respect, protect, promote and fulfil the rights in the Bill of Rights. The most important of these rights for present purposes is the right to human dignity and the right to life. In the light of these constitutional provisions a municipality that ejects people from their homes without first meaningfully engaging with them acts in a manner that is broadly at*

odds with the spirit and purpose of the constitutional obligations set out in this paragraph taken together.

[17] But the duty of the City to engage people who may be rendered homeless after an ejectment to be secured by it is also squarely grounded in Section 26 (2) of the Constitution. It was said in Grootboom that "in every step at every level of government must be consistent with the Constitutional obligation to take reasonable measures to provide adequate housing." Reasonable conduct of a municipality pursuant to Section 26 (2) includes the reasonableness of every step taken in the provision of adequate housing. Every homeless person is in need of housing and this means that every step taken in relation to a potentially homeless person must also be reasonable if it is to comply with Section 26 (2).

[18] And, what is more, Section 26 (2) mandates the response of any municipality to potentially homeless people with whom it engages must also be reasonable. It may in some circumstances be reasonable to make permanent housing available and, in others to provide no housing at all. The possibilities between these extremes are almost endless. It must not be forgotten that the City cannot be expected to make provision for housing beyond the extent to which available resources allow. As long as the response of the municipality in the engagement process is reasonable, that response complies with Section 26 (2). The Constitution therefore obliges every municipality to engage meaningfully with people who would become homeless

because it evicts them. It follows that, where a municipality is the applicant in eviction proceedings that could result in homelessness, a circumstance that a Court must take into account to comply with Section 26 (3) of the Constitution is whether there has been meaningful engagement."

[26] The conduct of a municipality that seeks to evict people has to be judged against the constitutional standard as set out in the cases referred to above. Before proceeding to do so I propose to first deal with the preliminary issues which were raised between the parties.

Condonation

[27] When the matter was postponed to 26 August 2015 the legal representatives of the parties agreed on a timetable regarding the filing of further documents. In terms of this timetable, which was not made an order of the Court, the respondents had to file additional answering affidavits on or before 13 July 2015 and the applicant had to file its supplementary replying affidavit on or before 4 August 2015. On 13 July 2015 the respondents filed their additional answering affidavits together with a counter application. The applicant did not file its supplementary replying affidavit on 4 August 2015 as agreed but filed it on 26 August 2015.

[28] The applicant applied to this Court for the condonation of the late filing of the

supplementary replying affidavit. One of the issues raised by the applicant in support of its application for condonation is the fact that when the timetable was agreed to between the parties it was not envisaged that the respondents would file a counter-application. The applicant submits that it is the filing of this counter- application that delayed the filing of the applicant's supplementary affidavit.

[29] I have considered the fact that it is more likely that even if the applicant had filed its supplementary answering affidavit timeously, the matter would not have been ripe for hearing on 26 August 2015 due to the fact that the respondents had launched a counter application in respect of which no timetable had been agreed to between the parties. Although the respondents oppose the application for condonation, there is no prejudice that they suffered as a result of the late filing of the supplementary replying affidavit.

[30] In the end I am persuaded to exercise the discretion in favour of condoning the late filing of the further supplementary affidavit by the applicant.

[31] That also leads me to the question of costs and as both parties were at fault regarding the date for the hearing on 26 August 2015, the cost of the said date are ordered to be costs in the cause.

The respondent's complaint relating to service

[32] In their papers the respondents have contended that there was no proper service of the notice of the proceedings on the respondents. The contention was based on the fact that part of the order granted by Ndita J, regarding the service of the notice of the proceedings to the respondents was that the Sheriff should advise the respondents through a loudhailer of the institution of the proceedings. It appears on the sheriff's returns of service that the Sheriff did not comply with this as he did not advise the respondents through a loudhailer of the notice of the proceedings.

[33] Prior to the hearing of the 9 November 2015, the applicant sought another order regarding the service of the notice of the proceedings on the respondents, which order was granted by Blignault J. The order granted by by Blignault J on 9 November 2015 substituted the prior order which had been granted by Ndita J. There is no complaint by the respondents regarding the compliance with the order granted by Blignault J. It also appears that this order was complied with and as such the complaint relating to a prior order is academic.

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The challenge to the authority of the deponents to the applicant's affidavits

[34] The respondents challenged the authority of the deponents to the applicant's various affidavits. This challenge was abandoned by the respondents at the

commencement of the proceedings and as such it became unnecessary to deal with it.

The respondents' application to have their first answering affidavit struck out

[35] Prior to the coming on record of Ashraf Mahomed Attorneys, the attorneys of record for the ten respondents there was an affidavit that was filed purportedly on behalf of all the respondents by Mxoliseni Zwayi. It is this affidavit that the respondents seek to have struck out in its entirety.

[36] The reasons advanced by the respondents for wanting to strike the answering affidavit are that:

1. The deponent mistakenly represented that he was authorised to depose to an affidavit on behalf of all the respondents when he had no mandate to do so.
2. The affidavit was done in good faith without the assistance of a legal representative, and
3. The affidavit does not properly state the date and place of execution and therefore fails to comply with uniform rules of this Court.

[37] The application is opposed by the applicant. Counsel for applicant submitted, correctly in my view, that where a party seeks to withdraw an admission made

in an affidavit it has been stated that;

"the approach is the same as that of an amendment involving a withdrawal of an admission, but the withdrawal of an admission is usually more difficult to achieve because:

(i) In involves a change of front which requires full explanation to convince the Court of the *bona fidas* thereof, and

(ii) *It is more likely to prejudice the other arty who had by the admission been led to believe that he need not prove the relevant fact and might, for that reason, have omitted to gather the necessary evidence"* (See **President Versekerings Maatskapy Bpk v Moodley** 1964 (4) SA 109 (T) at 110h-111a; **J R Yanish (Pty) Ltd v W M Spielhouse & Co. (WP) (Pty) Ltd** 1992 (1) SA 167 (C) at 170C-G.

[38] The reasons advanced by the respondents do not meet the requirements as set out above and I am not persuaded to exercise my discretion to strike out the first respondents answering affidavit.

Urgency

[39] The respondents contended that the application falls to be dismissed with a punitive cost order for the reason that it was brought as an urgent application in circumstances where there were no grounds of urgency.

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[40] These proceedings were commenced on 1 August 2014 and at that stage there were two parts to the application, namely part A - relating to the interdict and part B - relating to the eviction application. The part that was brought on an urgent basis was the one relating to part A relating to the interdictory relief.

[41] The matter was heard in fourth division and has been in fourth division since 26 February 2015 when it was postponed by the order of Katz AJ on 31 October 2014. As such there is no merit to the contention that the matter falls to be dismissed for lack of urgency.

Unlawful occupation

[42] It is not in dispute that the applicant is the owner of the land that is currently occupied by the respondents. That the respondents do not have the consent of the applicant to occupy the property appears also to be common cause. This appears in the applicants founding affidavit as well as the affidavit filed on behalf of the respondents. That being the case, the respondents are therefore occupying the applicants land unlawfully and as such the PIE Act is applicable to them.

[43] Having dealt with the preliminary issues I now proceed to consider whether it would be just and equitable to grant an order for an eviction of the

respondents. I also deal with the respondents' counter-application within the context of the enquiry as to whether it would be just and equitable to grant an order for an eviction of the respondents. I consider it appropriate to do so as the counter-claim raises one of the issues that are considered when determining whether it is just and equitable to grant an eviction.

Is it just and equitable to grant an eviction

[44] The factual matrix upon which this application falls to be determined is largely not in dispute. In short the respondents took occupation of the property between May and July 2014. This they did without the consent of the applicant. On the applicant's own papers there was no engagement with the respondents prior to the launching of the application for their eviction. The reasons advanced by the applicant for not engaging with the respondents were that some of the respondents refused to provide their details, were hostile and threatening to the applicant's officials. Given the lack of co-operation from the respondents at that stage the applicant undertook to supplement its papers so as to deal with the issue of alternative accommodation in the event of it obtaining the particulars of the respondent which suggest that some of the respondents would be rendered homeless by an eviction. After this undertaking the applicant neither supplemented its papers to deal with the issue of alternative accommodation nor engaged with the respondents other than to conduct a survey.

[45] When the respondents raised the issue of meaningful engagement and alternative accommodation, the applicant adopted the attitude that it is not obliged to provide alternative accommodation. The response of the applicant was also not consistent in that whereas on the one hand it said that it was prepared to engage with the respondents on the other hand it indicated that it could not meaningfully respond to the request for an engagement with the respondents as the respondents had not provided the detail as to the proposed parametres of engagement. The applicant also advised that the only representations it was prepared to take from the respondents were in relation to the date for the vacation of the property.

[46] The conduct of the applicant as described above is what was described by Jacoob, J, in the ***Occupiers of 51 Olivier Road*** case referred to above as the one "*is broadly at odds with the spirit and purpose of the constitutional obligations*" that the applicant has towards the respondents. That the applicant has a constitutional obligation to engage meaningfully with people who would become homeless as a result of eviction is clear from the following passage in the Occupiers of 51 Olivier Road case referred to above; "*The Constitution therefore obliges every municipality to engage meaningfully with people who would become homeless because it evicts them. It follows that, where a municipality is the applicant in eviction proceedings that could result in homelessness, a circumstance that a court has to take into account to comply with section 26(3) of the Constitution is whether there has been meaningful engagement*."

[46] The applicant submitted that taking the following circumstances into account it would be just and equitable to grant an order for an eviction of the respondents: that the respondents have been in occupation for less than six months when the proceedings were initiated; the fact that the respondents are in unlawful occupation of the property; the fact that the respondents' occupation of the property formed part of an unlawful invasion; the fact that there is a duty on the respondents to place all their relevant circumstances before the court and the fact that the respondents do not have a defence to the eviction application. The applicant also referred to a number of cases in which the courts denounced land invasions as an appropriate way to enforce one's constitutional right to adequate housing (See ***City of Cape Town v Unlawful Occupiers, Erf 1800 Capricon*** 2003 (6) SA 140 (C) at 151I, ***President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae***) 2005 (5) SA 3 (CC) at para 49, ***Port Elizabeth Municipality v Various Occupiers*** 2005 (1) SA 217 (CC) at para 80 and ***Government of the Republic of South Africa and Others v Grootboom and Others*** 2001 (1) SA 46 at para 2 and 92)

[47] Undeniably the issues raised by the applicant are relevant considerations. However, paragraph 92 of the ***Grootboom*** case referred to above is quite apposite in my view as the court stated that; "*This judgment must not be understood as approving of any practice of land invasion for the purposes of coercing a State structure into providing housing on a preferential basis to those who participate in any exercise of this kind. Land invasion is inimical to the systematic provision of adequate housing on a planned basis. It may well*

be that the decision of a State structure, faced with the difficulty of repeated land invasions, not to provide housing in response to those invasions, would be reasonable. Reasonableness must be determined on the facts of each case".

[48] In my view, in a matter where a municipality applies for an eviction it is bound to act reasonably. Part of acting reasonably is the engagement with those who are to be evicted as that ensures that they are treated with dignity in the process. The applicant has not only failed to engage with the respondents but has also failed to provide reasons why it should be held that its failure was reasonable under the circumstances. This is particularly so as the applicant realised this at the start of the proceedings. The respondents have consistently indicated their willingness to engage with the applicant, at least from the time of filing of the answering affidavit dated 29 December 2014. Instead of taking up the issue of engagement with the respondents, the applicant sought to dictate to the respondents on what it would be prepared to engage them with, namely, the date on which they would vacate the property.

[49] The other factor that has weighed heavily with this court is the applicant's attitude that it is not obliged to provide alternative accommodation to the respondent on the basis that the respondents were in occupation of the property for a period of less than six months when the proceedings were instituted. For this submission the applicant relies on section 4(6) of the PIE act which does not list the availability of alternative accommodation as a consideration. In order to rely on section 4(6) of the PIE act, the applicant

submitted that it is entitled to institute the proceedings either under section 4 or section 6 of the PIE act and it has referred to various cases in this regard.(See ***Mangaung Local Municipality v Mashile and Another*** 2006 (1) SA 269 (O) at 274, paragraphs 10 and 11, ***City of Cape Town v Unlawful Occupiers Erf 1800 Capricorn (Vrygrond Development) and Others*** 2003 (SA) 140 (C) at 149D-E, ***Transnet Ltd v Nyawuza and Others*** 2006 (5) SA 100 (D&CLD) at 103).

[50] The cases relied on by the applicant were decided based on the definition of an owner in the PIE act which includes an organ of state. Section 6 (3) of the PIE act appears to offer greater protection than section 4(6) in that one of the circumstances that the court has to consider in order to determine whether it is just and equitable to grant an order of eviction is the availability to the unlawful occupier of suitable alternative accommodation. In essence where an unlawful occupier has been in occupation of the municipal property for a period which is less than six months, the extent of the protection it enjoys under the PIE act would depend on the applicant municipality. In my view this would lead to arbitrariness.

[51] In my view it is not even necessary to decide whether a municipality is entitled to elect whether to proceed under section 4 or under section 6. The interpretation of these two sections which would be consistent with the values of the new Constitutional dispensation would be to interpret these two section in a manner that provides greater protection to the person who is to be homeless upon being evicted. In instances where the person is to be evicted

from land owned by an organ of state the protection afforded by section 6(3) of the PIE act, must be available even where the person has occupied the property for less than six months. This must be so because section 6 does not does not differentiate between those who have been occupation for less or more than six months.

[52] Lastly, I enquired from counsel for the applicant whether the applicant would make alternative accommodation available to those of the respondents who would be rendered homeless upon being evicted. Counsel indicated that those of the respondents who would be rendered homeless by an eviction are welcome to engage with the applicant with regards to alternative accommodation. Although this offer was made, this is the sort of issues that the applicant could and should have canvassed with the respondents had it engaged with them and it would not be appropriate to order an eviction where the court does not have all the relevant information as to what is to happen to the respondents.

[53] For the reasons set out above, I am not satisfied that it would be just and equitable to grant an order for an eviction of the respondents.

[54] I have taken into account the fact that the property is a bio-diversity and dune area which cannot be developed. I have also taken into account the deplorable conditions under which the respondents live as described by the respondents who have filed affidavit and I am of the view that it would be in

the interest of all the parties concerned to find a speedy resolution of this matter

[55] The respondents in the counter-application seek an order staying the eviction application pending an engagement between the parties and I am of the view that such an order would be appropriate under the circumstances.

[56] Although the respondents have been successful I do not think that it would be appropriate to the applicant to pay costs. On the one hand the applicant has failed to comply with its constitutional obligations. On the other hand the respondents have taken the law into their hands by invading the property. The respondents cannot be compensated by a cost order for their actions.

[57] **In the circumstances I make the following order:**

1. **The application for eviction is stayed;**

2. **The applicant is directed to engage with the respondents and to report to this court within six months of the date of this order.**

3. **Each party is to pay its costs.**

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NUKU, AJ