IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

REPORTABLE

CASE NO: A 389/2016

In the matter between:

MR.R.P.JACOBS Appellant

and

COMMUNICARE, A NON PROFIT COMPANY

(REG NO: 1929/001590/08) First Respondent

THE CITY OF CAPE TOWN Second Respondent

JUDGMENT DELIVERED ON 14 MARCH 2017

GAMBLE, J:

[1] The first respondent is a non-profit company operating in the Cape Peninsula which makes available affordable, low-cost housing to deserving tenants. In

2002 it rented out a flat in the suburb of Ruyterwacht to the appellant, his wife and their 2 sons. The initial rental payable was R 538,94. Thereafter the rent increased from time to time in terms of clause 7.4 [1] of the parties' lease agreement and by 2015 had risen to R2055 per month.

[2] On 1 July 2014 the first respondent increased the rental payable by the appellant once again. Unhappy with the extent of the increase, the appellant sought assistance from the Rental Housing Tribunal ('the Tribunal"). A hearing was initially set for 22 January 2015 but was rescheduled by the Tribunal. During May 2015 the appellant received a letter from the Tribunal informing him that the hearing had been set down for 10h00 on 17 June 2016. However during July 2015 the appellant received a letter from the Tribunal informing him of a default ruling which had been made in his absence as he had failed to appear on 17 June 2015. The appellant thereafter made enquiries and established that the date furnished to him by the Tribunal (17 June 2016) was erroneous: it should have been 2015.

[3] The appellant then attempted to persuade the Tribunal to reconsider the matter but it remained resolute that its ruling was fixed. There being no appeal procedure arising from such a ruling, the appellant's only remedy was to seek review of the new rental determination. However, he did nothing and continued paying the rental which had been in place immediately before the Tribunal's ruling.

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[1] *"7.4 The Landlord shall have the right to vary the rental during the lease period by giving the Tenant one clear calendar month's notice."*

[4] The appellant soon fell further behind with his rent[2] and on 8 October 2015 he received a letter demanding arrears in the sum of R3788.95. He was afforded a week to rectify the breach and when he failed to do so, the first respondent cancelled the lease on 21 October 2015. It thereafter after moved swiftly to secure his eviction from the premises, approaching the magistrate's court in Goodwood immediately.

[5] That court then heard an application for eviction in terms of s 4(1) of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act, 19 of 1998 ("PIE") which was opposed by the appellant. In his answering affidavit the appellant highlighted the problem arising from the incorrect date furnished by the Tribunal and went on to point out that his personal circumstances were dire. He said, *inter alia,* that he and his wife were divorced and that only he and his son Ray then resided in the flat. The appellant further alleged that he suffered from Post Traumatic Stress Disorder ("PTSD") as a consequence of being involved in 2 vehicle hijackings when he had been employed as a driver.

[6] The appellant set out his personal and domestic circumstances as follows:

> "*21. Insofar as my personal circumstances are concerned, I wish to apprise this Court of the following:*
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> *21.1 I am (sic) 55 year old single male;*

[2] He was already in arrears at that stage.

21.2 I am unemployed and receive a State disability grant;

21.3 I have no alternative accommodation and an eviction would render me homeless;

21.4 I am afflicted (sic) by a disability and not only is (sic) unemployed but unemployable;

21.5 I am financially independent (sic) and cannot afford to rent another residence; and

21.6 My disability grant is simply not enough to afford alternative accommodation.

22. Furthermore my son, Ray, also occupies the property. His personal circumstances are as follows:

22.1 He is a 26 year old single male; and

22.2 He is currently employed part-time at a Seven-Eleven in Goodwood, Western Cape."

[7] The appellant offered no medical explanation or report relating to his alleged disability (PTSD) or the prognosis in that regard but did attach a copy of his social security card issued by the South African Social Security Agency. Further, he did not give details regarding Ray's earning capacity, nor did he explain how he and Ray had been able to maintain themselves on the limited resources available to them.

[8] The appellant's affidavit before the magistrate's court did not raise any sustainable defence on the merits of the claim for eviction. As I have said, the problem relating to the incorrect date furnished by the Tribunal did not afford the appellant a defence against the first respondent's claim for vacant occupation of its premises. The first respondent had lawfully exercised its rights under clause 7 of the lease to increase the rental and that increase would stand until the Tribunal held otherwise. And, once the appellant fell in arrears in respect of the rental lawfully increased, the first respondent was entitled to cancel the lease after the appellant had been put to terms and had failed to comply therewith. Once the lease was cancelled, the appellant's continued occupation of the premises became unlawful and the first respondent was fully within its rights to approach the court for an order for eviction, provided only that it complied with the provisions of PIE.

[9] In light of the fact that the appellant's period of unlawful occupation did not exceed 6 months, the first respondent was entitled to approach the court in terms of the provisions of s4(6) of PIE to secure his eviction from the premises. In such circumstances there was a duty on the magistrate to consider *"all the relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women",* whereafter an order could be made on condition that it was just and equitable to do so. Because the appellant's occupation had been unlawful for less than 6 months, the magistrate was not statutorily enjoined to consider the question of whether alternative accommodation could be made available by a municipality or another organ of State: that enquiry is compulsory only where the occupier has been in unlawful occupation in excess of 6 months and where the provisions of s 4(7) of PIE are triggered.

[10] Once the magistrate was satisfied that all the requirements of s 4 of PIE had been complied with and that no valid defence had been raised by the appellant, he was compelled to (*"must*") grant an order for eviction. When doing so the magistrate was required, by virtue of the provisions of s 4(8) of PIE, to determine-

> *"(a) a just and equitable date on which the unlawful occupier must vacate the land under the circumstances; and*
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> *(b) the date on which an eviction order may be carried out if the unlawful occupier has not vacated the land on the date contemplated in paragraph (a)."*

[11] In determining what a just and equitable date might be, the court is required, under s 4(9) of PIE, to *"have regard to all relevant factors, including the period the unlawful occupiers and his or her family have resided on the land in question."* In the case of the appellant, that would be a period exceeding 12 years.

[12] Although this application for eviction was not brought in terms of s 4(7) of PIE, the first respondent purported to give notice to the City of Cape Town of the proceedings against the appellant. I say purported, because although the City is cited as the third respondent in the proceedings in the lower court, and because the notice in terms of PIE was designated for its attention, there is no proof that the application was in fact served on the City, nor is there any indication of any participation in the proceedings by the City.

[13] The record of proceedings reflects that the presiding magistrate was sympathetic to the appellant's problem, and on 19 February 2016 the appellant was

afforded a postponement of 3 months to enable him to approach the Tribunal to request it to reconsider his objection to the rent increase. The matter was due to be heard again by the same magistrate on 19 May 2016, but it turned out that the magistrate was otherwise engaged in another matter on that day. Accordingly an order was only made 3 June 2016 in terms whereof the appellant was given until 31 July 2016 to quit the premises. In reality, the appellant was only required to vacate about 9 months after the first respondent initiated proceedings.The record reflects further that the magistrate carefully considered the appellant's personal circumstances and took these into account when affording him a little extra time within which to vacate.

[14] However, what does not appear from the record is what became of the notice to the City. In argument before us Ms Steyn, for the first respondent, was unable to assist the court in understanding what information, if any, was provided by the second respondent to the magistrate. Experience in this Division in matters similar to this informs us that the City of Cape Town is able to provide the court with information about the availability of alternative housing and, in particular, the availability of emergency housing so as to avoid the spectre of homelessness. However, neither the magistrate nor this court has been made aware of the current position in this regard.

[15] When pressed in relation to the possible assistance to be found in a report from the Municipality, Ms Steyn sought repeated refuge in the controversial judgment of Willis J in *Johannesburg Housing* [3], and in particular in the following passage-

> *"[84] No municipality, no government, no politician, no court, no king, no emperor and no potentate can guarantee to any person unqualified permanence in his or her place of residence."*

[16] On the strength of the view held by the presiding judge in that matter of the interpretation to be placed on the word "*homelessness",* Ms Steyn sought to suggest to this court that no purpose would have been served by the magistrate requiring the City to report on the availability of alternative housing for the appellant. The following passage in the judgment of Willis J suggests that it could be argued that some municipalities have more important things to do than to assist courts of law in coming to a determination as to whether a notice period in a particular PIE matter is a reasonable or not:

> *"[92] The high courts are duty bound to have regard to the provisions of PIE and the injunction of the Constitutional Court to apply their minds to the contribution which municipalities make to the resolution of the problems of*

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[3] Johannesburg Housing Corporation (pty) Ltd v Unlawful Occupiers , Newtown Urban Village 2013 (1) SA 583 (GSJ)

housing. In doing so, it would be intellectually dishonest for a court not to take into account the real problem that exists at a municipal level, with its capacity in terms both of finance and its administrative personnel, to solve problems. If a city cannot even mend potholes properly and resolve billing crises expeditiously, what hope does it have of addressing adequately the needs of housing? Courts cannot blink, Bambi-like, at the real dangers that are posed through a lack of capacity at a municipal level…."

[17] The frustrations of a judge sitting in this country's commercial hub with the inefficient functioning of a local authority are not necessarily shared by the judges in this Division. The City of Cape Town regularly provides this court with useful information regarding the prospects of available emergency housing for persons in dire need of a roof over their heads. To be sure, precisely that kind of information would have been invaluable in a situation like this to determine, not necessarily whether there was permanent council housing available for the appellant (who already enjoys the benefit of subsidised accommodation for people with low incomes), but, what was available by way of emergency housing, Indeed, were such emergency accommodation to be have been made available to the appellant, and had he refused to take it up for whatever reason, the magistrate would have been well placed to determine how much time to give the appellant to quit the premises.

[18] The 2 leading appellate authorities on PIE evictions[4] have offered the lower courts considerable guidance in relation to the adjudication of such matters and,

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[4] City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 38 (Pty) Ltd and Another 2012 (2) SA 104 (CC) ; City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others 2012 (6) SA

in particular, the procedural aspects thereof. Granted, both cases involved the application of s 4(7) of PIE and so the consideration by the court of the availability of alternative housing was expressly required, but both judgments stress that the court making the decision to evict must have sufficient information before it to enable a just and equitable decision to be made.

[19] In *Changing Tides* the Supreme Court of Appeal dealt fully with the reporting obligations of local authorities involved in eviction proceedings.

> *"[39]…. Now that it is clearly established that local authorities do owe constitutional obligations to persons evicted from their homes who face homelessness as a result, it is appropriate to set out their obligations to the court in proceedings of this type. I deal only with cases where, on the principles set out above, they are joined in the litigation, and the applicant alleges that the circumstances of the eviction are such that it may result in homelessness, and engage their constitutional obligations with regard to the provision of temporary emergency accommodation."*

Exactly that situation obtained in the present case, given the joinder of the second respondent and the allegation by the appellant of the prospect of homelessness.

[20] The Supreme Court of Appeal then detailed its requirements for proper reporting from a local authority in such circumstances and went on to comment as follows:

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"[41] Those requirements have been distilled from the various orders made by the courts in cases of this type. Provided that this information is furnished to the court at the outset, it should enable the court to deal with the application without much, if any, need for further investigation and possibly without further involvement of the local authority. I have no wish to add to the burden of local authorities in these cases. However, the additional burden should not be undue as they are in any event

enjoined by s 4(2) of PIE to file a report in all eviction proceedings.[5] *All that this requires of them is, in certain cases, to amplify that report in order to provide the court with the information it needs to decide whether to grant an eviction order. The more comprehensive the report furnished by the local authority at the outset, the less likely that it will become embroiled in lengthy and costly litigation, so that the additional effort at the outset should diminish costs in the long run and enable eviction cases to be dealt with expeditiously in the interests of all concerned… Where, in response to that report, the applicant indicates that it intends to seek an order that imposes duties upon the local authority, it goes without saying that the local authority must be furnished with the proposed order in sufficient time to enable it to consider its terms, suggest amendments and if no agreement is reached, to appear and make appropriate submissions to the court on its terms."*

[21] Turning to the purpose of requiring a local authority to furnish such information, the Supreme Court of Appeal observed as follows:

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[5] The *dictum* is not sustained by the wording of the section in question which reads as follows –

> *"4.2 At least 14 days before the hearing of the proceedings contemplated in subsection (1), the court must serve written and effective notice of the proceedings of the unlawful occupiers and the municipality having jurisdiction."*

"[47] In considering the grant of an eviction order the court is concerned with the plight of those who, as a result of poverty and disadvantage, are unable to make alternative accommodation arrangements themselves and require assistance from the local authority to do so. It is particularly concerned to ensure, so far as possible, that those who face homelessness are provided at least with temporary emergency accommodation. The ancillary orders attaching to an eviction order will not affect those who are able to find a roof for their heads and a place of shelter without assistance, nor those who for reasons of their own, such as an unwillingness to have any involvement with a public authority, will not seek assistance, even if it means nights spent on the streets. The central task before is to identify those who require assistance from the local authority. What the City needs to know is who requires temporary emergency accommodation and the nature of their needs, for example, whether dormitory accommodation would suffice or whether a flat of some sort is required for a family with children, or whether an agent or disabled person has some special needs. The question is how this information can most quickly and efficiently be communicated to the City so that it can formulate an appropriate plan to address the needs of these people."

[22] In the founding affidavit the application for eviction the first respondent's general manager, Mr Adams, describes the business of the first respondent thus -

"*3….. Applicant's business is the facilitation of the provision of affordable accommodation, through social investment programmes for the benefit of economically disadvantaged citizens of the Western Cape."*

He stresses the importance of good corporate governance pointing out that -

> "*4….. Tenants…are accordingly required, as with any other business, to settle their liability to [the appellant] timeously on due date in order to assure [the appellant's] continued functioning and accordingly its continued ability to assist persons in need of affordable housing."*

[23] The undisputed facts in the lower court were that the appellant suffers from PTSD, which he describes as a disability and for which he receives a State disability grant. He claims that he is unemployable and that homelessness will ensue if he is evicted from the home which he currently occupies. Given that the appellant's current accommodation was expressly provided by the first respondent for *"the benefit of economically disadvantaged citizens",* and given that he fell into arrears because of the short payment (rather than non-payment) of rental, it is reasonable to infer that the eviction of the appellant might have lead to him being without a roof over his head - certainly in the short term. In such circumstances, the case called out for a report from the local authority in relation to the availability of at least emergency housing.

[24] The first respondent was the party which drew the onus of persuading the court that eviction from its premises of the terms sought was just and equitable in the circumstances[6]. It should therefore have ensured that a report was furnished by the second respondent to inform the court of the relevant facts and circumstances relating to the appellant's prospects of finding suitable alternative accommodation, and in the absence thereof, of the availability of emergency housing. The steps which

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[6] Changing Tides at [29] –[30]

the first respondent was required to take in this regard were not onerous: it had joined the second respondent as a party in the proceedings and it was required to do no more than to ensure that the papers were served on it, and thereafter to request it to report to the court. Yet it chose not to do so.

[25] The tenant in this matter, like most of the first respondent's tenants, falls to be treated differently to a normal residential tenant renting in the suburbs of say Green Point or Wynberg. I say so because the property was made available to the appellant on the strength of his limited financial means and his resultant need for affordable housing. It stands to reason therefore that when such persons are evicted from their homes (in essence subsidized accommodation) on the basis of non-payment of rental, the prospects of them finding similar affordable accommodation are slim. Simply put, if they cannot afford to rent from the first respondent they are not going to be able to easily afford to rent elsewhere, other than perhaps in accommodation provided by the City of Cape Town. In such circumstances, a report from the City as to alternative accommodation (be it permanent or emergency) is imperative before the court can make a determination as to what notice period is just and equitable.

[26] In *Changing Tides* [7] the court, in relation to the necessity to join the local authority, observed that this duty did not arise in all instances but suggested that it would generally be a wise precaution to adopt that route.

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[7] At [38]

> *"[38] …. That does not mean that the local authority will need to become embroiled in every case in which an eviction under PIE is sought. The question in the first instance is always whether the circumstances of the particular case are such as may (not must) trigger the local authority's constitutional obligations in regard to the provision of housing or emergency accommodation. If there are, the need for the local authority's direct involvement as a litigant will depend on its response to those obligations. If, by way of example, it filed a report stating that it had adequate emergency accommodation available for all and any persons evicted from the premises and that the court could make an order that it provide such accommodation to all evictees, that might suffice, without more, subject to furnishing some details about the nature and locality of the accommodation and the means by which the occupiers could obtain access to it."*

[27] In my view, and having regard to the circumstances of this case, the failure of the magistrate to consider a report by the local authority was a procedural defect in the proceedings in the court below which had the effect that the magistrate did not properly discharge his constitutional obligations[8]. However, the responsibility for that failure does not lie at the door of the first respondent alone. As *Changing Tides*[9] demonstrates, the magistrate also had a duty to respond proactively and to call for a local authority report in a matter such as this.

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[8] *Changing Tides* at [23] – [25]

[9] At [27]

[28] The question that then arises is what should be done in the present circumstances. Mr Fisher, for the appellant, fairly conceded that his client had no defence on the merits of the claim for eviction and that the lease had been validly cancelled. The real issue was whether a fair notice period had been granted or not. On the facts before the court at this stage, and in the absence of a report from the local authority, it is not possible to say with any degree of certainty whether the procedural defect was fatal or not.

[29] However, the appellant has known for a considerable period of time that his lease has been terminated. And throughout that time he has known of the necessity to seek alternative accommodation. He has been the beneficiary of more than one indulgence in this court - his appeal was reinstated after it had been struck from the roll for failure to prosecute it timeously and his counsel was permitted to argue the matter notwithstanding the fact that his heads of argument had been filed late.

[30] The first respondent on the other hand has had to wait patiently for the litigation to come to a conclusion, all the while being unable to earn a fair rental from its much-needed accommodation. In my view, in such circumstances the prejudice to the first respondent in sending the matter back to the magistrate to reconsider the period of notice in the light of that which has been stated above, far outweighs the prejudice to the appellant who has been enjoying a roof over his head at a significantly reduced rental for quite some while. Both counsel were agreed that in the event that the matter was not remitted to the magistrates court, it would be just and

equitable to order the appellant to vacate the premises by the end of April 2017. For the sake of clarity such an order will be made.

[31] As far as costs are concerned, I did not understand Ms Steyn to press for such an order. While it is true that the appellant has not achieved substantial success on appeal, this court has found that the proceedings in the court below might have been different had the first respondent and the magistrate adopted a more proactive approach. In the circumstances it seems fair to me to make no order as to costs.

ORDER OF COURT

It is ordered that:

A. The appeal is dismissed with no order as to costs.

B. The appellant and all those holding title under him shall vacate the premises situated at […], S. Crescent, Ruyterwacht, Western Cape or before 30 April 2017.

C. The Sheriff of this Court is authorised to eject the appellant and all those holding title under him in terms of a warrant of ejectment with effect from 2 May 2017.

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GAMBLE J

KOSE AJ: I agree.

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KOSE AJ