Not reportable

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

CASE NO.: 1570/2020

In the matter between:

SUPER FOUR DEVELOPERS CC	**APPLICANT**
and	
MOEGAMAT AZMIE MALLICK	**FIRST RESPONDENT**
ANDRÉ JAMES LE ROUX	**SECOND RESPONDENT**
NOLEEN MEYER	**THIRD RESPONDENT**
NATASHA ALARICE AUGUSTUS	**FOURTH RESPONDENT**
GIFT	**FIFTH RESPONDENT**
AMANDA	**SIXTH RESPONDENT**
JOHN	**SEVENTH RESPONDENT**
ISAAC (RASTA)	**EIGHTH RESPONDENT**
OCCUPERS OF ERF 1588 AND ERF 1620 MOUNT ROAD (11 FETTES ROAD, NORTH END, PORT ELIZABETH)	**NINTH RESPONDENT**
NELSON MANDELA BAY MUNICIPALITY	**TENTH RESPONDENT**

REASONS FOR JUDGMENT

Govindjee AJ:

Background

[1] The applicant sought an order of eviction against the first to ninth respondents ('the respondents'), in terms of the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 1998 ('PIE').[1]

[2] The application was argued on 29 July 2021 and the following Order was handed down on 24 August 2021:

> '1. An eviction order is granted against the First to Ninth Respondents ('the Respondents'), being unlawful occupiers of Tulbagh Flats, 11 Fettes Road, North End, Gqeberha ('the property').
> 2. The eviction order may be enforced if the Respondents do not vacate the property within 60 (sixty) days from the date of service of this order at the property.
> 3. The Sheriff of this Honourable Court is authorised to enlist the assistance of any person, including the members of the South African Police Services, to assist him / her in the eviction of the Respondents in the event that the Respondents fail to vacate the property within 60 (sixty) days from the date of service of this order at the property.

[1] Act 19 of 1998.

4. The Respondents are directed to pay the costs of the application jointly and severally, the one paying the others to be absolved.
5. Adv D Skoti and Mr Z Madikane are directed to file affidavits within 14 (fourteen) days to explain their non-compliance with the orders of Revelas J (22 April 2021) and Gqamana J (17 June 2021), and why the wasted costs occasioned by the postponement of the matter on 22 April 2021 should not be paid by them, jointly and severally, *de bonis propriis*.
6. Mr Z Madikane is to ensure that this Order is brought to the attention of Adv D Skoti, and to confirm this by way of affidavit.
7. The wasted costs occasioned by the postponement of the matter on 22 April 2021 remain reserved.'

The reasons for the Order follow.[2]

The Facts

[3] The applicant purchased the property from the Salvation Army on 29 July 2019. The property consists of a main block of flats in which there are seventeen units and one separate unit built above three undercover garages at the back of the property.

[2] A notice of application for leave to appeal the Order was brought to the attention of the Registrar on 16 September 2021. The applicant requested an expedited date for the hearing of the application for leave to appeal and direction regarding the wasted costs referred to in paragraphs 5-7 of the Order. The following Directive was issued:
'1. Application for leave to appeal will be heard via the MS Teams platform on 27 October 2021 at 11:30am.
2. The issue of the wasted costs occasioned by the postponement of the matter on 22 April 2021 will also be argued at this time.
3. Reasons for the Order issued will be provided by 4 October 2021.
4. The respondents are afforded until 18 October 2021 to amplify their reasons for seeking leave to appeal, if necessary.'

Registration of the transfer took place on 18 September 2019, so that the applicant is the registered owner of the property.[3]

[4] According to the applicant, the property had been taken over by unlawful occupiers so that the Salvation Army had effectively lost control of the building.[4] It purchased the property with the intention of renovating and upgrading the buildings and units so that they could be leased.

[5] Pursuant to purchasing the property, the applicant attempted to identify the occupants of the various units and established that a number of occupiers were paying rental to a person known as 'Rasta', who resided in the back unit of the property. The applicant claimed that the respondents were not occupying the property with the consent of either the Salvation Army or the applicant, so that they were unlawful occupiers as defined in PIE.[5]

[6] The applicant averred that it was unable to commence with its intended renovations to the property, and that the building was falling into disrepair.[6] In addition, the applicant indicated that it was incurring holding costs in the form of rates and taxes, and was liable for municipal service charges in respect of water, electricity, sewerage

[3] P 13 of the indexed papers.
[4] As in *The City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others* [2012] ZASCA 116 para 2, the applicant makes reference to the building being 'hijacked'.
[5] P 14, 15 of the index. S 1 of PIE defines 'unlawful occupier' to mean 'a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land, excluding a person who is an occupier in terms of the Extension of Security of Tenure Act, 62 of 1997, and excluding a person whose informal right to land, but for the provisions of this Act, would be protected by the provisions of the Interim Protection of Informal Land Rights Act, 1996 (Act 31 of 1996).'
[6] P 15, 16 of the index.

and refuse removal. These services were being utilised by the respondents. No income could be obtained as none of the units could be leased out.[7]

[7] The applicant obtained an Order on 1 September 2020 grating it leave to serve the section 4(2) PIE Notices (in English, Afrikaans and isiXhosa) on the respondents in ways other than through personal service. The matter was subsequently postponed on various occasions.

[8] The respondents filed a single answering affidavit, deposed to by Thandokazi Maphukata, in opposing the relief sought by the applicant. This affidavit called for the tenth respondent ('the municipality') to file a report prior to eviction, and alluded to the municipality's duty to provide temporary emergency accommodation to all person being evicted who had no alternative accommodation. Little of the applicant's founding affidavit was disputed. Ms Maphukata indicated that she had occupied the property in 2016 and paid rent of R1000,00 per month at that time. She confirmed that she had not been tasked to make averments on behalf of 'Rasta' and that he should answer for himself, accepting that he was not an agent of the applicant and was unauthorised to lease out units and / or collect rental from persons occupying the units on the property.

[9] Ms Maphukata denied that the occupiers were violent people and indicated that 'many of the occupiers are unemployed persons' and that 'the Respondents are not

[7] The applicant's papers indicates that the municipal account in respect of rates and service charges in respect of the property amounts to approximately R27 000,00 per month, which the applicant is required to pay despite not having the beneficial use and occupation of the property: p 17 of the index. The applicant was, at the time of its reply, indebted to the tenth respondent in the sum of approximately R385 000,00 in respect of water, electricity, services, rates and taxed: p 121 of the index.

barbaric and arrogant people and the continued occupation in the property is not to frustrate or deprive the applicants of their rights over their property, but are occupying because the property is primary residence to the respondents and minor children who will be rendered homeless and destitute if the eviction is carried out in the manner which the applicant seeks.'[8]

[10] A 'mandate' document attached to the answering affidavit, signed by four occupiers as 'the committee and community of Occupiers of Erf 1588 and 1620 Mount Road' purportedly granted permission to Ms Maphukata to litigate on their behalf as an elected community leader. Various documentation relating to children residing at the premises, and including birth certificates, was attached to the answering affidavit. No confirmatory affidavits were appended.

[11] The applicant's replying affidavit raised its concerns with the 'committee' that had granted permission to Ms Maphukata to depose to the answering affidavit. It noted that the deponent had failed to disclose the identity of persons occupying the seventeen units of the property and had not set out the personal circumstances of those persons so as to assist the court in making a determination in terms of s 4 of PIE. The respondents were specifically invited to place this information before court prior to the hearing of the matter.[9]

[12] The applicant's view, as expressed in reply, was that the occupants were lower income earning individuals who would be able to secure alternative accommodation

[8] P 73, 74 of the index.
[9] P 116 of the index.

in the event of an eviction order being granted, and that the circumstances were not such as to warrant the municipality providing alternative accommodation for them.[10] As reflected below, this view was shared by the municipality.

[13] The matter was originally set down for 22 April 2021 before Revelas J, and then postponed to 17 June 2021 before Gqamana J. The events which resulted in the matter being postponed on both occasions are relevant in order to determine the issue of the wasted costs of 22 April 2021, and are considered, below. In addition, it is significant that the municipality was directed to file a report with the Registrar setting out 'what steps it intends or is able to take in order to provide alternative land or emergency accommodation to the First to Ninth Respondents in the event of their being evicted and rendered homeless'.[11] It was also ordered, by agreement, that the parties would file affidavits dealing with the considerations set out in Regulation 37(2) and 37(3) of the Regulations to the Disaster Management Act, 2002.[12] In the case of the municipality, this affidavit was to deal with the availability of emergency accommodation or quarantine or isolation facilities pursuant to the Regulations.

[14] The applicant's affidavit in response added the following information:

a. A number of the units had been unlawfully subdivided by the respondents and the additional number of people had resulted in overcrowding and a generally unhealthy and risky environment in the context of COVID-19.
b. Rental had, at least previously, been paid to the eighth respondent, suggesting that accommodation could be rented elsewhere.

[10] P 118 of the index.
[11] P 163 of the index. The applicant and the respondents were afforded ten days after delivery of the municipality's report to file affidavits in response.
[12] Act 57 of 2002.

c. Several motor vehicles were parked at the property, it being presumed that at least some of these vehicles were owned by the respondents and gainsaying the allegations of destitution.
d. The respondents were aggressive and the member of the applicant who deposed to the affidavit had been threatened, resulting in a criminal case being opened. Attempts at engaging with the respondents in order to discuss a possible solution had been futile.

[15] The respondents submitted an affidavit of Nonkazimlo Sunshine Gaqo, seemingly one of the occupiers of the property, who essentially drew attention to various constitutional provisions and called for a report from the municipality.

The municipality's stance

[16] The municipality initially outlined its policies and procedures regarding the provision of accommodation / land, also in the context of the granting of an eviction order. This included mention of the development of a Housing Needs Database System, since 2003, in which all housing needs are registered. Housing opportunities are allocated to registered individuals through set criteria, including prioritisation on a 'first come first serve' basis and preference for vulnerable persons including the elderly, persons with disability and child-headed homes.

[17] The Assistant Director in the municipality's Department of Human Settlements confirmed that the names of the respondents could not be found on the housing database, which contains in excess of 100 000 registered housing needs. The respondents were invited to contact the municipality in order to register and become

eligible.[13] The municipality also commented on the problem of queue jumping, and acknowledged that the scale of housing delivery was not addressing the massive demand.

[18] The municipality's affidavit in response to regulation 37(3) of the regulations to the Disaster Management Act, 2002, and focusing on emergency facilities, is instructive. From this it is evident that the municipality accesses emergency housing from the Eastern Cape Department of Human Settlements on an application basis, and as the need for emergency housing arises. One thousand five hundred temporary shelters / units were provided immediately after the onset of COVID-19 in the country, but were exhausted by the end of the 2020 / 2021 financial year. COVID-19 had impacted negatively on the municipality's ability to provide emergency housing, and the only available option for the respondents was to register on the Housing Needs Database.

[19] Importantly, the municipality, in seeking to comply with its reporting obligations, had requested consultations with the occupiers in order to ventilate crucial matters such as whether an eviction was likely to result in any or all of the occupiers being homeless. The municipality was, however, precluded from properly investigating such factors 'due to the occupiers' reluctance to divulge all required information or to participate in the consultations.'[14]

[13] P 222, 223 of the index.
[14] P 234 of the index.

[20] Consultations had nevertheless proceeded with those willing to consult with the municipality, namely the second respondent, fourth respondent, sixth respondent and one other individual considered to be an occupier. Two further 'house invasion reports' were submitted in respect of the first and third respondents based on information received from the next of kin and observations from the municipality's officials. The consultations and submissions of the interviewed occupiers were reduced to writing and recorded in pro-forma questionnaires attached to the municipality's report.[15]

[21] According to the municipality:

a. 'The first, second, sixth and eighth respondents are employed;
b. Some of the units are in a "bad condition" and are "overcrowded";
c. There are minors resident in the property;
d. Some of the occupiers were paying rental and unilaterally stopped paying same;
e. It is alleged that some of the occupiers have nowhere to go;
f. There is no conclusive or *prima facie* evidence before Court that in the event of the Court ordering the eviction that all or any of the occupiers will be rendered homeless, save for the bald and unsubstantiated allegation made in the house invasion reports that the interviewed occupiers have nowhere to go;
g. The allegation that some or all of the occupiers have nowhere to go appears improbable when one has regard to the fact that the ninth respondents are now aware of the NMBMs housing database and have been made aware of same since the delivery of the initial report on 15 June 2021. However, the

[15] P 241-247 of the index.

ninth respondents have failed or refused to take any steps to register or apply for housing through the specified policy and procedure.'

[22] The municipality's report highlighted that some of the respondents were gainfully employed and had means to make monthly rental payments. They had failed to place any information or evidence before court relating to the nature and extent of their previous tenancy (prior to occupation of the property), their family ties within the court's jurisdiction, or other factors distinguishing their circumstances from persons registered on the housing database.[16]

The law

[23] PIE was enacted to provide for the prohibition of unlawful eviction and to provide for procedures for the eviction of unlawful occupiers and related matters. In terms of the Act's Preamble, no one may be evicted from their home without an order of court made after considering all the relevant circumstances. The Preamble also notes that it is desirable that the law should regulate the eviction of unlawful occupiers from land in a fair manner, while recognising the right of land owners to apply to a court for an eviction order in appropriate circumstances. Special consideration should be given to the rights of the elderly, children, disabled persons and, particularly, households headed by women.

[24] The application and consideration of PIE in eviction cases is compulsory.[17] Section 4 of PIE deals specifically with 'eviction of unlawful occupiers', as follows:

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[16] P 238 of the index.
[17] *Machele and others v Mailula and others* 2010 (2) SA 257 (CC) para 15.

‘(1) Notwithstanding anything to the contrary contained in any law or the common law, the provisions of this section apply to proceedings by an owner or person in charge of land for the eviction of an unlawful occupier.

(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 on the unlawful occupier and the municipality having jurisdiction.

…

(5) The notice of proceedings contemplated in subsection (2) must –

(a) state that proceedings are being instituted in terms of subsection (1) for an order for the eviction of the unlawful occupier;

(b) indicate on what date and at what time the court will hear the proceedings;

(c) set out the grounds for the proposed eviction; and

(d) state that the unlawful occupier is entitled to appear before the court and defend the case and, where necessary, has the right to apply for legal aid.

…

(7) If an unlawful occupier has occupied the land in question for more than six months at the time 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, except where the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women.

(8) If the court is satisfied that all the requirements of this section have been complied with and that no valid defence has been raised by the unlawful

occupier, it must grant an order for the eviction of the unlawful occupier, and determine –

(a) a just and equitable date on which the unlawful occupier must vacate the land under the circumstances; and

(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).

(9) In determining a just and equitable date contemplated in subsection (8), the court must have regard to all relevant factors, including the period the unlawful occupier and his or her family have resided on the land in question.

…

(12) Any order for the eviction of an unlawful occupier or for the demolition or removal of buildings or structures in terms of this section is subject to the conditions deemed reasonable by the court, and the court may, on good cause shown, vary any condition for an eviction order.'

[25] In ***City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others***,[18] the Supreme Court of Appeal considered the precise relationship between the requirements of s 4(7) and s 4(8) in the context of an application for eviction at the instance of a private landowner, noting that some judgments tended to blur the two enquiries mandated by these sections into one. The SCA held as follows:[19]

[18] *Supra* para 12. It must be noted that *Changing Tides* dealt with a situation in which people were living in a building considered to be a 'death trap' because of health and safety problems, and that their situation was one of dire need: para 52.

[19] *Ibid* (footnotes omitted). On the question of onus, see para 30: it is for the applicant to ensure that the information placed before the court in its founding affidavits is sufficient to satisfy it that It would be just and equitable to grant an eviction order; the applicant must show that it has complied with the notice requirements under s 4 and that the occupiers of the property are in unlawful occupation; the applicant also has to demonstrate that the circumstances render it just and equitable to grant the order. On the meaning of 'just and equitable', see, in general, *Johannesburg Housing Corporation supra*.

> 'The first enquiry is that under s 4(7), the court must determine whether it is just and equitable to order eviction having considered all relevant circumstances. Among those circumstances the availability of alternative land and the rights and needs of people falling in specific vulnerable groups are singled out for consideration. Under s 4(8) it is obliged to order an eviction 'if the… requirements of the section have been complied with' and no valid defence is advanced to an eviction order. The provision that no valid defence has been raised refers to a defence that would entitle the occupier to remain in occupation as against the owner of the property, such as the existence of a valid lease. Compliance with the requirements of section 4 refers to both the service formalities and the conclusion under s 4(7) that an eviction order would be just and equitable. In considering whether eviction is just and equitable the court must come to a decision that is just and equitable to all parties. Once the conclusion has been reached that eviction would be just and equitable the court enters upon the second enquiry. It must then consider what conditions should attach to the eviction order and what date would be just and equitable upon which the eviction order should take effect. Once again the date that it determines must be one that is just and equitable to all parties.'

[26] Wallis JA, on behalf of the court, summarised the appropriate enquiry to be undertaken as follows:[20]

> 'Once the court decides that there is no defence to the claim for eviction and that it would be just and equitable to grant an eviction order it is obliged to grant that order. Before doing so, however, it must consider what justice and

[20] Para 25. Also see *Johannesburg Housing Corporation* para 127, explaining that there cannot be only one correct date in the determination of the dates for property to be vacated, and eviction and that a court may act within a permissible range of options which should be carefully considered.

> equity demands in relation to the date of implementation of that order and it must consider what conditions must be attached to that order. In that second enquiry it must consider the impact of an eviction order on the occupiers and whether they may be rendered homeless thereby or need emergency assistance to relocate elsewhere. The order that it grants as a result of these two discrete enquiries is a single order. Accordingly it cannot be granted until both enquiries have been undertaken and the conclusion reached that the grant of an eviction order, effective from a specified date, is just and equitable. Nor can the enquiry be concluded until the court is satisfied that it is in possession of all the information necessary to make both findings based on justice and equity.'

[27] It is so that the State, at all levels of government, owes constitutional obligations to those in need of housing and in particular to those whose needs are urgent, such as those faced with homelessness in consequence of an eviction.[21] It is indisputable that local authorities do owe constitutional obligations to persons evicted from their homes who face homelessness as a result. Those obligations arise under s 26 of the Constitution and exist separately from any question of whether it is just and equitable for a court to grant an eviction order. In relation to persons in crisis with no access to land and living in intolerable conditions, it is the state that would be expected to provide

[21] On the need for the local authority to be joined whenever the circumstances (as alleged by an applicant for eviction) raise the possibility that constitutional obligations to provide emergency accommodation have been triggered, see *Changing Tides* para 38. On the meaning of 'homeless' and 'homelessness', see *Makama and Others v Administrator, Transvaal* 1992 (2) SA 278 (T) at 285I-286A and *Johannesburg Housing Corporation* paras 81, 85 where the following definition was offered: 'Without any reasonable prospect, between the date of the court order which it is proposed be made that the occupier is to vacate the property and the date upon which the eviction order is to be effected (in the event that the occupier does not vacate the property), of the occupier being able to find alternative accommodation that is *(a)* of a comparable or better standard to and *(b)* at a similar rental to and *(c)* within reasonable proximity to that of the property from which the eviction is sought.'

emergency and basic shelter to any affected respondent.[22] But the availability of suitable alternative accommodation or land, while vital to the justice and equity evaluation, cannot be the sole, decisive enquiry to be considered by a court faced with an eviction application. The Constitutional Court has, for example, confirmed that there cannot be an absolute right to be given accommodation considering the great need for housing and limited availability of appropriate resources.[23] Even where the eviction is at the instance of an organ of state, there is no unqualified constitutional duty on local authorities to ensure that there cannot be an eviction unless alternative accommodation has been made available.[24] While it is so that an eviction order is far less likely to be just and equitable where no alternative accommodation is provided, neither PIE nor s 26 of the Constitution provide an absolute entitlement to be provided with accommodation:[25]

> 'In some circumstances a reasonable response to potentially homeless people may be to make permanent housing available and in others it may be reasonable to make no housing at all available. In all of this the court will have to be mindful of all other relevant factors including the resources available to provide accommodation.'

[28] The issue of the availability of alternative accommodation is even more complicated where eviction is requested by a private owner of property, relying on its constitutional right to property.[26] The effect of PIE is not to expropriate private property,

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[22] *City of Johannesburg v Rand Properties (Pty) Ltd & Others* 2007 (6) SA 417 (SCA) para 47, as cited in *Changing Tides* para 14.
[23] *Government of the Republic of South Africa & others v Grootboom* 2001 (1) SA 46 (CC) para 95.
[24] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 28.
[25] *Changing Tides* para 15, citing *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg & others* 2008 (3) SA 208 (CC) para 18 and *Grootboom* para 46.
[26] *Changing Tides* para 16.

but to delay or suspend the exercise of an owner's rights until a determination has been made whether eviction would be just and equitable, and the conditions for this.[27] Private entities are not obliged to provide free housing for other members of the community indefinitely, but their rights of occupation may be restricted, and they can be expected to submit to some delay in exercising their right to possession of their property in order to accommodate the immediate needs of the occupiers. [28]

[29] It is also appropriate to note that the usual characteristics of ownership as well as the lack of any lawful reason to be in occupation are important factors in the exercise of the court's discretion. [29]

> 'In most instances where the owner of property seeks the eviction of unlawful occupiers, whether from land or the buildings situated on the land, and demonstrates a need for possession and that there is no valid defence to that claim, it will be just and equitable to grant an eviction order.'

[30] Before determining whether an eviction order should be granted, the relevant authorities must be engaged in order to ensure that they will discharge any of their obligations to persons facing eviction. It is part of the court's duty to ensure that the issue of possible homelessness has been properly canvassed.[30] In ***Occupiers of***

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[27] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd & another* 2012 (2) SA 104 (CC) para 40.

[28] *Ndlovu v Ngcobo; Bekker & another v Jika* 2003 (1) SA 113 (SCA) para 17. Where the eviction is sought by a private landowner the availability of alternative land or accommodation assumes greater importance in the second enquiry, namely, what is a just and equitable date for eviction: *Changing Tides* para 20.

[29] See *Changing Tides* paras 18, 19, also for consideration of the weight to be attached to the availability of alternative land or accommodation to the issue of whether it is just and equitable to make an eviction order.

[30] *Occupiers, Shuluna Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* [2010] 4 All SA 54 (SCA) paras 14, 15.

Mooiplaats v Golden Thread Ltd & Others,[31] for example, the court had granted an eviction order without investigating the possibility of it resulting in homelessness. The eviction order was set aside on the basis that it could not be said that an eviction order was just and equitable and the case was remitted to the High Court to obtain a report from the municipality about the housing situation of the occupiers; the possibility of homelessness if they were evicted; the provision of alternative land or accommodation; the consequences of an eviction if no alternative land or accommodation was provided and the measures that could be taken to alleviate the situation of the owner if an eviction was delayed while alternatives were arranged.

[31] What is expected is for local authorities to go beyond filing a general report detailing its current housing policy and to engage directly with the facts of the particular case. Information regarding the building or property in question, the number and personal circumstances of the occupiers, whether an eviction order is likely to result in homelessness and proposed steps to alleviate this, as well as details of engagements with occupiers, is, by way of example, also necessary.[32] This information, stemming from the local authority's obligation to file a report in all eviction proceedings in terms of PIE, is designed to assist courts to determine whether an eviction order should be granted, and the more comprehensive the report the better.[33] Guidance has also been provided to courts on the extent to which they are expected to take a proactive approach in ensuring that there is sufficient information available prior to granting an order for eviction:[34]

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[31] 2012 (2) SA 337 (CC).
[32] *Changing Tides* para 40.
[33] *Changing Tides* para 41.
[34] *Changing Tides* para 27.

> 'What they are obliged to do in eviction cases is ensure that all the relevant parties are before them, that proper investigations have been undertaken to place the relevant facts before them and that the orders they craft are appropriate to the particular circumstances of the case.'

Analysis

[32] Eviction requires people's constitutional rights, including everyone's right to have access to adequate housing, to equal protection of the law, to have their dignity respected and protected, and not to be evicted without an order of court made after consideration of all the relevant circumstances,[35] to be matched against the rights of owners not to be deprived of their property.[36] In balancing these competing rights, consideration of the facts of each instance of alleged illegal occupation is the appropriate point of departure.[37]

[33] Courts must, therefore, be informed of all the relevant circumstances in each case in order to be satisfied that it is just and equitable to evict and, if so, when and under what conditions.[38] The obligation to provide the relevant information is primarily on the parties to the proceedings, and officers of the court are expected to furnish the court with all relevant information that is in their possession in order for the court to properly interrogate the justice and equity of ordering an eviction.[39]

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[35] Ss 10, 26 of the Constitution of the Republic of South Africa, 1996 ('the Constitution').
[36] S25(1) of the Constitution.
[37] *Mayekiso and another v Patel NO and others* 2019 (2) SA 522 (WCC) para 58.
[38] *Occupiers, Berea v De Wet NO and Another* 2017 (5) SA 346 (CC) para 46.
[39] *Berea* para 47.

[34] In this case, regrettably, the respondents' answering affidavit leaves much to be desired. It explains the position of only one of the occupiers and her children, and does so sketchily.[40] The position of the other respondents remains a mystery, with limited information emanating from those respondents who deigned to complete the municipality's questionnaires. There is no meaningful disclosure of the financial circumstances and household arrangements involving the occupiers of the property. For example, what efforts, if any, have been made on the part of the respondents to find alternative accommodation within their available resources?[41] A list of failed efforts would certainly have been of some assistance, and the absence thereof is unfortunate. There is also no explanation as to why the respondents have chosen to adopt this approach. Despite being legally represented, and despite the invitation to place adequate information before the court, they remain silent on material matters which lie within their knowledge.[42] The affidavits filed on their behalf fail to deal with a range of relevant issues, and satisfy themselves with a few bald assertions suggesting possible homelessness in the event of eviction. A similar situation was apparent in ***Luanga v Perthpark Properties Ltd***:[43]

> 'The terse statement is made in the papers that the appellant and her family would be rendered homeless and "effectively on the streets" in the event of an eviction order, because it is alleged that none of the occupants of the premises can afford to pay a deposit for new premises. In the absence of any details about the employment status and income of the appellant's husband and three

[40] While Ms Maphukata's affidavit indicated that she resided at the property with three minor children, she failed to disclose, for example, whether she is employed, married or presently paying any rental. *Cf* the information provided by the occupiers in *Blue Moonlight Properties*.
[41] See *Mayekiso* paras 67, 68.
[42] See *Luanga v Perthpark Properties Ltd* 2019 (3) SA 214 (WCC) paras 37, 38.
[43] Paras 39, 40.

> adult brothers, it is difficult to attach any weight to these bald assertions…This court was disturbed by the failure of the appellant, who had had the benefit of legal representation, to provide obviously relevant details of the ages, employment status and incomes of the occupants of the property. These were details which Mr Langenhoven should have been able to ascertain with relative ease, and his unexplained failure to do so gave rise to serious questions.'

[35] The point made in that judgment is that respondents facing an eviction application, particularly those who have the benefit of legal representation,[44] must engage fully on the relevant issues and paint the picture to satisfy the claim that there is a genuine risk of homelessness. Details regarding the employment status and income of adult members of those occupying the property are clearly relevant and must be provided. Should there be a good reason why the information cannot be furnished, this should be disclosed. Failure to do so creates the real risk that a court will inevitably come to the conclusion that the assertions regarding inability to afford alternative accommodation and the risk of homelessness are not genuine or *bona fide*, so that they may be rejected merely on the papers. [45] Providing the court with a canvass that is effectively blank, save for the soft hint of homelessness, is simply not adequate.

[36] It might be added that the nature of the engagements between the applicant and the respondents, as well as between those respondents and the municipality make it clear that the mediation contemplated by PIE is inappropriate in this instance.[46]

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[44] On the duties of legal representatives, see *Luanga* paras 47, 48, with reference to *Berea* para 47.
[45] *Luanga* paras 44, 45, with reference to *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A). Also see *Mayekiso* paras 66, 67.
[46] S 7 of PIE. Also see *Johannesburg Housing Corporation* para 123.

[37] The respondents are occupying the applicant's land without its consent and without any other right in law permitting occupation. They are accordingly classified as 'unlawful occupiers' in terms of s 1 of PIE. It may be assumed that most of the unlawful occupiers had occupied the property for more than six months at the time when the eviction proceedings were initiated. As such, s 4(7) of PIE is applicable, and a court may only grant an eviction order if it is of the opinion that it is just and equitable to do so. All the relevant circumstances, including particular focus on the plight of vulnerable persons and the availability of land for relocation, must be considered in determining this issue.

[38] There has been compliance with the service formalities required by s 4 of PIE. In considering whether eviction is just and equitable the court must, in addition, consider what is just and equitable to all parties. The respondents have failed to raise any valid defence. As indicated, the actual position of the vast majority of the respondents is unknown given their failure to participate in the proceedings or to engage with the municipality's inquiries. No explanation for this has been given by their legal representative. It cannot be said that the respondents require the immediate assistance of the municipality or that they will actually be rendered homeless should they be evicted. Even leaving aside the applicant's averments in this regard, the questionnaires completed by four of the respondents, and the confirmation of previous rental payment in the answering affidavit, suggest the contrary.[47]

[47] See *Johannesburg Housing Corporation* par 60, with reference to the *ex tempore* judgment of Wepener J, in dismissing an application for joinder, at 3.

[39] By contrast, the applicant has demonstrated its need for possession, both in order to safeguard and improve the property and to stem its debt to the local authorities in respect of the running expenses.[48] The municipality has been engaged and has canvassed the issue of possible homelessness to the satisfaction of the court through its reports, which go beyond generality and have dealt directly with the applicable facts. These facts indicate that the assertions of homelessness are unsubstantiated so that they may be rejected on the papers. There is sufficient information available for this court to exercise its discretion in concluding that it is just and equitable to grant an order of eviction given all the circumstances.

[40] Before doing so, however, it is appropriate to consider what justice and equity demands in relation to the date of implementation of that order, and whether any conditions should be attached.[49] From the applicant's perspective, it has been more than two years since the applicant acquired the property. Its rights over the property have effectively been suspended since that time. The premises is falling into disrepair and it has been unable to commence with intended renovations. The applicant has also incurred various holding costs and is liable for considerable municipal service charges without being able to generate any income from the property.

[41] From the respondents' perspective, it must be noted that Ms Maphukata has occupied the property since 2016. The position of the other respondents is uncertain, but it may be accepted that they have been aware of their unlawful occupation of the property since late 2019. Mindful that there are children and other potentially

[48] See *October NO and Another v Hendricks and Another* 2016 (2) SA 600 (WCC) para 30.
[49] Ss 4(9) and 4(12) of PIE.

vulnerable persons presently residing on the premises, the application for the eviction order to be enforced within 30 days from the date of service of the Order is inappropriate. I consider a 60-day period, from the date of service of the Order at the premises, to be sufficient time for the respondents to make alternative accommodation arrangements, and to engage with the municipality in the event that any emergency situation develops. The granting of an eviction order, effective from a date 60 days hence, is, in my view, just and equitable given the circumstances. To deny the applicant access to its property beyond this period of time would unjustifiably trample upon its rights. I am also mindful of the contestation surrounding the property, and the allegations of intimidation and threatened violence that form part of its history. The Order issued is crafted accordingly, so that it may be enforced in the event that the respondents have not vacated the property within this time period.

Costs

[42] It was argued that the respondents should not be saddled with a costs order in the event that the court grants the application, based on the principle laid down in ***Biowatch v Registrar Genetic Resources and Others***.[50] That decision provides guidance when dealing with constitutional litigation 'where the state is sued for the state's failure to fulfil its responsibilities for compelling claims between private parties'.[51] The Constitutional Court did not provide clear guidance to the issue of costs when private parties engage in disputes involving constitutional rights.[52]

[50] 2009 (6) SA 232 (CC).
[51] *Biowatch* para 16.
[52] *Itireleng Bakgatla Mineral Resources (Pty) Ltd and Another v Maledu and Others* [2017] ZANWHC 86 para 84.

[43] The general principle as far as private litigation is concerned is that costs will ordinarily follow the result, although exceptional cases may justify a departure from this rule.[53] As in ***Itireleng Bakgatla Mineral Resources***, this matter involves a private dispute between a juristic person and individual occupiers, with the municipality cited as an interested party.[54] In my view, no exceptional circumstances are apparent to warrant a departure from the principle that costs should follow the result, to be paid jointly and severally by the respondents.[55]

The wasted costs of 22 April 2021

[44] The remaining issue concerns the wasted costs occasioned by the postponement on 22 April 2021. As indicated, the matter was set down for hearing on 22 April 2021. On that date, Revelas J granted a postponement to 17 June 2021 in the following terms:

> 'It is Ordered:
>
> 1. That the matter be and is hereby postponed to 17 June 2021.
> 2. That the wasted costs occasioned by the postponement of this matter are reserved subject to paragraph 3 below.
> 3. That Advocate D Skoti is to file an affidavit on or before 31 May 2021 explaining why he did not appear before the above Honourable Court on even

[53] *Bothma v Els and Others* 2010 (2) SA 622 (CC).
[54] *Supra* para 85.
[55] The wasted costs occasioned by the postponement of the matter on 17 June 2021 are, in terms of the order of Gqamana J, to be paid by the municipality. For an example of what is regarded by the Constitutional Court to be an 'exceptional circumstance' in this context, see *Campus Law Clinic (University of KZN Durban) v Standard Bank of South Africa Ltd and Another* [2006] ZACC 5, as cited in *Bothma* para 96. In *Campus Law Clinic*, important constitutional issues were raised in the public interest, justifying the Court's refusal to award costs to the bank. Also see *Barkhuizen v Napier* [2007] ZACC 5 para 90.

date and give reasons as to why an Order of costs of the postponement should not be given against him *de bonis propriis*.

4. That if the reserved costs order is not made against Advocate D Skoti, the First to Ninth Respondents will be liable for the costs occasioned by the postponement.
5. …
6. …
7. …
8. That the First to Ninth Respondents' attorney, Mr Madikane, is directed to ensure that this Order is provided to Adv D Skoti.'

[45] The wasted costs occasioned by this postponement were further reserved when the matter came before Gqamana J on 17 June 2021. On this occasion, Mr Madikane was directed to file an affidavit within five days setting out whether or not he had complied with the directive contained at paragraph 8 of the Revelas J Order, quoted above, and, if so, in what manner he had complied with the directive.

[46] Neither Adv Skoti nor Mr Madikane have filed affidavits as directed by this court and, *prima facie*, are acting in disregard of these directives, so that an order *de bonis propriis* may be appropriate. The Order issued affords them a final opportunity, within fourteen days of the Order, to explain both their non-compliance and why such a punitive order should not be made. As Adv Skoti is no longer on brief, Mr Madikane is directed to bring this Order to his attention. The wasted costs occasioned by the postponement on 22 April 2021 remain reserved.

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A GOVINDJEE

ACTING JUDGE OF THE HIGH COURT

APPEARANCES

Applicant	:	Adv K D Williams
Instructed by	:	Joubert Galpin & Searle
First – Ninth Respondents	:	Adv Moteno
Instructed by	:	Lawyers for Black People (NPC) SA
Tenth Respondent	:	Adv L Ntsepe
Instructed by	:	Roland Meyer Attorneys
Heard on	:	29 July 2021
Date of Order	:	24 August 2021
Reasons for judgment	:	4 October 2021