REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2021/43690

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

31 JANUARY 2022
.....
DATE
SIGNATURE

In the matter between:

DEPARTMENT OF HUMAN SETTLEMENT, GAUTENG PROVINCIAL GOVERNMENT	First applicant
INKANYELI DEVELOPMENT (PTY) LTD	Second applicant
And	
ALL PERSONS TRESPASSING, UNLAWFUL OCCUPYING ANY PORTION / UNIT / HOUSE / BUILDING WHICH IS PART OF THE BOIKETLONG MEGA HOUSING DEVELOPMENT PROJECT SITUATED AT SEBOKENG EXTENSION 28.	First respondent
EMFULENI LOCAL MUNICIPALITY	Second respondent

(This judgment is handed down electronically by circulation to the parties' legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 31 JANUARY 2022.)

JUDGMENT

MIA, J

[1] This matter comes before me for reconsideration of the order handed down on an urgent basis by Opperman J on 21 October 2021. The applicants in the application for reconsideration were the respondents in the application heard on 21 October 2021 where an order for eviction was granted in their absence. I shall refer to them as the respondents for ease of reference. The court granted the order for eviction and drew to the respondents' attention the provisions of Rule 6(12) (c) which provides that a person against whom an order was granted in his/her absence in an urgent application may by notice set the matter down for reconsideration of the order.

[2] The first applicant was the Department of Human Settlements, Gauteng Provincial Government. Its head office address is situated at 11 Diagonal Street, Johannesburg. It oversees the provincial administration of housing matters. The second applicant was Inkanyeli Development (Pty) (Ltd). The second applicant was a private stakeholder in partnership with the applicant responsible for developing affordable integrated human settlements. The first respondents were the unlawful occupiers, who occupied the RDP subsidized units situated in Boiketlong Mega Housing Development Project situated at Sebokeng Extension 28 Emfuleni Local Municipality. The second respondent is the Emfuleni Local Municipality which is responsible for the land and has an interest in the matter.

[3] When the matter appeared on 21 October 2021 the applicants indicated that 387 subsidized units had been completed and were ready for handing over to identified beneficiaries. The land was owned by the second applicant. Ownership passed once the houses were transferred to the identified beneficiaries. The first applicant was responsible for the handing over of land and the houses. It was for this

reason that the application was brought in both applicants' names. The applicant follows a process requiring stipulated requirements to be met. This the applicants contend ensured the allocation of housing in a transparent, dignified and orderly manner. The waiting list was made public to enable the public to check the process. The beneficiaries of the 387 units have met all the requirements, submitted all the required documentation and have been informed of the units they are to occupy. A number of units had been handed over however when the applicant attempted to hand over the remaining units they discovered that the remaining units had been occupied unlawfully. They were not aware of the number of units occupied and suspected units may have been damaged.

[4] The applicants relied on the imminent danger and the possibility of fights ensuing and windows and walls being damaged. This would result in the applicant incurring further costs before the units could be handed over for occupation to the intended beneficiaries. This would further result in beneficiaries who followed due process being prejudiced and unlawful conduct would follow if the first respondents were not evicted.

THE ISSUE FOR DETERMINATION

[5] The issue for determination was the reconsideration of the order handed down on an urgent basis by Opperman J on 21 October 2021.

NON COMPLIANCE: RETURNS OF SERVICE

[6] The respondent's first point of consideration was that the applicants failed to adhere to the directions of the court order of Molahlehi J, directing the Sheriff to serve the notice on the principal doors of the invaded units. The respondents point out that there was a return of service filed indicating that service was effected on the principal doors of the invaded units. Thus it was argued service would not have been possible as the applicant was not even aware of which units were occupied according to the applicants founding affidavit. The sheriff

failed to filed 186 returns of service and filed one generalised return of service which it was argued was not effective service. The service was not properly effected on approximately 186 occupants. The first respondents were not aware that an urgent application was proceeding on 21 October 2021. The first time the respondents state they became aware of the order for eviction was when a community member showed it to them on 22 October 2021.

NON COMPLIANCE WITH SECTION 5 OF THE ACT

[7] The first respondents contended furthermore, that the applicants did not serve an effective notice in terms of the Prevention of Illegal Eviction from Unlawful occupation Act 19 of 1998 (the Act). It was submitted on behalf of the first respondents that the notice did not state that the first respondents were entitled to appear before the court to defend the case and had the right to apply for legal aid. This failed to meet the jurisdictional requirements mandated by the Act. The applicant's application for an urgent application for eviction was brought in terms of the provisions of section 5 of the Act. However, it was argued on behalf of the first respondents that the application was not brought in terms of section 5(2) read with subsection (3). The effect hereof is that there was no written notice of the application on the first respondents and they were not informed that they were entitled to appear to defend the matter and to seek the assistance of legal aid in doing so. On this basis, it was argued that the basis of the omission was crucial and rendered the entire proceedings unfair. Thus the submissions continued no order should have been granted because of statutory non-compliance.

[8] Section 5(2) of the Act provides that:

> "before the hearing of the proceedings contemplated in terms of section 5(1) the court must give written and effective notice of the intention of the owner or person in charge to obtain an order for

eviction of the unlawful occupier to the unlawful occupier and the municipality in whose area of jurisdiction the land is situated."

[9] Section 5 (3) of the Act provides that the notice contemplated in subsection (2) must:

"'(a) state that proceedings will be 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."

[10] The respondents sought an opportunity for the reconsideration of the matter on the basis that they:

10.1 were not afforded an adequate opportunity to be present to argue the matter;

10.2 the court was misled with regard to the urgency of the matter;

10.3 the relevant personal information of the first respondents was not placed before the court to enable the court to determine whether the eviction was just and fair;

10.4 the first respondents are entitled to alternative accommodation and no report was forthcoming from the Emfuleni Local Municipality (the Municipality) and

10.5 finally the legal basis on which the eviction was sought was legally unsound.

[11] The respondents raised their fundamental right to adequate housing enshrined in section 26 of the Constitution as an issue that was not addressed by the applicant and the Municipality as follows:

> "a. Everyone has a right to adequate housing;
>
> b. the state must take reasonable and other legislative measures, within its available resources, to achieve the progressive realisation of this right;
>
> c. no one may be evicted from their home, or demolished without an order of court, made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."

[12] In addition to the issue of service, the respondents also raised the fact that a number of the occupants are female-headed households with children, factors not brought to the attention of the court. The court was thus not in a position to determine the period the first respondents as unlawful occupiers resided on the premises and the possibility of alternative accommodation as there was no report filed by the Municipality. The issue of mediation was not canvassed and 186 of the occupiers have not considered the possibility of appointing a mediator.

[13] The issues raised by the first respondents that there were no returns of service is a valid concern. If the applicants did not know the addresses of the units that were unlawfully occupied it does not follow that the service was conducted on the particular addresses or identified addresses. The document which serves as a return of service is not sufficient as the return of service on the 186 units as it does not identify the units served and does not identify that there was service as directed by the order of Mohalehli J.

[14] The second point taken by the first respondent was that there non-compliance with section 5 of the Act. In *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes & Others* 2010 (3) SA 454 (CC) the Court held:

> "It is apparent that s 5(1) sets out certain very stringent requirements to obtain an urgent eviction pending the determination of proceedings for a final order of eviction of the applicants. In proceedings in terms of section 5 therefore, any issue in relation to whether an order for eviction should be granted, and, in particular, whether it is just and equitable to grant the eviction order, would be entirely irrelevant. In this case the High Court found that 'the applicants had clearly complied with the procedure laid down in s 5 of PIE' on the basis of certain notices that had been issued by that court."

In the present matter the first respondents did not all receive the requisite notices and those who did, did not receive a notice that was compliant with the procedure laid down in s 5 of the Act.

[15] I have considered the first respondents' grievance that they informed the first applicant that they were aggrieved with the allocation of housing. They raised the issue of housing being allocated to undeserving cases in their view and due to illegal sales and notified them of the self allocation of the homes until the problem was resolved. This in my view did not warrant the self-allocation even if the matter was still being addressed almost a year after the occupation occurred.

[16] Having regard to the applicants procedure for allocation the first respondents may not fulfil all the requirements for consideration due to a loss of income during the Covid Pandemic. This does not justify a resort to self help measures where they occupied RDP units which had been allocated but not occupied.

[17] Having regard to the number of females and children among the first respondents these are considerations that ought to have been placed before the court when an eviction order was considered. There was no report and still is no report from the second respondent regarding alternative accommodation.

[18] In view of the above considerations the lack of compliance with procedure and formalities which infringed fundamental and constitutional rights of the first respondents the eviction order that was

granted must be set aside. The applicants may set the matter down upon proper notice to the first respondents. A report must be obtained from the second respondent regarding alternative accommodation available for the first respondents to enable the court to consider an appropriate order if an order for eviction is granted evicting the first respondents from the accommodation.

ORDER

[19] The first respondents are unemployed and without legal resources. The form of the notice did not comply with the requisite form which was prejudicial to the first respondents and did not enable them to seek legal aid timeously and to attend court. The application for reconsideration is successful and costs should therefore follow the cause on the party and party scale.

[20] In view of the above I make the following order:

1. The order granted on 21 October 2021 is set aside.

2. The applicants to pay the costs of the application on a party and party scale.

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S C MIA
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Appearances:

On behalf of the applicant	: Adv. PM Ramoshaba
Instructed by	: State Attorney, Johannesburg
On behalf of the respondent	: Adv. VJ Chabane
Instructed by	: Sithi & Thabele Attorneys
Date of hearing	: 03 December 2021
Date of judgment	: 31 January 2022