

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 20/31579

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED. YES

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SIGNATURE

DATE 23 October 2023

In the matter between:

SETHUNYA FAMILY TRUST

First Applicant

**MPHO PATRICK LETLADIJWANE LESUFI
N.O IN HIS CAPACITY AS TRUSTEE
OF THE SETHUNYA FAMILY TRUST**

Second Applicant

and

OCCUPIERS OF ERVEN 139 BEREA

First Respondent

**THE CITY OF JOHANNESBURG
METROPOLITAN MUNICIPALITY**

Second Respondent

JUDGMENT

MAHON AJ:

This revised judgment is handed down electronically by circulating it to the parties' representatives by email and by uploading on CaseLines.

- [1] This is an application for an eviction order against the first respondent and all other persons occupying or claiming a right of occupation through or under the first respondent, from the property described as Erf 139 Jeppestown Township, situated at 58 Auret Street, Johannesburg, Gauteng (“the property”).
- [2] The group of occupiers of the property who are colloquially referred to collectively as the “first respondent” comprise 127 people living in 43 family units at the property. This includes women and children who have been living there for, in most cases, upwards of 7 years. I will refer to them as “the occupiers”.
- [3] The applicants acquired the property in August 2019 and seek to lease the currently occupied units to other tenants in order to supplement their income.
- [4] It is common cause between the parties that the property belongs to the applicants and that the occupiers occupy the property without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy the property. Hence, they meet the definition of an “*unlawful occupier*” in section 1 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 Of 1998 (“PIE”).

- [5] It is also common cause that many of the occupiers will or are likely to be rendered homeless if an eviction order is granted. This invoked the need to cite the second respondent (“the City”) to the proceedings, as the authority that would have to take reasonable measures within its available resources to alleviate homelessness.¹ I will return to the City’s obligations in due course.
- [6] Understandably, the applicants want no part in any dispute relating to the City’s responsibility to provide accommodation to the occupiers – this is the obligation of the City and not the applicants. The applicants, legitimately, merely seek to exercise their rights of ownership. An indefinite delay in evicting an unlawful occupier where the title of the owner of the property and the unlawfulness of such occupation are undisputed, would conceivably amount to a deprivation of property contrary to the provisions of section 25(1) of the Constitution, which proscribes deprivation of property except in terms of law of general application.
- [7] The occupiers, on the other hand, have the right to adequate housing enshrined in section 26(1) of the Constitution. Where the State suffers from a lack of resources or capacity, its ability to achieve the progressive realisation of this right, which it is required by section 26(2) of the Constitution to pursue, is inhibited.
- [8] However, the State’s failure to achieve the progressive realisation of this right cannot simply be viewed through the narrow perspective of those who are immediately impacted, such as the occupiers in the present case. It is a reality which affects all citizens and in the complex balancing exercise that must

¹ *Occupiers, Berea v De Wet No and Another 2017 (5) SA 346 (CC) at para [57]*

necessarily take place when competing rights intersect, an applicant for eviction may be required to exercise a degree of patience in order to accommodate the capacity constraints of the State.²

- [9] This obligation finds expression in the philosophy of Ubuntu, the belief in a universal bond of sharing that connects all humanity and which suffuses our whole constitutional order. With reference to the interpretation of PIE, in particular, the Constitutional Court stated in **Port Elizabeth Municipality**³ that:

“Thus, PIE expressly requires the court to infuse elements of grace and compassion into the formal structures of the law. It is called upon to balance competing interests in a principled way and to promote the constitutional vision of a caring society based on good neighbourliness and shared concern. The Constitution and PIE confirm that we are not islands unto ourselves. The spirit of ubuntu, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern.”

- [10] On the facts of this matter, the applicants have certainly been made to exercise patience. The application for eviction was launched in October 2020

² *City Of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd And Another 2012 (2) SA 104 (CC) at para [100]*

³ *Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC)*

and was ultimately heard before me on 2 August 2023 almost three years later.

[11] And whilst the applicants are required to exercise a degree of patience, the City is equally required to fulfil at least two important functions:

[11.1] Firstly, it is by now well-established that, where an eviction may lead to homelessness, a local authority will generally be required to provide a report dealing with the situation – and, in particular, setting out the steps it has taken or intends to take, to provide suitable alternative accommodation. In **Changing Tides**⁴, the Supreme Court of Appeal explained what such a report, at a minimum, is required to set out, namely:

[11.1.1] the information available to City in regard to the building or property in respect of which an eviction order is sought, for example, whether it is known to be a 'bad building', or is derelict, or has been the subject of inspection by municipal officials and, if so, the result of their inspections. The City should indicate whether the continued occupation of the building gives rise to health or safety concerns and express an opinion on whether it is desirable in the interests of the health and safety of the occupiers that they should be living in such circumstances;

⁴ *City of Johannesburg v Changing Tides 74 (Pty) Ltd And Others 2012 (6) SA 294 (SCA) at para [40]*

- [11.1.2] such information as the City has in regard to the occupiers of the building or property, their approximate number and personal circumstances (even if described in general terms, as, for example, by saying that the majority appear to be unemployed or make a living in informal trades), whether there are children, elderly or disabled people living there, and whether there appear to be households headed by women;
- [11.1.3] whether in the considered view of the City an eviction order is likely to result in all or any of the occupiers becoming homeless;
- [11.1.4] if so, what steps the local authority proposes to put in place to address and alleviate such homelessness by way of the provision of alternative land or emergency accommodation;
- [11.1.5] the implications for the owners of delay in evicting the occupiers;
- [11.1.6] details of all engagement it has had with the occupiers in regard to their continued occupation of or removal from the property or building;
- [11.1.7] whether it believes there is scope for a mediated process, whether under s 7 of PIE or otherwise, to secure the departure of the occupiers from the building and their

relocation elsewhere and, if so, on what terms and, if not, why not.

[11.2] Secondly, where homelessness would otherwise follow, the City is required, within its available resources, to make temporary alternative accommodation available to the occupiers.

Just and Equitable

[12] In the assessment of what constitutes fairness and equity, a court must consider a non-exhaustive list of factors. In this specific case, the pertinent factors include the following:

[12.1] The Occupiers have maintained their occupancy for a period exceeding six months, with some individuals having resided there for an extended duration.

[12.2] The applicants were aware of the presence of the Occupiers when they acquired the property.

[12.3] Evicting the Occupiers would result in them becoming homeless; and

[12.4] there is no counterbalancing risk of homelessness for the applicants, unlike situations where eviction is sought to accommodate a family's housing needs.

[13] One could reasonably anticipate that when acquiring land for commercial use, a property owner who is cognizant of the long-standing presence of Occupiers

must acknowledge the potential for enduring their occupation for a certain duration. Naturally, it is not reasonable to expect a property owner to offer free housing indefinitely to those without shelter on their property. Nevertheless, under specific circumstances, an owner might need to exercise patience and recognise that the right to occupy may be temporarily constrained.

[14] To determine whether eviction by a specific date would be fair and equitable in the context of this case, it is necessary to assess whether land has been offered or can reasonably be provided, as outlined in the relevant legal framework. The City's responsibilities play a crucial role in shaping this assessment. However, it is for the City to demonstrate the constraints on its capacity, as I set out more fully below.

The Report by the City and the Availability of Alternative Accommodation

[15] On 6 April 2023, the City filed a report setting out the following information:

[15.1] On 15 November 2022, a team from the City attended at the property, to conduct an occupancy audit;

[15.2] 43 households were audited which comprised of 127 occupants and a summary of the data collected is as follows:-

[15.2.1] 33 households which are South African residents;

[15.2.2] 10 households which are foreign nationals;

[15.2.3] 6 households did not disclose their household income

- [15.2.4] 20 households are earning less than R3 500.00 per month; and
- [15.2.5] 7 households are earning more than R3 500.00 per month;
- [15.3] a summary was provided of the relevant occupiers' personal circumstances as disclosed in the occupancy audit, dealing with the age and sex of the members of the various households, their employment status and monthly income and whether or not they had any alternative means of accommodation;
- [15.4] 19 households had declared an income below R3500.00 per month and it was concluded that these 19 households will be rendered homeless should an order for eviction be granted without the provision of alternative accommodation This is apparently the "threshold" which is applied by the City to determine a person's eligibility for temporary alternative accommodation;
- [15.5] 6 of the households did not disclose their household income during the occupancy audit. The City states that if an order for eviction is granted against these households, they should only qualify for temporary alternative accommodation if they disclose their incomes and if those incomes are below the threshold;
- [15.6] 10 of the households declared that they are non-South African citizens. According to the City, these households should only be considered for temporary alternative accommodation if they can

demonstrate that they earn below the threshold of R3500 per month and that they are in the country legally;

[15.7] 7 of the households declared an income which is above the threshold of R3 500.00 and according to the City, will not qualify for temporary emergency accommodation if an order for eviction is granted;

[15.8] The City estimates that as many as 100 000 people, currently within the City's jurisdiction may request assistance through temporary emergency accommodation, with the greatest number of occupiers being in Region F, Region E, Region C and Region A. This demand has increased recently due to the high number of people losing their homes due to job losses occasioned by the Covid pandemic;

[15.9] The City established 10 inner city facilities, all of which are said to be full. In addition, the City has temporary housing facilities in other regions that are not temporary emergency accommodation facilities. These are the Rugby Club facility in Florida (Region C). This is City owned land that the City has used over the past 10 years to temporarily accommodate evictees in structures constructed by the City;

[15.10] This land was invaded by a relatively small number of people who over time established a small informal settlement. As and when required, the City has over the period of the past 10 year relocated various evictee communities to this site;

- [15.11] the City, to date, has not had any available resources to extend its temporary emergency accommodation facilities to Region B;
- [15.12] this requires compliance with Supply Chain Management and Procurement Regulations which according to the City, usually takes between 2 and 3 years;
- [15.13] the City is thus of the view that if I am to grant an eviction order, linked to a date by which alternative accommodation is to be provided to the occupiers, that date should be 3 years hence.
- [16] After considering the contents of the City's report and the availability of temporary alternative accommodation, the court must determine whether it would be just and equitable to evict the occupiers. An order that will give rise to homelessness cannot be said to be just and equitable, unless provision is made to provide for alternative or temporary accommodation.⁵
- [17] I must therefore be satisfied that accommodation will be available at the point of eviction. I need not be satisfied that the accommodation is ready and available at the time of this judgment. It is enough that the eviction order which I propose to grant is structured to link the date of eviction to the date on which alternative accommodation is to be provided.⁶
- [18] That is the relief which the occupiers submit would be most appropriate in the circumstances of this application and I, too, am inclined towards this view.

⁵ *Occupiers, Berea v De Wet No And Another 2017 (5) SA 346 (CC) at para [57]*

⁶ *City Of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd And Another 2012 (2) SA 104 (CC) at [97] and [100]*

- [19] I must say that I find it startling that the City can suggest that a period of three years would be required to procure temporary emergency accommodation. It is a proposition which, regrettably, is not backed up by any empirical data.
- [20] The Occupiers argue that the City's report lacks specificity, is overly generalised, and falls short of meeting the stipulated requirements set out by the Supreme Court of Appeal in **Changing Tides**.⁷ They argue that the report is a vague and sweeping representation of the City's lackadaisical approach, essentially expressing an inability to offer alternative accommodation or land in this case or similar cases, despite its constitutional duty to do so.
- [21] Our courts have consistently expressed disapproval and strong criticism of deficient reports when they are submitted in cases demanding specific, proactive, and detailed information. The City bears the responsibility of ensuring that the Court's ultimate decision is fair and equitable within the given context, necessitating the provision of comprehensive and pertinent information. The Occupiers argue that the report from the City fails to meet this standard.
- [22] There is some merit in the Occupier's criticism of the City's report. It neglects to furnish up-to-date information regarding the City's housing policies, inventory, and responsibilities and lacks thorough elaboration on the City's interactions with the residents concerning their housing requirements.
- [23] But should the absence of this specific information preclude the granting of an eviction order? To what extent should the applicants be forced to

⁷ *City of Johannesburg v Changing Tides 74 (Pty) Ltd And Others 2012 (6) SA 294 (SCA)*

accommodate the occupiers, while they and the occupiers await a proper report from the City, particularly where sufficient details of the Occupiers circumstances, have been provided?

[24] As I have already observed, it is the City's obligation to provide adequate temporary alternative accommodation, within its available resources, where homelessness is likely to result from an eviction. If that is the point of departure, then it must be for the City to disclose facts upon which it can rely for a justifiable limitation on its compliance with that obligation. It seems to me, therefore, that if the City seeks to excuse itself from fulfilling this obligation, then it must bear the onus of establishing the necessary facts. Once I am satisfied by the contents of the City's report that an eviction is likely to result in homelessness (as I am in the present matter), the City must be directed to provide temporary alternative accommodation for the occupiers unless it establishes a basis for being excused from doing so in the short term.

[25] It is not sufficient for it to simply rely on unsubstantiated hyperbole such as the bald, sweeping statement that it will take 2 to 3 years to find alternative accommodation without any explanation other than an opaque reference to "*Supply Chain Management and Procurement Regulations*".

[26] The Constitutional Court has long since rejected the proposition that the City cannot be ordered to provide accommodation in the short term, simply because it currently has none readily available. If the City has no accommodation presently available for the occupiers, it must procure some.⁸

⁸ City of Johannesburg v Blue Moonlight Properties 2012 (2) SA 104 (CC)

[27] I am accordingly satisfied that the City must be directed to provide temporary alternative accommodation. Without a proper explanation for any other extended period, I am of the view that 4 months should be more than adequate for the city to comply with this obligation, bearing in mind that it has been a party to this application for more than three years and has thus been able to anticipate that it would ultimately be ordered to provide such accommodation. This is the period which was afforded to the City in **Blue Moonlight**⁹ and I have no reason to doubt its appropriateness in the present circumstances.

[28] With that in mind, I now turn to the question of which occupiers are to be accommodated by the City.

The Income Threshold and the Treatment of Non-South African Citizens

[29] The City accepts that it is required to provide temporary alternative accommodation to households comprised of South African citizens who earn less than R3,500.00 per month. It disputes that its obligations extend to illegal immigrants or South Africans earning more than R3,500.00 per month.

[30] I was informed by Mr McMaster, who appeared for the City, that the R3,500 threshold arises from the provisions of the City's "*Temporary Emergency Accommodation Provision: Policy*" which was adopted by the Council of the City of Johannesburg. It is not clear to me how that amount was earmarked as the appropriate threshold but, although the Occupiers take issue with the appropriateness of the threshold, a formal attack on the Policy or its adoption

⁹ *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd And Another* 2012 (2) SA 104 (CC)

is not before me. In the absence of such an attack I must accept, until the contrary is demonstrated, that the necessary facts and circumstances were considered when adopting the threshold. If the threshold is susceptible to attack, then that question ought to be decided by another court which is properly vested with all of the necessary information.

[31] The City's differentiation on the basis of nationality stands on a different footing. The contention by the City in relation to non-South African occupiers that such occupiers '*will be required to prove that they are in the country legally prior to being considered for temporary emergency accommodation*' is untenable. The National Housing Code provides that illegal immigrants will be provided emergency alternative accommodation on the conditions prescribed by the Department of Home Affairs on a case by case basis. It does not confer on the City the authority to make the provision of alternative accommodation conditional on proof that the occupier is legally within the country.

[32] There is another aspect of the application of the policy which requires comment. The City states that, for purposes of determining whether an occupier falls above or below the threshold, income arising from social assistance in the form of Child Support Grants, is taken into account.

[33] Section 28 of the Constitution guarantees to every child, amongst other things, the right to basic nutrition, shelter, basic health care services and social services. This includes the right to social assistance where a child's parents are unable to support them. The fact that the caregiver occupiers, in this case, receive social assistance in the form of a Child Support Grant should not place

them at a disadvantage when being considered for temporary alternative accommodation. This form of social assistance ought not to be regarded as income or taken into account for purposes of determining whether an occupier falls above or below the threshold.

The Appropriate Order

[34] From what I have stated above, it appears to me that an eviction order must be granted and that the City must be directed to provide temporary alternative accommodation to those occupiers who fall below the City's threshold income figure of R3,500 per month. However, income derived from Child Support Grants must not be included for purposes of determining whether any occupier falls above or below the threshold. Moreover, an occupier's eligibility for temporary alternative accommodation must not be made conditional upon proof that the occupier is legally within the country.

[35] The eviction of occupiers under circumstances such as those which serve before me, may be just and equitable where the date of the eviction is linked to the date on which alternative accommodation is to be provided. As I have said, because the City has been in a position to anticipate an order directing it to provide alternative accommodation, for a significant period of time, I am of the view that four months from the date of this order would be sufficient for the City to procure temporary emergency accommodation for those Occupiers to whom accommodation is to be provided. This was the period which was provided by the Constitutional Court in **Blue Moonlight**,¹⁰ and I have no

¹⁰ *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd And Another 2012 (2) SA 104 (CC)*

reason to think that this period would not be appropriate in the present circumstances.

[36] The City has provided a schedule of those Occupiers whom it has identified as falling within the threshold of R3,500 set out in *Temporary Emergency Accommodation Provision: Policy* and it accepts that it is duty-bound to provide those occupiers with temporary alternative accommodation. The schedule is reproduced as annexure "X" to this judgment. To that list one must add those occupiers whose monthly income, excluding income derived from Child Support Grants, is less than R3,500 per month, regardless of their nationality or immigration status. Given that the City has already established the monthly incomes of the Occupiers, to the extent possible, it should not be a difficult task to simply revise its conclusions in the light of the observations made in this judgment.

[37] In light of the fact that all parties to the application have achieved an element of success, it would be appropriate, in my view, that each party pay their own costs of the proceedings.

[38] I accordingly grant the following order:

1. The First Respondents and all those who occupy through and under them are evicted from the immovable property described as Erf 139 Jeppestown, Township, situated at 58 Auret Street, Johannesburg, Gauteng ("the property").
2. The First Respondents are ordered to vacate the property by no later than 8 March 2024, failing which the eviction order may be carried out;

3. The Second Respondent is directed to provide Temporary Emergency Accommodation in a location as near as possible to the area where the property is situated on or before 23 February 2024, to the following persons, provided that they are still resident at the property and have not voluntarily vacated it:
 - 3.1. those of the First Respondents who are listed in annexure X; and
 - 3.2. those of the First Respondents who form part of households earning less than R3,500.00 per month, excluding any income derived from Child Support Grants and regardless of whether they are foreign nationals or not;
4. The Second Respondent is directed to notify the First Respondents in writing of the nature and location of the accommodation to be provided to them in terms of paragraph 3 above, by 25 February 2024;
5. Each party is to pay their own costs.

D MAHON
Acting Judge of the High Court
Johannesburg

This revised judgment was handed down electronically by circulation to the parties' legal representatives by email and by being uploaded to CaseLines. The date and time for hand down is deemed to be 23 October 2023.

APPEARANCES:

For the Applicant: **Adv M Madi**
Instructed by: **KHR Attorneys**

For the First Respondents: **Ms P Sekate**
Instructed by: **Seri Law Clinic**

For the Second Respondent: **Mr G McMaster**
Instructed by: **Kunene Ramapala Inc.**

Date of hearing: 4 August 2023

Date of judgment: 23 October 2023

Date of revised judgment: 24 October 2023

ANNEXURE "X"

HOUSEHOLD NO	UNIT NUMBER	NO OF OCCUPANTS	SURNAME	FIRST NAME	GENDER (F/M)	SPOUSE/ PARTNER NAME	NO. OF DEPENDANTS
1	Roof top	1	Siyaya	Zwelabo	M	N/A	N/A
2	84	1	Nkabinde	Sandile Innocent	M	N/A	N/A
3	85	2	Mokoena	Dimakatso M	F	Molefi Seleke	2
5	89	6	Sithole	Thulasizwe P	M	Kholeka Mabaso	5
6	90	4	Mazibuko	Pretty	F	N/A	4
7	91	1	Jele	Xolani	M	N/A	N/A
9	93	2	Dube	Njabulo	M	N/A	1
10	94	2	Muchanga	Noxolo	F	N/A	1
12	96	2	Ndlovu	Memory M	F	N/A	1
13	97	4	Bawana	Mkhuseli	M	N/A	3
14	98	2	Radebe	Nomfundo Hazel	F	N/A	1
15	99	4	Nkabinde	Ayanda Zwai	M	Nokuthula Mkhwan	2
16	100	2	Ndumo	Thandeka	F	N/A	1
17	101	3	Dube	Wellinton	N	Samukeliso Jiyane	1
18	102	2	Mokoena	Mpai	F	N/A	1
20	104	3	Madela	Lindokuhle	M	N/A	2
21	105	5	Fipaza	Nangomso	F	N/A	4
22	106	2	Mokoena	Twalane Alice	F	N/A	1
25	109	4	Mabanga	Dumisani B	M	Sayinile Ellen Dzayi	2
28	112	3	Buthelezi	Zama	F	N/A	2
29	113	4	Mtheza	Thembeke V	F	Ncedakale Zamile	3
30	114	3	Mwelase	Nombuso G	F	N/A	2
31	115	1	Mulilo	Prosper K	M	N/A	N/A
32	116	2	Cengani	Siyakhohlwa	M	N/A	1
33	201	3	Binali	Missa Twaya	F	N/A	2
34	202	5	Ngwenya	Mbongiseni	M	Siphiwokuhle nyath	3
36	205	3	Moyo	Patricia	F	Rafick Richard	1
37	207	4	Milasi	Sakhile	F	N/A	2
38	208	1	Ncube	Buhlebenkosi	F	N/A	N/A
39	209	2	James	David	M	N/A	1
40	210	2	Ngwenya	Thanks-God N	M	N/A	1
41	212	3	Zulu	Vusumuzi S	M	N/A	2
42	213	3	Dube	Mpumelolo	M	Sihle Ndlovu	1
43	215	3	Dube	Sipho	M	Moyo Prevllege	1