REPUBLIC OF SOUTH AFRICA

THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE:

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGES ~~YES~~/NO

(3) REVISED:

08 JANUARY 2024
DATE:

SIGNATURE:

CASE NR: 57383/2021

In the matter between:

MOHOLOHOLO DEVELOPMENT (PTY) LTD **APPLICANT**

and

THE CITY OF TSHWANE METROPOLITAN MUNICIPALITY **FIRST RESPONDENT**

THE OCCUPIERS OR ERVEN 632 AND 633, CLARINA EXTENSION 32 **SECOND RESPONDENT**

Delivered: *This judgment was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 8 January 2024.*

JUDGMENT

MARUMOAGAE AJ

A INTRODUCTION

[1] In this application, the applicant seeks to evict the first and second respondents from the property known as Erven 632 and 633 Clarina Extension 32, Akasia, Pretoria. In addition to the eviction order, the applicant also requires the court to determine the date on which the respondents should vacate this property. Both respondents oppose this application. The first respondent also brought a separate urgent applicant for the applicant's eviction application to be postponed *sine die*. The court is called upon to decide who should bear the costs of the application for postponement.

[2] This application demonstrates the fundamental challenges of homelessness in South Africa and how municipalities fail those in desperate need of housing through their officials and some of their internal processes that ultimately lead to commercial disputes with business people who can assist municipalities in providing alternative accommodation to the homeless.

[3] This application has nothing to do with the occupants of the property the applicant claims to own, but a business deal with the first respondent that seems to have gone bad. However, those who will suffer the most are the occupants of this property who are continuously being failed by the first respondent as the municipality that has been ordered by the Constitutional Court to provide them with alternative accommodation.

B OVERVIEW

[4] Those who are part of the second respondent previously resided at Schubart Park Apartments Block (Schubart Building). They were evicted following an order of this court which they successfully appealed against at the Constitutional Court, which ordered the first respondent to provide the second respondent with alternative accommodation.

[5] The occupants of the Schubart Building were forced to vacate this building after it was set on fire during service delivery protests. In July 2023, the first respondent took control of the property in dispute and caused 100 families to occupy it.

[6] The first respondent procured the alternative accommodation by way of a tender process. To participate in the tender process, the applicant acquired the property from Autumn Star. However, this acquisition was conditional on the applicant being awarded a tender by the first respondent. The tender was awarded to the applicant. In its bid, the applicant had to immediately provide 160 units with a further 432 units to be built as time went by. The first respondent made an initial payment of the tender to the applicant. The applicant charged the first respondent occupational rent which the first respondent did not pay.

[7] With the money received from the first respondent, the applicant paid Autumn Star. Ultimately, the applicant intended to sell the property to the first respondent. However, there was no written sale of agreement between the parties. Notwithstanding this, the applicant proceeded to prepare for the erection of 432 units and issued invoices which the first respondent refused to pay.

[8] The first respondent refused to make further payments to the applicant because it regarded the tender awarded to the applicant to be unlawful, illegal, and unconstitutional. The first respondent advanced several reasons why this

tender process was unlawful, including the fact that the way the tender was advertised violated its supply chain management regulations.

[9] This court is not called upon to adjudicate the lawfulness of this tender. It is therefore unnecessary to burden this judgment with the allegations made by the first respondent regarding this tender. However, it suffices to mention that the first respondent lodged a review application in this court to set aside this tender.

C SUBMISSIONS OF THE PARTIES

[10] To allow the review application to be heard first, the first respondent applied for this eviction application to be postponed *sine die* and for the applicant to also be responsible for the costs of this postponement. The applicant alleged that the application for postponement was made late. However, the applicant appears to agree that the eviction application should be postponed but insists that the first respondent should bear the costs of the postponement. The second respondent is of the view that the applicant should bear the costs of the postponement.

[11] The applicant did not respond to the first respondent’s lengthy affidavit submitted in support of the application for postponement with an answering affidavit. But rather submitted a draft order which the first respondent rejected. The draft order deals with the submission of the report by the first respondent and what should be contained in that report.

[12] All the parties were allowed to file concise heads of arguments after the matter was argued which were pointed and of assistance to this court. The court is indebted to all the parties' legal representatives in this regard. The first respondent is of the view that the applicant should have brought a substantive application supported with an affidavit for the relief sought in the draft order. The second respondent agrees with this view.

[13] It was submitted on behalf of the first respondent that it is illogical for the eviction application to be disposed of before this court decides on the validity of the disputed tender that was awarded to the applicant. It was argued further that there is a risk of conflicting judgments if the eviction matter was to be decided before the review application is finalised. Further, the application for a stay of the eviction which the first respondent intended to lodge should be decided before the eviction application can be decided.

[14] The applicant was also confronted with the difficulty of faceless individuals that it sought to evict. Apart from this, the court was not furnished with a report dealing with the personal circumstances of the occupants of the property by the first respondent to determine whether alternative accommodation would be available to the first respondent if an eviction order was to be granted.

[15] At least 100 families face eviction in this matter which makes it necessary for information to be placed before this court relating to alternative accommodation by the first respondent. It was submitted on behalf of the applicant that where there is no information regarding the availability of alternative accommodation if the occupiers are to be evicted, the court cannot decide whether it would be just and equitable to grant an eviction order.

[16] It was submitted further on behalf of the first respondent that the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act[1] (hereafter PIE Act) does not stipulate that the municipality must produce a report, as well as what such report should contain. Further, the obligation to produce a report depends on the circumstances of each case.

[17] It was submitted on behalf of the second respondent that the applicant had a duty to ensure that there was a report before the court by the first respondent dealing with the provision for alternative accommodation. Further, failure to do so demonstrated that the matter was not ripe for hearing and that the matter was placed on the roll prematurely.

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[1] 19 of 1998.

D APPLICABLE LEGAL PRINCIPLES AND ANALYSIS

i) Access to adequate housing

[18] In terms of section 26(1) of the Constitution of the Republic of South Africa, 1996 (hereafter Constitution), *'[e]veryone has the right to have access to adequate housing'*. This is a fundamental right that can restore the dignity of those who can access housing. However, the reality of South Africa is that not everyone can access housing. For those who are unable to access housing through their own means, the state has a constitutional mandate to take reasonable legislative and other measures within its available resources to progressively grant them access to housing.[2]

[19] The Constitutional Court in *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd,*[3] held that *'[t]he progressive realisation of access to adequate housing … requires careful planning and fair procedures made known in advance to those most affected'.* In this case, those who are part of the second respondent, despite their vulnerability and being destitute, were previously evicted by the first respondent from the Schubart Building. The Constitutional Court further illustrated how poorly the first respondent treated those who are part of the second respondent. The Constitutional Court held that:

> *'[u]nfortunately the history of the City's treatment of the residents of Schubart Park also shows that they appeared to regard them, generally, as "obnoxious social nuisances", who contributed to crime, lawlessness and other social ills. If there were individuals at Schubart Park who were guilty of, or contributed to, these ills, they should have been dealt with in accordance with the provisions of the law relating to them'.*[4]

[20] Those who find themselves in the shoes of the second respondent are usually treated in a distasteful and undignified manner by their very own people who

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[2] Section 26(2) of the Constitution. See also *Thubakgale and Others v Ekurhuleni Metropolitan Municipality and Others* 2022 (8) BCLR 985 (CC).
[3] 2005 (5) SA 3 (CC); 2005 (8) BCLR 786 (CC).
[4] *Schubart Park Residents' Association and Others v City of Tshwane Metropolitan Municipality and Another* 2013 (1) SA 323 (CC); 2013 (1) BCLR 68 (CC) para 50.

happen to occupy positions of power in different state entities, who take decisions that effectively infringe on their dignity. They are subjected to continuing eviction proceedings depending on who runs municipalities.

[21] Those who are part of the second respondent were once evicted and the Constitutional Court restored their dignity. They are again facing the indignity of an eviction based on a commercial agreement that has nothing to do with them. Those who are part of the second respondent have a right not to be evicted from a place that has effectively become their home, without an order of court made after considering all the relevant circumstances.[5]

[22] Despite accessing adequate housing where they have settled and established families, those who are part of the second respondent now stand to be removed from their property simply because the applicant and the first respondent cannot meaningfully engage each other to find an amicable solution that can restore their dignity. Those who are at the centre of making decisions have their own homes and live comfortably. They seem not to care what happens to those who are part of the second respondent. In my view, this is shameful and unacceptable.

ii) The duty to furnish a report

[23] The PIE Act provides the legislative framework within which landowners or persons in charge of land can evict those occupying their land.[6] All the parties appear to agree that this eviction application cannot proceed and must be postponed *albeit* for different reasons. On the one hand, the applicant believes that this matter should only be heard once the first respondent has furnished a report detailing the circumstances of those who are part of the second respondent. The second respondent agrees with this approach. On the other

[5] Section 26(3) of the Constitution.
[6] See *Msibi v The Occupiers of Unit [....] C[....] and Another* (55038/2021) [2022] ZAGPPHC 880 (18 November 2022) paras 9 – 21, where the general principles that are applicable in eviction proceedings are summarised. There is no need to repeat them in this judgment.

hand, the first respondent is of the view that the matter cannot proceed before the review application is finalised.

[24] On the issue of the report by the municipality on eviction matters, section 4(2) of PIE Act dictates that the municipality should be served with written and effective notice of the eviction proceedings. Section 4(6) of the PIE Act provides that the court has the discretion to grant an eviction order

'… if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women'.

[25] Part of the reason municipalities are served with eviction applications is not only to provide alternative accommodation. Such service is also an invitation for municipalities to come forward to assist the court to understand the circumstances of persons who reside within their areas of jurisdiction. This can only effectively be done when municipalities commission reports that contain the relevant circumstances of persons sought to be evicted.

[26] In this respect, municipalities have an implicit obligation to place these people's circumstances before the court. This can effectively be done through a report compiled by the relevant municipality. While this will be based on the circumstances of each case, where there is a possibility of mass homelessness, I am of the view that there is an inherent duty on the relevant municipality to provide such a report.

[27] While recognising the burden this duty may place on municipalities, the Supreme Court of Appeal in *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others*, held that:

'[h]owever, 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. 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.[7]

[28] This entails that municipalities are well within their rights to commission general reports that they can submit to the court as and when they are served with eviction applications. These reports will generally inform the court of the state of housing demand within the municipality and availability of alternative accommodation as well as the steps taken to provide such accommodation. However, there are instances such as in this matter where the report must specifically deal with the personal circumstances of those sought to be evicted.

[29] I am of the view that the extent to which the applicant can establish the right to evict those who are part of the second respondent, the first respondent will be obliged to furnish the court with a report. However, until the review application has been finalised, it will be premature for the first respondent to do so. In my view, this eviction application was also brought prematurely. There is merit in the first respondent's contention that its review application should be finalised first before the eviction application can be entertained.

iv) Postponement

[30] The first respondent's application for postponement was brought on an urgent basis. However, the issue of urgency was not dealt with in the founding affidavit, heads of argument and submissions that were made on its behalf during oral hearing. In any event, since the applicant seems to agree that this matter should be postponed, *albeit* for different reasons, the first respondent's failure to adequately deal with the requirements of Rule 6(12) of the Uniform Rules of Court can be overlooked. The only contentious issue concerning the postponement of this issue relates to who should bear the costs.

[31] There appears to be different schools of thoughts when it comes to who should bear the costs with regards to applications to postpone matters. On the one

[7] 2012 (6) SA 294 (SCA); 2012 (11) BCLR 1206 (SCA); [2013] 1 All SA 8 (SCA) para 41.

hand, some courts have held that the general rule is that the party that seeks a postponement should bear the costs.[8] On the other hand, some courts have refused to order parties that seek postponements to pay costs when they have justifiable reasons for their applications.[9] In *Ketwa v Agricultural Bank of Transkei,* correctly held that *'… it is inappropriate to state, as a general rule, that wasted costs are to be paid by the party which seeks a postponement'*.[10]

[32] In this matter, the first respondent felt obliged to bring a substantive application to postpone a matter that ought not to have been enrolled in the first place. Given the fact that there is a pending review application which may have led to the application probably being dismissed, the application for postponement came to the applicant's rescue because its eviction application remains alive.

[33] In my view, it was ill-considered considering the review application for the first respondent to enrol the eviction application to be heard before the review application is finalised. I am of the view that the applicant should bear the costs of this application. By enrolling this application, the applicant also forced the second respondent not only to oppose this application but also to brief counsel to argue the matter. It is only fair that the applicant also bears the costs of the second applicant.

F CONCLUSION

[34] In my view, the first respondent and the applicant should be reminded that those who are part of the second respondent are real people with entrenched fundamental rights. They are worthy of respect, regard, and care. Their socio-economic circumstances do not warrant that they should be rendered invisible in these proceedings. It is unfair that they should constantly be subjected to eviction proceedings and forced to approach courts for protection. It is hoped

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[8] See *Van Rooyen v Naude* 1927 OPD 122, where it was stated that 'the practice which has generally been adopted in South African -courts in a case like this is to throw the burden of the wasted costs on the party applying for the postponement'. This approach was followed in several decisions such as *Hlongwane v Roux & Van Gass NNO* 1948 (1) SA 62 (W) 71, *Orphindes and others v Stratton and others* 1953 (1) SA 152 (SR) 154 and *Grobbelaar v Snyman* 1975 (1) SA 568 (O) 570.

[9] See *Burger v Kotze and another* 1970 (4) SA 302 (W) and *Van Staden v Union and SWA Insurance Co Ltd* 1972 (1) SA 758 (E) 758

[10] [2006] 4 All SA 262 (TK).

that the applicant and the first respondent would open channels of negotiation to meaningfully engage each other to find a viable solution to their dispute.

ORDER

[35] In the premises, I make the following order:

1. The respondent's application for the postponement of the applicant's eviction application is granted.

2. The applicant is to pay the first and second respondents' costs for the application for postponement, including costs of counsel.

3. The applicant's application for eviction is postponed *sine die.*

C MARUMOAGAE

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION

PRETORIA

Counsel for the applicant:	Adv JP Vorster
Instructed by:	Machobane Kriel Inc
Counsel for the first respondent:	Adv PL Uys
Instructed by:	Lawtons Inc
Counsel for the second respondent:	Adv H Scholtz
Instructed by:	Lawyers for Human Rights
Date of the hearing:	9 October 2023
Date of judgment:	8 January 2024