THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 873/2012
Reportable

In the matter between:

EKURHULENI METROPOLITAN MUNICIPALITY **FIRST APPELLANT**

GAUTENG DEPARTMENT OF HOUSING **SECOND APPELLANT**

and

VARIOUS OCCUPIERS, EDEN PARK EXTENSION 5 **RESPONDENTS**

Neutral citation: *Ekurhuleni Metropolitan Municipality v Various Occupiers, Eden Park Extension 5* (873/12) [2013] ZASCA 162 (26 November 2013)

Bench: Ponnan, Malan, Majiedt, Willis and Saldulker JJA

Heard: **4 November 2013**
Delivered: **26 November 2013**

Summary: Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) – s 4 – eviction of unlawful occupiers.

ORDER

On appeal from: South Gauteng High Court, Johannesburg (Satchwell J sitting as court of first instance):

The appeal is dismissed with costs, such costs to include those consequent upon the employment of two counsel.

JUDGMENT

PONNAN JA (MALAN, MAJIEDT, WILLIS and SALDULKER JJA concurring):

[1] The first appellant is the Ekurhuleni Metropolitan Municipality (the municipality), a metropolitan municipality established as such in accordance with the provisions of the Local Government: Municipal Structures Act 117 of 1998. The second appellant is the Gauteng Department of Housing (the provincial department) established in accordance with the provisions of the Public Service Act 1994 (Proclamation 103 of 1994) and is responsible for the provision of housing within the Gauteng Province. The appellants appeal against the judgment of the South Gauteng High Court, Johannesburg, in which Satchwell J dismissed with costs their application in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE), for the eviction of various occupiers (the Respondents)[1] from a housing development known as Eden Park Extension 5 (Ext 5).

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[1]The Respondents have throughout the proceedings both in this court and the one below been divided into two groups. The first group consisted of respondents who fell under the banner of the Eden Park Community Action Unit and the second was described as the Remaining Occupiers of Eden Park Community.

[2] The development of subsidised housing at Eden Park was initiated as a local development project in 2000 when a proposal was made by a company known as Bluedot Properties to the Alberton Town Council to erect 3 500 houses with donor funding. It was envisaged that the project would assist the Alberton Town Council to address its housing backlog. Ms Minnie Booysen, the principal deponent to the affidavits filed on behalf of the respondents, alleged that:
'These houses were to be donated to the squatters; homeless people and backyard and zozo dwellers of Eden Park and the feeder areas, with the proviso that all intended beneficiaries resident within the jurisdiction of the ATC [Alberton Town Council] were to be drawn from the provincial departmental housing waiting list.'

[3] Ms Booysen further stated that when representatives of the Eden Park and other feeder area communities met with officials of the municipality they were assured that their applications would receive priority in respect of the development at Ext 5. She added:
‘When in March 1999 it was reported in the Alberton Record that the community of Eden Park was not going to benefit from the development at EPE5, and that the residents on the waiting list from Eden Park had shrunk from 2600 to 304, the community engaged the First Applicant by marching to its offices and requested that the matter be investigated. As is apparent from what is to follow the community has engaged the Applicants on the allocation of the homes in EPE5 from as early as 1999. The purpose of this engagement was to ensure that the identification of beneficiaries was transparent and done in a manner that prioritized the needs of the homeless people and backyard dwellers in Eden Park and the immediately surrounding townships.’

[4] Towards the end of 2001 and for reasons that do not emerge on the papers donor funding for the project was withdrawn. The municipality then took over the project, whereafter the provincial department became responsible for the construction and allocation of houses. In 2003 the municipality made available for inspection its waiting list of beneficiaries. Contrary to the expectations of the local community, of the 2 149 housing stands that had been developed by that stage, only 77 were allocated to applicants from Eden Park and the other feeder areas. At a

meeting with the municipality in September 2003, the ward councillor for the Eden Park community, Mr Jarvis, expressed the local community's dismay at the housing list. The municipality's executive director of housing, Mr Chanee, indicated at this meeting that '[a]ny alleged discrepancies received [would] be investigated'. He indicated further that:

'It must be remembered that no system is flawless and that during 1998 and 2000, documents were not captured by the Council, but were submitted to Province for capturing. The possibility of documents being lost during this period is not excluded.'

On 26 September 2003, according to Ms Booysen, the municipality withdrew the waiting list and suspended the allocation process 'due to the problems it was experiencing with the waiting list'.

[5] On 24 November 2003, the provincial department initiated a new housing allocation programme called '[t]he 1996 and 1997 Waiting List Beneficiaries' programme. The then MEC for Housing: Gauteng, issued a policy directive (the directive) announcing the new provincial programme. The directive recorded that the province had experienced 'various problems [plaguing] the Waiting List at a provincial and municipal level'. It added that the allocation of housing subsidies to beneficiaries 'has not been totally aligned to the Waiting List and as a consequence a significant number of beneficiaries [who had] applied in 1996 and 1997 [had] not yet received any subsidy assistance'. The directive further provided that:

'a) All beneficiaries that are captured on the Gauteng Department of Housing's Waiting List as 1996 and 1997 applicants, are eligible for housing assistance;

b) Beneficiaries that are subsidized in terms of this programme be exempted from the R2 479,00 financial contribution;

c) All beneficiaries within this programme that earned below R3 500 per month are eligible to receive the full subsidy amount; and

d) All beneficiaries are given preference in housing projects especially where the top structure has been completed.'

[6] In the meanwhile on 20 November 2003 the mayoral committee of the municipality had adopted a resolution (the resolution) in respect of housing allocations in Ext 5, which stated:

'That the following beneficiary qualification criteria for Eden Park Extension 5 BE NOTED and APPROVED in addition to the Provincial and National Housing subsidy qualification criteria

(a) They shall be beneficiaries from Alberton, Thokoza and Eden Park (100 beneficiaries shall be from Eden Mews).

(b) They shall be beneficiaries who are in possession of Form C's dated between January 1996 to December 1999, including beneficiaries who are in possession of Form C's and already registered by Ntuli Noble and Spoor, but were not reflected on the waiting lists.

(c) The final beneficiary waiting list comprise of beneficiaries mentioned in (a) and (b) above and with an income not exceeding R1500,00.

(d) The final beneficiary waiting list shall be published immediately upon the approval of the proposed criteria for a period of (30) thirty days.'

[7] During January 2004 the municipality issued a new waiting list. But that list which included only 268 applicants from Eden Park and other feeder areas did little to quell the disquiet that had already been expressed by the respondents. Several meetings followed between community representatives and the local councillors in an attempt to gain clarity on the housing subsidy applications and allocation process at Ext 5. And as the housing construction project progressed, the discontent by members of the community became manifest. A series of petitions and protests followed. Eventually on 9 October 2008 and following a mass meeting, the residents of Eden Park began occupying the unoccupied and incomplete houses in Ext 5. Ms Booysen summarises what motivated their conduct thus:

'Despite all these efforts [at engagement] the community is still none the wiser on the criteria used to identify the qualifying beneficiaries for Eden Park Extension Five. We have attempted to engage the applicants through our local ward councillor and our local community organisation, EPCAU [the Eden Park Community Action Unit] with no success. . . . The occupation also came about because of the incoherent and mysterious beneficiary identification process; the general failure on the part of the applicants to explain their housing policy and their beneficiary qualification criteria; and their overall inability and unwillingness to engage with the respondents and explain why available housing resources in the area were not used in whole or in part to address the needs of the community . . .

When our concerns were not addressed there were those of us that had been approved but not allocated [houses] who became afraid that we would just be looked over again and not benefit. There were others who had applied for housing in 1996 and 1997 but still had not benefitted, never mind that the development was meant to cater for these applications. Some had been allocated homes at the development and these homes were incorrectly given to somebody else. It was all these factors that led to the eventual occupation . . . .'

[8] Against that backdrop, the appellants approached the high court for an order in the following terms:

'1) For the eviction of the respondents from the houses the erven numbers of which are listed and attached to the founding affidavit as FA2 within 30 days from the date on which the order is granted.

2) That if the respondents do not vacate the aforesaid houses within 30 days from the date on which the order is granted, the Sheriff for the district of Alberton be hereby authorized to do all that is necessary to give effect to the eviction order by removing the respondents and all persons who occupy the aforesaid houses through the respondents and all assets belonging to the respondents or belonging to all persons who occupy the property through the respondents from the aforesaid houses.

3) That the respondents be ordered to pay the costs which may be occasioned by the Sheriff having to give effect to the eviction order.

(4) That the respondents be ordered to pay the costs of this application.'

[9] Annexure FA2 to the founding affidavit, under the caption 'Stand numbers of houses illegally occupied', listed 903 such stands. In support of the application, the municipality's Executive Director: Legal and Administrative Services stated:

'1.8 The respondents are unlawful occupiers of six hundred and fifty one (651) houses **("<u>the houses</u>")** constructed by and at [the] instance of the second applicant on land belonging to the first applicant situated at Eden Park Extension 5.

1.9 I attach hereto as FA2 a list of erven numbers for the houses unlawfully occupied by the respondents. All of these erven are on Portion 175 of the Farm Palmietfontein 141 IR which belongs to the first applicant. The first applicant's attempts to ascertain the identities of the respondents all of whom occupy the

houses have been unsuccessful. The reason why attempts to ascertain the identities of the respondents is that officials employed by the applicants to do so were threatened with violence when they visited the houses to ascertain the respondents identities. I, however, confirm that the houses are occupied illegally as it will become apparent below.'

[10] The high court was not persuaded that it would be just and equitable in the circumstances of this case to order the eviction of the respondents from Ext 5. What informed the conclusion of the high court were the following three broad yet overlapping considerations: first, the appellants had displayed uncertainty and confusion as to the identity of those persons who were to be evicted; second, the integrity of the waiting list and the allocation process had been compromised, accordingly, so the high court stated 'the possibility, indeed the probability [existed], that there had been arbitrariness to the process which renders it unacceptable'; and third, the appellants adopted an 'exclusionary' eviction process that did not have proper regard to the personal circumstances of each of the unlawful occupiers.

[11] The Constitution is the touchstone. Its key constitutional provisions at issue in this case are s 26 and s 28(1)(*c*). Section 26 provides:

‘(1) Everyone has the right to have access to adequate housing.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.'

Section 28(1)(*c*) provides:

‘Every child has the right - to basic nutrition, shelter, basic health care services and social services.'

These rights, as part of a cluster of socio-economic rights, entrench the right of access to adequate housing and the right of the child to shelter. To those provisions may be added section 2(1) of the Housing Act 107 of 1997, which provides that national, provincial and local spheres of government are bound to observe certain principles when dealing with 'housing development'. Those include ensuring that

' . . . . housing development –

(iv) is administered in a transparent, accountable and equitable manner, and upholds the practice of good governance . . . .'

[12] The Constitutional Court has held on several occasions that s 26 of the Constitution requires that all state action concerned with housing must be reasonable and cognisant of the human dignity of the occupiers. Thus in *Government of the Republic of South Africa & others v Grootboom & others* 2001 (1) SA 46 (CC) the Constitutional Court held (paras 82 and 83):
'All implementation mechanisms and all State action in relation to housing falls to be assessed against the requirements of s 26 of the Constitution. Every step at every level of government must be consistent with the constitutional obligation to take reasonable measures to provide adequate housing.
. . . .
Section 26, read in the context of the Bill of Rights as a whole, must mean that the respondents have a right to reasonable action by the State in all circumstances and with particular regard to human dignity. In short, I emphasise that human beings are required to be treated as human beings. This is the backdrop against which the conduct of the [appellants] towards the [respondents] must be seen.'

[13] Moreover, in *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes & others (Centre on Housing Rights and Evictions & another,* Amici Curiae*)* 2010 (3) SA 454 (CC) para 148, Moseneke DCJ observed that where the occupiers reside on land owned by the State different and more stringent considerations may well apply, given the State's obligations under s 26(2) of the Constitution. In that case, the Constitutional Court made plain that in order for government to obtain an eviction order from state-owned land it needs to show both that in seeking the eviction, it is acting reasonably within the meaning of s 26(2) of the Constitution (which enjoins it to take reasonable steps to provide adequate access to housing) and that the eviction is just and equitable as contemplated under PIE. The requirement of reasonableness thus overlaps with the justice and equity enquiry under PIE, particularly in respect of government's implementation of its housing development plans. The reasonableness or otherwise of government's conduct is thus a material factor in determining whether the eviction is just and equitable.

[14] PIE was passed to give effect to s 26(3) of the Constitution. Eviction proceedings by the 'owner of land' are governed by section 4 of PIE and by 'an organ of State' by section 6. The appellants contend that where an application for eviction is brought by an organ of state which is also the owner of the land in question it must be considered under s 4 and not s 6 of PIE. The high court approached the matter on the basis that s 4 found application. I shall assume in the appellants' favour, without deciding, that the high court was correct in its approach.

[15] To the extent here relevant s 4 of PIE, headed 'eviction of unlawful occupiers', reads:

'(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.

. . .

(6) If an unlawful occupier has occupied the land in question for less 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 the rights and needs of the elderly, children, disabled persons and households headed by women.

(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).*'

[16] In *City of Johannesburg v Changing Tides 74 (Pty) Ltd & others* 2012 (6) SA 294 (SCA) Wallis JA explained:

‘[11] In terms of s 4(7) of PIE an eviction order may only be granted if it is just and equitable to do so, after the court has had regard to all the relevant circumstances, including the availability of land for the relocation of the occupiers and the rights and needs of the elderly, children, disabled persons and households headed by women. If the requirements of s 4 are satisfied and no valid defence to an eviction order has been raised the court "must", in terms of s 4(8), grant an eviction order. When granting such an order the court must, in terms of s 4(8)*(a)* of PIE, determine a just and equitable date on which the unlawful occupier or occupiers must vacate the premises. The court is empowered in terms of s 4(12) to attach reasonable conditions to an eviction order.

[12] There does not appear to have been a consideration of the precise relationship between the requirements of s 4(7) (or s 4(6) if the occupiers have been in occupation for less than six months) and s 4(8) in the context of an application for eviction at the instance of a private landowner. In some judgments there is a tendency to blur the two enquiries mandated by these sections into one. 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 into 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.'

[17] The phrase ‘just and equitable’ is not unknown to our law. It is, by way of example, to be found in s 344(*h*) of the Companies Act 61 of 1973, which provides that ‘a company may be wound up by the Court if it appears to the Court that it is just and equitable that the company should be wound up'. To be sure, that may not be an entirely apt analogy but the approach of the courts to that enquiry may nonetheless be instructive. In *Apco Africa (Pty) Ltd & another v Apco Worldwide Inc* 2008 (5) SA 615 (SCA) para 16 and 17, this court held:

‘That subsection, unlike the preceding subparagraphs of s 344, postulates not facts but only a broad conclusion of law, justice and equity as a ground for winding-up (*Moosa NO v Mavjee Bhawan (Pty) Ltd and Another* 1967 (3) SA 131 (T) at 136H). It is well settled that the subsection giving power to the court to wind up a company on the just and equitable ground is not confined to cases in which there are grounds analogous to those mentioned in other parts of the section (*Loch v John Blackwood* [1924] AC 783 (PC)). Nor, on the other hand, can any general rule be laid down as to the nature of the circumstances that have to be borne in mind in considering whether a case comes within the phrase (*Davis & Co Ltd v Brunswick (Australia) Ltd* [1936] 1 All ER 299 (PC) at 309). It must also be recognised that there is no necessary limit to the generality of the words "just and equitable". Section 344(*h*) affords a court a wide judicial discretion in the exercise whereof, however, certain other sections of the Act must be taken account of (*Erasmus v Pentamed Investments (Pty) Ltd* 1982 (1) SA 178 (W) at 181).

The words just and equitable –

" . . . are a recognition of the fact that a limited company is more than a mere judicial entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations *inter se* which are not necessarily submerged in the company structure. That structure is defined by the Companies Act and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The “just and equitable” provision does not … entitle one party to disregard the obligation he assumes by entering a company, nor the

court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.

It would be impossible, and wholly undesirable, to define the circumstances in which these considerations may arise. . . . "

(*Per* Lord Wilberforce in *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 (HL) at 379*b*–380*b* [1972] 2 All ER 492 at 500*a*–*h*).)'

[18] In *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter & others* 2000 (2) SA 1074 (SE) at 1081E-G Horn AJ observed in the context of PIE:

'The use of the term just and equitable relates to both interests, that is what is just and equitable not only to the persons who had occupied the land illegally, but to the landowner as well. The term also implies that a court, when having to decide a matter of this nature, would be obliged to break away from a purely legalistic approach and have regard to extraneous factors such as morality, fairness, social values and implications and any other circumstances which would necessitate bringing out an equitably principled judgment.'

That dictum was approved by Sachs J in *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) in these terms:

'[35] The approach by Horn AJ has been described both judicially and academically as sensitive and balanced. I agree with that description. The phrase "just and equitable" makes it plain that the criteria to be applied are not purely of the technical kind that flow ordinarily from the provisions of land law. The emphasis on justice and equity underlines the central philosophical and strategic objective of PIE. Rather than envisage the foundational values of the rule of law and the achievement of equality as being distinct from and in tension with each other, PIE treats these values as interactive, complementary and mutually reinforcing. The necessary reconciliation can only be attempted by a close analysis of the actual specifics of each case.

[36] The court is thus called upon to go beyond its normal functions and to engage in active judicial management according to equitable principles of an ongoing, stressful and law-governed social process. This has major implications for the

manner in which it must deal with the issues before it, how it should approach questions of evidence, the procedures it may adopt, the way in which it exercises its powers and the orders it might make. The Constitution and PIE require that, in addition to considering the lawfulness of the occupation, the court must have regard to the interests and circumstances of the occupier and pay due regard to broader considerations of fairness and other constitutional values, so as to produce a just and equitable result.'

[19] Thus both the Constitution and PIE emphasise that the court must take into account all relevant factors before granting an eviction order. As Wilson[2] notes, the enquiry to be undertaken is therefore whether, given all the relevant factual, legal and socio-economic circumstances, it is just and equitable to order the eviction of the unlawful occupier.

'This requires a court to make a value judgment, but it must not do so in a vacuum.'

There are various considerations relevant to this determination, as outlined both in the Act and through the case law, with each factor taking on either an increased or lesser importance depending on the prevailing factual matrix of each matter. According to Chenwi[3] the following are potentially relevant to the enquiry:

'(i) [T]he manner in which the occupation was effected; (ii) the duration of the occupation; (iii) the availability of suitable alternative accommodation or land; (iv) reasonableness of offers made in connection with suitable alternative accommodation or land; (v) the timescales proposed relative to the degree of disruption involved; (vi) the willingness of the occupiers to respond to reasonable alternatives put before them; (vii) the extent to which serious negotiations have taken place with equality of voice for all concerned; and (viii) the gender, age, occupation or lack thereof and state of health of those affected . . . [and] the manner of execution of the eviction order, that is, whether it was executed humanely . . . Furthermore, the interests of surrounding communities as well as the negative impact of "land gaps" on investor-confidence in the country, and the right of landowners (discussed subsequently), have been regarded by the courts as relevant factors.'

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[2] S Wilson 'Judicial enforcement of the right to protection from arbitrary eviction: Lessons from Mandelaville' (2006) 22 *South African Journal on Human Rights* 535 at 536.

[3] L Chenwi 'Putting flesh on the skeleton: South African judicial enforcement of the right to adequate housing of those subject to evictions' (2008) 8 *Human Rights Law Review* 105 at 127-128.

[20] The discretion to be exercised in determining whether or not to grant an order of eviction based upon what is just and equitable is one in the wide and not the narrow sense. Consequently, as Harms JA explained in *Ndlovu v Ngcobo; Bekker & another v Jika* 2003 (1) SA 113 (SCA) para 18, '[a] court of first instance . . . does not have a free hand to do whatever it wishes to do and a Court of appeal is not hamstrung by the traditional grounds of whether the court exercised its discretion capriciously or upon a wrong principle, or that it did not bring its unbiased judgment to bear on the question, or that it acted without substantial reasons'.

[21] Further, whilst 'technical questions relating to onus of proof should not play an unduly significant role' in an enquiry such as this, that does not mean, as Wallis JA observed in *Changing Tides*, that the onus of proof can be disregarded. Wallis JA added:

'[29] . . . After all what is being sought from the court is an order that can be granted only if the court is satisfied that it is just and equitable that such an order be made. If, at the end of the day, it is left in doubt on that issue it must refuse an order. There is nothing in PIE that warrants the court maintaining litigation on foot until it feels itself able to resolve the conflicting interests of the landowner and the unlawful occupiers in a just and equitable manner.

[30] The implication of this is that, in the first instance, it is for the applicant to secure that the information placed before the court is sufficient, if unchallenged, to satisfy it that it would be just and equitable to grant an eviction order. Both the Constitution and PIE require that the court must take into account all relevant facts before granting an eviction order. Whilst in some cases it may suffice for an applicant to say that it is the owner and the respondent is in occupation, because those are the only relevant facts, in others it will not. . . .'

[22] Doubtless, the position of the respondents is desperate. Most, if not all, of them live below the bread line. One of the respondents, Mr Alfred Hlatshwayo, put it as follows in his affidavit:

'35. The respondents are poor people with an average household surviving on social grants and disability grants from the Government. A small minority of the respondents have full-time employment. The majority of the respondents

has no formal employment and is depended on hawking in the streets of Eden Park and surrounding areas like Katlehong, Thokoza and Greenfields. This involves selling vegetables and fruits, soft drinks, sweets, cigarettes and other goods.

36. Some of the respondents survive and support their families by doing casual piece-jobs for a daily fee as cleaners, domestic work or general construction workers around areas like Boksburg, Alberton and Germiston, Katlehong and Thokoza which are all not far from Eden Park.'

That, however, can hardly excuse their conduct, which by their own admission appears to have been part of a deliberate strategy to gain some kind of preference in the allocation of housing resources over many others who sadly also live in lamentable conditions and are in urgent need of relief. Ordinarily, such conduct may, without more, justify the scales in the just and equitable enquiry being tipped against them. For, given the resort to self-help encountered here, a court may rightly decline to countenance such conduct. Indeed, as Yacoob J made plain in *Grootboom* (para 92):

'This judgment must not be understood as approving any practice of land invasion for the purpose of coercing a State structure into providing housing on a preferential basis to those who participate in any exercise of this kind. Land invasion is inimical to the systematic provision of adequate housing on a planned basis. It may well be that the decision of a State structure, faced with the difficulty of repeated land invasions, not to provide housing in response to those invasions, would be reasonable. Reasonableness must be determined on the facts of each case.'

[23] Whilst those observations in *Grootboom* speak to land invasions generally, where – as here - the land or houses concerned have already been allocated to other named beneficiaries, the effect of an invasion is generally far more deleterious, for not only are the carefully crafted plans and policies of the relevant authorities scuppered, but more importantly the rights and expectations of those beneficiaries are negated. The resort to self-help, breeding as it does chaos and anarchy, is the very antithesis of the rule of law. Tellingly, Mr Hlatshwayo explains:

‘After almost 9 years of waiting for a house to be approved and allocated to me, I was informed by the first applicant . . . [that] a house was available to be allocated to

me and my family in Palm Ridge . . . I was expected to take occupation of the house with immediate effect.

I reported to the housing office within the 3 days period as instructed by the first applicant. At the housing office, I was advised that the house that has been approved and allocated to me had been invaded by an unknown person. The first applicant's officials refused to give me details as to where exactly the house was situated in Palm Ridge as they feared, at the time, that I might take the law into my own hands.'

As is apparent from Mr Hlatshwayo's account, a disregard for the rule of law often engenders self-perpetuating cycles of lawlessness. And, it goes without saying that lawlessness, if left unchecked, can only serve to imperil our constitutional democracy.

[24] But whilst the respondents' conduct, which is undoubtedly a weighty factor in the enquiry, is deserving of the strongest censure it needs to be placed in its proper historical and factual context. Once that is done and the considerations to which I now turn are balanced as against their unlawful conduct one's initial lack of sympathy becomes tempered somewhat. The appellants accept that they have a duty to ensure that they should have in place a coherent housing policy that is reasonably and appropriately implemented. Of the housing policy in place, Mr Abraham Lorenzen, the Regional Director: Housing Development of the municipality stated:

'During 2003, the First and Second Applicants took a decision to commence with the implementation of the Eden Park 5. The Second Applicant issued [the directive] in November 2003 that states that beneficiaries from the 1996/1997 waiting list application be prioritised and, around the same period, the First Applicant passed [the resolution] supporting the directive as well as amplifying the directive. . . .'

The truth of the matter though is that chronologically the resolution pre-dated the directive. Absent an explanation from the appellants (and there was none) it is difficult to comprehend how the resolution supported and amplified the directive. The directive declared that the provincial department's 'Waiting-List Data Base was developed to provide a tool . . . for chronological, transparent and fair allocation of subsidies in Gauteng'. The directive acknowledged that 'various problems [had] plagued] the Waiting List at a provincial and municipal level' and that the allocation of housing subsidies to beneficiaries '[had] not been totally aligned to the Waiting List

and as a consequence a significant number of beneficiaries [who had] applied in 1996 and 1997 [had] not yet received any subsidy assistance'. The directive further provided that '[a]ll beneficiaries that are captured on the [provincial department's] Waiting List as 1996 and 1997 applicants, are eligible for housing assistance'.

The tenor of the municipality's resolution, on the other hand, is that it prioritised beneficiaries from the Alberton, Thokoza and Eden Park areas and widened the scope of eligibility for those who were in possession of 'Form C's' from the two year period (1996–1997) to a four year period, being 1996 to 1999. By way of explanation, the municipality stated in its replying affidavit that it 'adopted the MEC['s] directive but amplified it to prioritise people from Alberton, Thokoza and Eden Park who applied for houses from 1996 to 1999'. But that is simply inaccurate, for, far from adopting the directive and amplifying it as the municipality asserts, it, in truth, adopted different criteria. There were thus on the face of it two different official policies at play.

[25] Mr Shami Kholong, the Executive Director: Legal and Administration Services of the municipality, who deposed to its founding affidavit, explained how the relevant housing policy in respect of Ext 5 was implemented. He stated:

'1801 houses have now been completed and a list of 1801 beneficiaries approved to occupy such houses has been drawn up and approved. I attach hereto as FA5, a copy of that list. 1200 of such beneficiaries have already taken occupation of the completed houses. The list of beneficiaries who have been approved to benefit from the houses constructed on the land is comprised of people from various areas around the first applicant's various areas of jurisdiction (and in some instances far from Eden Park). As a result of this composition, people who have applied for houses and some who have not even applied for houses who live around Eden Park have complained to the first applicant for not having been allocated houses from the houses that are being constructed at Eden Park.

. . .

I attach hereto as FA6 a list of approved beneficiaries who have been allocated the houses which have been illegally occupied by the respondents who now cannot take occupation of the houses allocated to them. The second applicant is now prevented from handing over the illegally occupied houses to the lawful beneficiaries listed in FA6.'

What is unclear from those allegations is precisely what criteria had been employed in compiling FA5 and 6. And, whilst it may be understandable that the appellants may have experienced some difficulty when they, at the outset, approached the court for relief in the face of an *en masse* invasion, that lack of clarity did not abate as the case unfolded. That much emerges from the replying affidavit of Mr Lorenzen, who stated:

'Eden Park 5 was initially under the control of the First Applicant and the Second Applicant took over the development during July 2008 when approximately 750 houses were already completed and allocated. The Second Applicant continued with the project list which was drawn from a computerised database and once applicants were approved and captured on the Housing Subsidy System **("HSS")** against the development they were linked to stand numbers as per the Surveyor General Plan. Once these houses were completed they were allocated to beneficiaries.

The project list took into account a submission received from the relevant Ward Councillor and Community leaders of the Eden Park community. This includes a list of 304 beneficiaries, elderly beneficiaries and beneficiaries with disabilities and/or special needs including beneficiaries that were in possession of Form C 1996/1997 but were not captured on HSS. Some of the beneficiaries captured on these lists were already approved and formed part of the project list whereas subsidy applications had to be done by those who were not found to have been approved.

Once beneficiaries on those lists were approved, they were then added to the project list. I annex hereto marked **"AL3"** a copy of the final list. The final list was compiled following the guidelines laid in annexes "AL1" [the directive] and "AL2" [the resolution]. The final list also took into account submissions from members of the Eden Park Community.

The list submitted by the Eden Park community, however, had to comply with "AL1" and "AL2". In this regard, I annex marked **"AL4"** a copy of a letter addressed to the First Applicant by the Second Applicant. As appears from "AL4", the final list took into account the elderly and beneficiaries with special needs and beneficiaries from the Eden Park Community with Form C 1996/1997 but were not captured on HSS. I annex marked **"AL5"** a copy of a reconciliation of the different categories. Further to the above I annex the MEC approval dated 19 March 2009 marked **"AL6"**.

As appears from what is stated above, the final list was not compiled arbitrarily but was compiled following clearly defined guidelines and directives.'

[26] As I have already endeavoured to demonstrate, the resolution and directive, upon which the appellants assert they relied, were at odds with each other. There is in any event no explanation as to how it was possible for beneficiaries, especially the elderly and those with special needs, who were in possession of form C's not to have been captured on the housing subsidy system in the first place. In addition, there is no indication as to who the community leaders were who influenced the compilation of the list in respect of the additional 304 persons or what criteria had been employed to identify those beneficiaries. In these circumstances it is hard to fault the high court's conclusion that: '. . . the integrity of the listing and allocation process has been shown to have been compromised. I cannot find that evictions based on such process can be "just and equitable" '.

[27] An important feature of the respondents' case is that they had been promised priority in respect of the allocations in Ext 5. In that regard Ms Booysen asserted:

'It was around this time [March 1999] that the First Applicant called a community public meeting, where the late City Manager and Head of Housing Mr Paul Sambo stated that the Eden Park Residents would get preference in respect of any RDP development that had been earmarked for the area. I was present at this meeting. He said that if ever there was movement in RDP houses for the area Eden Park Residents would be allocated first, subject to needs also of residents from the feeder areas. It is no understatement to say that all the residents of Eden Park, including me left that meeting on the understanding that we would benefit first.'

The response of Mr Andile Sihlala, on behalf of the appellants, to those allegations was:

'Whatever arrangements were made before 24 November 2003 were superceded by a directive issued by the MEC for housing which provided that only the 1996/1997 applicants for state subsidized houses will be considered to benefit before applicants who applied for state subsidized housing after 1997. It is not the purpose of this application to consider the merits or lack thereof of this directive. For this reason, it is not necessary to further ventilate issues pertaining to this directive.

I note the allegations made against councillor Sambo. Councillor Sambo is deceased. Councillor Sambo held numerous meetings relating to the allocation of state subsidized houses in Eden Park Extension 5 and other areas within the first

applicant's area of jurisdiction. There is no record of Councillor Sambo advising or agreeing with Booysen and her fellow respondents to the effect that Eden Park Extension 5 residents will get preference in the Eden Park Extension 5 development or any such development for that matter. For this reason, I respectfully submit that the first applicant did not create an impression or an expectation to the effect that Eden Park Extension 5 residents would be given preference in the allocation of state subsidized houses.'

Mr Sihlala was hardly in any position to deny Ms Booysen's allegations that a promise had been made to the respondents that they would receive priority. Moreover, given the history of the matter, to suggest as he glibly does, that the directive 'superceded' any such arrangement as asserted by Ms Booysen, portray the appellants as insensitive and uncaring. It would thus seem that in its approach to the respondents, the appellants ignored the admonition of the Constitutional Court in *Port Elizabeth Municipality* that 'those seeking eviction should be encouraged not to rely on concepts of faceless and anonymous squatters automatically to be expelled as obnoxious social nuisances . . . [J]ustice and equity require that everyone is to be treated as an individual bearer of rights entitled to respect for his or her dignity'.

[28] In all the circumstances the appellants may well have: (a) been in breach of their constitutional obligations; and, (b) failed to meet the obligations imposed upon them by the Housing Act. But it is not necessary to go that far. It suffices for present purposes to hold, as the high court did, that it would not be just and equitable to order the eviction of the respondents.

[29] It follows that the appeal must fail and in the result it is dismissed with costs, such costs to include those consequent upon the employment of two counsel.

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V PONNAN
JUDGE OF APPEAL

APPEARANCES:

For First Appellant:	G I Hulley (with U Dayanand-Jugroop) Instructed by: A F van Wyk Attorneys, Johannesburg Webbers, Bloemfontein
For Second Appellant:	G I Hulley (with U Dayanand-Jugroop) Instructed by: T P Mabasa Attorneys, Johannesburg Webbers, Bloemfontein
For Respondents: (Remaining Occupiers of Eden Park Community)	T N Ngcukaitobi (with J Bleazard) Instructed by: Mdladlamba Attorneys, Johannesburg Phatshoane Henney Inc, Bloemfontein
For Respondents: (Eden Park Community Action Unit)	B Makola (with B Manentsa and H Mutenga) Instructed by: Legal Resources Centre, Johannesburg Bloemfontein Justice Centre, Bloemfontein