



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL, PIETERMARITZBURG LOCAL DIVISION**

CASE NO: 12282/2015

In the matter between:

MPOFANA MUNICIPALITY

APPLICANT

and

**LINDELANI SITHOLE AND 186 OTHERS
(Listed as per annexure MM1 to the Notice of motion)**

RESPONDENTS

JUDGMENT

SISHI J

Introduction

[1] This is an application for the eviction of the respondents who are currently staying in the Town Hall belonging to the applicant. The Town Hall is annexed to the applicant's main offices at 10 Claughton Terrace Mooi River, KwaZulu-Natal.

[2] The occupiers are former residents of Bruntville Hostel (the hostel) in Mooi River, KwaZulu-Natal. Members of the community destroyed the hostel by fire in April 2015.

[3] Following the fire, the former residents of the hostel moved into Mpfana Municipality Town Hall, which belong to the municipality. They have remained there ever since. In the main application, the municipality seeks to evict the occupiers from the Town Hall.

[4] The occupiers opposed the eviction on the basis that alternative accommodation offered by the municipality is manifestly inadequate. As a consequence, an eviction order would not be just and equitable. However, the occupiers recognise that the current conditions in the Town Hall are not suitable. As such, they bring a counter application for an order directing the municipality to provide them with suitable alternative accommodation.

[5] In addition, the occupiers challenge the municipality's failure to comply with the provisions of section 26(2) of the Constitution, related legislation and regulations, which requires the municipality to develop a reasonable plan for the provision of emergency housing. The occupiers seek an order compelling the municipality to do so in the counter-application.

Background

[6] There is an application for the condonation of the late filing of the respondents' heads of argument. The heads of argument were due to be filed on 08 September 2017. These heads of argument were only filed on 14 September 2017 and were accordingly filed four (4) days late. The condonation application was not opposed by the applicant. Having considered the application, the court was satisfied that good cause had been shown, and accordingly granted the application.

[7] The municipality wishes to move the occupiers to Mooi River Sports Centre, which consists of a permanent building and a soccer field. According to the occupiers there is insufficient space in the main building to house everyone. It is common cause that the municipality intends to use the tents to house the occupiers who cannot be accommodated in the main building¹. This, according to the occupiers, is not a constitutionally permissible solution. The alternative accommodation offered by

¹ Municipality's Answering affidavit in the main application, vol 3, page 20 para 58

the municipality fails to meet the basic standards required by the Housing Act, the Housing Code and the Constitution.

[8] The applicant contends that although the respondents' occupation of the Town Hall was initially by consent from the applicant, such consent was given with the understanding that it would only be a temporary arrangement whilst formal arrangements were being put in place. The consent to occupy the Town Hall has now been withdrawn and they are now occupying the Town Hall illegally. Despite demands the respondents have either failed, refused or disregarded the applicant's notice to vacate the Town Hall and relocate to the Sports Field Centre.

[9] The applicant further contends that the respondents have vandalised and damaged the Town Hall by breaking window panes, they continue to abuse the electricity supply to the hall at the expense of the applicant. Furthermore, the respondents are implementing hazardous ways of connecting electrical appliances such as stoves and heaters. According to the applicant there is a real possibility that the respondents will cause an electrical fire through the abuse and unlawful electrical connections in the Town Hall.

Main application

[10] The applicant contends that the order should be granted on the following basis:

- a) That the applicant is the owner of the property;
- b) That the respondents are in unlawful occupation of the property;
- c) That the respondents have refused to be given alternative accommodation;
and
- d) That the respondents are occupying the property without any just cause, but for the sake of holding the applicant in ransom.

Are the respondents “unlawful occupiers” within the meaning of PIE?

[11] PIE defines an “unlawful occupier” as a person who occupies land without the express or tacit consent of the owner. In this matter, the building i.e. the Town Hall is owned by the applicant. It has been explained above that the consent given to the occupiers by the municipality has been withdrawn. The occupiers now occupy the Town Hall illegally. This fact is common cause between the parties.

Circumstances of the occupiers

[12] It is common cause that the occupiers of the Town Hall are low income earners. Those that are employed have found work as security guards, farm workers, waitresses, packers, machine operators and welders. They earn between R1200 and R4 500 per month.

[13] The majority of the occupiers' families do not live in Mooi River they live some distance away. Many of the occupiers are the sole breadwinners in their families. They send most of their earnings back to their families, who rely on the money to support themselves.

[14] Some of the occupiers' families live with them. As a consequence there are seven (7) children living in the Town Hall and 15 women.

Occupier's period of occupation

[15] After the burning of the Bruntville Hostel in Mooi River in April 2015, wherein the respondents resided, they were then given temporary accommodation at the municipality's Town Hall. The occupiers have been occupying the Town Hall ever since April 2015.

Evictions in terms of the Act

[16] The eviction application has been brought by the applicant to evict the occupiers in terms of section 4(1) of the Prevention of Illegal Eviction from and Unlawful Occupation Land Act ('PIE'²). Counsel for the respondents correctly pointed out that given that the Municipality is a party seeking to evict the occupiers, the application should have been brought under section 6 of PIE (which applies to an eviction at the instance of an organ of state).

[17] Section 6 of PIE provides that a court may grant an order for eviction if it is just and equitable and in the public interest³. In determining whether these requirements are met, what a court must consider is the availability to the unlawful occupiers of suitable or alternative accommodation or land (section 6(3)(c)⁴)

[18] Section 6(1) of PIE provides:

- '(1) An organ of state may institute proceedings for the eviction of an unlawful occupier from land which falls within its area of jurisdiction, except where the unlawful occupier is a mortgagor and the land in question is sold in a sale in execution pursuant to a mortgage, and the court may grant such an order if it is just and equitable to do so, after considering all the relevant circumstances, and if—
- (a) the consent of that organ of state is required for the erection of a building or structure on that land or for the occupation of the land, and the unlawful occupier is occupying a building or structure on that land without such consent having been obtained; or
 - (b) it is in the public interest to grant such an order.'

² 19 of 1998

³ Residents of Joe Slovo Community, Western Cape v Thubelisha Homes And others (Centre on Housing Rights and Evictions and Another, Amici Curiae) 2010(3) SA 454 (CC) at para 99

⁴ See Residents of Joe Slovo Community at para 105

[19] The Constitutional Court in *Port Elizabeth Municipality vs Various Occupiers*⁵ emphasised the new approach that courts must adopt in eviction matters. A court must take an active role in adjudicating such matters, and the court stated:

'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 special 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 exercise 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 regards to broader considerations of fairness and other constitutional values, so as to produce a just and equitable result.'

[20] This case was cited with approval by the Constitutional Court in *Occupiers of Erven and 88 Berea v Christiaan Frederick De Wet N.O.*⁶.

[21] Section 6(3) of the PIE provides:

'(3) In deciding whether it is just and equitable to grant an order for eviction, the court must have regard to—

- (a) the circumstances under which the unlawful occupier occupied the land and erected the building or structure;
- (b) the period the unlawful occupier and his or her family have resided on the land in question; and
- (c) the availability to the unlawful occupier of suitable alternative accommodation or land.'

[22] As this is an application for eviction at the instance of the municipality, it would be more appropriate to deal with it in terms of section 6 of PIE dealing with evictions at the instance of an organ of the state.

⁵ 2005(1) SA 217 CC at para 36

⁶ (CCT 108/16) [2017] ZACC 18; 2017 (8) BCLR 1015 (CC); 2017 (5) SA 346 (CC) (8 June 2017)

Temporary alternative accommodation

[23] It is not in dispute that it is the municipality's responsibility to provide temporary alternative accommodation whenever such a need arise.

[24] The Constitutional Court in *Occupiers of Erven and 88 Berea*⁷ clarified the municipality's obligation regarding the provision of temporary alternative accommodation to evictees. The Constitutional Court held that:

'Where there is a risk that homelessness may result, the availability of alternative accommodation must be taken into account by a court deciding whether or not to grant an eviction application⁸

[25] The local authority (in this case the municipality) has a duty to provide temporary emergency accommodation to all persons being evicted who have no alternative accommodation⁹. If there is a risk that the occupier would be rendered homeless on being evicted, the municipality must provide alternative accommodation.

[26] In this case, there is a real risk that the occupiers would be rendered homeless if the eviction order is granted for the following reasons:

- 26.1 As indicated above the occupiers moved to Mooi River in search of work. They arrived between 1998 and 2014.
- 26.2 The occupiers do not have their own homes. They cannot afford to rent accommodation in Mooi River. Most occupiers are the sole bread

⁷ *Occupiers of Erven and 88 Berea v Christiaan Frederick De Wet (N.O.)* ZACC 18

⁸ *Occupiers of Erven and 88 Berea*, at para 61 and 81

⁹ *Occupiers of Erven and 88 Berea*, at para 59

winners in their families, large portion of their wages are sent home to their parents, siblings, spouses and children for support.

[27] The circumstances of the occupiers as set out above and earlier on in this judgment have not been disputed by the applicant. Their period of occupation of the Town Hall has also not been disputed

[28] In *Residents of Joe Slovo and Blue Moonlight* the occupiers were in a similar situation.

[29] In *Residents of Joe Slovo*, Yacoob J noted that:

'The Applicants occupied the land and build their rudimentary structures and circumstances of dire need. They had nowhere to go. They had come to the urban centre in search of work. Their circumstances require empathy, care and concern¹⁰.'

[30] *Blue Moonlight*¹¹ the court accepted that most of the occupiers worked in the central district of Johannesburg and needed to live in close proximity of that area:

'The location of the building is crucial to the Occupiers' income. The majority of them say that they would not be able to afford the transport costs necessitated by living elsewhere. The Occupiers, relying on expert evidence, also state that if they were to be evicted, they would have to sleep on the street as they would not be able to find affordable accommodation¹².'

[31] In this matter, it is clear that if the eviction order is granted, the municipality would be under a duty to provide the occupiers with suitable temporary accommodation.

¹⁰ *Resident of Joe Slovo Community, Western Cape v Thubelihle Homes and Others* 2009(9) BCLR 847 CC

¹¹ *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another (CC)* 2012(2) SA 104 CC

¹² *Blue Moonlight* at para 6

[32] It appears that section 6 of PIE is applicable in these eviction proceedings, as the eviction sought is at the instance of an organ of state.

[33] In this matter emphasis would be placed on the third requirement of section 6(3). In terms of section 6(3)(c), in deciding whether it is just and equitable to grant an order for eviction, the court must have regard to the availability to the unlawful occupier of suitable alternative accommodation or land. The other requirements in terms of 6(3)(a) and (b) have been referred to earlier on in this judgment.

[34] The applicant alleges in the founding affidavit that all the pre-requisite of section 6 have been met by the allegations which have shown that the respondents are living in an unhealthy condition, dangerous environment as they are utilising electricity in a dangerous manner.

[35] The applicant further contends that it is undesirable and unsafe for the Respondents to keep on occupying the Municipal Hall as they are overcrowded and there are hygienic problems associated with their continued occupation of the said property. The municipality has offered the unlawful occupiers temporary alternative accommodation at the Mpofana Municipality Sports Centre. The unlawful occupiers have however refused to accept such accommodation.

[36] The applicant contends that the unlawful occupation results in deprivation of property under section 25(1) of the Constitution. Section 25(1) of the Constitution provides that "no one may be deprived of property, except in terms of law of general application, and no law may permit arbitrary deprivation of property". Deprivation might, however, pass constitutional muster by virtue of being mandated by law of general application and if not it would be arbitrary. Therefore PIE allows for the eviction of unlawful occupiers when it is just and equitable to do so.

[37] The Sports Centre consists of a building and a soccer field. The building contains 2 offices, 4 changing rooms, 2 bathrooms and a disabled bathroom. The two offices are small in size (8.75 m²) a number of the rooms have no plug fittings, electricity is disconnected in the offices and the men's bathroom. Three (3) of the toilets were not working, there were six (6) showers in total situated in the disabled's bathroom.

[38] These facilities are manifestly inadequate. The Sports Centre does not constitute suitable temporary alternative accommodation for the following reasons:

1. The bathroom facilities are insufficient to serve the occupier's needs in terms of the sanitation and ablutions. There is inadequate water in the building
2. The offices and changing rooms are far too small to accommodate 186 people. Each office has a floor space of only 8.75 m².
3. It is common cause that the Municipality intends using tents to house the occupiers who cannot be accommodated in the Sports field. Tents are expressly prohibited in terms of the Housing Code.
4. The local community regularly uses the field for sports matches and events. The occupiers are concerned that their presence will make it impossible for members of the local community to use the field for its intended purpose. This will cause further tensions between the groups. Given the violent behaviour of members of the community in the past, this poses a risk to the safety of the occupiers. The Municipality has not adequately addressed these concerns.
5. If some of the occupiers are forced to live in tents on the field, their constitutional rights to dignity, health, bodily integrity and access to housing will be infringed.

6. For those accommodated in the building, there will be no privacy. All the occupiers, including those living with their wives or partners, will have to share the little space that is there.

[39] In response to the claim that the proposed alternative accommodation is inadequate, the municipality simply states that it does not have the capacity or resources to provide better accommodation. It does not explain:

1. The resource constraints that prevent it from providing suitable alternative accommodation at the Sports Centre or elsewhere. It has provided no information regarding its budget situation in general or its housing budget in particular.
2. On the steps that it has taken to investigate and secure adequate alternative accommodation for the occupiers, it had not stated whether it has investigated using properties other than the Sports Centre. It has not explained it is unable to upgrade the facilities at the Sports Centre (for example, to put up prefabricated shelters on the Sports Centre and install temporary facilities to ensure adequate access to water, sanitation and electricity).
3. On the issue of whether the municipality has requested assistance from the provincial government, section 2.6.1 of the Housing Code stipulates that municipalities should request assistance from the provincial housing department if the municipality lacks the capacity, resources or expertise to fulfil its obligations.

[40] In *Blue Moonlight*, supra, the court rejected the city's argument that it had insufficient resources to provide temporary alternative accommodation to the occupiers. It did so on two grounds.

1. First, it noted that the city had provided information regarding its housing budget but did not provide information relating to its budget situation in general. As a consequence, the Court did not know what the City's overall financial position was.
2. Second, it held that the city could not escape responsibility on the basis that it had failed to plan and budget for the provision of emergency accommodation. It was required to do so as part of its constitutional obligations. The court stated:

'This Court's determination of the reasonableness of measure within available resources cannot be restricted by budgetary and other decisions that may well have resulted from a mistaken understanding of constitutional or statutory obligations. In other words, it is not good enough for the City to state that it has not budgeted for something, if it should indeed have planned and budgeted for it in fulfilment of its obligations¹³.'

[41] Section 26 of the constitution sets out the Constitutional Rights to housing. It provide as follows:

- "(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."

[42] Section 26, requires the state to take reasonable steps to provide access to adequate housing.

[43] The Housing Act 107 of 1997 was enacted to give effect to section 26(1) and (2) of the Constitution. The purpose of the Housing Act is:

¹³ Blue Moonlight, at para 74

“to provide for the facilitation of a sustainable housing development process, for this purpose to lay down general principles applicable to housing development in all spheres of government and to define the functions of national provincial and local governments in respect of housing development.”

[44] Section 2 of the Housing Act sets out the general principles applicable to housing development. These principles are binding on national, provincial and local spheres of government. The following principles are important for present purpose:-

“2. General principles applicable to housing development.

(1) National, Provincial and Local spheres of government must –

- (a) Give priority to the needs of the poor in respect of housing development;
- (b) Consult meaningfully with individuals and communities affected by housing development;
- (c) Ensure that housing development –
 - (i) Provides a wide choice of housing and tenure options as is reasonably possible;
 - (ii) Is economically, fiscally, socially and financially, affordable and sustainable;
 - (iii) Is based on integrated development planning; and
 - (iv) Is administered in a transparent accountable and equitable manner, and upholds the practice of good governance.”

[45] The Emergency Housing Policy (EHP) forms part of the National Housing Code, 2009. It was enacted in terms of section 3(4)(g) of the Housing Act. Observance of its provisions is mandatory in an emergency housing situation.

[46] The EHP is triggered where affected persons are in need of emergency housing for reasons beyond their control. Emergencies are defined in chapter 12 of the Housing Code, they include people who have become homeless as a result of declared or undeclared state of disaster; people evicted or threatened with imminent eviction from land or unsafe buildings (as in the present case). Further, emergency situations or conditions are defined in section 12.3.1 of the Housing Code.

A Just and Equitable Order

[47] In the absence of suitable alternative accommodation, according to the respondents, it would not be just and equitable to grant the eviction order, for the following reasons:

- a) First, the municipality has failed to place essential information before this court. This information pertains to the personal circumstances of the occupiers and the conduct of the municipality. Municipalities are under an obligation to put relevant information before the court. The personal circumstances of the occupiers, whether there are children and women, elderly or disabled people, whether the eviction order is likely to result in occupiers becoming homeless; the availability of suitable alternative accommodation. The list is endless. The court will grant an eviction order only where (a) it has all the information to decide whether the eviction is just and equitable; and (b) the court is satisfied that the eviction is just and equitable having regard to the information in (a). An eviction order granted in the absence of either of these two requirements will be arbitrary.¹⁴
- b) Second, the municipality's proposed alternative accommodation does not satisfy the requirements of the EHP, and is inconsistent with the constitution. The details of this aspect have been dealt with earlier on in this judgment.
- c) Third, the municipality has not acted reasonably. Reasonableness or otherwise of the government's conduct is a material factor in determining whether eviction is just and equitable.

[48] In order for the government to obtain an eviction order from state owned land and property and in pursuance of government's section 26(2) of the Constitutional obligations, government needs to show both:-

- a) That in seeking an eviction, the government is acting reasonably within the meaning of section 26(2) of the Constitution, which enjoins the government to take reasonable steps to provide access to adequate housing; and

¹⁴ Occupiers of Erven 87 and 88 Berea vs Christian Frederick De Wet N.O. [2017] SA CC18 para 52.

b) That the eviction is just and equitable as contemplated under the PIE.

[49] It is clear from the circumstances of this case that the municipality has not acted reasonably and has not taken cognizance of the dignity of the occupiers. The municipality does not have an Emergency Housing Plan. The municipality officials are unaware that in terms of the EHP, they are permitted to apply to the KwaZulu-Natal Province for funding and technical assistance, to provide temporary housing and access to services for households and communities affected by emergencies.

[50] In the circumstances, it would be grossly unjust and inequitable to evict the occupiers from the Town Hall and move them to the Sports Centre.

Counter application

[51] In the counter-application, the occupiers seek a detailed order, which is set out in the Notice of Counter-Application. In brief, the occupiers seek an order:

- 1) Declaring that the municipality has acted in breach of various obligations under the Constitution, the Housing Act 107 of 1997, the Housing Code and the Local Government: Municipality Systems Act 32 of 2000.
- 2) Directing the municipality to develop a plan for the provision of emergency housing that complies with the above obligations.
- 3) Directing the municipality to provide the occupiers with temporary alternative accommodation that complies with the guidelines set out in the Housing Code.
- 4) Directing the municipality to decide whether to make an application to the Provincial or National government for financial assistance, in terms of the provisions of the Housing Code.
- 5) Directing the municipality to provide the occupiers with permanent accommodation within three (3) years of the date that they are moved into temporary accommodation.

- 6) Directing the municipality to file reporting affidavits to the court, setting out the steps that it has taken to comply with the order.
- 7) The order specifies that the municipality must meaningfully engage with the occupiers regarding the provision of both temporary and permanent accommodation.

[52] In the counter-application, the occupiers seek to compel the municipality to comply with its Constitutional and statutory obligations.

[53] In part of the order sought in the counter-application, the respondents seek declarations that the applicant has failed to fulfil its obligations under the Constitution, the Housing Act, the Housing Code and the Systems Act.

[54] In its treatment of the occupiers, the municipality continues to violate its legal obligations. It lacks a reasonable plan for the implementation of its legal obligations. Accordingly, declarations are necessary because they inform the municipality that its current conduct is unlawful and indicates that the occupiers' rights to housing as expressed in statute and regulations are being violated.

[55] In addition to the declarations, they seek an order directing the municipality to develop a reasonable plan for the provision of emergency housing. The remainder of the relief focuses on their situation. But the occupiers are primarily interested in their own accommodation of a permanent nature.

[56] In the Notice of Counter-Application, the occupiers seek a detailed order and the accompanying motivation is fully set out in the founding affidavit in support of the

counter-application and amplified in the respondents' replying affidavit in the counter-application.

[57] The applicant's answering affidavit to the counter-application is not particularly helpful. They insist that they do not have adequate resources to provide the emergency temporary houses and or permanent houses.

[58] The applicants have indicated that the respondents do not qualify for consideration on the on-going housing projects. That the respondents also do not qualify for RDP houses in the applicant's jurisdiction, Mooi River, as they themselves pointed out that they do have houses in their places of origin.

[59] The orders sought by the respondents in the Notice of Counter-Application have not been seriously challenged by the applicant save for what has been stated earlier on in this judgment.

[60] The motivations for some of the specific orders sought in the counter-application are set out below.

Standards for temporary alternative accommodation

[61] The emergency housing programme sets out the following requirements for temporary emergency accommodation:

- (i) The municipality must provide basic municipal engineering services such as water, sanitation and access to roads.
- (ii) There must be access to a water point or tap for every 25 families.

- (iii) Temporary sanitation facilities must be provided. An acceptable standard is one Ventilated Improved Pit Latrine (VIP toilet) per five (5) families.
- (iv) The floor area of a shelter should be at least 24 m² and may vary up to 30 m² depending on the need and possibilities within the funding limits.
- (v) Temporary shelters should be strong and durable and should provide basic shelter against the elements. The preferred option for the provision of shelter is supply of prefabricated units. "No tented structure will be provided under this programme."

Order regarding temporary accommodation

[62] It would be grossly unjust and inequitable to evict the occupiers from the town hall and force them to move into the temporary accommodation offered by the municipality.

[63] However, as indicated above, the occupiers acknowledge that the current living conditions in the Town Hall are unsuitable. In the circumstances they seek an order directing the municipality to provide them with appropriate temporary accommodation. The nature of the order is such is that the precise form and location of the temporary accommodation would have to be determined.

[64] The occupier seeks to establish the following process to resolve the problem. This does not appear to be opposed by the applicant.

- (1) The basic requirement is that the temporary accommodation must meet the minimum criteria in the Housing Code.
- (2) The parties must engage meaningfully to attempt to reach an agreement.

- (3) If they are able to agree, the court will consider the agreement and make it an order of court if it is satisfied.
- (4) If the parties are not able to reach an agreement, they shall present the issues in dispute to the court for its determination.
- (5) Once the nature, location and timing of the temporary accommodation is determined, the municipality shall provide the accommodation and file a report.
- (6) The occupiers shall be entitled to file a response, and either party may set the matter down to resolve disputes in the implementation.

Joinder of Provincial and/or national Government

[65] The Provincial and/or National Governments are interested and necessary parties to such applications. I have already indicated above that in terms of the EHP and the National Housing Code, municipalities can apply for financial assistance to the Provincial or National Government. The applicant, therefore, has to decide whether to make an application for financial assistance to the Provincial or National Government.

Permanent accommodation

Order regarding permanent accommodation

[66] After finding temporary accommodation, it would then have to provide the occupiers with permanent accommodation. That is clear from the Constitution, the Housing Act and the Housing Code¹⁵. If the occupiers accept that the provision of permanent accommodation will take time, time to plan, time to allocate resources,

¹⁵ See section 26 of the Constitution (that the state must take reasonable steps within its available resources to provide access to adequate housing); section 9 of Housing Act (which requires the Municipality to ensure that the inhabitants of its area of jurisdiction have access to adequate housing on a progressive basis); Section 23(1) of the Municipal Systems Act (requires municipalities "together with other organs of state contribute to the progressive realisation of the fundamental rights contained in sections.... 25 [and] 26 ... of the Constitution")

and time to construct. They also accept that they are not the only residents of the Municipality who are entitled to accommodation. They therefore propose that the Municipality be afforded three (3) years to provide permanent accommodation.

[67] The occupiers seek an order directing the parties to meaningfully engage to determine the nature and location of the permanent accommodation; the timing of relocation and the persons who qualify to such accommodation. As with the provision of temporary accommodation, the occupiers propose a structure where an agreement is made an order of court. If no agreement can be reached, the court will resolve outstanding disputes.

Meaningful engagement

[68] The obligation to consult meaningfully with the occupiers arises from section 2(1)(b) of the Housing Act. This obligation binds the national, provincial and local spheres of government. In *Occupiers of 51 Olivia Road*¹⁶, the Constitutional Court dealing with the requirements of meaningful engagements, held:

'Engagement is a two-way process in which the city and those about to become homeless would talk to each other meaningfully in order to achieve certain objectives'¹⁷.

[69] The court went on to describe the obligations of the city in relation to meaningful engagement:

'Engagement has the potential to contribute towards the resolution of disputes and to increased understanding and sympathetic care if both sides are willing to participate in the process. People about to be evicted may be so vulnerable that they may not be able to understand the importance of engagement and may refuse to take part in the process. If this happens, a municipality cannot walk away without more. It must make reasonable efforts to engage and it is only if these reasonable efforts fail that a municipality may proceed without

¹⁶ *Occupiers of Olivia Road, Berea Township and 197 main Street Johannesburg v City of Johannesburg and Others* 2008(3) SA 208 (CC)

¹⁷ *Occupiers of Olivia Road*, at para 14

progressive realisation of the fundamental rights contained in sections ...25 [and] 26... of the Constitution'.

- 2.2 Section 2.13.1 of the Emergency Housing Programme requires that Municipalities must 'initiate, plan and formulate applications for projects relating to emergency housing situations'. In *Blue Moonlight*, the Court noted that the city had an obligation to plan proactively for emergency situations²¹.
3. Third, the municipality is required to act in accordance with the principles of good governance when dealing with 'housing development'. The municipality has failed to do so. The occupiers have been denied assistance, protection and access to adequate housing on the basis of their political affiliation.

[73] The municipality lacks a reasonable plan for the implementation of these statutory and constitutional obligations in the event of a housing emergency. Indeed, it appears to have no plan at all. The occupiers seek a declaration that the municipality has failed to fulfil its obligations in terms of the Constitution, the Housing Act, the Housing Code and the Municipal Systems Act. In addition they seek an order directing the municipality to develop a reasonable plan for the provision of emergency housing.

[74] Having considered all the above, I am satisfied that it would be grossly unjust and inequitable to evict the occupiers from the Town Hall and move them to the Sports Centre and tents on the soccer field. Forcing the occupiers to live under such conditions would violate their constitutional rights to dignity, health, bodily integrity and access to adequate housing. It has been contended, correctly in my view, on behalf of the respondents that the relief sought in the counter application provides a balanced solution to the occupier's housing crises.

²¹ *Blue Moonlight* at para 66 – 67

[75] During argument counsel for the applicant was asked by the court if the proposed order sought in the counter-application was fair and reasonable, he agreed that all the prayers sought were fair and reasonable.

[76] In the result the applicant's application for the eviction of the unlawful occupiers from the Town Hall has to be stayed pending compliance with other orders. The counter application should succeed.

[77] In the result, the court makes the following order:

Declaratory relief: An order:

1. Declaring that the applicant (the Municipality) has acted in breach of:
 - 1.1 The Constitutional rights of the respondents in section 26 of the Constitution, Housing Act and the National Housing Code.
 - 1.2 Its obligations under section 26 of the Constitution; section 2(1), 9(1)(a)(i), 9(1)(e) and 9(1)(f) of the Housing Act 107 of 1997, and section 2.6.1 and the general requirements for temporary emergency housing stipulated in Chapter 12 of the National Housing Code; and
 - 1.3 Sections 4(2)(b), 4(2)(e) and 4(2)(f) of the Local Government: Municipal Systems Act 32 of 2000.
2. Directing the municipality to develop a plan for the provision of emergency housing that complies with its obligations in paragraph 1.

Temporary accommodation

3. Declaring that the municipality is obliged to provide the respondents with temporary alternative accommodation that complies with the guidelines set out in the National Housing Code, including:

- 3.1 Water supply by means of stand pipes which are located within a walking distance of 250 meters from the temporary shelter for every 25 families.
 - 3.2 Sanitation by means of chemical toilets and/or Ventilated Improved Pit Latrines (VIP) type toilets located at central points for the communal use; and
 - 3.3 Electricity supply by means of lights and plug points for connecting appliances.
4. Directing the municipality to engage meaningfully with the respondents in order to reach an agreement about the precise nature and location of the temporary accommodation, and the timing of the relocation;
 - 4.1 The engagement should take place and be finalised within 60 days of the order of this court.
 - 4.2 The municipality is directed to file an affidavit recording the outcome of the process of meaningful engagement.
 - 4.3 If parties agree on the terms of temporary shelter it will provide, the court will consider the agreement and, if it is satisfied with the terms, make it an order of court.
5. If the parties are unable to reach an agreement through the process of meaningful engagement.
 - 5.1 The municipality shall file a report stating its proposal and the reasons for the disagreement.
 - 5.2 The respondents shall be entitled to file a response to the report within 10days of receipt of the applicant's report referred to in sub paragraph 5.1 above.
 - 5.3 The court shall determine the outstanding issues of dispute between the parties and direct the terms under which the municipality shall provide temporary accommodation.

6. The municipality shall provide the temporary accommodation determined in terms of para 4.3 or 5.3.
7. Once all the occupiers have been provided with temporary accommodation, the municipality shall file a report to that effect.
8. The respondents shall, within 10 days, be entitled to file a response to the report referred to in paragraph 7 above.
9. The court or any party may set the matter down for a hearing in order to resolve a dispute from the implementation of the order.

Joining provincial and/or national government

10. Within ten (10) days of the order of this court the municipality is directed to decide whether to make an application to the provincial or national government for financial assistance, in terms of the provisions of the National Housing Code.
 - 10.1 Should the municipality decide not to apply for financial assistance to the Provincial or National government it should provide the court and the Respondents with its reasons together with its decision.
 - 10.2 Should the municipality decide to apply for financial assistance to the Provincial or national government it shall apply, by submitting all the required documents, within 20 days of the order of this court.
 - 10.3 Should the Provincial or National government refuse the municipality's application for financial assistance, the Applicant is directed to bring an application joining the relevant Member of Executive Committee (MEC) of the Provincial Parliament or the relevant Minister of the National Parliament as the party to these proceedings.

- 10.4 Should the municipality decide to bring an application joining the MEC or the Minister in these proceedings, the Respondents shall be given leave to supplement their papers.
- 10.5 The court shall, if necessary, hold a further hearing on the relative obligations of the municipality, Provincial and National government.
11. The eviction proceedings are stayed until the outcome of the abovementioned orders.

Permanent accommodation

12. Directing the municipality to provide the respondents with permanent accommodation within three (3) years of the date they are moved into temporary accommodation. For the purpose of this order, 'provide' means taking any steps in terms of the Constitution, Housing Act, National Housing Code and Local Government: Municipal Systems Act to ensure that the respondents are provided with permanent accommodation.
13. Once the respondents have been provided with adequate temporary accommodation, the municipality is directed to engage meaningful with the Respondents in order to reach an agreement about the precise nature and location of the permanent accommodation.
 - 13.1 The engagement should take place and be finalised within one year;
 - 13.2 The municipality is directed to file an affidavit recording the outcome of the process of meaningful engagement.
 - 13.3 If the parties agree on the terms of permanent accommodation it will provide, the court will consider the agreement and, if it is satisfied with its terms, make it an order of court.
14. If the parties are unable to reach an agreement through the process of meaningful engagement:

- 14.1 The municipality shall file a report stating:
- 14.1.1 For each respondent, indicate what type of accommodation he or she qualifies for; and
 - 14.1.2 The outstanding issues of dispute and the reasons therefor.
- 14.2 The respondents shall be entitled to file a response to the report within 30 days of receipt of the report referred to in paragraph 1.4 above.
- 14.3 The court shall determine the outstanding issues of dispute between the parties and direct the terms under which the municipality shall provide permanent accommodation.
15. The municipality shall file a report every 90 days after either the agreement is made an order of court, or the court determines the outstanding issues of dispute, on the progress made in providing permanent accommodation to the respondents.
- 15.1 The respondents shall be entitled to respond to those reports within 30 days.
 - 15.2 The court, or any party may set the matter down for the resolution of a dispute regarding the implementation of this court's order.

At Sishi

SISHI J

Appearances

For the Applicant : **Adv SH Zondi**

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For the First Respondent : **Adv E Webber**

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Date of hearing : **31 August 2017**

Date delivered : **19 December 2017**