

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

CASE NO: 43051/2016

In the matter between:

SIMON OKOYE First Applicant

SILINDILE IRENE IMMACULATE OKOYE Second Applicant

and

IAN BRUCE LOCKYER First Respondent

**THE UNLAWFUL OCCUPIERS OF PORTION 2 OF
ERF 813 ROSETTENVILLE SITUATED AT
18 HAIG STREET, ROSETTENVILLE** Second Respondent

**THE UNLAWFUL OCCUPIERS OF REMAINING
EXTENT OF ERF 757 ROSETTENVILLE SITUATED
AT 79 MABEL STREET, ROSETTENVILLE** Third Respondent

**THE UNLAWFUL OCCUPIERS OF REMAINING
EXTENT OF ERF 758 ROSETTENVILLE SITUATED AT
81 MABEL STREET, ROSETTENVILLE** Fourth Respondent

**THE UNLAWFUL OCCUPIERS OF REMAINING
EXTENT OF ERF 813 ROSETTENVILLE SITUATED AT
54 GEORGE STREET, ROSETTENVILLE** Fifth Respondent

**THE UNLAWFUL OCCUPIERS OF ERF 814
ROSETTENVILLE SITUATED AT 52 GEORGE
STREET, ROSETTENVILLE** Sixth Respondent

**THE CITY OF JOHANNESBURG
METROPOLITAN MUNICIPALITY**

Seventh Respondent

UNLAWFUL OCCUPIERS, “ANNEXURE A”

Eight Respondent

RESPONDENTS’ HEADS OF ARGUMENT

I INTRODUCTION

1. As denoted by the Applicants in their Heads of Argument and Chronology, the matter has a protracted history. We will not repeat the history in these Heads of Argument for the sake of brevity.
2. The facts in this matter are also largely common cause. We pause here merely to mention the following primary points, namely:
 - 2.1. The occupiers’ initial occupation was lawful and based on an oral lease agreement. This position has since changed. However, they are not to be conflated with land invaders or people who are intentionally expropriating property;
 - 2.2. The occupiers are vulnerable, the majority being poverty-stricken and unemployed; some are elderly; and many have young children;
 - 2.3. The court has not been fully appraised of many of their current circumstances, many of which have drastically changed since the global pandemic of COVID-19, unfortunately not for the better;
 - 2.4. If evicted without alternative emergency accommodation the occupiers would face homelessness;

- 2.5. That the occupiers are currently living on the Applicants' property unlawfully is not in dispute;
 - 2.6. What is in dispute before this court is whether, in the circumstance of this case, granting an order for eviction is just and equitable. It is in this context that that matter should be assessed.
3. It further bears mentioning that the occupiers as indicated in the Supplementary Answering Affidavit of Mr Lungile Baduza:
- “have been residing on the property for more than 6 months; a large majority of them have resided on the property for more than five years.”¹*
- They are on these premises afforded protection under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, Act No: 19 of 1998 (“**PIE Act**”).
4. We deal with the structure of these Heads of Argument in turn.
 5. These Heads of Argument are structured as follows:
 - 5.1. **Part I** is the introduction;
 - 5.2. **Part II** sets out the issues for deliberation in this matter;
 - 5.3. **Part III** sets out the law that finds application in *casu*;
 - 5.4. **Part IV** is the conclusion.

¹ Index Vol 8, at page 750, para 14 – 8th Respondents' Supplementary Answering Affidavit

II THE ISSUES FOR DELIBERATION IN THIS APPLICATION

6. The pertinent issue for deliberation in this matter involves the balancing of rights. The court is called to consider whether it is just and equitable in the circumstances of this case to grant an order evicting the occupiers.
7. The court is therefore seized with the difficulty of balancing the rights of the vulnerable occupiers as contemplated in the PIE Act, the Constitution of the Republic of South Africa, 1996 (“***the Constitution***”) and the Applicants’ rights.
8. This court is indeed between a rock and a hard place, quite similar to ***Modderklip***,² which we submit is binding on this court.
9. The Applicants in their Heads of Argument note the court’s difficulty in deciding the issues. The Applicants invite this court to consider the occupiers’ rights. However, the Applicants state as follows:

“It is respectfully submitted that the above Honourable Court must carefully weigh up the competing interests of the applicants who are Deed Title holders as per their Deed of Transfer to their immovable property against the rights of the unlawful occupiers whose right flow from the discretion contained in s 4(6) and s 4(7) of the PIE Act. The PIE Act was introduced to regulate the eviction process and to afford proper judicial oversight. It was enacted to balance the owner’s property rights and the occupant’s right to access to housing (see the preamble of the Act).”³ (Emphasis added.)

10. We submit with respect that the occupiers’ rights go far beyond a discretion in the PIE Act. The occupiers’ rights flow directly from the Constitution. The impact of the eviction on intersecting rights bares mention here and scrutiny by the

² *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)* 2004 (6) SA 40 (SCA) (“**Modderklip**”). The judgment was upheld on appeal to the Constitutional Court - 2005 (5) SA 3 (CC)

³ Applicants’ Heads of Argument para 19

courts. In *Olivia Road*⁴ the Constitutional Court accepted that eviction from one's home will inevitably implicate the right to human dignity and the right to life. By association this implicates the right to freedom and security of the person and the right of children to basic shelter and protection, even more so now that the country and the world is facing a global pandemic. The "conundrum" of the vulnerable occupiers, who if evicted under the current circumstance face homelessness, is far reaching. It is not just about the discretion in the PIE Act.

11. The Applicants submit in their Heads of Argument⁵ and we quote:

"It is correct that a court may refuse an eviction application if the respondents would be rendered homeless and the granting of the eviction order would not be just and equitable in the circumstances (Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele [2010] 4 All SA 54 (SCA)). On the other hand: it is all the more important that property rights be fully respected under the common law and pursuant to section 25(1) of the Constitution which rights should be respected by both the state and by private persons. The applicants enjoy the rights guaranteed by section 25(1) of the Constitution, which section protects private property rights." (Emphasis added.)

12. We submit with the greatest of respect that the Applicants in this paragraph create a false dichotomy. It is submitted, with respect, not "**all the more important that property rights be fully respected under the common law and pursuant to section 25(1) of the Constitution which rights should be respected by both the state and by private persons**". Our Constitution does not have a hierarchy of rights; this irreconcilable difference simply does not exist.

III THE LAW ON EVICTIONS ANSWERS THE JUST AND EQUITABLE QUESTION IN THIS MATTER

13. Section 4(7) of the PIE Act provides as follows:

⁴ *Occupiers of 51 Olivia Road, Berea Township v City of Johannesburg* 2008 (3) SA 208 (CC) ("**Olivia Road**") para 16

⁵ Applicants' Heads of Argument para 20

“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.”

(Emphasis added.)

14. Notably, what is just and equitable in terms of section 4(7) of the PIE Act will vary from case to case. What is clear though is that it would be difficult for a court to conclude what is just and equitable without being fully appraised of the circumstance of the occupiers.
15. The general principles within which to measure what is just and equitable in an eviction application are well established. we deal with these in turn:
 - 15.1. Evictions which lead to homelessness will not, generally, be permitted;
 - 15.2. Where it appears that an eviction might lead to homelessness, the municipality having jurisdiction over the property is a necessary party to the proceedings and must be joined;
 - 15.3. The municipality has a duty to report to the court on what steps can be taken to prevent the occupiers from becoming homeless. Such a report must engage with the actual situation of the occupiers concerned and make a good faith attempt to provide some sort of alternative for them. We submit further that this is even more important a step in the times of COVID-19, where access to hygiene and basic services are now a life and death issue.
 - 15.4. If there is no land or accommodation available, an eviction order may be refused. However, a court will require a municipality to justify why its

housing programme does not cater to the occupiers concerned. We submit further it cannot be just and equitable now more than ever before to grant an order that will leave many of the occupiers destitute during a global pandemic.

16. We deal with these principles and the applicable authorities more fully below.

Evictions leading to homelessness will not ordinarily be permitted

17. It is by now accepted that courts will not ordinarily grant an eviction order of unlawful occupiers if that order would lead to homelessness. There is a plethora of authority in this respect.

18. In ***Port Elizabeth Municipality*** Sachs J, writing for a unanimous Court, held that:

*“a court should be reluctant to grant an eviction against relatively settled occupiers unless it is satisfied that a reasonable alternative is available, even if only as an interim measure pending ultimate access to housing in the formal housing programme.”*⁶

19. In ***Shulana Court***⁷ the Constitutional Court held that:

*“It will, generally, not be just and equitable for a court to grant an eviction order where the effect of such an order would be to render the occupiers of the property homeless”.*⁸

20. In ***Modderklip*** the Supreme Court of Appeal (“**SCA**”) held that eviction orders must be executed humanely. In circumstances where the occupiers (who in that

⁶ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) (“**Port Elizabeth Municipality**”) para 28

⁷ *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville v Mark Lewis Steele* 2010 (9) BCLR 911 (SCA) (“**Shulana Court**”)

⁸ *Shulana Court* para 16

case had unlawfully invaded the land) had no alternative accommodation available to them, Harms JA held that:

*“the order cannot be executed - humanely or otherwise - unless the State provides some land.”*⁹

21. Notably, in both ***Shulana Court*** and ***Modderklip***, eviction was sought not by the State but by the owner of the private property concerned.

The municipality’s role as a necessary party to the eviction proceedings

22. Section 4 of the PIE Act states two reasons why a municipality may be joined to proceedings for eviction:

22.1. To report on whether it is necessary for it to appoint a mediator, in terms of its powers under section 7 of the PIE Act; and

22.2. To report on what steps it can take to provide relief for the occupiers in the event that an eviction order is granted.

23. This emerges clearly from the judgment of the SCA in ***Shorts Retreat***.¹⁰ In that matter, the SCA overturned an order for the eviction of approximately 2000 people, because the high court had not adequately explored the possibility of the provision of alternative land or the possibility that mediation might have led to an equitable outcome. Jaftha JA, writing for a unanimous court, held that:

“The court did not consider suggesting to the appellants that they request the municipality to refer the matter for mediation and settlement in terms of the provisions of PIE before the eviction order was issued. This aspect underscores why it was

⁹ *Modderklip* para 26

¹⁰ *Occupiers of Erf 101, 102, 104 and 112 Shorts Retreat, Pietermaritzburg v Daisy Dear Investments (Pty) Ltd* 2010 (4) BCLR 354 (SCA) (“**Shorts Retreat**”)

necessary to join the municipality as a party, in which case the municipality could have been ordered to submit to mediation.”¹¹

24. The learned Judge continued:

“The affected community lives within the municipality’s area of jurisdiction and cannot be wished away. A community of this size cannot, with the best will in the world, relocate and find alternative accommodation overnight. The municipality should be concerned about the community being compelled into a further unlawful occupation of land. An order by the court below, after consideration of all the relevant circumstances, will no doubt impact on the municipality. It is clearly a necessary party, hence the order by this court. In any event, the order is directed, not only at safeguarding the municipality’s interest, but also to ensure that any order that is issued by the court below is just and equitable.”¹²

25. The SCA then concluded that:

“The municipality’s position in eviction proceedings under PIE differs from that of a third party in ordinary litigation because it has constitutional obligations it must discharge in favour of people facing eviction. It should therefore not be open to it to choose not to be involved.”¹³

The municipality’s duties in reporting

26. A municipality has a duty to report to a court on what measures it has in place to cater for the occupiers in the event that they are evicted. The Seventh Respondent herein, being the City of Johannesburg Metropolitan Municipality (“**the City**”), cannot renege its duty to report, but does not appear to have come to grips with the purpose of that duty, alternatively is unbothered by the consequences of this failure.

¹¹ *Shorts Retreat* para 9

¹² *Shorts Retreat* para 13

¹³ *Shorts Retreat* para 14

27. The Constitutional court stated in **Modderklip**:¹⁴

“It is unreasonable for a private entity such as Modderklip to be forced to bear the burden which should be borne by the State, of providing the occupiers with accommodation.”

28. We agree that an owner is entitled to an eviction order in the ordinary course when it is just and equitable in the circumstances. However, we submit that the enforceability of that eviction might be delayed on equitable grounds (PIE Act section 4(8)). This provision cannot, of course, be used to delay eviction indefinitely, as this would amount to an arbitrary interference with the owner’s Constitution section 25 rights and common law property rights.

29. As explained by the SCA in **Ndlovu/Bekker**,¹⁵ the effect of the PIE Act is not to expropriate; the landowner retains the protection of its Constitution section 25 rights. The PIE Act merely delays the enforcement of these rights until a determination is made as to whether it is just and equitable to evict the unlawful occupiers, and under what conditions.

30. In **Shulana Court** and **Shorts Retreat**, the SCA confirmed that a court is not only entitled to ask for a report from the municipality, but it is also required to interrogate its contents.

31. Each eviction case is different, hence the necessity to treat each differently. The circumstances of each group of unlawful occupiers, either as individuals or as a group, are also unique. In the instant matter, the City’s failure to report properly on the circumstances of the occupiers is unfortunate, to say the least. The City’s obligation with regard to the occupiers will depend on several factors including the personal circumstances of the individuals concerned. However, there is no indication either in the form of affidavits or by way of reports that the

¹⁴ *Modderklip* para 45

¹⁵ *Ndlovu v Ngcobo ; Bekker and Another v Jika* 2003 (1) SA 113 (SCA) (“**Ndlovu/Bekker**”) at 123I-124C

circumstances of the occupiers have been given proper consideration. We are dealing here with unlawful occupiers who are desperately poor, elderly and some of whom have been rendered jobless due to COVID-19. Such cases require extra vigilance and compassion. That is precisely why there is a need to get specific information from the City regarding a specific case.

Eviction orders may be refused

32. Finally, we submit that where it is clear that an eviction would lead to homelessness, our courts have, in fact, refused to grant eviction orders to private land owners: In *Modderklip* the SCA set aside an eviction order and declared that the occupiers were entitled to occupy the land until alternative accommodation became available to them.

The enquiry and circumstance in the Present Case

33. We submit that the following factors are key to the enquiry in the present case:

33.1. The occupiers will be rendered homeless on eviction, unless temporary emergency accommodation is made available to them by the City.

33.2. The occupiers are dreadfully poor.

33.3. The occupiers have lived on the property for many years and are well established in the area in terms of their work and their children's schooling.

33.4. The City has failed to acknowledge its obligations to the occupiers or give effect to them. In particular, and despite the applicants' legal representatives' attempts to coordinate a formal assessment with the City's Department of Housing, the City has:

- 33.4.1. failed to make a genuine attempt to come to grips with the actual situation of the occupiers in this case;
 - 33.4.2. failed to ascertain how many persons require urgent (emergency) housing assistance;
 - 33.4.3. failed between August and November 2020 to assess the occupiers but for five family units and those who approached the City and were assessed in their quest to register themselves on what it calls the City's "Expanded Social Package" ("**ESP**") database;
 - 33.4.4. failed to report meaningfully to this court on what it can do to assist the occupiers; and
 - 33.4.5. failed to take steps to verify the occupiers' circumstances post lockdown and the impact of COVID-19 on their livelihoods.
34. The occupiers' circumstances and vulnerability cannot be gainsaid. In **Port Elizabeth Municipality**, the Constitutional Court held as follows on the right to housing:

"A home is more than just a shelter from the elements. It is a zone of personal intimacy and family security. Often, it will be the only relatively secure space of privacy and tranquillity in what (for poor people, in particular) is a turbulent and hostile world. Forced removal is a shock for any family, the more so for one that has established itself on a site that has become its familiar habitat . . . It is not only the dignity of the poor that is assailed when homeless people are driven from pillar to post in a desperate quest for a place where they and their families can rest their heads. Our society as a whole is demeaned when State action intensifies, rather than mitigates, their marginalisation. The integrity of the rights-based vision of the Constitution is punctured when governmental action augments, rather than reduces,

denial of the claims of the desperately poor to the basic elements of a decent existence.”¹⁶

35. In **Joe Slovo**,¹⁷ the Constitutional Court emphasised the need for eviction orders to be carefully tailored in order to safeguard against homelessness. In that case, it fashioned an order which made clear that no occupier would be required to vacate his or her home unless and until temporary accommodation was ready and available for the occupier concerned.

IV CONCLUSION

36. Having regard to all of the above, we submit that it would not be just and equitable to order the eviction of the occupiers without the provision of alternative accommodation by the City. For the reasons stated above, we submit that any eviction order granted should be conditional on alternative accommodation actually being available to the occupiers.

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Chambers

Sandton

05 November 2020

¹⁶ *Port Elizabeth Municipality* paras 17 and 18

¹⁷ *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 (3) SA 454 (CC) (“**Joe Slovo**”) para 318