IN THE HIGH COURT OF SOUTH AFRICA

NORTHWEST DIVISION, MAHIKENG

CASE NO: M353/2021

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

13/01/2023

DATE SIGNATURE

In the application between:

JB MARKS LOCAL MUNICIPALITY **APPLICANT**

and

THE ILLEGAL TRESPASSERS ONTO AND/OR ATTEMPTIVE / PROSPECTIVE/ ACTUAL OCCUPIERS OF:
ERF 2148, PROMOSA, POTCHEFSTROOM;
THE REMAINING PORTION OF ERF 2150, PROMOSA, POTCHEFSTROOM;

ERF 2149, PROMOSA, POTCHEFSTROOM;
ERF 2150, PROMOSA, POTCHEFSTROOM;
THE REMAINING PORTION OF ERF 1201,
ALLAN HENDRIKSE ROAD, PROMOSA,
POTCHEFSTROOM;
REMAINING EXTENT OF PORTION 448
OF THE FARM TOWN; AND
TOWNLANDS 435 IQ, POTCHEFSTROOM **RESPONDENTS**

Heard on: 22 August 2022

Judgment Delivered on: 13 January 2023

This judgment was handed down electronically by circulation to the parties' representatives via email. The date and time of hand-down are deemed to be 10:00 am on Friday, 13 January 2023.

JUDGMENT

MORGAN, AJ

INTRODUCTION

[1] It is trite that South Africa is experiencing a housing crisis, with its harsh consequences being felt the most by those who are indigent and financially marginalised. This housing crisis has rendered a sundry of constitutional rights and promises hollow and illusionary. The right to housing is interlinked with the enjoyment of many rights – such as the right to dignity, the right to privacy, and the right to sufficient water and food.

[2] Recognising the crucial nature of the right to housing, as entrenched in terms of section 26 of the Constitution, Sachs J eloquently stated:

> "Section 26(3) evinces special constitutional regard for a person's place of abode. It acknowledges that a home is more than just a shelter from the elements. It is a zone of personalintimacy 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 thathas become its familiar habitat. As the United Nations Housing Rights Programme report points out:
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> > 'To live in a place, and to have established one's own personal habitat with peace, security and dignity, should be considered neither a luxury, a privilege nor purely the good fortune of those who can afford a decent home. Rather, the requisite imperative ofhousing for personal security, privacy, health, safety, protection from the elements andmany other attributes of a shared humanity, has led the international community to recognize adequate housing as a basic and fundamental human right.'
>
> 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 whengovernmental action augments rather than reduces denial of the claims of the desperately poor
> to the basic elements of a decent existence."[1]

[3] However, the persisting housing crisis renders some of these ideals nugatory. It is well-documented that the housing crisis that now characterises post-apartheid South Africa can be traced back to a conglomeration of legislation enacted during colonisation and under apartheid such legislation was the Natives Land Act 27 of 1913, the Native Trust and Land Act 18 of 1936, the Group Areas Act 41 of 1950, and the Prevention of Illegal Squatting Act 52 of 1951.[2]

[4] The government's inefficiency and corruption over the past two decades have only exacerbated the housing crisis. The devastating effect of state corruption and how

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[1] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) paras 17-18.

[2] For broader discussions: Sol Plaatje, *Native Life in South Africa* (2007), Rodney Davenport, 'Some reflections on the history of land tenure in South Africa, seen in the light of attempts by the State to impose political and economic control' (1985) *Acta Juridica* 53; Bernadette Atuahene, 'Paying for the Past: Redressing the Legacy of Land Dispossession in South Africa' (2011) 45 Law & Society Review 955; Sfiso Benard Nxumalo, 'Revisiting the relationship between property rights and land reform legislation in South Africa: Grobler v Phillips and Others' (*Oxford Property Law Blog*, 22 December 2021).

it has hindered the realisation of the right to housing can be seen in the recent Constitutional Court judgment of *Thubakgale*.[3] With the utmost urgency, corruption should be rooted out of the country as it continues to be a significant barrier to socio-economic rights and undermines the rule of law and other fundamental constitutional tenets.

[5] This application represents the harsh reality described above. It is an application brought by JB Marks Local Municipality ('the Municipality') against approximately 255 respondents occupying land within the jurisdiction of the Municipality. The Municipality describes the affected land as follows:

(a) Erf 2148, Promosa, Potchefstroom (zoned as "Public Open Space"). There are currently 30corrugated iron shack structures erected on this property.

(b) The remaining portion of Erf 2150, Promosa; Potchefstroom (zoned as "Public Open Space"). There are approximately 10 corrugated iron shack structures erected on this property.

(c) Erf 2149, Promosa, Potchefstroom (zoned as "Public Open Space"). There are approximately 5 corrugated iron shack structures erected on this property.

(d) Erf 2150, Promosa, Potchefstroom (zoned as "Public Open Space"). There are approximately 15 corrugated iron shack structures erected on this property.

(e) The remaining portion of Erf 1201, Allan Hendrikse Road, Promosa, Potchefstroom (zonedas "Municipal"). There are approximately 50 corrugated iron shack structures erected on this property.

(f) Remaining extent of Portion 448 of the Farm Town and Townlands 435 IQ, Potchefstroom(zoned as "Municipal"). There are approximately 5 corrugated iron shack structures erectedon this property.

[3] *Thubakgale and Others v Ekurhuleni Metropolitan Municipality and Others* 2022 (8) BCLR 985 (CC).

[6] This matter primarily concerns section 26(3) of the Constitution (as well as other constitutional provisions), unlawful occupation, and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("PIE"). Unfortunately, this matter is not unique. Case law databases are replete with cases that deal with such issues, including rich jurisprudence from the Constitutional Court, which this Court is bound to follow.

BACKGROUND FACTS

[7] The facts of the case are largely common cause. In essence, the Municipality complains that the respondents have unlawfully occupied the affected land. The Municipality approached this Court for an order under Part B in the following terms:

> "1. That the respondents are **immediately interdicted** from:
>
> a. trespassing into, invading and/or attempting to occupy and/or occupying the affected land;
>
> b. promoting, instigating, arranging, or in any way trespassing onto, invading and/or attempted occupation and/or occupation of the affected land;
>
> c. threatening or intimidating any public officials and / or employees of the Applicants and/or officials of the South African Police Services assisting with the prevention of the Respondent(s) trespassing onto, invading and/or attempting to occupy and/or occupation of the affected land and/or the execution of the order of this Court;
>
> d. Using any public or social media platform for the purposes of promoting or arranging the trespassing onto, invading and/or attempted occupation and/or occupation of the affected land.
>
> 2. That the respondents or anyone who unlawfully occupies the affected land vacate and be evicted from the affected land within 24 hours from the granting of the final order, failing whichthe applicant will direct the sheriff of this Honourable Court to evict the respondents from the Property.

3. That the sheriff of the Honourable Court be authorised to request any person of the South African Police Service to assist with the eviction, demolition or removal of the Respondents and/or any structures from the affected land, provided that the sheriff must be present during all material times of such an eviction, demolition or removal.
4. That any structures that are erected on the affected land be demolished and removed by the respondents within 48 (forty-eight) hours of the granting of the aforementioned order, failing which the sheriff of this Honourable Court must be authorised and directed to demolish and remove the structures on the affected land."

The Municipality's submissions

[8] I will set out some of the Municipality's arguments below concerning specific arguments, but I briefly sketch out the arguments here. In essence, the Municipality avers that the respondents do not occupy the affected land lawfully as it is the owner of the affected land which the respondents have invaded.

[9] It further avers that the respondents merely erected iron shacks that they did not occupy on the affected land. In addition, that they erected these structures to protest and demonstrate their disapproval of the Municipality's housing programme. Thus, the iron shack structures were not erected to secure accommodation and shelter. Therefore, they cannot be said to be homes.

[10] The Municipality contends that they visited the affected land on two separate occasions, and they did not find anyone living in the affected land and that the shacks were empty. It also contends that the affected land poses health and safety risks to anyone who occupies the land.

[11] The Municipality asserts that it has several constitutional and statutory duties in relation to the zoning and planning of the affected land within its jurisdiction and that the affected land has not been zoned for residential purposes, thus it cannot provide

some essential services that a municipality must provide in terms of its constitutional obligation.

[12] It further alleges that even if the residents lived in the affected land, they occupied the land for less than six months at the time when the court proceedings commenced. According to the Municipality, the residents moved to the land on 15 June 2021. As a result of the short-term occupancy of the respondents on the affected land, it alleges that section 4(6) of the PIE Act is not triggered, and thus it does not have to provide alternative temporary accommodation to the respondents in the event that the eviction order is granted.

The Residents' submission

[13] The residents disagree with the Municipality. They claim that they occupied the affected land from about April 2020. According to them, they have occupied the land for over six months and therefore the Municipality has a legal obligation to provide alternative accommodation in the event an eviction order is granted.

[14] In short, they submit that a large number of the residents are women and children and lack the financial resources to purchase a house. They are homeless and have erected iron shack structures to occupy them as their homes. They reiterate that all of them have applied for housing, with some of them going as far back as 1998, but sadly these promises made to them by the provincial government in various political rallies that the affected land was earmarked for low-cost housing scheme which they would be beneficiaries of proved false.

[15] They further allege that the Municipality has failed to facilitate a meaningful engagement between themselves and the Municipality prior to the institution of the present court application.

[16] They further contend that if they are evicted from the affected land, they would be rendered homeless and would render the eviction unjust and inequitable. They also allege that the Municipality has failed to offer them alternative accommodation or land.

[17] Regardless, it is undisputed that the respondents occupied the affected land without consent. Thus, the eviction sought is in terms of the PIE Act.

APPLICABLE CONSTITUTIONAL AND LEGISLATIVE PROVISIONS

[18] For ease of reference, I reproduce the relevant constitutional and legislative provisions

[19] Section 26 of the Constitution provides the following:

> "(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."

[20] Section 1 of the PIE Act provides:

> "Definitions
> 1. (i) 'building or structure' includes any hut, shack, tent or similar structure or any other form of temporary or permanent dwelling or shelter
> (ii) 'consent' means the express or tacit consent, whether in writing or otherwise, of the owner or person in charge to the occupation by the occupier of the land in question;
> ...
> (ix) 'owner' means the registered owner of land, including an organ of state;
> ...
> (xi) 'unlawful occupier' means a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land, excluding a person who is an occupier in terms of the Extension of Security of Tenure Act 62 of 1997, and excluding a person whose informal right to land, but for the provisions of this Act, would be protected by the provisions of the Interim Protection of Informal Land Rights Act, 1996 (Act No. 31 of 1996)."

[21] The relevant provisions of section 6 of the PIE Act provide:

"Eviction of unlawful occupiers

(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)."

[22] Section 6 of the PIE Act reads:

"Eviction at instance of an organ of state

6. (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 of 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) For the purposes of this section, ''public interest'' includes the interest of the health and safety of those occupying the land and the public in general.

> (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.
>
> (4) An organ of state contemplated in subsection (1) may, before instituting such proceedings, give not less than 14 days' written notice to the owner or person in charge of the land to institute proceedings for the eviction of the unlawful occupier.
>
> (5) If an organ of state gives the owner or person in charge of land notice in terms of subsection (4) to institute proceedings for eviction, and the owner or person in charge fails to do so within the period stipulated in the notice, the court may, at the request of the organ of state, order the owner or person in charge of the land to pay the costs of the proceedings contemplated in subsection (1).
>
> (6) The procedures set out in section 4 apply, with the necessary changes, to any proceedings in terms of subsection (1)."

[23] An 'unlawful occupier' is defined in section 1 of the PIE Act as a person who has never had consent to occupy land and does not have any other right in law to occupy such land, excluding a person who is an occupier under Extension of Security of Tenure Act 62 of 1997 or has an informal right under the Interim Protection of Informal Land Rights Act 31 of 1996.[4]

[24] A person who initially had consent, but such consent subsequently lapsed or has been revoked also falls within the definition of an unlawful occupier.[5] Thus, the PIE Act applies to almost all evictions throughout South Africa. The PIE Act is umbilically linked to, and has its origins in, section 26(3) of the Constitution.[6] According to Sachs

[4] The Interim Protection of Informal Land Rights Act 31 of 1996 is a temporary measure enacted to safeguard the customary land rights in South Africa's customary land tenure system.

[5] *Ndlovu v Ngcobo; Bekker v Jika* [2002] 4 All SA 384 (SCA).

[6] *Port Elizabeth* Municipality above para 24; *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC) paras 54-55; *Economic Freedom Fighters v Minister of Justice and Correctional Services* 2021 (2) SA 1 (CC) para 74; J Pienaar and A Muller, 'The impact of the Prevention of Illegal Eviction

J in *PE Municipality*, section 26(3) of the Constitution demonstrates particular constitutional regard to a person's home. Thus, the PIE Act ensures that arbitrary inroads are not made into this right. It achieves this in several ways, which must be complied with by both private individuals and the State.

[25] First, it provides that a court may only grant an eviction order where such an order is just and equitable after considering all the relevant circumstances.[7] Courts have generously interpreted the provision of 'all the relevant circumstances'. For instance, an eviction order cannot be granted where the eviction would lead to homelessness.[8] The PIE Act itself prescribes certain circumstances that courts must consider when granting an eviction order. Section 4(6) provides that where an unlawful occupier has occupied the land for less than six months prior to eviction proceedings being commenced, courts must consider the rights and needs of the elderly, children, disabled persons and households headed by women.

[26] Section 4(7) deals with unlawful occupiers who have occupied the land for more than six months before the eviction proceedings. It provides that in addition to taking into account the rights and needs of children, disabled persons, the elderly and households headed by women, a court must consider whether suitable alternative accommodation has been made available or can reasonably be made available by the local authority or any other organ of state or another landowner. However, courts have clarified that the alternative suitable accommodation requirement applies to sections 4(6) and 4(7) of the PIE Act.[9]

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from Unlawful Occupation of Land Act 19 of 1998 on homelessness and unlawful occupation within the present statutory framework' (1999) 3 *Stell LR* 379; Jackie Dugard, '*Modderklip* Revisited: Can Courts Compel the State to Expropriate Property where the Eviction of Unlawful Occupiers is not Just and Equitable' (2018) 21 *PERJ* 1, 3; Tanveer Jeewa, 'Unlawfully occupying the bridge to transformation: A case for judicial exploration when evictions are unjust and inequitable' (Unpublished Master of Laws thesis, University of Cape Town 2021); and Nxumalo (n2 supra).

[7] PIE, s 4(6) and 4(7).

[8] *Occupiers of Erven 87 and 88 Berea v De Wet N.O.* 2017 (5) SA 346 (CC).

[9] *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* 2010 4 All SA 54 (SCA) and *Occupiers of Portion R25 of the Farm Mooiplaats 355 JR v Golden Threat Ltd* 2012 2 SA 337 (CC).

[27] Second, as asseverated by Wallis J in *Changing Tides*, the onus of proving that the eviction is just and equitable is on the person seeking to evict the unlawful occupier. Prior to the enactment of the PIE Act and the adoption of the Constitution, an owner merely needed to prove that the land was theirs and that the occupiers lacked the requisite consent or right to occupy the land. That was enough. The unlawful occupier would have to raise a defence – such as acting under necessity or consent. However, as a result of the PIE Act and the Constitution, the owner has to do more – they must prove that, in light of all of the relevant circumstances, the eviction would not result in an unjust and inequitable eviction.

[28] Third, there must be meaningful engagement between the landowner, unlawful occupiers, and the State before an eviction.

[29] Meaningful engagement requires the parties to genuinely engage in a dialogue and explore possible solutions to the dispute before approaching a court. South Africa's constitutional democracy is 'designed to ensure that the voiceless are heard'[10] A failure to meaningfully engage before asking for an eviction order may result in its refusal.[11] The duty to facilitate this engagement primarily falls on the State. While there is no closed list of considerations, the Constitutional Court in *Occupiers of 51 Olivia Road, Berea Township* enumerated the following considerations:

> '(a) what the consequences of the eviction might be;
>
> (b) whether the [local authority] could help in alleviating those dire consequences;
>
> (c) whether it was possible to render the buildings concerned relatively safe and conducive to health for an interim period;
>
> (d) whether the [local authority] had any obligations to the occupiers in the prevailing circumstances; and

[10] *Oriani-Ambrosini v Sisulu, Speaker of the National Assembly* 2012 (6) SA 588 (CC).

[11] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 454 (CC) and *Abahlali Basemjondolo Movement SA v Premier of the Province of Kwazulu-Natal* 2010 (2) BCLR 99 (CC).

(e) when and how the [local authority] could or would fulfil these obligations.'[12]

[30] The PIE Act seeks to balance competing interests between landowners' rights and unlawful occupiers' rights. It ensures that landowners do not employ the right to exclude and evict unencumbered. This balance is necessary and deeply rooted in notionsof justice and equity. Being a country birthed from severe inequality and land dispossession, courts and landowners cannot be blind to the legacy of colonisation and apartheid. The common law rights of landowners are not ignored and disregarded, as they are enshrined and protected under section 25(1) of the Constitution. The Constitution merely ensures that the rights are not exercised to the detriment of others, especially since homelessness is prevalent in South Africa.[13] A failure to ring-fence the common law right to exclude renders social justice, equality and dignity elusive concepts of law, only to be written about and never experienced.

[31] The Constitutional Court in *Pheko* held that section 26(3) does not authorise an eviction without a court order, which has taken into account all the relevant circumstances of the case.[14] The PIE Act amplifies this by providing that a court may not grant an eviction order unless the eviction sought would be "just and equitable" in the circumstances. The court thus has to have regard to a number of factors including but not limited to: whether the occupiers include vulnerable categories of persons (the elderly, children and female-headed households), the duration of occupation and the availability of alternative accommodation or the state provision of alternative accommodation in instances where occupiers are unable to obtain alternatives on their own. Prior to engaging with these factors and whether it would be just and equitable to evict the applicants, it is prudent to enquire whether there was meaningful engagement.

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[12] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC) para 14.

[13] *Modderklip* above para 36.

[14] *Pheko and Others v Ekurhuleni Metropolitan Municipality* 2012 (2) SA 598 (CC) para 21.

MEANINGFUL ENGAGEMENT

[32] The Constitutional Court has instructively dealt with the requirement of meaningful engagement. As highlighted earlier, section 26(3) proscribes evictions without an order from the court, taking into account the circumstances of that case and the legislature enacted the PIE Act. It sets out a number of requirements to be followed and factors to be considered before granting an eviction order. Courts have repeatedly noted that our constitutional order, as well as the PIE Act, require that the landowners and unlawful occupiers must meaningfully engage and consult each other in the course of seeking an eviction order. There must be a constructive dialogue between the occupiers and landowners. It is perspicuous that the proper consultation and meaningful engagement between landowners and unlawful occupiers are central to a dignified eviction process.

[33] The requirement for meaningful engagement was suggested in *PE Municipality*. There, Sash J remarked that meaningful engagement provides a vehicle for a dignified and effective eviction process that will reconcile the varying and competing interests of the parties. He asseverated:

> "The managerial role of the courts may need to find expression in innovative ways. Thus, one potentially dignified and effective mode of achieving sustainable reconciliations of the different interests involved is to encourage and require the parties to engage with each other in a pro-active and honest endeavour to find mutually acceptable solutions."[15]

[34] Against our constitutional background, the reasons for this should be obvious. Again, Sachs J provides an irrefutable justification for the importance of such an engagement:

> "[T]hose seeking eviction should be encouraged not to rely on concepts of faceless and anonymous squatters automatically to be expelled as obnoxious social nuisances. Such a stereotypical approach has no place in the society envisaged by the Constitution; justice and equity require that everyone is to be treated as an

[15] *PE Municipality*, para 39.

> individual bearer of rights entitled to respect for his or her dignity. At the same time those who find themselves compelled by poverty and landlessness to live in shacks on the land of others, should be discouraged from regarding themselves as helpless victims, lacking the possibilities of personal moral agency. The tenacity and ingenuity they show in making homes out of discarded material, in finding work and sending their children to school, are a tribute to their capacity for survival and adaptation. Justice and equity oblige them to rely on this same resourcefulness in seeking a solution to their plight and to explore all reasonable possibilities of securing suitable alternative accommodation or land."[16]

[35] Sachs J postulated that mediation may be a viable and effective alternative to litigation. This is particularly the case since litigation is so costly. More on mediation later.

[36] In *Occupiers of 51 Olivia Road*, the requirement of meaningful engagement was further developed.[17] In this case, the Constitutional Court issued an interim order in which it directed the parties (the landowner, the City of Johannesburg and the unlawful occupiers) to meaningfully engage with each other and resolve the dispute in light of the constitutional and statutory obligations on the parties. After a certain period, the parties had to revert and update the Court on the status of the deliberations.

[37] According to *Occupiers of 51 Olivia Road*, meaningful engagement involves a two-way process where the property owner, the municipality and the unlawful occupiers contribute to the solution and approach such deliberations with sympathy and understanding.[18] There is no set list of what ought to be discussed as this can range from the living conditions, alternative accommodation, obligations of the municipality to the unlawful occupiers, etc. The engagement must be careful, consistent and structured.

[38] Meaningful engagement is a great vehicle to ensure just, equitable and legitimate outcomes, provided that the State acts in good faith and does not merely treat such

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[16] *PE Municipality*, para 41.

[17] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC).

[18] Ibid, para 14.

engagement as a mere gesture and thus nugatory. Furthermore, courts should strictly scrutinise the outcome of the meaningful engagement, particularly where the State does not provide housing. Liebenberg notes that the meaningful engagement inclusion is a welcomed affirmation of the principle of participatory, deliberative democracy in addressing issues and problems concerning the right to housing.[19] Yacoob J observed:

> "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 appropriate engagement. It is precisely to ensure that a city is able to engage meaningfully with poor, vulnerable or illiterate people that the engagement process should preferably be managed by careful and sensitive people on its side."[20]

[39] The Court recognised the value of rendering explicit an obligation on municipalities to engage meaningfully before instituting eviction orders. The Court found and located this obligation within the constitutional duty of the state to act reasonably contained in section 26(2) of the Constitution and the "need to treat humans with the appropriate respect and care for their dignity to which they have a right as members of humanity."[21]

[40] In *Joe Slovo*, five different judgments were handed down.[22] All these judgments supported the same order but differed on the reasons for the order. However, the Justices of the Constitutional Court agreed on the importance of meaningful engagement. Ngcobo J remarked that:

> "In my view, the key requirement in the implementation of a programme is engagement. There must be meaningful engagement between the government and the residents. The requirement of engagement flows from the need to treat residents with respect and care for their dignity. Where, as here, the government is seeking the relocation of a number of households, there is a duty to engage meaningfully with

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[19] Sandra Liebenberg, *Socio-economic rights adjudication under a transformative constitution* (2010) 301.

[20] Ibid, para 15.

[21] Ibid, para 10.

[22] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 (3) SA 454 (CC).

> residents both individually and collectively. Individual engagement shows respect and care for the dignity of the individuals. It enables the government to understand the needs and concerns of individual households so that, where possible, it can take steps to meet their concerns."[23]

[41] Comparatively, the Indian Supreme Court has acknowledged the importance of proper consultation / meaningful engagement. The Court in *Olga Tellis* viewed procedural protections as being both of intrinsic value (i.e., the right to participate in the process by which decisions affecting them are made) and instrumental value (i.e., relating to consistent and accurate application of rules).[24]

[42] Housing insecurity (homelessness) affects the marginalised in political decision-making and other important social and economic activities. Consultation grants the marginalised a voice and agency in determining their own lives. A consultation will probably lead to more effective and dignified solutions because all parties would have contributed to the solution. The Indian Supreme Court remarked that without active participation by the dwellers, no legitimate and effective outcome could be produced.

[43] In the same breath, the Indian Supreme Court in *Ahmedabad* remarked that it would be necessary to consider each case's specific conditions and circumstances to make a reasonable and proportionate eviction notice and order.[25] It noted that proper consultation is the only mechanism to give effect to this.

[44] Regardless of the Indian Supreme Court's jurisprudence, our courts' jurisprudence is rich on this point and recognise the need for meaningful engagement. Without such a consultation, the eviction cannot be said to be just and equitable as required by the PIE Act and section 26(3) of the Constitution.

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[23] Ibid, para 238. It must be noted the *Joe Slovo* case has been criticised for allegedly retreating into a narrow consideration of procedural fairness (i.e. meaningful engagement). See Kirsty McLean, 'Meaningful engagement: one step forward or two back? Some thoughts on Joe Slovo' (2010) 3 Constitutional Court Review 223.

[24] *Olga Tellis and Others v Bombay Municipal Corporation* AIR 1986 SC 180 paras 90-91.

[25] *Ahmedabad Municipal Corporation v Nowab. Khan Bulab Khan* (1997) 11 SCC 121.

[45] It bears emphasising that the requirement for meaningful engagement is well-established in our jurisprudence. This cannot be gainsaid. The state has a constitutional obligation to engage with unlawful occupiers before seeking an eviction. This is to ensure that any evictions are carried out justly and those being evicted are treated with the dignity that the Constitution has granted to each and every individual in South Africa regardless of their social standing, whether they are property owners or unlawful occupiers. The centrality of meaningful engagement in our constitutional dispensation is pronounced because of the legacy of apartheid, which was characterised by forced removals and large-scale evictions.

[46] Our society is committed to social, economic, and political transformation. Part and parcel of this transformation is observing the values of human dignity, freedom and equality. Socio-economic rights, such as the right to housing, are instrumental and pivotal to the social and economic transformation of our country and society.[26] A crucial site of redress is the lack of housing and homelessness that persists in South Africa. As highlighted in *Modderklip*:

> "The problem of homelessness is particularly acute in our society. It is a direct consequence of apartheid urban planning which sought to exclude African people from urban areas and enforced this vision through policies regulating access to land and housing which meant that far too little land and too few houses were supplied to African people. The painful consequences of these policies are still with us eleven years into our new democracy, despite government's attempts to remedy them. The frustration and helplessness suffered by many who still struggle against heavy odds to meet the challenge merely to survive and to have shelter can never be underestimated. The fact that poverty and homelessness still plague many South Africans is a painful reminder of the chasm that still needs to be bridged before the constitutional ideal to establish a society based on social justice and improved quality of life for all citizens is fully achieved."[27]

[26] *Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 (1) SA 765 (CC) paras 8-9.

[27] *President of the Republic of South Africa v Modderklip Boerdery* (Pty) Ltd 2005 (5) SA 3 (CC).

[47] Mechanisms like meaningful engagement are meant to provide the bridge to the constitutional ideal of establishing a society founded on social justice and improved quality of life for all citizens is fully achieved.

WAS THERE MEANINGFUL ENGAGEMENT IN THIS CASE?

[48] In plain terms, it is undisputed that there is no consultation at all. The Municipality avers that the respondents do not live in the affected land and merely erected shacks. It alleges that no one was on the premises and affected land. It further alleged that the affected land was empty and unoccupied to the point that they could not affect the personal service of the summons and had to affix the summons in three different poles in person. As a result, its belief that the affected land is unoccupied, the Municipality and the respondents have not meaningfully engaged about the evictions. I want to emphasise the fact that there has been no meaningful engagement. So this case is not about whether there was sufficient engagement – there has been none at all. This is, of course, unfortunate.

[49] The respondents occupy the affected land. They have provided forms setting out their personal circumstances. The population of the occupiers comprises elderly people, women and children. There are 711 minor children who occupy the affected land. Many people who occupy the affected land are indigent and without abundant resources. Most respondents are either unemployed or make a modest living in the informal sector. They have erected these iron shacks because they are homeless and do not have formal housing. In fact, they are waiting on the applicant to provide access to adequate housing and discharge their duties until section 26(1), read with section 26(2) of the Constitution, to provide access to adequate housing.

[50] All the respondents have submitted applications for housing allocations. Some applications have been submitted as far back as 1998, without any success. Some of the respondents have submitted more than one application. The applicant has not provided them with housing. The applicant is currently under administration under section

139(1)(b) of the Constitution. Thus, it is doubtful that the applicant will be able to discharge its constitutional duties under section 26 of the Constitution. The features of this case reminds me of the *dictum* of the Constitutional Court in *Mathale*, where the Court remarked:

> "This case illustrates not only the dire situation in which multitudes of poor people find themselves, but also the administrative hodgepodge the Municipality has caused in its formalisation process. It appears that there is general displacement of people in the Municipality."[28]

[51] Conceivably, the respondents may be victims of the poor governance and appalling administration by the applicants, who now sought to evict them. They are compelled to languish and squalor. The respondents in their papers complain about the lack of transparency in the criteria for housing allocation. They also accuse the applicant's officials are engaging in corrupt activities and accepting bribes. This allegation is a serious one. However, that allegation has no bearing in this matter.

[52] The applicant avers that it has a constitutional mandate to the administration of "building regulations", "municipal planning", and "public places" the harmonious and effective administration of these functions to the benefit of and in the interest of the community and citizens of the applicant. They contend that they have to ensure that the municipality to effectively and sustainably rendered, and the Applicant must safeguard and promote the health, safety, good order, amenity, convenience and general welfare of the citizens within its jurisdiction.

[53] These submissions are compelling, and they are common cause. However, these submissions bite against the argument of the applicant. These submissions favour meaningful engagement. Undoubtedly, the applicant can communicate some of its difficulties, explain the delay and backlog in the housing programme, and the safety and health concerns. It could raise that it has a constitutional mandate concerning municipal

[28] *Mathale v Linda* 2016 (2) SA 461 (CC), para 53.

planning, building planning and public places. These are all issues that would be pertinent to meaningful engagement.

[54] All things considered, this Court cannot grant an eviction order. This would not be just and equitable and would be against the dictates of the Constitution and PIE. This should be the end of the case, but it is not. The respondents submit that they would be rendered homeless if they are evicted from the affected land if they are not provided with alternative or temporary housing. I now turn to that.

WOULD IT BE JUST AND EQUITABLE FOR THIS COURT TO GRANT AN EVICTION ORDER IF SUCH AN EVICTION WOULD RENDER THE RESPONDENTS HOMELESS?

[55] In *Occupiers of Erven 87 and 88 Berea,*[29] the Constitutional Court held that an order that will give rise to homelessness could not be said to be just and equitable, unless provision has been made to provide for alternative or temporary accommodation.[30] The Court further held that where there is a risk that homeless may result, the availability of alternative accommodation becomes relevant circumstances that must be taken into account.[31] Moreover, the Court held that once it is established that there is a risk of homelessness, the duty of a municipality to provide temporary emergency accommodation is triggered.[32] It is now a trite principle that it is only just and equitable to evict unlawful occupiers if alternative accommodation is provided where an eviction would otherwise result in homelessness.

[56] It is well-established that the state, including municipalities, owes constitutional obligations to persons evicted from their homes who face homelessness. Those

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[29] *Occupiers of Erven 87 and 88 Berea v De Wet N.O. and Another* 2017 (5) SA 346 (CC).

[30] Ibid, para 57.

[31] Ibid, para 61.

[32] Ibid, paras 61-62.

obligations arise under section 26 of the Constitution and exist separately from any question of whether it is just and equitable for a court to grant an eviction order. In relation to persons in crisis with no access to land and living in intolerable conditions, the municipality would be expected to provide emergency and basic shelter to any respondents.[33] The failure to provide alternative emergency accommodation may taint the just and equitable nature of the eviction.

[57] As stated above, the applicant has not engaged the respondents at all. Therefore it has not indicated whether it is willing or has the capacity to provide alternative accommodation if the eviction order is granted. The applicant has laboured under the incorrect impression that the affected land is not occupied and thus had not made an effort to engage with the respondents. The respondents' submission that they would be rendered homeless must be taken seriously. It bolsters the need for meaningful engagement between the unlawful occupiers and the applicant. The possibility of homelessness is weighty consideration and should be attended to expeditiously.

[58] In *Occupiers of Mooiplaats*, the Constitutional Court refused to grant an eviction order because it would not be just and equitable to evict unlawful occupiers without investigating the possibility of homelessness. The Court remitted the matter to the high court and ordered the High Court to obtain a report from the municipality about the housing situation of the occupiers; the possibility of homelessness if they were evicted; the provision of alternative land or accommodation; the consequences of an eviction if no alternative land or accommodation was provided and the measures that could be taken to alleviate the situation of the owner if an eviction was delayed while alternatives were arranged. I find no reason to depart from the reasoning of this Court.

[33] *Super Four Developers CC v Mallick and Others* [2021] ZAECPEHC 52 para 27.

[59] I am of the view that considering the real possibility of the unlawful occupiers being rendered homeless and absent any meaningful engagement, an eviction order cannot be granted as it would be unjust and inequitable.

[60] In my view, the applicant's conduct resembles that of many local authorities during apartheid. First, the applicant compared itself to a private landowner through some of its arguments and placed ownership at the centre of its argument. While the local authority owns the property, it is not akin to a private landowner and ownership is no longer as central as it was under apartheid. The applicant owns the affected property for the benefit of the public under its jurisdictions. It has constitutional obligations in relation to the land under its jurisdiction, but it does not have a private interest and cannot claim to be treated in similar fashion as a private landowner.

[61] As Sachs J stated:

> "The Constitution imposes new obligations on the courts concerning rights relating to property not previously recognised by the common law. It counterposes to the normal ownership rights of possession, use and occupation, a new and equally relevant right not arbitrarily to be deprived of a home. The expectations that ordinarily go with title could clash head-on with the genuine despair of people in dire need of accommodation. The judicial function in these circumstances is not to establish a hierarchical arrangement between the different interests involved, privileging in an abstract and mechanical way the rights of ownership over the right not to be dispossessed of a home, or vice versa. Rather it is to balance out and reconcile the opposed claims in as just a manner as possible taking account of all the interests involved and the specific factors relevant in each particular case."[34]

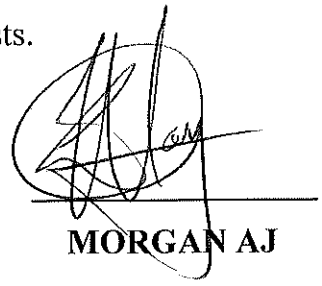
[62] In conclusion, the eviction order cannot be granted without the peremptory proper and meaningful engagement with the respondents and additional reasons stated above.

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[34] *PE Municipality* above para 23.

Order

[63] Therefore, the application is accordingly dismissed with costs.



MORGAN AJ

PARTIES REPRESENTATIVES

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For the Respondents:

Adv D Brown instructed by Chris Billings Attorneys.