THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case number: 245/08
No precedential significance

In the matter between:

THE OCCUPIERS OF ERF 101, 102, 104 and 112, SHORTS RETREAT, PIETERMARITZBURG **APPELLANTS**

v

DAISY DEAR INVESTMENTS (PTY) LTD **1st RESPONDENT**
HASSIM EBRAHIM TAR ALLY N.O. **2nd RESPONDENT**
ZAINAB BIBI ALLY N.O. **3rd RESPONDENT**

Neutral citation: *The Occupiers of Shorts Retreat v Daisy Dear Investments* (245/2008) [2009] ZASCA 80 (3 July 2009)

Coram: Mpati P, Navsa, Jafta JJA, Kroon et Tshiqi AJJA

Heard: 8 May 2009

Delivered: 3 July 2009

Summary: Evictions in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 – the requirements therefor restated.

ORDER

On appeal from: High Court of South Africa (Natal Provincial Division, (Jappie J)

In the result the following order is made:

1. The appeal is upheld.

2. The order of the court a quo is set aside and replaced with the following order:

   (a) The Msunduzi Municipality ("the Municipality") is hereby joined in these proceedings.

   (b) The Applicant is to serve on the Municipality, within 5 days of this order, a copy of all documents filed in the High Court, in these proceedings and a copy of this order.

   (c) The Municipality is directed by 30 June 2009, to file a report, confirmed on affidavit, in order to report to the court on

      (i) What steps it has taken and what steps it intends or is able to take in order to provide alternative land and/or emergency accommodation for the Occupiers of Erven 101, 102, 104 and 112 Shorts Retreat in the event of their being evicted and when such alternative land or accommodation can be provided;

(ii) What the effects would be if the eviction would take place without alternative land or emergency accommodation being made available;

(iii) What steps can be taken to alleviate the effects of the current occupation of the properties referred to above if the occupiers are not immediately evicted and pending alternative land or accommodation being made available.

(d) The applicants and the occupiers may, within fifteen days of delivery of the Municipality's report, file affidavits in response to such report;

(e) The matter is postponed *sine die*, for consideration of the matter, including, if appropriate, the possibility of mediation to seek a resolution of the matter and such other interim or final order, as it may be considered appropriate;

(f) The question of costs is reserved.

(g) Nothing in this order should be construed to mean that the Municipality is precluded from taking such steps as it may be advised to take pursuant to its joinder.

3. There is no order as to costs of the appeal.
4. The matter is remitted to the court a quo for its further conduct.

JUDGMENT

JAFTA JA (Mpati P, Navsa JA et Kroon, Tshiqi AJJA concurring)

[1] At the hearing of this appeal and by consent the parties requested the following order:

'1. The appeal is upheld.

2. The order of the court a quo is set aside and replaced with the following order:

(a) The Msunduzi Municipality ("the Municipality") is hereby joined in these proceedings.

(b) The Applicant is to serve on the Municipality, within 5 days of this order, a copy of all documents filed in the High Court, in these proceedings and a copy of this order.

(c) The Municipality is directed by 30 June 2009, to file a report, confirmed on affidavit, in order to report to the court on

(i) What steps it has taken and what steps it intends or is able to take in order to provide alternative land and/or emergency accommodation for the Occupiers of Erven

101, 102, 104 and 112 Shorts Retreat in the event of their being evicted and when such alternative land or accommodation can be provided;

(ii) What the effects would be if the eviction would take place without alternative land or emergency accommodation being made available;

(iii) What steps can be taken to alleviate the effects of the current occupation of the properties referred to above if the occupiers are not immediately evicted and pending alternative land or accommodation being made available.

(d) The applicants and the occupiers may, within fifteen days of delivery of the Municipality's report, file affidavits in response to such report;

(e) The matter is postponed *sine die,* for consideration of the matter, including, if appropriate, the possibility of mediation to seek a resolution of the matter and such other interim or final order, as it may be considered appropriate;

(f) The question of costs is reserved.

(g) Nothing in this order should be construed to mean that the Municipality is precluded from taking such steps as it may be advised to take pursuant to its joinder.

3. There is no order as to costs of the appeal.
4. The matter is remitted to the court a quo for its further conduct.'

We stated at the time the order was made that reasons for the requested order would follow. These are the reasons.

[2] The appeal is against an order of the Pietermaritzburg High Court (Jappie J) in terms of which the appellants were ordered to demolish their homes and vacate erven 101,102,104 and 112 situate at Shorts Retreat, Pietermaritzburg. The appeal is with the leave of this court.

[3] The appellants – a group of people the majority of whom are unemployed, poor and homeless – settled on the erven in question illegally. They erected informal dwellings described as shacks in the papers. Some members of the group occupied the buildings on the properties. With the passing of time the group grew into a community of approximately 2000 people. Some households in this community are headed by women. The only services they receive from the local authority are a communal water tap and a mobile clinic.

[4] The appellants have been in occupation of the properties concerned for a period in excess of five years. Although the respondents – the landowners – were aware of the occupation no legal action was taken to evict them until Msunduzi Municipality (the municipality) demanded that they be evicted. The demand was made in April 2006 and it was based on the assertion that the erection of shacks contravened the municipality's health bye-laws. The application for eviction was instituted in October 2006.

[5] The order issued by the court below was challenged on the basis that the requirements of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE), in terms of which the application was brought, were not met. PIE was enacted so as to give effect to the rights in s 26 of the Constitution.[1] It prescribes requirements which must be met before the court may issue an eviction order. The relevant parts of s 4 of PIE read:

'(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.

(2) At least 14 days before the hearing of the proceedings contemplated in subsection (1), the court must serve written and effective notice of the proceedings on the unlawful occupier and the municipality having jurisdiction….

(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

[1] Section 26(3) provides: '(3) No one may be evicted from their home, or have their house demolished, without an order of court made after considering all the relevant circumstances. …'

(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)*.

(9) In determining a just and equitable date contemplated in subsection (8), the court must have regard to all relevant factors, including the period the unlawful occupier and his or her family have resided on the land in question.'

[6] The section requires that before an eviction order is granted the court must be satisfied that such order will be just and equitable to the applicant and the unlawful occupier. In determining whether an eviction is just and equitable, the court is required to consider amongst others, whether land has been made available or can reasonably be made available by a municipality or an organ of state for the relocation of the occupier.[2] In a case such as this, where a large group of people is to be evicted, the court must also take into account the rights and needs of the elderly, children, disabled persons and households headed by women as part of the relevant circumstances. Information relating to these latter matters was not placed before the court. As a result they were not taken into account in determining whether the eviction was just and equitable.

[7] The issue relating to alternative land to which the appellants could be relocated was also not explored adequately. The court below readily accepted a report filed by the municipality pursuant to an order it had issued. This report states that the appellants could not be accommodated in any of the municipality's existing housing projects and that no land could be identified for their relocation. It states further that before the municipality could provide houses or land in terms of its housing programme, it has to follow a long process which can take up to five years. The programme prescribes an inflexible procedure which is not suitable to the circumstances of this case.

[2] This requirement does not apply to cases where the eviction proceedings are instituted within six months from the date of occupation.

[8] The court below also accepted as correct the allegation that if the municipality 'continues to make land available to people who invade either private or public owned land with the intention of fast tracking their housing needs, the municipality will not be in a position to address its current identified backlogs'. There is no evidence on record showing that the appellants' occupation was motivated by an ulterior desire to leapfrog others in the queue for housing. The facts establish that the occupation occurred because the appellants were homeless and had nowhere else to go.

[9] 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 necessary to join the municipality as a party, in which case the municipality could have been ordered to submit to mediation.[3] Section 7 of PIE provides for an appointment of a mediator by a municipality in a case where, as here, the occupied land does not belong to it.[4] The function of the mediator is to facilitate meetings between the interested parties with a view to finding an equitable solution. Mediation is necessary particularly in cases where a large number of people is involved. In *Port Elizabeth Municipality v Various Occupiers* Sachs J said:[5]

'In my view, s 7 of PIE is intended to be facilitative rather than exhaustive. It does not purport, either expressly or by necessary implication, to limit the very wide power entrusted to the court to ensure that the outcome of eviction proceedings will be just and equitable. As has been pointed out, s 26(3) of the Constitution and PIE, between

[3] See the discussion on joinder later in this judgment.
[4] Section 7(1) provides: '(1) If the municipality in whose area of jurisdiction the land in question is situated is not the owner of the land the municipality may, on the conditions that it may determine, appoint one or more persons with expertise in dispute resolution to facilitate meetings of interested parties and to attempt to mediate and settle any dispute in terms of this Act…'.
[5] 2005 (1) SA 217 (CC) para 45.

them give the courts the widest possible discretion in eviction proceedings, taking account of all relevant circumstances. One of the relevant circumstances in deciding whether an eviction order would be just and equitable would be whether mediation has been tried. In appropriate circumstances, the courts should themselves order that mediation be tried.'

[10] It emerges from the facts on record that, had it been tried, mediation could possibly have yielded an equitable outcome. The appellants have demonstrated their willingness to vacate if provided with alternative land. The respondents pointed out that alternative land to which the appellants could be relocated was available at a nearby place called France in Pietermaritzburg. This was, however, not explored at the hearing. In the circumstances of the present case there was no compliance with the mandatory requirements of PIE. It follows that the eviction order was premature.

[11] The effect of the order issued on appeal was to join the municipality without a substantive application for joinder. This was done for the following reasons. If an eviction order that is just and equitable to the appellants is issued at the conclusion of the re-hearing of the matter, it will ineluctably affect the municipality's interests. This makes the municipality a necessary party which must be given an opportunity to be heard before such order is made. It seems to me that had the court below not fallen into error in determining whether the order it contemplated was just and equitable to both sides, it could have insisted upon joinder of the municipality.

[12] At common law our courts have an inherent power to order joinder of parties where it is necessary to do so. Ordinarily such an order is issued pursuant to an application by one of the parties, in a court of first instance, which would have been served upon the party whose joinder is

sought. A court could however, even on appeal, *mero motu* raise the question of joinder to safeguard the interests of third parties and decline to hear a matter until such joinder has been effected.[6] In this case there was no formal application and all that was required of the municipality was the report referred to earlier.

[13] The court below, incorrectly, did not consider the municipality a necessary party. It is clear from the papers already filed that the municipality itself rendered some assistance to the occupants during their occupation of the land in question by way of installation of a tap to provide water. The municipality has apparently been to visit the site on a number of occasions with officials from the Department of Land Affairs. 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 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.

[14] The municipality's position in eviction proceedings under PIE differs from that of a third party in ordinary litigation because it has

[6] See Erasmus *Superior Court Practice* at B1-95 and *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A). At p 659 of that case this court referred with approval to *Collin v Toffie* 1944 AD 456 and *Home Sites (Pty) Ltd v Senekal* 1948 (3) SA 514 (A) as instances where the question of non-joinder was raised for the first time before this court. In both instances this court set aside the lower court's order and referred the case back to be dealt with after the third party had been joined and it ordered the plaintiff in those cases to join the third party.

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. Moreover, s 4 of PIE obliges the courts to be innovative and if it becomes necessary, to depart from the conventional approach.[7] In any event the order issued does not in any way preclude the municipality from raising any issue it may wish to raise.

[15] Although the Minister of Land Affairs was not ordered to be joined as a party it may be an aspect, that the court below and the parties, should consider.

[16] It is for all these reasons that this court issued the order referred to above.

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C N JAFTA
JUDGE OF APPEAL

[7] In this regard the Constitutional Court stated in *Port Elizabeth Municipality* above n 6 in para 36: 'The court is thus called upon to go beyond its normal functions and to engage in active judicial management according to equitable principles of an ongoing, stressful and law-governed social process. This has major implications for the manner in which it must deal with the issues before it, how it should approach questions of evidence, the procedures it may adopt, the way in which it exercises its powers and the orders it might make.'

APPEARANCES:

FOR APPELLANT:	Paul Kennedy SC Rudolph Jansen Instructed by Lawyers for Human Rights Durban Lawyers for Human Rights Legal Aid Board Bloemfontein
FOR RESPONDENT:	P C Bezuidenhout SC Instructed by Jasat & Jasat, Pietermaritzburg Webbers Bloemfontein