

4 APRIL 2008

/BH

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: 36775/06

IN THE MATTER BETWEEN:

**CHIEFTAIN REAL ESTATE INCORPORATED
IN IRELAND**

APPLICANT

AND

**CITY OF TSHWANE METROPOLITAN
MUNICIPALITY
THE GOVERNMENT OF THE REPUBLIC OF
SOUTH AFRICA
THE MEMBER OF THE EXECUTIVE COUNCIL:
HOUSING, GAUTENG**

FIRST RESPONDENT

SECOND RESPONDENT

THIRD RESPONDENT

JUDGMENT

MAKHAFOLA, AJ

INTRODUCTION

[1] The applicant has launched motion proceedings in the main case against the City of Tshwane Metropolitan Municipality for an order in the following terms:

“1. The respondent is ordered to, *ante omnia*, take all necessary steps to

remove all illegal informal settlers from the following property of the applicant:

1.1 Portions 6 and 7 of the farm Hoekplaats 384, Registration Division J.R., Province of Gauteng; and

1.2 Portions 27 of the farm Mooiplaats 355, Registration Division, Province of Gauteng;

2. Costs of the application.

3. Further and/or alternative relief.”

[2] This application was opposed by the respondent and three sets of affidavits were filed namely: the founding, the answering and the replying affidavits.

[3] The present application before court is premised on three payers namely, joining the Government of the Republic of South Africa and the MEC: for Housing in Gauteng, and leave to amend the applicant’s Notice of Motion for insertion of

certain prayers thereof.

[4] The joinder application is opposed by the parties purported to be the second and third respondents. The opposition is based on the question of law in terms of Rule 6(5)(d)(iii) by a notice that sets forth such question of law.

[5] Factors not in dispute:

1. That the property occupied by unlawful occupiers is the property of applicant;
2. That the applicant wants the said occupiers removed from its property;
3. The applicant is a company incorporated in Ireland with an address in the Republic of South Africa at 87A Biccard Street, Polokwane, Limpopo Province.
4. The respondent municipality may in terms of Act 19 of 1998 section 6 bring an eviction order against the illegal occupiers of land.

5. The primary duty to evict unlawful occupiers is on the owner or person in charge of land in terms of section 4 of Act 19 of 1998.

APPLICANT'S CASE:

[6] In summary form the applicant avers that the undertaking by the City of Tshwane Municipality that the municipality would relocate the unlawful occupiers on the property of the applicant at its own costs by August 2005 with a window period until 31 December 2005. The relocation did not happen. The municipality has cited primarily the delays in obtaining funding from the Gauteng Housing Department.

[7] The applicant has further averred that the Municipality has alleged that it is unable to remove the illegal occupiers and that the Municipality officials faced physical violence and its property was damaged. The Municipality officials were also denied access by the occupiers to the property.

FIRST RESPONDENT'S CASE

[8] In its answering affidavit which deals with the merits it took two points in *limine*

namely: that the applicant on its own version had no dealings with or any contractual relationship with the Municipality and that *ex facie* the founding affidavit the applicant has no *locus standi in judicio* to bring an application against the Municipality.

- [9] The erstwhile owner Kaywell was unable to remove the occupiers and had relied on the first respondent to do so. But, there was no contractual binding to him to remove the illegal occupiers by a specific date.

SECOND AND THIRD RESPONDENTS' CASE

- [10] Their case against the joinder of themselves in the case between the applicant and the first respondent is predicated on 6 points in terms of their notice under the provisions of Rule 6(5)(d)(iii) of the Uniform Rules of Court.

- [11] They state that there is no question arising between government and the applicant that depends upon the determination of substantially the same questions of law or fact to found a joinder. There is also no cause of action made by the applicant against the Government. There are no factual allegations to which the Government is to plead or answer. The only impediment alleged, in the

applicant's replying affidavit, to the removal of the squatters is the failure of the Municipality to implement any lawful steps to obtain sanction for the eviction. There is no duty on the National Government or Provincial Government to apply in terms of section 6 of Act 19 of 1998 "PIE" for the eviction of squatters. That duty rests with the owner of the land or the person-in-charge thereof or the local authority which has jurisdiction wherein the land is situated. Any joinder to be granted would amount to a mis-joinder which does not meet the requirements of rule 10(3).

THE LAW

[12](a) Rule 10(3) states that several defendants may be sued in one action either jointly, jointly and severally, separately or in the alternative, whenever the question arising between them or any of them and the plaintiff or any of the plaintiffs depends upon the determination of substantially the same question of law or fact, which if such defendants were sued separately, would arise in each separate action.

[13](b) In *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 659 it is stated as follows: "Indeed it seems clear to me that the

court has consistently refrained from dealing with issues in which a third party may have a direct and substantial interest without either having that party joined in the suit or, if the circumstances of the case admit such a course, taking other adequate steps to ensure that its judgment will not prejudicially affect the party's interests."

[14](c) *Aquatour (Pty) Ltd v Sacks and Others* 1989 (1) SA 56 (AD) at 62C the following appears: "It is settled law that the right of a defendant to demand the joinder of another party and the duty of the court to order such joinder as to ensure that there is waiver of the right to be joined (and this right and this duty appear to be co-extensive) are limited to cases of joint owners, joint contractors and partners and where the other party has a direct and substantial interest in the issues involved and the order which the court might make ..."

[15](d) In *Harding v Basson and Others* 1995 (4) SA 499 (CPD) at 501C the court said:

"A party's right to demand that someone be joined as a party arises if such a person has a joined propriety interest with one or either of the existing

parties to the proceedings or has a direct and substantial interest in the Court's order.”

[16](e) *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (AGRI SA and Others, AMICI CURIAE)* in this case the Constitutional Court has *inter alia*, stated the following:

“The state must not only provide necessary mechanisms for the citizens to resolve disputes between them, but also prevent large-scale disruptions of social fabric resulting from execution of court orders – Large-scale land invasions posing serious threat to public peace – ...”

[17] In terms of the Prevention of illegal eviction from and unlawful occupation of Land Act no: 19 of 1998 Section (4)(1) stipulates the following:

“Notwithstanding anything to the contrary contained in any law or the common law, the provisions of this section apply to the proceedings by an owner or person in charge of land for the eviction of an unlawful occupier.”

[18] Section 6(1) thereof provides that:

“An organ of state may institute proceedings for the eviction of an unlawful occupier from the land which falls within its area of jurisdiction, except where the unlawful occupier is a mortgager and the land in question is sold in the 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 relevant circumstances.”

[19](g) Act 108 of 1996 section 1(c) provides as follows:

“The Republic of South Africa is one sovereign, democratic state founded on the following values: supremacy of the constitution and the rule of law.”

[20](h) Act 108 of 1996 section 25(1) provides the following:

“No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivations of property.”

[21](i) Act 108 of 1996 section 26(1) provides that:

“Everyone has the right to have access to adequate housing.”

Section 26(2) states that:

“The state must take reasonable legislation and other measures, within its available resources to achieve the progressive realisation of this right.”

[22](k) Act 108 of 1996 section 25(5) provides as follows:

“The state must take reasonable legislation and other measures, within its available resources to foster conditions which enable citizens to gain access to land on an equitable basis.”

[23](l) Act 40 of 2002 section 1(1)(b) defines an organ of state as:

“A municipality contemplated in section 151 of the Constitution.”

[24](m) Act 108 of 1996 Section 151(1) and (4) provides as follows:

Section (1): The local sphere of government consists of municipalities, which

must be established for the whole territory of the Republic.

Section (4): The national or provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its duties.

[25](n) Act 108 of 1996 section 239 an organ of state is defined as:

“Any department of state or administration in the national, provincial or local sphere of government.”

EVALUATION AND ASSESSMENT

[26] This application does not deal with the merits of the case but with an application for a joinder. In order to place the concepts in a proper perspective all parties to the application had to touch briefly on the background of the main case. All counsel had referred extensively to *Modderklip* case (*supra*) for and against joinder.)

[27] In the *Modderklip* case the applicant had obtained an order of ejectment which could not be implemented. The unlawful occupiers were 40 000. The eviction order was unenforceable because the occupiers had nowhere to go. [Paragraph (44) at 22B-E].

[28] *In casu*, the occupiers are 20 000 (Paragraph 46 founding affidavit) and the applicant has not as yet applied for eviction because the Municipality had made an undertaking it would do that. It did not perform in terms of its undertaking. The occupiers are violent and aggressive they are not prepared to move. The Municipality has left this colossal problem of eviction in the hands of the applicant.

[29] Taking cue from the *Modderklip* case that illegal occupiers of a big number are hard, if not impossible to evict, why should the applicant first obtain an eviction order as the owner of the property. Will it serve any purpose when the attitude of the occupiers is clear? The municipality lacks the capacity to evict.

[30] The Municipality is part of the hierarchy of the national organ of state. If it fails

to protect the applicant the same duties of protection vested in the provincial and national organs of state should be invoked. All the sections of the constitutions quoted above should be activated. The second and third respondents have a direct and substantial interest that the duties of the municipality should not be impeded but that they should be carried out. *Vide:* Act 108 of 1996 section 151 (*supra*).

[31] The state must exercise its duties in terms of section 25(5) of the constitution and where there is a threat of lawlessness as *in casu* if the applicant were to evict the occupiers, then the state has a duty to uphold the rule of law. The rights of the illegal occupiers cannot be ignored as provided for in section 26(1) and (2) of the Constitution. And in the case of this nature where the applicant and the illegal occupiers' rights have to be protected the Municipality having expressed lack of sufficient funds, the second and third respondents as higher echelons of the organs of state have a direct and substantial interest in the final outcome of the main case.

[32] I find that a joinder should be granted, in the circumstances of this case.

ORDER

[33] The application is granted in terms of prayers 1, 2, 3, 4 and 5. The question of

costs in the application for a joinder is rolled over to the court hearing the main application.

K MAKHAFOLA
ACTING JUDGE OF THE HIGH COURT