IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

JOHANNESBURG

CASE NO: 4480/07

DATE: 2007-12-05

REPORTABLE

I n the matter between

SAILING QUEEN INVESTMENTS Applicant

and

THE OCCUPANTS LA COLLEEN COURT Respondent

J U D G M E N T

JAJBHAY, J:

[1] This is an application for the joinder of the City of Johannesburg ("the City") in an application to evict the respondents from La Colleen Court ("the premises") and for the stay of the main eviction application pending determination of the relief sought by the respondents in Part B of their Notice of Motion. The applicant is the owner of the premises. It opposes this application. The City has filed a notice of intention to oppose. It has done nothing more.

[2] This application raises certain fundamental issues, which include the obligations (if any) of a municipality, in this instance the City, in evictions under sections 4 of the Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998 ("PIE") of individuals in desperate need, likely to become homeless or continue to be unlawful occupiers should they be evicted.

[3] The respondents have submitted that the joinder of the City is one of necessity. They contend that as the City is mandated by law, alternatively of convenience in light of the City's statutory and constitutional obligations towards the respondents, no eviction order would be ***"just and equitable"*** (as contemplated in sections 4(6) and 4(7) of PIE) without the participation of the City. The salient and common cause facts in this matter can be reasonably set out as follows. [4] The applicant is the owner of the premises. The applicant purchased the premises well knowing it to be occupied by the respondents. Many of the respondents in this matter may be classified as persons in "desperate need". Six of the respondents are children; some are disabled and part of a woman-headed household. All of the respondents have been in occupation of the premises for a period exceeding six months. Until May 2005 the respondents who resided on the premises occupied the premises lawfully and they were able to afford the rental. The majority of the respondents have resided on the premises for more than two years. The average household income of the respondents is R805 per month. None of the respondents are able to obtain lawful and affordable accommodation should they be evicted in the circumstances of the present matter. Many of the residents have already been homeless or subject to prior evictions. The erection of shacks is not a viable option due to the City's strict prohibition of such practice. Many of the respondents are on the City's waiting list for housing subsidies. The respondents have stayed on the premises despite the lack of electricity and water. The respondents have been subjected to attempts at spoliation and illegal eviction on previous occasions. The City has as yet, not implemented any programme for the provision of emergency shelter. Any eviction in the circumstances of the present matter, would thus lead to the respondents being homeless for a protracted period of time.

[5] The City has been appraised of these proceedings. It sought a postponement in August 2007, and has limited itself to stating that it has neither the resources nor accommodation available to assist the respondents. The City did not appear at this hearing in order to participate in any constructive way in these proceedings. It has not engaged with the parties in this matter to address the needs of the respondents or the applicant, nor does the City offer an explanation for its failure to provide interim shelter to the respondents.

[6] The reason for a joinder is usually convenience. Time, effort and

costs are saved by joining parties or causes in one action instead of bringing separate actions: *BHT Water Treatment (Pty) Ltd v Leslie and Another*, 1993 (1) SA 47 (W) at 5E-H. Apart from considerations of convenience, there are circumstances in which it is essential to join a party because of the interest that it has in the matter. When such an interest becomes apparent the Court has no discretion and will not allow the matter to proceed without joinder or judicial notice of the proceedings to that party. In matters such as the present, the City has a direct and substantial interest in any order that this Court might make in the eviction application. Such order cannot be sustained or carried into effect without triggering the constitutional obligations of the City, (Section 26 (2) of the Constitution) and as such, the City is a necessary party and should be joined in the proceedings. This Court has previously held that evictions, warrant obtaining information from the City on whether alternative accommodation was in fact available: *Ritama Investments v Unlawful Occupiers of Erf 62 Wynberg*, an unreported judgement of the Transvaal Provincial Division dated 6 March 2006 under case 30782/05; In the *Ritama* case, the Court held that the local authority was best placed to give the Court information on housing of land available, which was relevant to justice and equity in an eviction application such as the present:

> "Normally the information regarding available housing for the homeless will be critical to determine whether an eviction order should be made at all, and if so, on what terms and conditions justice and equity would best be served." p13, L14-12.

[7] A simple reply from the City that no land or housing was available was deemed insufficient and amounting to a violation of constitutional obligations by the City, *Ritama* above. In *ABSA Bank v Murray and Another*, 2004 (2) SA 15 (C) at paras 41 and 42 the Court held that:

> "In [its] view, the failure by municipalities to discharge the role implicitly envisaged for them by statute, that is, to

> report to the Court in respect of any of the factors affecting land and accommodation availability and the basic health and amenities consequences of an eviction, especially on the most vulnerable such as children, the disabled and the elderly, not only renders the service of the section (section 4(2)) notice superfluous and unnecessarily costly exercise for the applicants, but more importantly, it frustrates an important objective of the legislation. It will often hamper the Court's ability to make decisions which are truly just and equitable. If PIE is to be properly implemented and administered, reports by municipalities in the context of eviction proceedings instituted in terms of the old statute should be the norm and not the exception."

[8] In the matter of *Cashbuild (South Africa) (Pty) Ltd v Scott and Others*, 2007 (1) SA 332 (T), the Court held that upon receipt of a section 4(2) notice the City was obligated to apply its mind to mediation, its legal interest arising from its obligation under section 7 of PIE. The eviction issue therefore could not be resolved until the City had been joined and given an opportunity to consider the facts of the case. Poswa J emphasised that:

"Indeed the City itself should have taken steps to be joined in the matter." More recently in the unreported judgment of *Lingwood and*

Another v Unlawful Occupiers of Erf 9 Highlands, an unreported judgment of the Witwatersrand Local Division dated 16 October 2007 under case 2006/16243, the Court held that where evictees were in similar circumstances to the respondents in the present matter, the City had an obligation towards the respondent regarding alternative accommodation. The Court further held that while it was it not the Legislature's intention to exclude eviction where no alternative accommodation was available, that Court was reluctant to order an eviction without joinder of the City and more information on any programmes that the City has for emergency housing.

[9] In any event, once respondents such as those in the present matter are evicted, it inevitably becomes the responsibility of the City either as a result of the homelessness of the respondents, or the need to resort to further unlawful occupation for shelter. Therefore, any eviction order made by this Court in the main application would inevitably affect the City. In my view, no eviction order can be just and equitable without the intervention of the City in matters such as the present. Our Courts have interpreted both PIE and the Housing Act 107 of 1997 ("the Housing Act") as imposing obligations on municipalities not only to fulfil their obligations under section 26 of the Constitution but also to cater for individuals in emergency situations, to provide information regarding their fulfilment of statutory requirements for plans to provide access to adequate housing in terms of section 26 of the Constitution and their implementation. The information regarding the City's fulfilment of such obligations is fundamental to a Court being able to determine whether or not eviction is just and equitable.

[10] The Housing Act and its National Housing Code mandates the City to take meaningful steps in ensuring individuals in desperate need have, at the very least, temporary shelter should they be evicted from the premises. The respondents in this matter are in such desperate need and are therefore entitled to the protection afforded to them under PIE, the Housing Act and the Constitution. Such information is as yet not before this Court, thus making it impossible for any Court to properly exercise its discretion in terms of section 4(7) of PIE. The City has simply stated that there is neither land nor alternative accommodation available. This to my mind is a far cry from its obligations. The City having failed to provide this Court with the relevant information voluntarily, the only appropriate means then is to ensure that any contemplated eviction will be just and equitable once the City has been joined, and the City fulfils its constitutional obligations. Therefore, it is apposite and necessary to join the City in the circumstances of the present matter. Consequently a stay of proceedings is also warranted by such a joinder. Any prejudice that might be suffered by the applicant as a result of such a stay is vastly outweighed by the constitutional obligations at hand and the prejudice the respondents would

suffer should the relief not be granted.

[11] The relief sought in this application is premised on the City's obligations, statutory as well as constitutional, to the respondents. The Constitutional Court as well as the Supreme Court of Appeal have held that a municipality's obligations extend at the very least to providing the Court with information necessary to establish when an eviction would be just and equitable. This is supported by South Africa's international obligations to ensure a "core minimum" of socio-economic rights is provided for by the state unless it can show its resources are demonstrably inadequate: Currie and De Waal, *The Bill of Rights Handbook* 5 ed (2005) 584 Juta. In the *Port Elizabeth Municipality* case, the Constitutional Court held that a Court must be fully appraised of all relevant circumstances before it can have regard to them: *Port Elizabeth Municipality v Various Occupiers*, 2005 (1) SA 217 (CC); *Modder East Squatters and Another v Modderklip Boerdery (Pty) Ltd*, 2004 (8) BCLR 821 (SCA); *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd*, 2005 (5) SA 3 (CC). The last-mentioned case, explicitly subjected the landowner's right to the limiting effect of eviction proceedings that are designed to accommodate the personal, social and economic circumstances of the unlawful occupiers. By taking the occupiers' personal and social circumstances into consideration, the Court in effect gave recognition to the rights imposed by the relevant constitutional and statutory provisions. All of this must be seen against the background of the broad historical context within which land rights developed and are still being reformed; AJ van der Walt, *Constitutional Property Law*, Juta, (2005).

[12] The Supreme Court of Appeal as well as the Constitutional Court in the *Modderklip* case held that where a private party infringed the rights of another (in that case unlawful occupiers infringed the right of ownership of the Modderklip farm owner), the state had a duty to protect that right. The failure to provide alternatives accordingly give the owner a right of action against the City, if it can be shown that the City unreasonably failed to provide alternative accommodation for the respondents and this caused an arbitrary deprivation of property in violation of section 25(1) of the Constitution. This resulted in the farm owner being granted damages as a result of its loss of ownership rights, where the state could not assist it in regaining its full rights of ownership over the land by providing alternative accommodation for the unlawful occupiers.

[13] The applicant in opposing the application for joinder relies solely on the decision of Boruchowitz J in *Xantium Trading 387 (Pty) Ltd v Molefe and others*, an unreported decision of the Witwatersrand Local Division handed down on April 2007 under case 23759/05. In that matter, Boruchowitz J held that the dictum in *Port Elizabeth Municipality* above,

requiring a Court to ensure it was provided with all relevant information before it could grant an eviction order was not authority for joinder of the local authority. All that was required of the Court, in due course was to consider all the relevant circumstances as set out in section 4(7) of PIE. Furthermore, the learned judge determined that Rule 10 of the Uniform Rules of Court does not allow joinder of a party at the instance of a defendant, nor was this a situation where the Court ought *mero motu* to raise the question of joinder. Therefore, the learned judge held that no legal or factual basis existed entitling the joinder that was sought, but that an independent application could be made under rule 13 for such a joinder. The joinder of the City was refused in *Xantium*.

[14] With respect, I cannot agree with the learned judge in the *Xantium* matter. What the Constitutional Court held in the *Port Elizabeth Municipality* case is that where desperately poor people were threatened with eviction a local authority will normally be required to provide the Court with information on its housing programme in order to allow the Court to exercise its discretion under section 4(7) of the PIE Act. Boruchowitz J did not consider the jurisprudence that has established the City's ability to provide the desperately poor with alternative accommodation and its role in acting as mediator in eviction matters as founding its interest in the outcome of an eviction which directly affects individuals in desperate need. Furthermore, section 7(1) of PIE enjoins the municipality to apply its mind to mediation in an endeavour to resolve a dispute when receiving a section 4(2) notice whether the application fell under section 4(6) or 4(7) of PIE. It would simply be untenable to contemplate that a municipality served with a notice in terms of section 4(2) of PIE, would be under no obligation to react to such a notice in any manner whatsoever.

[15] The City is entrusted with an obligation to ensure that the decision that is ultimately arrived at by the Court is just and equitable in all the circumstances. This would entail providing the Court with all relevant information.

[16] In this matter, the respondents do not claim alternative accommodation in the event that they are evicted (although they may well do so at a later stage) they say that no just and equitable order can be granted until the City has carried out its constitutional obligations and has set out what it is doing to provide alternative accommodation to the respondents. Under section 39(2) of the Constitution when interpreting Rule 10(3) of the Uniform Rules of Court, the Court has an obligation to:

" Promote the spirit, purport and object and of the Bill of

Rights".

[17] Whilst there is merit in Boruchowitz J's interpretation of Rule 10(3),

in my view, it is not the only possible interpretation. This Court should preferably choose an interpretation of Rule 10(3) which allows a joinder since the joinder sought by the respondents is necessarily incidental to the vindication of the respondents' constitutional rights of access to adequate housing, protection from arbitrary evictions, and dignity. I believe that I am further fortified by the guidelines set out in the *Port Elizabeth Municipality* matter above, where Courts are encouraged not to allow matters of form rather than substance to limit the Court's ability to find a just and equitable solution.

[18] In the present matter, I am satisfied that the interests of the respondents, as well as those of the applicant, and even those of the City will be properly protected once the City has been joined. Once all the relevant parties are before the Court, then, will the Court be properly able to address the issues raised by this particular eviction application, and more specifically the relief sought in Part B of the interlocutory application.
[19] In matters such as the present, where individuals in desperate need are faced with eviction it is just and equitable that the City be present to furnish the Courts with progress reports, in respect of persons occupying premises such as the respondents, if any. It is best in matters such as the present to have the City before this Court, ready and able to answer for its failure, if any, to fulfil its constitutional obligations to the respondents and to take responsibility for any consequences that this might have on their and the applicants' rights. A call for the City to attend to Court and make the necessary explanations does not make the City a party where relief is being sought against it, nor does it enable the Court to make orders against it as sought in Part B of the Notice of Motion. What the decisions in the *Port Elizabeth Municipality*, *Cashbuild* and *Ritama* require is that the information necessary before a determination is made whether an eviction is just and equitable be made available by the only entity that can, that is, the municipality. The municipality should not only be mandated to make this information available but this should be done, in such a manner that a Court is in a position to make an order that is just and equitable. This can only be done if the City is a party to the proceedings.
[20] In all the above circumstances I make the following order:
1. It is directed that the City of Johannesburg Metropolitan

Municipality be joined in these proceedings by virtue of its interest in the relief sought in the main application and in Part B of this application.

2. The main application is stayed pending the determination of Part B of this application.

3. The costs of this application shall be reserved to be determined when Part B of this application is determined.

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M. JAJBHAY
JUDGE OF THE HIGH COURT

DATE OF HEARING:	5 December 2007.
DATE OF JUDGMENT:	25 January 2008
COUNSEL FOR RESPONDENTS:	ADV NOKUKHANYA J. JELE INSTRUCTED BY CALS LITIGATION UNIT
COUN SEL FOR APPLICANT:	ADV C BOTHMA INSTRUCTED BY KERN AND PARTNERS

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The Housing Act and its National Housing Code mandates the City to take meaningful steps in ensuring individuals in desperate need have, at the very least, temporary shelter should they be evicted from the premises. The respondents in this matter are in such desperate need and are

therefore entitled to the protection afforded to them under PIE, the Housing Act and the Constitution.

The City having failed to provide this Court with the relevant information voluntarily, the only appropriate means then is to ensure that any contemplated eviction will be just and equitable once the City has been joined, and the City fulfils its constitutional obligations. Therefore, it is apposite and necessary to join the City in the circumstances of the present matter. Consequently a stay of proceedings is also warranted by such a joinder.

This decision differs with the detrmination of Boruchowitz J in *Xantium Trading 387 (Pty) Ltd v Molefe and others*, an unreported decision of the Witwatersrand Local Division handed down on April 2007 under case 23759/05.