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**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

Case No: D6235/2021

In the matter between:

eTHEKWINI MUNICIPALITY

APPLICANT

and

MASSON NAIR

FIRST RESPONDENT

RAJASEELAN DEVASAGAYAM

SECOND RESPONDENT

ALISHA NICOLE RAMNATH

THIRD RESPONDEDNT

CLINTAL DEVASAGAYAM

FOURTH RESPONDENT

OWEN DEVASAGAYAM

FIFTH RESPONDENT

COWN RAMNATH

SIXTH RESPONDENT

Coram: Mossop J

Heard: 1 August 2023

Delivered: 1 August 2023

ORDER

The following order is granted:

1. The second respondent is directed to do all things necessary to present an application to the applicant to secure its approval for the unauthorised construction

work performed at the immovable property with a street address of 4[...] S[...] Road, Block 16, Bayview, Chatsworth, Durban.

2. The applicant is directed to afford the second respondent all such assistance as he may require to present the aforesaid application to it and is directed to consider it and determine his application.

3. The second respondent must present his application described in paragraph 1 hereof to the applicant within 6 months of the date of this order, failing which the applicant may reapply on the same papers, suitably supplemented, for further relief.

4. There shall be no order as to costs.

JUDGMENT

MOSSOP J:

[1] This is an ex tempore judgment.

[2] The applicant, a municipality, owns the immovable property situated at 4[...] S[...] Road, Block 1[...], Bayview, Chatsworth (the property). The six respondents regard the property as their home and reside there. In this application, the applicant seeks to evict the respondents from the property in terms of the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (the PIE Act) and seeks an order that a structure that has been unlawfully erected by the respondents at the property be destroyed for want of planning approval for the erection of that structure. The respondents resist this relief.

[3] When the matter was called this morning, the applicant was represented by Mr Mthethwa and the respondents were represented by Ms Gopal. Both counsel are thanked for their submissions, especially Mr Mthethwa who is thanked for his considered submissions.

[4] The second to sixth respondents came to occupy the property through the first respondent, who concluded a lease agreement with the applicant in October 2009. The property is part of a social housing scheme implemented by the applicant, which

was known as 'Project 112'. It appears that the project was conceived and constructed to help the less fortunate members of our society. The applicant alleges that one of the conditions attaching to the lease concluded was a clause that prohibited the first respondent from making any structural alterations, additions or repairs to the then existing dwelling on the property. A copy of the lease agreement has not been attached to the founding papers and while the applicant may be correct in what it states regarding the contents of the lease agreement, I have no way of satisfying myself that that it is, indeed, correct.

[5] The applicant alleges that the lease agreement has been breached in two ways: the first respondent has constructed, or caused to be constructed, an unauthorised alteration on the property and he is also in arrears with his rental payments in the amount of approximately R30 000. When it is considered that the monthly rental at present is only R454.48, it is event that the first respondent has not paid rental for a substantial period of time. However, Mr Mthethwa advised me this morning that the applicant does not at this stage seek to recover the unpaid rental and it is not an issue in this application.

[6] The applicant states that the building that is the subject of this application is a block of flats. The alteration in respect of which complaint is made appears to be akin to a type of shed. It appears to be free standing and fixed to the ground and not to a block of flats. It certainly cannot be described as being luxurious, indeed it appears to be very humble housing, yet the second respondent states in his answering affidavit that the property:

'... is our home and the best home my family and I ever had.'

[7] The applicant alleges that the alteration is substandard and does not comply with the National Building Regulations and Building Standards Act 103 of 1977. It asserts that it is required to give its consent before any such building work is undertaken and it is required to approve plans for any construction proposed to be undertaken. This has not been sought by the first respondent and consequently has not been granted by the applicant and thus the alteration is unlawful.

[8] The applicant came to know of the alteration through a whistle-blower. It mandated one of its functionaries, a Mr Phiwo Sipika (Mr Sipika), to investigate the information that it received. Mr Sipika produced a report, which is attached to the founding affidavit. It is entirely unhelpful as all it contains is the names of the six respondents. It does not deal at all with the alteration of which complaint is made and does not identify in which manner the construction work is defective. From the very few photographs put up by the applicant, I am not able to offer any observations on the standard of workmanship used to construct the alteration.

[9] The second respondent has delivered an answering affidavit on behalf of the respondents. He complains that the applicant has failed to provide him and his family with housing, despite the family allegedly qualifying for that housing. He relates a miserable narration of his family's housing history. He earns R4 000 per month as a packer in a warehouse. He previously resided with a person called 'Ms Pinky' in a two bedroomed flat. Ms Pinky lived in the same flat with her adult son, her cousin and 6 grandchildren. When the second respondent and his family took up residence with Ms Pinky and her family, he had to split his family to allow two of his children to go and live with his mother in a nearby one bedroomed flat. Residing with his mother was his two brothers, his unemployed sister and her daughter. One of his brothers was employed but the other was a drug addict. The second respondent states that: 'In 2018, I just felt so helpless seeing my family suffer under these unbearable conditions that I needed to do something for my family to live together under more pleasant circumstances.'

[10] From this fleeting look into the respondents' lives, it is evident that they are not a wealthy family. In its founding affidavit, the applicant states that: 'The housing project was particularly incorporated to house families that did not come from a well off earning background and the low cost housing was in order for the Applicant to provide houses in line with the constitutional obligation to provide adequate housing.' That partially explains why the respondents are in the property: they, unfortunately, are the type of family that qualifies for that type of housing.

[11] The relief claimed by the applicant is drastic insofar as the continued housing requirements of the respondents are concerned and appears to me to be completely

devoid of any empathy for the respondents living conditions. There is, in fact, no ubuntu at all. Ubuntu can loosely be defined as a fundamental African value embracing dignity, human interdependence, respect, neighbourly love and concern. In *S v Mankwanyane*,¹ six of eleven judges identified ubuntu as being a key constitutional value that:

‘... places some emphasis on communality and on the independence and on the interdependence of the members of a community. It recognises a person’s status as a human being entitled to unconditional respect, dignity value and acceptance . . . The person has a corresponding duty to give the same ...’

[12] The Constitutional Court has made several allusions to ubuntu being one of the core constitutional values of human dignity, equality and freedom. Though ubuntu is not specifically mentioned in the final Constitution, it remains part of our jurisprudence.

In *Port Elizabeth Municipality v Various Occupiers*,² Sachs J said:

‘The spirit of ubuntu, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the needs for human interdependence, respect and concern.’

[13] The applicant appears to have lost sight of the fact that it is dealing here with people: living, breathing people. It seems not to be concerned that by embracing formalism over the need to care for people it may deprive such people of their home. It appears to be unconcerned that if the respondents are evicted they will have no alternative accommodation to which they could move. They will thus be rendered homeless.

[14] The applicant believes that it is resolving a problem by attempting to evict the respondents. I do not see it that way. Eviction in these circumstances resolves nothing, because if the applicant obtains the relief that it seeks it will still remain responsible for rehousing the respondents. I am not prepared to render the family homeless. Indeed, following the judgment in *The Occupiers, Shulana Court, 11*

¹ *S v Mankwanyane* 1995 (3) SA 391 (CC).

² *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 30.

Hendon Road, Yeoville, Johannesburg v Steele,³ the Supreme Court of Appeal decided that it would generally not be just and equitable, and would therefore be in contravention of sections 4(6) and 4(7) of the PIE Act, to grant an eviction order where the effect would be to render the occupiers homeless. In *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd*,⁴ the Constitutional Court took into consideration a number of factors to determine whether the eviction order would be just and equitable or not, although it eventually decided that regardless of who the party seeking the eviction is, once the possibility of homelessness exists as a result of an eviction order the scenario can be categorised as an emergency and the state should provide emergency accommodation. Thus, granting this application would simply mean that the applicant would have to accommodate the respondents elsewhere. That the respondents have attempted to improve their living conditions without excessive resources at their disposal is, in my view, something to be applauded and not deprecated.

[15] It seems to me to be much more pragmatic to try and solve the present problem than simply create another one because I have no doubt that the applicant will, as it always does in matters of this nature, state that it has no resources with which to assist the respondents. In my view, the way to solve the problem is to require the first respondent to get planning approval for what has been constructed at the property and to conclude a realistic payment plan with the applicant so that the accumulated arrear rental can be paid. I appreciate that this may sound like wishful thinking, but it may resolve the matter and, in my view, is infinitely preferable to rendering the respondents homeless.

[16] I can see no point in burdening the respondents with a costs order where they cannot even pay the modest rent that they are required to pay. In the exercise of my discretion, I decline to grant a costs order. I accordingly grant the following order:

1. The second respondent is directed to do all things necessary to present an application to the applicant to secure its approval for the unauthorised construction

³ *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* 2010 9 BCLR 911 (SCA) paras 14, 16 and 18.

⁴ *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 2 SA 104 (CC).

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2. The applicant is directed to afford the second respondent all such assistance as he may require to present the aforesaid application to it and is directed to consider it and determine his application.

3. The second respondent must present his application described in paragraph 1 hereof to the applicant within 6 months of the date of this order, failing which the applicant may reapply on the same papers, suitably supplemented, for further relief.

4. There shall be no order as to costs.

MOSSOP J

APPEARANCES

Counsel for the applicants : Mr B Z Mthethwa

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Counsel for the respondent : Ms T Gopal
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Date of Hearing : 1 August 2023

Date of Judgment : 1 August 2023