IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

APPEAL CASE NO: A254/2009

In the appeal of:

DRAKENSTEIN MUNICIPALITY Appellant

In re

Magistrate's Court Case No 364/2008

MOGADIEN HENDRICKS First applicant
DINAS HENDRICKS Second applicant
VAALTYN HENDRICKS Third applicant
ROSEMARY HENDRICKS Fourth applicant

and

SARA HENDRICKS First respondent
CARMEN HENDRICKS Second respondent

JUDGMENT DELIVERED ON 15 DECEMBER 2009

BLIGNAULT J:

Introduction

[1] This is an appeal from the Wellington magistrate's court. It concerns the nature and extent of some of a municipality's obligations in terms of the provisions of the Prevention of Illegal Eviction from Unlawful Occupation of Land Act ("the PIE Act").

[2] The appeal is one of 7 (seven) similar appeals that were heard together. In each case the Drakenstein Municipality is the appellant. It is a municipality within the meaning of the PIE Act. Each appeal is directed against a judgment of the magistrate in terms of which appellant was ordered to be joined as a party, to report on and mediate in pending eviction proceedings.

[3] In each of the seven cases the applicant is a private landowner who applied for the eviction of the respondent(s) alleged to be in unlawful occupation of certain premises. The respondent(s) had been in occupation of the premises for more than six months when the proceedings were initiated. The disputes in question may be described as private law disputes between individuals:

(1) In the present matter, *Mogadien Hendricks and Others v Sara Hendricks and Another* (magistrate's court case No 364/2008), the dispute is whether rental has been paid in terms of an agreement of lease.

(2) In *Elizabeth Raab v Johanna Samson and Others* (magistrate's court case No 100/2008) the dispute concerns the alleged termination of an agreement of lease.

(3) In *Marieka Williams NO and Another v Piet Jacobs and Another* (magistrate's court case No 176/2007) the dispute is whether the property in question had been purchased by the occupier.

(4) In *Die Bestuursraad Arendsnes Straatkinderprojek v Saul Fransman and Another* (magistrate's court case No 1068/2008) the respondent had been dismissed from his employment by virtue of which he enjoyed occupation of the premises.

(5) In *Ivan de Villiers NO v Berenice Cupido* (magistrate's court case No 588/2007) the dispute concerns the sale of a property in the course of the winding up of a deceased estate.

(6) In *Samuel Gertse and Others v Cedric Gertse* (magistrate's court case No 1470/2007) there is a family

dispute concerning the alleged donation of the property to the occupier.

(7) In *Omar Pietersen and Another v Zoelfia Pietersen and Others* (magistrate's court case No 1555/2007) the defence is that the applicant acquired the property from a person to whom it had been donated in fraud of the occupiers.

[4] Except for the *Omar Pietersen* matter (magistrate's court case No 1555/2007), not one of the respondents in the various matters raised the non-availability of alternative land for occupation as a defence in the eviction application. In the *Omar Pietersen* case the respondent denied the applicant's allegation that it would be easy to obtain alternative accommodation. The respondent said that she had been informed that there were not many affordable properties to let in her area. She understood that the municipality's waiting list contained 32 000 names.

Relevant legislation

[5] The PIE Act falls to be construed against the background of section 26 of the Constitution of the Republic of South Africa Act 108 of 1996 ("the Consttution") which reads as follows:

> *"(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."*

[6] The provisions of sections 4 and 7 of the PIE Act apply to the present cases. Sub-sections 4(1), 4(2), 4(7), 4(8) and 4(9) reads as follows:

> ***"4. 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.

(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

(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."

[7] Sub-sections 7(1), 7(3) and 7(4) of the PIE Act read as follows:

*"**7 Mediation***

(1) If the municipality in whose area of jurisdiction the land in question if 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: Provided that the parties may at any time, by agreement, appoint another person to facilitate meetings or mediate a

dispute, on the conditions that the municipality may determine.

... ...

(3) Any party may request the municipality to appoint one or more persons in terms of subsections (1) and (2), for the purposes of those subsections.

(4) A person appointed in terms of subsection (1) or (2) who is not in the full-time service of the State may be paid the remuneration and allowances that may be determined by the body or official who appointed that person for services performed by him or her."

Appellants' affidavit

[8] The issue that led to the magistrate's judgment arose in the *Hendricks* application when the respondents raised a point *in limine* that the application could not proceed until the municipality (appellant) had complied with its obligations under the PIE Act. The magistrate called upon appellant to provide reasons why it should not provide a report to the court and mediate in the matter. Appellant then filed an affidavit deposed to by Dr Sidima Kabanyane, its municipal manager, to explain its stance in the matter.

[9] Dr Kabanyana said, *inter alia,* the following:

> *"3. I have been advised and verily believe that upon a proper construction of the PIE Act the municipality should not be joined as a party to the proceedings in an application by a private person in terms of s 4 of the Act, and that the requirements of the Act prescribe only that a copy of the process instituting eviction proceedings under the Act should be served on the municipality for its notice. I am advised and verily believe that the purpose of the requirement that a copy of the process be served on a municipality has been considered by the superior courts and has been held to exist so as to enable it to place relevant information before the court with reference to the question 'whether land has been made available or can reasonably be made available by a municipality or other organ of state or another landowner for the relocation of the unlawful occupier'.*
>
> *... ...*
>
> *5. I am advised and verily believe that the provisions of the Act which contemplate the provision of input by a municipality, whether by way of a report or the provision of mediation services, require a municipality to have regard to the nature of the particular claim and to determine whether the matter is an appropriate case for the local authority to investigate the provision of alternative land accommodation or land or whether to offer to mediate the dispute. The nature of a local authority's legal interest in eviction cases goes to the State's interest and duty in the provision of basic municipal services as contemplated in terms of the Local Government: Municipal System Act 32 of 2000 and the realisation of the basic rights*

enshrined in sections 25 – 28 of the Constitution. These considerations will not ordinarily arise in matters where the eviction arises out of a breach of contract such as when the unlawful occupier breaches a lease agreement, or fails to vacate premises at the termination of such agreement, or fails to meet instalments on a mortgage loan. In addition to the fact that there is no or insufficient governmental basis for involvement in most matters of the type mentioned in the preceding sentence, the Drakenstein Municipality is simply not possessed of sufficient resources to involve itself in matters where it appears ex facie the application papers served on it in terms of PIE Act that the respondent is in breach of the contract under which he/she occupied the premises in issue and furthermore that the respondent is employed an din receipt of an income and able to obtain alternative accommodation.

6. *The current matter is an example of such a case. Not only does it appear from the founding papers that the Respondents are in receipt of an income, but also that such income is sufficient to enable them to obtain alternative accommodation.*

7. *I am informed that in the current matter the Respondents have raised as a point in limine the contention that the claim for their eviction should be mediated in terms of S 7 of the PIE Act and also filed a Notice to that effect. I am advised and verily believe that the decision whether or not to accede to a request for mediation falls entirely within the discretion of the municipality. Any decision to accede to a request for mediation will entail the diversion of personnel appropriately qualified in dispute resolution for the purpose; alternatively, the*

engagement by the municipality of outside persons who have such qualifications and experience. The decision will therefore hold cost implications for the Municipality and, within the limits of its operating budget, impact on its ability to discharge its core functions in terms of the Systems Act.

8. *A decision to accede to a request for mediation in a case like the present one is not indicated because on the facts alleged in the papers served on the municipality the determination of the dispute between the parties in the current case does not raise socio-economic questions on which it would be economically or constitutionally appropriate to expend municipal resources."*

The magistrate's judgment

[10] The magistrate required that the following three issues be determined separately from the merits of each action:

(1) The need to join the municipality as a party in all seven eviction cases;

(2) The municipality's obligation to report to the court in all these cases;

(3) The municipality's obligation to mediate in all such cases.

[11] The magistrate gave identical judgments in all 7 (seven) cases. On the question of the joinder of appellant the magistrate held that the provisions of sub-section 4(2), read with sub-section 4(7), of the PIE Act make it clear that a municipality should be joined as a party in all eviction proceedings in terms of those provisions. She cited *dicta* from the following two cases in support of her statement that a municipality must be joined in all such cases:

(1) CashBuild (South Africa) Pty) Ltd v Scott and Others 2007 (1) SA 332 (T) para [32] (in this and the following cases I quote the paragraphs referred to by the magistrate in full):

> *"It is in my view as a direct consequence of s 26(2) of the Constitution that PIE was enacted in 1998. When, therefore, the role of a municipality within the context of PIE is being considered, it should be against this background. It is further in my view unthinkable and ludicrous to contemplate that a municipality served with a notice in terms of s 4(2) of PIE, in relation to an application that falls under s 4(6), would be under no obligation to react to such*

notice in any manner whatsoever. I am of course in the first place referring to a notice that appropriately joins the municipality. I have already stated my view even in respect of the situation where the municipality was not joined in the notice that is served on it, viz that municipality ought to take appropriate steps to ensure that it is a party in such proceedings. This is not a mandate it receives from an applicant - it is what Parliament entrusts the municipality with, viz to see to it that the Constitution's provisions are not rendered superfluous."

(2) *Sailing Queen Investments v The Occupants of LA Colleen Court* 2008 (6) BCLR 666 (W) paras [9], [14] and [18]:

"[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 views, 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

... ...

[14] 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.

... ...

[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."

[12] On the question of appellant's obligation to furnish a report the magistrate held that the facts of each eviction application differ. To enable the court to consider all relevant circumstances the municipality should report in all cases to assist the court in coming

to a just and equitable decision. The magistrate referred in this regard to *dicta* from the following two cases:

(1) *Absa Bank Limited v Murray and Another* 2004 (2) SA 15 (C) paras [41] and [42]:

> *"[41] In this matter, service of a notice in terms of s 4(2) of PIE was duly served on the municipality. The municipality, however, submitted no report or comment to the Court. I understand that this is the norm. In my view, the failure by municipalities to discharge the role implicitly envisaged for them by the 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 on the occupiers, especially the most vulnerable such as children, the disabled and the elderly, not only renders the service of the notice a superfluous and unnecessarily costly exercise for the applicants, but, more importantly, it frustrates an important object of the legislation. It will often hamper the Court's ability to make decisions which are truly just and equitable.*
>
> *[42] The provision of a report to the Court is a function regularly discharged by a variety of State departments in the context of proceedings in terms of various statutes. One thinks of the reports routinely filed for the assistance and guidance of the Courts by officials such as the Registrar of Deeds, the Master and the Registrar of Companies. In my view, if PIE is to be properly implemented and*

administered, reports by municipalities in the context of eviction proceedings instituted in terms of the statute should be the norm and not the exception."

(2) *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue and Another* 2009 (1) SA 470 (W) paras [66] and [67]:

"[66] The court is enjoined to consider 'all the relevant circumstances'. The circumstances expressly include whether alternative land or accommodation is available for the relocation of 'the unlawful occupier(s)'. It is evident that in eviction cases a municipality is obliged and expected to give the court a full picture of, inter alia, whether land has been made available or can reasonably be made available, for the relocation of a specific group of unlawful occupiers, not unlawful occupiers in general. Implicit in the above is that the municipality concerned, in order to submit a proper report, must, inter alia, investigate the circumstances of a case as well as consult with the stakeholders, where necessary.

[67] PIE and the Constitution require local authorities to respond in a proper and meaningful way to every eviction application that has the potential to result in homelessness. Counsel for the first respondents correctly submitted that the City's failure to furnish a proper report is conduct at odds with the spirit and purpose of the Bill of Rights...."

[13] In regard to mediation the magistrate said that a municipality is expected to act as participant in the process of eviction. One of its functions is to assist the court in performing its functions. It would ease the court's task, she said, if the municipality acted as mediator. The magistrate cited *dicta* from the following judgments in support of the statement that a municipality must mediate in all cases:

(1) *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) paras [32], [39] and [45]:

> *"[32] Both the language of the section and the purpose of the statute require the court to ensure that it is fully informed before undertaking the onerous and delicate task entrusted to it. In securing the necessary information, the court would therefore be entitled to go beyond the facts established in the papers before it. Indeed, when the evidence submitted by the parties leaves important questions of fact obscure, contested or uncertain, the court might be obliged to procure ways of establishing the true state of affairs, so as to enable it properly to 'have regard' to relevant circumstances. 'Just and equitable'*
>
> *... ... ...*
>
> *[39] In seeking to resolve the above contradictions, the procedural and substantive aspects of justice and equity cannot always be separated. 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 proactive and honest endeavour to find mutually acceptable solutions. Wherever possible, respectful face-to-face engagement or mediation through a third party should replace arm's-length combat by intransigent opponents.

... ...

[45] 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 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."

(2) *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC) para [21]:

"[21] Finally it must be mentioned that secrecy is counter-productive to the process of engagement. The constitutional value of openness is inimical to secrecy.

> *Moreover, as I have already pointed out, it is the duty of a court to take into account whether, before an order of eviction that would lead to homelessness is granted at the instance of a municipality, there has been meaningful engagement or, at least, that the municipality has made reasonable efforts towards meaningful engagement. In any eviction proceedings at the instance of a municipality therefore, the provision of a complete and accurate account of the process of engagement, including at least the reasonable efforts of the municipality within that process, would ordinarily be essential. The absence of any engagement or the unreasonable response of a municipality in the engagement process would ordinarily be a weighty consideration against the grant of an ejectment order."*

[14] The magistrate accordingly ordered that appellant should be joined as a party in all eviction cases and that it should furnish a report to the court in all such cases (including the *Hendricks* matter). Appellant was also ordered to mediate in all cases (including the *Hendricks* matter).

Appellant's submissions

[15] Mr D Borgström, assisted by Ms M O'Sullivan, appeared on behalf of appellant on appeal. They accepted that the reference

"whether land has been made available or can reasonably be made available by a municipality" in sub-section 4(7) of the PIE Act places an implied obligation on appellant to consider the grounds for the proposed eviction and, if appropriate, report to the court on whether land could reasonably be made available for the relocation of the unlawful occupiers, should they be evicted. Counsel for appellant submitted, however, that the municipality's duty to report does not apply uniformly in all cases.

[16] Counsel pointed out that the relevant information which a municipality can supply is whether alternative land can reasonably be made available for the relocation of the evictees. The extent of the municipality's obligations, counsel submitted, thus falls to be determined by the criterion of reasonableness. They referred in this regard to *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC) para [18]:

> *"[18] And, what is more, s 26(2) mandates that the response of any municipality to potentially homeless people with whom it engages must also be reasonable. It may in some circumstances be reasonable to make permanent housing available and, in*

others, to provide no housing at all. The possibilities between these extremes are almost endless. It must not be forgotten that the city cannot be expected to make provision for housing beyond the extent to which available resources allow. As long as the response of the municipality in the engagement process is reasonable, that response complies with s 26(2)...."

[17] Counsel submitted that the question whether reasonableness requires a municipality to report in a specific case, ought to be determined with regard to the context of the case and the purpose of such a report. The report is furnished in order to assist the court in assessing whether land has been made available or can reasonably be made available, thereby implicating the State's interests and obligations under section 26(2) of the Constitution. Where there is no evidence indicating that the local authority would be expected to provide alternative land for the relocation of the occupiers in any case, the need for a report from the municipality falls away.

[18] In regard to the magistrate's order that appellant must mediate in all cases, counsel for appellant submitted that it is clear from the wording of section 7(1) of the PIE Act, in particular the word *"may"*, that a municipality has a discretion whether to appoint

a mediator or not. In each of the present cases appellant has exercised its discretion and decided not to appoint a mediator. The disputes in these cases, they submitted, are not suitable for mediation by a mediator appointed by appellant. They are eminently suitable for determination by a court.

Gertse's opposition

[19] The only opposition in these appeals was by Mr Cedric Gertse, the respondent in the *Gertse* matter (magistrate's court No 1470/2007). Mr T Moller appeared on his behalf. He submitted that a municipality was obliged to report in every case in which an eviction in terms of section 4 of the PIE Act was sought. Such obligation does not only extend to the question of the availability of alternative accommodation but also to the furnishing of information on the criteria attached to making such accommodation available and whether the respondent in question qualifies for assistance from the municipality. He also submitted that it would be difficult to draw the line between persons like the individuals in the case and groups of homeless people. The court is obliged to consider all relevant information and the municipality is required to assist the court in making all possibly relevant information available.

[20] Mr Moller did not seek to defend the order of the magistrate that appellant is obliged to mediate in all cases.

The joinder of appellant in all cases

[21] I propose to deal with each of the three main topics in turn. It seems to me first that the question of the joinder of appellant is not an independent issue. The need for joinder would only arise where the municipality has a direct interest in the proceedings by reason of its duty to report to the court or to appoint a mediator.

[22] In the two cases cited by the magistrate where the municipality was joined as a party, it was for the specific purpose of reporting to the court or to appoint a mediator. The first of the cases cited by the magistrate in her discussion of joinder is *CashBuild (South Africa) Pty) Ltd v Scott and Others, supra.* In that matter the court was ultimately concerned with the question of mediation. The order made by it reads as follows:

> *"The local municipality of Lepelle-Nkumpi be and is hereby joined as the fourth respondent for the purpose of exercising its discretion in terms of s 7(1) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998."*

[23] The second case cited by the magistrate on the question of joinder is *Sailing Queen Investments v The Occupants of LA Colleen Court* 2008 (6) BCLR 666 (W). In that judgment the respondents were described as *"individuals in desperate need, likely to become homeless or continue to be unlawful occupiers should they be evicted"*. The municipality was joined because of its interest in the matter. It is obvious that the facts in that case differ fundamentally from those in the cases under consideration.

[24] Apart from the cases cited by the magistrate reference may be made to *The Occupiers of Shorts Retreat v Daisy Dear Investments* (245/2008) [2009] ZASCA 80 (3 July 2009). In that case the municipality was joined as a party in order to file a full report and, *inter alia,* to consider mediation as a solution. The facts in that case, however, also differ entirely from those in the present case. The occupiers were described as follows, in para [3]:

> *"[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."

[25] Not one of the *CashBuild, Sailing Queen* or *Shorts Retreat* cases is therefore authority for the proposition that the municipality must be joined in all cases even where reporting to the court or mediation is not required.

Appellant's obligation to report to the court in all cases

[26] I agree with appellant's contentions with respect to the municipality's duty to report to the court. It is apparent from Dr Kabanyana's affidavit that appellant received the application in question, that he applied his mind to the facts of the case and decided that this was not an appropriate case to investigate the question of the provision of alternative land by the municipality or to appoint a mediator. He had regard to the purpose of the PIE Act and the socio-economic circumstances of the case and pointed out that appellant is not possessed of sufficient resources to involve itself in investigating this question in all cases.

[27] It seems to me that appellant acted responsibly in these matters. It is required to react reasonably in fulfilling its obligations in terms of the PIE Act. The relevant information which a municipality can provide to the court is whether alternative land has been or can be made available for the relocation of the occupiers. Appellant considered the facts of the present cases and decided that these are not the kind of matters where a report on the making available of alternative land would be relevant. It would be unreasonable in my view to expect appellant to embark upon a costly and time consuming exercise to investigate matters and report on them in a case where such information is irrelevant.

[28] It is of course ultimately for the court and not for appellant to decide what is relevant or not. The point, however, is that the court can always call upon the municipality to provide relevant information where it becomes necessary for a proper decision of a particular case. In *Port Elizabeth Municipality v Various Occupiers,supra,* para [39], it was said that the *"managerial role of the courts may need to find expression in innovative ways".* Whether such a need arises in a particular case is a practical question to be decided on a case to case basis. The *Omar Pietersen* case (magistrate court No 1555/2007), referred to

above, is in my view the kind of case where relevant information could have been obtained from appellant without the need for a full investigation and report.

[29] The two cases cited by the magistrate do not support her finding that there is a general duty on the municipality to report in all cases. *Absa Bank Limited v Murray and Another* 2004 (2) SA 15 (C) was a case in which the respondents stayed on in a house after it had been sold in sequestration. The learned acting judge was able to decide the matter on the information before him without a report from the municipality. His reference, in para [42], to *"reports routinely filed for the assistance and guidance of the Courts by officials such as the Registrar of Deeds, the Master and the Registrar of Companies"* is interesting. These reports, more often than not, contain no more than a statement that the official has received the application and has no objection to the relief sought. This kind of report is clearly not what was envisaged by the magistrate in this case. She made the order after she had received Dr Kabanyana's affidavit in which he explained appellant's position. It appears further from the *dicta* cited by her from the *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue and Another* judgment (to which I refer below)

that the magistrate had a full investigation and detailed report in every case in mind.

[30] In *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue and Another, supra,* there were 71 unlawful occupiers. Their situation was described as follows, (see para [19]):

> *"The occupiers are poor people with an average income of R940 per month. Many of them have no income at all. A great number of occupiers have no formal employment and are dependent on informal trading and/or on doing casual 'piece-work' in the inner city for a livelihood. Some do heavy manual labour on building sites to survive.*
> *There is no lawful and affordable alternative accommodation available to the occupiers in the event of their eviction. Some of the occupiers have been homeless before and are terrified of being homeless again."*

This case is clearly one where the availability of alternative land was relevant. The judgment is no authority for the proposition that a full investigation and report is required in the kind of cases that form the subject matter of this appeal.

[31] Reference may also be made in this regard to *Lingwood and Another v The unlawful occupiers of R/E of Erf 9 Highlands* 2008(3) BCLR 325 (W) where the eviction order sought by the applicant, was not issued. The property concerned consists of 9 rooms occupied by 19 adults and 8 children. The court had regard, *inter alia,* to *"...the fact that this relatively small group of occupiers are apparently as a matter of fact genuinely homeless and desperately poor and needy...".* The facts, again, are completely different from those in the present cases.

[32] Counsel for the respondent *Gertse* posed the question: Where does one draw the line between individuals like his client and groups of desperately poor people who are likely to become homeless upon eviction? This is a valid question. It seems to me, however, that there will inevitably be a grey area between the two categories of cases. One cannot define the boundary line *in abstracto.* Classifications will have to be made on a case to case basis. In case of doubt the municipality would probably be well advised to file a report. The court, furthermore, as pointed out above, has a discretion and may call for information from the municipality should it become necessary for a proper adjudication of the particular case.

Mediation

[33] The two cases cited by the magistrate in regard to mediation do not support the order made by her. In *Port Elizabeth Municipality v Various Occupiers, supra,* the municipality was itself the applicant seeking the eviction of the unlawful occupiers. The respondents were 68 people including 23 children who occupied 27 shacks. They had indicated that they would be willing to leave the property if they were given reasonable notice and provided with suitable alternative land on to which they could move. These circumstances differ entirely from those in the present cases. It is important to note, furthermore, that the references to mediation (or engagement) in this judgment refer to mediation where the municipality itself, as the applicant in the eviction proceedings, is submitting to mediation as one of the parties. They do not refer to the kind of mediation (in terms of section 7(1) of the PIE Act) which the magistrate ordered in this case.

[34] In *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC) there were more than 400 occupiers of two buildings in the inner city of Johannesburg. Many were upon

eviction desperately in need of housing assistance. The facts are fundamentally different from those of the present cases. The applicant in the eviction proceedings furthermore was itself a municipality and it was ordered to submit to mediation.

[35] It seems to me that there is some confusion in the magistrate's approach to the question of mediation. She ordered appellant to mediate in all the disputes in question. She presumably meant that it should appoint a mediator in terms of section 7(1) of the PIE Act. The difference is material and she seems to have misunderstood appellant's stance in the matter.

[36] A municipality has a discretion in terms of sub-section 7(1) of the PIE Act to appoint a mediator. In the present cases appellant exercised its discretion in a reasonable manner on practical and economic grounds. The disputes in question are in any event suitable for determination by a court of law. In the circumstances appellant cannot in my view be compelled to appoint a mediator.

Conclusion

[37] In the result, the appeal succeeds and the following orders of the magistrate are set aside:

(1) The order that appellant must be joined as a party in all eviction proceedings brought in terms of the PIE Act, including the *Hendricks* matter (magistrate's court case No 364/2008).

(2) The order that appellant is obliged to furnish a report to the court in all such cases, including the *Hendricks* matter.

(3) The order that appellant must mediate in all such cases, including the *Hendricks* matter.

A P BLIGNAULT

DLODLO J: I agree.

for **D V DLODLO**