REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO:35151 /2012

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED.

11/3/2013

In the matter between:

MADULAMOHO HOUSING ASSOCIATION	**Applicant**
and	
MASIBI GAITSEWE, HILDA	**First Respondent**
AND OTHERS	**Second Respondent to Fifteenth Respondent**

JUDGMENT

Mia AJ:

[1] The applicant is a company incorporated in terms of section 1 of the Companies Act 61 of 1973 and is an accredited social housing provider as defined in the Social Housing Act 16 of 2008 (the Social Housing Act). The respondents are occupants of the of the rental housing complex known as Elkero House which is situated at No 34 cnr Claim and Pietersen Streets, Hillbrow, Johannesburg. The applicant seeks an order evicting the respondents in terms of the Prevention of Illegal Eviction from Unlawful Occupation of Land Act 19 of 1998 (PIE). The respondents have withheld payment since early 2012 of rent due complaining that the applicant is overcharging them and not disclosing the receipt of the grants received. They believe that the properties ought to have transferred to them after paying rental for five years. They request that the application be dismissed.

[2] The applicant concluded written lease agreements with the respondents between 2007 and 2012. The applicant attached copies of all the lease agreements. Paragraphs 3 and 4 of the lease agreements concluded in 2007 read as follows:

"3. INCREASE IN RENTAL

The monthly rental and parking charges in clause 3.3 of the Schedule shall increase on 1 July each year or on the first day of any subsequent month if two months' notice of such increase has been given by the Landlord to the Tenant in writing"

4. INCREASE IN MUNICIPAL SERVICE CHARGES

The charges for water, electricity, refuse and effluent shall increase when these charges are increased by the City of Johannesburg or utility companies."

[3] The respondents are in arrears with their rental payments since approximately mid 2012 and despite demand have failed to purge their default. The applicant attempted to recover rentals due by executing on the movable property of the respondents. It appears that this was resisted by the respondents as the applicant indicated that a firearm was brandished in the presence of the Sheriff. In view of the default the applicant cancelled the lease agreements. Mr Van Der Merwe appearing on behalf of the applicant submitted that tenants had no right to occupy the property and fall within the definition of an unlawful occupier in terms of the Act. He further submitted that the respondents are the leaders and instigators of a rental boycott calculated to cripple the applicant.

[4] It appears from the papers and Mr Van der Merwe pointed out that the respondents labour under the mistaken assumption that they receive individual subsidies when in fact an institutional subsidy applies. The latter is paid to the owner to renovate and or upgrade the premises to ensure it is habitable. A further misunderstanding is in relation to the rental due and applicable. Finally there is also a different view held regarding the ownership of the units and municipal charges and electricity. The respondents believe that these charges are subsidised. The applicant does not accept the submission made on behalf of the respondents that they are willing to pay rental as they have failed to pay any amount which places the applicant is dire financial straits in terms of maintaining the premises and paying creditors such as the City of Johannesburg. There is no submission that they have paid amounts to their attorneys to be held in trust or kept same ready for payment should there be clarity on the rental increases or the ESP packages due.

[5] Mr Ngubane appearing on behalf of the respondents pointed out that the Municipality was not joined in the matter. He highlighted that in view of the City of Johannesburg not having been joined; the provision of alternative accommodation poses a problem for the residents of Elkero House. In the present matter 15 families are affected by the application to evict the respondents. It is common cause that a number of other families approximately 45 families have already been evicted. This will result in 60 families being evicted should this Court grant the order as prayed for. Mr Ngubane submitted that the respondents would like the matter to be considered having regard to all relevant circumstances as contemplated in section 26(3) of the Constitution of the Republic of South Africa Act of 108 of 1996 (the Constitution). He raised the issue about subsidies and social grant packages paid to the applicant by the City of Johannesburg not reflecting in statements which the applicant has not disclosed. Mr Ngubane also expressed the view that the Department of Housing and the City of Johannesburg have information relevant to the respondents' grievances which this Court must consider in a determination in terms of section 4(7) of PIE. If such subsidies and social grant packages were paid then the City of Johannesburg and the Department of housing have an interest in the matter and ought to have been joined in the matter.

[7] The first respondent filed an affidavit whilst the remainder of the respondents filed affidavits confirming the contents of the first respondent's affidavit without placing their individual facts before this Court. I am accepting that the general aspects raised by the first respondent are relevant to the remainder of the respondents. On the first respondent's version the rent due was R 700 when the leased commenced in 2007 based on her income of R2500. Electricity was to be

purchased from a kiosk. The first respondent believed the property would be transferred into her name after three years as provided by a State subsidy, instead the rental started to escalate and is currently R1500. No mention is made of the monthly State subsidy she believed she was to receive. There is no documentary support for this statement and it appears that this belief may be due to receipt of misinformation or a misunderstanding from some source. The issue of the subsidy requires clarity as there is a deduction on the first respondent's rental statement relating to an "esp" amount.

[8] An examination of the leases and statements attached to the applicant's founding affidavit indicated that rental amounts varied between tenants. There did not appear to be an identifiable pattern applicable to different income groups as a tenant Hilda Mkwanazi earning R2500 pays R1033 whilst a tenant Joyce Mkwanazi also earning R2500 pays R1623. In contrast a tenant Privelage Gama earning R5000 pays R1033. This may have created suspicion and caused discontent among tenants in Elkero House. If the different amounts charged are not clarified the perception is gained that tenants are treated differently without any reason. The first respondent's rent commenced at R700 and has increased after five years to R1033 as opposed to the R1500 stated, this in itself indicated that tenants do not understand their statements and charges appearing thereon. There has been a gradual increase over a period of time and the lease makes reference to an increase. However it is not clear that the applicant gave the tenants the two months' notice of the increase before increasing the rental amounts since inception of the lease as is required in terms of the lease and to ensure compliance with section 2 of the Social Housing Act, to promote transparency accountability and efficiency in the

administration and management of social housing stock. The applicant does not state that it has complied in this regard and there are no copies of these notices appended to the founding affidavit. The first respondent does not address this aspect either and it appears that the respondents are unaware of their rights and obligations in this regard.

[9] The second complaint from the tenants was the issue of electricity and rates. The lease agreement makes it clear that rates, electricity and water will be charged separately. The amounts charged are reflected in the statements. The rates and sewer charges are the same for all tenants. The amounts for electricity vary significantly between tenants even though it is listed as a communal electricity charge. It is not clear on the papers what method is used to apportion the electricity cost. This has added to the discontent. I note that the statement of the first respondent reflects the monthly charges including rent, electricity, water, sewer, laundry and also reflects deductions of amounts paid by the first respondent and a deduction for an electricity ESP grant of R114.30 which is not reflected in the statements of other tenants or for earlier months for the first respondent. It is not clear how often this is received by the applicant and deducted. This has resulted in discontent as tenants do not know what deductions are applicable to tenants and the basis for such deductions. This deduction is also contrary to the submission on behalf of the applicant that only an institutional subsidy applies.

[10] The respondents are of the view that they are being evicted to make space for tenants willing to pay more for the same premises. They petitioned the Standing

Committee of the Gauteng Provincial Legislature in August 2012. The report of the Standing Committee reflects that a resolution was taken on 22 August 2012 to convene a meeting with the petitioners, the City of Johannesburg and the Department of Local Government and Housing to resolve the problems raised. There is no report forthcoming or report on the purported meeting. The respondent attached a progress report on the petitions which is undated .The desired outcome reflects that the properties be returned to the original owners whilst the way forward advocates that the Department and Municipality not be drawn on the matter. This has created confusion in terms of what action if any is envisaged. The Social Housing Act lists the roles of national government, provincial government and municipalities and other role players in the provision of social housing stock. The Social Housing Regulatory Authority has a particular oversight role to play specifically with regard to regulating the Government's investment in social housing and to conduct compliance monitoring and specifically monitoring amendments to lease agreements in terms of the regulations.

[11] I have noted that the municipality was not joined. A notice in terms of section 4(2) was served on the City of Johannesburg. In response the City of Johannesburg addressed correspondence referring to a report which is presently under review. It is not clear what the City of Johannesburg's view is and how the review will change the City's view as currently reflected in the report. I am of the view that the information from the Department of Housing and the City of Johannesburg regarding the ESP packages and who qualifies may assist in resolving the stand off between the respondents and the applicant. There appears to be different views held around the ESP package and how it impacts on the present matter.

[12] It is not clear that the applicant as a social housing institution has complied with its obligations in terms of the Social Housing Act and specifically section (2) (1) (i) (xii) which provides for transparency, accountability and efficiency in the administration and management of social housing stock or section 14(1) (k) which states that Social Housing institutions must seek permission from the regulatory Authority for any changes to lease agreements or other prescribed documentation. It is required to submit its lease agreement on an annual basis for approval. Section 14(3) (b) requires that the institution communicate proposed changes to residents. It is not clear that has been compliance in this regard.

[13] In *Port Elizabeth Municipality v Various Occupiers* 2004(12) BCLR 1268 (CC), the Court per Sachs J stated at Para [ ]:

"The combination of circumstances may be extremely intricate, requiring a nuanced appreciation of the specific situation in each case. Thus, though there might be a sad uniformity in the conditions of homelessness and desperation which lead to unlawful occupations, on the one hand, and the frustration of landowners at being blocked by intruders from enjoyment of their property, on the other, the actual details of the relationships involved are capable of infinite variation. It is not easy to classify the multitude of places and relationships involved. This is precisely why, even though unlawfulness is established, the eviction process is not automatic and why the courts are called upon to exercise a broad judicial discretion on a case by case basis. Each case accordingly has to be decided not on generalities but in the light of its own particular circumstances. Every situation has its own history, its own dynamics, its own intractable elements that have to be lived with (at least for the time being), and its own creative possibilities that have to be explored as far as

reasonably possible. The proper application of PIE will therefore depend on the facts of each case, and each case may present different facts that call for the adoption of different approaches."

[14] It is not clear on the papers that either party has fully complied with their responsibilities. This has resulted in a stand off which will result in harm to both parties and it is desirable that the Court exercise its discretion in the manner described at paragraph [36] of the judgment of Sachs J supra:

"[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. The Constitution and PIE require that in addition to considering the lawfulness of the occupation the court must have regard to the interests and circumstances of the occupier and pay due regard to broader considerations of fairness and other constitutional values, so as to produce a just and equitable result."

[15] The rental agreement provides for the applicant to increase the rental. This however is subject to the approval of the Social Housing Regulatory Authority. In the event that this has been done the applicant is entitled to remedies upon any breach by the respondent. The lease concluded between the parties is not a commercial lease and is monitored by the SHRA, thus the remedies must factor in protection afforded to vulnerable persons in the constitution as well as the PIE and the Social Housing Act. In enforcing its remedies the applicant cannot ride roughshod over the respondents' rights. The transparency, consultation and

information sharing around increases in lease agreements is not clear from the papers before me and it is not clear that the applicant has complied with the Social Housing Act in informing the respondents of increases and deductions applicable.

[16] The respondents are willing to pay their rentals but seek to engage with the applicant as well as the City of Johannesburg to gain clarity on the increases and the ESP packages applicable. This does appear to be unreasonable in view of the different charges discussed above. It seems that commonality may be found when all the interested parties are required to sit down to meaningfully discuss their different interests in an attempt to find an acceptable solution. The applicant seeks to evict the respondents in order to break the rental boycott and refers to a general air of discontent in South Africa. In the absence of an indication that there was notification as required by the Social Housing Act, approval by the SHRA it appears that the rights of the applicant will be favoured with disregard for the respondents' rights to adequate housing and to be informed and transparency as required by the Social Housing Act. The applicant suggested in its affidavit that violence may erupt if this Court does not grant the eviction and quell the dissidence of the respondents. I am not persuaded that the submission has merit which requires this Court to oust the tenants who request engagement and transparency which they are entitled to in terms of the Social Housing Act.

[16] In view of the above the following order is made:

1. The application is postponed sine die.

2. The parties are directed to appoint a mediator to engage in discussions alternately mediation and to invite the SHRA and the municipality to assist to the extent provided in the Act, to resolve the issue of the rental and extended social grant packages applicable to the tenants.

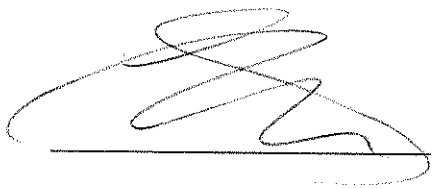
2.1. The applicant shall furnish all copies of notices communicating an increase in rental to the respondents.

2.2 The applicant shall disclose all amounts received as part of the extended social grant packages to the relevant respondents. The respondents may approach the SHRA and the Department of Housing in this regard

2.3 The applicant shall make available to respondents the correspondence from the SHRA reflecting approval of the latest lease and rental increase.

2.4 The parties are directed to explore all solutions mutually acceptable to the parties.

2.5 The costs of the application thus far are reserved for determination by the court adjudicating the application when it is reinstated.



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Acting Judge of the South

Gauteng High Court, JHB

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