IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION (MIDDELBURG LOCAL SEAT)

CASE NO:5018/2022

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

09/01/2024
DATE

[redacted]
SIGNATURE

In the matter between:

THEMBISILE HANI LOCAL MUNICIPALITY	**APPLICANT**
And	
DAMBUZA JUDAS MAHLANGU	**FIRST RESPONDENT**
JOYINA JOHANNES JIYANE	**SECOND RESPONDENT**
UNLAWFUL OCCUPIERS OF PORTION 1, 3, 4 AND 5 OF THE FARM VLAAKLAAGTE 221 JR	**FURTHER RESPONDENTS**

JUDGMENT

LANGA J:

Introduction and facts

[1] In this eviction application the Applicant, the Thembisile Hani Local Municipality, ("the THLM"), in its capacity as the owner of the land, seeks, *inter alia*, an order evicting the Respondents from the following properties:

1.1. The Remainder of Portion 1 of the Farm Vlaklaagte J221 JR, Vlaklaagte Town, Mpumalanga Province, (hereafter "Portion 1");

1.2. The Remainder of Portion 3 of the Farm Vlaklaagte J221 JR, Vlaklaagte Township, Mpumalanga Province, (hereafter “Portion 3”);

1.3. The Remainder of Portion 4 of the Farm Vlaklaagte J221 JR, Vlaklaagte Township, Mpumalanga Province, (hereafter “Portion 4”);

1.4. The Remaining extent of Portion 5 of Farm Vlaklaagte J221, Registration Division J.R., Mpumalanga Province, (hereafter “Portion 5”).

[2] The First Respondent Dambuza Judas Mahlangu is apparently a traditional leader of the Ndzundza Mabhoko Tribal Council who resides at Tweefontein K. The Second Respondent, Joyina Johannes Jiyane, also resides at Tweefontein K. The Further Respondents are the members of the public whose full particulars are apparently not known to the Applicant but who are alleged to be the unlawful occupiers of the above-mentioned properties. All the respondents will be referred to as the Respondents unless reference is made to a specific individual respondent.

[3] The Respondents opposed the application and raised the following points *in limine*:

3.1 In the first point *in limine* it was contended that there has been non-compliance with the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 1998, (“PIE”) as the Respondents have not been provided with alternative accommodation since they have been occupying the properties for a period more than six months;

3.2 In the second point *in limine* it was contended that there is a material dispute of fact which should have been foreseen concerning ownership of the properties relating to the donation of the land referred to by the Respondents.

[4] On the merits the Respondents claim the ownership of the properties apparently based on an award made in terms of the Restitution of Land Rights Act, 1994, ("RLRA"). Secondly, they contended that the Applicant failed to comply with the agreement in respect of the donation of the properties by the Mpumalanga Provincial Government to the THLM by not consulting with the communities involved. On this basis the Respondents insist that the donation should be cancelled by the Mpumalanga Provincial Government and that the present application be stayed or dismissed pending an application by Respondents to compel Mpumalanga Provincial Government to cancel the agreement.

Section 4(2) Notice

[5] Before I go into the merits of the defences raised by the Respondents, I want to first deal with the Section 4(2) notice. According to the papers, on 21 July 2023 the Applicant obtained an order authorizing the issue and service of the Notice in terms of Section 4(2) of PIE. The returns of service show that the order together, with the founding affidavit, were served on the 125 Respondents. The service in respect of the First Respondent was effected on his son whereas that in respect of the Second Respondent was on him personally. The rest of the Further Respondents were served by either the affixing and/or placing of the documents under a stone where nobody could be found at the addresses in question, some of which are partly completed dwellings and others open stands. From the returns of service filed by the sheriff it appears that the sheriff took the necessary steps to serve the application upon all the occupiers concerned. No real dispute was raised pertaining to service except the allegation that the founding affidavit was not attached thereto. There is, however, no evidence that any person who should have received service and notice of the application did not receive notice together with the affidavit. I am therefore satisfied that there was compliance with the provisions of section 4(2) of PIE, in that at least fourteen (14) days before the hearing of the proceedings, written and effective

notice of the proceedings was given to the Respondents or the alleged unlawful occupiers.

Brief facts

[6] It is common cause that the dispute in this matter relates to the occupation by the First, Second and Further Respondents of the property referred to in paragraph [1] above. From the facts and the evidence, it appears that the Applicant identified the land in question for a housing development and that the Municipal council had already approved agreements with different developers in respect of these properties. In respect of Portion 1, 4 and 5 Farm 221 JR Vlaklaagte, a lease agreement has been entered into by the THLM with Khazamula Property Development Company on 14 February 2019 pursuant an appointment letter issued to the developer dated 31 October 2014. The THLM has also entered into agreements with Amandebele Cultural Village (Pty) Ltd and Izwe-Libanzi Development Consultants CC for the development of the rest of the properties. According to the THLM, the development of these properties is aimed at providing human settlements for the local communities.

[7] The dispute over the properties was sparked by the occupation thereof on an unknown date by the First and Second Respondents who thereafter demarcated and allocated stands to other people for the purposes of erecting residential dwellings. The First Respondent refers to himself as the recognized traditional leader of Tweefontein land of Portion 5 of the Farm Vlaklaagte 221 JR and asserts that it is on the basis of this position that he has the power to allocate land to his subjects.

[8] Although the Respondents now allege that the eviction proceedings were only brought now by the Applicant after they had been in occupation of the properties for a long time, it is, however, evident from the papers that the Applicant and the Respondents have

been embroiled in litigation as early as 2019 when the occupation apparently took place. According to the First Respondent's assertions made in the urgent application under case 3015/2019, he occupied the land after it became clear to him that Tweefontein Farm, which they occupied, had become insufficient for the residents. In his affidavit he stated further that as leaders, he and the Second Respondent, approached the Applicant with a request for additional land for residential purposes and that the Applicant undertook to consider their request. He stated further that after not hearing from the Applicant, they decided to occupy the land and demarcated it. The First Respondent confirmed further that he and the other occupiers were requested by the Applicant then to stop the occupation, but they continued apparently because the Applicant did not favourably consider their request for additional land. The First Respondent conceded further that despite having been given 48 hours' notice by the Applicant on 26 June 2019 to vacate the land, they refused to do so.

[9] In the Respondents' affidavit in the urgent application it is contended that several meetings were held with the Applicant to discuss these properties over time but yielded no results. The papers further confirm that several written notices which were issued by the Applicant from at least 26 June 2019 informing the Respondents that they were occupying the land unlawfully were received by the Respondents. The said notices also directed them to vacate the land within 24 hours. The several notices attached to the papers are dated 24 June 2019, 24 November 2021, 29 December 2021 and 21 June 2022.

[10] It is common knowledge that on 08 February 2022 the Applicant eventually obtained an order under case 3015/2019 interdicting the First and Second Respondents from unlawfully demarcating and allocating stands or structures on properties 1 and 3 above. The court, however, did not grant the eviction order at that stage apparently because of non-compliance with PIE. The papers however show that the Applicant persisted with

court application from the time the land was occupied up to date. The Respondents on the other hand have admittedly continued to occupy and demarcate the land despite the court order and notices referred to above.

[11] Although it is not clearly stated how the occupation took place, it is nonetheless apparent from the papers that the Respondents occupied the properties without the consent of the Applicant and therefore invaded the land. According to the Applicant, when the urgent application was instituted in 2019, there were about 175 unoccupied sites allocated to other community members by the First and Second Respondents.

[12] The Respondents contended that their claim to be on the land is based on an award ostensibly made in terms of the RLRA. The First Respondent further averred that as he is a traditional leader in the area, he is therefore the owner of the properties through the land claim and restitution process. Although the Respondents raised some defences and points *in limine* to resist the application, I will, however, deal with the points *in limine* first. I must add that these points are intertwined with the defences on the merits.

Points *in limine*

Non-compliance with PIE

[13] The Respondents' first contention is that as they have occupied the land in question for more than six months, the THLM is therefore obligated in terms of PIE to furnish them with alternative accommodation if they are evicted from these properties. In this regard the Respondents seem to be conceding that they were in unlawful occupation of the property hence their reliance on the PIE. The Respondents' main defence which I deal with below is in conflict with this defence raised *in limine*. In my understanding the Respondents argued here that they have occupied the land for six months and that if they are to be

evicted the Applicant should comply with PIE by affording them alternative accommodation.

[14] However, in their papers, the Respondents startingly conceded that the land was donated by the Mpumalanga Provincial Government by way of a Donation Agreement dated 17 April 2019 to the Applicant. They further averred in this regard that the Applicant failed to comply with one of the conditions of the Donation agreement providing that "*Should the Municipality engage in the process of township registration (opening of township registers as per 4.3 above) or any land development on the property, the Municipality will adhere to the process of community and tribal participation and authorization, as well as the legislated or any other principles of rights to land."* (*"Clause 4.6*). I deal with this aspect under a separate heading below. What is important to state is that this in effect constitutes a concession that the property belongs to the THLM in terms of the said Donation agreement. However, despite this concession, the First Respondent expressly averred on the merits that the land belongs to them in terms of the RLRA even though they could not produce any proof of any award or order made by the Land Claims Court in their favour.

[15] The THLM on the other hand contended that there is no unqualified duty on local authorities to ensure that under no circumstances should a home be destroyed unless alternative accommodation or land is made available. It argued further that the availability of suitable alternative accommodation or land is one of the factors which have to be considered by a Court and cannot be interpreted as a pre-condition for the granting of an eviction order. The THLM relied in this regard on the decision in *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) in urging the court to dismiss this point *in limine.*

[16] I find that the contentions relied upon by the Respondents are mutually and fatally destructive. The Respondents seek on the one hand to rely on the PIE to be provided with alternative accommodation while at the same time making a claim of ownership and thereby claiming lawful occupation of the property. After a conspectus of the facts, the application cannot be dismissed on the basis of this point *in limine* which is accordingly dismissed.

Non-compliance with the donation agreement

[17] The second point *in limine* raised by the Respondents is also raised as a defence to the merits. They allege in this regard that the Court must stay or dismiss this application pending an application still to be launched to compel Mpumalanga Provincial Government to cancel the donation of the land to the Applicant.

[18] The THLM argued that this point *in limine* should be dismissed as there is no pending litigation or application, either in the form of a counter-application or an application on its own in terms of which the cancellation of the donation is sought. It argued further that in any event, even if there were such an application pending, the Applicants have not, in their papers, pleaded the material facts required for the interim interdictory relief claimed to be granted.

[19] It is trite that in motion proceedings affidavits fulfil the dual role and function of pleadings and evidence. They serve not only to define the issues but also to place the essential evidence before the Court and must contain factual averments supported by evidence which is sufficient to support the cause of action or defence for the relief claimed. See *Quartermark Investments (Pty) Ltd v Mkhwanazi and Another* 2014 (3) SA 96 SCA. Therefore, a party has a duty to allege in the pleadings the material facts upon which it relies for relief. In *Minister of Safety & Security v Slabbert* [2010] 2 All SA 474

(SCA) where the court stated that it is impermissible for a plaintiff to plead a particular case and the seek to establish different case at the trial. It is equally not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding a case except in a case w.here the issue in question has been canvassed fully at the trial

[20] It is common cause that the Respondents did not bring any counter-application or other application before Court in which interdictory relief is claimed. As in the case of the first point *in limine,* they have not pleaded this defence which is only raised in argument. As no material facts required for this relief have been pleaded, the Respondents are not entitled to this relief and this point *in limine* too stands to be dismissed.

Ownership in terms of RLRA

[21] I will now turn to the main defences on the merits which are intertwined with the points *in limine* above. As stated above, the First Respondent contended mainly that they are the traditional owners of the properties through a land claims and restitution of lost rights. They further allege that the "*land belongs to the people as per the traditional ownership and land claims act". (sic)* It is however surprising that despite this bold averment and claim which could favourably count in favour of the Respondents, the Respondents chose not to file any supporting evidence to prove this claim. No evidence either in the form of a court order or written notice by the Regional Land Claims Commissioner was filed by the Respondent to buttress this claim. This would have been the easiest way of establishing the issue of ownership.

[22] The Municipality on the other hand submitted that the Respondents are not the owners of the land in terms of RLRA as alleged. The Municipality argued that it has never received any written notice as contemplated in section 11(6) of the RLRA either in its capacity as owner of the land in question or as an interested party. It argued further that

apart from the fact that it has not received any written notice, no material facts were canvassed by the Respondents in their answering affidavit underpinning this defence. It argued therefore that the Respondents' papers also do not contain any evidence that such a claim exists that therefore no such a claim exists as alleged by the Respondents.

[23] It is trite that in a case of a claim complying with the provisions the RLRA, the Regional Land Claims Commissioner is obliged, by virtue of section 11(6) of the RLRA, to give written notice advising the owner of the land in question and any other party which, in his or her opinion, might have an interest in the claim, of the publication of the notice and further refer the owner and such other party to the provisions of section 11(7) of the RLRA. In this case the Respondent have not, in their papers alleged that this process took place. It is noteworthy from the papers that despite this averment, the Respondents have not pursued the matter in Court for an order setting aside any donation, lease, subdivision or rezoning of the land where the Court is satisfied that such conduct was not done in good faith as contemplated in section 11(7) (aA) of the RLRA.

[24] The Respondents have further failed to file any proof of the court order from the Land Claims Court made in terms of section 22 of RLRA concerning entitlement to the title in land in question. The order would have constituted the best evidence of their right in the property. Absent such an order, or at the most, a declaratory relief giving a right of restitution to the Respondents in terms of the RLRA, the Respondents have, in my view, failed to establish their alleged ownership in the property.

[25] Additionally, as I stated in the preceding paragraphs, this claim of ownership is clearly contradicted by the Respondents' concession that the land was donated to the Applicant by the provincial Government. This concession constitutes, in the circumstances, a recognition by the Respondents that the land belongs to the Applicant.

Furthermore, elsewhere in their papers the Respondent confirm that when they realised that they need more land, they approached the Applicant with a request for more land. If they indeed owned the land as contended, it would not have been necessary for them to make such a request for the same land from the THLM. Based on the papers and the Respondent's own version, the Applicant's ownership of the property cannot be disputed. It is therefore clear from the facts that the Respondents are not the owners of the land and I accordingly conclude that the Respondents' claim of ownership of the properties should be dismissed.

Just & Equitable Requirement

[26] Having found that the Respondents are not the owners of the land, it follows that they are unlawful occupiers of the land. In the circumstances I have to deal with the equally important enquiry whether or not it is just and equitable to evict the Respondents from the properties. One of the important constitutional provisions at issue in a case such as this one is Section 26 which provides 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.'* (My underlining).

[27] This section, which entrenches the socio-economic rights of access to adequate housing and, most importantly, makes evictions without judicial supervision unlawful, should be read with Section 2(1) of the Housing Act 107 of 1997 which provides that

National, Provincial and Local Spheres of government are bound to observe certain principles when dealing with housing development. These include ensuring that housing development is administered in a transparent, accountable and equitable manner and upholds the practice of good governance.

[28] Another relevant and significant provision relating to evictions is obviously Section 6 of PIE which reads as follows:

6. Eviction at instance of organ of state:

(1) An organ of state may institute proceedings for the eviction of an unlawful occupier from land which falls within its area of jurisdiction, except where the unlawful occupier is a mortgagor and the land in question is sold in a sale of 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 the relevant circumstances, and if—

(a) the consent of that organ of state is required for the erection of a building or structure on that land or for the occupation of the land, and the unlawful occupier is occupying a building or structure on that land without such consent having been obtained; or

(b) it is in the public interest to grant such an order.

(2) For the purposes of this section, "public interest" includes the interest of the health and safety of those occupying the land and the public in general.

(3) In deciding whether it is just and equitable to grant an order for eviction, the court must have regard to—

(a) the circumstances under which the unlawful occupier occupied the land and erected the building or structure;

(b) the period the unlawful occupier and his or her family have resided on the land in question; and

(c) the availability to the unlawful occupier of suitable alternative accommodation or land. (My emphasis).

[29] In such enquiries the onus is generally on the person applying for an eviction. The court must determine, after taking into account all relevant factual, legal and socio-economic circumstances, whether it is just and equitable to evict the unlawful occupiers. See *Ekurhuleni Metropolitan Municipality and Another v Various Occupiers, Eden Park Extension 5* [2014] 1 All SA 386. If satisfied that it is just and equitable, the court must then determine the date by which the unlawful occupiers must vacate the land and the date for the eviction if occupiers do not vacate land. Furthermore, the court may, in relevant circumstances, also make an order for the demolition and/or removal of any structures. Such orders must, however, be reasonable and bear reasonable conditions which may, where necessary, be varied.

[30] Now, having determined in this case that the Respondents do not own the land in question and are therefore in unlawful occupiers as envisaged by the PIE, I now turn to determine, as I am obliged to, whether it is just and equitable to grant the eviction order. As espoused in *Ekurhuleni, supra*, this enquiry involves a considerations of various factors such as *inter alia* the manner in which the occupation was effected; the duration of the occupation; the availability of suitable alternative accommodation or land; the willingness of the unlawful occupiers to respond to reasonable alternatives put before them; the extent to which serious negotiations have taken place with equality of voice for all concerned; the gender, age, occupation or lack thereof and the state of health of those affected; the manner of execution of the eviction order; the interest of surrounding communities as well as the negative impact of land grabs on investor confidence in the country and the rights of land owners.

[31] The Respondents contended that it will not be just and equitable in this case to order their relocation because they have *inter alia* been occupying the property with a legitimate expectation to be consulted and therefore had a veto right whether to allow a development of the properties which might be detrimental to their land rights. As stated in the preceding paragraphs, they further raised the argument that they have occupied the land for more than six months prior to the lodging of the eviction application and should therefore be provided with an alternative accommodation. They contended further that the plight of the elderly, the children, the disabled and women were not taken into consideration by the Applicant. (My emphasis). I will now turn to some of these relevant and pertinent circumstances to be taken into account at this stage.

Period of occupation

[32] I have already partly dealt with this issue earlier in the judgment when considering the points *in limine*. As I said these defences are so intertwined that it impossible to completely separate them. Before I consider the aspect of the period of occupation, it must be set straight that the Respondent's contention that they have a veto right whether or not to allow a development of the properties, is not only misplaced but it is also a manifestation of the arrogance of the entitlement with which they have approached and dealt with this matter right from the start. While it may be understandable that they had an expectation to be consulted, this does not in any manner convert into a veto right. They have no veto right and cannot therefore use this as a ground to challenge the eviction application.

[33] I now turn to the issue of the period of occupation. In the light of what I said in the preceding paragraphs, particularly in respect of ownership, I am satisfied that the Respondents fall in the category of unlawful occupiers as envisaged by PIE. It is therefore

important in view of Sections 4(6), 4(7) and 6(3) of PIE for a court hearing an eviction application to consider the period the unlawful occupier has been in occupation of the property. In terms of this Section 4(6), in the case where the period of occupation is less than six months, the eviction can be ordered if it is just and equitable after considering all relevant circumstances, including the rights and needs of elderly, children, disabled persons and households headed by women. If it is more than six months' occupation more is required. Section 4(7) specifically provides that the eviction may be granted if it is just and equitable after considering all the circumstances, including whether land has been made available (or reasonably may be) by municipality and after consideration of the rights and needs of the elderly, the children, the disabled persons and households headed by women. In terms of Section 6 (3) where the eviction is at the instance of a State organ such as in this case, the issue of alternative accommodation is important.

[34] However, on ordinary reading of texts, the issue of alternative accommodation is not finally determinative. It is for instance not material where homelessness will not result but an important factor where homeless is likely to result. Where a private landowner seeks the eviction, the provisioning of alternative accommodation may affect the date set in eviction order, but is less substantive in relation to whether or not to grant order even though the relevant Municipality may still be imposed with an obligation to provide alternative accommodation. However, in the case where such as in this case, a Municipality is the applicant, it is ordinarily only just and equitable if alternative land or accommodation is made available. See *City of Johannesburg v Changing Tides 74* [2012] ZASCA 114 at para 17).

[35] On this aspect I must categorically state that in this case it has not been established that the Respondents were on the property for more than six months when the litigation was instituted. Although the Respondents claim to have occupied the properties for a

period of more than six months, this is not enough as there is no evidence to support this averment. For instance, they were unable state exactly when they took occupation of the property. They only averment made by the Respondents in this regard is that the negotiations failed 2 months after they started in April 2019. The Applicant's evidence on the other hand, which is denied by the Respondents, is that the invasion of the properties and the erection of structures thereon was discovered on 22 June 2019. Based on the evidence one can make a generous estimation that the Respondents occupied the properties at least between April and May 2019. It is, however, not in dispute that the Applicant gave the Respondents notice to vacate the property on 26 June 2019 which by their own admission they refused to comply with. The Respondents further confirmed in their answering affidavit that the Applicant approached court in July 2019 to have them evicted from the properties but failed due to non-compliance with PIE. Based on the available evidence as well as inferential reasoning, when the application for eviction was launched in July 2019, the Respondents could not have been on the property for more than six months.

[36] It is evident that the Applicant took the necessary measures to prevent or stop the unlawful occupation of the properties as soon as it became aware thereof. This aspect is also important in determining whether it is just and equitable to grant the eviction order even though it is clear that Section 6(3) is of application in this matter as it is an organ of state which seeks to evict the unlawful occupiers. I deal with the aspect of the provisioning of alternative land or accommodation in the ensuing paragraphs.

The circumstances under which property occupied

[37] It is clear in this case that the Respondents have laid emphasis on the duration of their occupation of the property. They, however, do not aver when and how the occupation was attained, which factors are also important for consideration in this enquiry. The

Respondents have in my view conveniently skirted the issue and made no mention in their papers how and when they occupied the land. However, in the answering papers the First and Second Respondents confirm that they took occupation of the land without the Applicant's consent or permission. They apparently did so because they were of the view that the Applicant failed to consult with them in the process of the establishment of the envisaged townships and they had a veto right in this respect as stated above. I have already dealt with their claim to have a veto right above.

[38] However, what is evident from their affidavit is that the First and Second Respondents are not consistent and truthful. For instance, while the First Respondent claims to have taken the land over as the traditional leader in terms of the RLRA, he, however, could not advance any proof that he or the traditional authority are the owners of the land in terms of the RLRA. Further, whilst in their answering affidavit the First and Second Respondents denied they were not the owners of the properties, they nonetheless still conceded that the land was donated to the Applicant by the Provincial Government. Furthermore, they also confirmed that when they were not satisfied with the negotiations, the First Respondent, in his own words, took it upon himself to take over the land which he demarcated and allocated to the other respondents, ostensibly on the basis that he is the recognised traditional leader in the area.

[39] The above is a clear indication that when the First and Second Respondents occupied the land, they acted not only in bad faith, but they also took the law into their own hands. They demarcated and allocated the stands on the properties while they were fully well aware that they were dealing with the Applicant's property. What is clear enough though is that the circumstances under which occupation was gained were entirely unlawful as the First and Second Respondents confirmed. They took over the property well aware that they were not owners of the property and therefore not entitled to

allocate and demarcate them to other people as they did. The fact that they continued demarcating and allocating the stands despite being aware of a court order preventing them from doing so clearly shows their total disregard of the legal process and the rule of flaw. The Respondents' attitude and indifference to the rule of law is conduct that should sure be frowned at by the courts. As stated in *Ekurhuleni, supra,* this type of conduct is the very antithesis of the rule of law and should not be condoned. From the facts it is clear to me that this was not a case of landless and desperate people invading land. From the papers it is evident that the First and Second Respondents have residences elsewhere in Tweefontein. They, however, started the land invasion and encouraged the unlawful occupation of the land by others. This was clearly a case of anarchy and total disregard of the law and order and cannot be countenanced.

[40] Although the land issue is inherently a sensitive subject, especially given our history of arbitrary land dispossessions, one is inclined to sympathise with unlawful occupiers in certain circumstances. However, to allow the First and Second Respondents to act brazenly and unlawfully as they did with impunity can only lead to chaos and anarchy. This court takes a dim view at the Respondents unlawful conduct which also amounts to contempt of court as they continued demarcating and allocating land while they were aware of the court order restraining them from doing so. Consequently, the claim and defences by the Respondents that they had been occupying the properties as the owners and that they had a legitimate expectation and a veto right to allow a development of the properties should be jettisoned from the equation. The conduct of the Respondents, in particular the First and Second Respondents, support a conclusion that it is just and equitable for the eviction to be granted in the circumstances of this case. This aspect is, however, not the only one for consideration. I will now turn to the equally important aspect of the personal circumstances of the unlawful occupiers.

The personal circumstances of the occupiers

[41] It is trite that special consideration and recognition should be given to the rights of the elderly, children, disabled persons and particularly households headed by women and children. Their circumstances such as age, employment, the need of the elderly and the disabled persons, if any, as well as the period occupation and other circumstances must be disclosed to the court to enable it to exercise its discretion properly. While the responsibility to make such disclosure ordinarily rests on the Applicant, in this case the Respondents had a duty to do so particularly as such facts fall peculiarly within their knowledge. This is even more so as they have disputed the report submitted by the Applicant regarding the details and circumstances of the people on the property.

[42] Although the Respondent's counsel in his submissions referred to *inter alia* the aged and the children, there were no allegations of this sort in the Respondents' papers. No evidence was placed before court by the Respondents that the eviction will affect the elderly, children and the disabled amongst others. Even the confirmatory affidavits filed do not state the circumstances of the deponents, how they came to occupy the properties and what their personal circumstances are. The Respondents only made a bald allegation that the structures on the property "are occupied by families mostly of women and children". Despite making this important allegation and disputing the report by Applicant, the Respondents chose not provide any details of these people or their circumstances.

[43] The Applicant on the other hand attempted, despite difficulty in accessing the area and structures, to get information regarding the personal circumstances of persons on the property. As stated above it procured a report which was rejected by the Respondent without stating what the real facts are. According to this report, compiled by Sesana Projects CC, the total number of people residing at the property as at the time of the inspection was 8 men, 2 women and 1 child. There were no elderly and disabled persons

found on the property. In disputing this report the Respondents stated that the reason some of the people could not be found may be that some of the occupants work different shifts, some, day shifts and others nights shifts and that the Applicant's employees, Sesana Projects, probably came when these people were not at their shacks or houses and probably also do not enter the structures. These allegations by the Respondents do not help as they still failed to disclose to the court the correct numbers and circumstances of the occupants, which information should be available to them. Based on the evidence placed before court the details of the occupants as given by Sesana Projects should be accepted as correct and this report will be taken into account in determining whether the eviction should be granted.

The availability of suitable alternative accommodation or land

[44] As this matter deals with the eviction application by an organ of state it is necessary to quote Section 6 of PIE in full which provides as follows:

> *Eviction at instance of organ of state –*
>
> *(1) An organ of state may institute proceedings for the eviction of an unlawful occupier from land which falls within its area of jurisdiction, except where the unlawful occupier is a mortgagor and the land in question is sold in a sale of 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 the relevant circumstances, and if—*
>
> *(a) the consent of that organ of state is required for the erection of a building or structure on that land or for the occupation of the land, and the unlawful occupier is occupying a building or structure on that land without such consent having been obtained; or*
>
> *(b) it is in the public interest to grant such an order.*

(2) For the purposes of this section, "public interest" includes the interest of the health and safety of those occupying the land and the public in general.

(3) In deciding whether it is just and equitable to grant an order for eviction, the court must have regard to—

(a) the circumstances under which the unlawful occupier occupied the land and erected the building or structure;

(b) the period the unlawful occupier and his or her family have resided on the land in question; and

(c) the availability to the unlawful occupier of suitable alternative accommodation or land.

(4) An organ of state contemplated in subsection (1) may, before instituting such proceedings, give not less than 14 days' written notice to the owner or person in charge of the land to institute proceedings for the eviction of the unlawful occupier.

(5) If an organ of state gives the owner or person in charge of land notice in terms of subsection (4) to institute proceedings for eviction, and the owner or person in charge fails to do so within the period stipulated in the notice, the court may, at the request of the organ of state, order the owner or person in charge of the land to pay the costs of the proceedings contemplated in subsection (1).

[45] I have already dealt with the aspects of the circumstances under which the occupation of land took place as well as the period of occupation in the preceding paragraphs. I now turn to the aspect of the provision of suitable alternative accommodation. Similar to Section 4(7), Section 6(3) also provides that in addition to other factors such as the period of occupation etc, a court must consider the availability of suitable accommodation in the case of evictions by organs of state. In the *City of Johannesburg v Changing Tides, supra,* it was held that in the case where an organ of state is the applicant in an eviction application, it is ordinarily only just and equitable if

suitable alternative land or accommodation is made available. In *Port Elizabeth Municipality v Various Occupiers*, *supra,* the Constitutional Court stated the following in respect of the availability of suitable alternative accommodation or land:

> *[28] Section 6(3) states that the availability of a suitable alternative place to go to is to which regard must be had, not an inflexible requirement. <u>There is therefore no unqualified constitutional duty on local authorities to ensure that in no circumstances should a home be destroyed unless alternative accommodation or land is made available.</u> In general terms, however, a court should be reluctant to grant an eviction against relatively settled occupiers unless it is satisfied that a reasonable alternative is available, even if only as an interim measure pending ultimate access to housing in the formal housing programme.* (My emphasis).

Accordingly, although it is peremptory for the court to consider this factor, it is nevertheless, not determinative. Accordingly, although it is peremptory for the court to consider this factor, it is nevertheless, not determinative.

[46] Notwithstanding this, the Applicant in this case nonetheless referred to a report stating that there are two township establishment in the progress in the areas of Manala-Makarena and Ndzundza-Somphalali tribal authorities which can be made available for the relocation of the Respondents who may be in need of alternative accommodation. Alternatively, there are sites available in Tweefontein K and KwaMhlanga which may be available for those occupiers who are interested in purchasing the sites.

[47] However, the Respondents objected to the report compiled at the instance of the court in compliance with the public interest. They also rejected the personal circumstances of the occupiers and alleged that the report by the Applicant’s agents is self-defeating and self-contradictory without setting the record straight. The Respondents

instead simply contended that it will not be just and equitable to order their relocation in circumstances where they have a legitimate expectation to be consulted and a veto right to disallow the development of the properties. However, nowhere in their papers do the Respondents allege that they will be rendered homeless if evicted.

[48] As I have stated above, the First and Second Respondents have homes where they currently stay which are not part of the property in question. According to the report submitted by the Applicant most of the structures on the property were half built or incomplete and not occupied at the time of the visits. This is also clear from the photographs which were presented as part of the report. According to the report only a few structures had occupants. Based on the evidence it would appear that only a few people may be rendered homeless by the eviction even though no such claim was made by the Respondents. Despite having intimate knowledge, the Respondents failed to disclose the relevant details in their papers. I have nevertheless taken note of the undertaking made by the Applicant to accommodate the unlawful occupiers in need of accommodation elsewhere despite. This undertaking will be taken into account when making an order.

Infrastructure and services

[49] Lastly, it is evident from the papers that the Municipality is in the process of developing of the properties with the aim of providing human settlement to those who live, among other, in underserviced informal settlements and undeveloped areas. It is furthermore common cause, based on uncontroverted evidence, that properties at present are not yet having infrastructure like running water, proper sanitation and other services and therefore not yet suitable for human occupations. It would seem that the development of the properties will in the end be of benefit to the local communities in terms of the

infrastructure that will follow the development. It is, however, evident from the papers that the Respondents' occupation of the property blocked the development of the property.

Conclusion

[50] While one is cognizant of the fact that an owner no longer has an absolute right to evict the unlawful occupier, it is trite that a court has the discretion whether or not to grant the eviction if it is just and equitable to do so. In the light of the short period during which the occupiers have lived on the land in question; the manner in which occupation was effected; the fact that the Municipality need to evict the occupiers in order to put the land to some other productive use for the community and the attempts by the Municipality to negotiate with the people involved, I am satisfied that it is just and equitable to order the eviction of the Respondents from the properties in question. I am further satisfied that given the undertaking made by the Municipality, it should be ordered that the Municipality make provision for the temporary suitable alternative accommodation for the evicted people in need thereof.

Costs

[51] Concerning costs, it is trite that the granting thereof remain in the discretion of te court. *Naylor v Jansen* 2007 (1) SA 16 (SCA). The general rule regarding costs is that cost must follow the result. There seems to be no justification for the Applicant to be burdened with the costs of this application especially considering the steps taken by the Applicant to avoid the litigation. Furthermore, the Respondents acted in defiance of a court order. I do not find any reason in this matter for this rule to be deviated from and why the First, Second and Further Respondents or persons holding under them should not bear the costs of the litigation. I find therefore that the Applicant is entitled to the costs of this application on a party and party scale.

Order

[52] In the result I make the following order:

1. The First, Second Respondents and all the Further Respondents and persons holding under them are ordered to vacate the immovable property described below by no later than 30 April 2024:

    1.1. The Remainder of Portion 1 of the Farm Vlaklaagte J221 JR, Vlaklaagte Town, Mpumalanga Province, (hereafter “Portion 1”);

    1.2. The Remainder of Portion 3 of the Farm Vlaklaagte J221 JR, Vlaklaagte Township, Mpumalanga Province, (hereafter “Portion 3”);

    1.3. The Remainder of Portion 4 of the Farm Vlaklaagte J221 JR, Vlaklaagte Township, Mpumalanga Province, (hereafter “Portion 4”);

    1.4. The Remaining extent of Portion of Farm Vlaklaagte J221, Registration Division J.R., Mpumalanga Province, (hereafter “Portion 5”).

2. In the event of any of the Respondents or any person holding under them failing to vacate the property by 30 April 2024, then the Sheriff of this Court is directed and authorized to evict such Respondents or other persons from the property and to demolish and/or removal of structures where necessary and applicable;

3. The Sheriff is further authorized to employ the services of the South African Police Service to assist him/her, to remove the Respondents and those holding under them from the said property if it is necessary to do so;

4. The Applicant is ordered to provide suitable temporary alternative accommodation and/or land for those in need thereof, subject to the availability of such accommodation in the Manala-Makarena and Ndzundza-Somphalali area, alternatively, in Tweefontein K and Kwa-Mhlanga as per undertaking;

5. The Applicant is further ordered to file a full progress report regarding the matter to the court not later than two (2) months after the said eviction; and

6. The First, Second and Further Respondents and/or persons holding under them are ordered to pay the costs of the application on a party and party scale, jointly and severally, the one paying, the others to be absolved.

MBG LANGA
JUDGE OF THE HIGH COURT

Appearances:

For the Applicant:	Advocate A Thompson
For the Respondents:	Mr OB Morare
Date Heard:	29 August 2023
Date delivered:	09 January 2024

This judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be the 9 January 2024 at 13h30.