

SOUTH AFRICA / JUDGMENT

Barker and Another v Nangu and Another (EL2049/2023) [2024] ZAECELLC 37 (9 July 2024)

[2024] ZAECELLC 37

COURT

Eastern Cape High Court, East London Local Court

BEFORE

Bodlani

CASE / FILE NUMBER

EL2049/2023

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION, EAST LONDON CIRCUIT COURT)

Case

No: EL 2049 / 2023

In

the matter between:

DAVID

BARKER

First Applicant

NAVA

EMILIA

ANVARI

Second Applicant

and

VUYISWA

VERONICA NANGU

First Respondent

BUFFALO

CITY METROPOLITAN MUNICIPALITY

Second Respondent

JUDGMENT

BODLANI AJ

- [1] Very few issues are as contested and debated in the South African political landscape than land, land dispossession, land repossession and redress. That this is the case is no surprise. The legacy of land dispossession is traceable from the spatial inequality that was perpetuated during and, sadly, in post-apartheid South Africa. To understand why this position obtains, one merely has to understand South Africa's apartheid colonial and contemporary history.
- [2] Before me, it is sought an order authorising the eviction of a person from their home in vindication of the right to property. The irony is that in many a case, as in here, the vindication by one of their rights to property often entails the deprivation of another, of a place they had hitherto called their home. This too is partly rooted in South Africa's apartheid colonial spatial planning.
- [3] The applicants are the registered owners of erf 1[...], East London ("the property"). They purchased the property at a public auction on or about November 2022. Thereafter, it was registered in their names on 09 February 2023. It is common cause that the first respondent (Ms. Nangu), who is now 65 years old, occupies the residential house on the property together with her major children, Mr. Bonke Nangu and Ms. Sandisiwe Mhlanga. The latter has two minor children who also reside on the property.
- [4] An owner or person in charge of land who wishes to evict another person who resides on that land must comply with s 26(3) of the Constitution. That section requires that a court order first be obtained. It also provides that legislation may not permit arbitrary evictions. Essentially, s 26(3) of the Constitution carries a prohibition against unlawful evictions. This prohibition was given effect to through the enactment of the Prevention of Illegal Eviction of Unlawful Occupiers of Land Act, 1998 (Act No. 19 of 1998) ('the PIE Act').
- [5] The PIE Act enjoins the courts to order an eviction only "if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances" as contemplated in sections 4(6), (7), [1] and 6(1). [2] Thus, the PIE Act serves to regulate evictions from 'all land' in the Republic. It does so by prescribing its application only to 'unlawful occupiers' as defined and sets out both procedural and substantive safeguards to avoid arbitrary evictions. Finally, it provides that the court dealing with an eviction must be satisfied that the eviction is just and equitable.
- [6] In considering whether it is "just and equitable" to make an eviction order in terms of section 6 of the Pie Act, the

responsibilities that municipalities, unlike owners, bear in terms of section 26 of the Constitution are relevant.^[3] Indeed, municipalities have a major function to perform regarding the fulfilment of the rights of all to have access to adequate housing. Municipalities, therefore, have a duty systematically to improve access to housing for all within their area. They must do so on the understanding that often there are very complex socio-economic problems that lie at the heart of unlawful occupation of land in our country.

[7] It is not optional for municipalities to attend to their duties with insight and a sense of humanity. Their duties extend beyond the development of housing schemes, to treating those who are landless within their jurisdiction with utmost dignity and respect. For all this to be realized, there is a reciprocal duty upon who are landless to avail themselves the services that their municipalities offer. It is through the delivery of services that a municipality's expression of dignity and respect to its community would be experienced.

[8] In deciding whether to grant an eviction order, a court has an obligation to have regard to all relevant circumstances. Before it

can fully comply with such an obligation, it has to be apprised of such circumstances and it therefore needs all of the relevant

information.^[4] Both the Constitutional Court and the Supreme Court of Appeal are of the view that a municipality's obligations extend, at the very least, to providing a court with all of the information necessary to establish when an eviction would be just and equitable.^[5] To these I add, when municipalities undertake their obligations to put together information necessary to establish when an eviction

would be just and equitable, persons sought to be evicted have a corresponding obligation to enrich the process and thus, cooperate

with the municipality concerned.

[9] A report by a municipality must not only be comprehensive but must also be meaningful and specific, to assist the court to come to a just decision in a particular case. This would include information on the interests of the rights and needs of the elderly, children, disabled persons and households headed by women,^[6] if land may be made available, if there had been any mediation (especially in relation to state-owned land),^[7] and if alternative accommodation is in fact available.^[8] For a municipality's report to be case specific, it follows that persons sought to be evicted must fulfil their corresponding

obligation to enrich the process by placing their personal information before the municipality concerned.

[10] Notwithstanding service of the application upon it, Buffalo City Metropolitan Municipality ("the City") had initially

presented no report to this Court. This conduct falls to be discouraged. It is not for a municipality, in any application for an

eviction order, to choose to or not to render a report. Municipalities are under an obligation to do so. It is not in every application for eviction that a respondent would place their personal and family circumstances before a court. Factually, in many eviction cases, the respondent is an indigent person who does not afford the services of a lawyer and does not have the tools that would enable them to put the court in a position properly to decide what would be just and equitable in their case.

[11] In opposition to the application, the first respondent (Ms. Nangu) pleaded that it would neither be just nor equitable that she, and her children, be evicted from the property because they have nowhere else to go. It is common cause that the applicants purchased the property at a public auction. The sale to the applicants was sequel to Ms. Nangu's inability to service the credit agreement through which she had financed the purchase of the property. As a result of her inability to service the credit agreement between her and the financial institution that had financed her purchase of the property, the latter instituted foreclosure proceedings and repossessed the property.

[12] Notwithstanding, the brief history rehashed above, Ms. Nangu denies that she and her family are unlawful occupiers. She contends that to be referred to as such is heartless, insulting and inconsiderate given her and her family's attachment to the property. She also asserts that she is not prepared to vacate the property without a decent place in which to live. In its definition of an unlawful occupier, the PIE Act provides that:

“unlawful occupier” means a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land, excluding a person who is an occupier in terms of the Extension of Security of Tenure Act, 1997, and excluding a person whose informal right to land, but for the provisions of this Act, would be protected by the provisions of

the Interim Protection of Informal Land Rights Act, 1996 (Act No. 31 of 1996).’[9]

[13] Ms. Nangu's papers do not place her and her family within the exclusions contemplated in the definition of an unlawful occupier. Thus, by definition, Ms. Nangu's suggestion that she and her family are not unlawful occupiers of the property is mistaken. They are. Having determined that Ms. Nangu and her family are unlawful occupiers of the property, I now turn to consider whether Ms. Nangu and her family have a valid defence to the applicants' case.

[14] Justice and equity obliges unlawful occupiers seriously and meaningfully to, where there is a valid defence to the application

for eviction, place it before court. And, where there is no valid defence, that they seek a solution to their plight, explore all

reasonable possibilities of securing suitable alternative accommodation or land. This is more so after the institution of eviction proceedings, when it is known to them that the owner of the property in issue is taking active steps to vindicate their rights of ownership.

[15] Other than the mistaken assertion that they are not unlawful occupiers, Ms. Nangu's papers disclose no valid defence to the application. The PIE Act does not define what constitutes a "valid defence". In *Occupiers of Erven 87 and 88 Berea v De Wet N.O. and Another*,^[10] the Constitutional Court recognised that the notion of a "valid defence" concerns s 4(8) and not section 4(6) or 7 of the PIE Act. It said:

[64] It is apparent that the discussion of "valid defence" is in reference to section 4(8)^[11] and not section 4(6) or (7). Furthermore, read in context, the Supreme Court of Appeal does not exclude other possible defences and does not move away from the settled position that the court must come to a decision that is just and equitable to all parties to evict.

[16] It seems to me, therefore, that a valid defence would be nothing less of a right, in law, which entitles the holder to occupy the property. A frivolous, mala fide and untenable something which is not supported by the facts; falls short of recognition in law; and therefore, does not entitle the occupier to remain in occupation as against the owner of the property cannot amount to a valid defence. It is on this basis that I conclude that the version proffered by Ms. Nangu does not establish a valid defence to the application for eviction.

[17] Also, other than an approach to a relative for temporary accommodation, which was unsuccessful, there is no indication in her

papers that Ms. Nangu made any other attempts at getting an alternative place of residence. It bears mentioning that the assertion by Ms. Nangu that she and her family are not unlawful occupiers of the property and her pleaded attempt at securing alternative accommodation are difficult to reconcile. It seems to me that the attempt at securing alternative accommodation was made in recognition of the unlawfulness of the Nangu family's occupation of the property.

[18] I have already stated that the PIE Act requires the courts to hold the balance between illegal eviction and unlawful occupation and to ensure that justice and equity prevail in relation to all concerned. Thus, those seeking eviction should be encouraged not to expect the courts to treat those sought to be evicted as obnoxious social nuisances. Such a stereotypical approach has no place in the society envisaged by the Constitution. Similarly, those sought to be evicted should be encouraged to place before court all the information at their disposal, which would assist the court ensure that justice and equity prevails.

[19] The nature of the enquiry under section 4 of the PIE Act was examined in *City of Johannesburg v Changing Tides 74 (Pty) Ltd*.^[12] There, it was held that there are two separate enquires that must be undertaken by a court:

“First, it must decide whether it is just and equitable to grant an eviction order having regard to all relevant factors. Under section 4(7) those factors include the availability of alternative land or accommodation. The weight to be attached to that factor must be assessed in the light of the property owner's protected rights under section 25 of the Constitution, and on the footing that a limitation of those rights in favour of the occupiers will ordinarily be limited in duration. Once the court decides that there is no defence to the claim for eviction and that it would be just and equitable to grant an eviction order, it is obliged to grant that order.”[13]

[20] The second enquiry, which the court must undertake before granting an eviction order, is to consider—

“what justice and equity demand in relation to the date of implementation of that order and it must consider what conditions must be attached to that order. In that second enquiry it must consider the impact of an eviction order on the occupiers and whether they may be rendered homeless thereby or need emergency assistance to relocate elsewhere. The order that it grants as a result of these two discrete enquiries is a single order. Accordingly, it cannot be granted until both enquiries have been undertaken and the conclusion reached that the grant of an eviction order, effective from a specified date, is just and equitable. Nor can the enquiry be concluded until the court is satisfied that it is in possession of all the information necessary to make both findings based on justice and equity.”[14]

[21] Before undertaking the enquiries referred to above, which I undertake later in this judgment, and mindful that if granted, an eviction order might yield Ms. Nangu's family's homelessness, I issued a directive in the following terms:

“.....FOLLOWING UPON the hearing of this application on 13 June 2024, the following directive, which must urgently be adhered to issues:

I. The first respondent is directed, as undertaken by counsel during argument on 13 June 2024, to file her heads of argument on or before close of business on 14 June 2024. Together with her heads of argument, the first respondent is required to make available her bank statement for the past 6 (six) months up to 14 June 2024. This will assist the Court evaluate her financial position.

II. The applicant, on or before the close of business on 18 June 2024, is directed:

a). if so advised, to file a response to the first respondent's heads of argument on or before close of business on 18 June 2024; and

b). to, on affidavit, provide full details regarding payment for all municipal services on the property. The information must include what was owing at the time of the transfer of the property to the applicant, who paid it, who has been paying for municipal services

since the transfer of the property to date and how much has, in total been paid to date.

III. The second respondent is directed to file a report, in writing, on or before Friday, 21 June 2025[15] – dealing with the following issues:

- a). its ability and readiness to provide temporary emergency accommodation to the first respondent and her family should the court issue an eviction order against them;
- b). if the second respondent is in a position to and/or does provide temporary emergency accommodation following upon the grant of an eviction order, how the first respondent and her family can access such temporary emergency accommodation and by when;
- c). whether the first respondent qualifies for state subsidised accommodation in terms of the means test administered by the Department of Human Settlements;
- d). what assistance, in general terms, does it render to persons who have been evicted from what had hitherto been their homes, on account of foreclosure proceedings;
- e). whatever is the answer to the enquiry in d) what is the kind of assistance, if any, can it render to the first respondent should the court issue an eviction order and by when; and
- f). whether since the institution of the eviction application, the first respondent ever approached the second respondent and applied for assistance in connection with the application for her eviction and that of her family, and if so:
 - f.1 what was the nature of the first respondent's application; and
 - f.2 what was the outcome of that application.

IV. So as to facilitate giving effect to paragraph c) of this directive, the first respondent, through her attorneys, shall make herself available to second respondent's attorneys on or before Wednesday, 18 June 2024, for the second respondent's attorneys to have the first respondent meet with the relevant personnel in the second respondent's establishment for the execution of the purpose for which paragraph c) of this directive is designed.

V. Notwithstanding its delivery by the Registrar of this court, the applicants' attorney of record shall be responsible for the service of this directive upon the respondents' attorneys and filing in court."

[22] This directive attracted no response from Ms. Nangu. Similarly, the City did not heed it. The attorneys for Ms. Nangu filed an affidavit in terms of which they explained that they had brought the directive to her attention. Despite this, they had obtained no instructions on anyone of the questions raised in the directive. The applicants filed their response. The response showed that there is a substantial amount of money that is owing to the City for the services it has rendered on the property. It also showed that the applicants had singularly been responsible for whatever payments had previously been made to the City for services rendered by it on the property.

[23] Mindful that there is a tenant in the property, an issue I return to in paragraphs 30 and 31 below, so that if granted the reach of the eviction order would go beyond the Nangu family, I issued another directive in the following terms:

“...FOLLOWING UPON the hearing of the application on 13 June 2024, the court issued a directive (“the first directive”). This is a second directive, issued following upon receipt of an explanatory affidavit filed to explain the first respondent’s noncompliance with the first directive. Like the first, this directive must be urgently adhered to:

THE MANNER OF SERVICE OF THIS DIRECTICE

I. The applicant’s attorneys are directed to serve this directive to all the parties’ legal representatives and, with the use of the Sheriff upon the occupants of the property at [...] B[...] Street, Amalinda, East London, on erf 1[...], East London (“the property”). Similarly, the first respondent’s attorneys are directed to serve this directive upon the first respondent by whatever means

available at their disposal including by transiting it directly to her through the social media platform known as WhatsApp.

II. Should, at the time of service, the Sheriff find no one in the property willing to accept service or, no one at all, the Sheriff is authorised after satisfying himself that there is no one who is willing to accept service, to affix this directive in 3 (three) most prominent features of the property including but not limited to the main door, the main gate and/or the perimeter wall using an adhesive tape and if the method of service has been to affix, to take photos of this directive after affixing; and to thereafter render a return of service which explains fully how service was effected.

THE SUBSTANCE OF THE DIRECTIVE

I. The first respondent is given another opportunity and is required to make available her bank statement for the past 6 (six) months up to 18 June 2024. This will assist the court evaluate her financial position. This must be done and adhered to on or before 2 July 2024.

II. Mr. Bonke Nangu, Ms. Sandisiwe Mhlanga and any other occupant of the property whether they derive, or not, their occupation of the property from the first respondent are required, if they so wish, to advise the court, on affidavit which may be sworn to before a police officer in a police station, of their personal circumstances should an eviction order issue. This must be done and adhered to on or before 2 July 2024.

III. The second respondent is directed to place before this court a full report on what urgent services and assistance it provides to people who find themselves homeless by reason of having been evicted from land and/or properties by means of a court order. As part of this report, it must be included the name(s) and contact detail(s) of a person or persons who responsibility it is in the second respondent’s establishment to attend to matters such as dealt with in this paragraph. This must be done and adhered to on or before 2 July 2024.

IV. The parties and/or persons referred to in II above are required, if they so wish, to attend to the second respondent's attorneys on 28 June 2024. The second respondent's attorneys are directed to facilitate contact between the parties and/or persons referred to in II above with the officials of the second respondent whose responsibility it is to attend to matters such as dealt with in items III and IV of this directive.

V. The second respondent's attorneys are directed to report to this court, on affidavit, on or before 16h00 on 2 July 2024:

- a). whether there has been compliance with the matter dealt with in items III and IV of this directive; and
- b). the reasons for the failure to comply with the first directive, and why no one is liable to be held in contempt of court for that failure."

[24] For I did not know who else lives in the property, other than the Nangu Family and the tenant, and what their standard of education is, I also issued the second directive in IsiXhosa, and in the following terms:

"...EMVENI KOKUBA kuxoxwe ityala ngomhla we 13 Juni 2024, iNkundla yakhupha umyalelo ("umyalelo wokuqala"). Lo ngumyalelo wesibini okhutshwa emveni kokuba amaGqwewetha oMmangalelwa wokuqala efake ubungqina obufungelweyo buxela ukuba kutheni na uMmangalelwa wequlala engakhange awuthobele umyalelo wokuqala. Njengomyalelo wokuqala, lomyalelo mawuthotyelwe ngokukhawuleza:

INDLELA YOKUTHUMELA LO MYALELO

I. Amagqwetha abaNkandla mawawugqithise lomyalelo kuwo onke amagqwetha abandakanyekayo kulembambano iphambi kweNkundla. Ayakuphinda

kananjalo awuthumele lomyalelo ngeSithunywa seNkundla esiyakuthi sona siwuse phaya enamba [...] B[...] iSitrato, Amalinda, East London, kwiSitandi esingu namba 1[...], East London ("eMzini"). Amagqwetha oMmangalelwa wokuqala ayalelwa ububa awuthumele lomyalelo kuMmangalelwa wokuqala ngandlela zonke anokwenza ngazo de asebenzise nelikhasi libizwa ngokuba nguWhatsApp, nanjengoko ebizile xa ebethumela uMyalelo wokuqala.

II. Ukuba iSithunywa seNkundla asifumani bani owamkelayo lomyalelo ngexesha lokuwuthumela phaya eMzini, siyagunyaziswa ukuba sisakube

siqinisekisile ukuba akukho bani uwamkelayo umyalelo lo okanye unokuwamkela, siwuncamathisele kwezona ndawo zibonakala zisekuhlani

eziyi 3 (ezintathu) khona phaya eMzini. ISithunywa seNkundla siyagunyaziswa ukuba lomyalelo singawuncamathelisa esangweni, kulomnyango kungenwa ngawo ungaphambili endlwini, ukanti ke nakubiyo olu lubonisa umda weSitandi. Ukuba iSithunywa seNkundla siwuncamathelisile loMyalelo, siyakuwufota ze iFoto leyo incamatheliswe kwinkcaza ezeleyo echaza ukuba uthunyelwe njani na. Siyakuthi ke sisakuba siwuthumele lomyalelo iSithunywa seNkundla, senze inkcaza ezeleyo sichaza ukuba siwuthumele njani na umyalelo lo.

NGOWANTONI UMYALELO

I. UMmangalelwa wokuqala unikwa elinye ithuba lokuba abeke phambi kweNkundla uxwebhu lwengcaciso esuka kuvimba wakhe wokugcina imali,

iBhanki, onika ingxelo ngubume bemali yakhe kwiiNyanga eziyi 6 (ezintandathu) ezandulela umhla ka 18 Juni 2024. Oluxwebhu lwengcaciso luzakunceda iNkundla ijonge ubume bakhe ngokwasezimalini. Oku makwenziwe phami komhla ka 2 Julayi 2024.

II. UMhlekezi Bonke Nangu, NeNkosazana Sandisiwe Mhlanga naye namphi na omnye umntu ohlala phaya eMzini nokuba uhlala okanye akahlali ngokwemvume ayifumene kuMMangalelwa wokuqala, banikwa

ixesha, ukuba bayalifuna, lokubeka phambi kweNkundla inkcukacha ngobume babo, noko kunokwenzeka kubo xa iNkundla inokukhupha umyalelo

wokuba mabakhutshwe phaya eMzini. Ingxelo le, xa befuna, banokuyibeka phambi kweNkundla ngokuyifungela. Bangaya nakwisikhululo samaPolisa esikufuthsane kubo ukuze bancedakale ngokufungiswa. Oku makwenziwe phami komhla ka 2 Julayi 2024.

III. Ummangalelwa wesibini, uyayalelwa kwakhona, ukuba abeke ingxelo ezeleyo phambi kweNkundla malunga noko anokukwenza, uncedo

olungxamisekileyo olufanele nalunika umntu ophulukene nendawo yokuhlala ngenxa yesindululo seNkundla, inkcukacha ngoncedo olo,

igama lomntu ekuthethwa naye xa kufunwa uncedo olo, kunye nenkcukacha yokunxibelelana nomntu lowo. Oku makwenziwe phami komhla ka 2 Julayi 2024.

IV. Abo kubhekiselwe kubo apha kumhlathi we II ngasentla, bayalelwa ukuba badibane namagqwetha kaMmangalelwa wesibini ngomhla we 28 Juni 2024 ukwenzela ukuba abadibanise nabo basebenzela uMmangalelwa wesibini ekungumsebenzi wabo ukujongana nemeko yabantu abafanelwe luncedo malunga noku kuthethwa ngako kumhlathi we III no IV waloMyalelo.

V. Amagqwetha oMmangalelwa wesibini ayalelwa ukuba afake ingcaciso efungelweyo kuleNkundlwa ngo 16h00 ngomhla we 2 Julayi 2024 exela:

a). ukuba kwenzeke ntoni na ukuthobela umyalelo waleNkundla malunga nokukuthethwa kumanqaku III no IV walomyalelo; and

b). izizathu zokungathotyelwa komyalelo wokuqala nokuba kutheni na kungekho bani ufanelwe kukufumaniswa enetyala lokungathobeli Nkundla ngokungathobeli umyalelo wokuqala.”

[25] Shortly after the issue of the second directive, service thereof was effected by the sheriff upon one, Sandisiwe. Not only that, counsel for Ms. Nangu, Mr. Madukuda, took the unusual step of deposing to an explanatory affidavit in terms of which he explained the steps he took to bring the isiXhosa and English versions of the second directive to the attention of Ms. Nangu. Attached to his explanatory affidavit were screenshots of text and WhatsApp messages that he sent to Ms. Nangu. He also testified that he had sent voice notes to Ms. Nangu explaining the importance of compliance therewith. Lastly, he identified two close relatives of Ms. Nangu’s that he spoke to with the view to have them convey to Ms. Nangu the importance of adhering to the directives. However, none of these attempts propelled Ms. Nangu, her children and anyone else who resides in the property whatever it is that their occupation derives from (“the occupants”) into action. Most importantly, Mr. Madukuda indicated his firm belief and view that Ms. Nangu was aware of the second directive.

[26] In response to the second directive, the City filed a report stating what services it offers to persons who have been evicted from their former homes. The report also explained the process to be followed when applying for emergency housing or other form of assistance where it is required. It made it clear that there has to be an application made by the person in need of assistance. Once made, the application would be processed like any other. Coupled with the report, explanatory affidavits were filed regarding the failure by the City to heed the terms of the first directive. I accept the explanation. It was also explained that Ms. Nangu had not, despite being directed to do so if she and her family required assistance, approached the City’s attorneys for them to assist her meet the officials of the City whose duty it is to assist persons who have been evicted from their former homes.

[27] There is meaning to be attached to the failure by the occupants to avail themselves to the attorneys of City so that a meeting between them and the officials of the City concerned in assisting the homeless and in need of emergency accommodation. It is a failure by them to assist the City put together a case specific report that would have taken into account their personal and special

circumstances, if any. It is also a failure by them, unfortunately, to place before this Court more information which would have further enriched the process of this Court in its determination of what justice and equity requires in these circumstances.

[28] This is not to say that this Court is not in possession of information for use in its determination of what justice and equity requires in these circumstances. The failures referred to above form part of the information that is before this Court, which it is duty bound to consider. The failures also mean that the City was deprived of its opportunity to determine, regard being had to the Nangu household income – and the income of any other family that resides in the property albeit independently of the Nugu Family – entitlement to

emergency temporary or other form of housing and relief.

[29] Turning now to the first enquiry to be made in accordance with the decision in *Changing Tides*, I recognise that Ms. Nangu and her family became unlawful occupiers of the property on 09 February 2023 when she lost ownership thereof in a sale in execution. The application for their eviction was instituted on 30 June 2023, before the lapse of 6 (six) months since the applicants' ownership of the property. I have also considered that since taking ownership of the property, the applicants did not derive any benefit from their right of ownership. Ms. Nangu and her family have not been paying rent nor have they been paying for the municipal services that the City renders on the property.

[30] It is common cause that as part of facilitating the transfer of the property to them, the applicants paid a sum of R90 000.00

(ninety thousand rand) to the City for services it had rendered on the property during the currency of Ms. Nangu's ownership. A return of service for the service of the bundle of the application papers upon Ms. Nangu shows that service was effected upon a tenant. The bundle of the application papers was served upon Ms. Nangu to obviate an application for the postponement of the hearing after her attorney's abortive attempt at withdrawing as her attorney of record from the matter. The tenant cannot be the applicants' tenant. The applicants have had neither possession nor access to the property since taking ownership thereof. At best, it would be Ms. Nangu's tenant.

[31] Whilst I do not decide the issue whether the tenant in question is Ms. Nangu's, I mention in passing that it would be

unconscionable for her to have a tenant(s) in someone's property, whilst resisting, without a valid defence, an application

for her eviction therefrom. Having found that Ms. Nangu's papers do not establish a valid defence to the application for

eviction and having considered the aspects of the first leg of the enquiry, I find that it would be just and equitable to grant an eviction order in these circumstances.[16]

[32] That the occupants decided not to avail themselves the opportunity to meet the City's lawyers so that a meeting between them and officials of the City concerned in assisting the homeless and in need of emergency accommodation could be arranged is not the end. It is, in fact, the beginning. It is available to the court, if need be, to draw inferences from that conduct. In any event, the trigger to being assisted by the officials of the City is not one's introduction to them by lawyers. The trigger is the need for emergency or, alternative accommodation, and or one or the other form of service.

[33] Accordingly, with or without the assistance of the City's lawyers, nothing prevents the occupants from approaching the City for any form of assistance in the future, if they so decide. In accordance with the process indicated in the City's report, filed in response to the

second directive, I am satisfied that the kind of assistance they might require awaits them. If not, there are remedies in law. I need therefore to consider what justice and equity demands in relation to the date of implementation of the eviction order. I need also, to consider what conditions, if any, must be attached thereto.

[34] I now turn to the second leg of the inquiry envisaged in *Changing Tides*. During argument, Mr. Madukuda, was at pains repeatedly to point out that an eviction order in this case would lead to homelessness. This Court should be concerned with the issue regarding the availability of alternative accommodation, argued Mr. Madukuda. In contrast, Mr. Kotze urged me to deal with the application on the basis that its premises on s 4(6) of the PIE Act. Thus, I should not be concerned with the issues regarding the availability of alternative accommodation, he submitted. I disagree. Where, as in here, there is a risk that homelessness may result, the availability of alternative accommodation becomes a relevant circumstance that must be taken into account. This is regardless of whether the application is in terms of s 4(6) or (7) of the PIE Act.[17]

[35] What triggers the need for a court to consider the availability of alternative accommodation in its enquiry is the risk that

homelessness may result from the grant of the eviction order. A court will not be able to determine the justice and equity requirements of an eviction order without hearing from the local authority upon which a duty to provide temporary emergency accommodation may rest. This, primarily, is what informed the issue of the post hearing directives as part of this Court's role in active judicial management of an eviction application. In *Various Occupiers*,^[18] the Constitutional Court emphasised the new approach that courts must adopt in eviction matters. It said:

"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."

[36] Unfortunately, the intransigence of the occupiers, thwarted any product that may have arisen out of this Court's attempt at active judicial management. Be that as it may, to the extent that there was a dispute between the parties about the need for a report from the City and/or its role, I find that the City was not only a necessary party to the proceedings, it was duty bound to place, as it did, a report before this Court for its assessment of what is just and equitable, what services it renders to persons in need emergency and/or alternative accommodation. In determining the date on which the eviction order should be

implemented, I have considered the material in paragraphs [3], [8], [11] to [28], and [30] to [33], and

- [36] of this judgment, balanced against the interests of the applicants who have no responsibility to provide accommodation for the occupants.
- [37] I have also considered that since taking ownership of the property, the applicants did not derive any benefit from their right of ownership. If anything, they have had to incur expenses that are due to the City for the services it has rendered on the property since February 2023. Accordingly, I find that the eviction order should be carried out after a period of 15 (fifteen) days from the date of this judgment, should the occupants not vacate the property on their own, would be just and equitable. Accordingly, the following order shall issue:
1. It is declared that the first respondent, Ms. Vuyiswa Veronica Nangu, her family and all persons who, through her and/or who through whatever other means, occupy the property known as erf 1[...], East London, situated at No. [...] B[...] Street, Amalinda, East London are unlawful occupiers of that property (“the unlawful occupiers”).
 2. It is declared that it is just and equitable that the unlawful occupiers be evicted from erf 1[...], East London, situated at No. [...] B[...] Street, Amalinda, East London and that such eviction be carried out on a date after 30 July 2024.
 3. In the event of the unlawful occupiers failing to vacate the property and remaining in occupation thereof after 30 July 2024, the sheriff of this court, duly assisted by the Members of the South African Police Service if need be, is authorised to carry the terms of paragraph 2 of this order.
 4. The first respondent shall pay the costs of this application on a party and party scale, such costs to be on scale B referred to in Uniform Rule 67A.

A M BODLANI

ACTING JUDGE OF THE HIGH COURT,

EASTERN CAPE DIVISION.

For the Applicant : MESSRS BAX KAPLAN RUSSELL INC Intrusted by : MESSRS BAX KAPLAN RUSSELL INC Attorneys for the Applicants No. 34 Pearce Street Berea EAST LONDON Tel:

(043) 706 8400 Email: bradley@bkr-inc.co.za Ref: B PRINSLOO/MAT63382 For the 1st Respondent : Mr. MADUKUDA Intrusted by : MESSRS S. MJALISWA ATTORNEYS Attorneys for the First Respondent Office 40, 4th Floor Old CAN Building Union Street EAST LONDON Tel: 073 453 6623 Email: s.mjaliswainc2@gmail.com Ref: VVN01/07/2023 For the 2nd Respondent : No Appearance during argument Heard on : 13 June 2024 Delivered on : 09 July 2024

[1] These sub-sections provide that: “(6) If an unlawful occupier has occupied the land in question for less 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 the rights and needs of the elderly, children, disabled persons and households headed by women. (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.”

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(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.”

[2] This sub-section provides: “(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.”

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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.”

[3] Port Elizabeth Municipality v Various Occupiers

[2004] ZACC 7; 2005

(1) SA 217 CC at para 56 (Various Occupiers).

[4] ABSA Bank v Murray 2004 2 SA 15 (C) para 41 (ABSA Bank); Blue Moonlight Properties para 52; Various Occupiers, para 32; Sailing Queen Investments v The Occupants of LA Collee n Court 2008 6 BCLR 666 (W) (Sailing Queen Investments); Ritama Investments v The Unlawful Occupiers of Erf 62, Wynberg 2007 JOL 18960 (T) para 13 (Ritama Investments).

[5] Sailing Queen Investments para 11 referring to Various Occupiers and Modder East Squatters v Modderklip Boerdery (Pty) Ltd; President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd 2004 8 BCLR 821 (SCA) (Modderklip Boerdery); Occupiers Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Mark Lewis Steele 2010 9 BCLR 911 (SCA) para 10 (Occupiers Shulana); Wilson 2009 SALJ 285-286. However, according to Drakenstein Municipality v Hendricks 2010

(3) SA 248 (WCC) para 29 there does not seem to be a general duty on municipalities to report in all cases.

[6] Occupiers Shulana, above, n 5, para 11.

[7] Various Occupiers, above, n 3, paras 39 – 45.

[8] Ritama Investments, above, n 4, para 13; Sailing Queen Investments, above, n 5, para 6; ABSA Bank, above, n 4, paras 41 – 42.

[9] Section 1 of the PIE Act.

[10] (CCT108/16) [2017] ZACC 18; 2017 (8) BCLR 1015 (CC); 2017 (5) SA 346 (CC) (8 June 2017) (Occupiers of Erven 87 and 88).

[11] The sub-section reads as follows: “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).”

[11] The sub-section reads as follows:

“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).”

[12] [2012] ZASCA 116; 2012 (6) SA 294 (SCA); 2012 (11) BCLR 1206 (SCA) (Changing Tides) at paras 11 – 25.

[13] Changing Tides, above n 12, para 25.

[14] Changing Tides, above n 12, para 25.

[15] So soon as I noticed reference to 2025 in paragraph III of the directive, I brought it to the attention of the parties’ legal representatives that reference was, in fact, to 2024.

[16] Changing Tides, above, n 12, para 25.

[17] See Occupiers of Erf 101, 102, 104 and 112 Shorts Retreat, Pietermaritzburg v Daisy Dear Investments (Pty) Ltd

[2009] ZASCA 80; 2010 (4) BCLR 354 (SCA) (Shorts Retreat) at paras 11-4; Shulana Court above n 5 at paras 13-6; and Changing Tides, above n 12, at para 38.

[18] Various Occupiers, above n 3, para 36.

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