

SOUTH AFRICA / JUDGMENT

Dwele v Phalatse and Others (11112/15) [2017] ZAGPJHC 146 (7 June 2017)

[2017] ZAGPJHC 146**COURT**

South Gauteng High Court, Johannesburg

BEFORE

RS Willis

CASE / FILE NUMBER

11112/15

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****(GAUTENG****LOCAL DIVISION, JOHANNESBURG)****CASE****NO.: 11112/15****Not****reportable****Not****of interest to other judges****Revised.****In**

the matter between:

DWELE,
NICOLAS
SIYANDA Applicant
and
PHALATSE,
SUZAN First
Respondent
THE
UNLAWFUL OCCUPANTS OF ERF 4840
KAGISO
TOWNSHIP Second
Respondent
MOGALE
CITY LOCAL MUNICIPALITY
Third
Respondent

JUDGMENT

WILLIS AJ

1. In this matter, an application in terms of Prevention Of Illegal Eviction From And Unlawful Occupation of Land Act, Act 19 of 1998

(“the PIE Act”), the applicant applies for the eviction of the first respondent and all unknown persons occupying with and through her (cited collectively as “the second respondent”), from Erf 4840 Kagiso Township (“the property”), together with ancillary relief. The Mogale City Municipality was joined as third respondent.[1]

2. The applicant was represented before me by his attorney of record Mr Korsten. I was concerned that there was no appearance for first and second respondents given that they had filed opposing papers.[2] Mr Korsten satisfied me that he had adequately informed the Legal Aid representative acting for the respondents and delivered the set down and related documents giving full and timeous notice of the hearing of this application.
3. Four enquiries arise in this matter. The first is whether the applicant proves ownership as alleged. In casu this enquiry also determines whether the first and second respondents are unlawful occupiers and the applicability of the PIE Act. If the applicant is found to be the owner and the first and second respondents are unlawful occupiers, then the second enquiry is whether the procedural requirements of the PIE Act have been complied with. The Third enquiry is whether it is just and equitable as prescribed in the PIE Act to order an eviction. The fourth enquiry is the determination of an equitable date for eviction. Ultimately the onus in all four enquiries falls on the applicant.
4. In his founding affidavit the applicant alleges that on 25 March 2014 he purchased the property in terms of a written agreement from the previous owner, Dibapadi Properties 7 CC (“Dibapadi Properties”) for R260 000.00 which he secured by way of a mortgage loan from ABSA Bank who caused a mortgage bond to be registered over the property simultaneously with the transfer of the property into his name. It is relevant at this juncture to inform that in his replying affidavit the applicant explains that he incorrectly stated in his founding affidavit that he had purchased the property from Dibapadi Properties when in fact he had purchased the property from Ezulu Property Investors (Pty) Ltd (“Ezulu Property”). He explains that Dibapadi Properties was the authorised agent for the registered owner Ezulu Property and that he incorrectly referred to the seller as Dibapadi Properties. In her answering affidavit the first respondent says she is the only title holder and has no knowledge of any change in title to the property as set out in the Windeed report relied on by the applicant. Ezulu Property indeed appears in the Windeed report as the title holder prior to the applicant. Given her denial of knowledge, I doubt the respondent’s case and opposing papers would have materially differed had the applicant correctly described the seller. I cannot conceive of any material prejudice to the respondents if I accept this explanation and read the founding affidavit to correctly state the identity of the seller.

5. The applicant alleges that on or about 26 February 2015 the property was registered into his name in the Johannesburg Deeds Office under Deed of Transfer No.: T1794/2015. He explains that he is not in possession of the original Deed of transfer because the property serves as security for the mortgage loan from ABSA Bank until he has repaid it in full. As proof of his ownership the applicant put up a conveyancer's certificate and the Windeed report aforementioned, apparently downloaded from the Deeds Office website by his attorney of record Mr Korsten, together with a confirmatory affidavit by Mr Korsten. Before dealing with the applicant's case further, I turn to deal with the respondent's opposition.
6. The case in opposition is a denial that the applicant is the registered owner and a plea that the first respondent is the registered owner. The first respondent describes the property as a "reconstruction and development project (RDP) house". The first respondent alleges that she has been in occupation and residing on the property since 1971, a period in excess of 43 years. Although she disavows the applicability of the PIE Act, the first respondent (who says she is 75 years old) identifies the other occupants holding with and through her to be seven adults and four children (aged 17, 10, 6 and 4 years of age) seemingly pursuant to the provisions of section 4(7), (8) and (9) of the PIE Act, no doubt in the event of the respondents being found to be in unlawful occupation. It is apparent from the Windeed report that the first respondent was a prior title holder of the property and she specifically relies on the applicants' Windeed report to demonstrate her ownership. However the Windeed report indicates that the first respondent subsequently lost her title to the property to Mercantile Bank. The first respondent disputes that she sold the property to any party listed in the Windeed report and disavows ever applying for a loan from Mercantile Bank, or a bond being registered over the property in favour of Mercantile Bank. Although the first respondent herself relies on the Windeed report, albeit while disputing its veracity too, for reasons below its reliability remains in focus.
7. In reply the applicant put up two separate deeds of transfer, including his Deed of Transfer No.: T1794/2015, obtained from the Deeds Office (issued for judicial purposes) which are further proof of his ownership of the property; show that the first respondent did lose her title to Mercantile Bank; and together with reference to the Windeed report gives a timeline of who the registered owners of the property have been prior to his taking transfer. He also put up in reply a copy of a statement showing the rates and taxes charged to him by the Mogale City Municipality as well as a copy of a statement reflecting his monthly bond instalments to ABSA Bank.
8. The onus is on the applicant to establish the facts on which his case is based in his founding papers, which constitute and must contain both the pleadings and evidence. See *inter alia* *Titties Bar and Bottle Store (Pty) Ltd v. ABC Garage (Pty) Ltd* 1974(4) SA 362 T at 368 H to 269 B, *Director of Hospital Services*
- v. *Mistry* 1979 (1) SA 626 A. An applicant is required to do so at least in satisfaction of the general rule that the party who alleges must prove. An issue arising is whether the applicant's reliance in his founding affidavit on the Windeed report and a conveyancer's

certificate, passes muster in the face of the dispute raised in answer, and whether the evidence put up in reply ought to come to his assistance. His explanation for not putting up a copy of the “Title Deed”, because he is not in possession of the original, same being in the possession of ABSA Bank, is no excuse for not having obtained a copy from the Deeds Offices which he ultimately did do as evidenced in his replying affidavit. It is trite that the best evidence for proof of ownership of immovable property is the Title Deed. See *Goudini Chrome (Pty) Ltd v. MCC Contracts (Pty) Ltd* [1992] ZASCA 208; 1993 (1) SA 77 A at 82 where it is stated:

“The best evidence of ownership of immovable property is the Title Deed to it (R v. Nhlanhla 1960 (3) SA 568 (T) at 570 D – H; Gemeenskapsontwikkelingsraad v. Williams and Others (1) 1977 (2) SA 692 (W) at 696 H; Hoffmann and Zeffertt The South African Law of Evidence 4th Ed at 391 – 2). A Title Deed conforms to the precondition specified for a public document (cf Hoffmann and Zeffertt (op cit at 150); Schmidt Bewysreg 3rd Ed at 331). A public document is admissible in evidence, according to s 18 of the Civil Proceedings Evidence Act 25 of 1965,

if a copy thereof is produced which purports to be signed and certified as a true copy or an extract from the relevant register by the officer to whom custody of the original is entrusted.”

9. At the very least in vindicatory claims proof of ownership has to be adequate. See *Rusken N.O. v. Thiergen* 1962 (3) SA 737 A at 744 A – B. In my view the conveyancing certificate carries little weight in all the circumstances. When I raised my concerns with Mr Korsten about reliance on a Windeed Report as adequate proof of ownership he could only point me to the Windeed report and the Title Deed copy put up in reply. My concern with a Windeed report is that Windeed has a disclaimer regarding its information which is gathered from suppliers and to this extent it indemnifies itself. The information obtained is also hearsay in that the person responsible for extracting the information has not put up an affidavit. See *Sibango v. PPM Plumbing (Pty) Ltd* 2016 JBR 0799 (GP) at para 20. The affidavit by Mr Korsten that he printed up the Windeed report does not cure the aforementioned issues. If the Windeed report and conveyancers certificate are inadequate for want of not being the best evidence available to be advanced, and if the applicant’s proof of ownership put up in reply cannot come to his assistance then that may be the end of the matter.
10. In answering this question it is helpful to have regard to the principles laid down in *Business Partners Ltd v. World Focus* 754 CC 2015 (5) SA 525 (KZD) as to what is required of an applicant in motion proceedings:

“[8] It is trite that in application proceedings the affidavits constitute not only the pleadings but also the evidence. Equally trite is that an applicant must make out his case in his founding affidavit and that he must stand or fall by the allegations contained therein. It follows therefore that the applicant must set out sufficient facts in his founding affidavit which will entitle him to the relief sought.

- [9] The general rule is that the court will not permit an applicant to assert new facts in his replying affidavit which should have been set out in his founding affidavit. However, this rule, like all general rules, is not without exceptions. As was stated in *Shepherd v. Tuckers Land and Development Corporation (Pty) Ltd* (1) by Nestadt J.

‘This is not however an absolute rule. It is not a law of the Medes and Persians. The court has a discretion to allow new matter to remain in a replying affidavit This indulgence, however, will only be allowed in special or exceptional circumstances.’

- [10] A variety of factors can be taken into consideration by the court when exercising such a discretion. What is of overriding importance in the consideration of those factors is that the applicant should not be permitted to make a case in reply where no case at all was made out in the founding affidavit and ‘none is authority for the proposition that a totally defective application can be rectified in reply.’”

See further *Shepherd v. Tuckers Land and Development Corporation (Pty) Ltd* (1) 1978 (1) SA 173 (W) at 177 H – 178 A; *Poseidon Ships Agencies (Pty) Ltd v. African Coaling and Exporting Co (Durban) (Pty) Ltd* 1980 (1) SA 313 D at 315 H – 316 A.

11. Even if one is disinclined to take into consideration Deed of Transfer No.: T1794/2015, put up in the applicant’s replying affidavit, the applicant filed a replying affidavit as of right and was entitled therein to address the first respondent’s case and denials subject to not being entitled to rely on inadmissible material. The applicant was entitled in reply to deal with the first respondent’s allegation that she is the registered owner of the property as opposed to the applicant as well as the denial on the basis of no knowledge, that she ever lost title to Mercantile Bank. To this end and to show that the first respondent had in fact lost her title to Mercantile Bank (something which the applicant was not obliged to deal with in his founding papers), the applicant put up in reply the deed of transfer between the first respondent and Mercantile Bank (“the Mercantile Deed”), which declares how pursuant to litigation between Mercantile Bank and the first respondent and a resultant sale in execution, the first respondent lost her title to Mercantile Bank. The applicant was entitled to put the Mercantile Deed up in reply. As I have said the applicant also set out a timeline in reply. In doing so he referenced the Windeed report and the Mercantile Deed. During or about 1990 the title holder to the property was indeed the first respondent. On or about 23 June 1998 Mercantile Bank became the title holder to the property. The Mercantile Deed establishes that action was instituted by Mercantile Bank against the first respondent in the Johannesburg Magistrate’s Court resulting in the property being attached and ultimately sold in execution on 3 December 1997 to Mercantile Bank. To this extent the veracity of the Windeed report was supported. According to the Windeed report Mercantile Bank sold and transferred the property to Key Lettings

(Pty) Ltd who in turn sold and transferred the property to Ezulu Property.

12. By this stage the first respondents claim to ownership lost legal traction. The First Respondent has no other defence to the Applicant's case save to rely on a possible dispute of fact about the applicant's ownership.
13. In motion proceedings a final order may be granted if those facts averred in the applicant's affidavits, which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. In certain instances the denial by a respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact. It is bona fide disputes in motion proceedings which fall to be determined on the facts contained in the opposing papers which must be preferred in accordance with the rule in *Plascon-Evans Paints Ltd v. Van Riebeeck Paints (Pty) Ltd*

[1984] ZASCA 51; 1984 (3) SA 623 A at 634 E – 635 C.

14. I come to answering whether the Deed of Transfer evidencing transfer into the name of the applicant, attached to the replying instead of the founding affidavit, should stand as proof of the first applicant's ownership of the property in this application. The following factors move me to exercise my discretion in favour of the applicant. The applicant did not fail to assert his ownership of the property in his founding affidavit. He also did not fail to put up evidence of his ownership. He did not fail to make out a case. What he failed to do was to put up his best evidence. I doubt that the first respondent's case and denials would have looked materially different even if the applicant had, in his founding affidavit, put up a copy of the Deed of Transfer. The first respondent denies knowledge and I accept that, particularly in as much as the judgement and foreclosure orders granted against her may never have come to her attention. Such order and the consequences thereof however stand until set aside and her lack of knowledge does not avail her of a defence. So on the application papers as a whole, and sans the applicant's Deed of Transfer No.: T1794/2015, there is admissible and reliable evidence that the first respondent is not the owner. As I have dealt with above the applicant was entitled to deal in reply with the first respondent's denials and challenges which (leaving aside Deed of Transfer No.: T1794/2015), he did in a proper manner in relation to the first respondent's

allegations and denials. In my view of all the papers, even sans the applicants Deed of Transfer No.: T1794/2015, there never was a genuine or bona fide dispute alternatively any such bona fide dispute dissipated in the face of the reply. In my view the applicant was not asserting new facts in his replying affidavit by putting up Deed of Transfer No.: T1794/2015. Of course had he not put up Deed of Transfer No.: T1794/2015 in reply, his case may have failed for want of that best evidence. However I find that the circumstances justify the exercise of my discretion in the applicants favour to allow Deed of Transfer No.: T1794/2015 to remain and to be relied on in the replying affidavit.

15. On the conspectus of evidence I find that the applicant became the rightful titleholder of the property on 26 January 2015 when transfer was given to him from Ezulu Property Investors (Pty) Ltd.

16. There is no basis for me to find that the first respondent and those occupying the property with and/or through her, do so lawfully. In all the circumstances I find that the PIE Act is applicable.

The PIE Act

17. Section 4 of the PIE Act contains both procedural and substantive provisions. On 20 May 2015 this court authorised written and effective notice pursuant to the provisions of section 4(2) of the PIE Act, reserving the costs of same to be determined at the hearing of the application. I am satisfied that no issue turns on the procedural provisions in ss 4(2), (3), (4) and (5).

18. I turn to quote the substantive provisions in ss 4(6), (7), (8) and (9):

“(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 sold in a sale of execution pursuant to a mortgage, where the land has been made available or can reasonably be made available by a municipality or other Organ of State or another landowner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women.
- (8) If the court is satisfied that all the requirements of this section had been complied with and that no valid defence has been raised by the unlawful occupier, it must grant an order for the eviction of the unlawful occupier, and determine-
- (a) a just and equitable date on which the unlawful occupier must vacate the land under the circumstances; and
- (b) the date on which an eviction order may be carried out if the unlawful occupier has not vacated the land on the date contemplated in paragraph (a).
- (9) In determining a just and equitable date contemplated in sub-section (8), the court must have regard to all relevant factors, including the period the unlawful occupier and his or his family have resided on the land question.”

19. In determining whether or not to grant an eviction order, I must exercise a discretion based on what is just and equitable. The discretion is one in the wide and not the narrow sense. See *Ndlovu v. Ngcobo*; *Bekker and Another v. Jika* 2004 (1) SA 114 (SCA) para 18; *Media Workers Association of South Africa and Others v. Press Corporation South Africa Ltd* ('Perscor')
- [1992] ZASCA 149; 1992 (4) SA 791 A 800; *Knox D'Arcy Ltd and Others v. Gamieson and Others* [1996] ZASCA 58; 1996 (4) SA 348 (A) 360 G – 362 G.
20. Essentially there are two inquiries mandated by these sections. In terms of section 4(7) of the PIE Act, an eviction order may only be granted if it is just and equitable to do so, determined after the court has had regard to all the relevant circumstances, including the availability of land for the relocation of the occupiers and the rights and needs of the elderly, children, disabled persons and households headed by women. If the requirements of s 4 are satisfied and no valid defence to an eviction order has been raised, a court 'must', in terms of s 4(8) grant an eviction order. When granting such an order the court must, in terms of s 4(8) (a) of the PIE Act, determine a just and equitable date on which the unlawful occupier or occupiers must vacate the premises (the next inquiry). The court is empowered in terms of s 4(12) to attach reasonable conditions to an eviction order. The date that it determines must be one that is just and equitable to all parties.[3]
21. The relevant facts and circumstances in the papers before me are the following. The first respondent is an unemployed elderly female of 75 years of age. She has resided in the property for approximately 43 years. There are two families residing on the property. The Nhleko family consist of Bernard Nhleko a 56 year old male employed as a panel beater, his wife Priscila a 53 year old unemployed female, their children: Nonhalahala a 23 year old unemployed female, and Nkosinati a 17 year old minor son. The Phalatse family consist of Lawrence Phalatse a 53 year old unemployed male, his wife Thembisile a 50 year old unemployed female, their children: Petunia a 29 year old unemployed female, Gomotsang a 10 year old minor son and Ramoetsa a 4 year old minor daughter. Then there is Marcus Marks a 30 year old unemployed male, and lastly there is a 6 year old minor male child Lwande Daba about whom I am told no more, but can only assume is looked after by one of the adults named above.

The first respondent specifically points out that none of the occupiers are disabled. From this I take that none have special

needs. Furthermore this is not a household headed by a woman. In her answering affidavit the applicant alleges that she is not in a position to afford any other accommodation, stating that she should not be required to do so as she is the lawful owner of the property. However she does not say she will be destitute if evicted. Unfortunately the first respondent tells me nothing more about the various persons aforementioned. Being unemployed does not necessarily equate to having no income or being destitute upon eviction. I am not told of any need for accommodation, emergency or otherwise, in the event of eviction. I am not told whether any of the parties does or

does not receive a social grant. It bears mention that in a confirmatory affidavit Bernard Nhleko confirms the first respondent's answering affidavit insofar as it relates to him "and all other parties currently residing at no. 4840 Kagiso Township as confirmed in Annexure "CA1"." Annexure "CA1" to his affidavit is a document with the signatures of the six other adults besides the Applicant and Bernard Nhleko being a 'resolution' that they have appointed Bernard Nhleko to sign all affidavits on their behalf and any other function as required by law. He too provides no information on the circumstances of the other occupiers.

22. I reasonably expect the first respondent to have the income of a social grant which currently stands in excess of R1 550.00, unless of course she is disqualified from a social grant by virtue of some other income. It is very likely that the first respondent charges the two families and Marcus Marks a monthly rental. This is common practice in communities where there is a shortage of housing and how she would make some income. Of course this income for the first respondent would fall away in the event of an eviction, but what this does cause me to consider is that the Phalatse family and Marcus Marks too, probably have some form of income enabling them to pay the first respondent. Even if my expectations aforementioned are wrong I am not given any relevant information. I at the very least expect the first respondent to have given some detail and made some allegations as to the assistance required by herself and the other occupiers in the event of their eviction.

23. Ultimately an applicant for an eviction order under s 4(7) of the PIE Act bears the onus of satisfying the court that it is just and equitable to make such an order. However an applicant is not required to go beyond what he/she/it knows or what is reasonably ascertainable. See *Changing Tides supra* paragraphs 28 – 34. Further as Harms JA in *Ndlovu (supra)* said:

"Relevant circumstances are nearly without fail facts within the exclusive knowledge of the occupier and it cannot be expected of an owner to negative and advance facts not known to him and not in issue between the parties."

Ultimately the information I question above, could not have been supplied by the applicant and I draw the inference that the respondents preferred not to divulge same. Even though one of the circumstances is unemployment, I have no reason to believe I am dealing with people who will be destitute upon eviction.

24. The constitutional court in *City of Johannesburg Metropolitan Municipality v. Blue Moonlight Properties (Pty) Ltd and Another* 2012 (2) SA 104 (CC) confirmed that private entities are not obliged to provide free housing for other members of the community indefinitely, but their rights of occupation may be restricted, and they can be expected to submit to some delay in exercising, or some suspension of, their right to possession of their property in order to accommodate the immediate needs of the occupiers.

25. In contrast the applicant too does not tell me much about himself save to understandably complain about his own hardship in the circumstances of having to pay for the respondent to live in his property. In fact in his own citation he refers to himself as an "adult female", however annexed marked "ND5" to the applicant's replying affidavit is a copy of an

unabridged birth certificate for his four year old minor child Elihle. This certificate confirms that the applicant is in fact a male and the minor child's father. He alleges that his minor child is his responsibility and resides with him. Although he does not tell me about his employment I accept that he is employed by virtue of the credit granted to him by ABSA Bank and his ability to pay ABSA Bank the amount of R1 721.49 per month and pay rates and taxes in the amount of R1 764.96 to Mogale City Municipality each month.

26. There is no defence to the applicant's claim of ownership and eviction. I have considered the interests of the applicant and the respondents. Having carefully weighed the factors and circumstances relevant to this application and finding no compellable reason not to evict I find it just and equitable to grant an eviction order.
27. The final enquiry is into what justice and equity demand in relation to the date of implementation of an eviction order and what if any conditions must be attached to an order. The impact of an eviction order on occupiers is almost always severe and there is a possibility that the occupiers in casu may be rendered homeless, even if only for a very short while, if not given adequate time to organise their relocation. There is not only one family affected but at least three if not four in effect. It can take time for the reality to set in before an evictee begins facing that reality and starts making arrangements for the inevitable. The applicant's hardship in the interim does not compare to what the respondents face in the near future. While losing one's home after nearly 43 years cannot be made easy but more time to accept this fate and make the necessary arrangements can go some way to easing the pain and promoting timeous relocation. In all the circumstances I believe I cannot give the respondents less than three months. I expect that this judgement and the order to follow will only be served in the next two to three weeks and therefore believe the date should be set at the end of September 2017.
28. The applicant also seeks to interdict the "first and/or second respondents" from entering the property after vacating or being evicted. No argument was advanced in this regard, and correctly so, as no case is made out for such relief.
29. Regarding costs, they follow the result including the costs of the s 4(2) application. No other reserved costs were brought to my attention and none appear on the court file before me.
30. In the result I make the following order:
 - 30.1. The first respondent and any and all persons (collectively the second respondents named above) occupying with and through the first respondent are hereby evicted from the immovable property situated at Erf 4840 Kagiso Township, registration division I.Q. Gauteng Province hereinafter referred to as "the property".
 - 30.2. The first and second respondents are ordered to vacate the property on or before Saturday 30 September 2017 and not to return thereafter.

30.3. It is further ordered that in the event that the first and/or second respondents do not vacate the property on or before 30 September 2017, the sheriff alternatively his duly appointed deputy together with such assistance as he deems appropriate is authorised and directed to evict the first and second respondents from the property.

30.4. The first and second respondents are ordered to pay the costs of this application including the costs of the application in terms of s 4(2) of the PIE Act.

RS WILLIS AJ

Date of Hearing: 19th April 2017

Judgment

Delivered: 7th June 2017

APPEARANCES

On Behalf of the Applicant: Mr J H Korsten

Instructed By: K & B Attorneys

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Randhart

011 024 1036

On Behalf of the Respondent: Non Appearance

Instructed By: Fick Attorneys

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011 692 2087

[1] The application was served in March 2015 and in April 2015 attorneys acting for the first and second respondents filed notice of opposition. The application was finally heard on 19 April 2017.

[2] In the applicant's practice note and in court, Mr Korsten explained that on 22 March 2016 the application had been postponed

by agreement between the parties to 2 May 2016 in order for the respondents to file heads of argument. The matter was not

timeously enrolled and did not proceed on 2 May 2016. On 17 October 2017 when the matter was again set down the respondents

requested, and were granted by agreement, a postponement on account of their attorney withdrawing and their need to approach Legal Aid to assist them. With reference to documents and emails contained in additional court bundles Mr Korsten explained his interaction with Legal Aid (Krugersdorp) who dealt with him on behalf of the respondents.

- [3] City of Johannesburg v. Changing Tides 74 (Pty) Ltd and Others 2012 (6) SA 294 (SCA) para 11. At para 25 Wallis JA summarised the requisite approach as follows: “A court hearing an application for eviction at the instance of a private person or body, owing no obligations to provide housing or achieve a gradual realisation of the right of access to housing in terms of s 26(1) of the Constitution, is faced with two separate inquiries. First

it must decide whether it is just and equitable to grant an eviction order having regard to all relevant factors. Under s 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 s 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 the order. Before doing so, however, it must 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 inquiry 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 he grants as a result of these two discreet inquiries is a single order. Accordingly it cannot be granted until both inquiries 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 inquiry be concluded until the court is satisfied that it is in a position of all the information necessary to make both findings based on justice and equity.”

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