

SOUTH AFRICA / JUDGMENT

Nelson and Another v B.S and Others (2350/2020) [2021] ZAWCHC 207 (19 October 2021) [2021] ZAWCHC 207

COURT

Western Cape High Court, Cape Town

BEFORE

P.A.L. Gamble

CASE / FILE NUMBER

2350/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

WESTERN

CAPE DIVISION, CAPE TOWN

CASE NO: 2350/2020

In the matter between: NAZEEM
NELSON
First Applicant
NADIA
NELSON
Second Applicant
and
B[....]
S[....]
First Respondent
S[....]
S[....]
Second Respondent
Z[....]
S[....]

Third Respondent

N[....]

S[....]

Fourth Respondent

(In her personal capacity
and as guardian of
any minor children holding
title under her)

N[....]

S[....]

Fifth Respondent

R[....]

B[....]

Sixth Respondent

R[....]

S[....]

Seventh Respondent

Y[....]

H[....]

Eighth Respondent

ALL OTHER OCCUPANTS

OCCUPYING NO. [...],

CAPE TOWN,

UNDER THE FIRST TO

EIGHTH RESPONDENTS

Ninth Respondent

CITY OF CAPE

TOWN

Tenth Respondent

Bench: P.A.L. Gamble

Heard: 26 August 2021

Delivered: 19 October 2021

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parties' representatives via email and release to SAFLII. The
date

and time for hand-down is deemed to be 15h00 on Tuesday 19 October
2021.

JUDGMENT

- DATE OF EVICTION

GAMBLE, J:

INTRODUCTION

1.

On 29 March 2021 this Court made an order that the first to ninth respondents (hereinafter collectively referred to as “the respondents”) were in unlawful occupation of the applicants’ dwelling house situated at [...], Cape Town (“the premises”) and that they were thus liable to be evicted therefrom. The matter was postponed to 26 July 2021 and the date for the eviction was held in abeyance pending certain further directions by the Court in regard to the procurement of further information relevant to the fixing the date of eviction.

2.

To that end, the Court directed the tenth respondent (“the City”) to file a supplementary report within three weeks regarding the availability of suitable alternative accommodation owned by the City, or of which the City was aware, which might be accessed by the respondents when they are evicted. The parties were afforded an opportunity to address the issues raised in the City’s report by way of supplementary affidavits, which were to be filed within two weeks of receipt of the City’s

report.

3.

Further, and in accordance with s 7(1) of PIE[1] the Court directed the City to appoint a mediator within two weeks of delivery of its report, who was to attempt to mediate the dispute between the parties regarding the date for quitting the premises.

4.

When the Court reconvened on 26 July 2021, the City had neither reported nor mediated as directed. The Court heard that the City had belatedly instructed attorneys to represent it at the hearing and Adv. Wynne appeared for the City on that day. Mr. Wynne offered an explanation from the Bar for the City’s non-compliance and, pursuant thereto, the Court called upon the City to file an affidavit explaining its non-compliance.

5.

A draft agreement was subsequently concluded between the parties in terms whereof the City was to file its report, arrange for mediation and explain its failure to do what it was directed to do earlier. The matter was then postponed to 18 August 2021.

6.

When the matter commenced on 18 August 2021, Mr. Wynne explained to the Court (with reference to the City’s further affidavits) that the person to whom the order had been sent by the applicant’s attorneys had left the employ of the City but that his email address had not been disconnected. For that reason, the applicants’ attorneys’ email had not bounced back. Mr. Wynne went on to note that once the matter had come to the City’s attention, it had taken immediate steps to comply with the directives.

7.

The situation seems to have arisen by virtue of the shortcomings of modern technology and I do not think that the City's conduct has been shown to have been willful. On the other hand, the applicants' attorneys could have done more when there were repeated failures to respond to their litany of emails asking for progress reports from the City. It remains a curiosity in the modern age of digital technology that parties often appear to have forgotten of the utility of the telephone.

ACCOMMODATION AVAILABLE TO THE RESPONDENTS

8.

The City reported to the Court that a mediation session had been held but that the parties were unable to find each other. In addition, it provided an update to its report of August 2020 dealing with the availability of low cost housing and emergency housing. As far as the availability of rental properties belonging to the City is concerned, the situation remains dire – the City says that it currently has 349 672 persons registered on its housing database who are awaiting the allocation of formal housing opportunities.

9.

The City goes on to explain that it is now dealing with housing applications lodged in 2013 in respect of “low demand areas” and the mid 1990's/early 2000's in respect. “high demand areas”. The third respondent entered her name on the City's housing needs database in 2016, while the first and second respondents registered in 2000 and 2019 respectively. The remaining respondents have not registered with the City. Given the length of the queue for the allocation of low-income rental housing offered by the City, it says that it is not possible to accommodate the respondents' needs immediately as this would

encourage queue jumping.

10.

The City also referred to the availability of social housing under the auspices of the Social Housing Regulating Authority (“SHRA”) in which affordable rental housing is made available to deserving candidates depending on their levels of income. In the Tafelberg judgment[2], this Court noted (in August 2020) that persons earning between R5 000 and R15 000/month, qualified for the allocation of social housing. It further noted the availability at that time of social housing in a variety of complexes across the Peninsula where rentals ranged from R800 to R4100/month. In its first report filed in August 2020, the City indicated that income levels for social housing were between R1500 and R15 000. Such rentals are calculated with reference to an applicant's gross monthly income.

11.

Turning to the City's Emergency Housing Plan, it notes that it has established a number of Temporary Relocation Areas ("TRA's") over the years. These are rudimentary corrugated iron structures intended to accommodate the most vulnerable of evicted persons. These include camps at Blikkiesdorp near Delft, Wolwerivier near Mamre and Kampies in Philippi. The latter is, according to Mr. Wynne, the current venue of choice as the others are over-subscribed. TRA accommodation is only available to persons who have applied therefor. In the City's report dated 26 August 2020, the respondents were urged to register for TRA accommodation – a copy of the City's application form for such accommodation was attached to the affidavit of Ms. Pretorius who authored that report. To date none of the respondents has applied for TRA accommodation and Mr. Wynn informed the Court from the Bar that the delay in acquiring such accommodation was 6 – 8 months from the date of application.

APPLICANTS' CURRENT CIRCUMSTANCES

12.

In a supplementary affidavit filed on behalf of the applicants, Mr. Nazeem Nelson informed the Court of their current circumstances. He says that his wife, the second applicant, was formerly married to a certain Mr. Thebus with whom she co-owned a house in Mitchells Plain. When the second applicant and Mr. Thebus were divorced in 2009, they agreed that she could remain in occupation of that property until she re-married, in which event the property would be sold and the proceeds shared between them. Mr. Nelson says that he and the second applicant were married in 2012.

13.

Mr. Nelson explains that Mr. Thebus has had to tolerate the continued occupation of the Mitchells Plain property by the Nelsons and their children since 2016 due to the refusal of the respondents to move out of the Kensington premises. The inability to access the Kensington premises has resulted in the Nelsons incurring an additional expense of R6000/month in respect of the Mitchells Plain property. In addition, they must bear the bond instalment, rates, and taxes payable on the Kensington premises. The respondents have made no attempt whatsoever to cover any of the costs of their occupation of that property.

14.

In the report filed by the mediator it was pointed out that the respondents had belatedly (during the mediation) made an offer to rent the premises from the applicants for R4500 per month and to pay the associated municipal charges. This was rejected by the applicants who said that the bond instalment was of the order of R7000 per month and the rates and services costs amounted to about

R3000. The applicants were said to be unhappy that such an offer was made, both because it was inadequate and because it came so late in the day, the respondents having enjoyed rent-free accommodation at their expense for 5 years or so.

ALLOCATION OF A BNG HOUSE TO THIRD RESPONDENT

15.

The mediator disclosed that while discussing the matter with the applicants, she had been informed that the third respondent had allegedly “been given a RDP house by the City of Cape Town and that the handover ceremony had taken place on Sunday 8 August 2021”. She said that Mr. Nelson had told her that he attended the ceremony, as had the third respondent. Mr. Nelson then filed a further supplementary affidavit confirming his attendance at the ceremony together with his brother who, he said, had been identified as a prospective recipient of a low-cost house built under the Provincial Government’s “Breaking New Ground” program (“BNG”). These houses are colloquially referred to as “RDP houses” in accordance with the previous name of the program.

16.

In a photograph attached to this supplementary affidavit, Mr. Nelson’s brother, Shafiek, is seen holding up a certificate presented to him at the ceremony, the material part whereof reads –

“This serves to congratulate Shafiek Nelson on being identified as a home owner beneficiary”

Mr. Nelson said that he had seen the second and third respondents in attendance at the ceremony and that a similar certificate had been handed over to the latter.

17.

The Court asked for clarity on this issue and Mr. Wynne duly procured an explanatory affidavit from an employee in the City’s Directorate of Human Settlements, Ms. Kock, who is also the author of the two earlier reports from the City. Ms. Kock explained that she had checked the City’s records and established that the second, third and eighth respondents had been registered on the City’s “Housing Needs Database”. In 2008 a “rental housing opportunity” had been allocated

by the City to the third respondent, which “she elected to voluntarily relinquish in and during 2008.”

18.

Ms. Kock said that she had made enquiries concerning a housing development being undertaken by the Provincial Government in the New Woodlands area of Mitchells Plain. She reports as follows.

“7. To this end, I have been advised that the Third Respondent has not yet been allocated a housing unit in the development in question and, at this stage, has simply been informed of the fact that she may qualify as a beneficiary of the project. The purpose of the gathering, which is stated to have taken place on 8 August 2021, and pursuant to which the First Applicant alleges that a house was handed over to the Third Respondent, was in effect an information session undertaken with persons who may prospectively qualify as beneficiaries to the project.

8. I have been advised that the process of approving and/or selecting beneficiaries for the development will only take place at a much later stage, once the process of approving applicants for housing subsidies has been concluded.
9. Accordingly, the Third Respondent has not, at this stage, received a housing opportunity in the New Woodlands Development, nor is she guaranteed of receiving one. Her application will be assessed by the Western Cape Provincial Department of Housing in due course, in accordance with the qualifying and/or allocation criteria that has (sic) been determined for the project in question.”

THE GRANNY FLAT

19.

In an earlier supplementary affidavit, Mr. Nelson had referred to the fact that there was a granny flat adjacent to the premises that had two bedrooms. It was intimated that certain of the respondents might wish to take up temporary residence in the flat after eviction. Indeed, in a draft order handed up by Mr. Bence at a continuation of the hearing on the matter on 26 August 2021, provision was made for a concession by the applicants that the first and third respondents might occupy the granny flat for a couple of months after being evicted from the main residence.

20.

This resulted in a further supplementary affidavit being filed by the first respondent on 30 August 2021. In this affidavit the first respondent took umbrage at the suggestion that the granny flat might afford her suitable alternative accommodation, pointing out that it had been completely gutted by fire in January 2016, had subsequently been vandalized by unknown persons after the fire and, in any event, it was without water or electricity. A set of photographs was put up in support of this allegation, from which the accuracy of the allegations can be verified.

21.

In reply to these allegations, Mr. Nelson pointed out that he and the second applicant had purchased the premises in November 2016 and taken transfer thereof in August 2017. He went on to say that neither he nor his wife had any knowledge of the fire damage occasioned to the granny flat, but that in any event they had been precluded from entering upon the premises by the respondents at all material times. He denied that he had any knowledge of the damage before the property was purchased and berated the respondents for allowing the property to deteriorate in this matter. Mr. Nelson said that he was not possessed of sufficient funds to renovate the granny flat and it could accordingly no longer serve as alternative accommodation for the respondents upon eviction.

PERSONAL CIRCUMSTANCES OF THE RESPONDENTS

22.

The relevant personal circumstances of the various respondents are as follows.

- (i) The first respondent is 57 years of age, has no dependents and is reliant upon a disability granted of R2 500 to support herself.
- (ii) The second respondent, who is the sister of the first respondent, is aged 52 years and is employed as a receptionist earning R6 800 per month. She is said to have contracted Covid 19 earlier this year but has recovered.
- (iii) The third respondent is aged 63 years and is a recipient of a State pension of R1800 per month. Her health is not good and she has been in and out of hospital, on occasion being unable to attend the virtual hearings in this matter because of poor health. It would appear that the problem is related to tuberculosis. She contracted the Covid 19 virus in 2020 but has fortunately survived. The third respondent has been earmarked as a prospective recipient of a house in the New Woodlands development referred to earlier. We know, too, from the later affidavit of Ms. Kock that the third respondent turned down an offer of alternative housing in 2008.
- (iv) The fourth respondent is an unemployed female aged 24 years who has three children aged seven, six and two years respectively.
- (v) The fifth respondent is a 25-year-old unemployed male with no dependents.
- (vi) The sixth respondent is a 24-year-old unemployed male whose parents are said to live in Knysna and Mitchells Plain. He advances
no reasons as to why he could not stay with either of them.
- (viii) The seventh respondent is an unemployed female aged 25 years and is said to be a dependent of the second respondent. However, the nature of her relationship with the second respondent was not clarified by Mr. Sharuh during final argument.
- (viii) Finally, the eighth respondent is a 58-year-old male employed as a driver who earns R5 000 per month.

23.

In argument, Mr. Sharuh accepted that the second and eighth respondents earned sufficient to qualify for affordable housing. He submitted further that the only vulnerable persons were the first and third respondents. He accepted that the level of lockdown under the Covid 19 regulations (at Level 2 when the matter was finally argued and now at Level 1) had made it possible for a court to consider eviction. In the circumstances, it was suggested that the respondents should collectively be afforded at least 12 months' notice to vacate the premises

24.

Mr. Bence pointed out that the applicants had been deprived of access to their property for close on 5 years. They have effectively been subsidizing the respondents' accommodation needs for at least 4 years since taking transfer of the property and would have paid in excess of R90 000 per annum in that regard. By the Court's calculation, this amounts to a staggering aggregate of between R350 000 and R400 000 which will be irrecoverable from the respondents.

WHAT IS JUST AND EQUITABLE?

25.

PIE requires this court to make an order that is just and equitable in the circumstances. Blue Moonlight^[3] instructs a court that the 'just and equitable' statutory injunction requires consideration of the interests of both the occupiers and the owners. Importantly, the order must infuse elements of grace and compassion on the part of the Court for the plight of the occupiers while ensuring that the rightful owners of property are not effectively expropriated by the conduct of the unlawful occupiers. Importantly, it is not the function of a private landowner to have to accommodate an unlawful occupier ad infinitum. Van der Westhuizen J put it thus in Blue Moonlight, a case involving the occupation of a block of flats rented out for commercial purposes.

"[40] It could reasonably be expected that when land is purchased for commercial purposes the owner, who is aware of the presence of occupiers over a long time, must consider the possibility of having to endure the occupation for some time. Of course a property owner cannot be expected to provide free housing for the homeless on its property for an indefinite period. But in certain circumstances an owner may have to be somewhat patient, and accept that the right to occupation may be temporarily restricted, as Blue Moonlight's

situation in this case has already illustrated. An owner's right to use and enjoy property at common law can be limited in the process of the justice and equity inquiry mandated by PIE."

26.

The present case does not involve commercial considerations. Rather, the applicants are family of the respondents and the applicants knew when they purchased the house to "keep it in the family", as it were, that the respondents had lived there for a considerable period of time. The applicants say they were assured by the occupants at the time that they bought the premises that they were willing to move and that they had secured alternative accommodation. The respondents deny this, claiming now that they were granted a life right of occupation by the deceased, Mr. Jalodien Williams.

27.

Whatever, the truth of the matter, the applicants have endured the presence of the respondents in their house for a very long time. They have, in the circumstances, truly demonstrated the spirit of ubuntu which PE Municipality[4] contemplated. However, rather than accept their generosity and the fateful consequences which their ownership ultimately brings, the respondents have entrapped the owners in myriad legal proceedings in a futile effort to establish a right under Islamic law which they must have known could never succeed.

28.

An order for ejectment now might operate harshly against some of the respondents. I say might because there is the possibility that the Provincial Government may make good on its public demonstration of largesse in August 2021 and ultimately grant the third respondent the use of a house in the New Woodlands BNG development in the not too distant future. But, against that, I must bear in mind that the respondents offered recently to pay rental for the premises to the applicants of R4500 per month. That offer means that the respondents are able to pool their means and afford accommodation appropriate to their needs. They are not penniless, nor are they averse to being accommodated as a family in rather restricted conditions – after all they were able to make do with three bedrooms and were prepared to pay the costs associated therewith. Their offer of rent having been declined by the applicants, the respondents must now put their resources towards the procurement of affordable rental premises, whether through the assistance of the SHRA or otherwise.

29.

Having regard to all the relevant circumstances, I am of the view that it would be just and equitable to afford the respondents 3 months' notice to vacate. In so deciding, I bear in mind that the respondents have known for more than a year that the applicants were serious about taking occupation of the premises and, most importantly, they have known since the end of March 2021 that they will be required to vacate. The fact that they have taken no meaningful steps to seek alternative accommodation is entirely of their own making and the applicants cannot be expected to be penalized further. The applicants have been more than tolerant and kind to the respondents. They are entitled to move into their home now.

COSTS

30.

Through their obstinate resistance, the respondents have put the applicants to considerable expense to recover occupation of that which is their own. It is thus only fair that a costs order should follow the result. While it may ultimately prove to be a brutum fulmen, given the limited means of the respondents, I am of the view that such an order should be made nevertheless in order that others who might consider adopting a similar stratagem are dissuaded from doing so.

ORDER OF COURT

Accordingly, the following order is made:

A. The first to ninth respondents are ordered to vacate the premises situated at No. 87, Sixth Street, Kensington, Cape Town (“the premises”) on or before 21 January 2022.

B. In the event that the first to ninth respondents fail to vacate the premises as aforesaid, the Sheriff of this Court or his/her deputy is authorized to cause the first to ninth respondents to be evicted from the premises on 31 January 2022.

C. The first to eighth respondents shall pay the costs of the application jointly and severally, the one paying the others to be absolved, such costs to include the costs of the respondents’ dismissed stay application.

GAMBLE, J

Appearances:

For the applicants: Adv. J Bence

Instructed by Le Roux Attorneys Inc

Cape Town

For the 1st – 9th respondents: Mr P Sharuh

of Sharuh Attorneys

Bellville

C/o De Kelerk & Van Gend

For the 10th respondent: Adv. R Wynne

Instructed by Hayes Incorporated

[1] The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998

[2] Adonisi and others v Minister of Transport and Public Works, Western Cape and others

[2021] 4 All SA 69 (WCC) at [45] – [46]

[3] City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties (39) (Pty) Ltd and another 2012 (2) SA 104 (CC) at

[37] – [41]

[4] Port Elizabeth Municipality v Various Occupiers [2004] ZACC 7; 2005 (1) SA 217 (CC) at [37]

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