

# Municipalities' duties

## TO OCCUPIERS FACING EVICTION FROM PRIVATE LAND

While a number of recent judgments have confirmed the duty of municipalities to 'meaningfully engage' with unlawful occupiers before seeking to evict them from municipal land, they did not clearly establish the duties of municipalities to occupiers who face eviction from private land.

*Blue Moonlight Properties 39 (Pty) Limited v Occupiers of Saratoga Avenue and Another* (2006/11442) [2010] ZAGPJHC 3 (4 February 2010)

The recent South Gauteng High Court judgment in *Blue Moonlight Properties 39 (Pty) Limited v Occupiers of Saratoga Avenue and Another* (2006/11442) [2010] ZAGPJHC 3 4 February 2010 (Blue Moonlight Properties) dealt exactly with this issue. The judgment touches on a number of important matters: namely, the duty of municipalities to vulnerable occupiers (and private landowners) in eviction proceedings instituted by private landowners, the reasonableness of the City of Johannesburg's programme to facilitate access to housing and the role of intergovernmental relations in determining the duties of national, provincial and local government in realising the right to housing.

### The facts

The plight of inner-city dwellers was first highlighted in the case of *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg and Others*, CCT 24/07. The judgment highlighted the tension which many cities like Johannesburg face in balancing the duty to regenerate declining city centres and attract development to the city against the competing duty of care to the vulnerable occupiers of the derelict and unsafe buildings that comprise the inner city.

The case of Blue Moonlight Properties clearly reflects this tension. Blue Moonlight Properties purchased a property in the inner city of Johannesburg in 2005. They did so with the intention of demolishing the buildings and redeveloping the

property to realise its investment potential. At the time, the buildings were home to approximately 71 occupiers (later increasing to 86). The occupiers – elderly people, women-headed households, youth and children – were described as desperately poor, with very little income. These occupiers were furthermore dependent on their proximity to the city centre for the limited employment opportunities that their location afforded them.

While some of the occupiers had lived in the buildings since as far back as 1999, others had only recently joined the community. Importantly, at the time of the eviction application, all of the occupiers had been in occupation of the buildings for longer than six months. This is significant, in that section 4(7) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (Act 19 of 1998) (PIE) provides that a court, in considering all 'relevant circumstances' before granting an eviction order, must consider whether 'land has been made available or can reasonably be made available by a municipality or other organ of state ... for the relocation of the unlawful occupier'. It was for this reason that, when faced with the prospect of eviction and homelessness, the occupiers made an application to the Court to have the City of Johannesburg (the City) joined to the proceedings. They furthermore requested the Court to order the City to furnish it with a report detailing the steps it had taken to provide the occupiers and other occupiers in similar situations with access to

emergency temporary housing, as well as permanent housing on a progressive basis.

## Issues

### *The City: 'Not my problem' syndrome*

In a report submitted to the Court, the City argued that it had 'no constitutional or statutory duty to provide accommodation to occupiers evicted from private land'. As housing is a national and provincial competence, the City argued that it 'merely implements provincial and national housing policy but has no obligation to finance it'. The City further argued that 'its constitutionally mandated role is *passive* in respect of housing delivery, in the sense that it does not itself dictate policy or provide funding'. In this regard, the City claimed that while it had set aside funds to cater for occupiers evicted from municipal land, it simply did not have the budget to provide alternative accommodation for occupiers evicted from *private* land. The City correctly argued that the funding for the emergency housing programme should come from the provincial government. In this regard, the City submitted that it had recently unsuccessfully requested a budget for the programme from the province.

By making reference to the earlier landmark judgments of *Grootboom* and *PE Occupiers*, the Court held that the duty to 'take reasonable legislative and other measures within available resources to achieve the realisation of the right' of access to adequate housing contained in section 26(2) of the Constitution bound *all* spheres of government. Similarly, the Court argued that section 26(3) of the Constitution, which provides that 'no one may be evicted from their home or have their home demolished without an order of court made after considering all relevant circumstances', was reflected in the Housing Act (Act 107 of 1997) and PIE. Section 4 of PIE creates a special duty on landowners to inform the municipality of an intention to evict within the municipal area, indicating a clear role for the municipality. Importantly, Chapter 12 of the Emergency Housing Programme under the National Housing Code obliges municipalities to 'investigate and assess the emergency housing needs within their areas and undertake proactive planning in that regard'. The Court held that all of these obligations bound municipalities and they could not 'choose not to be involved' in eviction proceedings.

### *Failing to plan or planning to fail?*

In the context of these obligations, the Court evaluated the reasonableness of the City's housing programme. By excluding vulnerable occupiers evicted from private land from its

# key points

- A private landowner who has complied with the requirements of PIE is entitled to approach a court for an order to evict unlawful occupiers.
- The duty to provide temporary emergency accommodation to unlawful occupiers falls on municipalities and *not* private landowners.
- Together with national and provincial government, municipalities are equally bound to progressively realise the right to housing.
- Municipalities have a duty to identify the needs of vulnerable occupiers and make provision for their needs in their emergency housing programmes.
- Any housing programme that unfairly discriminates between categories of unlawful occupiers is unreasonable.
- Municipalities are obligated to provide alternative accommodation not only to occupiers evicted from municipal land, but to those removed from private land.
- Municipalities have a duty to place 'meaningful information' before the Court to equip it to make informed decisions in eviction cases dealing with vulnerable occupiers.

emergency housing programme, the municipality arbitrarily excluded them from the planning, budgeting and implementation processes necessary to give effect to the programme. The Court held that while the provincial government might fund the programme, it was the municipality's duty to identify and quantify the scale of the needs in its communities and present those needs to the province for costing. To this end, 'the City cannot rely on its own default to explain why it has neither the budget nor the accommodation to cater for indigent occupiers of private land facing eviction'. It was for this reason and because the City had only recently started engaging the province on the issue of funding for alternative accommodation for vulnerable occupiers that the Court refused the request of the City to join the province to the proceedings.

### *Budgeting*

In response to the argument that the City did not have the funds to finance a more extensive emergency housing programme, the Court pointed out that the City had reported a surplus for the 2008/09 financial year. At no point did the City explain to the Court why a portion of that surplus could not be used to secure temporary accommodation for vulnerable occupiers. The Court also highlighted the fact that if the City could find the financial resources to fund the limited programme that only catered to occupiers evicted from municipal land, it should be able to source funding for a programme that included occupiers evicted from private land. The Court also interrogated the claim by the City that it could not easily source alternative accommodation for vulnerable occupiers. It did so on the basis that the City, when forced to find accommodation on an urgent basis in another court matter, had in fact been able to find alternative accommodation. The Court concluded that it remained 'sceptical regarding [the City's] protestations, either in relation to budgetary constraints or temporary accommodation'.

### *Duty to occupiers*

By excluding vulnerable occupiers from the protection afforded under the Emergency Housing Programme of the National Housing Code, the City not only impaired the dignity of vulnerable occupiers but impinged on their right to equal protection and benefit of the law. By excluding occupiers evicted from private land, the City created an arbitrary distinction between these occupiers whose 'plight may be similar to or worse than those occupying state-owned land'. The Court stated that it was hard to imagine how the City could justify its actions in view of the fact that the legislative,



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policy and judicial framework for the realisation of the right to housing placed an obligation on municipalities to ensure that those 'whose needs are the most urgent and whose ability to enjoy all the rights therefore are most in peril' were prioritised.

### *Duty to private landowners*

In examining the duties of private landowners in eviction proceedings, the Court held that provided that landowners complied with the administrative and substantive requirements of PIE, they were entitled to apply for an eviction order to evict unlawful occupiers from their property. The Court emphasised the fact that while the procedural safeguards of PIE might delay the full enjoyment of the property rights of landowners temporarily (to cater for vulnerable occupiers), it by no means



PRIVATE  
PROPERTY  
TRESPASSERS WILL  
BE PROSECUTED

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The judgment also highlighted a significant duty of the City and municipalities across the board to place ‘meaningful information’ before the Court in respect of both their long-term housing programmes and their emergency housing programmes. In this case, the duty to place meaningful information before the court served the dual purpose of providing an overview of the number of imminent evictions that were likely to take place in the inner City as well as the availability of accommodation for vulnerable occupiers who could be left homeless as

could be interpreted to indefinitely suspend their property rights. Private landowners had no obligation to bear the duties of the state in realising the occupiers’ right to housing. To indefinitely burden private landowners with the duty to accommodate unlawful occupiers without compensation would violate their right to equality before the law.

## The order

What has arguably attracted the most significant media attention to this case is the remedy that the Court crafted to ensure that the rights of the occupiers and those of the landowner were protected. Firstly, the Court found the emergency housing programme of the City to be irrational, arbitrary and unreasonable and directed the City to remedy it.

In the meantime, the Court not only ordered the City to find temporary alternate accommodation for the occupiers on eviction, but went a step further by directing the City to pay each household or occupier a rental deposit of R850 to secure temporary accommodation as well as a stipend of R850 a month for rent until such time that the City secured the alternative accommodation. The Court also directed the City to pay Blue Moonlight constitutional damages to be calculated on the basis of the amount that it would have cost the City to provide the occupiers with temporary alternate accommodation.

As well as vindicating the rights of private property owners, the judgment has raised crucial issues for local government. The Court has emphasised again the duty of all spheres of government to ensure that the needs of the most vulnerable in society are met. In this regard the Court held that municipalities could not choose to remain uninvolved where the rights of vulnerable occupiers were compromised in eviction situations.

a result of such evictions. The Court therefore ordered the City to provide a comprehensive report containing an audit of all of the derelict buildings in the inner city, which could possibly be used as alternative, temporary accommodation. This is in keeping with the judgment of *Drakenstein Municipality v Hendricks* (see page 26) which held that where vulnerable occupiers are ‘genuinely homeless and desperately needy’ a municipality must fully investigate their circumstances and report to court. This, importantly, does not place an undue burden on municipalities in situations where occupiers are not vulnerable and can assist themselves.

The judgment in *Blue Moonlight Properties* is indicative of a definite move on the part of the courts to ensure that eviction orders are individualised and that *vulnerable* occupiers do not fall through the cracks. The immensity of the housing crisis cannot be a justification for not fully interrogating the consequences of an eviction order for each vulnerable occupier and the efforts that can be taken to ameliorate those difficulties. Importantly, the Court highlighted the fact that there were a growing number of judgments adding to the jurisprudence on the right of access to housing and the duties of municipalities in eviction situations – a fact which must change and shape the way municipalities formulate and implement their responses to vulnerable occupiers.



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