IN THE MAGISTRATE'S COURT FOR THE DISTRICT OF THE CAPE HELD AT

CAPE TOWN Case number: 8917/19

In the matter between:

JENNIFER THERESA MOORE N.O AND 24 OTHERS Applicants

and

THE CITY OF CAPE TOWN Respondent

JUDGMENT

1. The applicants seek an order in terms of rule 19 of the Magistrates Court act 32 of 1944. They request the striking of certain averments in the respondent's affidavit/housing report.

2. This is an interlocutory application brought at the instance of the fifth to twenty fifth applicants.

3. The application is opposed by the respondent.

4. On 23 March 2021, the day the matter was set down for hearing, the applicants, represented by Mr Haffagee and Advocate Titus approached the Court in chambers. I was advised that Advocate Titus had been approached and will be representing the applicants. I was further advised that the applicants' intended approaching the court for an order in terms of rule 19 of Act 32 of 1944. Advocate Mitchell was not ready to deal with the matter as he was leaving his practice and pursuing a career on the bench and obtained a contract position as a Magistrate Cape Town Court. I was advised that the respondent intended briefing counsel to replace Advocate Mitchell.

5. The matter was adjourned for arguments to 26 July 2021 and a timeline ordered in respect of papers to be filed. Advocate Winne represents the respondent.

6. I think it apt to deal with the history of litigation in this matter.

7. The respondent in the main application have commenced proceedings in terms of section 4 of the Prevention of Illegal Eviction From And Unlawful Occupation Act 19 of 1998 (The PIE Act). In January 2019 notices of cancellation and notices to vacate were served on the applicants. It appears that notices to vacate dating back to 2017 and 2018 was so too served on the applicants.

8. The notices to vacate were served on 25 named respondents. The respondents are cited too on the notices of motion. The notices advised the applicants that the respondent was the owner of the premises and that

lease agreement between the South African National Circus School Trust has been terminated on 20 April 2018. The applicants were advised to vacate by 22 February 2019 failing which eviction proceedings would be instituted. The applicants were informed that they had the opportunity to present in writing their circumstances relevant to their occupation and the respondent's intention to evict them, which circumstances include rights of the elderly, children, disabled persons and households headed by women. An address was provided where the information in writing may be delivered.

9. The applicants failed to vacate the premises which resulted in the subsequent applications in terms of the PIE act being initiated. It is common cause that the invitation to the applicants to provide the relevant circumstances was not complied with. I can only assume that they elected not to provide this information to the respondent.

10. The notice of motion in terms of section 4(1) and (2) of the PIE Act was served on the applicants in September and November 2019 respectively. The applicants were served with notices to appear on 12 December 2019 and the matter was adjourned to 29 January 2020 for the applicants to obtain legal representation. Mr Dunn came on record and a hearing date was arranged between the parties, namely 1 April 2020 with a timeline to file papers. On 1 April 2020 the matter once again adjourned to 8 June 2020 for hearing this during the heavy lockdown period. On 8 June 2020 the parties agreed to postpone the matter to 26 June 2020 as none of the applicants were present. On 26 June 2020 the parties agreed to postpone the matter for hearing to 22 July 2020.

11. The parties on 22 July 2020, agreed to an order being granted that the applicants and respondents consider meaningful engagement and or mediation. I made it clear that should the engagement fail the parties are to resort to mediation. The matter was adjourned to 1 September 2020. As the parties were still engaging with each other a further postponement was requested and granted with date being 15 September 2020 and again 29 October 2020. As I was not available on 29 October 2020, a further date, namely, 2 November 2020 was arranged. On 2 November 2020 I was advised by Mr Dunn and Advocate Mitchell that no meaningful engagement took place and that the applicants were not willing to resort to mediation, with an independent party being appointed as mediator at the respondent's expense.

12. The matter was then adjourned to 20 January 2021 for hearing. On the said date Mr Dunn was not available and a further date for hearing was arranged, namely 11 February 2021. I was advised that this date suited Mr Dunn. On 11 February 2021, Mr Dunn advised the court that he was instructed by the applicants to apply to the court for a supplementary affidavit to be submitted as evidence which reflected the history of meaningful engagement. This application was heard 5 March 2021 and judgment was granted on 12 March 2021 dismissing the application. The matter was thereafter adjourned to 23 March 2021 for hearing, and as indicated earlier, the applicants approached this court with the present application.

13. I think is important to mention that a Housing Report was drafted by the respondent dated 11 May 2020. The respondent replied to the applicants' answering affidavits, which reply is dated 7 June 2020. From the housing

report it appears that some of the applicants provided information based on the respondent's questionnaire, other applicants elected not to provide information.

14. The Applicants seeks the striking out of a number of paragraphs in the respondent's replying affidavit including annexures "C" and "D" to the replying affidavit. In essence what the applicants seeks is the striking out of any reference to the housing report, the housing report itself and its offer for emergency/alternative accommodation. The applicant contends in the main that the respondent has not made out its case in its founding affidavit and is required to make all the essential averments in its founding affidavit. The applicants contend further that the respondent introduced new material in its replying affidavit which should be struck out and that the applicants have suffered prejudice through it being unable to address the housing report of the respondent.

15. Advocate Titus submits that new material should have been placed in the respondents founding affidavit as that is where an applicant's case is made out in motion proceedings. She does contend that Courts in exceptional cases do permit new material. She submits further that the new material was not new to the respondent and should have been in its founding affidavit.

16. The Court in **Shakot Investment (Pty) Ltd v Town Council of Borough of Stanger 1976 (2) SA 701 (D)** held that:

'In consideration of the question whether to permit or strike out additional facts or grounds for relief raised in the replying affidavit, a distinction must,

necessarily, be between a case in which the new material is first brought to light by the applicant who knew of it at the time the when his founding affidavit was prepared and a case in which facts alleged in the respondent's answering affidavit reveal the existence of a further ground for relief sought by the applicant. In the latter type of case the Court would obviously more readily allow the applicant in his replying affidavit to utilise and enlarge upon what has been revealed by the respondent and to set up such additional ground for relief as might arise therefrom.'

17. So too, **Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd (363/11) [2012] ZASCA 49 (30 March 2012)** where the court stated:

"...but the rule that all the necessary allegations upon which the applicant relies must appear in his or her founding affidavit is not an absolute one. The court has a discretion to allow new matter in a replying affidavit in exceptional circumstances. A distinction must be drawn between a case in which the new material is first brought to light by the applicant who knew of it at the time when his founding affidavit was prepared and one in which facts alleged in the respondents' answering affidavit reveal the existence or possible existence of a further ground for the relief sought by the applicant. See Shakot Investments (Pty) Ltd v Town Council of the Borough of Stanger."

18. An applicant for the striking out of any matter from an affidavit has to satisfy two requirements: firstly, that the matter to be struck out is scandalous, vexatious or irrelevant; and secondly, that the applicant must satisfy the court that he or she will be prejudiced if the matter is not struck out.

19. Rule 19 of the Act provides as follows:

(2) Where any pleading contains averments which are scandalous, vexatious, or irrelevant, the opposite party may, within the period allowed for filing any subsequent pleading, apply for the striking out of the matter aforesaid, and may set such application down for hearing in terms of rule 55 within 10 days of expiry of the time limit for the delivery of an answering affidavit or, if an answering affidavit is delivered, within five days after the delivery of a replying affidavit or expiry of time limit for delivery of a replying affidavit: Provided that-

(a) the party intending to make an application to strike out shall, by notice, delivered within 10 days of receipt of the pleading, afford the party delivering the pleading an opportunity to remove the cause of complaint within 15 days of delivery of the notice of intention to strike out; and

(b) the court shall not grant the application, unless it is satisfied that the applicant will be prejudiced in the conduct of any claim or defence if the application is not granted.

20. Mahomed CJ had the following to say regarding applications to strike out in **Beinash v Wixley 1997 (3) SA 721 (SCA) at 733A-B** :

"What is clear from this Rule is that two requirements must be satisfied before an application to strike out matter from any affidavit can succeed. First, the matter sought to be struck out must indeed be scandalous, vexatious or irrelevant. In the second place the Court must be satisfied that

if such matter was not struck out the parties seeking such relief would be prejudiced."

21. Advocate Titus was at pains to stress respondent's constitutional obligations when it comes to matters involving the PIE Act. Aspects of meaningful engagement and emergency accommodation should have been dealt with in its founding affidavit as it had the information and was aware that many of the applicants were unemployed. Reference was made to the Changing Tides case as support for the contention that the applicant should obtained the necessary information and compile a housing report prior to the instituting proceedings. Advocate Titus also submitted that meaningful engagement should have been resorted to prior to proceeding with the eviction of the applicants.

22. The circumstances of Changing Tides reveal that the occupiers were evicted from the building they occupied as per a High Court Order. The eviction was not opposed by the occupiers who had represented themselves. From what can be gathered, the court of first instance, the High Court, had no housing report from the City of Johannesburg when it ordered the eviction. It ordered that the City accommodate occupiers whose names were on a schedule compiled by a sheriff. The Supreme Court of Appeal did not set aside the order directing that the occupiers be evicted. It remitted the matter back to the High Court to determine at date upon which the occupiers are to be evicted and ordered the City to provide a housing report.

23. The case law is replete with cases in which housing reports were obtained after the institution of eviction proceedings. There have also been instances where courts have ordered meaningful engagement prior to delivery judgments. The practise therefore does not create unfairness or tips the scales in favour of the respondents such as the City. In fact the courts have gone further and permitted occupiers to reply or respond to housing reports. In **City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another (CC) [2011] ZACC 33** the City successfully applied for the admission of new evidence in the form of an updated housing report. See also **Baron and Others v Claytile (Pty) Limited and Another [2017] ZACC 24** where the court permitted new evidence, namely a report relating to available alternative accommodation.

24. **Yacoob J in Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg and others (24/07) [2008] ZACC 1** held that where the City became aware of the possibility that people/occupiers would be rendered homeless it had to at the very least have engaged meaningfully with the occupiers. In the instant case the court, prior to judgment, made an interim order to the effect that the parties engage meaningfully and provide affidavits reporting on the results of the engagement.

25. A Court cannot find that an eviction is just and equitable or determine a just and equitable date without all relevant information. The Court in Changing Tides has stated that in order to discharge its function the court must be possessed of information regarding all relevant factors that bear upon its decision. If the said information is not before the Court, a court can

act proactively and ensure that the said information is made available to reach a just decision.

26. There is no doubt that the arms of government are mandated to fulfil their constitutional obligations when it comes to matters under the PIE Act. This is to ensure that they address the housing needs of the people affected by the eviction, and in particular to address the plight of those who face an emergency situation of homelessness.

27. Where occupiers face homelessness an order for eviction would be unjust when it is unclear whether the alternative accommodation was a made available.

28. In the present case the applicants argue that the City has not complied with their constitutional obligations. They, the respondents', had to consider meaningful engagement and further obtained all the necessary information of the applicants prior to institution of the proceedings, it is further argued.

29. The court in Changing Tides made the following remarks:

"The response to this may be to say that the applicant for relief will be unaware of the circumstances of the occupiers and therefore unable to place the relevant facts before the court. As a general proposition that cannot be sustained. Most applicants for eviction orders governed by PIE will have at least some knowledge of the identity of the persons they wish to have evicted and their personal circumstances. They are obviously not required to go beyond what they know or what is reasonably ascertainable. The facts of this case belie the proposition that an applicant, even in a case

where a building has been hijacked, is unable to place information before the court in regard to the identity and circumstances of the occupiers. Changing Tides was able to describe in considerable detail the circumstances in which the occupiers were living. It had served notices to vacate on a number of them and managed to assemble a list, albeit incomplete and defective, of the names of 97 occupiers. It made it clear that the occupiers were people of extremely limited means, some at least of whom gathered rubbish from the streets for personal use or resale and left rotting garbage inside and outside the building. It specifically alleged that the occupiers were people who would, on eviction, qualify for emergency housing. It referred to earlier proceedings in which it had previously obtained an eviction order that had subsequently been set aside at the instance of occupiers. For some reason it did not provide the court with information about the occupiers' circumstances gleaned from the affidavits in those proceedings."

"All that was important information, both in regard to the grant of an order and in determining a just and equitable date for the eviction order they were seeking. It would have provided a substantial body of information to assist the court in reaching a decision on whether it was just and equitable to evict the occupiers."

"However, the fact that an applicant bears the onus of satisfying the court on this question means that it has a duty to place evidence before the court in its founding affidavits that will be sufficient to discharge that onus in the light of the court's obligation to have regard to all relevant factors. The City's contention, that the common law position continues to prevail and that it is for the occupiers to place the relevant facts before the court, is

incorrect. Once that is recognised it should mean that applicants go to greater lengths to place evidence of relevant facts before the court from the outset and this will expedite the process of disposing of these applications, particularly in cases that are unopposed as the need for the court to direct that further information be obtained will diminish."

30. The facts of the case reveal that the respondent obtained information of the occupiers of the premises. This is evident from twenty four names cited as applicants or "respondents" in the main application. The respondent served notices on the said applicants including a request for information and their circumstances to consider in respect of their current occupation and for the respondent's intention to proceed with eviction. The applicants refused or neglected to assist with the information. The respondents went further by providing the respondents with questionnaires which questionnaires required the applicants to provide their personal circumstances to the applicant.

31. The applicants Mr Shane Taliona (sixth respondent), who also happens to be the deponent of the founding affidavit in this current application, Ayubu Godfrey tenth respondent), Gregory Booth (eleventh respondent), Jaelli Hallis (twelfth respondent), James Tambala (thirteenth respondent), Joseph Alexander (fifteenth respondent), Mark Shelton (sixteenth respondent), Nazier Jaffer (seventeeth respondent) , Tanaka Mandanga (eighteenth respondent), Kami Gordon (twentieth respondent) did not assist in completing the questionnaires or provide the necessary circumstances requested in the notice to vacate, yet they complain that the applicant have not complied with their constitutional obligations.

32. I reiterate what the court held in Changing Tides that it is no excuse to say that the party seeking an eviction was unable to obtain the occupiers information, but it goes further and states *"They are obviously not required to go beyond what they know or what is reasonably ascertainable."* I believe that the respondents did what was required of them in attempts to obtain the information of the applicants.

33. As to meaningful engagement, I made an order that the parties engage despite the fact that proceedings have already been instituted, see **Occupiers of 51 Olivia Road**. I made a further order that if meaningful engagement was unsuccessful then the parties are to resort to mediation. It was clear from the submissions made by the legal representatives for the respective parties that the engagement proved unsuccessful. The PIE Act makes provision for mediation. It provides for the appointment of a person/s with expertise in dispute resolutions to facilitate meetings with interested parties to settle any disputes. It is common cause that the applicants refused to consider mediation.

34. The applicants request that I strike out the paragraphs as well as the housing report dealing with the offer of alternative accommodation. They argue that it should have been placed in the respondent's founding affidavit and further that the applicants will be prejudiced as they have not had an opportunity to respond to the replying affidavit by the respondent and the housing report. The prejudice can be alleviated by providing the applicants with an opportunity to respond.

35. Advocate Wynne submits that the material regarding the applicants personal circumstances were only provided in their answering affidavits which the respondent had an opportunity to address on in the replying affidavit. To a certain degree the information in housing report was information that was available i.e the fact that the applicants would possibly face homelessness. I say so because most of the information of the applicants were obtained after some of the applicants elected to provide the said information for purposes of the housing report. I have to consider that the respondents made attempts to illicit information from the applicants which was not forthcoming. Had they provided a report or scares information in their founding affidavit, I am a convinced the applicants would have taken issue with the scares information provided. Further to this is the fact that the respondents' replying affidavit and housing report was completed in June 2020, approximately 12 months ago. The applicants through their legal representatives had the opportunity of approaching this court with permission to respond to the housing report and replying affidavit. They elected not to. I am surprised that Mr Dunn, who is a seasoned attorney in the field of evictions, has not advised his clients of the option available.

36. A further question I have to consider is why the applicants are requesting the report to be striked out when they have refused to accept the offer by the respondents. It is clear from the papers that they wish to remain resident on the premises based on their lengthly stay as well as the fact that they have made the premises their home.

37. I find that that there are special circumstances warranting a departure from the rule that the applicant's case is to be made out in the founding affidavit.

38. As stated earlier, an application such as this requires an applicant to show that the paragraphs that it wishes the court to strike out are scandalous, vexatious or irrelevant and prejudice would be caused. I certainly do not find the paragraphs irrelevant as the information is necessary for the court to reach a just decision. It has not caused general public outrage/scandolous and there were no submissions by the applicant in this regard. I do not deem the paragraphs or housing report vexatious. As to prejudice. The applicants will not be prejudiced should they be granted an opportunity to respond to the replying affidavit and housing report. Based on the delays in this matter and the length of time this matter has been on this court roll I find that it would not be just to grant the application. It would necessitate further delays in approaching the applicants again to fill in the questionnaires and drafting a new housing report.

39. In the circumstance make the following order:

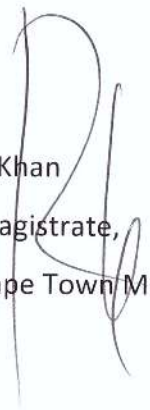
40. The application to strike out is dismissed with costs.

41. As to costs for the appearance on 23 March 2021, these costs are to stand over for later determination.

42. The applicants are granted leave to respond to the replying affidavit of the respondent including the housing report by 30 June 2021. The respondent is given leave to reply by 16 July 2021.

43. A hearing date is to be arranged thereafter with permission for the parties to supplement their heads of arguments.

44. Costs to stand over for later determination.



R Khan

Magistrate,

Cape Town Magistrates Court