

Dear Colleagues

RITAMA INVESTMENTS v UNLAWFUL OCCUPIERS OF ERF 62 WYNBERG - [2007] JOL 18960 (T)

This matter highlights some of the hurdles developers may come across when dealing with unlawful occupiers and the PIE Act and may be worthwhile taking note of should you have developers as clients.

(Note that the matter was reported by JOL in January 2007, but the decision was handed down in January 2006 already.)

The dispute

In the Transvaal High Court, Ritama Investments made application for the eviction of several unlawful occupiers from a property. The respondents relied on the PIE Act. An earlier similar application in the WLD was unsuccessful. The first application was made during March of 2005 and this second application in January 2006.

The facts

Plaintiff is Ritama Investments, a developer company who (at the time of the application) was about to take transfer of a certain property. The defendants are various illegal occupiers of the same property and include elderly and infirm people, women, and children, some who suffer from disabilities, some unemployed, some who are citizens and some possibly non-citizens. During March 2005, applicants made their first attempt at obtaining an eviction order. This application was unsuccessful, hence the second application.

(It is unclear from the judgment why the first application failed. However, it appears that at the initial proceedings the land occupiers alleged that their occupation was legal and therefore refused to adhere to an eviction order.)

Held

Bertelsman J held that the PIE Act introduced a new responsibility on a court when dealing with evictions: no eviction order may be made unless it is done in accordance with the Bill of Rights. This responsibility obliges the court to weigh up all the relevant circumstances to achieve an equitable solution of the conflict of rights and interests between the private landowner and the homeless unlawful land occupier. However, this duty does not rest on the courts alone, but also on all organs of the state. Therefore, the court found that in an application under PIE, the compulsory notice in terms of section 4 to the local authority concerned, is not a mere notice to a third party who may be interested in the outcome of litigation between a landowner and unlawful occupiers of land. It is much more: the local authority, the organ of state primarily concerned with the housing of unlawful occupiers, is normally in the best position to inform the court whether there is housing or land available, whether transit facilities exist in which the unlawful occupier may be accommodated if evicted. If no land or housing is available, the court ought to be advised of whatever plans exist to deal with the homeless in the area. This information is *critical* to a court to determine on what terms and what conditions equity can be served if an eviction order has to be made. Therefore without the input from the local authority, the court cannot do a proper investigation of the relevant circumstances and can therefore not make an order.

Ordered

Bertelsmann J held that in light of the absence of adequate information from the local authority, no eviction order can be made. The judge criticized the local authority and stated that its failure to provide the court with information amounts to a failure to comply with its (the local authority's) constitutional obligations to assist the courts and the poor and homeless to ensure that they are treated with dignity and provided with housing as soon as possible. He postponed the matter and ordered that the Metropolitan Municipality of Johannesburg and the MEC for Housing (Gauteng) appear in person and answer the court's questions with regard to housing options for the unlawful occupants were the court to order eviction.

Concerns for developers and other thoughts that arise from the judgment

1. Although this decision proffers nothing new with regard to the application of the PIE act, it accentuates the obligation of the local authority as a party to the proceedings.
2. It also exposes the extreme inconvenience a developer may face when the land earmarked for development is unlawfully occupied. In this matter, the initial application was brought in March of 2005 and the second application 10 months later. Even at the later hearing, the matter was not resolved, but postponed to a further date. Writer has no knowledge of the outcome of the postponement, but can only speculate what further delays awaited the developer (and unlawful occupiers alike). For the developer, such delays compromise the financial viability of the development itself. Arguably, such hurdles will negatively influence the growth of investment in local property development in a country where there is a severe shortage of housing.
3. As noted in the court record, it is an equally disconcerting tale from the unlawful occupiers' perspective since the relevant property is unfit for human habitation – there is no sanitation, municipal services had been disconnected and there is severe overcrowding. The occupiers cannot find housing in the open labour market due to their impoverished state. Their needs must therefore be catered for (primarily) by the State. The area where the property is situated, Alexandra, falls within an area where the government launched an integrated sustainable rural development and urban renewal plan in 2001 already. The ARP (Alexandra Renewal Project) would include the building of, amongst other things, 1403 houses and some R1,3 billion rand was earmarked for this project. Nothing much had come of it; very little progress was made by 2006. The occupiers told the court that meetings had been arranged with the local authority, but was then not attended by the officials.
4. So, where does this leave the developer and unlawful occupiers? Both parties are severely prejudiced by the unacceptable lack of performance by the relevant local authority and MEC for Housing. Bertelsman J did order the latter parties to appear in court to give answers, but realistically, the answers would probably not entail immediate relief for the developer or occupiers. It would probably take the form of a promise to make temporary housing available to the occupiers within a certain period of time but not offering the developer any certainty.
5. One further concern relates to a statement made by the local authority at the first hearing to the effect that the authority does not have any land and/or alternative accommodation available to accommodate the unlawful occupiers. If this was in fact true, what would the developer's rights be? (The local authority did not repeat the 'defence' at the second hearing, and the court did not need to address the issue.)
6. Bertelsmann J's judgment was very critical of the local authority's lack of performance in providing housing to the destitute and found that the local authority was not discharging its constitutional duties. Hopefully such calls by the judiciary to hold local authorities accountable, will make PIE more workable in that equitable solutions may be reached more expeditiously.