

SOUTH AFRICA / JUDGMENT

Appollis and Another and Breede Valley Municipality and Others (09986/2025) [2025] ZAWCHC 138 (24 March 2025) [2025] ZAWCHC 138

COURT

Western Cape High Court, Cape Town

BEFORE

Slingers

CASE / FILE NUMBER

09986/2025

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THE REPUBLIC OF SOUTH
AFRICA
IN THE HIGH COURT OF
SOUTH AFRICA
(WESTERN CAPE
DIVISION, CAPE TOWN)
Case No: 09986/2025
Before the Hon Madam
Justice Slingers
Hearing: 20 March 2025
Judgment Delivered: 24
March 2025

In the matter between:

RALPH
APPOLLIS
First Applicant
VIOLET
MURRAY
Second Applicant
and
BREEDE VALLEY
MUNICIPALITY
First Respondent

EXECUTIVE MAYOR:

BREEDE VALLEY MUNICIPALITY
Second Respondent

MUNICIPAL MANAGER: BREEDE VALLEY MUNICIPALITY
Third Respondent
JARCON INVESTMENTS
(PTY) LTD
Fourth Respondent
This judgment is handed
down electronically by circulation to the parties' legal
representatives' email addresses. The
date of hand-down is
deemed to be 24 March 2025.

JUDGMENT

SLINGERS J

INTRODUCTION

- [1] In November 2021 the first and second applicants' ('the applicants') rights to lawfully occupy the fourth respondent's property were terminated. When the applicants failed to vacate the property at the end of January 2022, in accordance with their undertaking, the fourth respondent instituted eviction proceedings against them out of the Worcester Magistrate's Court. On 19 April 2023 the Worcester Magistrate's Court granted an order of eviction in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ('PIE').
- [2] The applicants appealed against the Worcester Magistrate's Court's decision to the Western Cape High Court. The first respondent was cited as the second respondent in the appeal but, unlike the fourth respondent (cited as the first respondent in the appeal) did not file a Notice to Oppose. On 6 December 2024 the appeal court made a deed of settlement an Order of Court ('the settlement agreement'). The deed of settlement was concluded between the parties in the appeal who were the applicant and the fourth respondent. In terms of the deed of settlement:
- (i) the applicants withdrew their appeal;
 - (ii) the applicants would voluntarily vacate on or before 31 January 2025 and;
 - (iii) in conjunction with the agreement reached between the parties and in conjunction with the Breede Valley Municipality the applicants would take occupation of a plot of land situated at Hammat Pietersen Square in Rawsonville ('the property') as set out the first respondent's report dated 27 November 2024 which was annexed to the deed of settlement.
- [3] The first to third respondents argue that the settlement agreement amounted to an eviction order.

- [4] The applicants were unable to take possession of the property as per the terms of the settlement agreement. Consequently they instituted these proceedings in terms whereof they seek an order directing the first to third respondents to immediately provide and make available to the applicants the property, alternatively an order directing the first to third respondents to provide and make available on an urgent basis any other suitable land in the same vicinity and extent provided for in the Court Order of 6 December 2024 ('the Court Order').
- [5] Not only does the first to third respondents oppose the relief sought by the applicants but they have also instituted a counterapplication wherein they seek an order rescinding the Court Order to the extent that it:
- (i) evicts persons other than the applicants;
 - (ii) evicts the applicants in terms of the PIE; and
 - (iii) directs the first respondent to relocate the applicants.
- [6] Both applications were placed on the urgent roll for Monday, 17 March 2025. However, not only was the record in excess of 500 pages, but the applicants also filed their heads of argument on the day of the hearing. Therefore, the matter was postponed to the urgent roll of Thursday, 20 March 2025.
- [7] The applicant's condonation application for the late filing of its heads of argument was not opposed by any party and was granted. Similarly, no party took issue with the fourth respondent's late filing of its heads of argument.

THE RESCISSION APPLICATION

- [8] I deal firstly with the first to third respondents' rescission application.
- [9] The first to third respondents argue that the Court Order was erroneously granted because it appears that The Extension of Security of Tenure Act, Act 62 of 1997 ('ESTA') was applicable to the applicants' eviction which would have ousted the Hight Court's jurisdiction.
- [10] When the eviction proceedings were conducted in the magistrate's court, the first respondent was cited as a respondent.[1] During those proceedings the applicants raised the point in limine that ESTA was the applicable statute. This argument was not supported and/or endorsed by the first respondent. After hearing the matter the Worcester magistrate's court determined that PIE was the applicable statute and not ESTA.
- [11] When the matter came on appeal to the Western Cape High Court, the first respondent was again cited as a party to the appeal. The applicants abandoned the point in limine and did not pursue the argument that ESTA was the applicable statute. During the appeal proceedings, the first respondent was requested to and complied with the requests to prepare housing reports for the appeal court. At no stage did the first respondent raise the argument that the Western Cape High Court had no jurisdiction as ESTA was the applicable

statute.

- [12] Whether or not PIE or ESTA applied was not a disputed issue which required the adjudication of the appeal court as the finding of the magistrate's court in this regard was no longer challenged by any party cited in the appeal proceedings.
- [13] In its heads of argument, the first to third respondents argue that '... it is unclear whether the Court Order was in fact competent as a matter of law...' If the Court Order was not legally incompetent it should have lodged an appeal against it and not seek to rescind it.
- [14] Consequently, there is no merit to this ground challenging the validity and applicability of the Court Order.
- [15] The second ground on which the first to third respondents seek to rescind the Court Order is that it purportedly seeks to evict persons other than the applicants. During the hearing of the matter this ground was not pursued as it was accepted that no persons other than the applicants would be affected by the Court Order.
- [16] The third ground on which the first to third respondents seek the rescission of the Court Order is that they had not agreed to the specific terms of the Court Order, more specifically, paragraph 2.3.4 thereof which reads that:

'In accordance with the agreement reached between the parties and in conjunction with the Breede Valley Municipality the Wendy House is to be assembled at Hammat Pietersen Square in Rawsonville ('the site') as set out in the Municipal Progress report dated 27th November 2024 and annexed hereto as "RA 1"

[17] The municipal progress report provides that:

'We, the Breede Valley Municipality, hereby wish to report to the Honourable Court on the progress of case number: 694/2022.

Meaningful engagement took place on 24 May 2024 via Microsoft Teams with Mr. W. Wagner for the respondents and Mr. A Tukela for the Appellant.

The Breede Valley Municipality currently has a vacant plot in Rawsonville at Hammat Pietersen Square for the First Appellant and his family, to take immediate occupancy since there has been several attempts from the community and organisations to occupy the vacant plot illegally. Furthermore, we wish to confirm that the Applicant did visit the vacant plot they accepted the offer.

It is therefore our recommendation to advise the Appolis family to move onto the vacant plot as soon as possible.'

- [18] Thus, the settlement agreement did no more than incorporate the first respondent's recommendation contained in its report of 27 November 2024.

[19] The first respondent's report dated 27 November 2024 was preceded by correspondence dated 24 October 2024 wherein it was advised that the applicants were willing to accept the fourth respondent's settlement proposal and to finalise the matter. It was further informed that:

'However, since the matter is before the High Court, any settlement agreed upon has to be confirmed by the court and made an order of Court.

We are therefore required to obtain a report from your office outlining that the municipality has provided and for the occupiers to settle on and the details of such piece of land, i.e.

- Location of the plot
- Size of the plot
- Nature of tenure (temporary emergency accommodation or secure tenure)
- Etc.

Should you wish to sit and discuss this with you further, I will be in the winelands of 29- 31 Oct and would gladly make time to meet with you.'

[20] Thus, the first respondent was expressly informed that its report was required for the purposes of a settlement agreement which would be made an Order of Court. Therefore, while the first respondent may not have been a signatory to the settlement agreement that was made an Order of Court, it was pertinently aware that its report would be used in the final settlement agreement which would be made an Order of Court. In the circumstances its complaint that it was not a signatory to the deed of settlement is disingenuous.

[21] I would be remiss not to mention that at all times the first respondent was cited as a party to the appeal proceedings. If it did not want its report to be incorporated into the settlement agreement it could have elected to actively participate in the appeal by either filing an explanatory affidavit and/or opposing the appeal. It did neither and for all practical purposes elected to abide by the court's decision notwithstanding being informed that its report was required for a settlement agreement that would have to be made an Order of Court.

[22] The first to third respondents also bemoan that they were not:

- (i) advised of the terms of the final settlement agreement;
- (ii) provided with a copy of the final settlement agreement;
- (iii) a party to the final settlement agreement;
- (iv) provided with a draft of the court order before being made final;
- (v) asked to indicate whether it agreed with the terms of the court order before it was made an order of court;

(vi) advised at any point prior to 15 January 2025 that the final settlement agreement had been reached; and

(vii) advised at any point prior to 15 January 2025 that the final settlement agreement had been made an order of court.

[23] They do not set out what their position would have been had they been asked for their input into either the settlement agreement or Court Order. The court is not informed whether they would have objected thereto, and if so, the basis of such objection.

[24] The second and third respondents stand in a different position to the first respondent as they were never before the court in either the lower court proceedings or the appeal proceedings, while the first respondent was at all relevant times a cited party. The first respondent was not cited as a respondent in the court proceedings as an ordinary respondent. On the contrary, it was cited as a result of its constitutional and statutory obligations to provide emergency accommodation to persons who would be rendered

homeless consequent upon the granting of an eviction order. In light of the correspondence exchanged between the applicants and the municipality and the court's requests to the municipality to prepare reports, it had to have been acutely aware of the reasons for and possible consequences of its report dated 27 November. Therefore, while common collegiality would have expected the applicants to furnish the first respondent with both the deed of settlement and the Court Order, nothing prevented the first respondent from requesting to be kept abreast of developments and /or specifically asking for the deed of settlement in respect of which its report was required.

[25] Consequently, there is no merit in the argument that the Court Order should be rescinded on the grounds that the first respondent was neither a signatory to the deed of settlement nor had it agreed to the terms of the Court Order.

[26] In the circumstances, the first to third respondents' counter application to rescind the Court Order of 6 December 2024 is dismissed with costs, which costs shall include the costs of 2 counsel where so employed on scale B.

THE MAIN ACTION

[27] I turn now to the main application wherein the applicants seek an order directing the first to third respondents to comply with the Court Order by directing the first to third respondents to immediately provide and make available to the applicants the land described in the Court Order, alternatively that they provide and make available on an urgent basis any other suitable land in the same vicinity and extent provided for in the Court Order, further alternatively in the event that the Hammat Petersen Square

land or any other land is not made available, the suspension of the execution of the Court Order in terms of Rule 45A until such a time as land for the relocation of the applicants has been made available by the first to third respondents.

- [28] On 15 January 2025, the first respondent was advised in an email that the municipal plot / land provided to accommodate the applicants as a form of alternative accommodation was occupied by unknown person who allege to have been placed on the plot by the municipality. The first respondent was asked to verify the truth hereof, and if so, advise how it intends to rectify the issue. In response to this email, the municipality asked for an indulgence until the 17th January 2025 in order to launch a proper investigation and to provide a correct response. The response came in the form of opposition to the main application and a counterapplication to rescind the Court Order.
- [29] The first respondent states that where open plots in informal settlements become available and promised to a particular party, as in this case, the process is carefully managed so as to ensure that it is not unlawfully occupied by other persons. The court is not told how this process is managed, who manages it and what resources are required to manage it.
- [30] The first respondent reports that it was informed on or about 10 September 2024 of complaints relating to a person who was clearing the Hammat Petersen Square land ('the property') and that it received another complaint on 15 November 2024 pertaining to the potential unlawful occupation of the property. The first respondent duly responded hereto and prevented the unlawful occupation of the property.
- [31] The first to third respondents aver that they are unable to make the property available to the applicants because it has been unlawfully occupied.
- [32] The court is not informed how and when the property came to be unlawfully occupied in light of the first respondent's carefully managed process to prevent unlawful occupation of the land as well as its previous successful interventions to prevent the unlawful occupation thereof. The court is not advised whether the first respondent learnt of the unlawful occupation only when it was informed by the applicants or whether it learnt of it sooner. More importantly, the court is not informed of the steps, if any, the first respondent took to address the unlawful occupation. The regretful approach of the first respondent appeared to be that as the applicants failed to take possession of the property immediately, the first respondent cannot be held accountable if the property is no longer available as a result of unlawful occupation.
- [33] While the court is told that the first respondent does not have unlimited resources that would allow it to constantly patrol all of its properties, particularly over the December holiday period it is not told whether or not any resources were employed in protecting the property in question. The court is not told that the first respondent was unable to prevent the unlawful occupation of the property despite its best efforts or whether it was unable to prevent the unlawful occupation because it failed to take any steps or was unable to take any steps to prevent it. Put differently, the first respondent's explanation does not assist it because it is of such a general nature and does not speak to the specific information relevant to the property.

- [34] Therefore, on the first respondent's own version it appears as if it failed to properly manage its own process to prevent the unlawful occupation of the property and thereafter failed to take any steps to address the unlawful occupation thereof.
- [35] During the hearing of the matter advocate Adikhari for the first to third respondents submitted that the court could not force the first to third respondents to institute eviction proceedings. That may be. However, the first to third respondents are statutorily obligated to maintain, safeguard and manage its assets, which would have included the property. Therefore, they do not have the election not to take active steps against the unlawful encroachment on its assets. A failure to take active steps could render it derelict of its statutorily mandated obligation, in addition to its constitutional obligation to uphold the rule of law.
- [36] In the circumstances, the first to third respondents defence of impossibility cannot be sustained as it appears to have contributed to the factors giving rise thereto.
- [37] The first to third respondents made an offer of alternative accommodation at Spokiesdorp. The applicants sought and was granted an opportunity to file a further affidavit setting out why this offer was not acceptable. Similarly, the first to third respondents were afforded the opportunity of replying thereto. In its supplementary replying affidavit, the first to third respondents take issue with the fact that applicants supplementary affidavit is deposed to by the legal representative and that no confirmatory affidavits have been filed. Therefore, it constitutes impermissible hearsay evidence. While it may constitute hearsay evidence, it is trite that hearsay evidence may be admitted in urgent applications.
- [38] The applicants have rejected the offer of alternative accommodation at Spokiesdorp on the basis that there is a risk of flooding, the area is crime-ridden and unsafe and that it is close to the sewage works and that there is a lack of electricity.
- [39] The first to third respondents concede that the Spokiesdorp plot is in the 100 year floodline. However, it goes on to state that during July 2023 emergency repairs to the riverbank and the construction of an earth berm to prevent future flooding was completed. Further remedial work to prevent flooding is due to commence in March 2025 and is anticipated to be completed within 3 months.
- [40] The first to third respondents concede that there is no electricity in Spokiesdorp but submit that provision would be made for water and sanitation for the applicants. They argue further that Spokiesdorp is a mere 250m away from the property and that the same concerns in respect of crime and health would be equally applicable to the property.
- [41] The property may be 250m away from the offered plot in Spokiesdorp but there is no South African Human Rights Commission investigation and report into the property while there is one in respect of Spokiesdorp which found it to be a health hazard due to its proximity to floodwater and sewage works and which recommended the relocation of residents.

- [42] In the circumstances it cannot be said that the offer of accommodation to Spokiesdorp is a suitable alternative, especially as the applicants have minor children.
- [43] As mentioned above, the second and third respondents are in a different position to the first respondent as they were never parties to the court proceedings either in the court a quo or in the appeal proceedings. Therefore, I am not inclined to make any order against them flowing from the settlement agreement and Court Order.
- [44] Therefore, after considering the papers filed on record and after hearing argument, I make the following order:
- (i) the first to third respondents counter application to rescind the Court Order of 6 December 2024 is dismissed with costs, which costs shall include the costs of 2 counsel where so employed and shall be on scale B.
 - (ii) the applicants' non-compliance with the forms, time periods and service required by the Uniform Rules of Court are condoned and the matter is deemed urgent in terms of Rule 6(12).
 - (iii) it is declared that the first respondent had a constitutional obligation to take reasonable steps to ensure that the applicants' rights to occupy the land described in the settlement agreement made an order of court, per Saldanha, J and Williams, AJ on 06 December 2024, as the vacant plot at Hammat Petersen Square, Rawsonville ('the property') were not infringed upon by unlawful occupiers.
 - (iv) it is declared that the first respondent failed to comply with its obligations as referred to in paragraph 3 of this Order, by failing to take reasonable steps to prevent unlawful occupation of the property and thereafter failing to take urgent and reasonable steps to remedy the said lawful occupation.
 - (v) the first respondent is therefore directed to provide and make available the applicants, within 30 days, of obtaining knowledge of this Order, a suitable vacant plot in the same vicinity, and of comparable size, quality and condition as the property.
 - (vi) the first respondent is directed to report back to this court, in writing, within 30 days of the order of this court, setting out the steps they have taken to give effect to and comply with (v) of this order.
 - (vii) the execution of the Relocation Agreement Order is temporarily suspended in terms of Section 45A of the Rules. Any party may set the matter down on the urgent roll within 10 days of the report referred in paragraph (vi) of this order has been issued.
 - (viii) in respect of the main application, the respondent shall be liable for the cost of the applicant and the fourth respondent, such costs to include the costs of 2 counsel where so employed and shall be on scale B.
- [1] The second and third respondents were not cited as parties in the lower court proceedings nor in the appeal proceedings.

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Prepared on 12 October 2026 · Esheria