

SOUTH AFRICA / JUDGMENT

City of Cape Town v Those persons attempting and/or intending to settle on the erven in District Six the details of which are identified in Annexure A to notice of motion (7349/2021) [2021] ZAWCHC 98 (19 May 2021) [2021] ZAWCHC 98

COURT

Western Cape High Court, Cape Town

BEFORE

J Cloete

CASE / FILE NUMBER

7349/2021

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IN THE HIGH COURT OF
SOUTH AFRICA
(WESTERN CAPE DIVISION,
CAPE TOWN)

Case

No: 7349/2021

In the matter between:

THE CITY OF CAPE
TOWN
Applicant
and
THOSE PERSONS
ATTEMPTING AND/OR INTENDING TO
SETTLE ON THE ERVEN
IN DISTRICT SIX THE DETAILS
OF WHICH ARE IDENTIFIED
IN ANNEXURE A TO NOTICE
OF
MOTION
Respondent
Coram: Justice J Cloete
Heard: 19 May 2021
Delivered: 19 May
2021

JUDGMENT

CLOETE J:

- [1] This the return day of a rule nisi in respect of an interim interdict granted on 1 May 2021, in which the applicant (“the City”) obtained an order, inter alia restraining the respondents from entering or being upon 138 erven in District Six (“the properties”). The details of the properties are described in Annexure “A” to the notice of motion.
- [2] The City owns all of the properties. They are all earmarked in terms of the Restitution of Land Rights Act 22 of 1997 (“the Restitution Act”) for restitution to people who were dispossessed of their land during 1968 when District Six was declared a “whites-only” area under the previous Group Areas Act. Forced removals from District Six resulted in some 60 000 people being removed from the area.
- [3] During 1995 to 1998, the State commenced a process to recognise the restitution claims of former District Six residents. A total of 2 670 claims were submitted by the closing date of the initial lodgement process at the end of 1998. Of these claimants, 1 439 chose financial compensation and the remaining 1 126 chose to return to District Six.
- [4] The first two phases of the process were completed in 2004 and 2012 respectively, and the third phase is meant to conclude during this month, i.e. May 2021. As part of the third phase 108 dwellings were meant to be completed by mid-May 2021, and it was anticipated that the units would be handed over to the qualifying beneficiaries by end May 2021.
- [5] After the third phase is completed, a further 954 approved claimants will need to be accommodated through the remainder of the restitution process. It is anticipated that the restitution process will be completed by 2024 at an estimated total cost of R1.87 billion.
- [6] For as long as the properties remain threatened by unlawful occupation the State’s plans to redevelop the area and realise the rights of the claimants are accordingly at risk. If the properties are unlawfully occupied by the respondents, it will have the effect of halting the process and frustrating the Constitutional imperative of land restitution to those who have been unlawfully deprived of their properties by the apartheid regime.
- [7] Moreover, an unlawful occupation will undermine the rights of the District Six beneficiaries who: (a) suffered atrocities under an oppressive regime, including forced removals; (b) have followed the government-established process for land restitution; and (c) are patiently awaiting their turn in the process despite the length of time it has taken and, in most instances, the conditions of poverty in which they live.

[8] Certain of the properties have already been the subject of unlawful occupation

(“occupied properties”). The City’s case is that it has a real apprehension that persons unlawfully residing on the occupied properties will simply move to the unoccupied ones and that others will also move onto the properties. This has occurred in the past, once development of the occupied properties commenced.

[9] The purpose of the final interdict sought is to prevent the further unlawful

occupation of the occupied properties, and to prevent the unlawful occupation of the unoccupied properties. At present, approximately

28 tents and 1 wood and zinc structure are on erven 115718, 115734 and 115717 which are situate on the corner of Hanover and Constitution Streets, District Six (“Hanover Street property”). In addition, erf 9933 is being used as a base upon which building materials are being placed unlawfully.

[10] On the evening of 20 March 2021 a group of persons unlawfully occupied the Hanover Street property which at that stage was vacant. On 21 March 2021 the City’s Anti-Land Invasion Unit (“ALIU”) ascertained that 6 tents had been unlawfully erected there. The City was unable to prevent that occupation, since by the time its officials were notified those occupiers had already established their tents.

[11] The City’s mayoral committee member for housing (Councillor Booï) and officials from the Western Cape Provincial Government met with the unlawful occupiers on 24 March 2021 to discuss their demands for housing. During this meeting the occupiers made clear that their occupation was an attempt to get around the lawful housing allocation process. By 31 March 2021 the number of tents on the Hanover Street property had increased to 28.

[12] The City attempted to prevent further unlawful occupation of that property as well as other properties. It put in place an Operational Plan which entailed:

- (a) deployment of 6 law enforcement officers, 2 Metro Police officers and 2 traffic officers to patrol the area on a 24-hour basis; (b) the installation of a law enforcement caravan at the area adjacent to the Hanover Street property to act as a contact point for the law enforcement officers and to co-ordinate all reports from them; (c) daily patrols by the City’s Displaced Persons Unit (“DPU”) for 2 hours every morning and 2 hours every evening, of all the properties; (d) CCTV monitoring of the area as an early warning system to allow for the allocation of resources for any potential unlawful land occupations; and (e) an immediate response/reaction team.

[13] Despite these measures, on 27 April 2021 at approximately 09h50, about 80 persons

arrived at the Hanover Street property (identifying themselves as members of a group called “Heideveld United”), and met with the existing unlawful occupiers. They told them that they should stay in occupation of that property until the City provided them with “decent housing” and the Mayor and Councillor Booï had agreed to meet with them. By 10h26 most of the

Heideveld United group had left, with only a few remaining. However at 12h20 a large group of approximately 150 people (consisting of mostly women and children) who seemed to be associated with Heideveld United, arrived at the Hanover Street property, accompanied by two light delivery vehicles loaded with building materials.

[14] City law enforcement officials approached the drivers of the vehicles, who told them they had been paid R150 to deliver materials. The drivers left voluntarily. However during this exchange with the drivers, the

respondents took the opportunity to erect a wooden structure on the Hanover Street property. The City officials tried to engage with them. However they refused and used women and children to block the access of City officials to that property.

[15] At this point, the crowd became agitated and were chanting and moving ever closer to where the City law enforcement officers were stationed. As a result, a decision was taken to stand down in order to call in the Metro Police Tactical Response Unit (“TRU”) and the SAPS Public Order Policing Unit (“POPS”).

[16] At about 12h30, when the crowd had calmed down slightly, the City law enforcement officials

again tried to engage with the respondents and advised them to stop erecting the structure that they were in the process of putting up. Despite these further attempts to engage with them, the group managed to erect four sides of the structure. The ALIU arrived at about 13h00, by which time the structure had largely been erected but was not complete. The occupiers allowed the ALIU to access the site to investigate. It was observed that the structure, although incomplete, was occupied by an elderly woman and a number of children. She stated that she was now residing there with the children, and the structure contained personal belongings and cooking equipment. It was thus assessed as being occupied and accordingly subject to the provisions of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 18 of 1988 (“PIE”).

[17] The occupiers and members of the crowd refused to identify themselves to City officials, save to state that they were backyard dwellers from various areas of the city and they wanted to meet with senior City officials. For the next two days the officials continued to patrol the properties, in particular the Hanover Street property.

[18] On 29 April 2021 there was a further attempt to occupy the Hanover Street property by a large group of persons who brought more building materials. The City correctly states that this is a clear indication of an intention for more people to unlawfully occupy that property.

[19] On 30 April 2021 the City received information that a group of approximately 50 people

from Delft intended to take occupation of that property and/or other properties. A number of law enforcement officials were despatched and their presence averted the attempt once the drivers of the vehicles loaded with building materials spotted the officials. It was as a result of these events that the City approached court for urgent interim interdictory relief which was granted on 1 May 2021.

[20] The rule nisi (interim interdict) was properly served on the respondents in accordance with the service provisions contained in that order. Certain persons have requested and been provided with copies of the papers. No notice of intention to oppose has been delivered, but Mr Jassiem Johnson and Ms Sharief Nolan, representing both the occupiers and those intending to occupy, appeared in person at the hearing. In their address to the court their attitude is that they have equal rights to District Six but neither they (nor the other unlawful occupiers) have yet qualified to move lawfully onto the property in terms of the restitution process. It was explained to Mr Johnson and Ms Nolan that the relief sought by the City in this application does not pertain to those who are already in unlawful occupation, and both confirmed that they understood.

[21] In order for the City to obtain a final interdict it must establish: (a) a clear

right to the relief sought; (b) an injury actually committed or reasonably apprehended; and (c) the absence of any other

satisfactory remedy available to it.[1] To this it must be added that where a wrongful act has already occurred it must be of a continuing nature or there must be a reasonable apprehension that it will be repeated.[2] Whether or not the apprehension is a reasonable one is a factual, objective inquiry.[3]

[22] On the facts of this matter, I am persuaded that the City has demonstrated a clear right to the relief sought. First, it is the owner of the properties. It has the right to ensure that no unlawful conduct occurs thereon and that it can utilise the properties in the manner intended, i.e. for land restitution purposes. Second, it is entitled to secure this objective through the courts. Third, it is obliged in law to take all steps necessary to protect the properties in order to ensure that the restitution process is not frustrated in light of its Constitutional obligation to do so, as well as the relevant legislation including the Restitution Act. If allowed to continue the respondents are likely to slow down or bring the restitution process to a halt. This will deprive persons, who are the lawful beneficiaries of land claims, to the properties. Fourth, and very importantly, even though the respondents may have complaints in respect of the manner in which the City is delivering housing, they are not entitled to take the law into their own hands.

[23] This has been confirmed repeatedly by our courts, including the Constitutional Court which has stated that:[4]

‘The issues here remind us of the intolerable conditions under which many of our people are still living. The respondents are but a fraction of them. It is also a reminder that, unless the plight of these communities is alleviated, people may be tempted to take the law into their own hands in order to escape these conditions. The case brings home the harsh reality that the Constitution’s promise of dignity and equality for all remains for many a distant dream. People should not be impelled by intolerable living conditions to resort to land invasions. Self-help of this nature cannot be tolerated, for the unavailability of land suitable for housing development is a key factor in the fight against the country’s housing shortage.’

[24] This was stated in a judgment of the Constitutional Court on 4 October 2000, almost

21 years ago. The reality for many people in this country is no better than it was then. However to allow persons deeply frustrated

by their living conditions to take the law into their own hands and in the process, deprive others who themselves live in appalling

conditions but have followed due legal process, cannot be allowed.

[25] In our constitutional democracy, rights come with responsibilities. For the respondents to use women and children to attempt to achieve their personal goals is shocking. One can only imagine the trauma that those children have been subjected to and one does not know whether the elderly woman who is now caring for the children on the property has herself been subjected to threats and intimidation and left without a voice. Moreover there are no services at the property which is being

unlawfully occupied and the conditions are exposing them to disease.

[26] It is also not the case that the respondents have no other recourse. Their recourse lies through the courts to deal with the issue by lawful means. There are organisations which assist persons in the position of the

respondents, including lawyers. Mr Johnson confirmed that he has approached the Legal Resources Centre for assistance. The City

interacts with many of these organisations on a regular basis, and I have little doubt that if the respondents were to request the details of the other organisations, the City would provide them. It will also assist the City in meaningful and positive engagement with persons such as the respondents, although the City has no obligation in law to engage meaningfully with those who use land invasions to secure a tactical advantage. The obligation only extends to those falling under PIE.

[27] The facts have also established that there is a reasonable apprehension of irreparable

harm if the threat of unlawful occupation of the properties remains alive. To date at least three of the properties (being those that form the Hanover Street property) have already been unlawfully occupied. It is apparent from the events of 30 April 2021 that another group of people from Delft are intent on occupying the properties. The fact that the City was granted an interim interdict demonstrates that, despite its own attempts to manage the situation in a peaceful and lawful manner, it was met with resistance. The rights of the lawful District Six claimants must also be protected. It is a reality that the City does not have the resources to patrol the properties constantly. Moreover, given the mobile nature of the communities it will be extremely difficult to detect where people are setting up tents and/or makeshift structures.

[28] The City points out that this is not the only land invasion with which it is currently confronted. Unlawful land occupations in the City Metropolitan area have increased since the start of lockdown in March 2020. By way of example, on one day alone, multiple occupations took place in ten different areas at the same time. The City simply does not have the capacity or resources to manage more large-scale, ongoing land occupations. It is self-evident that the ALIU cannot possibly patrol the entire District Six area constantly, while also responding to the approximately 16 land invasion hotspot areas in the City.

[29] In light of the competing demands on the City's limited resources to manage unlawful occupations, coupled with the sheer amount of attempts to unlawfully occupy, I am persuaded that there is a real and definite risk that the District Six properties will be lost to unlawful occupations without a final interdict. To this it must be added that, without a court order, those unlawfully residing on the occupied District Six properties may simply move to the unoccupied properties. Put differently, it is not merely the Hanover Street property which is under threat, but all of the properties in that area. The effect, if these unlawful invasions are permitted to continue, is that the District Six claimants will be dispossessed for a second time. The only difference is that this time around it will be as a result of the unlawful actions of their fellow citizens and not the disgraceful apartheid regime.

[30] For all of these reasons I am also persuaded that the City has no alternative satisfactory remedy, since it has no other remedy which is: (a) adequate in the circumstances; (b) ordinary and reasonable; (c) lawful;

and (d) affords similar protection.[5] It is unrealistic for the City to content itself with subsequent eviction proceedings for new land invaders. In any event, given the Disaster Management Regulations[6] which prohibit evictions for the duration of the National State of Disaster (unless a court orders otherwise after consideration of a number of factors), the reality is that, for the foreseeable future, the eviction of those currently occupying as well as those intending to unlawfully occupy will be extremely unlikely.

[31] I thus make the order annexed marked "X".

J I CLOETE

IN THE HIGH COURT OF SOUTH AFRICA

“X”

(WESTERN CAPE DIVISION, CAPE TOWN)

Before the Honourable Justice Cloete

Cape Town: Wednesday, 19 May 2021

Case No: 7349/2021

In the matter between:

THE CITY OF CAPE TOWN Applicant and THOSE PERSONS ATTEMPTING AND/OR INTENDING TO SETTLE ON THE ERVEN IN DISTRICT SIX THE DETAILS OF WHICH ARE IDENTIFIED IN ANNEXURE A TO NOTICE OF MOTION Respondent

ORDER

HAVING READ THE PAPERS FILED OF RECORD, HAVING HEARD COUNSEL FOR THE APPLICANT AND THE RESPONDENTS AND/OR THEIR REPRESENTATIVES IN PERSON:

IT IS ORDERED THAT -

1. Subject to paragraph 4 of this Order, the Rule Nisi issued by this Court on 1 May 2021, is confirmed and an order is issued, subject to paragraph 4 hereof, in the following terms:

1.1. Interdicting and restraining the Respondents from:

1.1.1. Entering or being upon the Erven identified in Annexure A hereto (i.e. the same Erven annexed to the Notice of Motion) - "the Properties"

- for the purposes of unlawfully occupying or invading the Properties; and/or

1.1.2. Erecting, completing or extending any structure on the Properties; and/or

1.1.3. Occupying any vacant structures on the Properties; and/or

1.1.4. Intimidating, threatening, harassing or assaulting or in any way interfering with the Applicant's officials, Councillors or any persons acting on their behalf or involved with law enforcement at the Properties.

1.2. The Sheriff and /or the Applicant assisted in so far as needs be, by the members of the South African Police Service, are authorised to give effect to the provisions of this Order by:

1.2.1. Immediately removing any person found to be in contravention of this Order;

1.2.2. Demolishing any incomplete structure that is not occupied and is erected on the Properties after the granting of this Order;

1.2.3. Removing any possessions found at or near such structures including any building materials, which possessions and / or building materials shall be kept in safe custody for one week by the Applicant until released to the lawful owner; and

1.2.4. To take all reasonable steps in order to give effect to this Order.

2. Service of this order shall be effected in the following manner on the Respondents:

2.1. By the sheriff and/or Applicant and /or South African Police Services attending at the Properties and serving a copy of the Order in the following manner:

2.1.1. By reading aloud in English, Afrikaans and isiXhosa the contents of this Order by a loudhailer at the Properties;

2.1.2. By placing copies of the Order of this Court at visible and prominent places that are accessible to the Properties, and would reasonably come to the attention of the Respondents.

3. This Order shall be served on the South African Police Service at the nearest police station having jurisdiction over this area.

4. This Order shall not be construed as an eviction order. It shall not entitle the Applicant to demolish any occupied structures as at the date of this order or to use the provisions of this order for purposes of evicting occupiers from the property under the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998.

5. No order is made as to costs.

BY ORDER OF THE COURT

COURT REGISTRAR

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[1] Setlogelo v Setlogelo 1914 AD 221.

[2] NCSPCA v Openshaw [2008] ZASCA 78; 2008 (5) SA 339 (SCA) at para [20].

[3] Minister of Law and Order v Nordien 1987 (2) SA 894 (A) at 896G-I.

[4] Government of the RSA and Others v Grootboom and Others 2001 (1) SA 46 (CC) at para [2].

[5] LAWSA Vol 11 para 312 and the cases cited therein.

[6] Alert level 1 during Coronavirus Covid-19 lockdown effective 1 March 2021 (GG 44201 of 28 February 2021, adjusted by GG 44367 of 30 March 2021 and GG 44485 of 22 April 2021).

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