

SOUTH AFRICA / JUDGMENT

Ego Gardens (Pty) Ltd and Others v Minister of Police and Others (19186/2018) [2018] ZAGPPHC 158 (30 March 2018) [2018] ZAGPPHC 158

COURT

North Gauteng High Court, Pretoria

BEFORE

MIA

CASE / FILE NUMBER

19186/2018

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IN

THE HIGH COURT OF SOUTH AFRICA,

GAUTENG

DIVISION, PRETORIA

CASE

NO: 19186/2018

NOT

REPORTABLE

NOT

OF INTEREST TO OTHER JUDGES

REVISED

In

the matter between:

EGO
GARDENS PTY
LTD
1ST Applicant
HUNTING
LIVIN (PTY) LTD
2ND APPLICANT
MARLIN
SPLIT
CC
3RD APPLICANT
VINIT
PROP (PTY) LTD
4TH APPLICANT
SWITZERLANDVILLE

CC
5TH APPLICANT
VIRGO
CONNECTION
CC
6TH APPLICANT
And
MINISTER
OF
POLICE
1ST RESPONDENT
PROVINCIAL
COMMISSIONER OF POLICE
GAUTENG
2ND RESPONDENT
THE
STATION COMMANDER
OLIVENHOUTBOSCH
SAPS
3RD RESPONDENT
CITY
OF
TSHWANE
4TH RESPONDENT
UNLAWFUL
TRESPASSERS OF FAR,
OLIVENHOUTBOSCH
389
5TH RESPONDENT

JUDGMENT

MIA, AJ

INTRODUCTION

[1] The applicants seek relief on an urgent basis as follows:

4. That the 1st _3rd Respondents are ordered to:

4.1 Provide the Applicants with the following services:

4.1.1 The name of the designated police officer of the Public Order Policing Unit who the Applicants can contact when faced with a situation of public violence

4.1.2 The telephone number of the said police officer;

4.1.3 The immediate response by the Public Order Police to any complaint made by the Applicants at or near their properties in Olievenhoutbosch;

4.1.4 The name of the designated police officer of the Olivien hout bosch SAPS who the Applicants can contact when faced with a situation of public violence, trespass or intimidation to its property or representatives;

4.1.5 The telephone number of the said police official, and

4.1.6 The immediate deployment by the Olievenhoutbosch SAPS to attend at the property of the applicants on receipt of a complaint by the Applicants of any of the offences listed in 4.1.4 above.

5. That the 1s_t 4t h respondents, duly assisted by the Sheriff in so

far as needs be, as well as the members of the South African Police Services, are ordered to:

5.1 Forthwith remove any person found to be in breach of this order;

5.2 Removing any pegs, markings or structures erected on the premises;

6. The 5t h Respondents are interdicted from:

6.1 Entering upon Portions 81, 82, 85, 86, 87(Portion of Portion 4) and remaining Portion of Portion 4 of the farm Olievenhoutbosch 389 Registration Division JR of the Province of Gauteng for the purpose of unlawfully occupying or invading the property.

6.2 Erecting, completing and/ or occupying any structure on the property.

6.3 Intimidating, harassing, assaulting or in any way interfering with the Applicants representatives/agents.

6.4 Inciting or encouraging other persons to settle on the property or to erect structures on the property for the purposes of unlawfully occupying or invading the property or erecting any structures on the property;

6.5 Occupying the property in any manner.

7. The orders in 6 above shall operate with immediate effect.

8. The orders in (6) above shall operate as a rule nisi and the 5t h Respondent is called upon to attend at this honourable court on 24 April 2018 at 10hOO or so soon thereafter as this matter may be heard to show cause why the rule in (6) above should not be confirmed and why the 5th Respondent should not be ordered to pay the costs of this application jointly and severally, with the other Respondents , the one paying the other/s to be absolved.

9. Further and or alternative relief.

- [2] The application was opposed by all respondents except the fifth respondent on whom there has been no service. The applicants are all either companies or close corporations with properties located in the Olievenhoutbosch area. The properties are adjacent to each other and presently is undeveloped land intended for town planning and development. The area is surrounded by residential areas including a school, shops and business districts, however the land in question and the subject of this application is unfenced.
- [3] The trigger event which caused the launch of these proceedings is an incident which occurred on 9 March 2018. Mr Mahomed one of the businessman and property owners was called to the property as a large crowd had gathered close to the properties. Upon his arrival he found an Independent Electoral Commission (IEC) tent erected close to the property as well as tents of various political parties. There was also a large crowd estimated at one thousand persons on the properties. A small group persons were demarcating stand size portions of land and pegging them off. He approached them and enquired why the land was being pegged off and was met with the response that the land was being expropriated without compensation to be distributed to individuals. He was met with aggression and was threatened with arm.
- [4] He approached the observers at the IEC tent who informed him the group intended giving the land to person they invited to register. The persons who were to be the recipients of the land were person who had arrived in luxury vehicles which included Audi and Mercedes Benz motor vehicles. He concluded that the event was a land invasion and approached the local police station at Olievenhoutbosch for assistance to remove the trespassers. The police were unresponsive and refused to open a docket. He again approached the police on the evening of the 10 March 2018 when he succeeded in laying charges of intimidation and trespassing. The police however refused to attend on the premises to stop the trespassers or remove them from the premises.
- [5] Mr Omar prefaced his submission by referring to *Setlogelo v Setlogelo* 01914 AD 221 and contending that the applicants had a clear right to have their property rights protected. He referred to the three tiers of government namely the executive, the legislative which he termed the bureaucrats and the judiciary and submitted that the applicants were forced to approach the third tier in the face of the refusal of police to act to assist the applicants. He referred to the National Instruction 7 of 2017 distributed to the third respondent and to police station commanders throughout South Africa. The National Instruction defines trespassers and unlawful occupiers and gives directives as to how the police are to deal with such persons.

- [6] The National Instruction describes a trespasser as "someone who enters land without the permission of the owner" and requires that "3(d) Trespassers must be arrested as soon as possible by members of the Service after a complaint of trespassing is lodged and must be brought before court." Clause 4 of the National Instruction provides Practical guidance for operational commanders which is instructive and detailed in its instructions
- [7] Mr Omar submitted that the police failed to act in accordance with the National Instruction but failed to provide assistance and information subsequently which has prompted the applicants to approach this Court for the relief requested above. He submitted that throughout the National Instruction the tenor is to deal with instances of trespassing and unlawful occupation "as soon as possible" or "within the shortest period possible" or "the member must act immediately to ensure the complaint is attended to". The first to third respondents have complete disregard for the National Instruction and continue with a sense of impunity and blame their inaction on names not being provided of trespassers and because the title deeds of owners have not been provided. In refusing to proceed to the scene upon receipt of a complaint the first to third respondent disregard clause 4 of the National Instruction and the Practical Guidance for operational commanders.
- [8] Ms Maiti appearing for the first to third respondents submitted that the applicant had not made out a case for urgency. The matter had appeared previously before Pretorius J and thirteen days had passed since there was no urgency and the relief sought was not competent for various reasons. The request for details of the Public Order Policing Unit was not available as there was not a dedicated unit at Olievenhoutbosch. This unit was based elsewhere. The Olievenhoutbosch branch would assess the position and then sent a request for a team to be sent out to the area. It was thus not possible to furnish this detail. There was no particular person tasked with this duty thus a particular persons name could not be furnished either. All the relief afforded was dependant on the resources of the local police. The police effecting an arrest was dependant on the persons being identified and the persons were not identified by the complainants. She submitted that the application was premature. The applicants lacked locus standi and consequently they should bear the costs of the application.
- [9] Mr Bokaba appearing on behalf of the fourth respondent submitted that the reference to the third respondent was a typographical error. He submitted further that the fourth respondent had no obligation to prevent trespassing. This was an obligation of the first to third respondents . The applicant was misguided in its reliance on the Modderklip decision as that decision referred to unlawful occupation whilst the present matter referred to trespassing . He also took issue with what he termed the irrational nature of the relief.
- [10] Mr Bokaba made reference to widespread land invasion taking place throughout the country. This he submitted was regulated by the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, No. 19 of 1998 (PIE). PIE also indicated the circumstances under which a municipality ought to assist. This does not refer to instances where there is trespassing. This is an issue that falls within the criminal domain. The applicants' indicate

there is a threat of occupation, however there is no occupation as yet. He submitted that it was the prerogative of the landowner to take all steps to protect its property and referred to the decision in *Mkontwana v Nelson Mandela Metropolitan Municipality and Another, Bisset and Others v Buffalo City Municipality and Others*, Transfer

Rights Action Campaign and others v MEG, Local Government and Housing, Gauteng, and Others (KwazuluNatal Law Society and Msunduzi

Municipality as amicus curiae) 2005(1) SA 530 CC at para 59 where the Court per Yacoob said:

" This unlawful occupation benefits neither the property nor the owner and, in most cases, is prejudicial to both. It is nevertheless the duty of the owner to safeguard the property, to take reasonable steps to ensure that it is not unlawfully occupied and, if it is, to take reasonable steps to ensure the eviction of the occupier. If the owner performs these duties diligently, unlawful occupiers will not, in the ordinary course, remain on the property for a long period. It is ordinarily not the municipality but the owner who has the power to take steps to resolve a problem arising out of unlawful occupation of her property. It is accordingly not unreasonable to expect the owner to bear the risk."

[11] He referred to *JR 209 Investments Pty v Tshwane and The City of Tshwane Metropolitan Municipality and Others* A 204/16 which was similar to the present matter. It raised the issue whether the municipality and police bore the responsibility to assist persons such as the applicants. The court held that the municipality bore no such responsibility and that such obligation was only triggered after an occupation occurred. This was not the case in the present matter. He submitted further that the present fact were distinguishable from the *Modderklip* matter in that there was already an occupation of land and the court found in *Modderklip* that there was an obligation to provide accommodation and the municipality failed to provide accommodation to residents who were in need. The persons being offered land in exchange for registration as voter were persons who were not persons in need when regard is had to the luxury vehicles driven.

[12] Mr Bokaba also highlighted that the fifth respondents were not served and it would thus be impractical to make any order against them. They were a nameless and faceless group. In this regard he referred to *City of Cape Town v Yawa and Others* 2004(2) All SA 281 (C), the Court held at p 280 H

"it was already unlawful for person to occupy the property in question without the consent of the owner, in terms of the Trespass Act 6 of 1959, and there was therefore no purpose to granting the order. Nor was there any precedent for an order enjoining the public at large to obey the law"

The difficulty with an order against such a group is described at p 283H

"How ever it seems to me there is a much more fundamental problem with this aspect of the application. The person who comprise or might comprise the twentieth respondent, namely persons intending to unlawfully to occupy the erf, are not in any real sense an ascertainable group. In this instance there is not an "identified or identifiable group of person who are properly before court and against whom an effective order can be made" (Monwood paragraph

- 15) There is no prospect they will be identified during the course of the proceedings, as happened in the *Communicare* case(supra). The identity of the members of the twentieth respondent will change from day to day. Some of those currently intending to occupy the land may decide not to do so. Some people, who today have no intention to occupy the land, may subsequently decide to do so."
- [13] Mr Omar submitted in reply that the National Instruction spoke to urgency and yet the first to third respondent avoided dealing with the issue of trespassing and land invasion per the National Instruction. The fourth respondent come to court and say a crim is committed due to lack of housing and request that the court takes notice of the widespread land invasion yet protest that they have no obligation in this matter and the court should make no order against them. He invited the Court to adopt a proactive approach in the matter and to hold the municipality accountable by ordering them to take action in the matter and to address the needs of the *Olievenhoutbosch* community to the extent that they were homeless and were trespassing and required accommodation. He requested relief as prayed for in the Notice of Motion and invited and requested that the respondents be ordered to pay the costs jointly and severally.
- [14] The property which the applicants seek to protect is unfenced undeveloped land in relation to the partially developed community surrounding it. On the first to third respondents' versions the *Olievenhoutbosch* Police Station is not fully resourced to have a Public Order Police Unit stationed at in *Olievenhoutbosch*. They sent out an officer to assess the situation and call a team out if necessary. The relief requested in this regard is thus not practical. The National Instruction is applicable to all police officers and there is no indication that one officer is delegated to attend to trespassing matters similarly the relief requested to provide the name of one police officer would not serve any constructive purpose other than to place an undue burden on one individual for a responsibility which all serving police officers at *Olievenhoutbosch* ought to bear.
- [15] The request for an order for the immediate dispatch of the Public Order Police has logistical implication having regard to the manner in which they are called out. The land in question in private property and there is nothing which prevents the applicants from taking reasonable steps as indicated in *Mkontwana* supra where the Court per Yacoob J stated:

"It is nevertheless the duty of the owner to safeguard the property, to take reasonable steps to ensure that it is not unlawfully occupied" The same steps could be taken to ensure it were not trespassed upon. The effect of the order sought should however have the impact of redirecting the first to third respondents' resources to protecting the unfenced undeveloped land of the

applicants in the face of limited resources in the community. The South African Police may react per the National Instruction and pursue and matters in terms of the Trespass Act and similar legislation referred to in the National Instruction. It is not required that a court order be issued to compel the police to what is required. I recognise the constraints and limitations of resources of the police who cannot be in all places at all times. I must recognise that there are processes to hold them accountable. I consider this too against the resources of the applicants and the steps they have taken to secure the undeveloped land.

[16] The relief sought against the fifth respondent is fundamentally problematic for the same reasons set out in *City of Cape Town v Yawa and Others* 2004(2) All SA 281 281 (C), at 283. In the present matter the applicants refer to political parties present but fail to identify which political parties or cited them in the proceedings if indeed they were a part of the group pegging off land to distribute. The persons with vehicle could be identified by their vehicles. A nameless faceless group is too vague and is not an identifiable group of persons who are properly before court and against whom an effective order can be made.

[17] The citation of the municipality is premature in the proceedings. In this matter the second respondent has no general obligation to prevent trespassing or unlawful occupation of the property. If this were the position, it would have to devote resources to take preventative measures. The order is not tenable and the obligation of the municipality would only arise once there was an occupation and the municipality's obligations in terms of PIE were triggered.

[18] The only issue which remains to be determined is the issue of costs and whilst costs often follow the cause it remains within the discretion of the court. In the present matter the applicants approached this court in order to pursue a constitutional right namely to protect their property and to secure an order where they have been aggrieved that the state through the police have not fulfilled their constitutional and statutory obligations. Their requests for assistance were ignored initially. The police proffer the poor explanation that trespassers cannot be prosecuted because identities cannot be secured. The police failed to respond timeously to applicants. The issue of the names of investigating officers is still to be resolved and I am loathe to make an order that the police disclose such names where such a case has not been made out on the papers.

[19] In *Biowatch Trust v Registrar Genetic Resources and Others* 2009

(10) BCLR 1014 (CC) at para [56] the Court states:

"I conclude, then, that the general point of departure in a matter where the state is shown to have failed to fulfil its constitutional

and statutory obligations, and where different private parties are affected, should be as follows: the state should bear the costs of litigants who have been successful against it, and ordinarily there should be no costs orders against any private litigants who have become involved. This approach locates the risk for costs at the correct door at the end of the day, it was the state that had control over its conduct.

In view of the above I am of the view that each party should pay its own costs.

ORDER

[20] For the above reason the following order is made:

1. The application is dismissed.
2. Each party shall pay its own costs

S C MIA

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

Appearances:

On behalf of the applicant

Adv Omar

Instructed by

Zehir Omar Attorneys

On behalf of the 1st , 2nd and 3rd Respondents Adv L M Maite

Instructed by

State Attorney

On behalf of the 4th Respondent

Adv K T Bokaba

Instructed by

D.K Siwela Inc.

Attorneys

Date of hearing

27 March 2018

Date of judgment

30 March 2018

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