

SOUTH AFRICA / JUDGMENT

For Real Chicks (Pty) Ltd and Another v Mount Carmel Farms (Pty) Ltd and Others (2021/47326) [2025] ZAGPJHC 15 (16 January 2025) [2025] ZAGPJHC 15

COURT

South Gauteng High Court, Johannesburg

BEFORE

D J Wilson

CASE / FILE NUMBER

2021/47326

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

LOCAL DIVISION, JOHANNESBURG)

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED.

SIGNATURE

DATE: 16 January 2025

Case

No. 2021/47326

In the matter between:

FOR
REAL CHICKS (PTY) LTD
First
Applicant
DEMETER
WINGS (PTY) LTD
Second
Applicant
and
MOUNT
CARMEL FARMS (PTY) LTD
First
Respondent
CITY
OF EKURHULENI
METROPOLITAN
MUNICIPALITY
Second
Respondent
MEC
FOR AGRICULTURE, RURAL DEVELOPMENT
AND
LAND REFORM, GAUTENG
Third
Respondent
MINISTER
FOR THE ENVIRONMENT, FORESTRY
AND
FISHERIES
Fourth
Respondent
MINISTER
OF WATER AND SANITATION
Fifth
Respondent
MEC
FOR HUMAN SETTLEMENTS, GAUTENG
Sixth
Respondent

JUDGMENT

WILSON J:

1 The applicants own land in Elandsfontein, near Kempton Park. Their land is immediately adjacent to a farm owned by the first respondent, Mount Carmel. There is a substantial informal settlement on Mount Carmel's property. It is not presently known exactly how many people live in the informal settlement, but the applicants say that there were at least 162 structures present on the property

in 2015. That number had grown to 269 structures by February 2020. The second respondent, the Ekurhuleni Municipality, says that there were at least 126 households living on the property in December 2021. That figure was based on what the Municipality refers to as an "audit" of the property that is, apparently, only 70% complete.

2 The Mount Carmel property originally housed nothing more than an abandoned farmhouse and a dumpsite. The property has been occupied

since 2011, apparently without Mount Carmel's consent, and against its will – although I am not convinced that Mount

Carmel made much of an effort to stop the occupation. The Municipality says that those of the residents of the informal settlement who are employed work on neighbouring farms, and that they earn an average of R4200 per month from doing so. The land does not appear to have been prepared for residential occupation. There are few if any services on the property. At least some of the residents

are forced to wash themselves and launder their clothes in a stream that runs through it.

3 The applicants regard the informal settlement as a nuisance. They point to what they say are the clear health and environmental hazards posed by a large number of people living without basic services in such close proximity to their land. In their founding

affidavit, the applicants complain that the residents of the informal settlement regularly trespass on their property, sometimes using dogs to hunt there. The applicants emphasise what they say are the consequent risks of "rabies and other diseases" being spread by that activity. They say that the noise emanating from the informal settlement is "extreme" over weekends, and that "crime ha[s] increased exponentially" as a result of the informal settlement's occupation.

The relief sought before me

4 Aggrieved, the applicants instituted a two part application in this court. In their "first order prayed", the applicants

ask for three declarations. First, the applicants ask that I declare that the "establishment of a township" on the Mount Carmel property contravenes both the Spatial Planning and Land Use Management Act 16 of 2013 ("SPLUMA") and the

Municipality's own Spatial Planning and Land Use Management by-laws. Second, they ask for a declaration that the structures

erected on the Mount Carmel property contravene the National Building Regulations and Building Standards Act 103 of 1997 (“the

NBRA”). Thirdly, they ask for declaration that the structures were erected in contravention of the National Environmental

Management Act 107 of 1998 (“NEMA”), of the regulations promulgated under it, and, of the right to an environment that is not harmful to their health or well-being, enshrined in section 24 of the Constitution, 1996.

5 The applicants also seek an order directing Mount Carmel, the Municipality and the sixth respondent, the MEC, to compile a list of

the names of the residents of the informal settlement, together with further information concerning the residents’ relationships to each other, their nationalities and their immigration status. The applicants also seek an order directing the Municipality and the MEC to file a report addressing availability of alternative accommodation to the residents of the informal settlement.

6 Furthermore, the applicants ask for an order interdicting and restraining Mount Carmel from “allowing additional occupiers to take occupation” of its property, to “take steps to prevent pollution” of water on the applicants’ property,

and to file a report setting out the steps it intends to take to achieve that objective.

7 In the second part of their application - the “second order prayed” – the applicants seek an order directing Mount Carmel and the Municipality to demolish the informal settlement, to provide alternative accommodation to those residents of the informal settlement who would be rendered homeless by the demolition, and to interdict and restrain the Municipality and the fourth respondent, the Minister, from granting permission to establish a township on Mount Carmel’s property.

The relief sought is incompetent

8 Only the “first order prayed” is before me. None of it can be granted for at least the following reasons.

Non-joinder

9 In the first place, none of the residents of the informal settlement on Mount Carmel’s land has been joined to these proceedings. This is despite the fact that the applicants seek final relief which clearly affects the residents’ interests. Far-reaching final declaratory orders are sought in relation to which the residents must be given a reasonable opportunity to be heard. I am also asked to authorise a highly invasive form of census, which will see the residents being asked to disclose a wide range of personal information. None of this relief can be granted without the residents being joined to the proceedings and heard in relation to the relief, should they wish to be so heard.

10 Mr. Roberts, who appeared together with Ms. Roberts for the applicants, was unable to submit that the residents of the informal settlement did not have a direct and substantial interest in the “first order prayed”. He instead submitted that the

residents could not be joined to the proceedings because nobody can say who they were. He followed that submission up with the

proposition that the relief sought in the “first order prayed” is so obviously meritorious as to be incapable of dispute.

11 Mr. Roberts was wrong to submit that there was no way of joining the residents of the informal settlement to these proceedings. The applicants know that they seek relief in respect of all of the occupiers of Mount Carmel’s property. They need only have identified and joined the residents in that capacity. The practice of citing all of the residents of a particular property, usually in eviction proceedings, is so well-known that I have some difficulty in accepting that this did not occur to the applicants. Be

that as it may, the applicants were plainly in a position to identify the residents of the informal settlement with sufficient

particularity to make them parties to these proceedings.

12 I was, in addition, constrained to point out to Mr. Roberts that the compulsory practice of joining all directly and substantially interested parties to a lawsuit applies even to apparently unlosable cases. What matters is not the strength of the applicants’ case, but the fact that the relief sought will directly affect the rights of others. For the reasons I have given, the relief the applicants seek plainly directly affects the rights of the residents of Mount Carmel’s property, who ought to have been joined from the outset.

No prima facie right to the second order prayed

13 Mr. Roberts submitted that the relief sought in the “first order prayed” is merely preparatory to the relief being sought

in the “second order prayed”. The “second order prayed” is essentially an eviction order. Accepting for a moment that the “first order prayed” really is no more than interim relief pending the determination of the “second

order prayed”, it is trite that I cannot grant it unless I am satisfied that the applicants have a prima facie right to the “second order prayed”.

14 The applicants plainly have no such right. I can think of no cause of action in law for an order directing a neighbour to evict an

occupier of their property. Even if that remedy is available at common law to abate a nuisance, the Prevention of Illegal Eviction from, and Unlawful Occupation of, Land Act 19 of 1998 (“the PIE Act”) has long since supplanted any such remedy against an unlawful occupier. Everyone before me accepted that the residents of the Mount Carmel property are unlawful occupiers within the

meaning given to that term under section 1 of the PIE Act. The PIE Act makes clear that eviction applications may only be brought against unlawful occupiers by the owner or person in charge of the relevant property, or by a local authority acting in the public interest. The applicants simply have no standing to seek the eviction of the residents.

15 That being so, the applicants have no right to the “second order prayed”. To the extent that the absence of such a right

precludes the grant of the “first order prayed”, the application for it must be dismissed.

The declaratory orders sought

16 In any event, the three declarators the applicants seek in their “first order prayed” are neither interim in nature nor preparatory to an application for the second order prayed. They are, in substance, orders that confirm that the informal settlement

is neither an approved township under SPLUMA, nor an approved structure under the NBRA, nor a development that has been approved

under NEMA.

17 It is well established that I have a discretion to refuse an application for declaratory relief, even if it has some merit. That

discretion is normally exercised where there is no live controversy between the parties that would be resolved by a declaratory order. This is clearly such a case. Neither the Municipality nor Mount Carmel contend that the informal settlement has been erected in compliance with SPLUMA, the NBRA or NEMA. Indeed, in 2012, the Municipality instituted proceedings against Mount Carmel to compel

the eviction of the people then resident at the property, on the basis that they had moved on to the property in breach of the

Municipality’s Town Planning Scheme. The Municipality, wisely in my view, has not pressed that application to a hearing, but the very existence of the application indicates that the Municipality takes no issue with the applicants’ claims that the informal settlement was erected without complying with NEMA, SPLUMA or the NBRA. There is accordingly no controversy to resolve.

18 There is a further, more fundamental, reason why I will not grant the declaratory orders. Neither SPLUMA, nor the NBRA, nor NEMA

were ever intended to provide a mechanism to stigmatise informal settlements as illegal or unwanted blights on the environment or on urban development. They are intended to govern the terms under which sustainable, inclusive and environmentally friendly urban development takes place. It seems to me to be an abuse of these statutes to seek relief which is ultimately intended to eradicate a large number of people’s homes – whether or not those homes are perceived to constitute a nuisance to neighbouring property owners.

19 If the conditions in the informal settlement are to be addressed, they cannot sustainably be addressed as if the people living there are no more than sources of urban blight. The Constitution, the PIE Act and the National Housing Code, 2009 (especially the Upgrading of Informal Settlements Policy contained in the Code) provide the proper vehicles through which to address the needs of the informal settlers. I will not assist in applicants' attempts to repurpose SPLUMA, the NBRA and NEMA to evict the residents and destroy their homes. Nor, as a matter of law, may I do so.

The amendment

20 The applicants and the residents of the informal settlement, may, of course, have administrative law remedies against the Municipality and the other state respondents to take steps to improve living conditions there, or to provide alternative shelter if such steps cannot be taken while the residents remain in situ. It was perhaps an inkling that these remedies might be the proper route to a resolution of their difficulties that led the applicants, in April 2022, to amend the relief they sought, albeit without a formal application to do so. Instead of a straightforward eviction order in their "second order prayed", the applicants' amendment envisages a mandamus against the Municipality, compelling it to bring eviction proceedings under the PIE Act against the residents of the informal settlement.

21 The problem with the amendment, however, is that it completely redefines the legal issues between the parties. The question of whether a local authority may be compelled to bring eviction proceedings in the public interest is one of some difficulty (see, for example, *Abahlali Basemjondolo Movement SA v Premier of the Province of Kwazulu-Natal* 2010 (2) BCLR 99 (CC), paragraph 112). The PIE Act affords a Municipality the discretion to institute eviction proceedings. That discretion must, of course, be lawfully exercised, and a neighbour may well be heard to complain that a Municipality has failed to exercise that discretion lawfully in respect of a group of unlawful occupiers on adjacent land.

22 That issue is, however, nowhere canvassed in the papers. The applicants were not entitled to introduce it without a formal application to do so, and without affording the other parties to this case, especially Municipality, the opportunity to file further papers

dealing with it. At the hearing of the matter, Mr. Hulley, who appeared with Mr. Sithole for the Municipality, strenuously objected

to the introduction of the amendment on the grounds that the Municipality had no fair opportunity to deal with it. Mr. Hulley's

objection was clearly well-taken. The amendment is not properly before me, and I do not think I can fairly entertain it.

23 Nevertheless, in my view, the amendment envisages the only cognisable cause of action the applicants may have. If they wish to pursue it, they may do so in the context of a fresh substantive application, or by way of the formal introduction of the amendment under rule 28 before the “second order prayed” is brought back to a hearing.

Order

24 However, for the reasons I have given, the application as it stands is stillborn. The “first order prayed” must be refused. The application for it was woefully misconceived from the outset. I think that the application was so inept as to deprive the applicants of the costs shield that a litigant raising a constitutional issue would normally have in a case like this.

25 For all these reasons-

25.1 The application for the “first order prayed” is dismissed.

25.2 The applicants are directed to pay the respondents’ costs.

S D J WILSON

Judge of the High Court

This judgment is handed down electronically by circulation to the parties or their legal representatives by email, by uploading it to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 16 January 2025.

HEARD ON: 27 November 2024 DECIDED ON: 16 January 2025 For the Applicants: MG Roberts SC E Roberts Instructed by Moolman & Pienaar Inc For the First Respondent: ACJ van Dyk Instructed by Krouse Attorneys Inc For the Second Respondent: GI Hulley SC E Sithole Instructed by Chiba & Tourapi Attorneys.

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