

SOUTH AFRICA / JUDGMENT

Mangaung Local Municipality v Pudumo and Others (3143/09) [2010] ZAFSHC 2 (7 January 2010) [2010] ZAFSHC 2

COURT

Free State High Court, Bloemfontein

BEFORE

Van Zyl

CASE / FILE NUMBER

3143/09

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FREE STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC OF SOUTH AFRICA

Application No. : 3143/09

In the application between:-

MANGAUNG LOCAL MUNICIPALITY

Applicant

and

F. A. PUDUMO 1st Respondent

M. THOLA 2nd Respondent

M. RASUTHA 3rd Respondent

M. I. KHATLAKO 4th Respondent

M. L. PANYA 5th Respondent

M. E. KOLISANG 6th Respondent

M. KODISANG 7th Respondent

M. NGAKA 8th Respondent

T. MOCHADI 9th Respondent

D. M. MOKHELE 10th Respondent

and 357 others as 11th to 367th Respondents as per Amended List of Respondents dated 8/07/09 (“Group B respondents”),

and 148 others as 11th to 158th Respondents as per Annexure “A” to the Notice of Intention to Oppose (“Group C respondents”).

JUDGMENT:

VAN ZYL J

DELIVERED ON: 7 JANUARY 2010

[1] This is an application for a declaratory order that the occupants of the property known as a Portion of the Remainder of the Farm Botshabelo 826, commonly known as Botshabelo West and also referred to as Extension 1 of Block F, Botshabelo, be declared to be unlawful occupiers, combined with an application that such occupants be ordered to vacate the property, together with appropriate ancillary relief.

CITING AND IDENTITY OF RESPONDENTS

[2] Initially only the 1st to 10th respondents were cited as respondents. Leave was however granted to the applicant to amend its notice of motion and to amplify its papers by adding the names of any respondents who at the launching of this application, had not yet been identified, but whose identities might become known to the applicant during the process of service of the relevant papers. An amended list of respondents was subsequently filed on 8 July 2009, which list contains the names of the 1st to 10th respondents, as well as specific identified respondents as 11th to 104th respondents and furthermore unidentified occupants of certain numbered structures/shacks as 105th to 367th respondents, on which occupants, both identified as well as unidentified, service were effected (hereinafter referred to as “Group B respondents”).

[3] A notice of intention to oppose was subsequently filed on 7 August

2009. This notice reflects that the opposition is being done on behalf of 1st to 10th respondents, as well as the respondents listed in annexure “A” to the notice of intention to oppose as 11th respondent to 158th respondents (hereinafter referred to as “Group C respondents”). During the hearing of the application, Mr Nel, on behalf of the aforesaid 158 respondents, confirmed that his mandate to oppose the application is confined to such respondents.

[4] Although the numerical numbering of the aforesaid three “groups” of respondents overlaps, I consider it efficacious to maintain the reference to the numbered respondents as currently set out in the amended list of respondents on the one hand and annexure “A” to the notice of intention to oppose on the other hand.

[5] For the sake of clarity, I pause to furthermore explain that any reference in this judgment to “respondents” without

specifically identifying them should be understood as a reference to 1st to 10th respondents, as well as Group C respondents.

RERERRAL TO TRIAL

[6] After having read the papers and despite the very capable arguments by Mr Heymans, on behalf of the applicant, to the contrary, I have come to the conclusion that this matter should be referred to trial in terms of Rule 6(5)(g). It is custom that no reasons are advanced for such an order. In this instance I also consider it appropriate not to provide any reasons for this part of the order. However, because of the specific circumstances of this application and certain specific arguments that were raised during the hearing of the application, I do consider it necessary to provide reasons for some of the other orders I intend to make.

CONSIDERATION OF NECESSITY OF MEDIATION PROCESS:

[7] Mr Nel submitted that it is evident that there was no mediation process between the parties prior to this application. With

reference to the judgment in *PORT ELIZABETH MUNICIPALITY v VARIOUS OCCUPIERS*

[2004] ZACC 7; 2005 (1) SA 217 (CC), he submitted that whether mediation has been attempted, is one of the relevant circumstances in deciding whether an eviction order would be just and equitable. He consequently argued that should I decide to refer the matter to trial, the matter should first be referred to mediation prior to its referral to trial.

In his opposition to the aforesaid, Mr Heymans referred to section 7(2) of the Prevention of Illegal Eviction from Unlawful Occupation of Land Act No. 19 of 1998 (hereinafter referred to as “PIE”), and submitted that in terms thereof, the applicant was not compelled to have attempted to mediate the dispute before having approached court by means of the current application.

[8] Section 7(2) of PIE reads as follows:

“If the municipality in whose area of jurisdiction the land in question is situated is the owner of the land in question, the member of Executive Council

designated by the Premier of the province concerned, or his or her nominee, may, on the conditions that he or she may determine,

appoint one or more persons with expertise in dispute resolution to facilitate meetings of interested parties and to attempt to mediate and settle any dispute in terms of this Act: Provided that the parties may at any time, by agreement, appoint another person to facilitate meetings or mediate a dispute, on the conditions that the said member of the Executive Council may determine.”

- [9] The question whether mediation has been tried, is in fact, as correctly submitted by Mr Nel, one of the relevant circumstances in deciding whether an eviction order would be just and equitable. Furthermore, it appears that the constitutional court has in fact laid down the principle that in applications of this nature, a court should, in appropriate circumstances, order that mediation be attempted. This is not mediation referred to in section 7 of PIE, but compulsory mediation ordered by the court as such. In *PORT ELIZABETH MUNICIPALITY v VARIOUS OCCUPIERS*, supra, the following relevant dicta appears at 239B – D:

“[39] In seeking to resolve the above contradictions, the procedural and substantive aspects of justice and equity cannot always be separated. The managerial role of the courts may need to find expression in innovative ways. Thus, one potentially dignified and effective mode of achieving sustainable reconciliations of the different interests involved is to encourage and require the parties to engage with each other in a proactive and honest endeavour to find mutually acceptable solutions. Wherever possible, respectful face-to-face engagement or mediation through a third party should replace arm's-length combat by intransigent opponents.

- [40] Compulsory mediation is an increasingly common feature of modern systems. It should be noted, however, that the compulsion lies in participating in the process, not in reaching a settlement. ...”

And at 240B – D:

“[42] Not only can mediation reduce the expenses of litigation, it can help avoid the exacerbation of tensions that forensic combat produces. By bringing the parties together, narrowing the areas of dispute between them and facilitating mutual give-and-take, mediators can find ways round sticking-points in a manner that the adversarial judicial process might not be able to do. Money that otherwise might be spent on unpleasant and polarising litigation can be better used to facilitate an outcome that ends a stand-off, promotes respect for human dignity and underlines the fact that we all live in a shared society.

- [43] In South African conditions, where communities have long been divided and placed in hostile camps, mediation has a particularly significant role to play. The process enables parties to relate to each other in pragmatic and sensible ways, building up prospects of respectful good neighbourliness for the future. Nowhere is this more required than in relation to the intensely emotional and historically charged problems with which PIE deals. Given the special nature of the competing interests involved in eviction proceedings launched under s 6 of PIE, absent special circumstances, it would not ordinarily be just and equitable to order eviction if proper discussions, and where appropriate, mediation, have not been attempted.”

And also at 241D – 242A:

“[45] In my view, s 7 of PIE is intended to be facilitative rather than exhaustive. It does not purport, either expressly or by necessary

implication, to limit the very wide power entrusted to the court to ensure that the outcome of eviction proceedings will be just and equitable. As has been pointed out, s 26(3) of the Constitution and PIE, between them, give the courts the widest possible discretion in eviction proceedings, taking account of all relevant circumstances. One of the relevant circumstances in deciding whether an eviction order would be just and equitable would be whether mediation has been tried. In appropriate circumstances, the courts should themselves order that mediation be tried.” (Own underlining)

And lastly at 246E – G:

“[61] It remains only to be said that this decision in no way precludes further efforts to find a solution to a situation that is manifestly unsatisfactory to all concerned. In cases like the present, it is particularly important that the municipality not appear to be aligned with one side or the other. It must show that it is equally accountable to the occupiers and to the landowners. Its function is to hold the ring and to use what resources it has, in an even-handed way, to find the best possible solutions. If it cannot itself directly secure a settlement, it should promote a solution through the appointment of a skilled negotiator acceptable to all sides, with the understanding that the mediation proceedings would be privileged from disclosure. On the basis of this judgment, a court involved in future litigation involving occupiers should be reluctant to accept that it would be just and equitable to order their eviction if it is not satisfied that all reasonable steps had been taken to get an agreed, mediated solution.” (Own underlining)

[10] The aforesaid principles were also confirmed in OCCUPIERS OF 51 OLIVIA ROAD, BEREA TOWNSHIP AND 197 MAIN STREET JOHANNESBURG v CITY OF JOHANNESBURG AND OTHERS

[2008] ZACC 1; 2008 (3) SA 208 (CC) at 217I – 218E:

“[21] Finally it must be mentioned that secrecy is counter-productive to the process of engagement. The constitutional value of openness is inimical to secrecy. Moreover, as I have already pointed out, it is the duty of a court to take into account whether, before an order of eviction that would lead to homelessness is granted at the instance of a municipality, there has been meaningful engagement or, at least, that the municipality has made reasonable efforts towards meaningful engagement. In any eviction proceedings at the instance of a municipality therefore, the provision of a complete and accurate account of the process of engagement, including at least the reasonable efforts of the municipality within that process, would ordinarily be essential. The absence of any engagement or the unreasonable response of a municipality in the engagement process would ordinarily be a weighty

consideration against the grant of an ejectment order.

[22] This court made the interim order because it was not appropriate to grant any eviction order against the occupiers, in the circumstances of this case, unless there had at least been some effort at meaningful engagement. It was common cause during argument that there had been none. The ejectment of a resident by a municipality in circumstances where the resident would possibly become homeless should ordinarily take place only after meaningful engagement. Whether there had been meaningful engagement between a city

and the resident about to be rendered homeless is a circumstance to be considered by a court in terms of s 26(3).

[23] It follows that the Supreme Court of Appeal should not have granted the order of ejectment in the circumstances of this case, in the absence of meaningful engagement.” (Own underlining)

[11] In the current instance a mere bald statement was made on behalf of the applicant to the effect that the applicant tried to hold a meeting but that its request was ignored and that the respondents did not attend the meeting. No details whatsoever in support of these allegations, were given. It was furthermore alleged on behalf of the applicant that the respondents` alleged refusal to meet with the applicant,

“is to my view a clear indication that their hands are not clean and that they know that they are acting wrongfully and even unlawfully”.

See founding affidavit,

p. 27, paragraph 12 and p. 42, paragraph 63.

These allegations were denied by the respondents and they responded that should a meeting have been arranged, the respondents would have attended such meeting. According to the respondents no effort whatsoever was made by the applicant to mediate the dispute between the applicant and the respondents.

Based on the well-known test set out in *PLASCON-EVANS PAINTS LIMITED v VAN RIEBEECK PAINTS LIMITED*

[1984] ZASCA 51; 1984 (3) SA 623 (A), I am of the view that for purposes of adjudication of this application the respondents` version in this regard has to be accepted. Moreover, even should the applicant`s averments in this regard be accepted, the alleged attempt in any event did not comply with the required process as set out in the case law referred to above which the applicants should have attempted before launching the application

[12] I am consequently of the view that this dispute should in fact be referred to a proper negotiation and/or mediation process before the court process continues.

[13] With regard to the nature and contents of the mediation order I intend to make, I allow myself to be lead by the nature of the order that was issued in *OCCUPIERS OF 51 OLIVIA ROAD, BEREA TOWNSHIP AND 197 MAIN STREET JOHANNESBURG v CITY OF JOHANNESBURG AND OTHERS*, supra, at 212D – G, read with paragraph 61 of the judgment in *PORT ELIZABETH MUNICIPALITY v VARIOUS OCCUPIERS*, supra, referred to in paragraph 9 above. From the last-mentioned dicta it is evident that the duty is on the Municipality (the applicant) to initiate and facilitate such a mediation process. This duty will also be reflected in my order. For the same reason, the applicant is in my view to bear the costs of any skilled negotiator to be appointed. The necessity to report back to the court by providing a complete and accurate account of the process of engagement or mediation was

explained and emphasised in OCCUPIERS OF 51 OLIVIA ROAD, BEREA TOWNSHIP AND 197 MAIN STREET JOHANNESBURG v CITY OF JOHANNESBURG AND OTHERS, *supra*, paragraph 21 thereof, already referred to above in paragraph 10 above.

CONTENTS OF ORDER OF REFERRAL TO TRIAL

- [14] In my view the disputes of fact in this matter are incapable of resolution on the papers and too wide-ranging for resolution by way of referral to oral evidence and therefore it should be referred to trial. I take cognisance of the fact that when referring an application to trial, it is normally essential that the issues be defined and that the appropriate order would be one directing that the notice of motion should stand as a simple summons, that the declaration be filed within a fixed time and that the uniform rules dealing with pleadings and the conduct of trials thereafter apply. See *HAUPT t/a SOFT COPY v BREWERS MARKETING INTELLIGENCE* [2006] ZASCA 40; 2006
- (4) SA 458 (SCA) at 468J – 469B, read with footnote 1 thereof. However, in this instance I am of the view that the issues are evident, clear and confined enough on the affidavits as they currently stand. For this reason, and furthermore because I hope and trust that at least some of the issues will be resolved during the mediation procedure, I do not intend defining the issues any further,

nor do I intend ordering that further pleadings need to be filed. I consider it more appropriate that the parties themselves define the issues, as they then stand, after the negotiation and/or mediation process during the rule 37 conference to be held prior to the trial.

SCOPE OF EFFECT OF ORDER

- [15] With regard to substantive order I intend to make, I am of the view that only such respondents who are currently opposing this application, can and should be bound by the consequences of the order.
- [16] In view of the nature of this application and moreover in view of the referral to mediation which I intend to order, I do not consider it apposite, as requested by Mr Heymans, to in the meantime grant any relief by default against the respondents who are not currently opposing this application. Such relief should, in my view, stand over for later decision during the hearing of the trial (if any). I record that I am very much aware of the possible practical problems that might be ensued as a result of the fact that there currently are different “groups” of respondents living at the property, but some of which will now be bound by this order and some of which will not. However, it is impossible to make an order that will obviate all possible practical problems for all parties concerned. In any event, it will still be open to the parties hereto and/or the mediator and/or the trial court to decide whether to include or join any further respondents and/or group(s) of respondents to the mediation process and/or the possible eventual trial and/or court order in order to ensure an effective outcome to these proceedings.

COSTS

[17] In my view it is appropriate that the costs of the application ought to be reserved for decision by the trial court. Should the parties be able to settle the matter during the mediation process, they should endeavour to also settle the issue of costs, which, considering that the applicant launched this application without any or proper prior endeavours to mediate the dispute between the parties, will probably be for the account of the applicant.

ORDERS

[18] Consequently the following orders are made:

A: As between applicant and 357 others as 11th to 367th respondents as per Amended List of Respondents dated 8/07/09 (“Group B respondents”):

1. The relief claimed, including costs, are to stand over for later decision by the trial court referred to in paragraph 6 hereunder.

B: As between applicant and 1st to 10th respondents as well as 148 others as 11th to 158th respondents as per Annexure “A” to the Notice of Intention to Oppose (“Group C respondents”).

1. The applicant is ordered to forthwith initiate a process in conjunction with the aforesaid respondents to engage with each other meaningfully and as soon as it is possible for them to do so, in an effort to resolve the differences and difficulties aired in this application in the light of the values of the Constitution, the constitutional and statute duties of the municipality and the rights and duties of the citizens concerned.
2. Should the parties fail to meaningful engage with each other as aforesaid and/or fail to secure a settlement, the applicant is to appoint a skilled negotiator with expertise in dispute resolutions, which negotiator is to be acceptable to both parties, to arrange and facilitate a meeting between the parties and to attempt to mediate and settle the disputes in this matter.
3. Legal representation is to be allowed during the aforesaid process (processes), should any or both of the parties so prefer, the costs of which will be for each party’s own account.
4. Each of the two sets of parties are to file an affidavit providing a complete and accurate account of the process of engagement and/or mediation and the outcome thereof. Should he/she so prefers, the appointed mediator may also file a report providing a complete and accurate account of the process of mediation and the outcome thereof. The affidavits as well as the report (if any) are to be filed as soon as possible after conclusion of the mediation process, and in any event not later than 16 March 2010, or such later date as the parties may agree to.
5. The costs of the appointed negotiator, if any, are to be borne by the applicant.

6. Should the parties not be able to procure an agreed mediated solution, the application is referred to trial on the following terms:
- 6.1. The current affidavits are to stand as pleadings and as such the pleadings are to be deemed to be closed.
- 6.2 The Uniform Rules of Court pertaining to trial actions shall thereafter apply.
- 6.3 The trial court will be allowed to take cognisance of the affidavits and report (if any) referred to in paragraph 4 above and will be entitled to determine the evidential value thereof and/or whether and/or to what extent further evidence and/or cross-examination pertaining to the contents thereof, will be allowed or not.
- 6.4 The costs of the application are to stand over for later adjudication.
- [7] The registrar is requested and directed to enrol this matter for trial on a preferential basis as and when requested thereto by one or both parties.

C. VAN ZYL, J

On behalf of applicant: Adv. P.J. Heymans

Instructed by:

E G Cooper Majiedt Inc.

Bloemfontein

On behalf of 1st to 10th respondents and Group C respondents:

Dr P W Nel

Instructed by:

Justice Centre

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