
SOUTH AFRICA / JUDGMENT

Marialdo Tre (Pty) Ltd v Dlamini and Others (45617/2017) [2019] ZAGPJHC 299 (23 August 2019) [2019] ZAGPJHC 299

COURT

South Gauteng High Court, Johannesburg

BEFORE

H Van Eeden

CASE / FILE NUMBER

45617/2017

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THE

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF

SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NO: 45617/2017

In

the matter between:

MARIALDO
TRE (PTY)
LTD
Applicant
and
MATHANDA
DLAMINI
First Respondent
BONISILE
NOMSA
DLAMINI
Second Respondent
SENZO
NOBLE
MAJOLA
Third Respondent
SIMANGELE
CHERYL
KHOZA
Fourth Respondent
PATRICK
PHIKELEUNKOSI
MKHIZE
Fifth Respondent
RICHARD
ZWAKUSHIWO
MKHIZE
Sixth Respondent
THABANE
NGUBANE
Seventh Respondent
SANELE
SIYABONGA
ZUMA
Eight Respondent
SIMON
MBOPHI SENI
NGUBANE
Ninth Respondent
BUHLE
NKANYISO
Tenth Respondent
JOHANNES
CHIKOTA
Eleventh Respondent
MDUDUZI
LUCKY
MKIZE
Twelfth Respondent
SKHUMBUZO
ZUNGU

Thirteenth Respondent
SIPHAMANDLA
SEDRICK ZUMA
Fourteenth Respondent
SIBONGILE
ELLEN MNTUNGWA
Fifteenth Respondent
EMMANUEL
NKOSINATHI DLAMINI
Sixteenth Respondent
JABULANI
PIUS
MCHUNU
Eighteenth Respondent
BONISIWE
MNUKWA
Nineteenth Respondent

JUDGMENT

VAN EEDEN AJ:

1. The applicant seeks the eviction of a number of respondents, including all persons occupying certain immovable property by, through or under the persons listed as respondents. The matter was launched as long ago as November 2017. Ms C Gordon represented the applicant, and Ms E Broster, assisted by Mr N Sithole, represented respondents one, three to six, nine, twelve to fourteen, seventeen and eighteen (“the occupiers”). The sixteenth respondent is the City of Johannesburg Metropolitan Municipality (“the City”) and was represented by Mr G McMaster. There was no appearance on behalf of respondents two, seven, eight, ten, eleven, fifteen and nineteen.
2. The applicant is the owner of the immovable property concerned and the occupiers are in unlawful occupation. It was common cause that eviction had to be ordered, subject to the requirement that the date of the eviction should be just and equitable to all. The parties could not agree on the dates and other terms relevant to an order of eviction, in consequence of which each party handed up a separate draft order for debate. The occupiers proposed a time period of six months before eviction could be ordered, and the applicant acceded thereto as a maximum period, i.e. that eviction be ordered at the end of February 2020. The City did not agree to this or any other date.
3. The only real point of difference between the applicant and the occupiers was whether the eviction order had to be made conditional upon the City providing temporary emergency accommodation, abbreviated as “TEA”. Ms Gordon submitted that eviction could not be made conditional, as the applicant is entitled to finality. Ms Broster submitted that if the order is not made conditional upon TEA being made available, the occupiers might find themselves homeless. Mr McMaster submitted that the City could not comply with any order

directing it to provide TEA before the end of August 2020. It thus also turned out to be common cause that the City may be ordered to make available TEA, but again the parties differed on the nature of the order that had to be made.

4. I propose to stay as close as possible to the approach adopted by the Constitutional Court in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd & Another 2012 (2) SA 104 (CC)* (“Blue Light”), particularly as summarised at paragraphs [96] to [100].
5. It would be just and equitable if the order of eviction and the date whereupon it has to take place, is linked to the provision of temporary accommodation by the City. The date upon which the eviction is to take place, must be linked to a date on which the City has to provide accommodation. The City should also be required to provide accommodation some time before the date of eviction, in order to allow the occupiers some time and space to be assured that the order to provide them with accommodation was complied with and to make suitable arrangements for their relocation.
6. In the circumstances the date upon which the eviction is to take place, will be linked to a date upon which the City must provide the temporary emergency accommodation. The eviction cannot, however, be ordered to be conditional upon the City providing such accommodation. The applicant was required to and did demonstrate a degree of patience since November 2017. The applicant cannot be expected to be burdened with providing accommodation to the occupiers indefinitely. If ordered to be conditional, the obligation to provide accommodation is made that of the applicant, and that is not what the Constitution expects of an owner whose property is unlawfully occupied.
7. It follows that the eviction order to be made is final in nature. It will also be coupled with an order authorising the sheriff to evict the occupiers if they do not vacate by the date incorporated in the order. The occupiers are thus made aware that they are to be evicted from a certain date, regardless of the City’s compliance with the order to make accommodation available.
8. The City was cited as sixteenth respondent when this application was launched during November 2017. The notice of motion required the City to provide the occupiers who would be rendered homeless by the eviction order with temporary accommodation in a location as near as possible to the area where the property is situated.
9. The City did not agree to the eviction date acceptable to the applicant and the occupiers. Mr McMaster contended for an additional six-month period during which the occupiers had to remain in occupation of the applicant’s premises. This submission was based on a report provided by the City detailing that it needed a period of 24 months from the date upon which the report was given to accommodate the sixteen respondents. It was stated thus:

“66. ... there is no TEA immediately available for the occupiers. An appropriate date for eviction and provision of TEA will be after a 24 month period from the date of signature of this report”.

The report was signed on 1 August 2018, that is a year ago. The City thus contends that eviction should not be ordered prior to the end of August 2020.

10. It would not be just and equitable to expect the applicant to accommodate the occupiers for the full additional year that the City requests. The applicant's concession to an additional six-month period, i.e. until the end of February 2020, is just and equitable. It would then have been kept at bay by unlawful occupiers for a period exceeding two years, with the City having had notice of these eviction since November 2017.

11. The obligation to provide accommodation to the occupiers does not rest upon the applicant. It is the obligation of the City to progressively realise the right to adequate housing within its available resources in terms of section 26 of the Constitution, 1996. The City's report reflects a measure of frustration with court orders compelling it to provide TEA. It was stated thus:

"61. The City's position with regard to queue jumping and the so-called knee jerk reactions by court's to ordering the City to provide accommodation to unlawful occupiers in matters before them without regard to others in need of TEA, is well documented".

12. The City is, however, not required to do the impossible, but needs to demonstrate compliance with its constitutional obligations as far as possible. The reasoning adopted by the Constitutional Court in *Soobramoney v Minister of Health, KwaZulu-Natal*

[1997] ZACC 17; 1998 (1) SA 765 (CC) is still applicable, perhaps more so after two decades of constitutional development increasingly expecting more of organs of state. The City is only required to provide what it can within its available resources.

13. The provision of the report, now more than a year old, went some way in demonstrating that compliance. The report does not make for comfortable reading. It paints a bleak picture of an organ of state struggling to find and regulate accommodation for an ever-increasing number of unlawful occupiers, making ever-increasing and more militant demands. When the City is ordered to provide TEA, those evictees jump the queue ahead of occupiers of other buildings waiting to be accommodated. Then TEA becomes permanent accommodation provided by the City, as the recipients of TEA do not move on. In this manner evictees do become queue jumpers, albeit not queue jumpers in the sense used by the Constitutional Court in *Blue Light* [95].

14. A balance must be struck. The applicant cannot be further burdened, as I have already explained. In *Blue Light* the Constitutional Court ordered the City to make accommodation available and that order was met, notwithstanding initial protestations that it could not. I consider myself compelled to make a similar order. If the occupiers cannot be accommodated notwithstanding the effluxion of almost two years and the additional six months to be granted to the City to find a solution, the City must convince a court of that stark reality or face the consequences of non-compliance with a court order. To that end Mr McMaster requested that the orders incorporate a provision that the City could re-approach court if unable to comply with the proposed order to make TEA available. Given the finality

of the eviction order and the real possibility that the City may not be able to comply with an order to provide TEA, I intend to accede to that request.

15. The applicant requested that the City be ordered to pay the costs on the scale as between attorney and client. The City disputed that it should pay any costs, but it is true that the applicant was put to great lengths to bring this matter to fruition. Although the City's report was helpful, it failed to discharge its obligations with the promptness one would have expected. In particular, it failed to seek agreement with the other parties at any stage after the matter was launched. Instead, it remained inactive and it was necessary for the applicant to approach a court on 24 February 2018 for an order directing the furnishing of the report. The order was made in the City's absence. Then the report was filed later than the court order required, without explanation. The City's current attorneys of record was only instructed in May 2018. These factors favour the granting of a costs order.
16. The applicant was, however, by law compelled to accommodate the occupiers and had to turn to court for an eviction order. I consequently refrain from making a costs order, as the City is also quite clearly under tremendous pressure to comply with the obligation to assist unlawful occupiers with TEA. It is not that the City is sitting on its hands – the report clearly reflects the almost insurmountable problems it has to overcome. But when cited as a respondent, the City knows what will be expected of it. The better the City participates in legal process, the better orders courts will be able to craft in eviction proceedings. Refraining to make a costs order should not be seen as condoning the City's conduct in this matter.

It should be seen as encouraging the City to improve its efforts so that a better life for all its inhabitants may progressively become a reality.

17. I make the following orders:

17.1. The following persons shall be evicted from the respective living units occupied by them in the dwelling house and outbuildings situated at [...] Street, Hillbrow, Johannesburg ("the property"):

- 17.1.1. first respondent;
- 17.1.2. second respondent;
- 17.1.3. third respondent;
- 17.1.4. fourth respondent;
- 17.1.5. fifth respondent;
- 17.1.6. sixth respondent;
- 17.1.7. seventh respondent;
- 17.1.8. eighth respondent;

17.1.9. ninth respondent;

17.1.10. tenth respondent;

17.1.11. eleventh respondent;

17.1.12. twelfth respondent;

17.1.13. thirteenth respondent;

17.1.14. fourteenth respondent;

17.1.15. fifteenth respondent;

17.1.16. seventeenth respondent;

17.1.17. eighteenth respondent;

17.1.18. nineteenth respondent;

17.1.19. Ayanda Sphelele Majola;

17.1.20. Luyanda Aneliswa Majola;

17.1.21. Ayaphiwa Okuhle Majola;

17.1.22. Aphelele Snothile Majola;

17.1.23. Slindokuhle Muofhe Rabonda;

17.1.24. all persons occupying the property by, through or under the persons listed in subparagraphs 17.1.1 to 17.1.23 supra.

17.2. The persons listed in subparagraphs 17.1.1 to 17.1.23 supra shall vacate the respective living units occupied by them in the dwelling house and outbuildings on the property, by 28 February 2020, failing which the sheriff for the area within which the property is situated is authorised and required to forthwith evict

the said persons.

17.3. The sixteenth respondent is directed to notify the occupiers listed in Annexure “X” hereto, in writing of the nature and location of the accommodation to be provided to them by 7 February 2020.

17.4. The sixteenth respondent shall provide the occupiers listed in Annexure “X” hereto, with temporary emergency accommodation on or before 14 February 2020.

17.5. The Executive Director or Acting Executive Director: Housing of the City of Johannesburg Municipality for the time being (“the Director”) is requested to personally oversee and take all the necessary steps to assure compliance by the sixteenth respondent with the orders granted herein.

17.6. The sixteenth respondent's attorney of record is directed to bring the contents of this order to the attention of the Director.

17.7. In the event that the sixteenth respondent fails to comply with the orders in paragraphs 17.3 and 17.4 above, the applicant, the persons listed in Annexure "X" and the City, represented by its Director, are given leave to re-enrol the matter on a date and at a time agreed to between the parties, alternatively a date determined by the registrar, for such further relief as may be appropriate.

H VAN EEDEN

ACTING JUDGE OF THE HIGH COURT

Counsel for Applicant: Ms C Gordon

Instructed by: Hooker Attorneys

Counsel for First, Third to Sixth, Ninth, Twelfth to Fourteenth, Seventeen and Eighteen Respondents: Ms E Broster

Instructed by: Seri Law Clinic

Counsel for Sixteenth Respondent: Mr G McMaster

Instructed by: Kunene Ramapala Inc

Date of hearing: 20 August 2019

Date of judgment: 23 August 2019

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Prepared on 12 October 2026 · Esheria