

SOUTH AFRICA / JUDGMENT

Mkhonza and Others v City of Johannesburg and Others (10190/2020) [2020] ZAGPJHC 117 (21 April 2020)

[2020] ZAGPJHC 117

COURT

South Gauteng High Court, Johannesburg

BEFORE

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CASE / FILE NUMBER

10190/2020

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IN

THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL
DIVISION, JOHANNESBURG
CASE
NO: 10190/2020

In the matter between:

MKHAMBI
MKHONZA
1ST APPLICANT
XOLANI HLONGWANE
2ND APPLICANT
ZOTHANI
ZONDI 3RD
APPLICANT
And
CITY OF
JOHANNESBURG
1ST RESPONDENT
THE EXECUTIVE MAYOR OF
THE CITY
OF
JOANNESBURG
2ND RESPONDENT
THE CITY MANAGER OF
THE CITY
3RD RESPONDENT
OF JOHANNESBURG,
NDIVHONISWANI LUKWARENI

THE CHIEF OF THE
METROPOLITAN
4TH RESPONDENT
POLICE DEPARTMENT
NATIONAL COMMISSIONER
OF POLICE
5TH RESPONDENT

JUDGMENT

MIA, J

INTRODUCTION

- [1] The applicants seek relief on an urgent basis as follows:
- (a) directing that this matter be dealt with as one of urgency in terms of Rule (6) 12 the rules of this Court;
 - (b) the applicants' eviction and demolition of the properties and/or houses by the respondent on 16 April 2020 at Lawley Ext 2 is illegal and unlawful;
 - (c) the respondents to erect and rebuild all the applicants' houses shacks and properties that were demolished at Lawley Johannesburg on 16 April 2020, within 24 hours of granting this order.
 - (d) The respondent be interdicted from demolishing and destroying, evicting and confiscating the assets of the applicants.
 - (e) The respondents to return all the assets confiscated by the red ants during the demolition and eviction of the applicants houses and properties, within 24 hours of the granting of this order.
 - (f) Alternatively; the respondents to provide alternative accommodation for all the affected applicants and their families, pertaining only to those houses that could not be rebuilt or completed within 24 hours.
 - (g) The order in paragraph 4 above is to be implemented within 12 hours of the granting of this order.
 - (h) Punitive costs against the respondent's in their individual capacities."

The application is opposed by all the respondents except the fifth respondent.

- [2] The applicants allege that they are residents of Lawley Extension 2, Gauteng Province. The first respondent is the City of Johannesburg Metropolitan Municipality(The City), a local authority based in Loveday St, Johannesburg. The second respondent is, Councillor Mr Geoff Makhubo, the Executive Mayor of the City. The third respondent is Mr Ndivhoniswani

Lukhwareni, the city manager of the City. The fourth respondent is the Johannesburg Metropolitan Police Department(JMPD). The fifth respondent is Mr Kehla John Sithole, the National Commissioner of Police in the Republic of South Africa.

FACTS

- [3] The event preceding the launch of these proceedings is the demolition of properties in the area of Lawley Extension 2. The applicants contend that on 16 April 2020 the majority of residents were lawfully residing at Lawley Extension 2 for more than two years. The City with the assistance of the Red Ants protected by JMPD and the SAPS demolished their houses and properties and confiscated the assets. As a result they all have no accommodation and rely on friends and neighbours to take them in. They are at risk in the present Covid-19 pandemic which makes them susceptible to catching the virus and transmitting it to others. Neighbours have understandably been hesitant to offer assistance by way of accommodation under the circumstances.
- [4] They were advised that the City embarked on a strategy to remove illegal dwellers from the area as part of the "Mayoral Clean Sweep Initiative". However in sweeping out the illegal dwellers the respondent's also targeted lawful residents such as the applicants. The Red Ants moved through Lawley Extension 2 indiscriminately demolishing shacks and houses belonging to the applicants. When they approached the Red Ants, SAPS and JMPD to ascertain whether they had a court order to carry out the demolitions and evictions, JMPD and the SAPS became heavy-handed and shot rubber bullets at them. In this regard the applicants referred to video footage which they wished to tender as evidence.
- [5] The first respondent contests this version of events and states that the city has faced an alarming increase in illegal land invasions particularly in the south of Johannesburg which is regarded as a "hotspot". These areas include Ennerdale, Lenasia, Unaville, Vlaksfontein and Lawley. The City has previously had to obtain court orders interjecting land invasions. Due to the alarming rise in illegal land invasions the City established a unit within JMPD to address this growing problem. Ms Nompumelelo Mthembu is a member of the unit dealing with land invasions.
- [6] On 13 April 2020 Ms Mthembu received a call from Deputy Director Mr. Mangaliso of JMPD reporting calls of large-scale land invasions in the Lakeview area in Lawley. Ms Mthembu visited the area and verified that there was indeed land invasion taking place. She observed groups scattered in the early stages of erecting structures, pegging stands and demarcating stands for themselves in preparation for future construction. Besides the illegal nature of the land invasion, these persons were in breach of the national Covid-19 lockdown regulations. They were not in their homes and they were not carried out an essential service.
- [7] Ms Mthembu was not in JMPD uniform and was able to engage some of the invaders to find out what they were doing. They related to her that they had paid for portions of the land and were marking out individual portions. They pointed out that the individuals who had sold

the land to them were still in the area demarcating portions to other “would-be buyers”. Ms Mthembu did not have sufficient human capacity to repel the invasion at that point. Further JMPD had redeployed resources to assist with the Covid 19 enforcement of regulations. She advised his seniors about the land invasion and returned with redeployed JMPD officials on 14 April 2020 to stem the invasion. As soon as the officials left, the group would

occupy a different piece of land.

[8] On 15 April 2020 JMPD and its service provider, the Red Ants met in order to ascertain what was required to prevent further invasion and to ascertain how many people had invaded the land. The City identified which structures had been completed and occupied and which had not. It's instruction to the Red Ants was to demolish incomplete structures. This instruction was undertaken on 16 April

2020. They were informed that no occupied units were destroyed and no occupiers were evicted. Further some of the illegal invaders came to collect their belongings and assets before the shacks were demolished

by the Red Ants.

SUBMISSIONS

[9] Mr Marweshe, appearing for the applicants conceded in his submissions that of the 116 persons on the list, Annexure “A”, attached to the founding affidavit that only 16 persons had been living in the area since 2017 and 2018. The remainder had been living in the area since May and August 2019. He argued that they are homeless and are facing hardship. He referred to three examples in paragraph 32 of the founding affidavit namely Ms Lizzy Mpilo does not

have enough money to buy food for her children and has been on the streets since her shack was demolished. Ms Dorah Monas Legodi who has been not been accommodated by family due to the corona virus and Ms Lucy James who has four children who are also at risk. He argued that without a roof over their heads they struggle with social distancing and practising proper hygiene to flatten the curve. He argued further that the homes at this stage was contrary to the lockdown measures when people were required to remain indoors.

[10] In response to Mr Mokhare’s argument that the application was the same as the one dismissed before my brother Tsoka J, he submitted that it was not a reissue of the same application. He however, conceded that some of the applicants in the present matter were the same as the applicants in the matter before my brother Tsoka J but that was a miscommunication attributable to community leaders rather than an attempt at forum shopping. He agreed that there were similarities on the facts as well as the relief sought. He submitted however that there was a huge difference on other aspects. He argued that it was worrisome that whilst there was a moratorium on movement that the City would put people out in the dark especially when it was not clear that the City had a court order.

- [11] Mr Mokhare argued that there was a dispute of fact between the applicant and respondents' case on the papers. The applicants elected not to file a replying affidavit which was prejudicial to their case. He submitted that this was especially so as the present matter was the same application which served before my brother Tsoka J on Saturday on an urgent basis and was dismissed. The applicants in that matter raised the same facts before the Court and the respondents placed the same defence before the Court. The applicants also elected not to file a replying affidavit on Saturday which was telling.
- [12] He submitted that the video evidence referred to by the applicants did not assist their case. Mr Marweshe conceded during submissions that the applicants were illegal invaders and that it was not possible for the City to distinguish between legal occupiers of the land and illegal invaders who had arrived recently. The applicants had elected not to file a reply. They were not in a position to assist the Court or the City to make the distinction to resist the City's contention that they had only repelled illegal invaders. On the basis of Plascon Evans, it was not possible to grant the applicants the final relief it sought.

LAW

- [13] In motion proceedings where a dispute of fact is evident the decision of Plascon -Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984(3) SA 623 (A) directs that:

"...a final interdict should only be granted in motion proceedings if the facts as stated by the respondents together with the admitted

facts

in the applicant's affidavit justify such an order, or where it is clear that the facts, though not formally admitted, cannot be denied and must be regarded as admitted, requires clarification and perhaps qualification."

ANALYSIS

- [14] In considering the applicant's request for relief I have had regard to the concession made that the application is similar the relief requested previously on the same basis. I have noted that the deponent Mr Mkhonza appears from the list to have been in the area since May 2019 and the second and third applicants since August 2019. Neither of these three applicants have been in area for two years as deposed to under oath. Thus the statement under oath that the persons are residing in the area for two years is patently incorrect. The video footage also showed no evidence of police shooting the applicant's as suggested in the papers.
- [15] Ms Lucy James has four children at risk. However her name does not appear on the list marked Annexure "A" and it does not follow that she was a legal occupier who was dispossessed by the respondents. It would appear that her relief is for assistance of a general social welfare nature. The name of Ms. Dora Monas Legodi does also not appear on the list

and it is not clear that she was a legal occupier of a property. Ms. Lizzy Mpilo's name appears on the list and the nature of her hardship is that she does not have enough money to buy food for her children. There is no indication

that this is attributable to the respondents in any way. Ms Mpilo should be able to procure assistance for her children through SASSA grants and food parcels and through relief aid in the normal course.

- [16] In view of the internal inconsistencies in the applicants' case as well as the denial by the respondents' and the version they have put up; I am faced with two contradictory versions. The applicants have not in reply rebutted the version of the respondents with regard to the land invasions and the contravention of the Covid 19 lockdown measures by members of the community.
- [17] The facts as stated by the respondents taken together with the admitted facts and concessions made by the applicants do not justify the final relief sought by the applicants to rebuild and or replace the partially built illegal structures as it would tantamount to facilitating land invasion.
- [18] The only issue which remains to be determined is the issue of costs. In this regard whilst costs often follow the cause it remains within the discretion of the court. In the present matter Mr Mokhare expressed the view that it would be a futile exercise to order costs against indigent litigants. I agree and more so because the applicants albeit misguided approached this court in order to pursue a constitutional rights namely basic rights to food, shelter and housing.
- [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 reasons the following order is made:

1. The application is dismissed.
2. No order as to costs.

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JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances:

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Date of hearing

: 20 April 2020

Date of judgment

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