

SOUTH AFRICA / JUDGMENT

Mokhatla and Others v Ntsuseng and Others (2022/554) [2024] ZAGPJHC 498 (21 May 2024) [2024] ZAGPJHC 498

COURT

South Gauteng High Court, Johannesburg

BEFORE

Moorcroft

CASE / FILE NUMBER

2022/554

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IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2022-554

1. REPORTABLE: NO
2. OF INTEREST TO OTHER JUDGES: NO

In the application by

MOKHATLA, ROSAH FIRST APPLICANT MOKHATLA, MOSES SECOND APPLICANT
MAMADUMO, MONARENG AGNECIOUS THIRD APPLICANT MATHOBELA, LUCKY FOURTH
APPLICANT SEHURUTSI, MABE JACOB FIFTH APPLICANT MOABELO, CHOENE SIXTH
APPLICANT and other interested parties and NTSUSENG, SOLLY FIRST RESPONDENT
MAHLANGU, PINKY SECOND RESPONDENT MASHAMAITE, LAWRENCE THIRD RESPONDENT
SHERIFF OF TEMBISA FOURTH RESPONDENT

JUDGMENT

MOORCROFT AJ:

Summary

Urgent applications – rule 6 (12) – papers defective and presented in shambolic and disorganised
fashion – Non-compliance with requirements

Requirements - Consolidated Practice Directive 1 of 2024 – Deputy Judge President’s Notice to Legal Practitioners about the Urgent Motion Court, Johannesburg of 4 October 2021 - In re Several Matters on the Urgent Court Roll 2013 (1) SA 549 (GSJ)

Application not capable of regularisation – application dismissed

Order

[1] In this matter I make the following order:

1. The application is dismissed;
2. The applicants are ordered to pay the respondents’ cost on the scale as between attorney and client, being not lower than scale C;
3. The applicants’ counsel and attorney shall not to be paid any fees arising from the prosecution of the application launched under the above case number in April 2024;
4. The costs of the City of Ekurhuleni Metropolitan Municipality, the respondent in the main application, are reserved;
5. The Registrar is requested to furnish a copy of this judgment to the Legal Practice Council.

[2] The reasons for the order follow below.

Introduction

[3] This is a judgement in the urgent court. The applicants bring a spoliation application against the respondents.

[4] The papers in this application are shambolic. I list a few of the shortcomings and will elaborate further below:

4.1 The papers are not indexed and do not follow any logical sequence, with information scattered throughout the Caselines bundle.

4.2 Certain page numbers are duplicated a number of times which makes finding a particular page difficult.[1]

4.3 Annexures to affidavits are not annexed to the affidavits but appear to have been uploaded haphazardly under different headings.

4.4 Many pages do not follow sequentially.

4.5 The applicants and respondents cited in the notice of motion are not the same individuals listed in the application as originally issued in 2022 but there is no application for joinder nor for leave to intervene.

4.6 It is not possible to identify all the parties from the papers as uploaded.[2]

4.7 There are no returns of service or service affidavits.

4.8 The notice of motion is unsigned.

4.9 It is not clear when exactly the alleged spoliation occurred,[3] and by whom.[4]

[5] In April 2022 Mr Phinius Kheswa brought an application against the City of Ekurhuleni Metropolitan Municipality (“the

Municipality”) on behalf of himself and 278 other individuals. The applicants sought restoration of possession of Moroleng, Tembisa, Johannesburg, Gauteng Province. I refer to the 2022 application as the main application in the body of this judgment, and to the present application under the same case number as ‘the application’. It is not an interlocutory application pending the finalisation of the main application.

[6] The main application came before Wright J. The learned judge granted an order in the form of a rule nisi on 28 April 2022. Wright J granted interim relief and ordered the Municipality to show cause on 8 August 2022 why a final order

interdicting the Municipality from destroying the shacks erected by the applicants should not be made.[5]

The order made by Wright J lapsed on 8 August 2022 when Maier-Frawley J ordered[6] that the application be removed from the urgent court role and that the attorneys then acting for the applicants (BM Mudzuli Attorneys)

be ordered and directed to file an affidavit on or before 22 August 2022 to give reasons or grounds why the attorneys should not be ordered to pay costs de bonis proprius.

[7] Counsel appearing for the applicants in this matter before me submitted that the interim order granted by Wright J was still of force and effect but could not present any argument in support of this submission. The rule nisi was not extended on 8 August 2022. It has clearly lapsed and the submission made by the applicant’s counsel is rejected.

[8] The main application then served before Manoim J on 6 September 2022. The learned judge made an order that the application be removed from the roll of the urgent court, and that the applicants if so advised deliver their replying affidavit on or before 15 September 2022, The applicant’s heads of argument, practice notes and chronology had to be delivered by 23 September 2022 and the respondent’s on 30 September 2022 respectively. A joint practice note had to be filed by no later than 7 October 2022.[7] The costs were reserved.

[9] On 20 September 2022 a different matter between the Ekurhuleni Municipality as respondent and one thousand applicants from the Esselen Park Community extension 1 (Tembisa) and the Mashudu Mathimba Section under case number 2022/24043 came before Vally J. The learned justice raised concerns relating to the conduct of the applicant’s counsel, Mr Mkhize, and a Senior member of the Bar offered to assist the counsel. Mr Mkhize then proposed an order after consultation with his clients. In terms of the order[8] the application was withdrawn and Mr Mkhize was “barred and undertakes not to act for or on behalf of the applicants in the following matters 55475/2021; 5396/2022; 554/2022; 22417/2022

and 22418/2022”.

[10] This then brings me to the present application under case number 554/2022. In the present application Mr Mkhize again acts on behalf of the applicants in case number 554/2022 despite his undertaking given in case number 24043/2022. He submitted however that he is not precluded from acting as the present applicants are not among the 279 applicants in the matter under case number 554/2022 or the applicants under case number 24043/2022. This then raises two questions, firstly why the parties can not be identified by reading the application and also why this application was brought under an existing case number from 2022.

It is not clear from the papers what the commonality, if any, is between the 279 applicants in the application launched in 2022 and the present applicants. Six applicants are listed in the notice of motion but reference is also made to “other interested parties” who are not named but who are also alleged to be applicants. In paragraph 2 of the founding affidavit reference is made to a list of applicants in an annexure but the annexure is not annexed to the founding affidavit nor is it annexed to the supplementary[9] founding affidavit deposed to subsequently and that was annexed to a revised notice of motion of 25 April 2024. The applicants have however uploaded powers of attorney[10] and other documents that they say reflect the details of the applicants. Certain details also appear in confirmatory affidavits

annexed to the supplementary affidavit albeit that the pages do not all follow sequentially. The confirmatory affidavits were also not all deposed to before a commissioner of oaths.

[11] It is therefore not possible to identify all the applicants in the 2022 or the 2024 applications under the same case number with any degree of certainty. The applicants’ deponent in the founding and supplementary affidavit in the April 2024 application refers to the applicants as “the aggrieved group members of Moroleng Section, Tembisa” and she refers to herself as the chairperson of this organisation.

The respondents deny her status. In paragraph 16 of the answering affidavit the first respondent states that the “applicant

community” did not give instructions to the present applicants and their legal representatives to launch these proceedings. The residents of Moroleng Section are in fact (according to the respondents) represented by the respondent’s attorneys.

[12] The Municipality is the only respondent in the application as issued in 2022. Six respondents are now cited but no mention is made of the Municipality. The application was also not served on the Municipality even though it is a party to the main application.

[13] To summarise, the parties to the present application as launched under case number 554/2022 in 2024 are not the parties cited in 2022. It is not clear why the application was brought under the case number of 2022 as the present application is not an interlocutory application or one pending the final outcome of the application between the 279 applicants and the Municipality. There is also no application for intervention by any new applicants nor

an application by the 279 applicants to join new respondents. For this reason among others the application is fatally defective and constitutes an abuse.

[14] This application of 2024 was initially brought by way of a notice of motion dated 16 April 2024 (with a set down date of 23 April 2024) with a founding affidavit and an amended notice of motion was signed on 25 April 2024 with a set down date of 30 April 2024, together with a supplementary affidavit.

[15] The applicants seek an order that they be “forthwith granted an order to gain immediate occupation of their set properties/or land as described MOROLONG SECTION, Tembisa” and that they be “spoliated back into their properties with immediate effect” and that the respondents be interdicted from evicting the applicants from property or land described as Moroleng Section, Tembisa,

Gauteng. I interpret the prayers read with the affidavits to mean that the applicants seek an order that occupation of vacant land be restored to them. It is however not possible to properly identify the property with which the application is concerned.

[16] The respondents are cited in paragraphs 3 to 6 of the founding as well as the supplementary affidavit but it is stated that their “full and further particulars are unknown.” This begs the question whether the application could be served at all without the prior approach to court for an order of substituted service.

[17] The applicants also failed to attach any return of service or service affidavit to the papers before the court and the parties are not in agreement as to when exactly the application was served.

Consolidated Practice Directive 1 of 2024 was therefore not complied with. The Directive provides as follows:

“28.9. Service of process in all urgent matters shall comply with the Uniform Rules of Court. Save where required by legislation, where agreement can be reached by the representatives of all parties to vary the requirements of the rules to facilitate a wholly electronic exchange of papers, condonation shall be granted ipso facto.”

In terms of rule 6 (12) the Court may condone non-compliance with the rules as to service but it should only do so when it knows what was done to bring the application to the notice of the respondents, or the Court intends to grant an ex parte order for which is case is made out in the founding papers. Deviation from the rules must be kept to a minimum and must be justified.

[18] The first respondent informs the Court in paragraph 6 of his answering affidavit that the application was served on him at 15h36 on Monday, 29 April 2024 and that he certainly did not have sufficient time to prepare affidavits. The matter was enrolled for Tuesday, the 30th. He points out that the application was initially on the roll on the 23rd and was removed from the roll by the presiding Judge.

A respondent must be given adequate time to file opposing affidavits, lest adherence to the sound principles of audi alteram partem be reduced to mere lip service.

[19] The application in its present form was issued it would appear on 25 April 2024. In the notice of motion served on the afternoon of the 29th the respondents are required to file a notice of intention to oppose “at or about 29 April 2024.” However, the respondents are also required to file answering affidavits “on Sunday at 24 April 2024.” The respondents are then informed that if “no such notice to oppose is filed, this application may be heard in the respondents absence an order may be granted as prayed for in the notice of motion on the ____ 30th of April 2024.” The instructions are given in the notice of motion are completely nonsensical and unrealistic.

[20] I refer to the “Notice to Legal Practitioners about the Urgent Motion Court, Johannesburg” dated 4 October 2021. In this notice the Deputy Judge President indicated that the effective functioning of the urgent motion court

was being imperilled by several undesirable practices by some attorneys and some counsel. Frequently unrealistic timeframes[11] are set by applicants to file opposing papers. This often means that the papers do not reach the presiding judge prior to the hearing. The learned Deputy Judge President continued:[12] “the basic approach should be that a full set of papers is available to the judge on the previous Thursday so that the judge can organise a programme of preparation and prepare effectively. Counsel shall be required to justify what extreme exigency warrants a deviation from this approach.”

[21] Papers must be prepared in a manner suitable to be adjudicated urgently. Evidence should be properly presented and should be to the point.[13] It is an abuse when papers are not paginated correctly and do not follow sequentially in a logical fashion. Annexures should in accordance with the usual practice in the courts be annexed to affidavits and this practice should also be reflected on Caselines.

The papers must be indexed.

[22] It is instructive also to refer to the 2013 judgment *In re Several Matters on the Urgent Court Roll*[14] where Wepener J dealt with the abuses occurring in the urgent court and said:

[4] Some of the defects are the following:

1. A lack of indexing and pagination, the latter of which assists a judge to work easily with the papers and to find relevant documentation.
2. A lack of proper binding of papers, which, similar to indexing and pagination, assists a judge to work through the papers with a measure of convenience.
3. A failure in the index to describe each affidavit and annexure as a separate item, which makes the work of a judge more difficult. In this regard indices that read 'Annexure A', 'Annexure B' and 'Annexure C', etc, are of no assistance and fail to comply with the Practice Manual.

4.A lack of compliance with the Practice Manual's ch 9.24 regarding urgent applications in particular. As an example I refer to the requirement that an applicant set out explicitly the circumstances which render the matter urgent. In this regard a practice

has developed in this division, that practitioners see to it that there is a specific section headed 'Urgency' wherein this requirement is fully dealt with. This enables the presiding judge to quickly and conveniently determine the nature of the urgency and why the matter should be afforded preference on the motion roll, ie why it should be heard in the urgent court and not in the normal course of events.

[23] The respondents did give notice of intention to oppose but the applicants nevertheless proceeded with the application during the motion court week of 30 April 2024 and the matter was set down for Thursday, 2 May

2024. I allow the matter to stand down until Friday, 3 May and the applicant's counsel undertook to provide me with a hard copy of the papers as the electronic version was not easy to read. I also invited counsel to address me on the subject of a *de bonis propriis* cost order as sought by the respondent's counsel.

[24] The matter was then again called on 3 May 2024 but no hard copy of the bundle was made available. The council acting for the Municipality, Mr Sithole, was able to provide me with certain of the documents.

[25] Because of the extremely short time periods given it was not possible to comply with paragraph 28.10 of the Consolidated Practice Directive 1 of 2024 that came into effect on 26 February 2024. The Directive provides as follows:

"28.10. The urgent roll closes at noon on a Thursday for the following Tuesday. The applicant must properly consider the appropriate notice period to give to the respondent. Generally, enrolments ought to be made for the next week, but where longer notice periods are deemed appropriate by an applicant, matters may be enrolled for a later week."

[26] The applicants did not comply with paragraph 28.10 of the Practice Directive 1 of 2024, nor did they comply with the requirement in paragraph 5 that a compliance statement be filed.
[15]

[27] It was brought to my attention that the applicant's counsel was struck from the roll of advocates.[16] An application for leave to appeal was dismissed and an application for leave to appeal was made to the Supreme Court of Appeal.[17] Mr Mkhize submitted that he was entitled to appear as the application for leave to appeal suspended[18] the order of the High Court. Because of the view I take of the matter it is not necessary in the urgent court to say anything about

counsel's right to appear under these circumstances but these are matters to be considered by the Legal Practice Council. I will therefore request the Registrar to forward a copy of this judgment to the Legal Practice Council.

[28] Paragraph 28.8 of the Consolidated Practice Directive reads as follows:

“28.8. The enrolment of an allegedly urgent[19] matter found not to warrant a hearing on this roll may, at the discretion of the Judge seized with the matter, result in punitive

costs being awarded and the culpable counsel and attorney being ordered not to be paid any fees arising from the prosecution of such matter(s).”

[29] I am of the view that the conduct of the applicants’ counsel and attorneys are such that a punitive cost order is justified, and that the counsel and attorneys not be paid any fees.

[30] The Municipality was not cited or served in this application of 2024, but is the respondent in the main application. It was represented by counsel on both days when the matter was argued and his assistance of great help. I do not make an order in respect of the costs of the Municipality but reserve those costs for later determination perhaps when the main application is before court.

[31] For these reasons I make the order set out above.

MOORCROFT AJ

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION

JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 21 MAY 2024

COUNSEL FOR THE APPLICANTS: S W MKHIZE INSTRUCTED BY: VUYO MNAZANA & DE WEET ATTORNEYS, MNANZANA HLASELANI ATTORNEYS INC COUNSEL FOR THE FIRST, SECOND AND THIRD RESPONDENTS: A SESHOKA COUNSEL FOR THE CITY OF EKURHULENI METROPOLITAN MUNICIPALITY E SITHOLE DATE OF ARGUMENT: 2 & 3 MAY 2024 DATE OF JUDGMENT: 21 MAY 2024

[1] There is a duplication of page numbers. There is a notice of motion dated 16 April 2024 together with a founding affidavit

deposed to on the same day[1] that reflect the page numbers 0000 – 1 to 0000 – 44, as well as a supplementary affidavit at pages also numbered 0000 – 1 to 0000 – 33. The same numbering is then used for a further notice of motion dated 25 April 2024 at pages 0000-1 to 0000-4, with a copy of the supplementary affidavit at pages 0000-6 to 0000-31. The same numbering was used in 2022 when a notice of motion dated August 2022 was filed at pages also identified by the numbers 0000-1 to 0000-64, followed by another notice of motion dated 31 August 2022 at pages 0000-65 to

0000-128

- [2] In the supplementary affidavit it is alleged that the applicants are listed in an “Annexure T.S. 10 to the notice of motion.” There is no such annexure.
- [3] In paragraph 8 of the founding affidavit the deponent states that the applicants were in occupation of property when they were evicted “all or about the 15th of February 2024 till date one or about 20 March 2024, all illegal evictions by respondents are currently taking place which is within the jurisdiction of” this court. In paragraph 19 of the founding affidavit the applicants seemingly rely on a demolition of their houses that took place on 27 April 2021 and was carried out by the municipality. In paragraph 37 of the same affidavit the date of the alleged spoliation is given as follows: “the 28th / 30th of and 03rd March 2024 of March 2023”. It is not possible to interpret this statement
- [4] In paragraph 15 of the supplementary affidavit it is alleged that a group of “unknown angry illegal invaders being sent by respondent’s thus proceeded to erect structures or properties within the adjacent land order within the boundaries of Moroleng section community, tembisa.” These invaders are not identified and no basis is laid for the bald averment that they were sent by the respondents
- [5] Page 079-1. The references to page numbers are to the page numbers on Caselines.
- [6] Page AAA1.
- [7] Page 079-5.
- [8] Page 079-11.
- [9] Page 0000-5.
- [10] Page 0002-1 onwards.
- [11] Para 10.
- [12] Para 11.
- [13] Para 12 and 13.
- [14] In re Several Matters on the Urgent Court Roll 2013
- (1) SA 549 (GSJ). See also the judgment by Notshe AJ in East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others [2011] ZAGPJHC 196 paras 6 and 7.
- [15] Answering affidavit para 28 (page 080-15).
- [16] Legal Practice Council v Mkhize 2024 (1) SA 189 (GP).
- [17] Page 00-19.
- [18] Section 18 of the Superior Courts Act 10 of 2013.

[19] See also the Practice Manual, 2018, para 9.23.

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