

SOUTH AFRICA / JUDGMENT

Mpaka and Others v KSD Local Municipality and Another (3627/2015) [2017] ZAECMHC 24 (11 July 2017)

[2017] ZAECMHC 24

COURT

Eastern Cape High Court, Mthatha

BEFORE

SM Mbenenge

CASE / FILE NUMBER

3627/2015

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE LOCAL DIVISION, MTHATHA)

CASE

NO: 3627/2015

In

the matter between:

PATRICK
S. MPAKA
1ST
Applicant
SIMLINDILE
MNAMATHA
2ND Applicant
XOLISA
BANTSHI
3RD Applicant
NOLWANDO
LITHOLI
4TH Applicant
and
KSD
LOCAL
MUNICIPALITY
1ST
Respondent
DEPARTMENT
OF RURAL DEVELOPMENT

AND
RURAL
REFORM
2ND
Respondent

JUDGMENT

MBENENGE ADJP:

[1] On 17 November 2011 the Department of Rural Development and Land Reform (suing as applicant, otherwise hereinafter referred to as the Department) obtained an order, inter alia, restraining and/or interdicting Jonase Ndzambule, Thembinkosi Butshingi, Kwezi Matshanda (as first, second and third respondents,

respectively) and Zanemvula Nobhala “and others” from demarcating, selling or dealing with the Department’s land in any manner whatsoever. The order further reads as follows:

“3. That the 1st, 2nd, 4th and 5th Respondents and others[1] be and is hereby interdicted and restrained from demarcating, selling or dealing with the applicant’s land in any manner whatsoever;

4. The said Respondents be and hereby directed to demolish and remove all structures, fence or anything erected on the aforesaid land of the applicant forthwith;
 5. That the deputy sheriff is granted authority to demolish and remove any structure built by the Respondents thereon in the event the Respondents fail to demolish or remove such structure within ten (10) days of the order of this Honourable Court;
 6. Directing the members of the South African Police Services authority to render whatever assistance is required by the applicant or Deputy Sheriff in executing the order referred to herein above in paragraph
- 5;
7. Granting applicant leave to serve the order of this Honourable Court by inter alia, affixing copies thereof on the conspicuous places on the erven or sites occupied by the Respondents.” Sic.

[2] The execution of the order, approximately four years down the line, on or about 07 December 2015, resulted in structures constructed by the applicants herein being demolished. Consequent thereupon, this court was approached on an urgent basis on 09 December 2016, with the applicants evincing a determination to challenge the demolition as having been unconstitutional and, in essence, to seek an order restraining the first respondent and the Minister of Police (cited as the second respondent) from proceeding with any further demolition of structures without a court order and a mandamus directing the respondents to rebuild the applicants’ demolished structures.

- [3] In the course of time the application was withdrawn against the Minister of Police upon the delivery of an affidavit wherein it was averred that the police had played no role in the “demolition of [the][2] incomplete structures on the left side of the [R61] road”. Costs were also tendered. Once it emerged that the Department had been involved in the impugned execution of the order of 17 November 2011, the applicants joined the Department as the second respondent and amended their notice of motion so as to be worded thus:

“1. That the action of the Respondents of demolishing Applicants’ structures without a Court Order at Embassy area, Mthatha, be and is hereby declared to be unconstitutional and unlawful.

2. That the letter of delegation issued by the 2nd Respondent to the 1st Respondent through its Attorneys to execute the Court order dated 17 November 2011 be and is hereby set aside as invalid with no force of law.
 3. That the Respondents be and hereby interdicted and restrained from proceeding with any further demolitions of structure or evicting Applicants or removing their belongings from the Embassy area without being authorised to do so by a valid Court order.
 4. That the Court order dated 17th November 2011 which does not cite the Applicants as Respondents be and is hereby declared to have no force of law against the Applicants.
 5. That any demolition of Applicant’s structures carried out through the use of the Court order being impugned be and is hereby declared unlawful on the basis that the Court order is regarded as non-existent.
 6. That the Respondents be and are hereby ordered to re-build forthwith Applicants’ structures that they have unlawfully demolished at the Embassy area, Mthatha.
 7. That the Respondents be and are hereby ordered to pay costs of this application on a party and party scale jointly and severally each paying the other to be absolved.” Sic.
- [4] According to the applicants their occupation was not connected to the occupation that was interdicted in 2011 and that, therefore, it was improper for the respondents to have demolished the applicants’ structures without first obtaining a court order. In so far as the State Attorney, Mthatha had written to the first respondent requesting it (the first respondent) to provide the Department “with the machinery and the security in the form of Municipal police for security during the demolition” the applicants contend that the letter constituted an unlawful delegation of power.
- [5] In addition to defending the demolishment as having been authorised by the court order referred to above, the first respondent denies that any of its officials participated in the demolishment complained of as it merely provided the machinery[3] that was used to execute the demolition, which was done by the Department; the presence of officials from the Public Safety Department of the first respondent was limited to protecting the first respondent’s machinery.

- [6] The second respondent, on the other hand, contends that the letter alleged to constitute a delegation is not, upon its proper reading, a delegation in the true sense of the word. In terms of the letter the second respondent merely requested the first respondent to supply machinery and security during the demolishment. In so far as an interdict is being sought, the second respondent contends that the demolishment having already occurred, an accomplished demolition was not liable to be interdicted. Most significantly, the second respondent contends that the order of 17 November 2011 on the strength of which the demolishment was conducted was granted against specified “and other unknown” occupants; the order, “suffices to include also other surrogates and unauthorised invaders of the applicants’ land then and in the future.”
- [7] The second respondent furthermore contends that the structures that were demolished had been unoccupied as they were incomplete, having been built to below window level. The appropriate remedy, according to the second respondents, is an action for damages, not the instant application.
- [8] In my view, the letter soliciting assistance from the first respondent to provide the machinery for demolishing the structures

subject to this application speaks for itself. It did not constitute delegation of powers. The stance of both respondents that there was no delegation, but merely a situation where one tier of government solicited and obtained assistance from the other, is correct. In any event, the second respondent has owned the demolishment, and does not implicate the first respondent.

- [9] I now turn to consider whether the demolishment complained of was lawful.
- [10] The answer to the question at hand hinges on whether the order was, in the first place, issued against the applicants.
- [11] A duty is cast on a person launching proceedings against another or others to identify the persons against whom relief is being sought with precision. In the case of application proceedings rule 6(2) of the Uniform Rules of Court (the Rules) is an aid, whilst in the case of action proceedings rule 17(4) aids citation.
- [12] In *Kayamandi Town Committee v Mkhwaso & Others*[4] it was held that a notification to persons in general terms or to a group of individuals is a procedure frequently adopted in order to give interested persons an opportunity of joining in the litigation. Conradie J went on to say:

“But it does not by itself make them parties to the litigation and they do not merely by virtue of having been notified of the litigation become liable to be for contempt of court for failure to comply with any order which is eventually made. A failure to identify defendants or respondents would seem to me to be destructive of the motion that a Court’s order operates only inter parties, not to mention the question of locus standi in indicio. An order against respondents not identified by name (or perhaps by individualised description) in the process commencing on action (in very urgent cases, brought orally) on the record would have the generalised effect typical of legislation. It would be a decree and not a

Court order at all.”[5]

- [13] Over the years the courts have, alive to the challenges associated with the sudden invasion of land by persons or group of persons whose details are lacking, adopted a more benevolent approach and allowed the citation of an ascertainable group, even though their names might not be known.[6] However benevolent the courts have been, orders have not been granted against persons not occupying the land in question but “intending to unlawfully occupy” in due course because, said Budlender AJ, such persons are “not in any real sense an ascertainable group... who are properly before court against whom an effective order can be made; there [was] no prospect that they [would] be identified during the course of the proceedings...[t]he identity will change from day to day. Some people, who today have no intention to occupy the land, may subsequently decide to do so.”
- [14] Addressing himself to challenges associated with serving persons “intending to unlawfully occupy”, Budlender AJ went on to say[7]:
- “...If the Sheriff reads out the order today, it will be of no purpose as effect in respect of any person who is not present when he reads out the order, and who intends to occupy the land tomorrow or thereafter. It will be effective only in respect of any person who at the moment of announcement happens to be in the process of occupying the land, or visiting it. It will not give any notice of the order to any other people intending to occupy the land, and will be entirely ineffective as far as they are concerned...”*
- [15] In light of the foregoing, it could never have been, and never was, the intention of the court when granting the order it did on 17 November 2011 to make the order applicable to other surrogates and unauthorised invaders of the land in question in 2015.
- [16] Mr Msiwa, who appeared for the second respondent, was hard put to explain how it was available to this court to have granted an order of general application perpetually enjoining the public at large to obey the law. The procedure adopted by the second respondent constituted a flagrant violation of section 26(3) of the constitution which proscribes the eviction of persons from their home or have their home demolished without an order of court made after considering all the relevant circumstances.
- [17] Ms Nyobole, counsel for the applicants, argued that in the event of the Court declaring the demolishment to have been unlawful consequential relief such as was granted in *Tswelopele Non-Profit Org v City of Tshwane Municipality*[8] should be granted in this matter. In that matter the Court formulated an appropriate special constitutional remedy aimed at instilling recognition on the part of governmental agencies that participated in the unlawful operation that occupiers, too, are bearers of constitutional rights, and ordered that the occupiers whose shelters had been demolished be afforded “temporary habitable dwellings that afford shelter, privacy and amenities at least equivalent to those that were destroyed, and which are capable of being dismantled, at the site at which their previous shelters were demolished.”[9]

[18] Unlike in the Tswelopele case [10] where dwellings that had been occupied peaceably for at least 18 months had been destroyed, in the instant matter we are dealing with structures that were built to below window level and not habited. A more effective remedy would, in my view, be an action for damages than a restitution order.

[19] The question of costs remains to be considered. The applicants have been substantially victorious, hence there is no reason why costs should not follow the result. The first respondent opposed the application not merely on the basis that it had no complicity in the demolition subject to this application, but persistently associated itself with the second respondent contending, *inter alia*, that the applicants had no basis in law “to seek an order declaring the execution of the order in question unlawful.”

[20] The costs of 15 June 2017 when the matter was postponed were reserved. On that occasion, the second respondent had not

delivered any affidavit in answer to the allegations made against it. This came about because, so argued Mr Msiwa, the applicants had not sought and obtained an order granting them leave to deliver an additional set of affidavits. The order of 31 May 2016 was pointed to by Ms Nyobole as having granted the applicants the leave. That order, however, stated that the “[a]pplicant is granted leave to file supplementary affidavit averring essential averments for the joined applicants.” When the inadvertence and the confusion it caused was pointed out, the order was, at the instance of the applicants, varied so as to make reference to the second respondent as being the litigant against whom allegations in the supplementary founding affidavit should be made. This confusion, which can only be of the making of the applicants as being *dominus litis*, could and should have been avoided.

[21] The second respondent was opportunistic as it had earlier adopted the cavalier stance that the application was liable to be dismissed even on the version of the applicants. For that reason, only the first respondent is entitled to a cost order for the postponement of 15 June 2017. As between the applicants and the second respondent, each party should pay its own costs.

[22] I therefore grant the following order:

- (a) The demolition of the applicants’ structures by the second respondent on 07 December 2015 is hereby declared unlawful.
- (b) Subject to what is stated in paragraphs (c) and (d) below, the first and second respondents shall pay costs of the application jointly and severally, the one paying, the other to be absolved.
- (c) The applicants and the second respondent shall each pay its own costs of 15 June 2017.
- (d) The applicants shall, jointly and severally, the one paying, the other to be absolved, pay the costs of the first respondent occasioned by the postponement on 15 June 2017.

SM Mbenenge

Acting Deputy Judge-President

High Court, Mthatha

Applicants' counsel:

E N Nyobole

Instructed by:

SR Mhlawuli and Associates

Mthatha

First respondent's attorney: R M Mayekiso

Instructed by:

M R Mayekiso Attorneys

Second respondent's counsel: P V Msiwa

Instructed by:

State Attorney

Head on:

28 June 2017

Delivered on:

11 July 2017

[1] My emphasis.

[2] It does not appear that any rule nisi was obtained, even though according to the notice of motion that had been the intention.

[3] "TLB machines" and the operations thereof.

[4] 1991

(2) SA 630 (C).

[5] Ibid at 634.

[6] See for example *City of Cape Town v Stacy Yawa & Others*

[2004] 2 All SA 281 (C) per Budlender AJ ; also see *Illegal Occupation Erven Phillipi v Monwood Investment Trust Co (Pty) Ltd*

[2002] AllSA 115 (C).

[7] At 284c

[8] 2007

(6) SA 511; see also *Ntantana Ors v Mhlontlo Local Municipality and Another*

[2016] ZAEMHC 10 (15 April 2016).

[9] Supra at 523 C-D.

[10] Supra.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAECMHC/2017/24.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/mpaka-and-others-v-ksd-unknown-topic-aecmhc-2017--6a3ea5143b1caa912980b96f>

Prepared on 13 October 2026 · Esheria