

SOUTH AFRICA / JUDGMENT

Rex and Others v Mnister of Defence and Military Veterans and Others (22663/2018)

[2018] ZAGPPHC 348 (9 May 2018)

[2018] ZAGPPHC 348**COURT**

North Gauteng High Court, Pretoria

BEFORE

N Davis

CASE / FILE NUMBER

22663/2018

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Source record**HIGH****COURT OF SOUTH AFRICA****(GAUTENG****DIVISION, PRETORIA)****CASE****NO: 22663/2018****NOT****REPORTABLE****NOT****OF INTEREST TO OTHER JUDGES****REVISED****In**

the matter between:

WILHELMINA
HENDRINA
REX: First
Applicant
THE
OTHER MARIEVALE
RESIDENTS: Second
to Seventy Third Applicants
and
MINISTER
OF DEFENCE AND
MILITARY
VETERANS: First
Respondent
SOUTH

AFRICAN NATIONAL
DEFENCE
FORCE: Second
Respondent
OFFICER
COMMANING MARIEVALE
ENGINEERING
REGIMENT: Third
Respondent

JUDGMENT

DAVIS, J

Introduction

[1]This is yet another one of the those cases where organs of State have allowed a situation to develop to a point where a court of law is called upon to address an issue concerning the social well-being and dignity of people.

Nature of application

[2]The Applicants, being 73 individuals, claim that they, together with their dependants, have been living in Marievale, a former mining village and military base situated between Nigel and Springs in Gauteng and that they were forcibly evicted from their homes by members of the South African National Defence Force(the SANDF). The Respondents in the application are the Minster of Defence and Military Veterans, the SANDF and the Officer Commanding Marievale Engineering Regiment.

Military Base

[3]It is common cause that the premises from which the Applicants claim they were unlawfully evicted consist of "state quarters"

comprising individual houses, bungalows and stands, flats, hostels, rooms and a community hall, all constituting the Marievale township. It is also common cause that these premises presently form part of the Marievale Military base.

State quarters

[4]In respect of state quarters inside a military base and its occupation, the statutory regime is the following:

4.1 The Department of Defence (DoD) policy promulgated in terms of the Defence Act No 42 of 2002 is currently contained in DoD Instruction PERS 20/2000 dated 1 September 2000 - State Housing Policy and Procedures.

4.2 It, inter alia, provides that state quarters may be allocated to members of the SANDF and their immediate family members or dependants.

4.3 It further provides for occupation for an initial period of five years whereafter applications can be made for further occupation based on a "factor system" which comprises of a determination based on the member's age, salary and a host of other considerations.

4.4 One of the advantages of having members of the SANDF residing in state quarters is to enable the provision of training after hours and early mornings and further to conduct operational or regimental requirements.

4.5 The policy does not cater for members whose services have been terminated resulting from resignation, discharge / for whatever reason on retirement.

4.6 The state quarters are only meant for residential purposes and the sub-letting thereof or use for any other purpose, let alone criminal

activities are prohibited. Under no circumstances are civilians authorised and allowed to rent or occupy "military houses".

[5]Occupation

None of the Applicants are currently members of the SANDF and none of them have been granted authority by the SANDF to occupy state quarters in terms of the DoD policy. They are therefore unlawful occupiers and how their occupancy of (or "residence" in) state quarters came about, can be gleaned from the Respondents' own principal answering affidavit, deposed to by the Chief of the South African Army. In short, it is this:

5.1 Prior to 1996 the State quarters in the military base was solely used for occupation by white members of the SANDF. During the period 1996 - 2003 there was a transformation and integration process in the SANDF which resulted in black SANDF members and their families also taking up occupation of state quarters in the base.

5.2 "Some civilians" who were extended family members of the SANDF members came to reside with the members at the base.

5.3 The Applicants state that the base was initially occupied by the Group 16 military unit but over the years the size and complement of the unit shrank until about 2004 when the unit moved out of the base. This allegation is not refuted by the Respondents. What is denied is the allegation that the absence of military presence also resulted in an absence of guards and access control.

5.4 This denial is at odds with the following statements by the Chief of the Army:

"... there was an oversight on the part of the Respondents in terms of the administration and allocation of the state quarters ... there was an oversight at some stage on the part of the SANDF in not taking steps to ensure that the State quarters are indeed being occupied by the qualified occupants and that those were members of the SANDF. This is due to the fact that the SANDF was busy with the downscaling and transferring members in and out. As a result, the process of verification seemed very difficult at that time..."

[6]Consequences of occupation

It is to me astounding how the SANDF, running a military base which the Respondent's counsel was keen to point out constituted critical

military infrastructure, with a secure perimeter and controlled access, could have allowed the base to become a civilian village. The answer might be in unlawful conduct of members of the SANDF who are apparently being disciplined for this. Be that as it may, the consequences of the occupancy, which took place over the course of quite a number of years both prior and subsequent to the DoD policy referred to in paragraph 4 above were the following:

6.1 Marievale military base by and large became a village occupied primarily, if not exclusively, by a civilian population with unrestricted access and freedom of movement.

6.2 Unfortunately it also became a haven of criminal activity. Allegedly prostitution, the running of illegal shebeens and spaza shops and the possession of illegal firearms, ammunition and motor vehicles became the order of the day.

6.3 These criminal activities were largely terminated or eliminated during military police operations during May 2017.

6.4 Somewhere during this period or during the removals of which the Applicants complain or during the evacuation of the base during November and December 2017, some of the State quarters were damaged and vandalized with geysers, pipes, plumbing and electrical equipment being removed.

6.5 The Chief of the Army in his affidavit alleged that this vandalism and damages may run to millions of rands and may take years to repair.

[7]The removals

7.1 During November 2017 the military began preparations for a training exercise. This training could apparently no longer take place at the nearby training base at Heidelberg "... which military base was depleted due to the fact that there were no funds to renovate the training facilities" there.

7.2 Under the-guise of a training exercise and after having verified that the Applicants were unlawful occupiers, members of the SANDF conducted what amounted to be a forced removal of all the civilian occupants of Marievale.

7.3 The Chief of the Army described the exercise as being " ... conducted with the aim to train the newcomers in the system as to how to handle or deal with issues of inter alia non-adherence to Department of Defence instructions, policy and procedure within the military base".

7.4 The Applicants alleged in their founding papers that armed soldiers went from house to house ordering residents to vacate their homes immediately and used violent or intimidatory tactics by pointing automatic rifles at residents and threatening them. Allegations of assaults against vulnerable residents and young children were also made, all confirmed by affidavits of all 73 Applicants. They also relied on an affidavit of one Willem Koekemoer which was used in a separate application with which I shall deal more fully hereinafter.

7.5 The allegations of misconduct and forced evictions were denied by the Respondents but the fact remains that after the "training

exercise" all the civilian occupants were cleared from the military base. Most of them now live in squalor in a makeshift shanty town (as is apparent from the photographs which form part of the papers), cynically called "Happy Village". This informal settlement is being provided with water by the military twice daily "out of humanity". The Chief of the Army says that the inhabitants thereof "is the responsibility of the Department of Human Settlements and not the Respondents" .

7.6 The Respondents' denial of forceful removals and evictions were met in the Applicant's replying affidavits with more detail as to the specific members involved and, tellingly, supported by a set of photographs. These indicate a black man with an injured and swollen face, another in a hospital bed with similar injuries and numerous armoured vehicles outside houses together with a multitude of uniformed SANDF members bearing automatic rifles. The Respondents objected to the introduction of this evidence, claiming in a substantive application for striking out that this constituted impermissible "new matter". In this regard I was referred

by both counsel to a number of judgments confirming that an Applicant may not make out his case in reply. This is not such a case. The Applicants' cause of action pertaining to forced eviction was made out in the founding affidavit in various paragraphs in the main founding affidavit and some of the confirming affidavits. All that the reply did, was to meet the Respondents' blanket denials with visual proof. I also note that there was no request for leave to file a duplicating affidavit.

7.7 I interpose to deal with another bone of contention in the Respondents' application to strike out, namely certain video material. Much was made of the issue of admissibility thereof and legal argument was presented regarding the extension of rules pertaining to trials to motion proceedings and the like. I did not look at the video material and did not consider its contents (making all these arguments irrelevant) for the following reason: The application was launched as an urgent application on 28 March 2018. In the founding affidavit reference was made to the video material (contained in a compact Disc (CD)) but which was not annexed to nor served with the papers. The answering affidavit was deposed to on 10 April 2018. The replying affidavit was dated 16 April

2018. The matter was set down in the urgent court (as indicated in the notice of motion) for hearing on 17 April 2018, On that day it was removed by Van der Westhuizen, J due to the volume of the papers from whence it came by way of a direction from the Deputy Judge President to me in the Third Court for hearing on 2 May 2018. The video footage was only furnished to the Respondents on 20 April 2018, that is after the exchange of affidavits. It would be manifestly unfair to the Respondents if, in these circumstances, I had regard thereto and its contents have therefore not been perused. I do not deem it necessary, in the context of this matter as set out below and in view of the findings made by me, to deal with the remainder of the application to strike out. I similarly also ignored the Applicants' answering affidavit to the application for striking out as it was not served on the Respondents in a manner or at a time which allowed the Respondents to reply thereto.

[8]The "other" application

8.1 On 29 November 2017 14 Marievale residents briefed an attorney on their own to represent them in an urgent application pursuant to the forced evictions referred to above. This was launched in the Gauteng Local Division, Johannesburg in case no 2017/44930.

8.2 On 30 November 2017, Berger AJ granted a rule nisi returnable on 29 January 2018 whereby the members of the SANDF were restrained and interdicted from harassing, threatening or intimidating those applicants and from unlawfully evicting them from their homes in Marievale without an order of court. The interdict also included a restraint from unlawfully entering the properties or homes occupied by the Applicants "and all other residents in Marievale and from unlawfully restricting their freedom of movement or preventing them from entering or exiting Marievale" .

8.3 The rule nisi was confirmed on 29 January 2018 by Molahlehi, J who also refused leave to appeal. Currently, so counsel informed me, an application for leave to appeal is pending before the Supreme Court of Appeal, which is also why the Respondents preferred not to deal with the affidavit of Willem Koekemoer referred to in paragraph 7.4 above wherein the chain of events leading up to the evictions as well as conduct of the members of the SANDF had been detailed.

[9]Evaluation and findings:

9.1 Marievale is a military base under the control of the Respondents. It is used as a military training base.

9.2 Unauthorised civilians are not allowed to occupy state quarters in a military base.

9.3 Despite the Applicants claiming that they have purported leases with the Department of Public Works or were paying rent to a person who they allege they thought was representing the military or whether they had purported (and prohibited) sub-lease agreements with individual members of the SANDF, they were all in fact unlawful occupiers of state quarters.

9.4 On a conspectus of all the evidence there can be no real dispute that the Applicants were evicted by the Respondents and members of the SANDF during November or December 2017 from the homes they occupied at the time in Marievale.

9.5 These evictions took place without a court order.

9.6 Despite the fact that the occupation of Marievale by civilians was prohibited by DoD policy since 2000, the occupation was allowed to take place due to inaction, "oversight" or simple unconcern by the military over a period of many years, in some instances almost a decade.

9.7 In a letter sent to the Minister of Defence as long ago as 30 July 2009, the DoD (and the Department of Public Works) "... have recognized that the occupants cannot just be evicted and has therefore established an interdepartmental task team to address the issue of "illegal" occupation of houses at MME [Marievale Military Base]. The object of the task team is to ensure that these houses once again become available for military use, taking into account the constitutional rights of present occupants".

9.8 Nothing came of this interdepartmental task team. The Answering Affidavit of the Respondents merely noted the existence of this letter and allege that more consultation is needed in respect thereof. No supplementary affidavits were filed in this regard.

9.9 The constitutional rights referred to in the letter certainly included the Applicants' rights in terms of Section 26(3) of the Constitution

not to be evicted from their homes without an order of court made after consideration of all the relevant circumstances as well as the right to have their dignity respected and protected as provided in section 10 of the Constitution.

9.10 After having permitted the occupation of the state quarters in Marievale rather than preventing it, the Respondents could not simply revert to DoD policy without resorting to a legal process first. In fact, this is exactly what the S.A Army said it would do in respect of the then threatened eviction of the residents of the Marievale Military Base in a letter addressed by it to the SA Human Rights Commission dated 21 December 2015: "We further confirm that it is not the intention of the Department of Defence (SANDF) to evict any member of the public in occupation of state (military property) without compliance to due legal process".

9.11 With reference to *Motswagae v Rustenburg Local Municipality* 2013

(2) SA 613 (CC) at par [16], the "training exercise" conducted at Marievale, " ... sought to achieve eviction of the Applicants through the back door. This is not permissible". The same applies here and the Respondents' reliance on the Defence Act cannot trump the due process requirements of the Constitution. Although in the context of different legislation, this principle has been established as long ago as in 2000 in *Chief Lesapo v North West Agricultural Bank* [1999] ZACC 16; 2000 (1) SA 409 (CC).

9.12 The undesirability of residence of civilians and, indeed all unauthorized persons in a military base and the manner, fashion or timing of the termination of such residence or occupation are some of the factors to be considered by a court as and when the Respondents comply with the procedural requirements imposed by section 26(3) of the Constitution and which are statutorily catered for in the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

[10]Relief

The more vexing question is what form of relief should follow on the above findings. The Respondents say that some of the state quarters are not fit to be inhabited due to the fact that they are unsafe or lack water, sanitation and electricity reticulation. In respect of other quarters, these have been allocated to and are being occupied by members of the SANDF and whose occupation are necessary for the SANDF to fulfill its training and other obligations in terms of the Defence Act. There is insufficient evidence as to whether the present occupation of the Applicants in "Happy Village" can be made habitable or even if that occupation is lawful or whether it is on private land or not. There are clear difficulties in the implementation of a blanket restoration order such as that claimed by the Applicants and, having regard to the factual changes in the situation occasioned by the passage of time they, and not the Respondents, are to blame. Similarly, their occupation of quarters in a military base, prior to eviction would, by the very nature of the base, always have been subject to those restrictions dictated by the running of such a base. Their alternative relief, namely the payment of R 1 500 per person per month is so devoid of relevant substantiating evidence and detail and fraught with such unforeseeable permutations, that it cannot be granted. Mindful of the need for a speedy and effective remedy as stated in *Tswelopele Non-profit Organisation v City of Tshwane Metropolitan Municipality* 2007 (6) 511 (SCA) and further mindful of the fact that the relief will only be temporary in nature, I shall attempt to craft the order in as fair as possible manner.

[11]Order

1. Pending the finalisation of whatever legal proceedings the Respondents may launch for the eviction of the Applicants from the Marievale Military Base or the finalization of an agreement between the parties (with or without the intervention of other organs of state):

1.1 The Respondents are ordered to within 30 days from date of this order, allow the Applicants and their dependants as listed in the notice of motion herein, occupation of premises in the Marievale Military Base for residential purposes;

1.2 Insofar as specific state quarters previously occupied by the respective Applicants are not fit for habitation or have been allocated to or are occupied by members of the SANDF, the Respondents are ordered to provide temporary adequate alternative accommodation;

1.3 The Respondents and the members of the SANDF are restrained from harassing, threatening or intimidating the Applicants and their

dependants and ordered not to restrict their movement to and from the Military Base subject to the conditions that, save for the occupation contemplated in paragraph 1.1 and 1.2 above, the Applicants and their dependants may not interfere with military activities, the duties of the members of the SANDF or training conducted at the Military Base or exercise their rights of entry and exit from the base in such a fashion or at such times as to compromise the military security of the base.

2.The Respondents are ordered to pay the costs of the application.

N DAVIS

Judge of the High Court

Gauteng Division, Pretoria

Date of Hearing: 2 May 2018

Judgment

delivered: 9 May 2018

APPEARANCES:

For the Applicants: Adv .A Thompson (together with Mr J van Garderen)

Attorney for Applicants: Lawyers for Human Rights,Pretoria

For the Respondents: Adv. T C Kwindu

Attorney for Respondents: The State Attorney, Pretoria

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