



GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2019/21001

- (1) REPORTABLE: **NO**
 (2) OF INTEREST TO OTHER JUDGES: **NO**
 (3) REVISED.

28 August 2018

(Signature)

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 SIGNATURE

In the matter between:

**RESIDENTS OF JEFF MASEMOLA
 EXTENSION 8, WINNIE MANDELA**

Applicant

and

CITY OF EKURHULENI METROPOLITAN MUNICIPALITY

Respondent

REASONS FOR ORDER

SPILG, J

INTRODUCTION

1. On 25 July 2019 parties describing themselves as the residents of Jeff Masemola Extension 8, Winnie Mandela (*the Residents*) brought an urgent application against the City of Ekurhuleni Metropolitan Municipality (*the Metro*). The purpose of the order was to interdict the Metro from evicting them from the land situated at extension 8 Jeff Masemola and referred to as the Jeff Masemola informal settlement.
2. An order was also sought preventing the Metro from burning or destroying their

shacks pending the Metro providing them with proper structures for residential purposes.

Costs were sought on the attorney and client scale.

3. Mr Thobejane deposed to the founding affidavit. He describes himself as representing the Residents. In the affidavit he asserted that the Metro is set about destroying their shacks, harassing the community members, beating them and that these actions have also left children destitute.
4. The deponent to the founding affidavit avers that in about January 2019 people were moved from one portion of Winnie Mandela because the stands were considered hazardous as they were near electricity pylons. They were moved to ext. 8 Jeff Masemola.
5. It is further contended that since being moved they have been subjected to abuse by the Metro's police officials (*EMPD*) who have been responsible for burning down their shacks and property.
6. There are three confirmatory affidavits. They are by Mr Komane. Mr Sithole, and Ms Lehong. There is a fourth confirmatory affidavit but it is also deposed to by the main deponent. Mr Sithole also signed a power of attorney appointing the attorneys of record.
7. The Metro opposed the application.

THE ISSUES

8. Aside from raising lack of urgency, there are a number of technical issues raised, including that the founding affidavit has not been properly commissioned.
9. The Metro also contends that none of the disclosed persons forming part of the applicant have *locus*. The Metro points out that there are only three persons who have deposed to affidavits and according to it none of them were among those who had been relocated from Winnie Mandela to Jeff Masemola- and that they

actually reside elsewhere. No other person has been identified as forming part of the applicant.

10. On the merits of the case, the Metro contends that none of the persons who identify themselves as members of the applicant either reside on the land in issue or have a right to do so. The only persons who will enjoy such rights are those who were relocated under the Tswelopele re-blocking and re-alignment project.

In amplification, the Metro explained that the purpose of the project is to relocate people who were living under the Eskom power lines between Kenneth Kaunda and Samora Machel roads in the Duduza North informal settlement. A list of people subject to relocation was drawn up and the Metro contends that they are the beneficiaries entitled to take occupation of the houses that will be erected in the Tswelopele project. It is evident that the Tswelopele project was therefore implemented to ameliorate the living conditions of residents within Duduza North and relocate them to a development which had improved access to basic services *“in line with available resources”*.

It was contended that the four persons who described themselves as members of the applicant and others have sought to form part of the relocated group. However their names do not appear on the list of those who had to move from Tswelopele and therefore are not among those entitled to be relocated.

LOCUS STANDI

11. The Metro filed an affidavit by Ward Councillor Thomson confirming that each of the persons identified in the founding affidavit were not residents of Tswelopele ext. 8 but in fact tenants in Ward 102 Duduza. Accordingly there is no right or interest of theirs which is being infringed. The Councillor also refers to a conversation he had with Thobejane who verbally confirmed this.
12. This is not the first time the matter was brought before the court as a matter of urgency. It had been put on the urgent court roll of 28 June before Mia J. It was then removed from the urgent court roll at the request of the applicants, in order

to enable them to file a replying affidavit, with costs in the cause

13. Despite having been given the opportunity to do so, the applicants have still not filed an answering affidavit to the counter application or replying affidavit.

Accordingly the contents of the respondent's affidavit stand.

14. Secondly; no address is set out in any of the affidavits forming part of the founding papers identifying where any of the four currently reside nor do any of the deponents claim that they are directly affected by the conduct of the Metro. The furthest anyone goes is Thobejane who states that he is the chairperson of the applicants and also their adviser in legal matters.

15. I was therefore satisfied that the persons purporting to be the applicants *lack locus standi*. The outstanding issue then related to costs.

COSTS

16. I was concerned that there had been an abuse of process. *Adv Sithole* for the Metro only knew about the matter because he was representing the Metro in an unrelated matter which was brought on the same day in the urgent court. Nonetheless I was also concerned that the residents themselves should not be subject to a costs order as the situation did not appear to be of their own making but was due to decisions either taken by those who deposed to the affidavits in the founding documents or by their attorney.

I therefore required affidavits to be presented dealing with the responsibility for costs.

17. The applicants' attorneys filed an affidavit. Attorney Hlabane claimed that he had served the notice of set down on the Metro's correspondent attorneys at about 11am for hearing at 14h00 and did not act out of malice. He also stated that he felt duty bound to act in the best interests of "*the applicants and their current living conditions ... and the issue of land in our country is a very sensitive one more especially in Gauteng Province where people are competing for jobs and*

other necessities”.

18. In explaining the bringing of the application, Atty Hlabane said that:

“The applicants are without shelter ... and the respondent does not care about their plight and this is confirmed by the respondent’s conduct of burning their shacks each time the applicants erect. There are two competing rights in this matter, the rights of people who are earmarked to be relocate to the land in question and the rights of people who have been excluded but who feel that they are also entitled to the same piece of land.

From 28 June 2019 there has been a mushrooming of shacks in the area on a large scale and if indeed the city cares about its people why is it allowing the mushrooming of shacks in an area where people were promised decent housing not shacks.”

19. There are two issues. The first is the concern that the attorney has for the rights of those affected by urban land distribution and housing allocation. The other is the manner in which he conducted the matter.

20. As to the first, the need to resolve in a fair manner the land and housing crisis in the metropolitan areas having regard to available resources is a given. If those entrusted with the responsibility of ensuring that it is done are alleged to have acted improperly then, if administrative processes and negotiation fail, recourse must be had to the courts by way of interdict, compelling orders or declarators to protect rights- not by self- help.

21. In the present case the Metro identified people who were only agreeable to being removed from their settlement under Eskom pylons because the Metro had undertaken to relocate them to the area which is now threatened by land invasion. It is also evident that there was active involvement of the affected residents in the process. If the applicant’s attorney contends that his clients have prior rights then he must bring such a case to court and the court can decide

whether any interdictor relief is available in respect of all or a particular category once regard is had to the competing rights, individual situations and hardships.

22. However Atty Hlabane ought to have been aware that the matter was opposed.

He should have contacted his counterparts and given them notice that he intended re-launching the application or setting it down. It would also have been necessary for him to have explained the delay in proceeding with the original application and at the least have disclosed to the court what had occurred previously as well as what new facts are relied on to explain why a matter that had been dormant for a month should again be treated as urgent.

23. Then there is the way in which the application was brought. The full court in

Mtshali and others v Masawi and others 2017 (4) SA 632 (GJ) was at pains to deal with how communities or groups of affected persons can be conveniently identified in court proceedings albeit that the rules of court might not be followed to the letter. That was some two years ago. Yet Atty Hlabane failed to apply even this simple procedure which has resulted in persons whose rights or interests are not even affected being made a party. This does not mean that they cannot represent the community. Sometimes those who do not have a voice need such external assistance.

24. But then there are no shortcuts to be taken when approaching a court. Those whose rights are affected and who seek redress must be identified and they must confirm the relief sought by them or on their behalf.

If regard is had to the number of people who have attended court then the lists referred to in *Mtshali* and mentioned in the reasons delivered last week in *City of Ekurhuleni Metropolitan Municipality v The Unknown Individuals Trespassing on Farm Rietfontein 153 (case no 2019/25865 GLD)* should have been prepared. The attorneys only have themselves to blame because they failed to ensure that those who claim that their rights have been effected were not represented in these proceedings.

I also point out that the rights which are alleged to have been infringed are not included as a ground for seeking orders against the Metro nor has there been

any attempt to protect those rights against those who it is alleged are benefiting from it despite falling outside the category of those entitled to housing under the Project.

25. If the issues are of such a magnitude that the assistance of organisations who regularly deal with such matters may be of assistance in asserting their rights then such a course should be followed.

26. The Metro initially sought costs *de bonis propriis* against the attorneys. It was made clear that no costs were sought against the four persons who deposed to the founding papers.

27. The Metro's Divisional Head: Specialised Legal Services, Mr Frank explained the background to the application originally being removed from the roll at the insistence of the applicant's attorneys and his surprise at finding that the matter was re-enrolled without any prior communication. At the last hearing however counsel advised that the Metro does not now seek costs against anyone. However that does not end the issue of costs.

The applicant's attorneys and any counsel that may have been engaged are not entitled to charge a fee to any person or committee who they may have taken instructions from or members of a community or residents' group in respect of the application brought before me.

WAY FORWARD

28. This application was brought before me in a manner where those purporting to do so, i.e. the four deponents to affidavits filed in the founding papers, had no right of their own to protect or advance in relation to the issues in dispute. It is apparent that they are the spokespersons for those who claim to have grievances. While they can speak for them and give them voice they cannot be substituted for the affected persons.

29. There is also a counterclaim brought by the Metro. However the counterclaim is

against the same applicant. Since the applicant has no *locus* the application *per se* is stillborn and therefore cannot breathe life into a counter-application.

30. Before deciding whether permission should be given to allow amendments so that those who claim to have a legitimate grievance or claim that they are being spoliated are properly before the court it is advisable to set out the different contentions.
31. The Metro's position is that those entitled to acquire homes or otherwise occupy any land or a unit in the Project are on a list of beneficiaries and that the process of determining who was entitled to be on the list followed proper procedures, was fair and many, if not all, are people and their families who had agreed to be removed from other areas. They also contend that every attempted land invasion was thwarted, presumably based on an entitlement to rely on a right of counter-spoliation.
32. Counter-spoliation requires immediate reaction by the holder of a right to thwart its spoliation through an unlawful act of possession, such as a land invasion of municipal property.

See *Mans v Loxton Municipality and Another* 1948 (1) SA 966 (C) at 977-8 and *Fischer and another v Ramahlele and others* 2014 (4) SA 614 (SCA) at para 23 where the court said:

"A land invasion is itself an act of spoliation. The Constitutional Court has recently reaffirmed that the remedy of the mandament van spolie supports the rule of law by preventing self-help. A person whose property is being despoiled is entitled in certain circumstances to resort to counter-spoliation. "

See also *Yeko v Qana* 1973 (4) SA 735 (a) at 739B – D and *Ness and Another v Greef* 1985 (4) SA 641 (C) at 647I – 649H and *De Beer v Firs Investments Ltd* 1980 (3) SA 1087 (W) at 1092F

33. The Metro also points out that it is common cause that there does not exist a section known as Jeff Masemola, with the result that no one can claim to have

been removed from there.

34. The affected persons who attended court presented a memo to me. It is not under oath but gives an indication of what prompted them to occupy land in the area.

As in the *Rietfontein* case, they are individuals who believe that they have legitimate grievances and that some of them are entitled to be placed on the list of beneficiaries as they have prior rights or are on the list of beneficiaries who whether individually or as a group can claim no right to state housing. Their rights and the grounds for asserting them may be summarised as follows;

- a. Many came from Ext 8 Serope Mperekele and are being compelled to leave because, despite complaining to the police, nothing is done about the high incidence of murders and rape despite community representatives trying to work with the police to arrest the perpetrators. The community does not feel safe and neither the police nor any other authority have been able to secure their or their family's safety;
- b. Delegations from the community led by Thobejane attempted to engage with councillors and officials, who displayed no interest in their plight . It is claimed that their delegation was either threatened or told to get jobs;
- c. They believe that there is an unoccupied area where they can be accommodated;
- d. Corruption and manipulation by those responsible for compiling list of beneficiaries has resulted in those who have no rights being given preference on the list
- e. Those affected number approximately 150. In the time available a list was compiled of 113 names with individual signatures, identity numbers and contact numbers. The list was attached to the document they handed up. It also contained photographs of police removing structures. A video was also provided on a disc showing the police destroying shacks and burning

certain items.

The list of persons reflects men and women whose average age is in the main between their late 20s to late 30s although there are a few who were born in the late 1960s to early 1970s.

35. It is evident that there is a festering situation of discontent. The issues range from allegations of a failure to protect a community's right of security by police who do not perform their basic functions to residents who are taking over stands and land which others have prior right to- bearing in mind that the latter were removed from an area and are unable to return there. There are also allegations that the allocation process included those who have no entitlement to be on the lists as they have other properties. The community now has the list of beneficiaries and it would be a simple matter to identify those who it is alleged have no right to preference ahead of them and allow those who are genuinely entitled to be beneficiaries to take occupation as soon as possible.
36. In my view the papers filed do not set out all the rights and issues involved. The description of the applicants is challenged which also makes it difficult to simply identify individuals as being part of a group entitled to assert the rights contended for.
37. There remains a need to deal with the issues; whether it entails ensuring that the police do their job and guarantee the security of people within their communities or establishing if basic services, whether it be portable latrines or water, is brought to the area where they presently live.
38. In my view the application falls to be dismissed on the ground that the parties as identified do not have standing to bring the case. For this reason too any counterclaim against them cannot survive since there is no competent applicant against whom relief can be effective. This will release the parties to get their papers in order and start afresh as the underlying issues remain pressing.
39. Moreover there appear to be a number of interim solutions that may satisfy all the parties, accepting, as all must, that the issue is both about an objectively fair

process whereby different groups, who may well be in the same unenviable position vie for scarce resources. These issues are exacerbated by the failure to provide basic safety for citizens or a transparent process which keeps people informed of their progress on the housing lists or lists for receiving an adequate suite of basic services.

ORDER

40. The matter is before me and I do not believe that there is any redeeming quality in the original application to permit it to survive and engage the attention of another court.

The point in limine is good. It however also has the effect of rendering the counter-application moot for want of *locus* on the part of the persons purporting to come to court under the description of the cited applicant. Since the Metro does not accept that the persons come from or reside in the area described in their citation it is best that the entire application is dismissed.

41. However any party may approach the court on the same issues as contained in the present application and counter-application provided the identity of the affected persons is adequately described and identified in substantial compliance with the requirements set out in the cases cited earlier.

42. There will be no costs order nor may the applicants' attorneys or counsel, if any, charge their clients for bringing the application on 25 July 2019 or for any costs arising from the subsequent hearings or in respect of the preparation of any documents.

(Signature)

SPILG, J

DATES OF HEARING:

24 July, 1, 14, 16 and 19 August

DATE OF JUDGMENT:

2019

FOR APPLICANT:

28 August 2019

FOR RESPONDENT:

Attorney Hlabane

Adv E Sithole