

DELETE WHICHEVER IS NOT APPLICABLE

REPORTABLE: YES/NO.

OF INTEREST TO OTHER JUDGES: YES/NO.

REVISED.

14/12/09

DATE

SIGNATURE



4/2/2010

/bh

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NO: 69345/2009

IN THE MATTER OF:

THE MAMELODI HOSTELS RESIDENTS ASSOCIATION
DANIEL SELLO
THOSE PERSONS LISTED IN ANNEXURE A

1ST APPLICANT
2ND APPLICANT
3RD APPLICANT

AND

THE CITY OF TSHWANE
MINISTER OF SAFETY AND SECURITY
THE COMMISSIONER OF POLICE
THE MEC FOR HUMAN SETTLEMENT, GAUTENG
THE STATION COMMISSIONER FOR MAMELODI POLICE
STATION
THE MUNICIPAL MANAGER OF TSHWANE, MR KIBE
KEKANA
MAPULE PHORA
YVONNE MATJOKANE

1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT
4TH RESPONDENT
5TH RESPONDENT
6TH RESPONDENT
7TH RESPONDENT
8TH RESPONDENT

JUDGMENT

OMAR, AJ

[1] This is an urgent application concerning the residents of Block J, Mamelodi Hostels. It is common cause that the first respondent embarked on a demolition process of Block J on Sunday, 15 November

2009 by removing roof material. It is further common cause that members of the SA Police Services were present at the demolition.

- [2] The first respondent's conduct prompted the applicants to lodge an urgent application in this court on 16 November 2009, claiming in essence relief based on the *mandament van spolie*.
- [3] Although service of the application was effected on the respondents, none of the respondents appeared in court and a rule *nisi* with interim relief was granted by my brother Acting Judge R Du Plessis in their absence. The return date of the rule *nisi* was 24 November 2009.
- [4] The first respondent anticipated the return date to 21 November 2009 and the anticipation application was postponed to 25 November 2009 and costs were reserved.
- [5] The interim order was not complied with and on 19 November 2009, the applicants lodged a contempt of court application which included four further respondents who were not parties to the initial application.

- [6] On 24 November 2009 the first respondent requested my brother Acting Judge Du Plessis to recuse himself from the matter, to which he consented.
- [7] Both matters were heard by me on 26 November 2009.
- [8] The applicants concluded a settlement agreement with the second and third respondents as well as the fifth respondent in the contempt application which settlement agreement was made an order of court on 26 November 2009.
- [9] The issues before the court are the following:
- a) Confirmation alternatively discharge of the rule *nisi*.
 - b) The contempt application.
- [10] I will deal with the various issues *in limine* during the course of my judgment.

- [11] It was contended by counsel for the first respondent that the actions of the first respondent do not constitute spoliation and that the applicants consented to the demolition. The court was referred to numerous agreements between the first respondent and the Mamelodi Hostel Residents Committee, which forms part of the papers before the court, dating back from 1 September 2003, whereby it was agreed to implement the Hostel Development Project.

In line with the first respondents Housing Project, it embarked upon the relocation process of the hostel residents in which the residents of single gender hostels would be relocated to Temporary Residential Units (TRU's) whilst permanent structures would be constructed. Further the existing hostel is uninhabitable and unsafe for human occupation.

- [12] I cannot find any provision in any of these agreements referred by counsel for the first respondent, which entitles the first respondent to proceed with the demolishing of the hostel structures and particularly so while the lawful residents are still in occupation of the hostel and without their consent.

[13] Whilst the first respondents efforts to create better living conditions, is appreciated by the applicants and the court, this does not entitle the first respondent to take the law into its own hands.

[14] Further, whilst it is so, as argued by counsel for the first respondent that the hostel structures were unsafe and uninhabitable, the fact of the matter is that there were people still living in these structures and, in my view, the first respondent should have applied for an eviction order before embarking on a demolition process.

It is irrelevant for purposes of this argument, that the first respondent has provided alternative accommodation for 1200 occupiers.

[15] It is common cause between the parties that the applicants have been in peaceful possession of Block J Mamelodi Hostels until Sunday 15 November 2009. The actions of the first respondent in removing roof material from the building whilst the applicants were still residing in the hostel constitute an unlawful deprivation of their possession.

- [16] Further, the first respondent acted prematurely in proceeding with its demolishing process on 15 November 2009, as in terms of its notice to the residents, marked as annexure “DS2” to the founding papers, the demolition process was only to begin on 16 November 2009.
- [17] The applicants, through its attorneys, sent a letter to the first respondent on 21 July 2009 (annexure “DS1”) stating, *inter alia*, that they are prepared to move out of the hostels if they reach an agreement with the first respondent about certain issues, which includes obligations in terms of the Housing Code. Clearly this indicates that there is no agreement between the applicants and the first respondent that the latter would be entitled to commence with any demolishing process without the consent of the former.
- [18] It is also clear from the said letter that the first applicant has established its *locus standi* to launch proceedings on behalf of the residents of the hostel.

Further, the premises listed in annexure "A" to the papers are occupants in the hostel and are clearly affected by the demolition process and as such have *locus standi* to launch proceedings.

The second applicant has been mandated by the first and further applicants to act or sign documents on its behalf which is clearly indicated by annexures "DS3" to "DS29" of the papers. The first respondent further does not deny the existence of the first applicant.

[19] As indicated earlier, a rule *nisi* with interim relief was granted by my brother Acting Judge R Du Plessis. He recused himself from the matter having been requested to do so by the first respondent. I cannot comment on the submission by counsel for the first respondent that the dispute between Acting Judge R Du Plessis and the first respondent clouded his judgment. However it is clear that Judge R Du Plessis considered the urgency of the matter and granted a rule *nisi*.

[20] I have had the benefit of hearing the first respondent's version and I am of the view that the matter was urgent under the circumstances. Clearly the hostel residents were left without a roof over their heads.

[21] I find that the first respondent's conduct in proceeding with the demolishing of the hostel structures while the lawful residents were still in occupation and without their consent was unlawful and as such, the rule *nisi* granted by Acting Judge R Du Plessis on 16 November 2009 must be confirmed.

[22] As far as the application for contempt is concerned, I have a number of problems:

- a) Firstly, there is no proof that the application has been properly served on the respondents. Page 5 of the notice of motion indicates that the application was served on the respondents by fax and hand. This form of service in my view does not conform to the rules of this court. There is, in any event, no proof that the application has even been served by fax or by hand on all the respondents. There is only an acknowledgment by Moduka More that the document was received and accepted without prejudice on 19 November 2009 at 10:10. Moduka More is only the first respondent's attorneys of record.

- b) Secondly, the applicants have joined four (4) other respondents in the contempt application who were not parties to the initial application. I am of the view that the applicants have failed to join the parties formally in the proceedings. This constitutes a misjoinder in my view and the application stands to be dismissed on this ground alone.

This is not the situation where a company Director could be held responsible for the obligations of the company.

In my view, some of the additional respondents have no relation to the first respondent insofar as its obligations are concerned.

- [23] In view of the aforesaid I do not deem it necessary to deal with the issues relating to urgency or the merits of the application.

Thus, I make the following order:

1. That the rule *nisi* granted by this court on 16 November 2009 is hereby confirmed.
2. That the first respondent pays the costs of this application on an attorney and client scale including the costs of two counsel.
3. The contempt application is dismissed with costs.


SS OMAR
ACTING JUDGE OF THE HIGH COURT



CASE NO: 69345/2009

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

PRETORIA 01 DECEMBER 2009

BEFORE THE HONOURABLE MR JUSTICE OMAR, AJ

In the matter between:

THE MAMELODI HOSTELS RESIDENTS ASSOCIATION
DANIEL SELLO
THOSE PERSONS LISTED IN ANNEXURE A

1ST APPLICANT
2ND APPLICANT
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AND

THE CITY OF TSHWANE
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8TH RESPONDENT

HAVING HEARD counsel(s) for the party(ies) and having read the documents filed of record

IT IS ORDERED

1. THAT the rule nisi granted by this Court on 16 November 2009 is hereby confirmed.
2. THAT the first respondent pay the costs of this application on an attorney and client scale including the costs of two counsel.

Contempt Application:- The application is dismissed with costs.

BY THE COURT

REGISTRAR

☐ Att: GILFILLAN DU PLESSIS

HIGH COURT TYPIST: H POTGIETER