

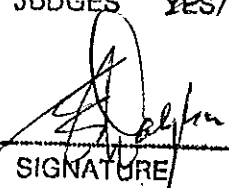
IAfrica Transcriptions (Pty) Ltd./MS

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

CCT 19/11

CASE NO: 5394/11

2011-03-11

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE	YES/NO
(2) OF INTEREST TO OTHER JUDGES	YES/NO
(3) REVISED	
DATE 9/6/2011	SIGNATURE 

REGISTRAR OF THE CONSTITUTIONAL COURT
PRIVATE BAG X1 CONSTITUTION HILL
2011-03-10
BRAAMFONTEIN 2017
GRIFPER VAN DIE KONSTITUSIONELE HOF

10

In the matter between

NTHABISENG PHEKO AND 777 OTHERS

Applicant

and

EKURHULENI METROPOLITAN MUNICIPALITY

Respondent

JUDGMENT

MAKGOBA, J: The applicants in this matter brought an urgent application before this court on Saturday afternoon, 5 March 2011 at 16:00 seeking an order in the following terms:

1. That the respondent be restraint and interdicted from demolishing and/or further demolishing accommodation and shelters of the applicants.
2. That the respondent be restraint and interdicted from intimidating the applicants to vacate the property.

3. That the respondent be restraint and interdicted from unlawfully evicting the applicants from the property;
4. That the respondent be ordered to provide alternative accommodation to the applicants and/or those applicants whose accommodations and shelters have been demolished."

Lastly an order as to costs. Upon hearing counsel in the afternoon on Saturday 5 March 2011 I postponed this matter to enable the respondent to file their answering affidavit and the matter was thus postponed to Wednesday 9 March 2011. On the morning of 9 March 10 2011 the respondent duly filed their answering affidavit which seemed to be quite voluminous and it was only fair that the matter be again postponed to enable the applicants to file their replying affidavit which they did. Presently the matter has been argued before me with a complete set of papers. I wish to express my gratitude to both counsel for having drawn up such voluminous papers at the shortest available time to enable the court to have a clear picture of the history of this matter and the essence of this matter. Counsel are commended for work well done.

I am now in a position to pass judgment in this matter after having 20 all the facts before me. The essence of the matter is that the area concerned, Bapsfontein informal settlement, has been declared a disaster area in terms of the Disaster Management Act no. 57 of 2002. This declaration was a sequel to a report by a firm of geologists way back in 2005 when they compiled a report to the effect that the area is a disaster area in that it has sinkholes. Furthermore, a recent report by

the geologists was also submitted to the respondent in the year 2009 confirming the previous report of 2005. From the papers I can deduce that a declaration of the disaster area was duly proclaimed by the respondent during December 2010. That declaration was duly published in the Provincial Gazette and pursuant to such declaration a resolution was taken by the council of the respondent that the area poses danger to livelihood of the residents and that the residents had to be moved for their safety. Thereafter various meetings were held with the residents and addressed by the officials of the respondent explaining the danger prevalent in the area. Permission was also sought and consent was obtained from the residents that they should relocate. I am informed and I can even deduce from the papers that certain residents have duly been relocated to a new area.

It would appear that the present applicants or some of them do not wish to relocate. Now the question is whether they have a choice to relocate or not. This is not a situation where I am dealing with unlawful occupiers where I would have expected the respondent to act in terms of the PIE Act to evict the residents from a particular area. I am dealing with a situation of necessity in the sense that the area has been declared a disaster area. I am unable to determine from my layman's point of view in the field of geology as to when the disaster is going to hit, that is when a sinkhole is going to occur right underneath one of the applicant's shelter. I cannot know that but at the same time I cannot close my eyes to a report before me that the area is dangerous. It is a situation where the applicants are resident in a dangerous area but they

resist being moved from that area. It is like a person burning in a fire and refusing to be rescued. The question is whether a responsible passer-by will just leave a person burning in a fire and say well it is none of my business. You do not have to ask somebody's permission to rescue him, whether he wants it or not; you will have to rescue him in an effort to save life. More so the respondent as a local government has a responsibility towards its residents to save their lives and to deliver services to them.

10 It has been argued by the applicants' counsel that the action of the respondent in evacuating the applicants is unlawful in as much as a court order has not been obtained to that effect. Counsel for the applicant is unable to tell me in terms of which law such a court order should have been obtained. For all I know the PIE Act is not applicable in this instance. This is a question of a disaster area and the respondent has a duty to manage the disaster. I take note of the fact that the applicants may be resisting to move, but their resistance or not, there is still a duty on the local government to act in the interests of its residents. Counsel for the applicant argued further that I should bear in mind that the relocation of the applicants would lead to them being
20 dumped in an area where there are no sufficient services or sufficient accommodation. That I should then interdict the respondent from removing these people because they are being taken to another area which is not suitable for human habitation.

May I then say that it is not the duty of the court to determine where the applicants have to be relocated to. That is an administrative

function within the sphere of the local government. This court's duty is to do judicial functions and not administrative functions. Be that as it may, the respondent has made good provision for the area where the applicants have to be moved to. In their answering affidavit they mention what services they have provided for and this have not been denied. The applicants then insisted that they have identified an area 3 kilometres from where they are where they can be moved to. By this they say we do not refuse to be removed but we want to be removed to a particular place. With respect the applicants cannot be choosers in
10 this instance. They cannot just choose an area. In any event I am not aware whether the area they have in mind is available for allocation for residential purposes or not. What I know is that the respondent has identified a particular area where others have already been moved to and that the rest of the residents of Bapsfontein informal settlement have to be relocated.

I am not unmindful of the plight of the applicants in the position in which they may find themselves. I take into consideration that they are indigent people. I have sympathy for poor people. I sympathise with the poor people but at the same time I have a duty to protect their life. I
20 cannot let them stay in a danger zone where they can be swallowed by the earth as it is. In the circumstances my finding is that the applicants knew all along since December 2010 that they have to be relocated to a new place but they have not been willing to do so. When the respondent's agents came on 5 March 2011 to execute their decision they then ran to this court for a remedy on an urgent basis. I am afraid

the application as it lacks urgency that even on the question of urgency it cannot succeed. Let alone on the merits as I have already outlined the merits of the case. The applicants will be well advised not to be misled by other people with ulterior motives who would like them to stay there at their own risk. The court is duty bound to apply the laws of this country without fear, favour or prejudice. Whilst I am sympathetic towards the plight of the applicants, I feel for their own safety and they will have to be relocated from that place.

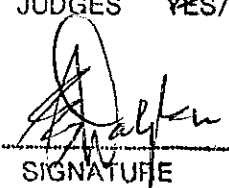
In the circumstances the applicants have not made out a case both
10 on urgency as well as on the merits of the application and as such the application is dismissed with costs.

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10 In the matter between

NTHABISENG PHEKO AND 777 OTHER

Applicant

and

EKURHULENI METROPOLITAN MUNICIPALITY

Respondent

J U D G M E N T

20 MAKGOBA, J: After delivering judgment in this matter the applicants' counsel addressed me on an application for leave to appeal against the judgment I have just given in terms whereof the applicants' application was dismissed with costs.

It has not been clear from the applicants' address to me as to on what grounds is the application for leave to appeal being made. I take it that the applicants' counsel would like me to understand that the court in giving judgment has erred in the judgment it has given. Be that as it may, the test at this stage for an applicant for leave to appeal is whether

another court can come to a different finding or whether there are prospects of success on appeal. I must say that this is a peculiar case. It is a case where as I am delivering judgment now a disaster which the respondent purports to prevent can hit at any moment. I do not know when a sinkhole is going to develop and swallow the applicants' shelters. For all I know is that if this matter were to go on appeal it will be finalised in not less than a year or two from now. This would mean that my judgment or my order shall have been suspended pending the appeal meaning that the applicants will be staying at that dangerous
10 area as they are. All what I wanted to prevent may definitely then take place. Even if they were to be successful on appeal by the time they succeed on appeal it may be that some of them have already sunk in the sinkhole.

I find it inappropriate that leave to appeal should be granted in the circumstances and more so that the grounds of appeal have not been clear to me. In any event I am not persuaded that another court will make a finding other than what I found nor do I believe that there are prospects of success on appeal. In the circumstances the application for leave to appeal is dismissed.