

NOT REPORTABLE

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE, PORT ELIZABETH**

**Case no: 2480/2012
Date heard: 16.5.2013
Date delivered: 17.10.2013**

In the matter between:

**NELSON MANDELA BAY METROPOLITAN
MUNICIPALITY (NMBMM)**

Applicant

vs

**NONTSIKA MAARMAN
MELISIZWE DABA
DAVID WILLEM
SIPHIWO SIPHE TOMMY
THEMBALETHU MHEKOLA
BABALWA SONJICA
LINDELWA MBOYI
YOLANDE XANISE
NONTSAPHO NDALISO
NTOMBOXOLO DYANTYI
SIYABULELA JANUARY**

**First Respondent
Second Respondent
Third Respondent
Fourth Respondent
Fifth Respondent
Sixth Respondent
Seventh Respondent
Eighth Respondent
Ninth Respondent
Tenth Respondent
Eleventh Respondent**

Case no: 2591/2012

In the matter between:

**NELSON MANDELA BAY METROPOLITAN
MUNICIPALITY (NMBMM)**

Applicant

vs

**NONTSIKA MAARMAN
DAVID WILLEM
SIPHIWO SIPHE TOMMY
NONTSAPHO NDALISO
NTOMBOXOLO DYANTYI
VUYO JANTJIES
XHATI MFUNDISI
NOMATHAMSANQA ZEALAND**

**First Respondent
Second Respondent
Third Respondent
Fourth Respondent
Fifth Respondent
Sixth Respondent
Seventh Respondent
Eighth Respondent**

JUDGMENT

TSHIKI J:

[1] In the two matters, case no 2480/2012 and case no 2591/2012 applicant has filed an application against all the respondents contending that they all had unlawfully occupied applicant's vacant land which is referred to as no 9 and 10 Kwanobuhle, Uitenhage (herein referred to as the property). An interim order was then granted in favour of the applicant and against all the respondents on 27 July 2012 wherein a Rule *Nisi* was issued in the following terms:

[1.1] Calling upon the respondents or any other interested party to show cause, if any, on or before 14 August 2012 why an order in the following terms should not be made:

[1.1.1] That the respondents or any other persons who are unlawfully occupying the Gunguluza Area 11 should vacate forthwith;

[1.1.2] That the members of the police based at Kwanobuhle Police station, Uitenhage, are hereby authorised and directed to evict the respondents and/or any other persons found to be in occupation of Gunguluza Area 11, KwaNobuhle Township and to deal with them as they are lawfully entitled and obliged to.

[2] That the members of the police continue to patrol Guguluza Area 11 and remove any persons that are in unlawful occupation thereof.

[3] That paragraphs 1.1 and 1.2 herein above operate as an interim order.

[4] A subsequent order was granted which varied the terms of the order in paragraph 1 above in that it authorised and directed the Sheriff of this Court to evict the respondents and/or any other person found in unlawful occupation of the land described above and, if necessary, the Sheriff would have to enlist the assistance of the members of the South African Police Service in Kwanobuhle in Uitenhage.

[5] The respondents in case no 2480/2012 have opposed the application by the applicant herein. Their main defence is a denial of having been in unlawful occupation of the applicant's land in question. The contention of the respondents is that applicant is confusing the respondents with the members of Ward 43.

[6] According to the applicant it later transpired that respondents one to five in case no 2480/2012 and other people were in contravention of the Court order dated 27 July 2012 in case no 2480/2012 and this contravention has resulted in applicant approaching this Court for a further order inclusive of contempt of court proceedings. This application was issued under case no 2591/2012 and on 14 August 2012, an order was granted against respondents with a Rule *Nisi* calling upon the respondents to show cause on or before 25 September 2012 why an order in the following terms should not be made:

- [6.1] That all persons in unlawful occupation of the open areas in Khayelitsha and Kwanobuhle Townships in Uitenhage be and are hereby ordered to vacate forthwith;
- [6.2] That the Station Commander of Khayelitsha and Kwanobuhle police stations in Uitenhage, be and are hereby authorised and directed to assist the Deputy Sheriff of this Court in effecting the order in 6.1 above;
- [6.3] That the Station Commander of the police stations mentioned in 6.2 above are hereby authorised and directed to deploy officers to patrol and monitor the township; remove, arrest and take into custody any persons that are in unlawful occupation thereof. Further that paragraphs 6.1 to 6.3 above to operate as an interim order.

Although not specifically stated, I would assume that this would have to be so pending the final determination of the application.

[7] The contempt of Court proceedings in case no 2591/2012 applied only in respect of the first five respondents and did not affect the sixth to the eighth respondents. The application in case no 2591/2012 was also opposed on the grounds that there has been no contravention of any order in that there was no interdict that was obtained and issued on 27 July 2012 under case no 2480/2012. The rest of the contents of the order in paragraph 6 above was simply denied without further elaboration.

[8] On the date of the argument of the two applications (case no 2480/2012 and 2591/2012) the parties agreed that the applications be argued at the same time. This was so because it is one case which has been unfortunately allocated two case numbers. The parties and the cause of action are the same save for the contempt of Court proceedings which do not apply to sixth to eighth respondents in both cases.

[9] On the date of the argument Ms N Msizi appeared for the applicant and Mr V Naidu represented the respondents.

[10] Respondents denial of the applicant's allegations against them is that they never committed any unlawful activities against the applicant. For that reason, applicant has not established the requirements of an interdict in that applicant has not established any prejudice suffered either actual or perceived. A further argument by respondents is that applicant has failed to establish that the alleged offences are

of a continuing nature or that there is a reasonable apprehension that these acts alleged against the respondents will be repeated in the future. Therefore, so the argument continues, the applicant has not established any facts justifying a reasonable apprehension that the harm is likely to be repeated.

[11] I must say that I do not understand the essence of the respondents' argument because the complaint against the respondents was continuing in that respondents were in actual and physical occupation of the land in question. In my view, respondents' bare denial is not sufficient to resist the claims against them by the applicant.

[12] It is trite practice that vague and unsubstantiated allegations are insufficient to create the kind of dispute of fact which would oblige the Court to either dismiss the application or refer the matter for oral evidence (*King William's Town Transitional Local Council v Border Alliance Taxi Association* (BATA) 2002 (4) SA 152 (ECD)).

[13] In the present case it does not appear that the respondents have raised any serious dispute of fact other than to allege that they are denying the applicant's allegations that the respondents are in unlawful occupation of the land in question. Even on probabilities it would be awkward and strange for the applicant municipality to go the extra mile by having to approach attorneys and the Court for something that has not happened. Judging from the contents of the respondents' affidavits, I cannot imagine that the applicant would simply approach this Court for something

that has not happened. ***Wightman t/a JW Construction v Headfour (Pty) Ltd and Another*** [2008] 2 ALL SA 512 (SCA) and 515 para 13 Heher JA stated:

“A real, genuine and *bona fide* dispute of fact can exist only where the Court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the Court will generally have difficulty in finding that the test is satisfied.”

[14] The above narration applies to both the main application and the contempt of Court proceedings whose denial by respondents is a bare one and therefore not genuine.

[15] I also do not agree with Mr Naidu that applicant has not established the requirement that there was no other remedy. In my view, absence of a no other remedy refers to absence of an adequate and speedy legal remedy (***Setlogelo v Setlogelo*** 1912 AD 221 at 227; ***Masuku v Minister van Justisie en Andere*** 1990(1) SA 832 (A)). Applicant's property was being invaded by the respondents and without any lawful justification. Self help is not a remedy even if there is a need by the poor people to obtain accommodation. I am therefore of the view that the applicant herein has established its case for a final interdict. I do not agree with the respondents in their argument that the orders sought by applicant do not amount to or do not seek an interdict. There is no substance in that allegation at all.

[16] On the contempt of Court the averments by the deponent to the applicant's affidavit are clear that the first to fifth respondents have even mobilised other people to join them in the illegal occupation of the applicant's land. This evidence, in my view, amounts to the required proof in proceedings of this nature. The first and fifth respondents in the contempt of Court proceedings were interdicted in case no 2480/2012 not to proceed with their unlawful conduct aforementioned. They elected to disregard the Court order, and, in my view, they have done so at their peril. In ***Mthimkulu and Another v Mahomed and Others*** 2011 (6) SA 147 CJ Classen J held at 154-155 para [17 and 18]:

“[17] Once an applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden (weerleggingslas) in relation to wilfulness and *mala fides*. All that is required of the respondent is to advance evidence which establishes a reasonable doubt as to whether non-compliance was wilful and *mala fide*. The rationale for this requirement is to prevent committal (loss of liberty) rather than conclusively.

[18] Where, however, enforcement of a Court order is sought civilly without any criminal sanction, proof of contempt of Court may be established on a preponderance of probability. A Court may issue a declarator that a respondent is in contempt of Court, established only on a balance of probabilities, together with associated relief such as barring a contemnor from access to civil courts until the contempt is purged. In the present case the appellants did not seek a committal, only a suspended fine. The respondents' liberty is not at stake.”

[17] There is evidence from the applicant's founding affidavit that “the first to fifth respondents have mobilised other people from Nobuhle and Khayelitsha to join them in the illegal occupation of the land and in threatening and demanding the allocation of the plots to them”. Evidence shows that respondents one to eight were served with the order of the Court dated 27 July 2012 whose contents are that the

respondents are unlawfully occupying the Gunguluza Area 11 and that they should vacate the land forthwith and this was made an interim order. These respondents did not vacate the land in question instead they remained in occupation and were mobilising other people to join them in the unlawful occupation of the applicant's land. It is, therefore, clear to me that the respondents in issue (1-5) have violated the order of 27 July 2012. As is expected even in the contempt of Court proceedings their only defence is as follows:

“Ad Paragraph 14

- 8 The content thereof is denied. The respondents and I are committee members of the Back yard of Ward 45 as a whole. It is specifically denied that the respondents as cited and I are in unlawful occupation of Area 11, Gunguluza.
- 9 It is respectfully submitted that no interdict was obtained on 27 July 2012 under case no 2480/2012.”

[18] What the respondents say herein does not make sense to me. Paragraph 1.1 of the order mandates them to “vacate the property forthwith”. What more is it expected of the applicant to do. What matters herein is the terms of the order granted against the respondents, whether it is in the form of an interdict or mandamus and in whatever form it has to be obeyed and complied with.

[19] I am satisfied that the applicant has proved contempt of Court against the first to fifth respondents in case no 2591/2012. Wherefore, I make the following order:

[19.1] In respect of case no 2480/2012 the Rule *Nisi* granted on 27 July 2012 against respondents herein is hereby confirmed.

[19.2] The first to fifth respondents herein are declared to be in contempt of the order granted by Chetty J on 27 July 2012.

[19.3] The first to fifth respondents in case no 2591/2012 are each ordered to pay a fine of R5 000.00 (five thousand rand) or in default of payment of such money to undergo two years imprisonment which is wholly suspended for five(5) years on condition that each respondent mentioned herein above shall not again commit contempt of Court and occupy applicant's property without consent or refuse to obey a Court order during the period of suspension.

[19.4] The respondents in case no 2480/2012 are ordered to pay costs of the application in that case jointly and severally the one paying the other to be absolved.

[19.5] The respondents in case no 2591/2012 are ordered to pay costs of the application in that case jointly and severally the one paying the other to be absolved.

P.W. TSHIKI
JUDGE OF THE HIGH COURT

Counsel for the applicant	:	Adv N Msizi
Instructed by	:	Pumeza Bono Attorneys PORT ELIZABETH
Counsel for the respondents	:	Mr V Naidu
Instructed by	:	Legal Aid Board PORT ELIZABETH