



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

(1) REPORTABLE: YES ☒ NO
(2) OF INTEREST TO OTHERS JUDGES: YES ☒ NO
(3) REVISED

SIGNATURE

DATE

2024-01-31

Appeal Case Number: A109/2022

Court a quo Case Number: 45074/2021

In the matter between:

MINISTER OF DEFENCE AND MILITARY VETERANS

First Appellant

DEPARTMENT OF MILITARY VETERANS

Second Appellant

and

STHEMBISO KUME

First Respondent

LINDILWA NTLABATHI

Second Respondent

THIBANE MALAKA

Third Respondent

YOLISA PHOLL

Fourth Respondent

LEBO MOGALE

Fifth Respondent

MOSES MAKHALEMELE

Sixth Respondent

SIMON MAKGATHOLELA

Seventh Respondent

DIANA MODISE

Eighth Respondent

BONGANI HLONGWANE

Ninth Respondent

ELPHIUS LEPHALE

Tenth Respondent

SYDNEY DLAMINI

Eleventh Respondent

ELLIOT NTLAHLA NGCOBO

Twelfth Respondent

JOSHUA MASHIGO

Thirteenth Respondent

ENOCK MADONSELA

Fifteenth Respondent

MARKS MUDZANANE

Sixteenth Respondent

JACOB LEGODI

Seventeenth Respondent

MPUMZI SAWANA

Eighteenth Respondent

MADIKOANE MANGENA

Nineteenth Respondent

ORPHAN OUPA MONEOE

Twentieth Respondent

JOHANNES MOKOENA

Twenty-First Respondent

PHENGO MANGLISO MOKGAOTSANE

Twenty-Second Respondent

MINISTER OF HUMAN SETTLEMENT

Twenty-Third Respondent

MEC OF HOUSING, HUMAN SETTLEMENT

Twenty-Fourth Respondent

CITY OF TSHWANE METROPOLITAN MUNICIPALITY

Twenty-Fifth Respondent

MINISTER OF PUBLIC WORKS

Twenty-Sixth Respondent

BOUTIQUE HOTEL

Twenty-Seventh Respondent

JUDGMENT

COETZEE AJ (Van der Westhuizen J and Mogotsi AJ concurring)

INTRODUCTION:

[1] This is an appeal to the full court of this division, against the order and judgment by the Honourable Acting Justice Lenya, delivered on the 1st of December 2021, after the Appellants have been granted leave to do so on 13 April 2022.

BACKGROUND:

[2] During 2019 and 2020, the First to Twenty-Second Respondent, who are Liberation Struggle War Veterans (LSWV) (hereinafter referred to as 'the military veterans'), were allocated houses by the First and Second Appellant, and the Minister of Human Settlements (the Twenty-Third Respondent) at Rama City Extension 10, situated on the Remainder of the Farm Rama No. 768, Registration Division JR, Province of Gauteng ('the property'). During August 2020 violence erupted at the property. According to the military veterans the community of Rama City accused them of unlawfully occupying RDP houses that were not yet allocated to beneficiaries.

[3] The above dispute prompted Rama City Development Company (Pty) Ltd to apply for an eviction order on the 1st of September 2020. The eviction order was sought against all unlawful occupiers of certain erven at the property, which did not include the military veterans. Following the granting of the eviction order, the Second Appellant accommodated the military veterans and their families at various locations, including a military base and later several guest houses and a hotel.

[4] The military veterans maintained throughout the litigation process that followed that the property was not safe for their families, due to the community's belief that they were criminals. The First and Second Appellant admitted to providing alternative accommodation for the military veterans. They claimed that they did so based on the belief of representations made that the veterans were targeted and victimized by sections of the Rama City community. The Second Appellant asserts that they later investigated the information and found it to be incorrect.

[5] The investigations further prompted the Second Appellant to instruct the military veterans to vacate the guesthouses and move back to the property by the 7th of September 2021. The military veterans, however, argued that the safety of the houses and the issue of evictions with Rama City Development had not been resolved. Subsequently, further litigation ensued between the parties.

RELIEF SOUGHT IN VARIOUS APPLICATIONS:

[6] The military veterans approached this court on the 13th of September 2021, on an urgent basis ('the urgent application'), for the following relief:

- "1. That the time periods and forms of service be dispensed with and that the matter be heard as one of urgent in terms of the Uniform Court Rule 6(12) as read with the Honourable court's practice manual.
2. to restrain and interdict the 1st and 2nd respondents [The First and Second Appellant] from terminating provision of accommodation to the applicants and their families and that the *status quo ante* is retained;
3. that the 1st and 2nd respondent are ordered and directed to retain the applicants and their families at the three guesthouses, which were already allocated to the applicants and the families until proper, accommodation are allocated to the respondents;
4. that the 1st and 2nd respondents allocate such funds for payment of such allocated accommodation.
5. that the 1st and 2nd respondents are directed and ordered to sign all necessary memorandum of understanding and/or agreements with all relevant stakeholders including but not limited to the sixth respondent [the Minister of Public Works] for identification and allocation of housing within Pretoria excluding Rama City Development.
6. That the 1st and 2nd respondents are ordered to pay the costs of this application on the scale of attorney and own client."¹

¹ Record, Volume 1, pg. 4 and 5.

[7] The abovementioned application was removed from the roll on the 13th of September 2021, by agreement between the parties, and the issue of costs was reserved.

[8] The First and Second Appellant filed an answering affidavit on 21 October 2021 and simultaneously filed a counter application ('the review application') wherein they sought the following relief:

- "1. That the decision of the Military Veterans Appeal Board, attached hereto and marked Annexure A1, be reviewed and set aside, in terms of the Promotion of Administrative Justice Act 03 of 2000 and/or in terms of Section 1(c) of the Constitution.
2. That the Honourable Court grant such further and/or alternative relief including declaring the aforesaid decision to be void ab initio and of no legal effect.
3. That any of the Respondent's in the counter-application [the First and Second Appellant and the 23rd to 27th Respondent] opposing the grant of the review relief be directed to pay the cost of the application."²

[8] The decision of the Appeal Board of Military Veterans, mentioned above, made the following order on 4 October 2021:

- "1. That the decision made by the Respondent [the Second Appellant] on the 2nd of September 2021, as set out in the attached letter, is herewith set aside.

² Record, Volume 3, pg. 258 to 289.

2. The Respondent is ordered to timeously pay the necessary expenses for the housing of the Appellants where they are currently staying and to, within 7 days after the end of each month, confirm with the Appellants that payment for the specific month was indeed, made.
3. The Respondent is ordered to, within 30 days to provide the Department of Public Works with the information required in their letter of 24 June 2021, which information is as follows:
 - 3.1 Accommodation specification of DMV (specifically for LSWV) with the exact number of residential properties required.
 - 3.2 Draft Memorandum of Understanding.
 - 3.3 Minutes of the meeting dated 17 March 2021.
 - 3.4 Confirmation of funds on user charges or conveyancing fees: and
 - 3.5 Report on the properties which were previously visited by the DMV and DPW and Johannesburg regional office.
4. The Respondent is ordered to reinstate the Appellant's [the Liberation Struggle War Veterans] benefit even at an alternative housing project as agreed between the parties by 28 February 2022. The Appellants cannot unreasonably refuse to accept an alternative housing benefit from the Respondent once the Respondent provides same.³

[9] The urgent application, which forms the subject of this judgment, was heard on the 1st of December 2021 by the Honourable Acting Justice Lenyai, who made the following order:

³ Record, Volume 3, pg. 298 to 299.

- "1. The first respondent [the First Appellant] is ordered to comply with the final decision of the Military Veterans Appeal Board in the matter between the Liberation Struggle War Veterans v Department of Military Veterans dated 4 October 2021, a copy of which is attached as "M".
2. The applicants [the 1st to 22nd Respondent] are ordered to vacate the property of the seventh respondent [27th Respondent] on or before 28 February 2022.
3. The first respondent is ordered to timeously pay all arrear expenses and all the future expenses for the period up to and including 28 February 2022, for the housing of the applicants at the seventh respondent.
4. The first respondent is ordered to pay the cost of the application on an attorney and own client scale, including the cost consequent upon the employment of two council."⁴

[10] The reasons provided for the abovementioned order⁵ was that in both applications, the urgent and counter application, the military veterans presented submissions that they were willing to seek their own alternative accommodation and pledged to vacate the hotel by the 28th of February 2022. According to the reasons, they further contended, that they had not voluntarily housed themselves at the hotel and insisted that the Second Appellant should settle the hotel bill. On the other hand, it was stated, that the Appellants maintained that they had supported the veterans, believing that their houses were vandalized at the property. Additionally, the Second Appellant could no longer afford to accommodate them at such an expensive establishment, as they had already allocated housing to them at the property. The court *a quo* stated that it made the order after

⁴ Record, Volume 6, pg. 501 and 502.

⁵ Record, Volume 5, pg. 490 to 500.

considering the arguments of the parties and acknowledging the risk the military veterans would face if returning to an environment that posed mortal danger.

GROUND OFS OF APPEAL:

[11] The main issues to be decided in the appeal are whether the court *a quo* granted relief that was not originally sought in the urgent application and whether there was a sufficient factual basis for the relief that was ultimately granted.

ANALYSIS:

[12] It seems that only the urgent application of the military veterans was set down for hearing on the 1st of December 2021. Although the counter application and the decision of the Appeal Board of Military Veterans were included in the affidavits, these separate proceedings were not scheduled for hearing in the court *a quo* on the specified date.

[13] The Appellants contended that the first paragraph of the order granted by the court *a quo*, which ordered the First Appellant to comply with the final decision of the Military Veterans Appeal Board, was inappropriate because it was not sought in the notice of motion. This is correct. The second, third, and fourth paragraphs of the order granted by the court *a quo* were also not requested in the notice of motion.

[14] The Appellants further contended that the second, third, and fourth paragraphs of the granted order contains implications that could not have been intended. They argued

that the order effectively imposed an obligation on the First Appellant to make payments of unspecified amounts and to provide unspecified services to the military veterans for an unspecified period. This, they argued, is contrary to the procurement framework, sourced from section 217 of the Constitution of the Republic of South Africa, 1996, that prohibits the eventualities arising from the order of the court *a quo*.

[15] The court in *The Road Accident Fund v Taylor and other matters*⁶ stated that:-

"In the circumstances, the age-old principle of *audi alteram partem* required that the affected persons be afforded reasonable prior notice and opportunity to state their cases. In *De Beer NO v North-Central Local Council and South-Central Local Council and Others (Umhlathuzana Civic Association intervening)* 2002 (1) SA 429 (CC) para 11, the following was said with particular reference to s 34 of the Constitution:

'This fair hearing right affirms the rule of law which is a founding value of our Constitution. The right to a fair hearing before a court lies at the heart of the rule of law. A fair hearing before a court as a prerequisite to an order being made against anyone is fundamental to a just and credible legal order. Courts in our country are obliged to ensure that the proceedings before them are always fair. Since procedures that would render the hearing unfair are inconsistent with the Constitution courts must interpret legislation and rules of court, where it is reasonably possible to do so, in a way that would render the proceedings fair. It is a crucial aspect of the rule of law that court orders should not be made without affording the other side a reasonable opportunity to state their case. . . ."

[16] The full bench held in *Mgoqi v City of Cape Town & Another*⁷ that:-

"the relief sought by applicant's counsel during his argument could not be considered as the notice of motion did not provide therefore and the applicant failed to move for an appropriate amendment of the notice of motion".

⁶ (1136-1140/2021) [2023] ZASCA 64 (8 May 2023) at par 33 to 34.

⁷ 2006 (4) SA 355 (CPD) at paras [10] - [13].

[17] In *National Commissioner of Police and Another v Gun Owners of South Africa*, the Court dealt with the amendment of the relief claimed at the instance of a Court. The SCA said the following':

'[25] Counsel for the appellants submitted that this intervention by Prinsloo J was inappropriate, and effectively resulted in a new case for GOSA, put up at the instance of the court itself. In my view, the submission has merit for two related reasons. The first is that there is a real risk that judicial intervention of the kind in question, may render the court susceptible to an accusation of bias. It is a fundamental tenet of the administration of justice, now subsumed under the Constitution,^[10] that all those who appear before our courts are treated fairly and that Judges act – and are seen to act – fairly and impartially throughout the proceedings. In *President of the RSA v SARFU*,^[11] the Constitutional Court explained it this way:

'A cornerstone of any fair and just legal system is the impartial adjudication of disputes which come before the courts and other tribunals. This applies, of course, to both criminal and civil cases as well as to quasi-judicial and administrative proceedings. Nothing is more likely to impair confidence in such proceedings, whether on the part of litigants or the general public, than actual bias or the appearance of bias in the official or officials who have the power to adjudicate on disputes.'

[26] The second reason is that in our adversarial system of litigation, a court is required to determine a dispute as set out in the affidavits (or oral evidence) of the parties to the litigation. It is a core principle of this system that the Judge remains neutral and aloof from the fray. This Court has, on more than one occasion, emphasised that the adjudication of a case is confined to the issues before a court:

'[I]t is for the parties, either in the pleadings or affidavits (which serve the function of both pleadings and evidence), to set out and define the nature of their dispute, and it is for the court to adjudicate upon those issues. That is so even where the dispute involves an issue pertaining to the basic human rights guaranteed by our Constitution, for "it is impermissible for a party to rely on a constitutional complaint that was not pleaded". There are cases where the parties may expand those issues by the way in which they conduct the proceedings. There may also be instances where the court may mero motu raise a question of law that emerges fully from the evidence and is necessary for the decision of the case. That is subject to the proviso that no prejudice will be caused to any party by its being decided. Beyond that it is for the parties to identify the dispute and for the court to determine that dispute and that dispute alone.'^[12]

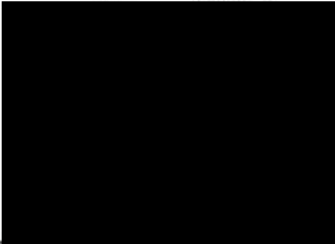
[18] The Appellants were not alerted in advance that the aforementioned order would be requested, nor were they given the opportunity to present their case. As a result of this alone, the order cannot stand and must be set aside.

As a result, the following order is made:

ORDER:

1. The appeal is upheld with costs.
2. The order of the Honourable Acting Justice Lenyai, granted on 1 December 2021, is substituted with the following:

"The Application is dismissed with costs, such costs to include the reserved costs on 13 September 2021."



COETZEE, AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT,
PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be the 31st of January 2024.