



**IN THE HIGH COURT OF SOUTH AFRICA**  
**FREE STATE DIVISION, BLOEMFONTEIN**

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|------------------------------|----|
| Reportable:                  | NO |
| Of Interest to other Judges: | NO |
| Circulate to Magistrates:    | NO |

**Case no: 3673/2021**

In the matter between:

**DIHLABENG LOCAL MUNICIPALITY**

Applicant

and

**ALL UNIDENTIFIED AND UNKNOWN PERSONS  
OCCUPYING OR INTENDING TO OCCUPY  
BAKENPARK EXTENSION 7 (VOGELFONTEIN)  
BETHLEHEM**

First Respondent

**ALL UNIDENTIFIED AND UNKNOWN PERSONS  
OCCUPYING OR INTENDING TO OCCUPY**

**BAKENPARK EXTENSION 5 (VOGVELFONTEIN)  
BETHLEHEM, EXCLUDING PERSONS  
IDENTIFIED IN ANNEXURE "A" TO THE NOTICE  
OF MOTION**

Second Respondent

**MOHLOKI MTHOMBENI**

Third Respondent

**THE DEPARTMENT OF HUMAN SETTLEMENTS,  
FREE STATE PROVINCE**

Fourth Respondent

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**JUDGMENT BY:** MTHIMUNYE, AJ

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**HEARD ON:** 17 FEBRUARY 2022

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**DELIVERED ON:** 25 MARCH 2022

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This judgment was handed down electronically by circulation to the parties' representatives by email, and release to SAFLII. The date and time for hand-down is deemed to be 12:00 on 25 March 2022.

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- [1] This a two-part application by Dihlabeng Local Municipality ("the Applicant") in terms of which it seeks primarily a final order of eviction the first and second respondents from **Bakenpark Extension 7** and **Bakenpark Extension 5 (Vogelfontein), Bethlehem** (hereinafter referred to as "the Municipal Properties"); and secondarily confirmation of the interim interdict against the respondents. In addition, the applicant seeks confirmation of the rule nisi issued by this division on 7 October 2021.
  
- [2] The Applicant is Dihlabeng Local Municipality, a municipality duly established in terms of section 12 of the Local Government: Municipal Structures Act, 117 of 1998 and the owner of the properties mentioned above, which properties are the subject of this application.
  
- [3] The First Respondents are unidentified and unknown persons currently occupying or intend to occupy Bakenpark, Extension 7 (Vogelfontein) Bethlehem.
  
- [4] The Second Respondents are unidentified and unknown persons who occupy or intend to occupy Bakenpark Extension 5 (Vogelfontein) Bethlehem, excluding persons reflected on Annexure "FA" to the founding affidavit, who moved to Bakenpark, Extension 5 (Vogelfontein), Bethlehem since May 2021.
  
- [5] The Annexure referred to above is also referred to as Annexure "FA1" to the Notice of Motion and it contains names of occupants of Bakenpark Extension 5 to whom this application does not apply since their occupation is the subject of another application before this court under case number 1214/2021.

- [6] The Third Respondent is Mr Mohloki Kantoro Mthombeni, an adult male person who is an elected Councillor of Dihlabeng Local Municipal Council and a proportional representative of the Economic Freedom Fighters Party. The Applicant submits that the third respondent entices, invites and/or incites persons to move into and to occupy the municipal properties.
- [7] The Fourth Respondent is the Department of Human Settlements, Free State Province, a department responsible for human settlements. No relief is claimed against the fourth respondent and is only joined herein as it might be called upon by the court and / or respondents to provide emergency alternative land in Dihlabeng area.
- [8] This matter has an intertwining history dating back to March 2021 where the Applicant approached this court on an *ex-parte* basis for an order stopping occupation of Erf 1273 Bakenpark, Extension 5 (Vogelfontein), Bethlehem on an urgent basis. An interim order was granted on 17 March 2021 by my sister Wright AJ and a rule nisi was issued for the respondents to show cause on 6 May 2021 why the order was not to be made final. On 27 May 2021, my sister Daniso J made the interim order final.
- [9] Subsequent to the above order, the respondents brought an application to rescind the orders of 17 March 2021 and 27 May 2021. The rescission application is a separate application under case number 1214/2021. On 14 July 2021, my brother Mhlambi J granted the respondents an order suspending the aforementioned orders pending the finalisation of the rescission application.
- [10] Subsequent to the rescission application, in the period between 6-7 August 2021, other persons who are now cited herein as first and second respondents, invaded the same portion of land which forms the subject of the rescission application. The applicant then brought this application in respect

of the invasion that took place between 6-7 August 2021. As stated in Para [4] above, this application excludes persons identified in Annexure “FA1” to the notice of motion in the rescission application.

- [11] The applicant submits that this land is earmarked for human settlement of persons on the municipality’s lists in accordance with the National Housing Needs Registry (NHNR). By invading this land, the first and second respondents are ‘*jumping the queue*’ of other deserving applicants as the land has already been allocated to qualifying applicants.
- [12] On 12 August 2021 this matter served before my sister Naidoo J who granted an interim order in respect of Part A of the application (dispensing with Uniform Rules for applications of this nature and authorisation of the manner of service), as well as the Rule Nisi calling upon the respondents to show cause if any, on 9<sup>th</sup> September 2021 why the interim order in terms of Part B should not be made final.
- [13] After service was effected in terms of the order of my sister Naidoo J, the respondents, filed a Notice of Intention to Oppose on 08 September 2021. The following day i.e. 09 September 2021 the matter served before my sister Wright AJ, who extended the Rule Nisi to 23 September 2021, on which date my brother Loubser J extended it to 7 October 2021. On 05 October 2021, the respondents then filed a Notice in terms of Rule 7(1) and (4). When the matter served before my sister Van Rhyn AJ on 7 October 2021, she granted an order postponing the matter to the opposed roll of 25 November 2021 and directing the respondents to file their answering affidavits on or before 28 October 2021. The applicant was directed to file its replying affidavit on or before 11 November 2021. She also confirmed the rule nisi issued by Naidoo J on 12 August 2021. I deal with the Rule 7 (1) and (4) in a separate paragraph below.
- [14] Instead of filing its answering affidavit on or before 28<sup>th</sup> October 2021 in accordance with Rhyn AJ’s order, the respondents filed same on 23

November 2021, accompanied by a condonation application for late filing. This was literally two days before the matter was set down to be heard. Consequently, the applicant could not have been able to file its replying affidavit timeously and as such the matter was postponed to 10 February 2022 by my sister Daniso J, with the rule nisi extended to the same day. Costs were reserved. The parties subsequently agreed to further postpone the matter to the opposed roll of 17 February 2022 to accommodate Counsel. Daniso J also directed the applicant to file its replying affidavit on or before 15 December 2021. The Applicant failed to file its replying affidavit on the said date and only did so on 8<sup>th</sup> February 2022 and asked for condonation. This time the replying affidavit was deposed to by Busa Petrus Molatseli, in his capacity as the Municipal Manager appointed on 10 December 2021.

[15] The matter then served before me on 17<sup>th</sup> February 2022. At the onset of the hearing, Counsel for the applicant raised four preliminary issues/points *in limine viz.* Rule 7 Notice, costs occasioned by the postponement on 25 November 2021, condonation of the late filing of the answering affidavit by the respondents and condonation of the late filing of the replying affidavit by the applicant. I deal with these in the paragraphs below.

[16] During submissions in the main application, concessions were made by both Counsels for the applicant and the respondents in respect of the main application and an agreement was reached that this court may make an order in terms of the draft order submitted by the applicant, taking into consideration concessions made in favour of the respondents, amongst others, provision by the applicant of alternative accommodation with portable water and necessary amenities to the first and second respondents.

[17] What was left for this court to determine were the four preliminary issues. I now deal with these individually:

#### Rule 7 challenge

- [18] The applicant's founding affidavit was deposed to by Mr Lekhetho Isaac Mokhathle on 12 August 2021. The respondents disputed the authority of Peyper Attorneys to act on behalf of the applicant in these proceedings and filed a notice in terms of Rule 7(1) and (4), calling upon Peyper Attorneys to provide them with a Power of Attorney signed by the applicant or on behalf of the applicant with delegated authority and/or resolution of the Municipal Council within 10 days of the notice. The Respondents further disputed the *locus standi* of Mr Mokhathle as Acting Municipal Manager, stating that he had no requisite authority or resolution from the Municipal Council authorising him to institute and prosecute (my emphasis) this application., alternatively to bring this eviction and interdict application as alleged under paragraph 2 of founding affidavit. They argue that the delegation to the Acting Municipal Manager reads that he be delegated '*to sign all documents regarding the following in line with the Delegation of Powers document approved by Council on 1 August 2013, ...to institute and defend any legal action in any Court*'. The respondent argues that the word 'institute' does not include authority to '*prosecute*' litigation.
- [19] In response to the Rule 7(1) Notice, the applicant, on 28 October 2021, filed the Special Power of Attorney and the Council Resolution dated 27 November 2019. The Special Power of Attorney was signed on 12 August 2021 by Lekhetho Isaac Mokhathle in his capacity as Municipal Manager duly authorised in terms of a Resolution dated 6 December 2019. The said resolution was also attached. This was out of the 10 days' period stipulated in the Rules, more specifically 9 days out of time.
- [20] The applicant requests condonation in this regard and submits no prejudice was suffered by the respondents as filing of the opposing affidavit is not dependent upon compliance with Rule 7. Further, the applicant points out that the respondents themselves were out of time in filing a Rule 7 Notice by more than a month. In terms of the Rules, they should have filed the notice within 10 days of having received the application. The respondents argue that the

applicant's response to its Rule 7 notice be excluded from admission into evidence as it was out of time and there is no condonation application before court for admission thereof.

[21] The granting of condonation for non-compliance with the Rules remain in the Court's discretion. The applicant did not bring a substantial application but made submissions in its heads and from the bar. In exercising its discretion, a Court must consider the degree of the lateness, explanation for the delay, prospects of success, degree of non-compliance with the rules, the importance of the case, the respondent's interest in finality of the judgment of the Court below, the convenience of the Court and the avoidance of unnecessary delay in the administration of justice – **Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd and Others<sup>1</sup>**.

[22] In the interests of justice and there being no prejudice suffered by the respondents as a result of the late compliance with this notice by the applicant, I find no reason not to condone the applicant's late response to the Respondent's Rule 7 Notice. As such the applicant's response to the respondent's Rule 7 Notice is admitted into evidence.

[23] The respondents further submit that the Municipal Resolution is fatally defective as it does not authorise the Municipal Manager to 'prosecute' but only to 'institute and defend any legal action in any court'. It appears that the respondent's contention is that the words 'institute' and 'defend' exclude prosecution of the action. In **Pretoria City Council v Meerlust Investments Ltd<sup>2</sup>**, the Appellate Division, as it then was, stated that the words 'to institute action' are not to be limited to merely commencing the action. Although in this case the context was with regards to prosecuting an appeal in the Supreme Court of Appeal and the court found that the authority to institute did not

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<sup>1</sup> [2013] 2 All SA 251 (SCA) at Para 11.

<sup>2</sup> 1962 (1) PHF 12 (AD) 324 at Para F-H.

include noting an appeal to a higher tribunal in the event of an adverse decision in the Court of first instance. In my view, the AD's *obiter dictum* in respect of limiting the said phrase, is applicable herein more especially because this is the same court where the action was instituted. For this reason, I have to reject the respondent's contention that the Municipal Manager did not have authority to prosecute this action.

Condonation for late filing of the Respondent's Answering Affidavit and the Applicant's Replying Affidavit

[24] Since the legal principles applying to condonation of non-compliance with Rules applies to both these applications, I deem it necessary to deal with them simultaneously. Despite having been ordered to file their answering affidavit on 28 October 2021, the respondents were only able to do so on 23 November 2021 and in doing so filed a condonation application for late filing. In the interest of justice, the applicant does not oppose condonation.

[25] Similarly, the applicant was directed to file its replying affidavit on or before 15 December 2021 but only did so on 8<sup>th</sup> February 2022, accompanied by another condonation application. The applicant submits that Mr Mokhathle, who was the deponent to the founding affidavit was suspended on 9 December 2021. The first draft of the replying affidavit had been drafted for his signature and had then to be changed to be deposed to by the new Municipal Manager appointed on 10 December 2022. It submits that no prejudice was suffered by the respondents in this regard and requests the court to grant the condonation in the interests of justice. The respondents oppose this on the basis that the applicant fails to account fully on the causes for delay.

[26] The standard for the condonation applications was affirmed by the Constitutional Court in **Van Wyk v Unitas Hospital and Another**<sup>3</sup> as the interests of justice and to determine whether it would be in the interests of

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<sup>3</sup> [2007] ZACC 24; 2008 (2) SA 472 (CC) at para 20.

justice to grant the condonation would depend on the facts and circumstances of each case.

- [27] Interestingly, the respondents rely on this case and submit that it is in the interests of justice to condone the late filing of their answering affidavits as this case implicates the constitutional rights of the respondents, and the information contained in the answering affidavit will assist this Court in discharging its function in terms of Section 6 (1) to (3) of the Prevention of Illegal Eviction from Unlawful Occupation of Land Act. I agree with this submission and find no issue with condoning the respondent's late filing of its answering affidavit. In the same vein, and for the same reasons, I do not see why the applicant's late filing of its replying affidavit should not be condoned.

#### Interdict against the Third Respondent

- [28] It is alleged by the applicant that persons making up the first and second respondents reported to the attorneys for the applicant that they were invited to invade the municipal properties by the third respondent. As a result thereof, the applicant seeks confirmation of the order interdicting the third respondent from inviting and enticing people to invade the land in question. In this regard and by its own admission, the applicant requires this court to make an order on the basis of hearsay evidence from an unidentified individual, which evidence is tritely inadmissible. The applicant placed no further evidence of wrongdoing and or specific unlawful conduct on the part of the third respondent upon which the relief sought can be granted, neither did it even attempt to satisfy the requirements for a final interdict as outlined in **Setlogelo v Setlogelo**<sup>4</sup>.

- [29] This allegation was also vigorously disputed by the third respondent which, even if the applicant's allegations were based on admissible evidence, presents a factual dispute. Guided by **Plascon-Evans Paints Ltd v Van**

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<sup>4</sup> 1914 AD 221 at 227.

**Riebeeck Paints (Pty) Ltd**<sup>5</sup> this court finds no justification to grant the relief sought herein. For these reasons, the interdict against the third respondent is discharged. The proper order with regard to costs would be the customary order that the costs shall follow the cause.

Costs Occasioned by Postponement on 15 November 2021

[30] As stated in para [13] *supra*, the respondents failed to comply with Van Rhyen AJ's order and to file their answering affidavit on or before 28 October 2022 and only did so on 23 November 2022. Consequently, the matter could not proceed and had to be postponed. The applicant has asked that costs occasioned by the postponement on 25 November 2021 be paid by the respondents since their legal representatives never advised the applicant's legal representatives timeously and the applicant had to brief Counsel for the day and to draft Heads of Argument which was done on 15<sup>th</sup> and filed on 17<sup>th</sup> November 2021. Had the respondents timeously informed the applicant of the delay, these costs could have been obviated. During argument, Counsel for the applicant submitted that although he may concede that the first and second respondents are indigent people who cannot be able to bear these costs, the third respondent is a paid Councillor and since he is the one who has allegedly incited the invasion, he must be mulcted with these costs. The contention that the third respondent incited the invasion was vigorously disputed by the third respondent. This has been dealt with fully in paragraphs [29] and [30] above.

[31] In supporting its submission to be awarded these costs, the Applicant relied on **Erasmus v Grunow**<sup>6</sup> and an unreported judgment of Wright AJ cited as **A.J.P v I.B**<sup>7</sup>. The hurdle for the applicant in this regard is the Biowatch Principle as outlined in **Biowatch Trust v Registrar Genetic Resources and**

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<sup>5</sup> [1984] (3) SA 623 (A) at para 9.

<sup>6</sup> 1980 (2) SA 793 (O) at 79B-C.

<sup>7</sup> [2021] ZAFSHC 165 (19 August 2021) at para [26].

**Others**<sup>8</sup>, and confirmed in **Harrielall v University of KwaZulu- Natal**<sup>9</sup>. In terms hereof, the court directed that the ordinary rule that costs follow the result should not be applied to unsuccessful private litigants who seek to vindicate their constitutional rights against an organ of State. This is a constitutional matter involving a right to housing and I am persuaded that this principle applies to all the respondents herein, including the third respondent.

[32] In the result, and in respect of the main application, the following **order is made**:

#### **ORDER**

1. The interdict against the Third Respondent is discharged with costs.
2. The First and Second Respondents shall apply to the Applicant's housing department within 21 days from service of the order to register as persons in urgent need of alternative accommodation/emergency housing.
3. The Applicant shall attend to the provisions of alternative accommodation to the persons who qualify for human settlement as being persons identified as the First and Second Respondents at the Farm Kuypsheim, Bethlehem district within 30 days from date of this order.
4. The Applicant shall ensure that there is adequate quantity of portable water available at all times at the Farm Kuypsheim in order to accommodate the First and Second Respondents.
5. The First and Second Respondent are ordered to vacate the municipal properties situate at **Bakenpark, Extension 7 (Vogelfontein) or Bakenpark, Extension 5 (Vogelfontein)** [hereafter referred to as "the municipal properties"] within 60 days from the date of this order.

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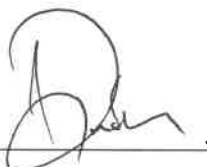
<sup>8</sup> 2009 (10) BCLR 1014 (CC).

<sup>9</sup> 2018 (1) BCLR 12 (CC).

6. Once the Applicant has provided alternative accommodation to the First and Second Respondents, the Sheriff of the Court, with the assistance of the South African Police Services, or a contractor of the Sheriff's choice is authorised to demolish all half-completed structures and structures which are not being occupied by any occupants immediately.
7. The First or Second Respondents are ordered to refrain from further demarcating, delineating, erecting structures and/or bringing building material onto and, or occupation of the municipal properties.
8. In the event of the First and/or Second Respondents failing to adhere to this order:
  - 8.1. The Sheriff is authorised and directed to remove any person who are part of or assists the First or Second Respondents from the municipal properties, with the assistance of the South African Police Services if required;
  - 8.2. The Sheriff is authorised and directed to remove any movable goods or items brought onto the municipal properties by the First and Second Respondents, with the assistance of the South African Police Services, if need be.
9. No person shall be evicted from the municipal properties unless the Applicant has provided alternative accommodation, which should be within 60 days from the date of this order.
10. The Applicant shall file a report with the Registrar of this Court within 21 days from date of this order in respect of all amenities and attributes of the available land situate at the Farm Kuypsheim, Bethlehem district.
11. The Respondents may approach the Court at any time after receipt of the report from the Applicant, on or before 1 May 2022, on the same papers duly

amplified to requests legal relief against the Applicant's intention to provide alternative accommodation at the Farm Kuypsheim, if the Respondents so require, for the Court to consider granting further or alternative supervisory orders.

12. Each party to pay their own costs, including the costs occasioned by the postponement of this matter on 25 November 2021.

  
**D. P. MTHIMUNYE, AJ**

**Appearances:**

For the Applicant:

Adv Rautenbach  
Free State Society of Advocates  
Instructed by Peyper Attorneys

For the First Respondent:

Adv Sindikolo  
Johannesburg Bar  
Sandton Chambers  
Instructed by Ian Levitt Attorneys