

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION - MTHATHA**

CASE NO. : 2858/2019

Heard on : 20 August 2019

Date delivered: 29 August 2019

In the matter between:

MANDLA HLANEKELA AND 13 OTHERS

Applicants

And

**UMZIMVUBU LOCAL MUNICIPALITY AND
ANOTHER**

Respondent

JUDGMENT

MAJIKI J

[1] Two urgent applications had been brought against the same respondent. Both were before court for argument at the same time. At the commencement of the hearing it was recorded that, in the light of the fact that the issues raised are relatively the same, the nature of the relief sought is similar both matters should be heard together. The matters are in respect of case numbers 2858/2019 and 2859/2019. In both matters all the papers had been filed, it was therefore agreed that the hearing should be for the determination of the final relief.

[2] In case number 2858/2019 there are fourteen applicants. In case number 2859/2019 there are eight applicants. The applicants seek that their eviction from the houses at extension 5 Chitwa Village be declared unlawful. Further, that it be ordered that their possession of the properties be restored. Both applications are opposed by the first respondent.

[3] It is common cause that the applicants were evicted from the properties that are the subject of dispute in this matter, at the instance of the first respondent.

[4] Further, the applicants occupied the houses without being allocated by the first respondent in accordance with the system it uses to allocate the houses to indigent beneficiaries. The said system includes the process of following the list compiled on a first come first serve basis and in accordance with government's housing policy.

[5] It is also common cause that in 2013 the first respondent instituted eviction proceedings under case number 2144/2013 against 27 known and listed occupants and other unknown occupiers. The order was granted by this court on 10 September 2015. The names of the applicants do not appear in the 27 people listed in that court order.

[6] It is in dispute between the parties as to whether in 2013 the applicants were already in occupation of the houses. According to the applicants they were not. In case number 2859, they say they occupied the houses in 2016. In case number 2858 the applicants say they did so between 2016 and 2017. According to the respondent, the applicants occupied the houses in 2013, accordingly in 2013 they were served with the application papers, the PIE notice and eviction order. Their identities were not known, they fell in the category of other unknown illegal occupants, against whom the eviction order was also granted.

[7] The issue for determination in the matter is whether the applicants were unlawfully evicted. This involves a factual enquiry as to whether they were in

occupation of the houses in 2013 and therefore were included in the 2015 order; whether they were served with all relevant documentation thereon as the respondent avers or they were not as they aver.

[8] According to the applicants they all occupied the houses between after the year 2013. They were forcefully evicted from their homes by members of the office of the second respondent who were in company of members of South African Police Service and the officials from the first respondent. The members of the second respondent carried some papers which were not handed to the applicants. Instead, they were shown what was said to be the court order authorising the eviction. They aver that their investigations about the case under case number 2144/2013 revealed that none of them appeared therein. When the proceedings therein were launched in 2013, none of them were in occupation of the said houses.

[9] Furthermore, according to the applicants, none of the applicants ever occupied the 49 houses listed in the application in Case No. 2144/2013. Accordingly, they seek an order that they be restored of possession of their homes. They say they, together with their families who include children had been in peaceful and undisturbed possession of the homes until they were unlawfully evicted.

[10] The respondents on the other hand aver that the said houses were allocated to the rightful applicants and not the respondents. The respondents occupied the houses illegally since 2013. They were sued under case number 2144/2013. They were duly served with section 4(2) of the Prevention of Illegal Eviction Act (PIE Act) issued on 25 May 2014. Eventually, they were evicted on the strength of the order in the judgment delivered on 10 September 2015 in that matter. Subsequent to that, the applicants broke into the houses and re-occupied them illegally. The present eviction is the continuation of the process of evictions which started in 2015. Attempts to evict them earlier were in vain. The deponent to the answering affidavit, the municipal manager of the first respondent says he knows that the applicant was in occupation of one of the houses in 2013. He resisted eviction in 2015. He does not state which

applicant he is referring to. He referred to the said applicant as a he, there are a number of male applicants in the matter. The denial in reply is made by the deponent to the founding affidavit. He denied that he was in occupation of the houses in 2013. He says his name is not in the listed respondents in case number 2144/2013. Further, no return of service has been attached for any of the processes that it is alleged were served.

[12] As regards the fact that the applicants' names do not appear in case number 2144/2013 the respondent avers that it did not know their names when instituting the proceedings. They were referred to as other unknown illegal occupiers of RDP houses in extension 5 Mount Ayliff.

[13] The respondent gives account of some of the allocations of the houses and their occupations as follows:

House No. 921 was allocated to one Phizile Mabindisa it is occupied illegally by the first applicant;

House No. 918 was allocated to Nomabomvana Magocoba;

House No. 916 was allocated to Priscilla Nyanga. It is illegally occupied by Fikiswa Lambati;

House No. 979 was allocated to Nomazwi Marry Mtshubungu its illegal occupant is the eleventh applicant;

House No. 973 was allocated to Daweti Sipunzi its illegal occupant is the sixth applicant;

House No. 966 was not yet allocated, it is not known as to who claims its return and

House number 1284 was allocated to Jojo Thamsanqa, its illegal occupant is unknown.

[14] According to the respondent, the applicants are not entitled to the relief they seek.

[15] As regards the applicants in case number 2859/2019, they aver that they realised that houses were being allocated by the first respondent to people who had applied for houses after the said applicants had applied. This is against

the normal procedure of compiling the lists, which is, on a first come first serve basis. They admit that they haphazardly took occupation of the houses. Since 2015 they have been in peaceful and undisturbed possession of the said houses. They were also evicted on 29 July 2019 in the same manner as the applicants in the other matter. They further aver that they all occupied the houses in 2016.

[16] The respondent in the said matter denies that there was anything wrong with its allocation of the houses. The list of the identified beneficiaries was annexed as “PGTN2”. No complaint was legitimately raised on their allocation process. There were no complaints even after service of order of 10 September 2015.

[17] Mr Mdoana, for those applicants submitted that there is no answer to paragraph 24 of the founding affidavit. The closer look of the papers reveals that the founding affidavit omits paragraph 19. From paragraph 18 it moves to paragraph 20. In answer, the deponent included paragraph 19, following normal numbering. The text in the answers correlate with paragraph 20 of the answer downwards. The answer referred to as answer to paragraphs 23.1 to 23.4 clearly relate to paragraph 24.1 to 24.4. Further, the said paragraph is the only paragraph that has subparagraphs in the founding affidavit. Also, the answer referred to as being in relation to paragraph 23.4 is an answer relating to averment about a sheriff from another district, which is an allegation contained in paragraph 23.4 in the founding affidavit. The confusion about numbering was started by the applicants. I make nothing much of it.

[18] In order to determine whether the applicants would be entitled to restoration, they are required to allege and prove that they were in peaceful and undisturbed possession of the property. Further, that they were unlawfully evicted.

[19] The facts that are central in relation to these requirements are in dispute. The applicant averring that since 2015 they were in undisturbed possession. The respondent on the other hand says they had been trying to evict them and

the applicants were resisting. Further, with regard to being unlawfully evicted, the respondents state that the applicants were included in the order of 2015 in case number 2144/2013.

[20] In motion proceedings seeking a final order, if there is a dispute of fact, which is material, the approach as articulated in **Plascon Evans Paints Ltd v Van Riebeck Paints Ltd** 1984 (3) SA 623 at 634H is such that the said order may be granted if those facts averred in the applicants' affidavits which have been admitted by the respondent together with those alleged by the respondent, justify such a final relief. Otherwise, the matter is to be determined on the version of the respondent. The respondent's version can only be rejected if it is far fetched or untenable that the court is justified in rejecting them merely on the papers.

[21] Firstly, I will deal with whether the applicants were served with the papers, as being unknown occupants in 2013. The respondent did not furnish the return of service, which would serve as proof of service. The respondent does not state that it is no longer possible to produce it. Further, the respondent tabulated the allocations for occupation, those that were legally approved and those unlawfully grabbed. The respondent does not state how and when service which was effected as intended to be service on the unknown occupants was made. Were the papers left at the houses; was there joint service at a common area? How was the service resisted? Without this crucial information to support that the applicants were served, I would not be able to find in the respondent's favour, that the applicants were served in 2013 and again with further processes in 2015.

[22] The aspect of peaceful and undisturbed and unlawful eviction would have to be determined on the version of the applicant. I am therefore unable to find that the eviction was lawful. This is further complicated by the fact that the applicants averred that they were not given eviction papers on 29 July 2019. The respondent in answer simply states that the applicants were aware of the judgment as far back as 2015, they were evicted and came back. It remains unanswered as to how the applicants gained knowledge of eviction proceedings,

if there is no detailed information about service of the order. It is not clear which applicants resisted by refusing to be evicted or which ones were indeed evicted and came back.

[23] The applicant which, because of the answer he gave, I accepted is the first applicant, was known. Was he served? did he resist? was he evicted but came back?.

[24] The respondent also states that the attempts to evict the applicants had previously not succeeded. Again, no details are furnished as to against which applicants the attempts were made, when and what transpired. This again complicates the issues around the resolution of the issue of when the applicants took occupation of the houses. If the respondent's version is not clear in this regard, it cannot be concluded that the order in case number 2144/2015 included the applicants.

[25] Mr Ngumle for the respondents referred me to the matter of **South African Informal Traders Forum v City of Johannesburg** 2014 (4) SA 371. However, that case is not so much on point with the present one, the removed traders therein had been trading lawfully. The interim relief was sought pending the review of the decisions of the city council, which effectively were removing them from their lawful sites. None of the said features are present in this matter.

[26] In conclusion, in the light of the lack of the details that give a full picture of the respondent's case, the application of the principle in **Plascon Evans Paints Ltd**, *supra* would not come to the assistance of the respondents.

[27] Nothing much was raised with the requirements for a final interdict except the one about the existence of a clear right. This requirement is not necessary to be met herein, as the relief sought is based on *mandament van spolie*. The applicants would be successful if they meet the two requirements for *mandament van spolie*. In my view, the applicants have met the said requirements.

In the result,

1. The eviction of the applicants from house numbers 921, 857, 1291, 916, 715, 973, 788, 918, 613, 979, 712, 934, 1284 and 966 in case number 2858/2019 and house numbers 1307, 609, 737, 1308, 1225, 1530, 1378 and 1336 in case number 2859/2019 situate at extension 5 Chitwa Village Mount Ayliff by the respondents is hereby declared unlawful.
2. The respondents are hereby directed to return forthwith to the possession of the applicants the houses mentioned in paragraph 1 of this order.
3. The first respondent is hereby directed to pay the costs of the application.

B Majiki

Judge of the High Court

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