

IN THE HIGH COURT OF SOUTH AFRICA



GAUTENG LOCAL DIVISION, JOHANNESBURG

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
05/09/2018	
DATE	SIGNATURE

CASE NO: A5039/17

Date of Hearing: 27 June 2018

Date of Judgment: 05-09-18

In the matter between:

METROPOLITAN EVANGELICAL SERVICES NPC

First Appellant

CITY OF JOHANNESBURG

METROPOLITAN MUNICIPALITY

Second Appellant

And

HLONIPHOKWAKE GOGÉ

Respondent

JUDGMENT

MASHILE J:

- [1] This appeal is against the whole judgment and order of Dewrance AJ sitting as Court of first instance. The order restored possession of a room at a temporary emergency accommodation facility or shelter, known as Ekuthuleni, to the respondent. The first appellant ran Ekuthuleni on behalf of the second appellant. Leave to appeal to this Court was granted by the Supreme Court of Appeal following a successful petition by the appellants.
- [2] On enquiry from this court both parties submitted that this appeal was not moot. In a written submission on that issue the respondent's representatives stated that he has been homeless since his exclusion from Ekuthuleni and has 'squatted' at times with friends who are living in another shelter.
- [3] The respondent was part of a group of individuals who took up occupation of accommodation at Ekuthuleni pursuant to the decision of the Constitutional Court in the matter of *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC). The respondent occupied a room at Ekuthuleni on the 30 June 2012. It is common cause that on 18 June 2016 the respondent went away after a confrontation with other residents at the shelter, returned on 25 September 2016, where he stayed overnight and changed his clothing; and was barred from entry to the room on 26 September 2016 by the appellants' security personnel.
- [4] Central to this matter is therefore whether the appellants lawfully barred the respondent from the room. It is common cause that the barring was not

sanctioned by a court order.

Background facts

- [5] During the evening of 18 June 2016 and at Ekuthuleni, the respondent became involved in arguments with Busisiwe Nhlapo ('Ms Nhlapo'), her daughter Mbali Nhlapo ('Mbali'), and a security guard at Ekuthuleni. The exchange allegedly left the respondent with burn wounds caused by boiling water poured over him by Mbali. As a result of these altercations, the respondent left Ekuthuleni, after locking the room in which he had left most of his belongings and taking the key to the room with him. During the period of the respondent's physical absence from Ekuthuleni, the first appellant left the room entirely undisturbed, notwithstanding that similar accommodation was highly in demand. On the respondent's return on 25 September 2016, he accessed the room. There is no suggestion that he did so unlawfully. Using his keys, the respondent opened the room, slept overnight, woke up the following day of 26 September 2016, and left for a while. When he came back later, the security guards of the appellants refused to let him inside the facility.
- [6] Consequently on 28 September 2016, the respondent launched an urgent application to regain access to his room at Ekuthuleni. He contended that the appellants' refusal to allow him to return to the room, that he had lawfully possessed and occupied for approximately four years and in which he had slept on 25 September 2016, constituted an illegal eviction. Furthermore, the respondent asserted that his eviction, in the absence of a court order authorising the appellants' actions, violated his rights as contemplated in, inter

alia, Section 26 (3) of the Constitution, and that he had been spoliated. The relief he sought is framed as interim relief, i.e., that he be re-admitted to Ekuthuleni pending the final determination of an eviction application that the appellants had brought against him some time ago and was not withdrawn.

[7] The appellants counter-applied for certain relief, including an order that the respondent be declared in contempt of an order granted by Vally J in this Division on 20 May 2016 under case number 2015/14392, in terms of which the respondent consented to be restrained from assaulting, intimidating or verbally abusing any person employed by the appellants, or occupying Ekuthuleni. The order was made in the presence of the respondent and his legal representatives.

[8] Dewrance AJ removed the counter-applications from the roll having ruled that it was not just and equitable for him to deal with the counter-applications on an urgent basis, and if entertaining them would mean that the court must enter into the merits of the factual disputes between the parties, in a matter where the court was to deal with the appellants' resort to self-help. Dewrance AJ then made the following order:

'61.1 The Respondents' refusal to allow the Applicant to occupy the shelter after 25 September 2016 is in breach of the Applicant's right contained in section 26(3) of the Constitution not to be evicted without an order of court;

61.2 The Respondents are ordered to forthwith re-admit the Applicant into the shelter;

61.3 The Applicant is awarded the costs on a party and party scale, including the cost consequent upon the employment of two counsel;

61.4 The counter applications are removed from the roll and costs are reserved.'

- [9] It is perhaps necessary to mention at this juncture that during the course of the hearing of the application before the court a quo, the appellants withdrew the pending eviction application, and causing, in effect, its substitution with the new eviction application brought by the appellants in their counter-applications.
- [10] The appellants contend that the order of the court a quo was wrongly made, because the room was not the respondent's home; that he had abandoned the room and had given up occupying it when he left Ekuthuleni on 18 June 2016; and, further, that he was not in occupation of it, or in peaceful occupation of it when he was not allowed to access it on 26 September 2016. The appellants' counsel submitted before us that the new eviction application was conditional upon the court a quo finding in favour of the respondent. However, the application itself does not purport to be conditional. Further, counsel submitted in written heads of argument that the counter-applications were wrongly removed from the roll by the court a quo, that despite the fact that such order was not appealable, but was, in any event, not appealed against by the appellants.
- [11] The issue that required determination, as rightfully concluded by the court a quo, is whether the respondent was lawfully evicted from the room that he occupied at Ekuthuleni. In deciding that question, this Court must make a finding on whether or not the room at Ekuthuleni was the respondent's home, or more particularly, whether he was in occupation of the room when he was denied access thereto on 26 September 2016. Relevant to these questions is whether, conscious of his rights in terms of the Constitution, he waived his right of occupying it on 18 June 2016, when he left. And a related question, namely,

whether he permanently, or temporarily, left the room on that date.

- [12] Notwithstanding the elaborate arguments advanced regarding the cause for the respondent leaving Ekuthuleni on 18 June 2016, what is crucial is that he left his belongings behind in the room; that he locked it and retained the keys (retaining one key himself and leaving the other key with a friend of his who also lived in the shelter), and, significantly, that he returned on 25 September 2016, opened the room with the keys he had retained; and stayed there overnight, only to be precluded from entry again on 26 September 2016.

The Legal position

- [13] Before turning to the analysis of the facts, I deem it necessary to briefly discuss the legal position. Section 26 (3) of the Constitution provides that: 'no-one may be evicted from their home without an order of court made after considering all the relevant circumstances.' An 'eviction' within the meaning of section 26 (3) extends to any significant interference with a person's place of residence. See *Motswagae v Rustenburg Local Municipality* 2013 (2) SA 613 (CC). It also incorporates a situation where a person is refused access to his or her home after a period of absence. See *Zulu v eThekweni Municipality* 2014 (4) SA 590 (CC) para 25.
- [14] Section 26 (3) of the Constitution and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ('the PIE Act') apply to homeless shelters. See *Ark City of Refuge v Bailing* [2011] 2 All SA 195 (WCC) para 6 and *Dladla v City of Johannesburg* 2018 (2) SA 327 (CC).

- [15] The section is also given effect to in the PIE Act. The PIE Act requires that an order for eviction from a person's home may only be granted after consent to occupy the property has been withdrawn, or a right of occupation has been validly terminated, written and effective notice is given to the occupier of the proceedings for his or her eviction, and a court is satisfied that having reviewed all the relevant information, an eviction order would be just and equitable.
- [16] Further, it is trite that a party who is in peaceful and undisturbed possession of a thing may not be deprived of it without a court order, that party's consent, or a clear statutory right, which must itself be constitutional. A party deprived of possession of a thing without these requirements being met has been spoliated, and is entitled to the common law remedy of the *mandament van spolie*. The remedy is necessary to protect parties in possession of their property, to protect the rule of law, and to guard against self-help.
- [17] The mandament is a robust and summary remedy. It will be granted even where restoration of possession would, on its face, constitute an illegal act, or further the commission of a crime. In those events, the ordinary remedies for illegality must be pursued. They are not reasons to deny the despoiled person the benefit of the remedy. The *status quo ante* must be restored before all else.
- [18] A bare allegation by a party that another party has voluntarily vacated premises previously occupied by the latter is not adequate. Additionally, the party wishing to evict must show that the party that he wishes to evict intended

to leave permanently and to waive his rights under section 26 (3) of the Constitution and the *mandament van spolie*, to judicial control over his eviction.

- [19] Accordingly, in this case the onus was on the appellants to establish that the respondent expressly waived his aforementioned rights and his right to occupy his room at Ekuthuleni freely, voluntarily and in full knowledge of the legal consequences of doing so. Insofar as the requirement of express waiver is needed, see *Road Accident Fund v Mothupi* 2000 (4) SA 38 (SCA). Alternatively, the appellants ought to show this by proving that the respondent's conduct was inconsistent with the intention to continue occupation. See *Borslap v Spangenberg* 1974 (3) SA 695 (A).

Discussion

- [20] An appropriate and a direct manner of deciding this case is to determine what the common cause facts are. If a decision can be made by reference to those agreed facts only then no need exists to clutter and confound them with the disputed facts. That said, the parties agree that:

20.1 The respondent has been occupying the room at Ekuthuleni since May 2012;

20.2 On 18 June 2018, the respondent, Ms Nhlapo, Mbali and a security guard had a violent exchange that left the respondent burnt with boiling water poured over him by Mbali;

20.3 The respondent took a few of his belongings from his room;

20.4 He locked the room and took the one key with him and left the other key with a friend, because she was the only one he could trust with his room;

20.5 He left most of his possessions inside the room. (The appellants' counsel's submission to the contrary is not borne out by the record. The deponent to the appellant's answering affidavit, Mr Pienaar, in fact confirms the respondent's statement that the respondent's belongings were in the room. Elsewhere in their answering affidavit the appellants aver they do not know whether there was anything in the room. But this does not explain Mr Pienaar's version that he did not want to open the room with the master key because he did not want to be 'accused of the theft of the items therein'.);

20.6 For the three month period during which the respondent was absent allegedly recuperating in Kwa-Zulu Natal, the appellants did not open or otherwise interfere with his room or possessions;

20.7 Notwithstanding that the demand for rooms at Ekuthuleni was critical, the first appellant did not seek to use the respondent's room for any other purpose during his absence;

20.8 The respondent returned to Ekuthuleni on 25 September 2016, and he accessed and slept in his room;

20.9 He slept overnight, changed clothes the following day, went out for a short while and on his return was denied entry.

[21] The respondent averred that he left Ekuthuleni on 18 June to seek medical attention and to be cared for by relatives in Kwa-Zulu Natal and did not return until he had recovered from most of his injuries. He also averred that before he left he told Mr Ngobeni, the caretaker of the shelter of his intentions and that he would be returning to the shelter upon his recovery. He also stated that he had regularly updated Mr Ngobeni about his condition. The appellants aver that the respondent did not tell any of the appellants' employees, including Mr

Ngobeni, where he was going to or when he would be returning. But this does not detract from the fact that other facts are clearly consistent with the respondent's version that he intended to return to the facility. He retained what he considered to be the means to gain access to and control of the room.

[22] All of the common cause facts show, indisputably, not only that the respondent regarded the room as his home; that he did not waive or intend to waive his right to occupy the room, but, in fact, intended to return to it; that he indeed, returned to it and that, at the time his access to it was barred by the appellants, he was still in occupation of it. That the appellants never withdrew the first application of eviction until they brought, in substitution of that application, a counter- application to evict the respondent from the shelter, is a recognition by them of his occupation of the room.

[23] There can be no reasonable contestation that the appellants' conduct in denying the Respondent access to the room in those circumstances, without a court order, or his consent, was unlawful.

[24] An argument advanced by the appellants as justification for their conduct in denying the respondent access to Ekuthuleni on 26 September 2016, is that their conduct constituted some form of private defence. In the light of the undisputed facts, I am completely at loss how the appellants can seek to rely on such a defence, where no case had been made to sustain it. The requirements of a private defence are the following: (a) There must be an attack, which must have commenced or is imminent; (b) The attack must be on a legally protected interest, which could be life and limb or property; (c) The

attack must have been unlawful. (See Jonathan Burchell, *Principles of Criminal Law*, (5th Edition)).

- [25] The respondent accessed his room on 25 September 2016. There was no suggestion at all that the respondent threatened anyone, or that an attack from the respondent was imminent, or had commenced. In fact, there is no evidence that after the respondent left on 18 June 2018 he attacked, or threatened to attack anyone.
- [26] The court of first instance cannot be faulted for holding that ‘the allegation that the respondent had voluntarily vacated the shelter was “quite fanciful, palpably implausible and far-fetched”.’
- [27] I have deliberately avoided venturing into the discussion and analysis of the disputed facts, because it would have been completely gratuitous, given the very simple basis on which this matter was capable of being decided. In the premises, the eviction of the respondent was unlawful insofar as it contravenes the provisions of section 26(3) of the Constitution, the PIE Act and constituted an unlawful eviction.
- [28] The appellants’ counsel submitted that even if the court a quo may have been correct in finding that the respondent’s constitutional rights have been infringed, it was not appropriate to order his return to the shelter. This argument lacks merit. It was indeed appropriate in light of the court’s approach to the matter. Even though the court a quo elected to determine the matter on

the basis that the respondent's rights in section 26(3) of the Constitution had been infringed, it correctly considered the relief to be appropriate for the enforcement and protection of those provisions of the Constitution that had been breached. At the heart of this matter is the appellants' resort to self-help in evicting the respondent. It was thus appropriate to grant relief which, in effect, restores the status quo ante.

[29] In the result I propose the following order:

The appeal is dismissed with costs, including those consequent upon the employment of two counsel.



B A MASHILE
Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg

I agree and it is so ordered.


PP

P COPPIN
Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg



E J FRANCIS
Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg

APPEARANCES:

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