

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

CASE NO. 3393 and 3394/2014

In the matter between:

LADUMA VUTHELA

First Applicant

LUNGISWA NONTLAYIYA

Second Applicant

and

MHLONTLO LOCAL MUNICIPALITY

Respondent

JUDGMENT

Bloem J.

[1] On 25 November 2014, some 16 months ago, Mjali J issued a *rule nisi* as a matter of urgency calling on the respondent to show cause on 11 December 2014 why the following orders should not be made final:

- “3.1 That the respondent’s action of evicting applicants from their homes and demolishing the homes of their families without any authorization by the Court to do so, be and is hereby declared unlawful;
- 3.2 That the respondent be and is hereby interdicted and prohibited from proceeding with the demolishing and eviction of applicants from their homes at Chris Hani Township, Tsolo, which is within the respondent Municipality’s area of jurisdiction;
- 3.3 That in the event the respondent Municipality has demolished applicants’ homes unlawfully without any Court Order, be and is

hereby ordered and directed to re-construct applicants' homes so unlawfully demolished. To afford shelter to applicant's family."

- [2] The court also ordered that paragraphs 3.2 and 3.3 operate as interim relief or a *mandamus* until the finalisation of the application. The *rule nisi* has been extended from time to time.
- [3] The first applicant is an adult male while the second applicant is an adult female. Both of them reside at Chris Hani Township, Tsolo (the township). The respondent is the Mhlontlo Local Municipality. The township falls within the respondent's territorial area of jurisdiction.
- [4] Before I set out the material facts of this application, I deem it necessary to say something about the founding papers. On 25 November 2014 Mjali J was faced with two applications each with its own notice of motion and founding affidavits. The two notices of motion were, save for the applicants' names, word for word the same. Even the mistakes therein were the same. For instance, in paragraph 2 thereof condonation was sought for the respective applicant's "*non-compliance with the General amendment Act of 19...*"¹. Furthermore, as is apparent from paragraph 3.3 thereof there is a loose standing sentence wherein the word shelter is wrongly spelt as "*sheltr*". The affidavits in support of the relief sought are, save for the applicants' names and their personal particulars, exactly the same. I have no doubt that Mjali J realised that the senseless duplication would unnecessarily increase costs. The learned Judge then ordered that the applicants to apply for the consolidation of the two

¹ Instead of the General Law Amendment Act, 1955 (Act No. 62 of 1955).

applications. That was not done, although it must be said that only one answering affidavit and 1 replying affidavit were delivered. In view of the conclusion that I reach it is unnecessary to take this issue any further but to warn that it might be necessary in future to order practitioners, to whom litigants entrust the conduct and prosecution of their cases, to pay the costs which are incurred by the unnecessary duplication of notices and affidavits, a clear abuse of the process of this court.

- [5] The applicants have been residing in a township since 1993. As I understand it, when they launched the application their case was that the respondent was about to demolish the houses (shacks) in which they and their families live to build low cost houses (RDP houses) on the same land. They therefore sought an interdict to prevent the demolition of their houses. In the event of the houses having been demolished by the time they secured an order from this court, the applicants sought an order that the houses be rebuilt by the respondent. The applicants refused to leave the township because, so they alleged, the respondent had not provided them with alternative accommodation. The respondent's case is that it and the residents of the township, inclusive of the applicants, reached agreement to the effect that they would be temporarily relocated, their houses be demolished after relocation to enable the Eastern Cape Department of Human Settlements to build RDP houses for those residents. They alleged that, while the demolition was in progress, the applicants complained about the nature of the alternative accommodation provided by the respondent.

- [6] The undisputed facts are that the respondent's officials called a meeting scheduled for 5 November 2014 of all the residents of the township and other residents who had applied for RDP houses in the township. That meeting was adjourned until 6 November 2014 to enable residents to produce copies of their identity documents to the respondent.
- [7] The applicant's alleged that they were surprised when, during the meeting of 6 November 2014, it was demanded that they should vacate the township and demolish their houses before 21 November 2014, failing which the respondent would demolish their houses. The applicants furthermore alleged that during that meeting no mention was made by the respondent of the provision of alternative accommodation for the residents of the township. The applicants alleged that the respondent intended demolishing the houses from 24 November 2014, hence the urgent application on 25 November 2014.
- [8] The respondent's case is that in the meeting of 5 November 2014 the local councillor, Speaker and Mayor informed the residents that the aforesaid provincial department would build RDP houses at the township. Residents were requested to volunteer to move to alternative accommodation, to be provided by the respondent, while their houses would be demolished and RDP houses built. The residents, including the applicants, agreed. To prove the agreement the respondent attached a document to its answering affidavit. That document was signed on 7 November 2014 by the applicants and one of the respondent's officials. The heading thereof refers to an agreement to be removed from the

shacks where the low cost houses were to be built. In the body of that document the applicants agreed to be removed from the land where the low cost houses were to be build and to be accommodated at a place to be selected by the respondent while those houses would be built. According to the respondent the alternative accommodation consisted of the Tsolo Junction Multipurpose Hall, temporary tents to serve “*as bath places for both men and women, respectively,... 6 (six) mobile separate but similar sanitary establishments for use by men and women and ... provision for water to be transported on site in the mornings, midday and early evening*”. It was only after the applicants’ houses had been demolished that the applicants, for reasons unknown to the respondent, did not want to be bound by the terms of the agreement. In its answering affidavit the respondent tendered the above alternative accommodation. It also tendered to prioritise the accommodation of the applicants in the newly build low cost houses as soon as they had been constructed.

- [9] Ms Nyobole, counsel for the applicants, submitted that there was obviously a dispute of fact regarding the provision of alternative accommodation. She nevertheless submitted that the applicants are entitled to the relief sought on the papers, but applied in the alternative for the matter to be referred to oral evidence if the main argument failed.² Mr Hobbs, counsel for the respondent, submitted that the applicant has not made out a case for the relief sought and that the *rule nisi* should accordingly be discharged with costs.

² *Administrator Transvaal and Others v Theletsane and Others* 1991 (2) SA 192 (AD) at 200A-D.

[10] In their founding affidavits the applicant's create the impression of a heartless municipality which demolished their houses in which they reside with their families "*which consist of young adults, small children and old people and some few family members with disabilities*" without providing alternative accommodation. Not a single word was said by either applicant in his or her founding affidavit about the respondent providing alternative accommodation. To the contrary, in their founding affidavits they both alleged that the "*respondent's officials did not concern themselves about the place where we will stay if we vacate our homes and thereafter they are demolished*". It was only in their replying affidavit that the applicants acknowledged that they signed the above agreement on 7 November 2014. They then also acknowledged that the respondent provided the above tents but took the view that they "*could never have agreed to be 'lumped' into two tents, men in one tent and women in another tent*", that those tents do not qualify as alternative accommodation and that "*individual tents or well-built shacks should at least having been provided for each household*".

[11] I agree with Mr Hobbs that there might have been a *bona fide* dispute of fact about the provision and unsuitability of the alternative accommodation provided by the respondent had the applicants dealt with the provision of alternative accommodation in their founding affidavit. When they deposed to their founding affidavits they had knowledge that the respondent had provided tents. They could then have complained in their founding affidavits about the unsuitability of the alternative accommodation. They failed to do so. They complained about the

unsuitability of the alternative accommodation only in their replying affidavit. The respondent was obviously prejudiced because it could not respond to the allegations contained in the applicants' replying affidavit.

[12] As a general rule an applicant in motion proceedings must make out his case in his founding papers. He should disclose such facts as would, if true, justify the relief sought. At the same time he should sufficiently inform his opponent of the case that he is required to meet. An applicant would generally not be allowed to supplement his case by adducing supporting facts in his replying affidavit, especially when those facts should have been contained in his founding affidavit.³ In the present application the relief sought was premised in the founding affidavits on the allegations that the applicants were not given “*an eviction notice in terms of the PIE Act*”⁴ and that the respondent's officials did not provide alternative accommodation to the applicants. That was the case that the respondent was called upon to meet.

[13] The respondent met that case by relying on the above agreement which negates not only the need for a notice as contemplated in the PIA Act but also any unlawful conduct on the part of the respondent. Section 26 (3) of the Constitution provides that no one may be evicted from his or her home, or have his or her home demolished, without an order of court made after considering all relevant circumstances. Where, in a case such as the present, there is an agreement that the owner of the house will vacate it to enable the demolition thereof to facilitate the construction

³ *National Council of Societies for Prevention of Cruelty to Animals v Openshaw* 2008 (5) SA 339 (SCA) at 349A-C; *Minister of Safety and Security v Jongwa and Another* 2013 (3) SA 455 (ECG) at 462B-C.

⁴ Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 1998 (Act No. 90 of 1998).

of a better house for him or her, logic dictates that there is no need for a court order to sanction such eviction and demolition. The respondent furthermore met the applicants' case by showing that it provided alternative accommodation in the form described above. In reply the applicants acknowledged that such alternative accommodation was provided but claimed that it was insufficient. In my view the issues which were raised in the applicants' founding affidavits were resolved when the applicants acknowledged the agreement and that the respondent provided alternative accommodation to them and the residents of the township. The dispute of fact to which Ms Nyobole referred relates not to the provision of alternative accommodation but to the unsuitability thereof. That is not the real issue herein. Her submission that the matter should be referred to oral evidence can accordingly not be sustained.

[14] I am of the view that, had Mjali J known on 25 November 2014 that there was an agreement between the parties and that the respondent had provided alternative accommodation to the applicants, she would in all probability not have issued the *rule nisi*. In my view the *rule nisi* should not have been issued in the first place.

[15] In the result, it is ordered that the *rule nisi* be and is hereby discharged with costs.

For the applicants:	Adv EN Nyobole, instructed by Nkoli Madaza & Associates, Mthatha
For the respondent:	Adv JL Hobbs, instructed by Cingo Attorneys, Mthatha
Date of hearing:	31 March 2016
Date of delivery of the judgment:	12 April 2016