

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

Case No.: 707/2015
952/2015

In the matter between:

JOHANNES VAN HEERDEN
THE AFFECTED MEMBERS OF BOTSHABELO
H2 COMMUNITY

1st Applicant

2nd Applicant

and

MANGAUNG METROPOLITAN MUNICIPALITY
MAYOR OF THE MANGAUNG METROPOLITAN
MUNICIPALITY
MUNICIPAL MANAGER OF THE MANGAUNG
METROPOLITAN MUNICIPALITY
MS. PASCALINA THAKHELI

1st Respondent

2nd Respondent

3rd Respondent

4th Respondent

JUDGMENT BY: DAFFUE, J

HEARD ON: 16 APRIL 2015

DELIVERED ON: 5 JUNE 2015

I INTRODUCTION

[1] An individual, Mr Johannes van Heerden (“Van Heerden”) and certain affected members of the Botshabelo H2 Community on the one hand, and the Mangaung Metropolitan Municipality (“the municipality”) on the other, are at loggerheads. The alleged eviction of applicants and the applicants’ *“right to peaceful and*

undisturbed ownership and/or possession of their premises” are the central issues in this application in so far as the merits are concerned.

II THE PARTIES

[2] Van Heerden is cited as first applicant and people described by Van Heerden as members of the Botshabelo H2 Community are as a group cited as second applicant. An attorney, Mr M Khang of Mphafi Khang Inc is the applicant’s attorney and he also presented argument to me on behalf of applicants.

[3] The municipality is the first respondent and its mayor and municipal manager are cited as second and third respondents respectively. Ms Tascalina Thakheli, the municipality’s manager: Informal Settlements is cited as fourth respondent. Adv. J. Lubbe SC assisted by Adv. T. L. Manye appeared for respondents.

III THE RELIEF SOUGHT

[4] Two applications served before me for adjudication. In application 707/2015 applicants seek a permanent interdict in terms whereof respondents be interdicted from evicting them from their premises and demolishing their shacks and/or houses and they furthermore be ordered to restore the applicants to *“their peaceful and undisturbed ownership and/or possession of their premises”*. Similar relief is sought in application 952/2015, but in addition, applicants want the court to find respondents to be in contempt of the court orders issued under application 707/2015 and that 2nd to 4th respondents be

sentenced to 120 days' imprisonment, suspended for a year. The two applications were "*joint*" by the court earlier at the request of applicants. It would be more appropriate and correct to consolidate the applications in terms of rule 11, but everybody understood what was intended. A consolidation was required in the light of the similarity of the relief claimed and the applicable legal principles.

IV THE LITIGATION IN CHRONOLOGICAL ORDER: A HISTORICAL OVERVIEW

- [5] On 23 August 2012 Rampai J granted eviction orders in application 3354/2012, the parties being Mangaung Metropolitan Municipality as applicant and Thabo Kgoabane, the first respondent, any possible/potential occupiers unknown to applicant of the vacant land in K section, Botshabelo cited as second respondent and any potential occupiers unknown to applicant on erven 2997 and 2874 in H section Botshabelo, cited as third respondent.
- [6] On 16 February 2015 applicant launched the urgent application in application number 707/2015 referred to above. The notice of motion was delivered to one Nhlanhla at the 2nd respondent's office that day, but it is not certain at what time. Fact of the matter is that the application was set down for hearing at 16h20 that day, respondents did not oppose the application and the following order was granted in their absence by my brother, Lekale J, which I quote *verbatim*:

- “1. Dispensing with service on the respondents, alternatively, forms and service provided for in the rules of this Honourable Court, and disposing of this application on an urgent basis in accordance with the provisions of Rules 6(12) of this Honourable Court’s rules.
2. Condoning, to the extent to which it may necessary, the applicants failure to comply with the provisions of section 35 of the General Law Amendment Act of 1955;
3. A *rule nisi* is issued, returnable on **2nd April 2015**, calling on the respondent to show cause, if any, why:
 - 3.1 The respondents should not be interdicted from evicting the applicant and all the affected members of BOTSHABELO H2, Community Members from their premises and from demolition their shacks and/or house;
 - 3.2 The respondents should not be ordered to restore immediately the applicants peaceful and undisturbed ownership and/or possession of their premises on the ground stated in the Founding Papers;
 - 3.3 The sheriff of this Court should not be authorized and directed, in the event of the respondents failing to comply with the order issued in paragraph 3.1 and 3.2 above within one (1) hour or sixty minutes of the order to take all steps and generally do all that which it may deem necessary in order to effect the restoration of the applicants to the aforementioned premises or the *status quo ante*;
 - 3.4 The respondents should not be ordered to pay the costs of this application;
4. The order contained in paragraphs 3.1 to 3.3 hereof will operate, pending the final determination of this application, as an interim interdict with immediate effect.
5. Directing that this order must be served on the respondents or their Legal Representative by fax or in accordance with the directives of this Honourable Court.”

- [7] It is apparent from the aforesaid order that a rule *nisi* with return date 2 April 2015 was issued, but the interdicts were ordered to operate as *interim* interdicts pending final determination of the application.
- [8] On 20 February 2015 respondents caused a notice in terms of rule 6(12)(c) to be issued, seeking the following orders:
1. Reviewing the order granted *ex parte* on 16 December (*sic*) 2015;
 2. Rescinding the said order;
 3. Ordering the applicants to pay the costs on an attorney and own client scale.
- [9] On 20 February 2015 Moeng AJ postponed the application in terms of rule 6(12)(c) to 23 February 2015, suspended the application of the temporary interdict pending finalisation of that application and interdicted respondents not “to interfere with the proprietary rights of any person in lawful occupation of property on or before 16 February 2015”. The costs were reserved.
- [10] On 23 February 2015 the matter was again heard by Moeng AJ who postponed the application until 19 March 2015, reserving costs of the application. He granted orders pertaining to the filing of answering and replying affidavits and also made the following further orders which I quote *verbatim*:
- “2. The first respondent must return the property removed from the premises on Monday, 17 February 2015 to the rightful owners before close of business on 23 February 2015 failing which the Sheriff is

authorised to take all necessary steps to return the said property to the rightful owners.

...

5. Paragraphs 2 and 3 of the order granted on **23 February 2015** remain.”

What paragraph 5 of the order of 23 February 2015 means is unclear. The only order granted on 23 February 2015 is the one by Moeng AJ and he could surely not refer to his own order.

[11] On 27 February 2015 application 952/2015 was issued, again on an urgent basis, the idea being that the matter be heard at 10h30 that Friday morning. The notice of motion was delivered that same morning on respondent’s attorneys, but it is not clear at what time. The following order was issued by Moeng AJ which I quote *verbatim*:

- “1. The service on the respondents, alternatively, forms and service provided for in the rules of this Honourable Court, are dispensed with and this application are disposed on an urgent basis in accordance with the provisions of Rules 6(12) of this Honourable Court’s rules.
3. A *rule nisi* is issued, returnable on **19th March 2015**, calling on the respondent to show cause, if any, why:
 - 3.1 The respondents should not be interdicted from evicting the applicant and all the affected members of BOTSHABELO H2, Community Members from their premises and from demolition their shacks and/or house;
 - 3.2 The respondents should not be ordered to restore immediately the applicant’s peaceful and undisturbed ownership and/or

possession of their premises on the ground stated in the Founding Papers;

3.3 The first respondent must return the property removed from the premises on Friday 27th February 2015 as well as on Monday, 17 February 2015 to the rightful owners before 19h00 on 27 February 2015 failing which the Sheriff of this court is authorised and directed to take all necessary steps in order to effect the restoration of applicant's property to the aforementioned premises or the *status quo ante* in which event the respondents shall be liable for all costs incurred thereto.

4. The order contained in paragraphs 3.1 to 3.3 hereof will operate, pending the final determination of this application, as an interim interdict with immediate effect.
5. The application under case no. 707/2015 is joint with this application.
6. The applicants are given leave to supplement their papers, should a need arise.
7. The respondents are ordered to pay the costs of this application."

[12] Respondents filed their answering affidavit and annexures thereto on 9 March 2015. On 31 March 2015 Van Heerden filed a replying affidavit, again alleging that he deposed to the affidavit in his personal capacity and also on behalf of members of Botshabelo H2 Community, who have been affected by the conduct of the respondents, as duly authorised. Numerous confirmatory affidavits and other annexures were attached. The applications were argued before me on 16 April 2015 whereupon I reserved judgment.

V POINTS IN LIMINE

[13] Respondents rely on two points *in limine*. It is their case, in respect of the first point *in limine*, that Van Heerden purports to be duly authorised to represent the affected members of Botshabello H2 Community, but that he has failed, alternatively neglected to attach such authorisation. Therefore it is averred that Van Heerden does not have the necessary *locus standi* to represent the remaining applicants in the proceedings.

[14] The second point *in limine* relates to the court order granted by Rampai J on 23 August 2012. In terms of that order unknown occupiers on erven 2997 and 2874 H section Botshabelo were directed to vacate the two erven and to remove all their property, equipment, building material or structures therefrom. No rescission application has been lodged in respect of this order which is therefore still valid and remains in force relating to the eviction of occupiers from those erven.

[15] I shall deal with the points *in limine* and issues related thereto later herein.

VI THE MERITS RELATING TO CERTAIN FACTUAL ISSUES

[16] Both applications have been drafted in vague and general terms. No factual averments have been made to indicate whose shacks

and/or houses have been demolished and whose properties – and if so, the nature thereof - have been removed from the various premises. Five confirmatory affidavits of so-called affected members have been attached to Van Heerden's founding affidavit. They read exactly the same, save for the deponents' names and residential addresses. The deponents confirm firstly that they entered into "purchase agreements" with the municipality entitling them to ownership or possession of the respective premises for which documentation were attached as well. Secondly, that Van Heerden *"has been authorised by all the affected members to approach Court on behalf of all of the members for the necessary relief"*. Van Heerden went further in deposing to his replying affidavit by attaching forty two further confirmatory affidavits by other so-called affected members with their supporting documents, confirming his version and reading identical to the affidavits attached to his founding affidavit. Van Heerden and the people he purports to represent clearly had in mind to prove that they were owners or at least lawful occupiers of the respective premises in section H2, Botshabelo.

[17] Van Heerden mentions the following in the founding affidavit in application 707/2015:

"5.8 Pursuant to the aforementioned purchases, we did not only take peaceful and undisturbed occupation of the premises but also erected shacks and built houses on the said premises.

...

5.10 Subsequent thereto we enjoyed and have been enjoying our ownership over the premises and our peaceful and undisturbed

possession and control in respect of the said premises until we were unceremoniously and unlawfully despoiled by the Respondents this morning, the 16th February 2015 at about 05h00.”

[18] In paragraph 7.2 of the same affidavit the allegation is made that “... we erected shacks and built brick houses on the premises” whilst in paragraph 7.10 it is again stated that “... the Respondent arrived with the Police contingent and started to demolish our shacks and houses without any word and/or explanation...”. In paragraph 7.14 it is stated that “... the eviction and demolition of our shacks and houses continued and it was still continuing when we left Botshabelo for our attorney’s office in Bloemfontein”. The general drift of the founding affidavit is also reflected in paragraph 8 where the deponent deals with urgency and in paragraph 9 where the requirements for interdictory relief are dealt with.

[19] Van Heerden counts him in with the group of people whose rights have allegedly been interfered with and he also refers to himself as one of the community members of Botshabelo H2 section. He resides at 2279, H2, Botshabelo, but does not reside in the area demarcated in yellow on the map, annexure “C”. Respondents allege that Van Heerden has not been affected by any of their actions as he is resident in an area sold by the municipality to a private developer in August 2009 and transferred in the name of the developer on 20 June 2013. The area in yellow on the map is the municipality’s property, demarcated and zoned as residential area, but still to be serviced with the necessary infrastructure suitable for human settlement. Respondents have targeted this

area to be cleaned up. Van Heerden does not categorically state that his house/shack has been demolished and that his property has been removed from erf 2279, H2, Botshabelo. If that was indeed the case, I would have expected him to make that clear.

- [20] Not one of the people that deposed to affidavits, either attached to the founding, or replying affidavit confirms under oath that his/her house/shack has been demolished or was in the process of being demolished when the first order was granted and/or that his/her property has been removed from the site occupied by him/her. This must be seen in light of the version put before court by the respondents and bearing in mind the legal principles applicable to the adjudication of factual disputes in applications with which I shall deal hereunder. Respondents admit that they started removing shacks and fences from approximately fourteen properties at the time when applicants took action. Only two half-built shacks were removed. It is denied that any person was removed from any of the premises or that premises were occupied.

VII LEGAL PRINCIPLES

- [21] In motion proceedings the affidavits constitute both the pleadings and the evidence and the issues and averments in support of the parties' cases should appear clearly therefrom. See **Minister of Land Affairs and Agriculture v D & F Wevell Trust** 2008 (2) SA 184 (SCA) at 200D. It is trite that the applicant in application proceedings must make out his/her case in the founding affidavit. A litigant should not be allowed to try and make out

a case in the replying affidavit. The founding affidavit must contain sufficient facts in itself upon which a court may find in the applicant's favour. An applicant must stand or fall by his/her founding affidavit. See **Director of Hospital Services v Mistry** 1979 (1) SA 626 (AD) at 635H – 636D.

- [22] A court should adjudicate factual disputes in application procedure having regard to the well-known **Plascon-Evans Paints dicta** recently approved and considered in more depth in **Wightman t/a JW Construction v Headfour (Pty) Ltd and Another** 2008 (3) SA 371 (SCA). I quote from paras [12] and [13]:

“[12] Recognising that the truth almost always lies beyond mere linguistic determination the courts have said that an applicant who seeks final relief on motion, must in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers: *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C. See also the analysis by Davis J in *Ripoll-Dausa v Middleton NO* 2005 (3) SA 141 (C) at 151A-153C with which I respectfully agree. (I do not overlook that a reference to evidence in circumstances discussed in the authorities may be appropriate.)

[13] A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be

disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter."

- [23] The common law rule is that an association of natural persons which has not its own legal personality cannot, as a general rule, sue or be sued in its own name, either directly or indirectly through the members of the executive in their representative capacity. See Erasmus, **Superior Court Practice**, B1-126II and **Ex-Trtc United Workers Front v Premier, Eastern Cape Province** 2010 (2) SA 114 (ECB) at 124E – 125B. Exceptions to the normal common law rule exist, e. g. an association may sue or be sued in its own name

if its constitution, regulations or by-laws provide that actions may be brought in the name of the association as such.

[24] Someone cannot institute action or defend action as agent on behalf of his/her principal. In the case of the conclusion of a contract, for an example, it is only the principal that requires rights or incurs obligations under the contract and the agent does not become either entitled, or obliged and cannot personally sue or be sued under the contract. See **S.W.A. Amalgameerde Afslaers Bpk v Louw** 1956 (1) SA 346 (AD) at 355C. Again, there are a few exceptions to the general rule and I refer to Erasmus *loc cit* at B1 – 126B.

[25] In so far as applicants rely on the mandament van spolie, the purpose and principles of spoliation was recently confirmed and summarised by the Constitutional Court in **Nggukumba v Minister of Safety and Security** 2014 (5) SA 112 (CC) at paras [10] – [13] and I refer to the following extracts:

*“[10] The essence of the mandament van spolie is the restoration before all else of unlawfully deprived possession to the possessor. It finds expression in the maxim *spoliatus ante omnia restituendus est* (the despoiled person must be restored to possession before all else).*

...

The main purpose of the mandament van spolie is to preserve public order by restraining persons from taking the law into their own hands and by inducing them to follow due process.

...

[12] A spoliation order is available even against government entities for the simple reason that unfortunately excesses by those entities do occur. Those excesses, like acts of self-help by individuals, may lead to breaches of the peace: that is what the spoliation order, which is deeply rooted in the rule of law, seeks to avert. The likely consequences aside, the rule of law must be vindicated. ...

[13] ... All that the despoiled person need prove is that—

(a) she was in possession of the object; and

(b) she was deprived of possession unlawfully.”

VIII EVALUATION OF THE FACTS AND LEGAL SUBMISSIONS

[26] The first point *in limine* has not been pleaded properly. It is apparent, if cognisance is taken of the annexures to the founding affidavit, that at least five people authorised Van Heerden to launch the application on their behalf. Several more authorisations were filed with the replying affidavit. However, Van Heerden cannot litigate as agent for and on behalf of his principals, the individuals who apparently authorised him, and he cannot represent an entity which does not have the capacity to sue or be sued. In either case, he does not have *locus standi* to represent either the individuals, or the group of affected people. The group of people identified as the affected members of the Botshabelo H2 Community does not have a constitution and/or is not regulated by any regulation or by-law and therefore does not have any capacity to sue or be sued, either in its own name or through office bearers which have not been identified in any event. In the absence of a

constitution the group cannot be regarded as a voluntary association with the necessary *locus standi* to launch these proceedings. In my view the *locus standi* hurdle is insurmountable and the applications should be dismissed on this basis without having to consider the merits.

- [27] A logical and necessary consequence of the above conclusion is that all persons whose rights have been prejudicially affected had to become parties to the litigation and cited in their individual names as applicants. Van Heerden is non-cited for another reason in so far as he does not have *locus standi* in the application as his premises fall outside the so-called affected area. He has not shown conclusively that his rights had been affected at all and therefore is not entitled to any relief.
- [28] Mr Khang argued that it is common cause that people are referred to as a group of occupiers, especially in eviction applications. This is indeed correct and a suitable example is application 3354/2012, the order issued by Rampai J on 23 August 2012. The case law has however developed clearly in this regard as it is not required of an applicant in such instances to try and identify people illegally occupying his/her property. It is well-known that such occupiers would not co-operate and provide their names and further details freely and voluntarily and will in fact make it as difficult as possible to be identified.
- [29] In *casu*, unlike as Mr Khang submitted, the matter is totally different. Those that have been prejudiced must come forward

and give instructions to their attorney to act on their behalf. If they succeed, so be it, but if they are unsuccessful and costs orders have to be made, the court must know against whom those orders are to be made and the successful party is entitled to know against whom to execute.

[30] I do not accept that the second point *in limine* is good on the facts of this case and Mr Lubbe has readily conceded this during argument. Nothing further has to be said about this.

[31] As mentioned, Van Heerden in his personal capacity has no case whatsoever. On the version of respondents which I have to accept for purposes of adjudication of this application, it being not far-fetched, untenable or so improbable that it should be rejected, Van Heerden's property has not been affected at all.

[32] On the basis that I am wrong in finding that the applications should be dismissed based on lack of *locus standi*, I am satisfied that neither Van Heerden, nor the so-called affected members of the H2 Community, Botshabelo have made out a proper case for relief. The founding and replying affidavits are vague in the extreme and the confirmatory affidavits do not go any further. Not one single person has deposed to an affidavit stating that his/her house or shack has been demolished or that his/her property has been removed from his/her site. I am not prepared to accept that all those deponents who deposed to affidavits attached to either the founding or the replying affidavit have suffered as a result of any action by the respondents. The photographs attached to the

replying affidavit do not constitute sufficient proof to support the applicants' version. Not a single piece of furniture or any other household item can be seen on the scene depicted by the photographs. This is a clear indication that nobody occupied any of the half-built shacks that had been demolished. I would have expected furniture such as beds, tables, stoves, TV's etc. to be depicted on photographs if that was really the applicants' case that they have been evicted from their premises, i.e. either shacks or houses. In so far as it might be suggested that brick houses were demolished, there is obviously no evidence whatsoever thereof. As mentioned I accept respondents' version in respect of factual disputes such as the above based on the criteria set out in **Plascon-Evans**.

- [33] Applicants cannot succeed with the mandament van spolie as they did not prove either of the requirements for spoliation. They haven't proven that they were in possession – let alone peaceful and undisturbed possession - of the relevant properties and secondly, that they were deprived of their possession unlawfully. I refer also to various meetings held with the community as stated on behalf of respondents, but find it unnecessary to deal with these in any detail, save to mention that two officials of the municipality, without being authorised thereto, purported to sell premises and/or issued so-called "Permission to Occupy" (PTO) certificates to the community. Disciplinary action has been taken against the offenders. Applicants failed to mention these meetings in the founding affidavits, for which minutes were attached to the answering affidavits. They also failed to prove the requirements

for permanent mandatory or prohibitory interdicts. Applicants relied on respondents' breach of their own policy, i.e. the by-laws relating to informal settlements and Mr Khang argued this issue with conviction. However, the factual foundation did not support his arguments as applicants did not prove their occupation, either legally, or illegally of the particular premises. Nothing more has to be said in this regard. Consequently the rules *nisi* issued in both applications should be discharged and both applications should be dismissed with costs.

[34] Respondents requested costs on an attorney and own client's scale when they brought the application in terms of rule 6(12)(c) and the costs stood over as indicated above. However I am not prepared to grant punitive costs orders and the usual costs orders shall be granted. There is clearly dissatisfaction amongst community members who might have been defrauded by municipal employees. The various official documentation placed before me tend to suggest that corrupt activities occurred and that the community was misled. There is also no reason to make provision for the costs of two counsel.

IX ORDER

[35] The rules *nisi* in applications 707/2015 and 952/2015 are discharged and applications 707/2015 and 952/2015 are dismissed with costs, such costs to include all costs previously reserved.

J. P. DAFFUE, J

On behalf of the applicants: Mnr. M. Khang
Instructed by:
Mphafi Khang Inc.
BLOEMFONTEIN

On behalf of the respondents: Adv. J. Lubbe SC
Assisted by: Adv. T. L. Manye
Instructed by:
Moroka Attorneys
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