



IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)

Case No: 442/15

Heard on: 04/09/2015

Delivered on: 23/10/2015

In the matter between

EMTHANJENI LOCAL MUNICIPALITY

Applicant

And

SOUTH AFRICAN NATIONAL CIVIC

First Respondent

ORGANISATION (SANCO)

BABALWA MADYO

Second Respondent

ALL PERSONS INTENDING OCCUPYING

Third Respondent

ERF 124, NONZWAKAZI TOWNSHIP

JUDGMENT

PAKATI J

- [1] The applicant, Emthanjeni Municipality, seeks confirmation of a *Rule Nisi* granted by Lacock J on 06 March 2015 on urgent basis against the respondents, the South African National Civic Organisation, Ms Babalwa Madyo, the secretary of the first respondent, and all persons occupying or intending to occupy Erf 124 of Nonzwakazi

Township (“the property”), the first to third respondents respectively. On 27 March 2015 further interim relief was included in the order of 06 March 2015 against first and second respondents. Emthanjeni Municipality also seeks confirmation of this order. The order of 06 March 2015 reads:

“1. A rule nisi is granted on the following terms:

*1.1 That the Third and other unknown Respondents are interdicted and prohibited from invading and/or trespassing and/or erecting any homes and/or abodes and/or dwellings or other structures on Erf 124, **NONZWAKAZI TOWNSHIP** in the district of De Aar.*

*1.2 That the Third and other Respondents are interdicted and prohibited from taking occupation of and/or occupying or inhabiting any home and/or dwelling and/or abode and/or other structure which was erected or might be erected on Erf 124, **NONZWAKAZI TOWNSHIP** in the district of De Aar.*

*1.3 That the Third and other unknown Respondents are interdicted and prohibited from conducting any activity whatsoever on Erf 124, **NONZWAKAZI TOWNSHIP** in the district of De Aar, which is aimed either directly or indirectly at establishing a home and/or dwelling and/or abode and/or other structure on the said Erf 124, **NONZWAKAZI TOWNSHIP** in the district of De Aar.*

1.4 That the First and/or other Respondents jointly and severally, are ordered to pay the costs of the application, the one paying the other to be absolved, only if the application is opposed by any of the respondents.

*2. The Respondents are called upon to show cause, if any, on Friday, **27 MARCH 2015** at 09h30 or so soon thereafter as the matter may be heard, why the prayers 1.1 to 1.4 above should not be made a final order of Court.*

3. That prayers 1.1 to 1.3 above shall operate as an interim interdict with immediate effect.

4. That the Sheriff of the district of De Aar, effect service of the court papers by

*4.1 serving a copy of the notice of motion, together with the Founding Affidavit and Annexures thereto on each person found to be on **ERF 124, NONZWAKAZI TOWNSHIP** in the district of De Aar, and/or busy with erecting of any home, dwelling, abode and/or other structure;*

4.2 by announcing the terms of the order granted by way of loud hailer on, at and near Erf 124, **NONZWAKAZI TOWNSHIP** in the district of De Aar; and

4.3 by affixing a copy of this notice of motion together with the Founding Affidavit and Annexures thereto and order on temporary notice boards at prominent places on Erf 124, **NONZWAKAZI TOWNSHIP** in the district of De Aar.

5. That the relief against the first and second respondents is postponed until the return day being 27 March 2015 at 09h30 and that service on the first and second respondents be effected in accordance with the Court Rules.”

[2] The order granted on 27 March 2015 states:

“IT IS ORDERED THAT:

1. The matter is postponed and the rule nisi [granted] on 06 March 2015 is extended to 08 May 2015;
2. The following order be included in the existing interim order as paragraph 1.3 A
 “That the First Respondent, through any of its members and the Second respondent, are interdicted and prohibited from conducting any activity whatsoever, which is aimed either directly or indirectly at establishing, enticing and/or instructing and/or enabling any person to erect and/or establish a home and/or dwelling and/or abode and/or other structure on Erf 124, **NONZWAKAZI TOWNSHIP**, in the district of De Aar.”

[3] The respondents opposed the application. They were unrepresented but Mr Sicelo Williams, the Deputy Provincial Secretary of the South African National Civic Organisation and the deponent to the opposing affidavit, sought to argue the matter on their behalf, which is impermissible. However, to avoid duplication and in the interests of saving time, they merely confirmed his submissions. The respondents argued that they were unaware that the property belonged to Emthanjeni Municipality until 10 March 2015 and that there were no boards identifying the property as belonging to Emthanjeni Municipality and warning that trespassers would be prosecuted.

[4] The following facts are undisputed:

- (a) That Emthanjeni Municipality is the registered owner of the property;
- (b) That on 10 February 2015 approximately 15 sections of the land on the property were cleared and pegged out but no structures were erected at that stage;
- (c) That the community informed Ms Nozibonelo Sanna Qondani, the Speaker and the law enforcement officer employed by Emthanjeni Municipality, that they intended to erect corrugated iron structures with the intention of occupying them permanently;
- (d) That they refused to vacate the property when instructed to;
- (e) That on 12 February 2015 Ms Qondani informed the respondents *via* a loud hailer that they had no right to occupy the property;
- (f) That on 28 February 2015 the threatened structures were built on the property; and
- (g) That the respondents had no permission to build structures on the property.

- [5] On 03 February 2015 Emthanjeni Municipality ostensibly responded to a letter (which does not form part of the papers) addressed to it by the South African National Civic Organisation on 29 January 2015 as follows:

“REQUEST FOR MEETING

Your letter dated 29 January 2015 bears reference.

The matter has been referred to the Mayor’s Office and you will be informed of the outcome of your request by the Manager of the Mayor’s Office which will be dealing with this matter. A date for the requested meeting will be communicated to you by the Mayor’s Office.”

- [6] The South African National Civic Organisation forwarded another letter to Emthanjeni Municipality on 12 February 2015 with the following recording:

“RE: Letter of Request

I am instructed by the abovementioned organisation to request a meeting with you and the council on 16/02/2015 at 10h00 at your offices.

1. *Sites to build houses for Nonzwakazi community.*
2. *Building of Shacks in Nonzwakazi Ward 3 as our houses are too small for the people who are staying in them as our one rooms are having more than 8 people staying in them and four rooms more than 12 people staying in them as that is very unhealthy and we request this due to the promises made to us by the council*

during 2014 election campaign and the council meets the people meetings of 2014.

3. *Renovating of Street 8 one-roomed houses as also promised in a council meets the people meeting of 2012.*

I close here with hope that our request will reach your favourable consideration.”

It should be noted that this letter was sent to Emthanjeni Municipality two days after the community had pegged out the said approximately 15 sections of the land.

- [7] On 19 February 2015 Ms Madyo (the second respondent) together with 100 to 200 community members (the third and further respondents) handed a petition (Annexure “V1”) to Ms Qondani on behalf of the third and further respondents. Emthanjeni Municipality contends that first and second respondents promote the actions of the third and further respondents. The petition reads:

“We, the community of Nonzwakazi (Ward 3) under the leadership of SANCO [the South African National Civic Organisation] hereby request you as Emthanjeni Municipality to respond and agree on the following matters as soon as possible:

1. *We request the building of 800 houses in Nonzwakazi (Ward 3) from the 2 500 houses allocated for De Aar.*
2. *We request you to renovate [extend is what is meant] the [one-roomed] houses in Street 8 at Nonzwakazi (Ward 3) as soon as possible starting from 1st April 2015.*
3. *We request you to stop charging our indigent people R10-00 for them to get their free electricity.*
4. *We request you to please stop cutting our electricity as we don’t owe the electricity, please deal with what we owe you, not what we don’t owe.*
5. *We also request you to avail sites for people or community members to build for themselves houses in Nonzwakazi (Ward 3).*
6. *We also want to bring [to your attention] that when both parties sign this petition, we legally agree that you as Emthanjeni Municipality will not destroy our shacks or remove them or us on the sites we are going to build them. We are going to build the shacks on the 28th February 2015 and that you are not going to stop us the community to build them or use your Law Enforcement, SAPS or Courts to stop us in building these shacks till you build houses for us as we don’t have houses.*
7. *We request you to renovate the falling houses and toilets of Streets 1, 2, 4, 5, 6, and 7 in Nonzwakazi (Ward 3).*
8. *We request you to renovate the tennis court and the Nonzwakazi Stadium.*

9. *We request you to rent out the old Nonzwakazi Beer Hall as it is used to commit crime, if not please get rid of it before people are killed or women are raped inside it.*
10. *We also request you to avail sites in Nonzwakazi (Ward 3) to build churches.*
11. *We are giving you seven days to respond on points 1, 2, 3, 4, 5, 7, 8, 9 of our petition failing to do so then we will take further action against your Municipality.”*

[8] On 24 February 2015 Emthanjeni Municipality responded as follows:

“We received your petition and would like to respond as follows:

1. *The Municipality is currently in the planning phase of the 4114 housing project. Construction of the top structures will be done over a few MTEF periods depending on allocations received from the National Department of Human Settlements. And people of Emthanjeni will have to stay where housing construction or development takes place in terms of the Breaking New Grounds principles. This is as government strive to integrate the various communities;*
2. *The Municipality will attend to this process;*
3. *We are not aware of this, but the matter will be investigated and dealt with accordingly;*
4. *The Municipality is rendering a basket of services, including electricity. Emthanjeni Municipality adopted a Credit Control Policy years ago and collection of outstanding revenue will be dealt with in terms of this policy;*
5. *There are currently no available serviced sites in De Aar. However, an individual who wants to build a house should feel free to enquire at the municipality;*
6. *The purpose of signing the petition was to **acknowledge receipt**. In the event of illegal occupation of municipal land, the necessary processes will be followed to correct the situation;*
7. *Revitalization of houses in all 7 Wards is an [on-going] process;*
8. *We can report that the tennis court [and] the stadium was renovated during the past five years. Maintenance of municipal assets is done in accordance with an approved budget;*
9. *The Municipality is looking at ways of managing this particular asset;*
10. *Please see my response in 5 above; [and]*
11. *Noted, but you are also referred to my response in 6 above.”*

[9] On 28 February 2015 the third and further respondents erected their shacks on the property. The same day Mr Faried Manuel, an employee of Emthanjeni Municipality, reported the matter to the police and a criminal case was opened at De Aar Police Station under Cas Number 227/02/2015.

[10] On 05 March 2015 Mr Allen Nicolas Boucher, an employee of Emthanjeni Municipality, inspected the property and compiled a report which showed that four

shacks were thereon, three incomplete and one complete but unoccupied. Furniture and clothing were on site. On 06 March 2015 the completed shack was occupied. The community members who were erecting shacks expressed their intention to occupy same permanently. Emthanjeni Municipality does not, at this stage, seek the eviction of the occupier of the completed shack.

- [11] The respondents alleged that Emthanjeni Municipality promised them adequate housing. One thousand houses were supposed to have been built for Ward 3 in 2014 already. In September 2014 the respondents learned that 300 houses had been approved for Ward 3. They contended that Ward 1, 2, 4, and 5 were promised 3 100 houses which never materialised. The respondents contended further that their houses are too small, dilapidated and overcrowded. They alleged that the signature on the petition by the Speaker on behalf of Emthanjeni Municipality was tantamount to acceptance of Clause 6 of the petition and therefore binding on the municipality. That was the reason why they did not lodge an application on or before 28 February 2015 when they built zinc structures.
- [12] It is important to note that the opposing affidavit did not deal with the allegations as contained in the Founding Affidavit. If the respondents' Answering Affidavit fail to admit or deny, or confess and avoid, allegations in the applicant's affidavit, the court will, for the purposes of the application, accept the applicant's allegations as correct.¹ Where in motion proceedings disputes of fact have arisen on affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if facts averred in the applicant's affidavit, which have been admitted by the respondent, together with facts alleged by the respondent, justify such an order.² There may be exceptions to this rule, as, for example, where the respondent's allegations or denials are so implausible or clearly untenable that the Court is justified in rejecting them merely on papers.³
- [13] The issue that falls for determination is whether the respondents should be allowed to occupy the applicant's property and/or erect zinc structures without Emthanjeni

¹ Rule 6 of the Uniform Rules of Court p B1- 43 to B1 – 44;

² Plascon-Evans Paints v Van Riebeeck Paints 1984 (3) SA 623 AD at 634H-I.

³ Plascon-Evans supra at 635.

Municipality's permission or whether proper procedures in relation to acquiring land should have been followed.

- [14] The requisites for the right to claim an interdict are a clear right, an injury actually committed or reasonably apprehended and the absence of similar protection.⁴ The courts should consider the circumstances under which the land has been occupied and whether it would be in the public interest to grant an eviction order.⁵

- [15] The Constitution guarantees that everyone has a right to have access to adequate housing and that the State must take reasonable legislative and other measures within its available resources to achieve the progressive realisation of this right.⁶

- [16] It is a well-known fact that the poor, constituting the majority of our people, live under intolerable conditions and therefore housing is still a huge problem for them. This has resulted in the communities helping themselves by unlawfully occupying or invading vacant land. Unless the plight of these communities is alleviated, they may be tempted to take the law into their own hands in order to escape their circumstances. This case brings home the harsh reality that the Constitution's promise of dignity and equality for all remains a distant dream for many. People should not be impelled by intolerable living conditions to resort to land invasions. Self-help of this kind cannot be tolerated, for the unavailability of land suitable for housing development is a key factor in the fight against the country's housing shortage.⁷ The respondents conceded that they did not follow the correct procedures to occupy the property.

- [17] In the instant case only a small number of people have infringed Emthanjeni Municipality's property or ownership rights. Importantly, this problem should be nipped in the bud before it spreads to larger communities. Regarding the fundamental constitutional value of human dignity Emthanjeni Municipality appreciates that it is its primary obligation to provide access to adequate housing. However, it has set programmes and procedures that have to be followed by those in need of housing who are indigent, subject to the municipality's budgetary constraints. No building plans

⁴Setlogelo v Setlogelo 1914 AD 221 at 227.

⁵ Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and Another [2001] 1 All SA 381 (E) at 390.

⁶ S 26 of the Constitution of the Republic of South Africa Act, 108 of 1996.

⁷ The Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC) at para 2.

were submitted to it for approval and there is no infrastructure on the property; not to regulate settlement would be to invite health risk and anarchy.

- [18] The respondents' argument that they did not know who the property belonged to until 10 March 2015 cannot hold water taking into account the petition served on Emthanjeni Municipality on 19 February 2015 and its response dated 24 February 2015. I restate para 6 of the petition which states:

"We are going to build the shacks on the 28th February 2015 and that you are not going to stop us the community to build them or use your Law Enforcement , SAPS or Courts to stop us in building these shacks till you build houses for us as we don't have houses."

This shows their determination to incite chaos. It also cannot be correct that when the Speaker signed for the petition she was accepting Clause 6 of the petition as an agreement between the respondents and Emthanjeni Municipality. The respondents referred to Annexure "V7 (A)", a document they identified as the permit that allowed them permission to build shacks on Erf 124 Nonzwakazi Township. However, this document does not refer to the said Erf.

- [19] In my view, Emthanjeni Municipality has made out a case for the relief sought. The respondents have indeed infringed its rights by their unlawful invasion and building of structures on the property. Programmes and procedures have to be followed in order to provide adequate housing to the needy as enshrined in the Constitution, but this must be done in an orderly manner. The two *rules nisi* orders stand to be confirmed.

COSTS

- [20] It was undisputed that the respondents entered the applicant's property without permission and built shacks for purposes of occupying them permanently as alluded to earlier. They refused to vacate the property when requested. The application was lodged on 06 March 2015 when the interim order was granted. A further order was granted on 27 March 2015. The respondents opposed the application on 22 April 2015 and the matter was postponed to the opposed roll. On 08 May 2015 it was postponed to 04 September 2015 when it was argued and the *rule nisi* was extended. The respondents insisted on conducting their own case when the matter was argued. They still refused to vacate the property. Their insistence to be on the property and yet

acknowledging their unlawful conduct renders them liable for the costs of this application.

ORDER

1. The *Rule Nisi* granted on 06 March 2015 is hereby confirmed.
2. The *Rule Nisi* granted on 27 March is hereby confirmed.
3. The respondents, the South African National Civic Organisation, Babalwa Madyo and All persons occupying or intending to occupy Erf 124 of the Nonzwakazi Township are ordered to pay the costs of this application, the one paying the other to be absolved.

BM PAKATI
JUDGE
NORTHERN CAPE DIVISION-KIMBERLEY

On behalf of the Applicant: **ADV D OLIVIER**
Instructed by: **DU TOIT & DE BEER ATTORNEYS**

On behalf of the 1st Respondent: **MR M WILLIAMS-IN PERSON**