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**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.



SIGNATURE

DATE: 5 August 2024

Case No. 2023-128720

In the matter between:

CALVIN BANTHAM

First Applicant

THE FURTHER UNLAWFUL OCCUPIERS OF ERF 1[...] RABIE RIDGE EXTENSION 1 LISTED IN ANNEXURE "X"

Second Applicants

and

CITY OF JOHANNESBURG

First Respondent

VIPER SECURITY SOLUTIONS

Second Respondent

G3 INVESTIGATIONS AND SECURITY SERVICES (PTY) LTD

Third Respondent

JOHANNESBURG METROPOLITAN POLICE DEPARTMENT

Fourth Respondent

BHEKANI ABANTU SECURITY AND MAINTENANCE CC

Fifth Respondent

JUDGMENT

WILSON J:

- 1 On 2 August 2024, I ordered the first respondent, the City, to restore the applicants to peaceful and undisturbed possession of the land at Erf 1[...] Rabie Ridge Extension 1 ("the property"). I interdicted and restrained the City from evicting the applicants again without a court order. I directed the City to pay the applicants' costs. I said that I would give my reasons in due course. These are my reasons.

The applicants and the property

- 2 The property is a plot of open land adjacent to an informal settlement and to the Rabie Ridge township. The City owns the property. In early 2020, the City earmarked the property for the development of 1200 temporary accommodation units to assist those living in overcrowded and unhealthy conditions in the informal settlement and in other informal settlements nearby. The project was said to be an urgent response to the Covid-19 outbreak, necessary to allow people living in informal settlements in the Rabie Ridge area to move to accommodation spacious enough to allow effective social distancing. In this way, the City sought to enable Rabie Ridge informal settlers to take steps to avoid the transmission of the Covid-19 virus.
- 3 The temporary housing project ultimately came to naught. Concrete slab foundations for at least some of the units were laid, but no further steps have been taken to develop the property since the temporary shelter project was announced. In its papers before me, the City accepts that the project was a failure, and that it now intends to put the land to some other housing-related use. The papers provide no further specificity than that.

- 4 The acute phase of the Covid-19 outbreak has of course now ended, but the applicants say that the overcrowded and unsanitary conditions the City identified in the area have been allowed to fester. Apparently frustrated by the City's failure, over a number of years, to make good on its promises to alleviate those conditions, the applicants took matters into their own hands. On 18 September 2023, they took occupation of the property, and constructed shacks on it. On 25 September 2023, the City, acting through its Metropolitan Police Department, and with the assistance of private security contractors, removed the applicants from the land and demolished their shacks.
- 5 Undeterred, the applicants moved back on to the property and reconstructed their shacks, more or less as soon as the City's employees left the area. This incited a further demolition operation, again at the behest of the City, acting through its Police Department and its security contractors. Once the dust settled on that operation, the applicants re-occupied the property, only for the City to remove them once again.
- 6 And so it went on. Between 25 September and 30 November 2023, the applicants say that no fewer than seven demolition operations were carried out at the property. The applicants say that these demolitions took place on 25 September, 9 October, 12 October, 26 October, 9 November, 16 November and 30 November 2023. Annexed to the City's answering papers are reports from various of the City's contractors which state that no less than 14 demolition operations were carried out in the Rabie Ridge area on City's behalf between 4 September and 9 November 2023. The most extensive of these

appears to have been carried out by the third respondent, G3, on 9 November 2023, in which G3 reports that it demolished 398 structures.

- 7 The reports on which the City relies do not specifically refer to the demolition of the applicants' shacks. They appear to refer to a broader set of demolitions carried out on the City's behalf on several properties in the Rabie Ridge area, which include but are not limited to the property concerned in this application. In addition, the reports the City tenders do not deal with the demolition operation the applicants say was carried out by the fifth respondent, Bhekani, on or about 30 November 2023. Nonetheless, there is no serious dispute that the seven demolition operations the applicants identify were in fact carried out on the property on the City's instructions on the dates that the applicants allege.

The spoliation application

- 8 The applicants claim that these demolition operations were unlawful acts of spoliation. They placed an application for an order restoring them to the property, and interdicting the City from carrying out further demolitions at the property, on this court's urgent roll for the week of 12 December 2023. The applicants sought relief against the City, G3 and Bhekani. They also mis-joined the City's Metropolitan Police Department, which has no legal personality of its own, and the second respondent, Viper Security Solutions, which the applicants now accept played no role in the demolition operations of which they complain.
- 9 On 14 December 2023, Senyatsi J struck the application from the roll for want of urgency.

- 10 In the meantime, however, at least some of the applicants had apparently re-occupied the property. We know this because, on 8 April 2024, Mr. Bantham filed a supplementary affidavit detailing the events surrounding an eighth demolition operation on the property. This eighth demolition operation appears to have triggered the re-enrolment of the spoliation application on my opposed motion roll for the week of 22 July 2024.
- 11 When I called the case on 23 July 2024, I was informed that the parties had reached an agreement to postpone the matter *sine die*, on the basis that neither party would act to disturb the “*status quo*” on the property as at the date of my order. Mr. Mosikili, who appeared for the City, and Ms. Mirtle, who at that time appeared for the applicants, confirmed that the intention behind the order was that the City would not evict anyone who happened to be in occupation of the property at the time the order was made, and that the applicants would not encourage further occupation of the property.
- 12 I was not satisfied that this would be a proper or a competent order to make, because there was no evidence before me of what that “*status quo*” was. In other words, there was nothing before me that set out the extent to which the property had been re-occupied after the eighth demolition operation, and accordingly no meaningful way in which I could ascertain exactly what conduct the postponement order would enjoin. I asked counsel whether the parties would be prepared to provide a list of individuals who both parties accepted were in occupation of the property on 23 July 2024. If that could be done, then I could make an order directing the City to refrain from removing those individuals from the property, and directing the applicants to refrain from

encouraging further occupation of the property for the period of the postponement. The parties agreed to follow this approach. I stood the matter down to Thursday 25 July 2024 in order for the list to be agreed.

- 13 However, the parties were ultimately unable to agree on a list of people in occupation of the property as at 23 July 2024. The City would only accept that one of the applicants' shacks remained standing on the property as at that date and, for that reason, that only one applicant actually resided at the property. The applicants contended that the list of occupants was much longer, because, for fear of further demolition operations on the property, they had taken to constructing makeshift shelters on the property at night, and dismantling them in the morning. The City did not accept that this was true. Even if it was, the City did not accept that this constituted "occupation" or "possession" of the property in the relevant sense.
- 14 In the absence of a shared understanding of what the "*status quo*" on the property was, the parties agreed that the matter should not be postponed *sine die*, and that I should hear the matter on its merits on 2 August 2024.

The merits

- 15 There were only two areas of dispute in the spoliation application. The first was purely factual. It was whether the papers established the identities of each of the applicants; the fact that each of the applicants had been removed from the property during the City's demolition operations; the authority of the first applicant, Mr. Bantham, to depose to the founding affidavit; and the authority of the applicants' attorney to act for them. The second area of dispute was whether the demolition operations carried out on the property between 25

September and 30 November 2023 constituted unlawful acts of spoliation. The applicants contended that they did. The City, on the other hand, characterised its conduct as lawful counter-spoliation.

16 I turn first to the applicants' identities and representation.

The applicants' identities and representation

17 On 7 December 2023, shortly before the applicants brought their case before Senyatsi J in urgent court, the City's attorneys issued a notice under rule 7 of the Uniform Rules of Court, challenging the applicant's attorney to prove his authority. A power of attorney, containing the names and identity numbers of 256 individuals, was produced on 12 December 2023. The City took no issue with the power of attorney, and has conducted itself throughout on the basis that the applicants' attorney is properly authorised. During argument, Mr. Mosikili accepted on the City's behalf that the power of attorney is authentic, and that I may safely accept the truth of its contents. That disposes of the challenge to the applicants' attorney's authority.

18 In paragraph 3 of his founding affidavit, Mr. Bantham alleges that he is authorised to depose to the affidavit on behalf of the applicants, who he describes as "the occupiers of the property". He refers to a series of confirmatory affidavits in which each of the applicants is identified, and in which each of them avers that they are "residing" at the property. Each of the affidavits also confirms "the correctness" of Mr. Bantham's founding affidavit insofar as it relates to them and to "the events which had occurred" at the property as at the date of its signature.

- 19 I cross-referenced the confirmatory affidavits on the court file with the power of attorney to produce a list of just over 200 people who had both deposed to confirmatory affidavits and signed the power of attorney. These individuals were, on the face of it, identified on the papers as occupiers of the property whose shacks had been demolished during the seven demolition operations that took place between 25 September and 30 November 2023, and who had instructed the applicants' attorney to bring the spoliation application.
- 20 Mr. Mosikili argued that the confirmatory affidavits should not be accepted, but he could not say why. The City does not place the contents of the confirmatory affidavits in dispute. It does not dispute, except perhaps in the vaguest terms, that each of the applicants before me has identified themselves. In these circumstances, I had to accept that the applicants in whose favour I made my order were properly before me, and I annexed a list of their names to my order of 2 August 2024, identifying all of them save Mr. Bantham as the second applicants.
- 21 I now turn to the issue of whether the City's conduct between 25 September and 30 November 2023 amounted to lawful counter-spoliation.

Counter-spoliation

- 22 The City does not dispute that it has demolished shacks on the property. It instead contends that the demolitions it carried out were lawful acts of counter-spoliation. In its answering affidavit, the City says that it only demolished incomplete or vacant shacks, and that doing so was perfectly lawful because the incompleteness or vacancy of the shacks signified that the applicants were not "in possession" of the land on which they were constructed. To assess this

claim, it is necessary to say something about the nature of the common law concepts of possession, spoliation and counter-spoliation, and the way in which they relate to each other in the context of individuals seeking to establish occupation of land for the first time.

Self-help, possession and spoliation

- 23 The common law generally abhors self-help. Once possession of a thing is established, it may not be brought to an end except by due process of law. “Due process of law” generally means either a court order authorising a change in possession, the possessor voluntarily giving up possession, or a statutory provision that authorises one person to take possession of a thing without the consent of the possessor or court approval.
- 24 A person who dispossesses another of a thing in the absence of any of these kinds of “due process” commits an act of spoliation. Spoliation is unlawful, and a court faced with an proven act of spoliation will order the spoliator to return the thing – even to an unlawful possessor – until any dispute about the right to possess the thing has run its course (*Ngqukumba v Minister of Safety and Security* 2014 (5) SA 112 (CC) (“*Ngqukumba*”), paragraph 10).
- 25 Counter-spoliation is a narrow exception to these rules. It permits a person who is in the process of being deprived of possession of a thing to resist the deprivation with force, without having to follow due process. It is often said that the act of dispossession, and the act of resistance, must be part of the same *res gestae*. In other words, both the attempt to establish possession of a thing, and the resistance to it, must be one continuous event (see, for example, F du Bois (ed) *Wille’s Principles of South African Law* (9 ed), 466).

26 While unlawfully taking possession of someone else's property "is itself an act of spoliation" (*Fischer v Ramahlele* 2014 (4) SA 614 (SCA), paragraph 23), the common law nevertheless recognises and protects the possession so established. In other words, once a person has been successfully dispossessed of a thing, the opportunity to counter-spoliate evaporates. After this, the obligation to follow due process attaches to anyone who seeks to recover the possession of the thing they have lost.

The nature of possession at common law

27 The critical question is accordingly at what point "possession" of a thing is established. Applicants for spoliation orders are generally required to show that their possession of the thing they wish returned was "peaceful and undisturbed" at the time it was taken away from them. This has sometimes been interpreted to mean that, in order to obtain a spoliation order, the applicant must demonstrate a sufficiently lengthy period of settled and unchallenged possession of the thing in dispute (see, for example, *Ness v Greef* 1985 (4) SA 641 (C), 649 and *Mbangi v Dobsonville City Council* 1991 (2) SA 330 (W), 337F to 339B).

28 There is, however, nothing in the common law concept of possession that requires the possessor to show either that their possession has subsisted for any particular period or that it is unchallenged. To "possess" something is merely to hold it with the intent to secure some benefit for oneself. Once property is held with the necessary intent, "peaceful and undisturbed possession" is established (*Yeko v Qana* 1973 (4) SA 735 (A), 739). Counter-spoliation is only permissible before the property is detained and the intent to

secure the benefit is formed. This means that it is not sufficient simply to challenge a person (whether by word or by deed) after they have taken the relevant property and formed their intent. Only the interruption of their attempt to obtain the property and form the relevant intention will be effective to counter-spoliate.

When did the applicants obtain possession of their shacks?

- 29 What all this means in practice is, of course, highly fact-dependent. But it seems to me that a person who has commenced construction of a dwelling on land clearly “holds” both the material out of which the dwelling is constructed and the land on which it is being constructed. They do so with the intent to secure for themselves the benefit of occupation of the land and the structure. In other words, they possess both the land and the structure. That being so, the remedy of counter-spoliation is not available to demolish completed or even half-built structures.
- 30 Nor does it make a difference if the shacks are vacant when the City peers into them. The fact that a shack is vacant does not mean that the person who built it has given up possession. Possession of immovable property does not imply continuous presence at it. Nobody would suggest, for example, that a person is not “in possession” of their office workspace merely because they happen to be at home. Conversely, nobody could seriously contend that a person does not possess their home during the hours they happen to be at work, or visiting friends, or on some other errand that takes them out of the house.

- 31 A lengthy period of absence might, in a given context, imply that the person who built a shack has given up possession of it. However, in this case, the City does not contend that it demolished the applicants' shacks because possession of them, once established, had been given up. It contends that the mere vacancy of a newly-constructed shack is evidence enough that possession has not yet been established. For the reasons I have given, that cannot be.
- 32 It follows that the counter-spoliation remedy the City says it engaged in this case was only available before construction of the applicants' shacks commenced. The City would obviously have been entitled to secure the property against the applicants before they set foot on it. The City would also have been entitled to repel the applicants as trespassers if it had found them on the property with building tools and materials. It may also have been entitled to repel them when they were marking out stands or levelling earth for the construction of their dwellings. But what it could not do – at least not without a court order – was demolish the applicants' structures once they were completed or in the process of construction.
- 33 The most recent authority on spoliation and counter-spoliation accords with this analysis.
- 34 In *Residents of the Setjwetla Informal Settlement v Johannesburg City* 2017 (2) SA 516 (GJ) ("*Setjwetla*"), van der Linde J held that new occupants of land in Alexandra, Johannesburg, had acquired possession of shack sites when they commenced construction on them. The Judge held that "[a]t that stage, that is before the shacks were completed and had been occupied, the

provisions of [the Prevention of Illegal Eviction from, and Unlawful occupation of, Land Act 19 of 1998] were not yet applicable. The [City of Johannesburg] was therefore not yet obliged to follow the pre-requisites there laid down. But that does not mean that the applicants had not yet acquired sufficient possession” (*Setjwetla* paragraph 14, emphasis added).

35 The Judge held that the new occupants of the land “had commenced constructing shacks on the respondents’ land, implying that they had driven poles into the ground; perhaps wrapped corrugated–iron sheets around some of those; perhaps fixed roofing material on top of those. That implies further that they actually moved around on the land, at least in the areas of those sites, while they were busy with their construction endeavours. It also implies that their own movable assets were affixed with a measure of permanence, at least to such measure that it could afford effective protection against the elements” (*Setjwetla*, paragraph 15).

36 For all those reasons, the City’s demolition of those shacks was unlawful, and the City of Johannesburg was interdicted from demolishing them again (*Setjwetla*, paragraph 20).

37 Van der Linde J justified his decision by referring to “the underlying rationale” of the law of spoliation. That, the Judge held, is “to prevent self-help; to foster respect for the rule of law; and to encourage the establishment and maintenance of a regulated society”. The Judge held that “if local authorities were permitted to move in with heavy engineering equipment, without first obtaining court sanction, whenever people moved onto their land, that

encourages conduct which in our society with its history is reminiscent of a time best forgotten” (*Setjwetla*, paragraph 18).

38 Likewise, in *City of Cape Town v South African Human Rights Commission* (1337/2022; 368/2023) [2024] ZASCA 110 (10 July 2024) (“*City of Cape Town*”) it was held that “if a homeless person enters the unoccupied land of a municipality with the intention to occupy it, the municipality may counter-spoliate before the person has put up any poles, lines, corrugated iron sheets, or any similar structure with or without furniture which point to effective physical control of the property occupied. If the municipality does not act immediately (*instanter*) before the stage of control with the required intention is achieved, then it cannot rely on counter-spoliation as it cannot take the law into its own hands. It will then have to seek relief from the court, for example by way of a *mandament van spolie*, an ordinary interdict, or pursue a remedy under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE)” (*City of Cape Town*, paragraph 12, emphasis added).

39 In the case before me, there is no dispute that the applicants moved onto the property and constructed their shacks on 17 September 2023, before having their shacks demolished seven days later on 25 September. Their shacks were demolished again fourteen days after that on 9 October; then again three days after that on 12 October; then again fourteen days after that on 26 October; then again fourteen days after that on 9 November; then again seven days after that on 16 November; and then again fourteen days thereafter on 30 November. Mr. Bantham says that the applicants had been trying to raise money to fund a spoliation application from early November, but it seems that

it was the seventh demolition operation that triggered the applicants' urgent application before Senyatsi J.

- 40 Given the authorities that I have laid out, it is clear that on the applicants' initial occupation of the property, and on each occasion on which they rebuilt their shacks, the applicants established possession of the property before being unlawfully dispossessed of it. In other words, the "narrow window period" in which the City would perhaps have been entitled to counter-spoliate had ended by the time each demolition operation was carried out (*City of Cape Town*, paragraph 38).

Can the applicants be described as "homeless" and does it matter?

- 41 Mr. Mosikili argued that the *City of Cape Town* case does not apply to the applicants because it deals only with the circumstances in which a "homeless" person can be counter-spoliated. It is clear from the papers, Mr. Mosikili submitted, that the applicants in this case were not "homeless" before they moved on to the property.
- 42 I do not think that I can accept that the applicants were not homeless before they moved onto the property. Even the City appears to accept that the applicants' circumstances were so poor as to warrant the provision of temporary accommodation to alleviate the conditions in which they were living. Moreover, even if the applicants were not homeless when they occupied the property on 17 September 2023, they were plainly rendered homeless on each occasion the City subsequently demolished their shacks.

43 Mr. Bantham repeatedly refers to the applicants' shacks as "homes" in his founding papers. The papers in this case are replete with pictures of bedding, furniture, clothes and other household goods nestled in wreckage of demolished shacks or strewn across the veldt in the aftermath of the City's operations. In its answering affidavit, the City said that the presence of these items was part of an elaborate ruse, intended to create the false impression that the shacks were the applicants' homes. That is, of course, fanciful. The applicants brought their homeware to the shacks because the shacks were in fact their homes. Had the applicants advanced their case on section 26 (3) of the Constitution, 1996, they may well have succeeded in convincing me that the City had demolished their homes without a court order contrary to that provision.

44 Nonetheless, as the *City of Cape Town* case makes clear, the issue of whether a person has been spoliated of their shack and the land on which it stands is conceptually distinct from the question of whether the shack and the land constitutes a "home", or whether the person who constructed the shack did so because they were homeless. Read as a whole, the *City of Cape Town* decision is not concerned with the status of a possessor of land, but with whether or not possession has in fact been established. In other words, what matters is whether the applicants in this case took possession of the land in the relevant sense, not where they were before they did so. This is consistent with the general rule in spoliation proceedings: that any social or legal rights or interests surrounding a dispute over the possession of a thing are irrelevant to the question of whether a possessor has in fact been spoliated (see *Ngqukumba*, paragraph 21).

45 Accordingly, I think that the applicants probably were homeless, or at least in dire housing need, before they moved onto the property, and on each occasion on which they reconstructed their shacks. But that is beside the point. Whether the applicants could fairly have been described as “homeless” at any time material to this case is entirely irrelevant to the question of whether they were lawfully counter-spoliated.

Delay

46 It was finally contended that the applicants had unreasonably delayed in bringing their spoliation application. I do not see how. The applicants approached the urgent court a mere twelve days after the seventh time they were spoliated. Their application was struck from the roll. They re-enrolled the matter for hearing in the ordinary opposed motion court immediately upon filing Mr. Bantham’s supplementary affidavit describing the eighth demolition operation on the property. Plainly, there was no delay.

Order

47 It follows from all this that I was bound to grant the applicants the spoliation order and the interdict they asked for.

48 I accept, as Mr. Mosikili was at pains to argue, that the City has a difficult task in securing its land in the context of widespread homelessness, deprivation and land hunger. I also find it hard to conceive of the desperation that must have driven the applicants to move on to land they had no right to occupy, and to rebuild their shacks each time the City destroyed them.

