

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 21/31801

(1)	REPORTABLE: <i>NO</i>
(2)	OF INTEREST TO OTHER JUDGES: <i>NO</i>
(3)	REVISED:
<i>13 18</i>	
DATE	SIGNATURE

In the matter between:

**THE WESSEL HAMMAN TRUST
(IT. 9887/81)**

HEREIN REPRESENTED BY:

PIETER HAUMAN HAMMAN N.O.

ERIKA LOUW N.O.

ESTELLE HAMMAN N.O.

WESSEL JOHANNES HAMMAN N.O.

JOHANNA MAGDALENA SCHABORT GENIS N.O.

and

THE EMFULENI LOCAL MUNICIPALITY

**GILBERTO MARTINS N.O., in his official capacity as the
Administrator of the EMFULENI LOCAL MUNICIPALITY**

First Applicant

Second Applicant

Third Applicant

Fourth Applicant

Fifth Applicant

First Respondent

Second Respondent

This judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to CaseLines/Court online and by release to SAFLII. The date and time for hand- down is deemed to be 12h00 on 13 August 2024.

Order: Para [51] of this judgment.

JUDGMENT

TODD, AJ:

Introduction

- [1] The Applicant Trust¹ was, at the time these proceedings were instituted, the owner of immovable property on which a holiday resort was operated. The property is located within the municipal area of the First Respondent municipality.
- [2] The property is located in what the Applicant describes as a peaceful and tranquil setting approximately 35km from Johannesburg in the direction of Vereeniging. The holiday resort traded on the peace and quiet of the area and the possibility of an escape from city life. The resort provided accommodation in the form of self-catering chalets and camping facilities. It also offered a wide variety of entertainment for families including a heated pool, cold water pool, water slide, trampolines and other forms of entertainment.
- [3] The municipality is the registered owner of neighbouring land. The municipality's land has been earmarked for the construction of certain low income housing developments. Following one initially successful development, with which the Applicant has no issue, two further township developments were planned but did not eventuate.
- [4] From approximately April 2021 occupiers arrived on the municipality's undeveloped land and began to build informal houses from corrugated iron

¹ The Applicants in the proceedings are in fact the five trustees of the Trust. For the purpose of this judgment, however, I simply refer to the Trust as Applicant.

sheets. According to the Applicant the structures were erected at “an alarming rate” and the number of informal structures on the land increased substantially. This occurred in circumstances in which there was no infrastructure provided by the municipality in the form of roads, water or storm water systems, sanitation or electricity.

- [5] The occupation of the municipality’s land occurred in a manner that was not compliant with the proposed township scheme or the applicable municipal bylaws. Consequently that occupation was unlawful. The Applicants sought the intervention of the municipality demanding that it take action to prevent the further and continued unlawful occupation of the land, and for the removal of illegal occupants and the provision of temporary accommodation elsewhere. They received no response.
- [6] The illegal occupation of the municipal land resulted, the Applicant asserts, in concerns about security and consequently the increased provision of security on the boundary between the Applicant’s property and the municipal land so occupied. In addition the Applicant describes increased air pollution caused by the burning of tyres and wood used for heating and for the preparation of food, which give rise to a nuisance or interference with the property rights of the land owned by the Trust on which the business of the resort was conducted.
- [7] The Applicants initially approached this Court on a semi-urgent basis during July 2021, three months after it had observed the arrival of unlawful occupiers on the adjacent municipal land.
- [8] In part A of that application, the Applicants sought an order directing the municipality to serve and file an affidavit and a report, within 30 days, dealing with the steps the municipality would take to ensure that it complied with its own bylaws insofar as these concerned the property that had been invaded. In the event that the municipality failed to comply with the order, or if the remedial steps it proposed did not constitute appropriate steps, or if the timeframes within which it proposed to take those steps were not reasonable, the Applicants sought leave to enrol the matter urgently for the relief contemplated in part B.

- [9] In part B, the Applicants sought an order directing the municipality to take steps to comply within 30 days with its own bylaws and national legislation insofar as it concerned the relevant land, and to report to the court on affidavit within 30 days of the order, detailing the steps and action that it had taken to ensure such compliance. In part B the Applicants further sought an order that if the Respondents failed to adhere to the time limits prescribed, an affidavit should be filed with the court explaining the reason for non-compliance.
- [10] Finally, the Applicants sought an order that to the extent necessary, after receipt of the affidavits to be delivered by the municipality, it be granted leave to approach the court on the same papers, duly supplemented, for further appropriate relief as may be necessary in the circumstances.
- [11] When the matter first came before court on 27 July 2021, an order was made by agreement between the parties broadly along the lines sought in Part A. The municipality was directed to deliver an affidavit and report within 60 days of the order, setting out the steps it intended to take to ensure that its bylaws were complied with and specifying the relevant timeframes and periods for implementation of remedial steps. If it failed to do so, the Applicant was given leave to re-enrol the matter on an urgent basis for the relief sought in part B.
- [12] The municipality did not comply with its obligations under the first order. As a result, the matter was re-enrolled on the urgent court roll in November 2021. This resulted in the Applicant obtaining the relief set out in part B of its notice of motion, what is referred to in the papers as the Victor Order, which was made on 9 November 2021.
- [13] The operative part of the Victor Order reads as follows:
- “2. *The First and Second Respondents (hereinafter referred to as the "**Respondents**") are ordered and directed to do and take all such steps as may be necessary to comply, within 30 days from this order, with its own by-laws, the Vereeniging Town Planning Scheme 1992, Section 2 of the Local Governance Ordinance, the National Building Regulations and Standards Act, 1977 (Act 6 of 1977) (as amended) and national legislation, including the Health Act 63 of 1977 (hereinafter referred to as the "**statutory requirements**"), insofar it concerns the*

land owned by the Emfuleni Local Municipality which is situated at Remaining Extent of Portion 9 of the Farm Vlakfontein 546 1.Q., Province of Gauteng (hereinafter referred to as "the municipality's land").

3. *Within 30 days from this Court order the Respondents are ordered and directed to report to this Honourable Court, on affidavit, the steps and action taken by the Respondents to ensure compliance with the order in paragraph 2 above.*
4. *That should the Respondents fail to adhere to the time constraints provided, an affidavit be filed with the Court and be served on the parties to this matter, explaining the reason for the non-compliance with the Court order.*
5. *That, to the extent necessary, after receiving the affidavit/s referred to in paragraphs 3 and/or 4 above, the parties are granted leave to approach this Court on the same papers, duly supplemented, for further appropriate relief as may be necessary in the circumstances."*

[14] The municipality did not comply with its obligations under the Victor Order either.

[15] As a result the Applicant approached this Court a third time. This time, in terms of a supplementary notice of motion, the Applicant brought an application for alternative relief on the strength of paragraph 5 of the Victor Order. It sought an order for the payment of constitutional damages in the sum of R9,100,000, being the claimed reduction in value of the Applicant's property caused by the municipality's failure to comply with its statutory obligations and the terms of the two prior court orders made under parts A and B of the proceedings.

[16] In answer to the supplementary notice of motion and affidavit the municipality delivered an answering affidavit deposed to by its municipal manager. The municipality conceded that it had delivered no affidavits in compliance with the prior orders and apologised for that omission. It submitted, however, that the answering affidavit then filed constituted a report to the court that, albeit belatedly, satisfied its obligations under the prior orders made in the matter.

[17] Regarding the procedure being followed by the Applicant, the municipality took issue with its approach in seeking damages by way of application when the issues involved inevitably complex questions of causation and quantification and where disputes of fact were foreseeable and inevitable.

- [18] On the merits of the Applicant's contentions, the municipal manager stated that the municipality has relinquished control of the relevant land to the Provincial Government for the purpose of developing human settlements, and it disputed that a large number of shacks had been erected on the land immediately adjoining the Applicant's land. On the contrary, the deponent asserted that after an inspection of the land in question a limited number only of uninhabited corrugated iron structures could be seen.
- [19] The deponent also described a prior attempt to clear a large informal settlement nearby, with the authority of a court order, which had resulted in social unrest and the death of one member of the team seeking to evict unlawful occupants of that land. This had occurred in relation to a large informal settlement approximately 3km away from the Applicant's property.

The parties' submissions

- [20] When the matter was argued Mr Kok, who appeared for the Applicant, relied primarily on the authority of the decision of the Constitutional Court in *President of the Republic v Modderklip Boerdery*². He submitted that the availability of an alternative remedy in delict did not preclude this Court from awarding constitutional damages.
- [21] Regarding the damages that had been suffered by the Applicant, Mr Kok submitted that a valuation report put up by the Applicant clearly established the reduction in the value of the property in direct consequence of the establishment of an informal settlement on the adjoining land. He submitted that it was clearly established on the papers that the difference in the value of the property before and after the establishment of the informal settlement was solely attributable to the existence of the informal settlement which, in turn, was solely attributable to the failure of the municipality to comply with its obligations under the relevant planning laws and the two orders of this Court that the Applicant had obtained under parts A and B of its application.

² 2005 (5) SA 3 (CC)

- [22] Mr Kok submitted that the loss of value in the property was foreseeable and reflected damages suffered by the Applicant. As regards the municipality's explanation provided in the answering affidavit about its reasons for not having evicted anyone from the property, Mr Kok submitted that the Applicants had not asked for an eviction but had asked for compliance with the relevant bylaws and with the terms of the prior orders of this Court.
- [23] Mr Kok submitted that in the circumstances the valuation report was the best evidence available regarding the damages suffered.
- [24] In a third supplementary affidavit which the Applicant sought leave to introduce to place certain additional facts before Court that had transpired since the exchange of affidavits and delivery of heads of argument, the deponent stated that in October 2023 the Applicant had sold the property to a third party for a purchase consideration of R3,900,000, some R500,000 higher than the value that had been placed on the property by the valuer. In this way the Applicant stated that it had mitigated its damages, and Mr Kok indicated that the Applicant had reduced the quantum of its claim correspondingly by an amount of R500,000, to R8,600,000.
- [25] From the limited information provided in this supplementary affidavit and its attachments it appears that the Applicant has sold the immovable property, and the related entity that operated a resort on the property has sold certain moveables, to an entity or entities that intend to conduct the business of a school on the property.
- [26] Mr Shepstone, who appeared for the First Respondent, submitted that the constitutional remedy for damages being sought by the Applicant was an extraordinary remedy that should be considered in exceptional circumstances only when an applicant has exhausted other available remedies. The Applicant had not in the present circumstances either attempted to use enforcement through contempt proceedings or relied on a claim in delict. This, he submitted, had the consequence that it was not entitled to claim constitutional damages.
- [27] Furthermore, Mr Shepstone submitted, the terms of the Victor Order on which the claim was founded do not authorise the bringing of an application such as

the present and on a proper interpretation of that order the Applicant was authorised to approach the Court for further relief only after receipt of affidavits that were to be delivered by the municipality. In the absence of those affidavits the Applicant could not rely on the authority of the Court to approach it again on the same papers. This, Mr Shepstone submitted, amounted to overlooking part of the Victor Order.

- [28] Even though it was the municipality's fault that the conditions contemplated in the order had not been met, Mr Shepstone submitted, it was open to the Applicant to use contempt proceedings to secure further relief, but contractual principles regarding fictional fulfilment could not be relied upon in these circumstances. Since the overall thrust of the initial application, including both parts A and B, had been the pursuit of a structural interdict, any further appropriate relief contemplated in the order must necessarily have been understood to have referred to alternative structural relief and not a new case based on new evidence regarding damages that was not foreshadowed in the original founding papers.
- [29] Mr Shepstone further submitted that the facts in this matter are distinguishable from those in *Modderklip* most obviously because there it was the litigant's own land that had been invaded. The State had taken no steps to comply with its obligations under a court order to remove the unlawful occupiers from the land. In *Modderklip*, he submitted, it was clear that there was no alternative remedy available and that constitutional damages was the only appropriate remedy in that situation.
- [30] In the present instance, by contrast, the Applicant has not been deprived of its property at all and at best can complain of nuisance in consequence of neglect of the adjoining property. This gives rise to an obvious cause of action in delict or, if the Applicant had wished to continue to pursue the structural interdict, and insofar as the municipality had failed to deliver answering papers, it could have used further enforcement proceedings including those applicable to contempt of court. These avenues remained open to the Applicant.

- [31] Mr Shepstone submitted that since there had been no effective expropriation of property in the present matter, unlike in the case of *Modderklip*, there was no violation of any property right under section 25 of the Constitution. Insofar as the Applicant relies on the violation to its rights under section 34 of the Constitution, there was no evidence of a causal link between the violation or infringement of the Applicant's right of access to courts and any harm alleged to have been suffered by the Applicant.
- [32] Regarding the evidence of the damages claimed, Mr Shepstone submitted that the expert valuer, whose evidence was not set out in an affidavit, did not in any event have the expertise to determine whether or not the invasion of neighbouring land had caused the reduction in value of the Applicant's land. He submitted that no such case was made out in the affidavits.
- [33] In reply, Mr Kok submitted that the municipality had put up no alternative basis for valuing the Applicant's property and had taken a supine approach to the problem, as had been case in *Modderklip*. The Applicant relied on a violation of its rights under section 34 of the Constitution. He reiterated the submission that the court in *Modderklip* had not prescribed an obligation to exhaust alternative remedies but rather had emphasised the duty on a court to give an effective and appropriate remedy. Where a violation of constitutional rights was concerned, this would include constitutional damages.

Assessment

- [34] Dealing first with Mr Shepstone's submission that an award for damages was not authorised by the Victor Order and consequently was either precluded or not adequately foreshadowed in the founding papers, a similar argument was expressly rejected by the Constitutional Court in *Modderklip*. There³ the Constitutional Court expressly agreed with the conclusion of the Supreme Court of Appeal that:

"If a constitutional breach is established, this Court is (as was the Court below) mandated to grant appropriate relief. A claimant in such

³ at paragraph [53]

circumstances should not necessarily be bound to the formulation of the relief originally sought or the manner in which it was presented or argued.”⁴

- [35] As regards Mr Shepstone’s submission that a remedy for constitutional damages is an extraordinary remedy that should be considered in exceptional cases only, where an applicant has exhausted all other remedies, I do not read the decision of the Constitutional Court in *Modderklip* to say this. Rather, the Constitutional Court referred⁵ to its earlier decision in *Fose* where it had said the following⁶:

“It seems to me that there is no reason in principle why ‘appropriate relief’ should not include an award of damages, where such an award is necessary to protect and enforce chap 3 rights. Such awards are made to compensate persons who have suffered loss as a result of the breach of a statutory right if, on a proper construction of the statute in question, it was the Legislature’s intention that such damages should be payable, and it would be strange if damages could not be claimed for, at least, loss occasioned by the breach of a right vested in the claimant by the supreme law. When it would be appropriate to do so, and what the measure of damages should be, will depend on the circumstances of each case and the particular right which has been infringed.”

- [36] In *Modderklip* the Court also reiterated its earlier stance in *Fose*⁷, that without effective remedies for breach of constitutional rights *“the values underlying and the right entrenched in the Constitution cannot properly be upheld or enhanced.”* As a result, *“the courts have a particular responsibility in this regard and are obliged to ‘forge new tools’ and shape innovative remedies, if needs be, to achieve this goal.”*

- [37] In *Modderklip* the Supreme Court of Appeal had concluded that damages was the most appropriate remedy in the circumstances, and that the remedy had distinct advantages over a number of other forms of relief on the facts of that

⁴ at paragraph [18] of the SCA judgment

⁵ in *Modderklip* at paragraph [58]

⁶ *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) at paragraph [60]

⁷ *Modderklip* paragraph [58] referring to *Fose* at paragraph [69]

matter. The Constitutional Court disagreed with the State's submission that a declaratory order would have been sufficient to vindicate Modderklip's rights.

- [38] This means, in my view, that this Court is entitled and indeed required to consider whether damages is an appropriate remedy in the circumstances having regard to the nature of the constitutional right relied upon by the Applicant in seeking that relief, and whether on the papers the Applicant has established that it has suffered damages equivalent to the claimed reduction in the value of its land in consequence of the violation of its constitutional rights.
- [39] The Applicant relies on its contention that the municipality has violated its right of access to courts under section 34 of the Constitution. That section provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or where appropriate another independent and impartial tribunal or forum.
- [40] In *Modderklip* the Constitutional Court decided that this right had been violated because the State had failed to give effect to the outcome of a dispute that had indeed been decided by a court.
- [41] In the present matter the Applicant relies on two distinct failures by the municipality. The first is its failure to enforce what I will refer to broadly as its town planning bylaws, and to prevent municipal owned land from being occupied unlawfully in breach of those bylaws. These failures, it seems to me, have little if anything to do with section 34 of the Constitution.
- [42] Secondly, the Applicant relies on the failure by the municipality to comply with its obligations under successive court orders to report to this Court on what it intends to do and has done to deal with the situation. These failures, too, it seems to me, do not interfere with the Applicant's right of access to courts or the enforcement of court orders. On the contrary, the Applicant would have been fully entitled to seek further orders holding the municipality or its relevant officials in contempt of court, or to have made further efforts to ensure that relevant officials of the municipality are brought before court. In this sense the Applicant had not come to the end of the road in its attempts to secure compliance with

court orders, and its right of access to court cannot be said to have been infringed.

- [43] In fact the Applicant secured a response from the municipality when it took the further step of seeking damages, and the municipality has now reported to court regarding its stance in relation to the land in question.
- [44] In any event, however, it is difficult for me to see that any part of the harm that the Applicant claims to have suffered is attributable to the municipality's failure to report to court. Rather, the Applicant's case is that it is the existence of the unlawful settlement on municipal land that has caused a reduction in the value of its property. Reporting to court has had, and could have had, little impact on the value of the land. In my view the Applicant has failed to show a causal connection between the failure to report to court and the diminution in value of the land. It is also far from clear whether any other failure on the part of the municipality has caused that loss of value.
- [45] In *Modderklip* the Constitutional Court referred both to the underlying social problem of homelessness in our society, and to the corresponding challenges faced by the State when seeking to address it:

"[36] The problem of homelessness is particularly acute in our society. It is a direct consequence of apartheid urban planning which sought to exclude African people from urban areas, and enforced this vision through policies regulating access to land and housing which meant that far too little land and too few houses were supplied to African people. The painful consequences of these policies are still with us eleven years into our new democracy, despite government's attempts to remedy them. The frustration and helplessness suffered by many who still struggle against heavy odds to meet the challenge merely to survive and to have shelter can never be underestimated. The fact that poverty and homelessness still plague many South Africans is a painful reminder of the chasm that still needs to be bridged before the constitutional ideal to establish a society based on social justice and improved quality of life for all citizens is fully achieved."

...

[49] *The state is under an obligation progressively to ensure access to housing or land for the homeless. I am mindful of the fact that those charged with the provision of housing face immense problems. Confronted by intense competition for scarce resources from people forced to live in the bleakest of circumstances, the situation of local government officials can never be easy. The progressive realisation of access to adequate housing, as promised in the Constitution, requires careful planning and fair procedures made known in advance to those most affected. Orderly and predictable processes are vital. Land invasions should always be discouraged. At the same time, for the requisite measures to operate in a reasonable manner, they must not be unduly hamstrung so as to exclude all possible adaptation to evolving circumstances. If social reality fails to conform to the best laid plans, reasonable and appropriate responses may be necessary. Such responses should advance the interests at stake and not be unduly disruptive towards other persons. Indeed, any planning which leaves no scope whatsoever for relatively marginal adjustments in the light of evolving reality, may often not be reasonable."*

[46] The municipality's stance in its answering papers is not, it seems to me, unreasonable in recognising and describing the challenges that unlawful occupation of land present both to homeless land invaders but also for other citizens including those such as the Applicant in this case. At the very least the municipality's stance opens the way towards future steps that might mitigate the adverse consequences of the growth of an unlawful settlement immediately adjacent to the Applicant's land.

[47] The municipality's response also raises material factual disputes concerning the Applicant's description of the unlawful occupation of the adjacent land and its consequences. Put differently, the Applicant describes a catastrophic nuisance, whereas in its answering papers the municipality asserts, on the strength of an inspection of the property by the deponent, only that there is limited unlawful

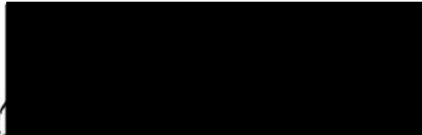
occupation on the immediately adjoining land of a kind that could hardly have the consequences in nuisance that the Applicant describes.

[48] In summary, the Applicant had not been deprived of access to its property, nor can it be said to have been deprived of access to the courts by reason of the municipality's failure to comply with prior orders of this court. The failure of a municipality to comply with its own municipal by-laws or other related laws under which property use is authorised and regulated, while unlawful, does not by itself engage fundamental rights.

[49] I am not persuaded on these papers that the Applicant has established either that it has suffered damages in consequence of a violation of its constitutional right of access to courts or that it has established a causal connection between a breach of obligations by the municipality and any loss suffered by it at the particular point in time at which it decided to realise the current value of its land by disposing of it to a third party, in that way perfecting the reduction in value of the property at a point in time chosen by the Applicant.

[50] In the circumstances the Applicant's claim for damages should be dismissed, and it seems to me that costs should follow the result. This does not preclude the Applicant from pursuing other forms of redress under its originally formulated notice of motion read with the Victor Order, or through instituting fresh proceedings relying on an alternative cause of action.

[51] I make the following order: the Applicant's application for constitutional damages is dismissed with costs.


C TODD
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

Date of Hearing: 22 and 24 May 2024

Date of Judgment: 13 August 2024

APPEARANCES

Counsel for the Applicant: P J Kok

Instructed by: Esthe Muller Inc

Counsel for the Respondents: R Shepstone

Instructed by: Lawrence Melato Inc