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

CASE NO: 128720/2023

DATE: 2024-08-16

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DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO.

(3) REVISED.

DATE 16 August 2024

SIGNATURE

In the matter between

CITY OF JOHANNESBURG
METROPOLITAN MUNICIPALITY

Applicant

20

And

CALVIN

BANTHAM

and

OTHERS

ents

Respond

JUDGMENT *EX TEMPORE*
LEAVE TO APPEAL

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WILSON, J: The applicant, the City of Johannesburg, seeks leave to appeal against my order dated 2 August 2024, in which I directed the City to restore the individuals identified in ANNEXURE X to my order to peaceful and undisturbed possession of Erf 1[...], R[...] R[...] Extension 1 (“the property”). Comprehensive reasons for the order were provided on 5 August 2024.

10 It has, at times, been difficult to discern the basis on which leave to appeal has been sought. This is primarily because the supplementary grounds of appeal and counsel’s heads of argument appear to be directed at findings alleged to have been made in my judgment that do not appear from the text of judgment itself.

 I have nonetheless done my best to distill what I believe were the five principal submissions made on the City’s behalf and I shall deal with each of them in turn.

20 It was first contended that I was incorrect to find that the applicants to whom I restored possession of the property were homeless.

 I did not find as a fact that the applicants were homeless. I found in my judgment that, on the undisputed facts, the applicants were, at the very least, in dire housing need. I found that, had their case depended upon proving that their shacks were their homes and they had been rendered homeless either by the demolitions or immediately
30 before the initial occupation of the property, then I may well have been convinced of that case. But I did not finally conclude that the applicants, to whom I restored possession of the property, were homeless at any time material to this application.

What I in fact found, as Mr Mosikili quite correctly conceded, was that the applicants' status, homeless or otherwise, was irrelevant to the question of whether or not they had established possession of the property immediately before each of the City's demolition operations.

Mr Mosikili contended that I ought not to have disregarded the applicants' status because the judgment in
10 the Supreme Court of Appeal in *City of Cape Town v South African Human Rights Commission* [2024] ZASCA 110 (10 July 2024), on which I relied to conclude that the applicants had established possession, only applied to homeless people and not to anyone else. The submission was accordingly that I was incorrect to apply the *City of Cape Town* case since I could only have applied it following a positive finding that the applicants were homeless.

I do not think that there is any prospect that a
20 Court of Appeal will adopt that approach. Although in the *City of Cape Town* case the Supreme Court of Appeal was dealing with homeless people entering unoccupied land, it was applying the law of spoliation and counter-spoliation.

That law applies irrespective of the status of the person claiming possession of a thing, or of those claiming to have lawfully counter-spoliated that person. So, it matters not whether the spoliator or the possessor were homeless. Nor does it matter what the nature of the
30 property said to have been spoliated was. What matters, for the purposes of a spoliation application, is whether possession of the property had been established prior to the alleged act of counter-spoliation.

There is no prospect that a Court of Appeal will find that the *City of Cape Town* case's analysis of what constitutes possession for the purposes of a spoliation application is confined to situations in which homeless people are alleged to have been counter-spoliated. In any event, whether or not the applicants were technically homeless, everyone in the case accepts that they were at the very least living in appallingly unhealthy and overcrowded conditions immediately before they first
10 occupied the property in September 2023. Even if it is of limited application, the decision the *City of Cape Town* case was plainly intended to apply to people in the applicants' position. For these reasons, the first basis on which leave to appeal was sought bears no prospects of success.

The second basis on which Mr Mosikili contended that leave to appeal should have been granted was that the applicants had unreasonably delayed in setting their spoliation application down after it had been struck from the
20 urgent roll.

The contention, as I understand it, is this: Justice Senyatsi struck the urgent spoliation application from the roll in his urgent court in December. The steps taken to reenrol the matter in the opposed motion court before me were only taken in April. That four-month delay, Mr Mosikili contends, was unexplained and, though he did not directly submit this, it seems to that Mr Mosikili wanted to contend that the delay is fatal to the application.

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Mr Mosikili was unable to point me to any authority to support the proposition that a four-month delay in obtaining a hearing on the ordinary opposed roll in a spoliation application that has been struck from the urgent

roll is fatal to the relief sought. I know of no such authority. In any event, for the reasons I gave in my judgment, I do not believe that there was any delay, let alone an unreasonable one.

My reasons for reaching that conclusion are in paragraph 46 of my decision. I have nothing to add to them save to say this: where poor and vulnerable people find themselves dispossessed of their dwellings by state action,
10 they will naturally require time to gather together and form a strategy about what to do next. To the extent this causes a delay in them exercising their right of access to court, it is not a delay to which I believe a court should attach any significance. For those reasons the second ground of appeal advanced by Mr Mosikili stands no prospects of success.

The third ground of appeal appears to have been that even if I was correct to reach the conclusion that the
20 applicants were unlawfully dispossessed and that the remedy of counter-spoliation was not available to the City on the facts before me, I ought nonetheless to have exercised a remedial discretion, and to have considered whether it was appropriate to order restoration to the property in all the circumstances.

The contention was that some other form of relief - different from granting the applicants identified in the papers restoration to the property and an interdict
30 restraining any subsequent demolition - ought to have been considered and granted.

I do not know what other relief would have been appropriate. Certainly no other relief was sought when the

parties argued the main application before me. I was invited either to dismiss the spoliation application, which is what the City of Johannesburg wanted, or to grant restoration to the property with an interdict restraining further evictions, which is what the applicants wanted. No middle ground was offered to me.

10 In any event, no middle ground would have been appropriate. A Court dealing with a spoliation application, in my view, has little to no discretion once it has found that a dispossession was unlawful and it is possible to order restoration. The *status quo ante* must be restored.

In this case there is no serious dispute that the dispossessions were unlawful, and there was no serious dispute that restoration was possible. In those circumstances it was not necessary for me consider any other form of relief. An order restoring the applicants to the property and granting appropriate interdictory and ancillary
20 relief was the only remedial option reasonably open to me.

For those reasons the third basis on which the City seeks leave to appeal stands no prospects of success.

A fourth contention appears to have been that I should not have accepted that those of the applicants who signed the confirmatory affidavits that were filed with the original founding affidavit ought to have been restored to the property.

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In my judgment on the main application, I found that the applicants in the application were those individuals who had both confirmed the contents of the founding affidavit under oath and signed a power of attorney filed by

the applicants' attorney shortly before the urgent application was heard. Those individuals were included on a list annexed to my order.

Mr Mosikili's contention is that I should not have ordered relief to favour those individuals. I should have instead adopted a shorter list that was produced in July of this year when the parties were trying to agree an interim order for the further conduct of the matter. I am at a loss to understand why I should have accepted a list compiled in July that everybody accepts was not under oath and not in evidence before me, over a list that was confirmed under oath when the applicants filed their founding papers in December.

Courts make orders based on facts that have been proved. Facts are proved by being placed under oath, and if they are not placed under oath, by being admitted notwithstanding the fact that they are hearsay. The only list of the applicants placed under oath before me is the list that I annexed to my order. There was no application from either party to enter any other list onto the record. There was no application by either party that I receive any form of hearsay evidence whatsoever. There was no agreement between the parties about who, if anyone, was in fact in occupation of the property in July this year, or at any other time relevant to the main application.

For all of those reasons, the list that I annexed to my order was the only list on which the applicants in the main application are properly identified by reference to admissible facts. There is no basis I can see on which an appeal court would disagree. The fourth ground of appeal, accordingly, stands no prospects of success.

It was finally contended that there is a compelling reason, notwithstanding any conclusion I might draw on the City's prospects of success, why I should send the matter on appeal. Mr Mosikili and Mr Mtshiyo, in their heads of argument described this case as novel.

But I do not see how. The principles that I applied in my judgment are virtually as old as South African law itself. Certainly what constitutes peaceful and undisturbed possession was first delineated in *Yeko v Qana* 1973 (4) SA 735 (A), a case that is over 50 years old. That definition has been confirmed in the *City of Cape Town* case in the Supreme Court of Appeal. It has also been confirmed in substance by the recent decision in *Residents of Setjwela Informal Settlement v the City of Johannesburg* 2017 (2) SA 516 (GJ).

It seems to me that the issues arising in this case are far from novel. They are, in fact, distressingly familiar. The City of Johannesburg, as it did in the *Setjwetla* case, has gone onto land and destroyed shacks. It is done so claiming the right to counter-spoliate. It has been told that its conduct exceeded the bounds of counter-spoliation. There is nothing new in that.

I accordingly find that the fifth ground of appeal, that there is a compelling reason to have my judgment reconsidered, whether by a full bench of this court or by the Supreme Court of Appeal, stands no prospect of success.

It is important, finally, to record what has not been seriously challenged in this application for leave to appeal. What has not been seriously challenged in this application

for leave to appeal is that the City of Johannesburg, on no less than seven occasions between 25 September and the 30 November 2023, demolished the applicants' shacks on the property. They did so after the construction of those shacks had commenced, and in many if not most cases after construction had been completed, and the applicants had actually moved into the shacks with their possessions.

10 On the binding authority in the *City of Cape Town* case, and on the authority in *Residents of Setjwetla Informal Settlement* (which are both themselves based on the authority of the appellate division in *Yeko v Qana*) once construction of a shack commences, the person who constructs it is in possession of the shack and the land it stands on. They may only subsequently be removed with a court order. Neither the City nor anyone else may lawfully counter-spoliate them by demolishing their shacks and excluding them from the land in the absence of such an order.

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There was no serious attack in the application for leave to appeal on that proposition. In the absence of such an attack, or on the factual findings underpinning that proposition, there can be no prospect of success on appeal.

For all these reasons, I make the following order:

1. The application for leave to appeal is dismissed.
2. The City of Johannesburg will pay the costs of the application.

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WILSON, J
JUDGE OF THE HIGH COURT
16 August 2024