

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG.**

Case Number: 2024/064315

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



SIGNATURE

09.9 2024

In the matter between:

**THE UNLAWFUL INVADERS OF PORTION 0 OF
THE TOWNSHIP FLEURHOF EXT 21 ERVEN 2887,
1946, 2948, 2953, 3004.**

Applicant

And

FLEURHOF EXT 2 (PTY) LTD and OTHERS.

Respondents

JUDGMENT

Noko J

Introduction.

[1] The applicants launched an application for reconsideration of the interim order granted in favour of the first respondent (*Fleurhof*) by Raubenheimer AJ on 18 June 2024. The applicants (“occupiers”)¹ were interdicted from, *inter alia*, invading the property, *to wit*, Portion 0 of Erven 2887, 2946, 2947, 2948, 2953, 3004 and 3005 of the Township Fleurhof Ext 21. (“*Properties*”)² with the return date being 26 August 2024. Occupiers are also seeking a *mandamus* against the sixth respondent (“*CoJ*”) to provide a temporary emergency accommodation and have brought an application for irregular proceedings against CoJ for having appointed two firms of attorneys who filed notices to oppose reconsideration application.

[2] The application is being opposed by Fleurhof and the sixth respondents (“*CoJ*”). In its opposition Fleurhof contends, *inter alia*, that the occupiers have failed to make a proper case for urgency. CoJ disputes urgency and further contends that no proper case has been made for an order directing CoJ to provide for the temporary emergency accommodation. CoJ has also raised a point *in limine* of non-joinder.

Background.

[3] There are *two ex parte* court processes which were undertaken by Fleurhof and the occupiers almost at the same time. The first one was in the Magistrate Court at the instance of the occupiers and the second one was in the High Court at the instance of Fleurhof (which is the subject of the application now serving before me). The Magistrate Court process was finalised and would be referred to in this *lis* only for the purposes of completeness.

¹ The word occupier is being used loosely as there is a dispute between the parties if the applicants were or are occupiers.

² Other orders are to interdict the occupiers “*from trespassing onto the properties, occupying any piece of land or unit on the properties, soliciting, assisting or instigating any person to act in contravention of the order, purporting to sell any unit on the said property, advertising or representing that they are authorised to sell a unit situated on the property.*”

[4] The occupiers approached the Magistrate Court for a spoliation order against Fleurhof contending that they have been unlawfully evicted from the properties. The proceedings was launched *ex parte* on 14 June 2024 and an interim spoliation order was granted with a return day being 11 July 2024. In the said papers the occupiers contended that they took occupation of the properties on 7 June 2024 and were illegally evicted on 10 June 2024. Fleurhof was served with the interim orders on 18 June 2024³ in the afternoon and proceeded to anticipate the return day on 19 June 2024. The interim orders were stayed on 20 June 2024 and discharged on 4 July 2024.

[5] In the meanwhile, Fleurhof, unaware of the proceedings in the Magistrate Court launched urgent *ex parte* proceedings in this court seeking orders to, *inter alia*, interdict the occupiers from invading the properties. Fleurhof states that it has entered into a joint venture with CoJ to build low income houses which process has been completed and the properties were ready for occupation.⁴ The application was precipitated by the threats made by the occupiers to invade the properties. The prayers sought in the application were in two parts. Part A was for an order, *inter alia*, interdicting the occupiers from invading the properties. Prayer B was for the final orders of the prayers set out in Part A of the application. The application served before Raubenheimer AJ on 18 June 2024 who granted the interim interdict sought.

[6] The occupiers became aware of the interim interdict and instituted this proceeding. The occupiers dispute that Fleurhof made out a proper case to approach the court both on *ex parte* and urgent basis. Further that the requirements for an interim interdict were not satisfied.

³ As it would be noted below Fleurhof was not aware of this orders at the time when it obtained interim orders in the High Court.

⁴ It is stated elsewhere in its papers that some of the units were not ready for occupation as yet.

Submissions by the parties.

[7] The judgment will first address itself to the points *in limine* of non-joinder raised by CoJ and the irregular proceedings raised by the occupiers. Thereafter the determination on the dispute about *ex parte* application, urgency and requirements for an interim interdicts.

Non joinder

[8] Counsel for CoJ contended that it had an agreement with JOSHCO (being the letting company within CoJ) which has to take over the properties and commence with letting processes to the suitably qualifying tenants. As such JOSHCO has an interest in the proceedings and should have been joined as a party. The failure by the occupiers to join JOSHCO is fatal to their application and it should be dismissed.

[9] The submission by the CoJ was shared by Fleurehof which contended that it was stated in its founding papers that CoJ was on the eve of handing over the properties to JOSHCO in terms of the agreement entered into between CoJ and JOSHCO. The said agreement requires CoJ to give JOSHCO an empty possession of the properties. JOSHCO has, by virtue of the said agreement interest in the subject matter and should have been joined.

[10] The occupiers on the other hand correctly contended that the application for reconsideration relates to the orders obtained by Fleurhof and if there was a need to join JOSHCO Fleurhof should have done so at the time of instituting the application. Except the relief sought for the provision of temporary housing against CoJ, the reconsideration application is not a new matter.

[11] The SCA held in *Naude*⁵ that “*The test whether there has been non-joinder is whether a party has a direct and substantial interest in the subject-matter of the litigation which may prejudice the party that has not been joined.*”⁶ The SCA referred with approval to the sentiments in *Gordon*⁷ where it was held that “*... if an order of judgment cannot be sustained without necessarily prejudicing the interests of the third parties that had not been joined, then those third parties have a legal interest in the matter and must be joined*”.⁸

[12] JOSHCO’s rights which are allegedly⁹ created by an agreement with CoJ relate to the renting out of properties transferred by CoJ to JOSHCO. Such rights will only accrue when CoJ has transferred the properties to JOSHCO and as such until such time that the properties have been transferred to JOSHCO the latter has no rights to exercise and none to warrant any protection by this Court. In any event JOSHCO is just an agent at the disposal of the CoJ. CoJ has stated that “*... after completion of the residential flats the flats would be handed over to JOSHCO for purposes of leasing the units for residential purposes*”.¹⁰ This seems to suggest that they were not ready to be transferred.

[13] Since the reconsideration primarily relates to the application brought by Fleurhof to interdict invasion by the occupiers the rights of JOSHCO are not the subject of the litigation hence adjudication of the application and the findings will not prejudice the legal interest of JOSHCO. As set out above Fleurhof did not find it necessary to join JOSHCO when instituting the proceedings and CoJ did not take quarrel with such a posture.

[14] In the premises the point *in limine* of on non-joinder has no merits and is bound to be dismissed.

⁵ *Absa Bank Ltd v Naude NO and Others* 2016 (6) SA 540 (SCA).

⁶ *Id* at para [10].

⁷ *Gordon v Department of Health, KwaZulu -Natal* (2008) (6) SA 522 (SCA)

⁸ *Id* at para [9].

⁹ CoJ has not attached the agreements to their papers.

¹⁰ See para 22.2 of the Sixth Respondent’s Answering Affidavit at CL 29-170.

Irregular proceeding.

[15] The occupiers contend that after service of the reconsideration application on CoJ the latter appointed two firms of attorneys who served notices to oppose on its behalf. The first notice to oppose was served by PG Matsheka Attorneys on 26 July 2024 and the second notice was served by Padi Attorneys Incorporated on 27 July 2024. This would have meant that the occupiers would have to serve two firms of attorneys with court processes which would financially stretch the occupiers who are impecunious. The service of the notice to oppose by Padi Attorney Incorporated whilst PG Matsheka's notice has not been withdrawn was irregular, so went the argument, and as such until PG Matsheka's withdrawal no audience should be accorded to Padi Attorneys. The occupiers' attorneys contend that the occupiers were prejudiced as they were then compelled to launch irregular proceedings against the CoJ to which they should be entitled to costs.

[16] The application for irregular proceeding was not clearly dealt with in CoJ's answering affidavit, except that during argument the counsel for CoJ contended that CoJ is represented by Padi Attorneys Incorporated who had also served opposing papers and no prejudice visited the Occupiers. The counsel was also not aware whether the first set of attorneys did withdraw as attorneys for CoJ.

[17] Rule 16(2) of the Uniform Rule of Court provides that once a party terminates mandate given to its attorneys such a party is expected to notify other parties of the new attorneys. This will accordingly be put into effect by the new attorneys. It does not appear that it was conveyed to PG Matsheka attorneys that the mandate has been terminated prior to the appointment of the second set of attorneys.

[18] There are merits in the irregular proceedings advanced by the occupiers that CoJ irregularly appointed two firms of attorneys. There were no cogent reasons advanced on behalf of the CoJ why this could not be construed as irregular and to this end the occupiers application is successful though the irregularity was rectified by the first set of attorneys having served notice of withdrawal. The occupiers should therefore be entitled to the costs.

Ex parte application.

[19] *Ex parte* applications are provided for in terms of rule 6(5) of the Uniform Rules of Court. Ordinarily once granted the opponent is entitled to anticipate the return date by setting down the matter on a 24 hours' notice. In such an instance there is no basis for the respondent to attend to address the question of urgency for anticipating the return day. The objective is to grant the same court an opportunity to consider the position of a party against whom an order was sought and obtained in its absence.

[20] The occupiers contend that ordinarily and in accordance with the principle of *audi alteram partem* another party to the *lis* must always be accorded a right of hearing and reply before an order is granted. There would be instances where due to exceptional circumstances the court may adjudicate over a *lis* and grant an order against the party who is not invited to court. A litigant seeking an order *ex parte* is enjoined to display utmost good faith and further demonstrate exceptional circumstances before the court grants an order. The occupiers contended that Fleurhof was not honest with the Court as there was a matter between the same parties pending in the Magistrate Court where two interim orders were granted for spoliation against Fleurhof. Had the Court been made aware of the pending *lis* which was between the same parties, the Court would not have entertained the application by Fleurhof. In view of the fact that Fleurhof had all the contacts of the occupiers and occupiers' attorneys it was therefore disingenuous to depose to an affidavit stating that it was not possible to serve the papers on the occupiers alternatively that Fleurhof did not know how or where to serve the occupiers, so went the argument. The Court should frown upon the Fleurhof's conduct in this regard. Reference was made of a return of service of the court order obtained by one of the occupiers, Olga, against Fleurhof which was served on Fleurhof and as such Fleurhof cannot argue that it was not aware that service could be on the occupiers or their legal representatives.

[21] The counsel for the occupiers further contended that second leg which Fleurhof failed to discharge to justify approaching the court on *ex parte* basis relates to the presence of exceptional circumstances. That these were not set out in the papers before the Court

granted the interim order. It must be noted, as the occupiers contended, that the reconsideration is not necessarily about the merits of the application but process which was undertaken by Fleurhof to approach the court without affording the occupiers *audi alteram partem*.

[22] Fleurhof persist with the argument that it did not have knowledge of the identities of the occupiers. In addition, the sheriff of the Court in Roodepoort did not timeously serve the *ex parte* spoliation orders granted by the Magistrate Court on 14 June 2024 and Fleurhof only became aware thereof in the afternoon of 18 June 2024 after the order was granted in the High Court. The return of service which the occupiers brought to the attention of the Court has no bearing on the application launched by Fleurhof as it relates to different parties altogether and not Fleurhof.

[23] In the premise, counsel for Fleurhof continued, the contention that Fleurhof failed to disclose the material facts and therefore not being honest with the court is therefore unfounded and unsustainable.

[24] I observed that the only reasons advanced by Fleurhof that *ex parte* application was warranted is that the occupiers refused to cooperate and provide their details and were already removed from the properties hence could not be served at the properties. Fleurhof stated that

[31] The Applicant does not have any contact details of the other Respondents,

[32] The Applicant does not know and is at present unable to ascertain the names of the invaders, or those unknown persons, who may join the land invasion, by the time that this application was heard.

[33] Needless to say, the invaders will not freely provide their names and most of them are opportunistic in their attempts.'

[25] Fleurhof states that as at the time of its application the occupiers were already removed from the properties at least three times, first, immediately after they invaded the units between 01:00 and 11:36 on Saturday, 8 June 2024,¹¹ second, after another invasion

¹¹ See para 64.20 of the Fleurhof's Founding Affidavit at CL29-37.

on 8 Saturday June 2024 at 14:48¹² and also another invasion on Sunday, 9 June 2024 at 7:45.¹³ Fleurhof contends that all these removal were *instander*.

[26] In contrast the occupiers argue that the occupation of the property was on 7 June 2024. This appears to be admitted by Fleurhof that occupation was on 7 June 2024 as it stated under oath at para 50.8 that “... *the First Respondent has to hand over these units, which were unlawfully invaded by the Applicants on 7 June 2024 in terms of contractual obligations to do so to Joshco.*”¹⁴ Underling added. Fleurhof seems to be approbating and reprobating, in one instance stating that invasion was in the early hours on Saturday and at the same time agreeing with the occupiers that occupation was on 7 June 2024. To this end it therefore appears that Fleurhof is not taking the court into its confidence.

[27] Notwithstanding the alleged difficulties which served as impediments for the application to be served Fleurhof requested that its order should be served *by announcing by a loud hailer...*,¹⁵ *by affixing on three notices boards, erected on prominent places, in close proximity at the entrance to the properties.*¹⁶ Finally to be served in any unit which may be occupied at the time of service. There is no motivation by Fleurhof to demonstrate why the same methods could not be used to serve the application on the occupiers instead of proceeding *ex parte*. Absent such motivation service which was requested in respect of the court order should have been occasioned by Fleurhof and then request condonation at the hearing before an urgent court. The principle of *audi alteram* is sacrosanct and cannot be left to vulnerabilities of the parties. Sutherland J (as he then was) stated in *BDFM Publishers*¹⁷ that,

“... the principle of Audi alteram partem rule is sacrosanct in the South African legal system. Although, like all other constitutional values, it is not absolute and must be flexible enough to prevent in advertent harm, the only time that a court will consider a matter behind a litigant speck are in exceptional circumstances. The phrase exceptional circumstances had she credibly, through

¹² Id at para 64.24 at CL 29.39.

¹³ Id at para 64.25.

¹⁴ See Answering Affidavit at CL 29.3.

¹⁵ See para 3.1. of the Applicant's Notice of Motion at CL 02-3.

¹⁶ Id at para 3.2.

¹⁷ *South African Airways Soc v BDFM Publishers (Pty) Ltd* 2016 (2) SA 561 (GJ).

overuse and habits of hyperbole, last match of its impact. To do that phrase justice it must mean ‘very rarely’-only if a countervailing interest is so compelling that a compromise is sensible, and then a compromise that is parsimonious in the deviation allowed. The law on the procedure is well established.”

[28] In the premises proceeding by way of *ex parte* is not justified and the application is bound to be dismissed on this basis alone.

Urgency.

[29] Reconsideration application is provided for in terms of rule 6(12)(c) of the Uniform Rules of Court. Just as in the *ex parte* application an order would have been granted in an urgent court in the absence of the respondent. The opponent is then given an opportunity to appear before the same court to consider its decision now having the version of the party against whom the order was made in its absence. The party bringing the reconsideration application need not address urgency of the reconsideration application as such a party is not necessarily initiating the process but just being allowed to present a version before a court which was already seized with the matter. It was held in *Competition Commission*¹⁸ that “[I]n an application for reconsideration under rule 6(12)(c) the court considers the matter *de novo* and the applicant in the original application retains the onus to justify the granting of the *ex parte* order.”¹⁹ The order being reconsidered in this instance will be the issue of urgency and merits as were argued by Fleurhof before Raubenheimer AJ.

[30] Rule 6(12)(c) does not prescribe the process to be followed when proceeding in terms of reconsideration application. The SCA held in *Afri Grain Marketing*²⁰ that

“The absence of prescription was intentional and the procedure will vary depending upon the basis on which the party applying for reconsideration seeks relief against the order granted *ex parte* and

¹⁸ *Competition Commission v Walmer Continental Edible Oils & Fats (Pty) Ltd and Others* 2020 (4) SA 527 (KZP).

¹⁹ Id at para [20].

²⁰ *Afri Grain Marketing (Pty) Ltd v Trustees for the time being of Copenship Bulklers A/S (In liquidation)* 2019 3 SA 321 (SCA).

in its absence. A party wishing to have the order set aside, on the ground that the papers did not make a case for that relief, may deliver a notice to this effect and set the matter down, for argument and reconsideration on those papers”.²¹

[31] Against the backdrop of the principles set out above I find that it was not necessary for the occupiers to argue urgency in the reconsideration application of the order granted in favour of Fleurhof, except for the order for provision of temporary accommodation being sought against CoJ.

[32] That notwithstanding, I will address arguments advanced by both parties regarding urgency of reconsideration application and of the Fleurhof application which was considered in the absence of the occupiers.

Urgency – Reconsideration application.

[33] As alluded to above the occupiers approached the urgent court for, *inter alia*, reconsideration in terms of rule 12(6)(c) of the Uniform Rules of Court for an order reconsidering. The occupiers referred the court to *Blue Rock Capital Limited*²² where the court held that “... to permit the respondents to themselves now claim lack of urgency on the part of the applicants would undermine audi alteram partem which rule 6(12)(c) gives effect to.”²³ Further that in *Faraday Taxi Association*²⁴ it was also held that “[F]rom the aforementioned two rules it is clear that such set down, or anticipation of the return day, are inherently urgent. There is accordingly no merit in the first point in limine. It is ruled that the matter is urgent.”²⁵

[34] Counsel for Fleurhof contends that the application for reconsideration failed to present any basis to deserve the audience of the urgent court. Further the directives of this

²¹ Id at para [12].

²² *United Medical Devices LL and Another v Blue Rock Capital Limited and Another* (13398/2015) [2016] ZAKZDHC 12 (4 March 2016).

²³ Id at para [42].

²⁴ *Faraday Taxi Association v Director Registration and Monitoring and Others* (58879/2021) 2022 ZAGPJHC (5 APRIL 2022).

²⁵ See para 27-1168 of the heads of argument. (2022 decision).

division prescribe the process that has to be followed to approach the court on urgent basis and occupiers have failed to comply therewith. The said directive further makes provision for the deviation where warranted and the presiding officer always possesses of discretion in this regard.

[35] Reference was made by Fleurhof of the judgment in *Re: Several Matters of Urgent Court Roll*²⁶ where the court held that the procedure as envisaged in Rule 6(12) is not there for the taking. In the premises, the argument continued, the occupiers should have approached the court immediately after receiving the court order of 18 June 2024. The first respondent further contends that there was hiatus between 10 June 2024 until 25 July 2025. Therefore, Fleurhof argues, urgency was self-created.

[36] CoJ on the other hand contended that the application that Temporary Emergency Accommodation be made available without proper reflection and basis being set out by the occupiers is meritless and equally the application being brought against CoJ is unsubstantiated. There are no details of who the occupiers are and where do they come from. They awaited a period of more 30 days to approach court and this was certainly a self-created urgency and should therefore be dismissed. Despite the passage of time, so the argument continued, the occupiers still request a period of 45 days to bring an application for mandamus. The proper approach would have been to couch their application into 2 parts, being for an interim relief pending the adjudication of part B on the mandamus.

[37] In my view and as stated above the issue of urgency in reconsideration application should not arise at all. The fact is that the urgent court took a decision and considered the Fleurhof's application and this falls to be reconsidered. The court should not consider whether the reconsideration is urgent to warrant being in an urgent court as the objective of the reconsideration is give the same urgent court another opportunity of considering the application with the benefit of now having the version of the parties against whom an order was granted in his absence. The judgment referred to by Fleurhof did not specific reference to Rule 6(1)(c) which was considered by the SCA in *Afri Grain Marketing* where it was

²⁶ See para 7.

held that the procedure is facts specific. Fleurhof did not address this specific requirements except setting out the general principles regarding urgent matters. It is however clear that in respect of the application against CoJ general principles and directives would find application.

[38] That notwithstanding I find that circumstances alluded to by the occupiers warrant the attention of the urgent court in respect of the reconsideration whereas in respect of the redress being sought against CoJ no proper case has been mounted to warrant the urgent attention of this court and to this end redress being sought against CoJ is bound to be struck off.

Urgency (Fleurhof's application).

[39] The occupiers contend that the application instituted by Fleurhof was not urgent and as such the court should struck it off the roll.

[40] Fleurhof contended that the basis of urgency is that the occupiers were threatening to invade the units and there was no other option but approach the court on urgency basis. Fleurhof averred that the occupiers had damaged the units and no assistance was forthcoming from members of the SAPS and security personnel was engaged at a huge cost estimated in the range of millions.

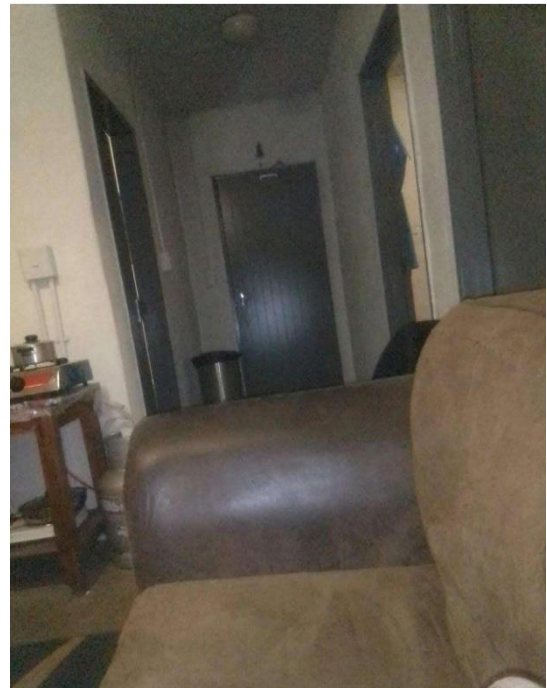
[41] It is trite law that one of the critical determining question on urgent matters is “*whether an applicant may be afforded substantial redress if the matter is heard in the ordinary course or not. If not, then the matter is urgent.*”²⁷ If one has regard to the relief being sought it becomes clear that approaching court on a normal basis Fleurhof would not in the long run obtain a substantial redress. Subject to what is set out below I find that Fleurhof's application deserves of the attention of the urgent court.

²⁷ *East Rock Trading 7 Pty Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others* (33767/11) [2011] ZAGPJBC 196 (23 September 2011) at para 7.

Interim interdicts

[42] The occupiers made submissions regarding the merits of the Fleurhof's application and contended that Fleurhof failed to satisfy the requirements for an interim interdict. At the time when Fleurhof's application was launched the Magistrate Court had issued a spoliation order in terms of which the occupiers were entitled to the possession and/ or occupation of the properties. Fleurhof could not exert any right on the properties as a result of those orders.

[43] The occupiers in advancing their case and in support of the contention that they were already in occupation and having settled before being illegally removed, attached photo of a unit which was fully furnished. They also attached a set of keys of the units. The photos at appended below.



[44] Fleurhof contended in retort that the photos of the unit attached is not that of the properties under the discussion and it appears to be a photo of an RDP house. Further that

indeed the keys which were shown are the keys of the inside rooms of the units and main doors were broken into by the occupiers. Fleurhof has attached photos which depicts, *inter alia*, motor vehicles of occupiers who were allegedly threatening to invade the properties but has failed to attach a photos of the unit to demonstrate that the difference between the rooms as shown on the occupiers' photo in relation to the units under discussion,

[45] Fleurhof further contends that it is the owner of the properties and that satisfied the requirements for a clear right which is more than what is required in interim interdicts. In any event the Magistrate's orders which were granted by the Magistrate Court in favour of the occupiers have been dismissed.

[46] The occupiers contend further that Fleurhof had an alternative relief of applying for eviction in terms for PIE alternatively launching criminal proceedings further alternatively to sue for damages and to this end the second requirement for an interim interdict was equally not satisfied. In contrast, Fleurhof stated that there was no need to apply for eviction as the units were not occupied. Second, Fleurhof submitted that the occupiers are impecunious and would not be able to settle any award for damages which may be granted in due course. The fact that the properties were due to be rented out in terms of the contract between CoJ and JOSHCO mean that Fleurhof may suffer irreparable harm as invasion by the occupiers may frustrate the handing over of units with *vacuo possessio*.

[47] The occupiers further contended that the parties who suffered and are suffering irreparable harm are the occupiers together with their respective family members and none could be demonstrated on the part of the Fleurhof. To this end this leg was also not discharged by Fleurhof.

[48] The last leg is the balance of convenience, the occupiers argued, does not favour Fleurhof. The fact that the families and the children of the occupiers ultimately had to be thrown in the street far outweigh any possible inconvenience to Fleurhof.

[49] Fleurhof contended further that the interim orders are not oppressive to the occupiers but there would be hardship which will visit Fleurhof if the interim order is set aside. Furthermore, the balance of convenience favours the retention of the order granted against the occupiers. In addition, that there is no right which can be exerted by the occupiers as they were removed *instanter* on 9 June 2024 and by 10 June 2024 invaders returned to their own homes and workplaces.

CoJ's submissions.

[50] CoJ contended that the occupiers should have had two-part application for an interim order and part B to comprehensively deal with the merits of their mandamus application. In any event the occupiers failed demonstrate that they are entitled to the redress requested since they were never occupiers of the units and were not evicted, they are neither faced with a disaster or any form of calamity and there is no confirmation of occupation of the units and finally that there is no evidence to demonstrate occupation of the units from 7 – 10 June 2024 as alleged by the occupiers.

[51] An order being sought for mandamus by the occupiers is a final order and the occupiers having failed to satisfy the requirements for a final interdict the application for mandamus in the form of ordering the TEA should be dismissed with costs.

Legal principles and analysis.

[52] For the purposes of an interdict Fleurhof has demonstrated that it is the rightful owner of the properties. To this end a right has been established. In contest therewith is whether the occupiers accrued any rights. If they were occupiers at some stage then they may have had rights as protected by PIE. Fleurhof contends that the occupiers never took occupation as its security personnel and members of the SAPS acted swiftly to remove them from the units. As alluded to above the removal allegedly took place on three different occasions between 8 and 10 July 2024.

[53] The occupiers on the other hand contended that they occupied the properties on 7 June 2024.²⁸ Further that they were unlawfully evicted by the employees of Fleurhof. The occupiers presented evidence through photos of the units and keys to demonstrate proof of occupation. In addition, it is accepted by both parties that indeed the occupiers are in possession of the keys though for the inside rooms and they broke the main entrance to move into the property.

[54] One would be inclined to ask whether the occupiers were in occupation and if so, whether Fleurhof has satisfied the requirements from the SCA in *City of Cape Town*²⁹ that the counter spoliation was swift enough to obviate taking complete occupation otherwise Fleurhof would have been required to approach court in terms of PIE if eviction is sought.

[55] The SCA in *City of Cape Town* held that

[11] "... it is clear that counter-spoliation is only permissible where: (a) peaceful and undisturbed possession of the property has not yet been acquired, i.e. when the taking of possession is not yet complete; and (b) where the counter-spoliation would not establish a fresh breach of the peace. Once a spoliator has acquired possession of the property and the breach of the peace no longer exists, counter-spoliation is no longer permissible. The person who seeks to counter-spoliate, in this case the City, must show two requirements: (a) the (homeless) person was not in effective physical control of the property (the possessory element); and (b) thus, did not have the intention to derive some benefit from the possession (animus element).

[12] This means, 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 (instantly) 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,

²⁸ See also Fleurhof stated at para 50.8 of the Answering Affidavit CL 29.23 where it is stated that "*However, this would not be so as the First Respondent has to hand over these Units which were unlawfully invaded by the Applicants on 7 June 2004...*".

²⁹ *City of Cape Town v South Africa Human Rights Commission* (1337/2022; 368/2023) [2024] ZASCA 110 (10 July 2024).

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).

[56] The assertion by Fleurhof is that occupation commenced at 01:00 in the morning and counter spoliation commenced at 11:56. Having regard to the set up as shown on the photos referred to above it appears that there was already occupation and the taking of possession was complete. The window opened to a counter spoliator shut once the occupier has settled. And once occupation has taken place it is irrelevant whether it was or was without consent and the owner cannot contend that because I resisted occupation then the window for spoliation is permanently opened. It is noted that in this instance that there was no need for the occupiers to build a structure and as such the time to settle is occupiers would be less. Fleurhof having just stated that *“They were removed immediately upon entering the units and none of the applicants had effective control of the units.”* On the version of Fleurhof removal of the occupiers commenced approximately 10 hours after they took occupation on 8 June 2024. At the risk of being repetitive Fleurhof affidavit also states that occupation took place on 7 June 2024.

[57] The SCA in City of Cape Town relates to the eviction from land belonging to the State. In this instance land belongs to a private person and one may wonder whether same should apply. There are no reasons for differentiation as rights enshrined in the constitution should apply both horizontally and vertically. In any event the development which is the subject matter of the *lis* was in partnership with CoJ³⁰ and the latter was responsible to decide on the tenants who would qualify. Fleurhof having stated that *“... all units have been allocated to the deserving applicants.”*³¹

[58] That being said I am not called to consider whether the occupiers are entitled to occupation or not but whether Fleurhof is entitled to an interdict sought. As set out above there is contest or dispute between the assertions whether the right as the owner should give way to the sights of an occupier accorded by the PIE Act of both parties and ordinarily

³⁰ See para 64.2 of the Answering Affidavit CL 29-30, where it is stated that *“The property is being developed in partnership with the Sixth Respondent, City of Johannesburg Metropolitan Council.”*

³¹ See para 39 of the Fleurhof Answering Affidavit, CL29-18.

in such an instance and as guided by the judgment in *Webster*³² I am enjoined to consider whether having regard to the improbabilities Fleurhof may succeed at trial. With the evidence presented by the occupiers Fleurhof's prospects appears to be slim.

[59] It was stated in *Iclear*³³ that Rule 6(5)(g) of the Uniform Rules of Court allows the court to refer to any specified issue for oral evidence if a dispute of fact cannot be readily resolved from the papers. In this regard the court may order that the deponent appear personally to provide evidence or grant such a deponent or any other person to be subpoenaed to appear and be cross examined as a witness for that purpose.³⁴

[60] I therefore conclude that the real right which has been demonstrated by Fleurhof has to give way to the exercise of the rights available to occupiers and to this end the relief sought would not have been granted.

[61] It appears that the efforts of Fleurhof was to obtain an order to sanitise their conduct of evicting occupiers who appear to have taken occupation of the properties. In terms of the doctrine of *in pari delectus portior est conditio defendentis* (unclean hands principle)³⁵ Fleurhof would not be entitled to the relief sought in these papers.

³² *Webster v Mitchell* 1948 (1) SA 1186 (WLD). "In the application for a temporary interdict, applicant's right need not be shown by a balance of probabilities. It is sufficient if such right is prima facie established., though open to some doubt. The proper manner of approach is to take fact as set out by the applicant, together with any fact set out by the Respondent which applicant cannot dispute and to consider whether, having regard to the inherent probabilities, the applicant could on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered, and if serious doubt is thrown upon the case. Of applicant, he could succeed. In considering the harm involved in the grant of refusal of a temporary interdict, where a clear right to relief is not shown, the Court acts on the balance of convenience. If, though, there is prejudice to be to the respondent., that produces less than that of the applicant, the interdict will be granted. Subject, if possible, to conditions which will protect the wrongdoer."

³³ *Iclear Payments (Pty) Ltd v Honeywell* (D7512/2021) [2023] ZAKZDHC 5 (13 February 2023).

³⁴ *Id* para 13.

³⁵ This principle is still recognised in our law See *Villa Crop Protection vs. Bayer Intellectual Property* 2024 (1) SA 331 (CC) where the court stated that "The clean hands principle warrants the exercise by the Court of its power not to assist a party that has committed a substantial wrongdoing in connection with the very patent it would enforce".

[62] In view of the contest and the unclean hands principle the relief sought would not be granted and having concluded a set out herein I need not be detained by other requirement for an interim interdict.

Conclusion

[63] The application launched by Fleurhof is bound to fail as it did not satisfy the requirements for an *ex parte* applications and the requirements for an interdict were also not satisfied.

[64] The irregular proceeding instituted by the occupiers has merits but since the cause for the complaint has been removed by the withdrawal PG Matsheka as attorneys of record the occupiers are entitled to cost order against CoJ.

[65] The occupiers have however failed to make a proper case for urgency in respect of an order for the provision of temporary emergency accommodation sought against CoJ.

Costs

[66] Principles with regards to costs order were settled in *Biowatch*³⁶ and in *Ferreira*³⁷ where it was restated that a party who is out of pocket as a result of the losing party should be able to recoup from the losing party. *Boiwatch* is also the authority for the decision that where a losing was attempting to advance a case predicated on rights enshrined in the Constitution should not be mulcted with costs order.

[67] In the premises the following order is granted.

³⁶ *Biowatch Trust v Registrar, Genetic Resources, and Others* 2009 (6) SA 232 (CC) at para 1.

³⁷ *Ferreira v Levin NO and Others v Vryenhoek and Others v Powell NO and Others* 1996 (2) SA 621 (CC) (1996 (4) BCLR 441 [1995] ZACC 2).

- a) The order granted *ex parte* against the respondents (Unlawful Invaders) on 18 June 2024 in their absence by Raubenheimer AJ is hereby reconsidered;
- b) The order granted by Raubenheimer AJ is amended as follows:
 - “The application is dismissed with costs.”
- c) The counter-application by the respondents for *mandamus* is struck off the roll with no order as to costs.
- d) The point *in limine* of non-joinder by the sixth respondent of JOSHCO is dismissed with costs.
- e) The sixth respondent is ordered to pay the costs in respect of the application for irregular process.



M V Noko
Judge of the High Court.

Dates:

Hearing: 30 July 2024.

Judgment: 9 September 2024

Appearances:

For the Applicant (Fleurhof): Adv JW Klok.

Instructed by Barnard Incorporated, Johannesburg

For the first respondent (Unlawful Invaders): Adv. KM Ntjana.

Instructed by BJ Seete Attorneys, Johannesburg.

For the sixth respondent : Adv Malema

Instructed by Padi Incorporated, Johannesburg