

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

Case No: **050803/2022**

REPORTABLE: No

OF INTEREST TO OTHER JUDGES: No

REVISED

27 JUNE 2025

In the matter between:

CITY OF EKURHULENI METROPOLITAN Excipient /Applicant
MUNICIPALITY

MINISTER OF HUMAN SETTLEMENT Second Excipient

MEC: GAUTENG DEPARTMENT OF HUMAN Third Excipient
SETTLEMENTS AND PUBLIC WORKS

And

NU-WAY HOUSING DEVELOPMENTS (PTY) Plaintiff/Respondent
LIMITED

In re:

NU-WAY HOUSING DEVELOPMENT (PTY) Plaintiff
LIMITED

and

CITY OF EKURHULENI METROPOLITAN MUNICIPALITY First Defendant

MINISTER OF HUMAN SETTLEMENT Second Defendant

MEC: GAUTENG DEPARTMENT OF HUMAN SETTLEMENTS AND PUBLIC WORKS Third Defendant

REGISTRAR OF DEEDS: PRETORIA Fourth Defendant

THE ILLEGAL OCCUPIERS OF THE PROPERTY SITUATED AT PORTION 83 (A PORTION OF PORTION 73) OF THE FARM OLIFANTSFONTEIN 410 J-R Fifth Defendant

THE ILLEGAL OCCUPIERS OF THE PROPERTY SITUATED AT PORTION 84 (A PORTION OF PORTION 73) OF THE FARM OLIFANTSFONTEIN 410 J-R Sixth Defendant

THE UNKNOWN OR UNIDENTIFIED OTHER PARTIES ACTING PERSONALLY AND/OR THROUGH, UNDER AND/OR REPRESENTING THE FIFTH TO SIXTH DEFENDANTS JOINTLY AND/OR SEVERALLY Seventh Defendant

THE SHERIFF: KEMPTON PARK Eighth Defendant

THE SOUTH AFRICAN POLICE SERVICES: TEMBISA BRANCH Ninth Defendant

This judgment is prepared and authored by the Judge whose name is reflected as

such and is handed down electronically by circulation to the parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for handing down is deemed to be 27 June 2025.

JUDGMENT

RETIEF J

INTRODUCTION

[1]The matter arises from a delictual action instituted by the Plaintiff [Nu-Way] against the First Defendant [Municipality] and others on the basis that the Municipality unlawfully took control and possession of its property, Portion 83 and 84 (a Portion of Portion 73) of the Farm Olifantsfontein 410 J-R [collectively the property] and, that it together with the Second Defendant, the Minister of Human Settlements [the Minister] and the Third Defendant, the MEC: Provincial Department of Human Settlements and Public Works [MEC] caused the Fifth and Sixth Defendants [illegal occupiers] to occupy the property by allowing them to erect illegal shelters thereon. Nu-Way now, *inter alia*, seeks compensation from the Municipality, the Minister and the MEC in the form of common law damages, alternatively constitutional damages, further in the alternative it seeks the eviction of the illegal occupiers from the property with costs.

[2]The Municipality, the Minister and the MEC have all excepted to Nu-Way's amended particulars of claim. Procedurally, Nu-Way's amended particulars of claim was triggered by an initial combined rule 23 and 30 notice served by the Municipality. The Municipality, who was still not satisfied with the amended particulars of claim, caused a second combined notice in terms of rule 23 and 30 to be delivered . This procedural step did not elicit a response from Nu-Way. The Municipality set its exception down for hearing and on the 30 August 2023 launched an application in terms of rule 30. The Minister and the MEC then joined the Municipality and excepted to Nu-Way's amended particulars of claim. This too

did not elicit a response from Nu-Way. The Minister and the MEC filed their exception.

[3]All the parties were in agreement that because the grounds relied on in the Municipality's rule 30 application overlapped with the grounds it raised on exception, both could conveniently be adjudicated *pari passu*. The matter before this Court proceeded on that basis. This Court now deals with both of the exceptions and the rule 30 application. To avoid confusion reference to the parties will be made as cited in the action.

[4]Nu-Way did not formally oppose the rule 30 application but raised two in *limine* points. The first was that the Municipality's rule 30 application is out of time and that, in the absence of an explanation for such delay, the Court should not entertain the application. The second was that the Municipality failed to address the aspect of prejudice in its founding papers and on that basis alone, the application should be dismissed. The Municipality now aware of the points to be taken at the hearing deals with its response in its written heads of argument. It therefore appears prudent then to first deal with this in *limine* point/s as the determination thereof will dictate the necessity for this Court to deal with the grounds raised in the rule 30 together with those raised by way of exception.

THE RULE 30 APPLICATION

[5]The central issue in the Municipality's rule 30 application is that the amended particulars of claim offend rule 18, in particular rule 18(4) for lack of particularity. It is common cause that the 13 (thirteen) grounds of attack overlap the majority of the grounds raised on exception. Although two (2) points in *limine* are raised by Nu-Way, logically if the first point raised will be decisive.

[6]It is common cause that the Municipality's rule 30 application was delivered out of time. Nu-Way contends that the Municipality is therefore time barred to prosecute the rule 30 application unless it seeks an extension of time and/or condonation in terms of rule 27. Upon failure by a party to adhere to the times prescribed in the rules, non-compliance arises and a party, like Nu-Way, is entitled to take this

stance in the absence of an agreement to the contrary. Upon the Municipality becoming aware of this point being taken and, on what basis it was taken, it was open to the Municipality to file an affidavit satisfactorily explaining the delay to enable the Court to understand how it came about, and to assess conduct and motive. The explanation is required for the entire length of the delay.¹ In this way, a Court is able to exercise its wide discretion and condone the non-compliance if it can't determine or be satisfied that good cause has been addressed or demonstrated.

[7]The fact that an application is filed out of time does not render it an irregular step as envisaged in terms of rule 30 and as argued by the Municipality. Nu-Way is not challenging that the step taken itself, to file the rule 30 application, is irregular in any form, but that it is simply out of time. In fact, Nu-way could have raised this complaint at the date of the hearing, but it chose to do so timeously to allow the Municipality to remedy it and to file an affidavit so that this Court could be in a position to exercise a discretion.

[8]The Municipality did not file an affidavit nor did it seek condonation for the extension of the time non-compliance. Nu-Way's point in *limine* succeeds and the rule 30 application was filed out of time without explanation. Therefore it is not necessary for this Court to deal with the remaining point in *limine* nor the grounds raised by way of rule 30 notice. Notwithstanding, the points raised by the Municipality on exception can conveniently be dealt with and in this way, no unnecessary delay is caused in the resolution of the matter.

[9]This Court now turns to the exceptions before it.

THE EXCEPTIONS

[10]From the pleadings it appears that the nub of attack raised by the Municipality and the Minister and MEC is in respect of claims 1 and 2 of Nu-Way's amended particulars of claim. The Municipality raised 13 grounds of complaint but has

¹ ***Van Wyk v Unitas Hospital and Another*** (CCT12/07) [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) (6 December 2007) at par 22.

indicated that it does not wish to persist with complaints 8, 10, 11 nor 13. In argument their Counsel further refined the attack by stating that the exception raised in respect of claim 1 (complaints 2, 3, 4, 5, 6, and 9) is on the basis of vague and embarrassing and that they are unable to plead to such allegations, and in respect of claim 2, (complaints 1 and 12) that Nu-Way's claim for compensation does not sustain a cause of action. The Municipality seeks that the offending paragraphs in claim 1 and that claim 2 be struck.

[11]The Minister and the MEC raise 2 grounds on exception on the basis that the averments which are necessary to sustain a cause of action are lacking and that such averments are bad in law.

[12]To grasp the reason for the complaints requires an understanding of claims 1 and 2 and how they arose, as pleaded, so that, at exception stage, all the possible readings of the facts can be explored² as against the complaints.

Synopsis of pleaded case in respect of the complaints raised in claim1 and claim 2

[13]Nu-Way, a property development company aims to promote and facilitate the provisions of affordable low-cost housing to low-income earners in South Africa. It is the lawful owner of the property upon which it, at its cost established two (2) townships, Tswelopele Proper and Tswelopele Extension 1. Nu-Way in 2016, as the owner transferred two erven, Erf 3[...] in Tswelopele Proper and Erf 5[...] in Tswelopele Extension 1 to beneficiaries. However it pleads that as a result of the Municipality's intentional conduct the Municipality refused to consent and allow transfer, therefore no further erven have been transferred. This conduct persists notwithstanding a Court order dated the 28 September 2021 in which Nu-Way was ostensibly granted authority to alienate and transfer erven situated on its property.

[14]Instead, the Municipality has allowed the illegal occupiers to take occupation of the property, it has taken civil possession of the property and, together with the Minister and MEC who, notwithstanding their obligations and due process in terms

² ***Tembani and Others v President of the Republic of South Africa and Another*** 2023 (1) SA 432 (SCA) para 14.

of the provisions of the Housing Act, have both caused or allowed such illegal occupiers to erect low-cost housing on the property. The low-cost housing constituting illegal structures. This constituting the pleaded the unlawful conduct unlawful.

[15]Such unlawful conduct constituting an infringement on Nu-Way's ownership right of possession. It has not received any compensation for its loss and/or for its deprivation of control and/or occupation of the property occasioned by the unlawful conduct and as a result thereof has suffered damages. Nu-Way pleads that the property can't be repossessed, alternatively, it would in any event be unfair to uproot the community of illegal occupiers which have already established themselves on the property. In consequence, Nu-Way seeks pecuniary damages, being the market value of the property, alternatively constitutional damages for the loss it had suffered for the infringement of its property rights, or it seeks the common law to be developed in terms of section 39 of the Constitution.

[16]Against this brief background this Court deals with the exceptions.

MUNICIPALITIES EXCEPTION

[17]Of the remaining complaints, complaint 1 and 12 overlap and are the central attack against the claim of compensation, in particular as claimed in claim 2. The remaining complaints 2, 3, 4, 5, 6, 7 and 9 all attack claim 1. This Court will commence with the challenges advanced as a result of vagueness constituting an embarrassment and an inability to plead thereto.

Claim 1: Complaints 2, 3, 4, 5, 7

[18]Nu-Way's amended particulars of claim are drafted according to a particular format. The format was confirmed by Nu-Way's lead Counsel in both his written and in oral argument. Paragraphs 12 to 52 he confirmed, deal with and are headed 'Background to Plaintiff's Claim'. The background to the Nu-Way's claim is further divided into five sub-headings dealing with the following subject matters: Property, the Township dispute, the Housing Development Scheme, Nu-Way's

ownership rights and the Possession and occupation of the property. Nu-Way's standard reply to the complaints raised as against paragraphs 27- 29, 32, 36-36.6 and 53 of the amended particulars of claim, being complaints 2, 3, 4, 5 and 7, are that the averments do not constitute *facto probanda* upon which its cause/s of action is/are based nor premised and, in consequence Nu-Way argues that it did not have to plead it [standard reply].

[19]Unfortunately, Nu-Way did plead it and what of the remaining paragraphs which make up a great deal of its background, being the remaining portions of paragraphs 12-52 which are not under scrutiny? It's not so much the volumes, but, as contended by Counsel for the Municipality, that such information, at times, is repeated and fleshed out under the different sub-headings. The fleshing out of information when repeated has created inconsistencies, causing confusion. The confusion has been compounded by the fact that the Municipality, in an attempt to plead complains that it can't discern whether the facts are pleaded for background purposes or as factors for consideration in respect of the compensation claim. Therefore, the Municipality finds it difficult to be pleaded. Such difficulty and the unnecessary averments renders the amended particulars of claim vague and embarrassing.

[20]Even if the Municipality accepts Nu-Way's standard reply which is now after the facts is being explained, Counsel for the Municipality argues that this does not assist Nu-Way and invited the Court to consider the matter The Secretary for Finance v Esselman³ in which the Court highlighted that:

"In my understanding of the formulation of the exceptions none of the defendants have taken issue with the prolixity of the particulars of claim. Likewise there is no objection, per se, to the pleading of history. The objection is to the plaintiff's failure to set out clearly what is history to which the defendants do not have to plead or those section of the particulars of claim which have no relevance against a particular defendant. The paragraphs listed as being irrelevant in the case against the third defendant

³ 1988 [1] SA 594 SWA 577 G-H read with Erasmus, *Superior Court Practice*, RS 20, 2022, D1-232B.

which number approximately 27 demonstrate this point graphically. There is no onus on any of the defendants to analyse and determine which of the paragraphs in the particulars of claim refer to them and consequently must be pleaded to. It is the duty of the plaintiff to set this out clearly and concisely so that there can be no doubt what case each defendant has to answer to.”

[21]Nu-Way’s standard reply, with reference to the engineering agreement as referenced in complaint 2 and 4, with reference to the consent which was sought by the Municipality to allow or pass transfer of erven to beneficiaries as referenced in complaint 3 and 5 and the relevance of the Court order in September 2021 in respect of the pleaded deprivation of control and beneficial possession of the property with reference to complain 7, is that it need not have pleaded that information. Moreover, Nu-Way contends that the Municipality can in any event obtain the information it seeks, in so far as it is relevant and does not constitute evidence to be led at the hearing of the action, by way of further particulars.⁴

[22]The difficulty with Nu-Way’s standard reply is that having regard to the basis of the delictual claim 1, the unlawful conduct relied on by Nu-Way as against the Municipality in respect of the property is causally linked by paragraph 56 which states that:

*“[56] The first defendant, knowing that the plaintiff is the registered owner, has exercised effective control and possession (own emphasis) of the properties in the manner as pleaded supra (own emphasis) and *infra*.”*

[23]Logically, “*supra*” can only mean the preceding paragraphs in relation to paragraph 56 to ascertain the manner of effective control and possession of the properties by reference. Therefore, in so far as effective control and possession of the properties is relied on to demonstrate the unlawfulness of such conduct by the Municipality, the information as background and history is not clearly severed from the cause of action as stated in the standard answer by Nu-Way. The Municipality

⁴ **Jowell v Bramwell-Jones and Others** 1998 (1) SA 836 (W) at 900 J.

should not be asked to try and discern which paragraphs “*supra*” relates to. This is why if information is to be pleaded and is purely for history, the pleader should do this with caution⁵ as the pleadings may be rendered vague and embarrassing. Considering the standard argument by Nu-Way, such complaints on the basis of vague and embarrassing must stand in respect of these complaints.

Complaint 6 and 9

[24]Both complaints center around Nu-Way’s inability to make reference to the exact sections of a statute relied upon. With regard to complaint 6, the complaint is that Nu-Way didn’t specify which provisions of the National Environmental Management Act, 107 of 1988 [NEMA] in paragraph 39 it relied on when it pleaded that the Municipality, the Minister and the MEC impacted on the rights of Nu-Way and the community, which it alleges caused or is likely to cause an adverse effect by the person in control of or using the land. Reference to NEMA is pleaded under background facts under the sub-heading ‘Property’.

[25]Although it is trite that a specific section need not be pleaded, reading the amended particulars of claim as a whole it is still unclear what the reason for the allegations are which are to be duly supported with reference to NEMA.

[26]In complaint 9, the Municipality, with reference to the illegal structures in paragraph 64, pleaded that the structures erected or allowed to be erected by the Municipality and the unlawful occupiers did not comply with the National Building Regulations and Building Standards Act, 103 of 1977, the Spatial Planning and Land Use Management Act, 16 of 2003 and its regulations and the relevant Tshwane Town Planning Scheme and the zoning of the property. This supporting the conclusion relied on by Nu-Way that the low-cost housing are illegal structures.

[27]Although Nu-Way correctly argues that reference to particular sections of a statute need not be pleaded, it is trite that if relief upon as a cause of action, that such reliance must be formulated in clear terms so that from the reading of the

⁵ See Footnote 1.

particulars of claim, it would be clear to the reader which provision the pleader intends to rely upon at trial.⁶ This makes perfect sense so that each party knows what case it must meet. Nu-Way does not engage with this argument in any way other than to rely on the general principle already referenced to. With reference to the Fund Trust (Pty) Ltd (in liquidation) matter Court considered a situation where particulars of claim were lacking the pleaded reference to a specific section, section 53(b) of the 1973 Companies Act. In so doing, Hefer JA relied on and made reference to an extract by quoting the Court *a quo* (per Tebbutt J). The quoted reference is:

“It is not necessary in a pleading, even where the pleader relies on a particular statute or section of a statute, for him to refer in terms to it provided that he formulates his case clearly (see Ketteringham v City of Cape Town 1934 AD 80 at 90) or, put differently, it is sufficient if the facts are pleaded from which the conclusion can be drawn that the provisions of the statute apply (see Price v Price 1946 CPD 59; Wasmuth v Jacobs 1987 (3) SA 629 (SWA) at 6341). I am of the view; the plaintiff has pleaded all the factual allegations so as to justify reliance on 53(b).”

[28]The question is, if the facts alleged in the particulars of claim are established at trial, will they bring the section into operation without reference to a specific section? On a reading of the particulars of claim as a whole and at the exception stage, the applicability of the NEMA is not apparent with regard to complaint 6 and although vague its vagueness does strike at the cause of action as pleaded in claim 1 and for that reason it must fail under exception. This may have been a different outcome in respect of the rule 18(4) complaint.

[29]Complaint 9 as raised and reasoned must also fail.

Claim 2: Complaint 1 and 12

⁶ *Fund Trust (Pty) Ltd (in liquidation) v Van Deventer* 1997 (1) SA 710 (A) at 725H-726A.

[30]According to the Municipality, complaint 1 and 12 overlap in that they are both directed at the compensation claimed for the *de jure* or *de facto* occupation of the property by the illegal occupants. The Municipality complains that the claims for compensation lack averments necessary to disclose a cause of action in that:

30.1. there is an unexplained delay to vindicate their ownership rights; and

30.2. there is failure to pursue alternative effective remedies.

[31]In argument Counsel for the Municipality explained that complaints 1 and 12 were to be confined to claim 2, being a claim for constitutional damages, alternatively calling for the development of the common law.

[32]As this Court understand the attack, the Municipality does not complain that Nu-Way has not pleaded sufficient facts to establish the fundamental right involved nor that a determination of whether there was a breach of the fundamental right can't be established nor harm for that matter but, the complaint strikes at Nu-Way's entitlement to claim constitutional damages on that basis for its failure to positively plead further facts. If that is so, such further facts are those of unexplained delay and failure to pursue alternative effective remedies.

[33]These complaints are raised by the Municipality when Nu-Way, in claim 2, only requests the trial court to exercise its discretion to consider constitutional damages if its claim 1, at common law, is not available as a suitable remedy. In consequence its appreciates that its entitlement to constitutional compensation is an exercise of the Court's discretion having regard to all the facts on a case to case basis.

[34]Notwithstanding a consideration of the complaints.

Unexplained delay

[35]The Municipality argues that Nu-Way has failed to allege *facta probanda* establishing that its delay of over twenty (20) years in seeking to vindicate its right

of ownership by either claiming compensation or eviction was itself not culpable and unreasonable.⁷ The Municipality argues that without the *facta probanda* dealing with delay, it has not established a cause of action as the unexplained twenty (20) year delay is patently culpable and unreasonable and it is therefore not entitled to the relief it is seeking without the missing material facts.

[36]Nu-Way argues that the question of delay is a fact-bound inquiry⁸ as opposed to *facta probanda* and accordingly the Court should be reluctant to make a decision at the exception stage in respect of a fact-bound issue. Furthermore, it contends that it is open for the Municipality to raise unreasonable delay as a defence.

Failure to peruse other effective remedies

[37] The Municipality argues that Nu-Way failed to allege facts establishing that it sought a court order for the eviction of the illegal occupiers.⁹ Furthermore that Nu-Way failed to allege that it sought a decision by the Municipality in terms of section 9(3) of the Housing Act 107 of 1997 [Housing Act] which empowers the Municipality to expropriate land from private owners and Nu-Way has failed to allege that it sought such a decision in relation to the erven on the property and if such decision was not made, then the Municipality argues that the correct remedy would be a review under the Promotion of Administrative Justice Act, 3 of 2000 or the principle of legality if appropriate.

[38]Nu-Way has appreciated that if it has established a constitutional claim as pleaded, it is the Court's obligation to consider what effective relief will be having regard to all the facts. What appropriate compensation or relief will be in the circumstance, is a fact-bound inquiry. Such logically can therefore not be pinned to *facta probanda* which strikes at the heart of a cause of action enquiry at this stage.

⁷ ***Modderfontein Squatters, Greater Benoni Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae; President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)*** 2004 (6) SA 40 (SCA) at par 32-38. See also ***President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae)*** 2005 (5) SA 3 (CC) at par 28 and 38.

⁸ ***Klokov v Sullivan*** 2006 (1) SA 259 (SCA).

⁹ See footnote 7.

[39]The necessity to plead further facts whether dealing with undue delay or appropriate remedy to sustain the compensation does not strike at the core of the cause of action and surely then can't be a bar for compensation in respect of claim 2.

[40]The Municipality's complaints must fail.

EXCEPTION OF THE MINISTER AND THE MEC

[41]Confusingly, the Minister and the MEC on exception call for the dismissal of claim 1 and 2 on the basis that claim 1 and 2 of Nu-Way's amended particulars of claim lack averments which are necessary to sustain a cause of action and are bad in law. On the face of it, a dismissal of the claims not apparent.

[42]The Minister and MEC raise two grounds in respect of both claim 1 and claim 2 on the basis that no cause of action has been established.

Ground of exception in respect of claim 1

[43]The Minister and MEC contend that the amended particulars of claim do not set out facts from which the conclusion can be drawn that the provisions of the Housing Act as set out in the amended particulars of claim apply. It is on this basis that it contends that it relies for lack of averments to bring claim 1 within the statute, the Housing Act. Such a complaint, in context, does not attack the core of Nu-Way's cause of action.

[44]Nu-Way's claim arose from delict and as such, reference to the Housing Act is to set out the statutory obligations upon which they will rely to establish the Ministers and or the MEC's statutory obligations. At the exception stage a Court accepts that the property was earmarked for low-cost housing in terms of the Housing Act as pleaded and that the erven were part of a housing initiative scheme. Flowing from that the provisions relied on in the Housing Act, if such not implemented as obligated, then as pleaded, such establishes wrongfulness, an element of delict.

[45]In consequence, claim 1, the delictual claim does not have to be brought within the ambit of the Act as relied on in this ground as Nu-Ways claim does not arise in terms of the provisions of the Act but arises in delict. In consequence, this complaint must fail as relied on.

Ground 2 in respect of claim 2

[46]The nub of ground 2 goes to the alternate remedy, the need for the Court to develop the common law in terms of section 39(2) of the Constitution in circumstances where another remedy already exists with reference to the common law and eviction in claim 3. The complaint is not raised as against the lack of allegations to sustain the relief sought (i.e. sufficient facts to sustain the development of the common law), but rather that it is inappropriate relief under the circumstances. In this regard, the reasoning in paragraph [38] above is repeated. In consequence, this ground must fail.

[47]The Minister and the MEC's grounds failed to address an appropriate legal attack striking at the core of Nu-Ways's cause of action as called for when raised on exception on this basis.

COSTS

[48]There is no reason why the costs should not follow the result.

[49]The following order:

1. The late filing of the First Defendant's Uniform Rule 30 application is not condoned.
2. The First Defendant is ordered to pay the Plaintiff's costs occasioned by the rule 30 application including, the cost of two Counsel if so employed, both taxed on scale C.

3. Grounds 2, 3, 4,5 and 7 of the First Defendant's exception succeeds.
4. The Plaintiff is ordered to, within 1(one) month from date hereof, amend its amended paragraphs 27-29, 32,36-36.6 and 53 of its particulars of claim, failing which, paragraphs 27-29, 32,36-36.6 and 53 will be struck.
5. The Second and Third Defendants' exception is dismissed with costs and the Second and Third Defendants are jointly and severally liable to pay the Plaintiff's costs, including the cost of two Counsel if so employed, both taxed on scale C.

L.A. RETIEF

Judge of the High Court
Gauteng Division

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