



IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MIDDELBURG

CASE NO: 2026-158935

- (1) Reportable: Yes/~~No~~
(2) Of interest to other Judges: Yes/~~No~~
(3) Revised: Yes/~~No~~

SIGNATURE

DATE

12/08/2026

In the matter between:

HELENCA VERWEY N.O

FIRST APPLICANT

HESTER SOPHIA ELIZABETH ROSSOUW

SECOND APPLICANT

HESTER SOPHIA ELIZABETH ROSSOUW N.O

THIRD RESPONDENT

JACOB OBERHOLZER N.O

FOURTH RESPONDENT

BELMARIE ROSSOUW

FIFTH RESPONDENT

JACO OBERHOLZER

SIXTH RESPONDENT

HELENCA VERWEY

SEVENTH RESPONDENT

and

EMFN PROJECTS (PTY) LTD

FIRST RESPONDENT

STEVE TSHWETE LOCAL MUNICIPALITY

SECOND RESPONDENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 12th August 2026 at 10h00rs

JUDGMENT

Nsibande AJ

Introduction

[1] This is an application brought by the applicants on an urgent basis. The applicants seek urgent spoliatory and vindicatory relief against the Steve Tshwete Local Municipality (STLM) and its agent, EMFN Projects (Pty) Ltd, who, it is alleged, unlawfully entered the farms belonging to the applicants and commenced erecting infrastructure in the form of toilets for the farm occupiers. The applicants contend that the municipality has no servitude entitling it to enter the land and that consent to enter the land was refused by the applicants.

[2] The municipality admits that it does not have a servitude over the farms nor an expropriation order, but argues that the entering of the farms was necessary as it needed to fulfil its Constitutional obligation and mandate and provide the toilets to the occupiers, as the occupiers have a Constitutional right to human dignity and the applicants have failed to provide such toilets for decades.

Facts

- [3] On 30 June 2026, the first applicant, Helenca Verwey, was approached by the employees of the first respondent. They requested permission from her to enter the adjacent farms. The permission and access were refused.
- [4] On 1 July 2026, the employees of the first respondent gained access to the first, second and third farms.
- [5] The employees of the first respondent started digging holes on the three properties, and these holes were dug next to the, or in the vicinity of, the houses of the farm occupiers. This was in pursuance of their mission to erect various water and/or sanitation infrastructure on the three farms for the benefit of the farm occupiers.
- [6] The first applicant approached the first respondents' employees at the property and enquired what they were doing. She was informed that the first respondent had been appointed by the second respondent to carry out construction activities and build decent toilets for the farm occupiers.
- [7] It is clear that no permission to enter the properties was provided by the applicants. No permission to conduct any excavations. No servitude existed, and no expropriation of the land was provided or existed.
- [8] The applicant sent a letter of demand to the respondents on 1 July 2026. The letter indicated that the activities undertaken on the three properties constitute the act of trespassing and spoliation and demanded that all building materials be removed, all holes and trenches be closed up, and all employees of the first respondent vacate the properties.

Issues

The applicants

[9] The applicants argued that the entry onto the farms, the excavations, and the erection of buildings on the farms, in the form of toilets for the occupiers, without consent, constitute trespassing and spoliation, and are a violation of section 25 of the Constitution. As a result, they seek urgent spoliation and vindicatory relief.

The second respondent (the municipality)

[10] The second respondent (the municipality) argues that the granting of the relief sought by the applicants would, for an indeterminate period, confine a vulnerable community to continued deprivation of their constitutional rights to access basic sanitation. The argument goes on to state that the constitutional mandate of the municipality is to ensure the provision of services to communities in a sustainable manner and to give priority to the basic needs of the community. That the installation of the sanitation facilities (biological toilets) at these farms, which fall under ward 18 of the municipality, is the fulfilment of such constitutional mandate.

[11] The municipality argues further that the properties on which the ablution facilities are being built are not farming estates; they are home to a substantial community of farm occupiers who have resided on the farms for an extended period of time and some for decades with the knowledge, tolerance and awareness of the applicants.

[12] The municipality argues further that as such the presence of the occupiers on the farms is not unlawful, and their rights to tenure on the farm are legally protected.

[13] The second respondent submitted that the entry on the farms does not constitute spoliation or trespassing; it constitutes a lawful exercise of its constitutional and

statutory mandate. It was further submitted that 9 toilets had been built at the time of the hearing of this matter. The second respondent conceded that the formal written notice to the landowner prior to entry was not provided as contemplated by section 21 of the Water Services Act 108 of 1997.

Legal Principles

[14] The applicants have approached the court for a *mandament van spolie* remedy. The facts of the matter are as stated above.

[15] A *mandament van spolie* remedy emanates from Roman Dutch Law and has been firmly embedded in the South African jurisprudence. It is a remedy designed to restore to a person who was in peaceful and undisturbed possession of property that property which possession was unlawfully deprived.

[16] In order for an applicant to succeed in this remedy, two elements must be affirmatively proven: (a) peaceful and undisturbed possession of property prior to the spoliation; (b) unlawful deprivation of that possession.

[17] Before dealing with the merits of the application, the respondent raised a number of *points in limine*, which must be dealt with.

[18] The second respondent raised the following: (a) the lack of urgency of the matter, (b) the *locus standi* of the trust – a defect in the trust capacity, (c) the non-joinder of the ESTA occupiers, and (d) the non-joinder of the estate of Rossouw.

Urgency

[19] The applicants stated that the matter is urgent. That on 1 July 2026, when the entry and digging on the farms was noticed, a letter to desist from entering and digging

was dispatched to the respondents, and no response was forthcoming, and the only alternative was to proceed with the urgent application.

[20] It was also submitted that the nature of the application being spoliation requires a speedy remedy. The application is therefore urgent and should be treated as such.

[21] The second respondent submitted that the matter is not urgent and any urgency claimed is self-created. The allegations are that the works started on 1 July 2026; however, these proceedings were instituted on 6 July 2026, and no proper explanation was provided for the 5-day gap. It is submitted that the applicants have not established the right that stands to be violated by the installation of the ablution facility. That the applicants retain full access and control of the farms; as a result, no genuine urgency has been established. As such, the application is to be struck off the roll for lack of urgency.

[22] The legal test for urgency is found in rule 6(12) of the Uniform Rules of Court, and it requires the applicant to set out explicitly the circumstances said to render the matter urgent and why substantial redress cannot be obtained in due course. Where matters of illegality and allegations of unlawful activities are alleged, the courts are quick to allow such to be brought before it, the purpose being to halt such illegalities and unlawful activities as soon as possible. This is what the court did in these proceedings. However, after hearing the facts of the matter, the court is not convinced that the applicant has succeeded in proving the urgency of the matter.

Locus Standi – defect on trust capacity

[23] The second respondent submitted that the fact that the trustees of the Dolf Rossouw trust, Trust T143/2020, admit that they do not presently maintain the minimum number of trustees required in terms of clause 6 of the Trust Deed to act, the first, third and fourth applicants do not have a mandate to act on behalf of the Trust.

[24] The applicants submitted that the Trust does not relate to all three properties, but only to one. That the defect in the trust capacity cannot affect the litigation function of the trust, in particular to defend or to enforce the rights of the trust. The court agrees with the applicant that the rights of the trust cannot be affected by the defect in the trust capacity. The available trustees may defend or enforce the rights of the trust. The point *in limine* is dismissed.

Non-joinder of ESTA occupiers

[25] The second respondent submitted that the non-joinder of the occupiers of the farm, who have a direct and substantial interest in the order sought, renders this application fatal and, as such, should be struck from the roll. The respondents submitted that the applicant must have joined the occupiers to the proceedings as the occupiers are co-possessors of the farms.

[26] The applicant, on the other hand, submitted that the identity of the occupiers cannot be established, as such they could not be joined to the proceedings.

[27] It is a fact that there are occupiers on the farms; the applicants have acknowledged that fact. The submission that the occupiers cannot be identified is far-fetched and stands to be dismissed

[28] The legal principles are trite regarding a direct and substantial interest in the subject matter before the court. If a direct and substantial interest has been established, a joinder of the party is necessary. See *Lottostar (Pty) Ltd and Others v Ithuba Holdings (Pty) Ltd and Others* [2023] ZASCA 119; see also *Judicial Services Commission and Another v Cape Town Bar Council and Another* [2012] ZASCA 115 and *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A).

[29] The court, in following these decided cases, upholds the *point in limine* of non-joinder of the occupiers as the relief sought directly affects them. The occupiers ought to have been joined in these proceedings.

Non-joinder estate of Rossouw

[30] The second respondent submitted that the non-joinder of the estate of Rossouw renders this application defective and, as a consequence, it should be struck from the roll. It was submitted that the estate of Johannes Adolf Rossouw, who died on 9 April 2023, is a separate entity and continues to be the registered co-owner of the undivided half share in Portion 1, which is one of the farms where the toilets are being built.

[31] The applicants submitted that the two executors of the estate in terms of the letters of authority and the spouse of the deceased have the right to enforce the estate's rights. The court agrees with the applicants in this matter, and besides, the relief sought for spoliation does not require that the owner of the property be the one to institute proceedings, but any person in lawful and undisturbed possession. This *point in limine* stands to be dismissed.

The Merits of the matter

[32] The nature of the matter, in particular the relief sought, requires that this matter be determined and finally be resolved. The court is capable of finally determining the matter, as it has heard the arguments on the merits. The interest of justice also dictates that the matter be speedily finalised.

[33] As a result, the court will proceed to deal with the merits of the matter, not undermining the findings in the points *in limine* raised.

[34] The question that the court needs to answer in these proceedings is whether the applicants have succeeded in proving the *mandament van spolie* claim against the respondents and whether they are entitled to the relief sought.

[35] It is also necessary to determine whether the consent of the owner or person in charge of the farms is a requirement to give effect to the constitutional rights to dignity of the occupiers.

[36] As indicated, there are two elements to be satisfied to succeed with the remedy of *mandament*: peaceful and undisturbed possession and unlawful deprivation of the possession.

[37] From the facts of the matter it is clear that the applicants are owners of the three properties. This fact is not disputed. It is also not disputed that, in these three properties, there are farm occupiers who have been residing on the farms openly and with the knowledge of the applicants.

[38] Firstly, the ablution facilities that are being built by the respondents are being built on the part of the farm which is occupied by the farm occupiers. It is the farm occupiers who were in peaceful and undisturbed possession of that part of the property on 1 July 2026.

[39] Secondly, the building of the toilets at the place where they are being built is clearly with the consent of the farm occupiers; there is therefore no unlawful deprivation of possession on their part.

[40] The applicants remain the owners of the properties, and they have full access to and possession of them.

[41] The court therefore finds that the applicants have not been unlawfully deprived of their possession of the farms and that on 1 July 2026 the applicants were not in peaceful and undisturbed possession of the part of the property where the toilets are being built.

[42] I then turn to the rights of the occupiers in the portion of the farm and analyse their rights. Section 6(2) of the Extension of Security of Tenure Act 62 of 1977 (ESTA) states as follows:

“without prejudice to the generality of the provisions of section 5 and subsection (1), and balanced with the rights of the owner or person in charge, an occupier shall have the right

—

(a) to security of tenure;

(b)....”

[43] In interpreting this section, Zondo J in *Hattingh and Others v Juta*,¹ stated as follows:

“In my view the part of section 6(2) that says: ‘balanced with the rights of the owner or person in charge’ calls for the striking of a balance between the rights of the occupier, on the one side, and those of the owner of the land, on the other. This part enjoins that a just and equitable balance be struck between the rights of the occupier and those of the owner. The effect of this is to infuse justice and equity in the inquiry.”

[44] In striking a balance between the rights of the landowner and the rights of the occupier as envisaged above, and also in infusing justice and equity, this court is called upon to answer the question of whether the consent of the owner is a prerequisite for the second respondent to enter the farmland and to install the ablutions for the occupiers.

¹ *Hattingh and Others v Juta* [2013] ZACC 5; 2013 (3) SA 275 (CC); 2013 (5) BCLR 509 CC para 32.

[45] It is trite law that occupiers are entitled to occupy dwellings that are consistent with human dignity.

[46] In *Daniels v Scribante and Another*,² Madlanga J's answer to the question of whether the consent of an owner was required is as follows:

"Not inconceivably, the interest of an occupier and those of an owner or person in charge may diverge. The occupier may be of the view that the dwelling requires improvements to bring it to an acceptable standard. The owner may disagree. Or, as is the case in the instant matter, the owner may accept that the dwelling's condition is not consonant with human dignity but still not be receptive to the idea that the improvements be made. Needless to say, if consent were a requirement, none would be forthcoming in those circumstances. Must the occupier then be content with that? No. If the wishes of the owner or person in charge were to carry the day, the occupier's rights would be completely denuded. In the end the occupier must reside under conditions that afford her or him as wholesomely as possible all the rights contained in ESTA. A simple stratagem like the refusal of consent by the owner cannot be allowed to render nugatory an occupier's right that is primarily sourced from the Constitution itself."

[47] The erection of these toilets in the three farms by the second respondent is an attempt to restore the dignity of the community living on the farm.

[48] The applicants argue that there are plans on the farms for the erection of these toilets, which plans have been there since the late 1990s. The applicants do not indicate, at least, when they envisage that those plans will be executed and the toilets be built for the occupiers. Instead, they pray for an order to demolish the 9 toilets that have been erected by the second respondent as there was no consent from the owner.

[49] Madlanga J concluded in the *Daniels* matter that:

² *Daniels v Scribante and Another* [2017] ZACC 13; 2017 (4) SA 341 (CC); 2017 (8) BCLR 949 (CC) para 59.

“This leads to the conclusion that in the final analysis an owner’s consent cannot be a prerequisite when the occupier wants to bring the dwelling to a standard that conforms to conditions of human dignity.

That an occupier does not require consent cannot mean she or he may ride roughshod over the rights of the owner. The owner also has rights. The very enjoyment by an occupier of rights conferred by ESTA creates tension between that enjoyment and owner’s rights. The most obvious owner’s rights that is implicated is the right to property under section 25 of the Constitution. If an occupier were to be entitled to act in an unbridled manner, that would mean an owner’s rights count for nothing. Under section 5 of ESTA an owner enjoys the exact same rights as does an occupier. The total disregard of an owner’s property right may impinge on her or his right to human dignity. That would be at odds with section 5(a) of ESTA. Unsurprisingly, section 6(2) of ESTA requires that an occupier’s rights to security of tenure be balanced with the rights of an owner or person in charge”³

[50] This Court fully aligns with the sentiments of Madlanga J. In the present case, the occupiers have a right to human dignity and are entitled to living conditions consistent with that dignity. As the occupiers do not have the financial muscle to improve their dwellings themselves, the second respondent, in fulfilment of its constitutional mandate, has the legal duty to restore the dignity of the occupiers by building the ablution facilities.

[51] This Court further agrees with Madlanga J that “although consent is not a requirement, meaningful engagement of an owner or person in charge by an occupier is still necessary. It will help balance the conflicting rights and interests of occupiers and owners or persons in charge”.⁴

[52] It will be of such necessary importance that the first and second respondents and the applicants have this meaningful engagement on the way forward in restoring the dignity of the farm occupiers, in this case by building the much-needed ablution

³ Ibid paras 60 and 61.

⁴ Ibid para 62.

facilities. This meaningful engagement does not detract from the conclusion that the existence of the occupier's rights is not dependent on the owner's consent.

Analysis

[53] The court is alive to the contrasting rights of the farm owners, the applicants, and the rights of the farm occupiers, who are the direct beneficiaries of the toilets being built by the first respondent at the instruction of the second respondent. As indicated, these rights are distinct from each other, and none owe their existence to the other. They are independent of each other. This court has a duty to protect the rights of both parties within the confines of the law and to uphold and defend the rights of both the farm owners and farm occupiers. In doing so, the court concludes that if it should grant the order as prayed for by the applicants, the court would be causing the farm occupiers to continue to live in conditions that violate their rights to human dignity.

Remedy

[54] It is clear that the applicants, as owners of the farms, have a right to property, which right is guaranteed and safeguarded by section 25 of the Constitution, which right this court has a legal duty to safeguard jealously, and there is no doubt that the right to property and the security of such right must be legally protected.

[55] However, this right must be balanced with the rights of the farm occupiers to human dignity. The farm occupiers have in no way interfered with the right to the property, exclusively conferred to the applicants. The building of the toilets at the part of the farm occupied by the farm occupiers in no way infringes the rights protected by section 25 of the Constitution.

Order

[56] In the result, the following order is made:

1. It is ordered that this matter is not urgent and should not have been enrolled on the urgent roll.
2. The respondents' point *in limine* on *locus standi* of trustees due to lack of quorum of Trustees is dismissed.
3. The respondents' point *in limine* of non-joinder of the farm occupiers is upheld.
4. The respondents' point *in limine* for the non-joinder of the estate of Rossouw is dismissed.
5. The application is dismissed.
6. It is ordered that the first and second respondents are entitled to make the following improvements on the three farms occupied by the farm occupiers:
 - 6.1. To enter the farm unhindered.
 - 6.2. To build the toilets for the occupiers in the vicinity of the dwellings of the occupiers at the farms.
 - 6.3. To store the building materials for the building of the toilets at a place convenient for building the toilets at the farms.
 - 6.4. The applicants and the first and second respondents are ordered to engage meaningfully regarding the implementation of the improvements, particularly on:
 - (a) The time at which the builders will arrive and depart on site;
 - (b) The movement of the builders on the farms;
 - (c) The need for the approval of the building plans in respect of the toilets; and
 - (d) Any other issue in order to ensure a smooth and unhindered building of the toilets on the farms.
7. If for some reason or other, the parties cannot reach an agreement, either of the parties may approach the Middelburg Magistrates' Court for the appropriate relief.
8. Each party to pay its own costs.


VM NSIBANDE
ACTING JUDGE OF THE HIGH COURT
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Heard on: 14 July 2026
Delivered on: 12 August 2026