

REPORTABLE

**IN THE HIGH COURT OF SOUTH AFRICA
EAST LONDON CIRCUIT LOCAL DIVISION**

Case No. EL 738/2020

In the matter between:

**RESIDENTS OF FARM GREYDELL
(AIRPORT PARK)
VATHISWA JACK**

**First Applicant
Second Applicant**

and

**NATIONAL DEPARTMENT
OF PUBLIC WORKS
SHERIFF OF THE COURT**

**First Respondent
Second Respondent**

**JUDGMENT IN RESPECT OF
PRELIMINARY OBJECTIONS
RAISED BY THE FIRST RESPONDENT**

HARTLE J

1. On Thursday 18 September 2020 the parties argued before me two preliminary objections raised by the first respondent. The first point taken by the first respondent, against the first applicant only, is that it lacks *locus standi in judicio*.
2. The second point (taken against both applicants) is that they should have proceeded by way of an action against the respondents because they seek compensation. The party asserts that it is a matter of foreseeability. The applicants should have foreseen that a material dispute of fact would arise in the matter with regard to the allegations made in their founding affidavit especially concerning the claim for compensation and that for this reason the court ought to dismiss the application.
3. If I may begin with the second objection first, the issue of whether the applicants claim constitutional reparation as opposed to compensation in the ordinary understanding of the word will depend on how the court hearing the matter views the mischief. The first respondent denies that the residents on the farm were evicted without an order of court. If the court finds that they were, this will constitute an infringement of their constitutional right not to be so evicted without due process which may invite an illegality enquiry and possibly orders of constitutional restoration and reparation. It is not for me at this present juncture to find definitively one way or another whether the parties whose interests are at stake here were as a matter of fact or law evicted from their homes. This issue must be carefully determined but at first blush it does appear that the applicants are pursuing a remedy for a constitutional infringement, or relief ancillary to the main, which is to vindicate what they claim to be

unlawful evictions. It is therefore not a preliminary issue so to speak and must await a determination of the obvious factual dispute that exists on the papers. Given the court's obligation not to condone any constitutional illegality, and upon proof of same to fashion an appropriate remedy, I am not inclined to predetermine, without affording the parties an opportunity to address the merits of the matter first, whether the compensation prayed for requires them to seek their redress by way of an action rather than by way of the present application. In the result I make no determination at this time in respect of the second preliminary objection.

4. Returning to the first objection, I do have concerns that the pleadings as they presently stand do not bear out with any clarity whose interests exactly are being represented under the mantle of "Residents of Farm Greydell (Airport Park)" and whether that cited entity has the requisite interest to assert legal standing. Each of the residents (including Mr Fani) obviously have the right in their individual capacities to claim that they have an interest in the relief claimed or the right to claim the relief as prayed for (and to call themselves by a collective name akin to how the first applicant is cited), but this aspect of standing has been complicated by the manner in which the deponent to the founding affidavit has pleaded the first applicant's place to stand in court.
5. The allegation in paragraph 1 is that he is an individual residing on the property. He amplifies in paragraph 2 that he is "also a person who has been directly affected by the actions of the respondents."

6. Yet he claims (in paragraph 2) that he is duly authorised to make the affidavit due to his standing as a community leader. In paragraph 4 he explains that he is a “chairperson” (of what entity he does not clarify) and repeats that he is a resident on the property. He then adds: “Deposing on behalf of the applicants.”
7. Under the rubric of “The Facts”, he generically deals with the mischief sought to be interdicted which is that the first respondent has evicted “the applicants” and demolished their residential structures. He claims that it is his view, which he had also communicated to the second respondent carrying out the demolition, that a prior order obtained in 2017 by the first respondent against “Persons whose identities are to the applicant unknown and who have attempted, are threatening or may even try to occupy the remainder of Portion 1 of the Farm Greydell 871” does not constitute legal authority for the eviction and demolition which happened on 27 July 2020.
8. It is further evident that he means to exclude from the operation of the prior order the “current residents of the land” who he seeks to suggest are not the illegal invaders envisaged in the prior order.
9. He also vaguely deals with the effect of the claimed evictions and demolition by “residents” who he does not identify except vaguely by the collective name referred to in the citation of the first applicant.
10. In conclusion he asserts his entitlement “as chairperson and leader of the community charged with the duty to serve and protect the residents

against unlawful eviction or treatment of any unlawful kind” to claim the relief which he does.

11. In response to the first respondent’s challenge that the applicant as described in the founding affidavit self-evidently lacks *locus standi*, the first applicant attached a list of the names of persons whose shacks and structures were allegedly demolished, supposedly without an order of court. It is by no means clear that they support the litigation leave alone what interest each of them has in the relief claimed or why they have the right in the context of what is asked for in the notice of motion to step forward and say that they are asserting such rights.

12. It being central to the issue whether any person residing on the farm was supposedly evicted without the prior order of court intending to operate in the first respondent’s favour against them, it would be crucial in my view to pertinently identify exactly who is affected by the claimed unlawful eviction, and how, in order to glean the interest sought to be protected.

13. The matter is further confounded by the fact that the applicant launched the present litigation under the case number of the prior proceedings which gives the impression that it is those persons included in the label of persons in general terms whose rights it presently seeks to assert.

14. Since it may appear that I am already determining the merits I point out that I am merely seeking to demonstrate how poorly the first applicant has pleaded its case on the issue of standing (which it bears the onus to

establish) and the fact that it has not ameliorated its situation at all by merely attaching to its replying affidavit a list of names of people whose shacks and structures have supposedly been demolished.

15. I am yet alive to the fact that I should not shut the door to residents who may have been unlawfully evicted and who are entitled to approach this court for appropriate relief.

16. On a charitable reading of the applicant's papers it (or the deponent rather) seeks to assert a right, in a purported representative capacity on behalf of a collection of as yet to be identified affected residents of the Farm who claim to have been unlawfully evicted without due process, on the basis provided in section 38 (b) or (c) of the Constitution. Of course it must plead such a case properly and seek leave under that vehicle to be substituted or joined to these proceedings should it wish to assert such a scenario. However the other possibility is that the first applicant meant to bring the case on behalf of each individual cited separately but collectively and for convenience referred to as the current citation reflects, but that would require a joinder of each such person. Whatever logistical problems may have vexed the first applicant in getting the residents to depose to affidavits confirming an infringement of their individual rights, and the effect of the illegality in each instance (there must be variations peculiar to each) and their interest in each case under the hasty circumstances in which the matter was brought before the court, a period of at least a month and a half had passed by the date when the matter was supposed to have been argued before me, in which time they ought to have been able to remedy the shortcomings or to start afresh. I

notice that my colleague, Griffiths J bent over backwards to accommodate the applicants in assisting them to craft an order which nowhere nearly bears resemblance to the original notice of application prayed for on the premise that the court was faced with a serious violation of the Constitution and the National State of Disaster regulations by the untimely and claimed eviction of the residents during Alert Level 3, but that kind of indulgence cannot continue to be sustained where it has pointedly been observed by the first respondent that the first applicant lacks jurisdiction and it (or he because he seems to refer in places to himself as the applicant) has not taken any corrective steps to get the papers in order.

17. The bottom line is that the case of the first applicant as it presently stands is woefully deficient and the first respondent must succeed in respect of the first preliminary objection that “it” lacks *locus standi*.
18. Since the party is a non-entity there appears to my mind to be little merit in awarding costs against it but in any event this aspect was not argued before me.
19. Since the matter retains a semblance of urgency insofar as the second applicant is concerned (who would be well advised to amplify exactly what she means by being “the victim of the circumstance”), it is imperative that the merits of the matter be argued as soon as possible. I propose in this respect to hear the matter myself on the first day of the new term, but should either party feel prejudiced by such election, arrangements should forthwith be made with the Registrar (in conjunction

with the Duty Judge as the case may be) for a resumed hearing before a different court. I propose further to extend the operation of the relevant paragraphs of Griffith J's orders pending the hearing and final determination of the matter in view of the *prima facie* perceived constitutional violation that was alleged with the option being left open to the first respondent to seek a reversal of the interim relief so to speak on the basis proposed in paragraph 5 of Griffith J's last order.

20. In the result I issue the following order:

- (a) The preliminary point of *locus standi* raised against the first applicant is determined in favour of the first respondent.
- (b) The "first applicant" is invited, in view of the allegation that residents who it purports to represent have been unlawfully evicted from their homes, to encourage those concerned to seek their separate joinder (including himself) to these proceedings, or to substitute a properly vouched for group under the provisions of section 38 (c) or (d) of the Constitution in place of the presently cited first applicant.
- (c) The determination of the first respondent's second preliminary objection (as against the second applicant who is the only party still before this court) is to stand over for determination at the hearing.
- (d) The application is postponed to 5 October 2020, to be heard at the East London Tribunal at 11h30.

- (e) Prayers 2 and 3 of this court's order dated 1 August 2020, read together with prayers 4 and 5 of the subsequent order dated 4 August 2020, are to remain operational pending the hearing and final determination of the application.
- (f) The costs are reserved.

B HARTLE

JUDGE OF THE HIGH COURT

DATE OF HEARING: 17 September 2020

DATE OF JUDGMENT: 21 September 2020*

**Judgment delivered by email to the parties on 21 September 2020*

APPEARANCES:

For the applicants: Mr. Z Madukuda instructed by Sipho Klaas Attorneys, East London (ref. SK/eviction2020/1)

For the respondents: Messrs T.M. Ntsaluba SC and Mr. N Nabela instructed by The State Attorney, East London (ref. Mrs Tyani – 322/16-P2)