IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION – MTHATHA)

CASE NO.: 1290/2020

Date of hearing: 18 March 2022

Date delivered: 23 August 2022

In the matter between:

MEMBER OF THE EXECUTIVE COUNCIL FOR THE DEPARTMENT OF PUBLIC WORKS	Applicant

And

MR MATHEW	First Respondent
MR JOSEPH	Second Respondent
MR NGOZI	Third Respondent
UNIDENTIFIED ILLEGAL OCCUPANTS OF ERF 308 MTHATHA	Fourth to further Respondents
COMBINED COMMUNITY SCHOOL	Fifth Respondent

JUDGMENT

MAJIKI J

[1] The applicant seeks an order that the respondents must vacate Erf 308, Mthatha. In the event of their failure to vacate, he seeks that they be evicted therefrom. The application is opposed by the first, second and third respondents who have filed an

answering affidavit and simultaneously filed a counter application. The fifth respondent will be referred to as the school, herein. It was subsequently joined in the proceedings. In the counter application the respondents seek an order that the title deed number T439/2019, issued in favour of the Provincial Government of the Eastern Cape, (provincial government) be declared invalid and set aside. The applicant has, in return, also opposed the counter application.

[2] In the replying affidavit to the main application and answer to the counter claim, the applicant challenges the authority of the deponent to the respondents' affidavits on behalf of the first three respondents, on the basis that they did not file their confirmatory affidavits, however that did not seem to be pursued during the hearing.

[3] It is common cause that, prior 1994, erf 308 Mthatha initially belonged to the South African Government. It was first registered in the name of the said government, in Deed of grant dated 16 July 1894. In 1991 it was erroneously transferred to South African Post Office Soc Limited (SAPO). In 2019 it was transferred to the provincial government, after the conclusion of a rectification agreement with SAPO.

[4] It is also common cause that the property consists of a multi-storey building and a single storey one. The former is occupied by various government departments. It is the single-storey building of erf 308 Mthatha (the property), consisting of numerous offices which is the subject matter of the proceedings. The property is occupied by the respondents, without permission or consent of the applicant. They are also not in possession of lease agreements with the applicant.

[5] It is further common cause that in July 2018, the officials of the department of the applicant (the department) made an attempt to negotiate with the occupants of the property, in order to request them to vacate the premises by 28 October 2018, in an amicable manner. On 26 September 2018, the applicant instructed the State Attorney's office to issue the respondents with notices to vacate. Therein, full reasons why the applicant was in need of the property were stated. Furthermore, the respondents were

informed that in the event of failure to yield to the notice, this court would be approached for an appropriate relief. Not all the occupants accepted the letters, but it seems not to be in dispute that, all the respondents are aware of the said letters. Despite the expiry of the period afforded in the notices, none of the respondents vacated the property.

[6] Following that, there was a delay in taking the process of the evictions forward. The said process was resuscitated after the appointment of the former member of the executive council (MEC) in the department and the head of the department (the deponent) in August and December 2019, respectively. After an audit of government properties, it was discovered that there were a number of government properties that were not utilised by the government. The school is a private finishing school for matriculation certificate students.

[7] The replying affidavit to the main application was filed out of time. The applicant has sought condonation for the lateness, which is not opposed by the respondents. According to the applicant the respondents filed a supplementary affidavit to the answering affidavit, after the main answering affidavit had been filed, without leave of the court or the applicant's consent. Issues raised therein, needed to be addressed. There were also judgments and historic material referred to therein, which were not attached. Those needed to be accessed from the archives. That also took time, the deponent was also in and out of the office, consultations could only materialise on 28 August 2020. The reply thereto was also filed late. According to the respondents they had to wait for the finalisation of the application to join the school, so that their replying affidavit could be consistent with any information that would be forthcoming, as a result thereof. The aforesaid lateness was therefore condoned, respectively, during the hearing of the matter.

PARTIES VERSIONS

[8] According to the applicant the department is the custodian of the property. It is part of the properties owned or vested in the provincial government, in terms of item 28(1) of schedule 6 of the Constitution of the Republic of South Africa, 1996 (the Constitution) read with section 239 of the Constitution. The property is required to provide office space for the government departments.

[9] Furthermore, according to the applicants, the respondents occupy the property illegally. The property is a commercial property. No one resides in the property. Following the department's audit, it was realised that, the government could have generated a lot of revenue in its properties but, such was lost. The current occupiers on the other hand, generate income therein, the school and others, like those operating law practices and salons.

[10] The applicant is not certain if all activities carried on in the premises are legal, whether electricity is properly and safely connected and whether general safety measures are maintained. It is not known if there are no dangerous chemicals or substances used in the premises. In the event, that there would be disaster or damage, which risks are highly likely, the government would suffer great financial loss.

[11] Finally, the applicant avers that the application is brought with utmost good faith. The applicant is being denied the right to effect renovations, which would enable the government to have use and enjoyment of the property. The applicant as a bona fide possessor, has a right to seek the respondents' eviction. The respondents have no valid right to be in possession of the property. The applicant disputes that the rectification agreement and the registration of the property constitutes administrative action. Further, he submits that the government's right of action has not prescribed.

[12] The deponent to the respondents' answering affidavit stated that he is one of the directors of the school. The summary of the defence raised in the answering affidavit is that, the property has always been a state land. Its disposal ought to be in ter \sms of the State Land Disposal Act no 48 of 1961 (Act 48 of 1961) and Land Administration Act 2 of 1995 (Act 2 of 1995). In terms of Act 48 of 1961 the control and disposal of the land in the vests in State President (president). The president may delegate such powers to the Minister of Land Affairs (minister). The minister may sub-delegate the said powers, in writing, to the MEC in the province, in terms of the two afore-mentioned statutes. The respondents aver that in relation to the present property, the applicant has not shown that such did take place, therefore the applicant has no cause of action. They say the rights of the school are protected in terms of the Constitution, as rights of occupation, they are existing rights. Those are also rights protected by common law.

[13] What happened according to the respondents, instead, is that on 22 December 1997 the minister sub-delegated, in writing, in a deed of delegation, the power to control the said property to the MEC, subject to stipulated statutory conditions, including, taking care of the persons like, the respondents. The MEC subsequently donated the property to King Sabatha Dalindyebo (KSD) municipality, subject to the same conditions contained in the deed of delegation. The donation has a legal effect; it is a legal disposal. It deprives provincial government of occupational rights and control. KSD municipality recognises the school's occupation, as it pays rates to KSD municipality. Further, SAPO lost its ownership after the land was delegated.

[14] According to the respondents, the applicant did the rectification transfer, without the conditions of sub-delegation, imposed by the minister. That, the respondents submit, is serious and prejudices persons like the school, which claims right of occupation of the portion the property. The conditions protect existing rights of persons, when the land is dealt with under Act 2 of 1995, during sub-delegation. Further, the delegation and sub-delegation constituted an administrative action. In terms of section 33 of the Constitution, subsequent administrative action must be

lawful, fair, procedural fair and reasonable. Also, in terms of the said section, an invalid title deed cannot be used in *rei vindicatio* proceedings.

[15] In the supplementary affidavit to the answering affidavit, the respondents attached a written delegation of ministerial powers, dated 22 December 1997. In terms thereof, the minister in terms of Act 2 of 1995, delegated the power and authority to the MEC to dispose of State land described in the schedule, referred to as having been attached thereto. However, the schedule is not attached to the said annexure. There are further annexures therein, the first is a list of properties, the property in issue appears therein. The list has no heading or any other form of identification as to what it is in respect of. However, in the affidavit it is referred to as a list of properties affected by the donation. Another document is the donation of land to local council, Mthatha, now KSD municipality, by the MEC, dated 14 October 1997. The property appears therein, with a request that the properties so donated be registered in the name of the local authority. According to the respondents, the applicant's department is bound by the said donation.

[16] The respondents aver that the MEC exercised his power of control over the property when the donation was made to KSD municipality. The donation deprived the provincial government of all occupational rights over the said land. Clause 4 of the delegation reads:

'*provided further that, where any listed properties in the attached Schedule, including a portion of the properties, formerly known as Municipal Commonages are/is to be utilised for housing/ township development or for any other development, the said MEC or a Municipal council or any other development WILL NOT RESULT ON THE DISPOSSESSION OF PEOPLE'S EXISTING RIGH (FORMAL OR INFORMAL) IN OR GRANTED ON OR OVER SUCH PROPERTIES OR COMMONAGE LAND AND IN THE EVENT PEOPLE'S RIGHTS ARE AFFECTED, IT IS A PREREQUISITE THAT A SOCIAL COMPACT AGREEMENT WITH THE AFFECTED BE CONCLUDED to the satisfaction of those people and in consultation with the Department of Land Affairs and in accordance with the provisions and/or conditions*

*stated in the Policy and Procedures on Municipal Commonage document by the said Department and provided further that the said development may only commence after the said Agreement has been concluded with the affected community ;' (*emphasis mine).

[17] Secondly, the respondents are of the view that since SAPO had lost in spoliation proceedings when it had unlawfully evicted the school, in a judgment delivered by Peko ADJP on 9 March 2006, under case number 34/2006, the applicant is not entitled to act against the school. These proceedings, therefore, cannot stand. The respondents view the transfer of the property in 2019, to the provincial government, from SAPO, through rectification agreement signed in 1995, as interference with possession and occupation of the school.

[18] Further, they say the evidence before Peko ADJP was that the school effected building renovations and made improvements to the property and it is still continuing to do so. The property was dilapidated and unused, SAPO did not care about the property. Mr Dexter, who acted on behalf of SAPO, told Dr Ceza, in the presence of the deponent, that the school could take occupation of the property and renovate it so that it was appropriate for use, by the school. SAPO gave the school occupational rights and it had been in possession of the property since 1994.

[19] Thirdly, the applicant's cause of action and the right to challenge the school's occupation have been extinguished by prescription, three years from the date of judgment in the spoliation proceedings, before Peko ADJP. The rectification itself happened after SAPO's right of action had prescribed, as well. Finally, the school had made an offer to purchase the property, to which there has been no response.

[20] Above these defences the respondents have launched a counter application seeking that the tittle deed rectifying the erroneous transfer from SAPO to the provincial government be declared invalid and set aside. The respondents repeated most of the above, as grounds for the review. According to the respondents, they seek

to invalidate the disposal of the property by SAPO to the provincial government. They aver that, the latter did not just accept the transfer but was a party to the rectification agreement. Also, at the time of the registration of the said transfer, SAPO's right of action had already prescribed and was not revived by the said registration.

[21] There are other grounds, including that, the interested parties, like the school was not heard and consulted before the rectification was decided. The respondents aver further that, they were supposed to have been heard, in compliance with clause 4 of the deed of sub-delegation. Further, the title deed, following the rectification agreement, does not specify the reason for the error that was being rectified, in order for the registrar of deeds to see whether the rectification complied with clause 16 of the delegation. Further, parties to the rectification agreement, in particular, the provincial government, if it was a party are not disclosed. Noteworthy, the said clause provides permission to the MEC to rectify errors relating to extent or size of the property, title deed number or year of the property, provided that the name, registration number and town or municipality in the schedule is correct.

[22] The applicant, in reply does not dispute the history of applicable legislation as articulated by the respondents. However, he avers that the applicable legislation, in order for the applicant to have power, to administer, control and dispose the land in question is the Land Disposal Act 7 of 2000, for the reason that the ownership of the property vested with the provincial government. The vesting that is alleged by the respondents is denied, the applicant relies on the deed of transfer and the delegations, which the respondents have also attached. The applicant explained in the founding affidavit that the applicant came to be the custodian of all immovable assets which are registered in the name of the provincial government. The historical delegations of authority are irrelevant to the central question in this application.

[23] The applicant disputes that the respondents made any improvements or expensive renovations in the property. He says, there are no lecture halls or

classrooms in the sense of a formal school. Business offices are illegally used as a school.

There is a minimum number of candidates in the school. The property consists of official administrative offices, it is not suitable for a school. Further, it is disputed that SAPO gave the school occupational rights, Mr Dexter could not have done so, as he was not the owner of the property. There are also no confirmatory affidavits to confirm the said allegation. The school therefore could not validly enter into lease agreements with any person.

[24] The applicant also denies the donation to KSD municipality. It submits that it has no legal effect. If there was any donation the deponent lacks standing to enforce it. It is of no consequence that the condition of registration of the properties, referred to in the deed of delegation was not complied with, due to the fact that the properties were not registered in the name of the respective donee municipalities. It is also denied that KSD municipality recognised the school's occupation of the property.

[25] Furthermore, the school is a private business that is in unlawful occupation of the property. It cannot create conditions by itself and seek to enforce those, to resist eviction. The public interest demand for the property outweighs those of a private school that is making a profit, without paying rent. The government currently rents properties for essential services at huge costs, to the prejudice of the taxpayer. The property is not for sale. The counter application is ill-conceived, the setting aside of the title deed would not result in the registration of the property in the name of the school. No case has been made for the registration of the property in the name of the school, such would be inconsistent with statutes which regulate the use of state assets. Existing occupational rights would not include persons or entities like, the school. There were also no conditions attached to the transfer of the said title deed. Even the sub-delegation referred to by the respondents, was not subject to conditions.

[26] The applicant also averred that the respondents delayed in bringing the application. (According to the respondents the review sought is one for the registration of the property, in 2019, following the rectification agreement, and not of the agreement entered into in 1991). Furthermore, the litigation regarding the interdict against development by private companies of land situated at Enkululekweni ministerial complex under case 607/2007, referred to by the respondents, is also irrelevant in the present litigation. The respondents in their replying affidavit to the counter application state that they became aware of the rectification registration, upon the service of the founding paper herein, in June 2020.

[27] In the said replying affidavit, the respondents made different averments regarding the conditions imposed on the property. Initially they had said the subdelegation was made subject to the stipulated conditions. In the replying affidavit, they aver that the disposal of the property was made subject to the conditions of the government in 1894, instead of the conditions in the delegation. Further, the school as the occupant of the property has full legal standing to enforce the decision to donate and the deed of sub-delegation by the minister. SAPO lost its ownership of the property as a result of the delegation of powers to the property to the minister. The property reverted to KSD municipality, subject to statutory conditions.

[28] The respondents made further new averments relating to non-joinder of the president and lack of jurisdiction of this court, in the light of the existence of a land claim including the property by Khoi Khoi Zan people.

THE ISSUE

[29] The central issue for the determination in the main application is, whether the applicant is entitled to seek the eviction of the respondents from the property. With regard to the counter application the issue is whether the respondents are entitled to have the registration of the property in the name of the provincial government set aside.

[30] The applicant is required to prove that the provincial government is the owner of the property and that he is entitled to evict the respondents from the property. The deed of transfer shows that the provincial government is the owner. However, the respondents submit that, such transfer is invalid. This aspect will be dealt with in the evaluation of the counter application.

EVALUATION

[31] I agree with the applicant that the judgment in the spoliation proceedings before Peko ADJP, does not have the implication of restraining the legal proceedings, like the present. All that order stated was that, there should be no interference with possession of the property without legal recourse. Those proceedings in their nature, are not about vindication or recognition of rights. *In Ngqukumba v Minister of Safety and Security and Others* 2014 (2) SACR 325 (CC) Madlanga J stated:

'*[10] The essence of the mamdament van spolie is the restoration before all else of unlawfully deprived possession to the possessor. It finds expression in the maxim spoliatus ante omnia restituendus est (the despoiled person must be restored to possession before all else), The spoliation order is meant to prevent the taking of possession otherwise than in accordance with the law…'*

The application to court for eviction, like in the present, is a legal recourse which a spoliation order envisages, before the act of spoliation. Similarly, the applicant sets out the correct legal position when making a submission that, the provisions of Prevention of Illegal Eviction from Unlawful Occupation Act 19 of 1998 does not apply to a commercial property.

[32] With regard to prescription, the respondents seem to be of the view that, the applicant's cause of action arose from the time of and is based on the judgment in the spoliation proceedings before Peko ADJP. That is not the case. No rights were conferred, determined or recognised in those proceedings. The applicant claims

eviction of the respondents because they occupy the property. The relevant date for determination of the cause of action therefore, would be the date on which the respondents claim to have acquired occupation. SAPO or the subsequent owner, as the registered owner, is entitled to claim the property, unless thirty years had elapsed from the date of occupation. The cause of action herein is not a debt, the three-year period provided for in section 11(1) of the Prescription Act number 68 of 1969 (Prescription Act) is not applicable. The relevant section in the present circumstances, is the one providing for acquisitive prescription. Section 1 of the Prescription Act provides:

'*Subject to the provisions of this Chapter and of Chapter IV, a person shall by prescription become the owner of a thing which he has possessed openly and as if he were the owner thereof for an uninterrupted period of thirty years or for a period which, together with any periods for which such thing was so possessed by his predecessors in title, constitutes an uninterrupted period of thirty years.*

In any event, the school does not claim that it possessed the property as if it were the owner of the property, even at this stage.

[33] The next issue relates to the allegation of donation by MEC to KSD municipality. In the respondents' version the donation was allegedly made to the local municipality in October 1997. In the same breath the minister's delegation was only on 22 December 1997. I therefore agree with the applicant that, if the delegation happened, it could not validly take place before the MEC himself was enclothed with delegated powers. Similarly, even when the minister's powers were allegedly delegated by the president, SAPO was already the owner of the property, by then. KSD municipality has also neither confirmed the donation, nor what the implications of its allowing the school to pay the rates are. The transfer of the said donation was also never registered.

[34] Furthermore, the respondents' submission with regard to its occupational rights are inconsistent. They seek to rely on the occupational rights that the school allegedly

acquired from SAPO, again regarding the judgment of Peko ADJP they incorrectly say it protected rights. Finally, they say their right of occupation is recognised by KSD municipality. However, SAPO has not confirmed the allegation about it. The respondents have not explained how Mr Dexter, as an individual, could pass rights relating to government property.

[35] I do not agree with the submission that the respondents have rights that are protected in clause 4 of the delegation. Clause 4, as quoted at paragraph 16 above, protects existing rights. None have been found to exist in respect of the school. Also, in relation to conditions, the same finding, about SAPO having owned the property already, at the time of the delegation, would be apply in this regard. Further, the respondents' version about the conditions differs between the one in the supplementary answering affidavit and that in replying affidavit in the counterclaim. Initially they had said the subdelegation was made subject to the stipulated conditions. Subsequently, they averred that, the disposal of the property was made subject to the conditions of the government in 1894. In any event, the schedule of properties referred to in the delegation of the minister to the MEC, to dispose of State land, in terms of Act 2 of 1995, annexed to the supplementary answering affidavit, was not attached to the annexure.

[36] With regard to the counterclaim the applicant submits that the said application, being a legality review was brought out of time. There is no application for condonation of that delay. The transfer of ownership from SAPO to the provincial government took place in 2019. The respondents in reply, say they became aware of the transfer in June 2020, when the main application was served. The applicant submits that, given the fact that there had been a previous attempt to evict the school; that Mr Dexter gave them occupational rights; and that one of the occupiers is a firm of attorneys, that was also involved in the spoliation litigation, before Peko ADJP, therefore the respondents ought to have taken interest in the ownership of the property. In my view, it would be far-fetched for the respondents, after keeping themselves in the loop about the delegations and donations, also, taking into account that they

wanted to buy the property, not to make an effort about the important part, that of being kept abreast about the transfer of ownership, which would have the effect of threatening their occupational rights and their interest, that of the school becoming the owner of the property. In fact, the involvement of the firm of attorneys, in their own version, that of being offered occupation in return for advice on aspects relating to their occupation, shows that they were or ought to have been vigilant in their dealings about the property.

[37] What further complicates issues for the respondents is that, the allegation about when they became aware of the passing of ownership is only made in the replying affidavit. There does not seem to be any reason why the respondents could not have been upfront about this integral part of the application, in the founding affidavit of the counter application. The applicant is not in a position to deal with this allegation. No reason has been advanced as to why it was advanced late. The court is inclined to agree with the applicant that there has been undue delay, in the review application.

[38] Having said that, however, it is considered necessary to deal with the merits of the counter application.

[39] Firstly, regarding the improvements that the respondents alleged to have made, even if their version was to be believed, those have not been quantified. Further, the respondents can still pursue a claim for what was allegedly expended therein, and not seek to resist eviction on the basis of such.

[40] The challenge to the rectification agreement on the basis of non-compliance with clause 16 of the conditions of delegation deed, in my view, cannot stand for two reasons. Clause 16 refer to specifically mentioned errors. Secondly, the date of the alleged delegation is after the transfer to SAPO. The need for the rectification agreement would not imply that SAPO did not own the property at the time it was registered in its name. This the respondents seem to recognise, at least, when they aver that they were given occupational rights by SAPO. There is also no merit in the

submission that, the reason for the error that was being rectified is not stated. The applicant stated that for an unknown reason the transfer to SAPO was made in error. The error was that of the transfer itself, it was rectified by the transfer to the provincial government.

[41] The respondent complain about not being heard before the rectification transfer. I agree with the applicant, neither the rectification nor the transfer of a title deed is an administrative action. They are not a decision taken or failure to take a decision by an Organ of State as contemplated in section 1 of Promotion of Administrative Justice Act 3 of 2000. (See **Nedbank v Mendelow NNO** 2013 (6) SA 130) at paragraph 24. Again, having found that they had no right in the property, there was no basis for them to be consulted or heard. Also, there would have been no need for the applicant to make allegations about the disposal through delegations and donations. Those are not part of the applicant's case. The applicant's case is that the property is part of the properties owned or vested in the provincial government, in terms of item 28(1) of schedule 6 read with section 239 of the Constitution.

[42] As for the averments made for the first time in the counterclaim, appearing in paragraph 28 above, it is trite that in motion proceedings the applicant has to make its case in founding affidavit and not in the replying affidavit. It is an exception that the court would, in the exercise of its discretion, under special circumstances, allow a new matter to be raised in the replying affidavit. (See **Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd and others 1974 (4) SA 362** (**T)** at **369A-B**; **Body Corporate, Shaftesbury Sectional Title Scheme v Rippert's Estate 203 (5) SA 1** at **6**)

No special circumstances are found to justify the introduction of the said new issues in the replying affidavit, herein.

[43] In my view, the title deed in the name of the provincial government is valid. It proves ownership of the property. No serious issue can arise in the applicant's reference to the department as the custodian of the property. The provincial government functions

through the various departments. The applicant averred that his department is responsible for matters relating to government properties. This is also apparent from the averment that the audit of properties was undertaken by the department. The applicant is the member of the executive responsible for the said department. Thereafter the officials of the department engaged in negotiations with the respondents, with a view to get them to vacate in an amicable manner.

[44] Having considered that the applicant is the registered owner of the property; the applicant requires the property to accommodate government offices; due notices to vacate were given to the respondents; and the respondents have been found to lack the right to occupy the property, I am satisfied that the applicant has made out a case for the eviction of the applicants. The respondents are carrying on business to the prejudice of the applicant, by being denied use and enjoyment of government property for public interest.

[45] Regarding the costs of 18 March 2021, in the order of the said date, it appears that the applicant was ordered to serve the papers on the fifth respondent, which is the school, by delivering a copy thereof on the respondent's attorneys. During the hearing the applicant submitted that all the respondents' affidavits were deposed to by the director of the school. The school therefore, was always in possession of the application papers before the said order was made. According to the respondents, service upon the school was necessary after its joinder. It appears that the court when making that order was also of that view. In that light, the applicant ought to pay the wasted costs of 18 March 2021.

[46] In the circumstances of this case, I am satisfied that an order for the eviction of the respondents is just and equitable.

In the result,

1. The respondents and all other persons in occupation of erf 308, Mthatha are hereby ordered to vacate the premises known as erf 308 Mthatha, within thirty (30) days of the order.

2. In the event of the respondent's failure, refusal or neglect to vacate the said property, in part or as a whole, the sheriff of this court, duly assisted by members of the South African Police Service, and the applicant's security services, if needs be, are hereby authorised to evict the respondent and any other person(s) found on the said property.

3. The counter application is hereby dismissed.

4. The respondents are hereby ordered to pay the costs of the main application, excluding the costs of 18 March 2021.

5. The applicant is hereby ordered to pay costs of 18 March 2021.

6. The respondents are ordered to pay costs of the counter application.

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B MAJIKI

JUDGE OF THE HIGH COURT

Counsel for the applicant : Ms Pillay SC with Mr Pitt

Instructed by : Messrs Mvuzo Notyesi Incorporated

2nd Floor, Old TH Madala Chambers
14 Durham Street
MTHATHA

Attorney for the Respondents	:	Mr Tshiki
Instructed by	:	Messrs Tshiki & Sons Incorporated 34 Victoria Street MTHATHA