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

CASE NO: 22/5396

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

DATE
SIGNATURE

In the matter between:

MIHLOTI, ROSE MILANI	First Applicant
VUYISILE, NDINISA HACKLY	Second Applicant
and	
EKURHULENI METROPOLITAN POLICE DEPARTMENT	First Respondent
CITY OF EKURHULENI METROPOLITAN MUNICIPALITY	Second Respondent

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JUDGMENT

MOORCROFT AJ:

Order

[1] This is an application for leave to appeal that was argued on 9 June 2022. I make the following order:

"1. The application for leave to appeal is dismissed;

2. The applicants are ordered to pay the costs of the application, and are liable jointly and severally the one paying the other to be absolved."

[2] The reasons for the order follow below.

Introduction

[3] I deal with the relief sought by the applicants under the headings of the prayers in the notice of motion.

Second[1] prayer: Interdicting the first and second Respondents from evicting the applicants from the property owned by the deceased farmer without a court order

[4] The applicants sought interdictory relief. An interdict is intended to prevent harm actually occurring at present or reasonably apprehended in the future. It is not a remedy to redress harm that occurred exclusively in the past.[2] They sought an order that the respondents be interdicted from evicting them from *"the property owned by the deceased farmer without a court order."*

[5] No description of the property was provided by the applicants but the property was described by the respondents. The City of Ekurhuleni Metropolitan Municipality (*"the respondent"*), is the owner. The deceased farmer's estate was not cited but I

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1 The first prayer in the notice of motion related to urgency.
2 Van Loggerenberg and Bertelsman *Erasmus: Superior Court Practice* D6-1 *et seq.*

was satisfied that the land is Council land and that there is no need to join the estate of the deceased farmer, Erasmus.

[6] The first applicant informs the Court that she occupied the property until 17 February 2022 when her shack was destroyed. It is common cause, and was again conceded by the applicant's counsel, that the applicants do not have a right to occupy the property, nor do they have a *prima facie* right for the purposes of an interim interdict. In the light of the concession, which was properly made, the application for an interdict cannot succeed. A clear right is a prerequisite for a final interdict.

[7] The applicants in effect seek the assistance of the respondent in respect of accommodation and I have requested the respondent's counsel to convey the request to the respondent.

[8] The situation must be distinguished from the situation where a landowner seeks an order evicting unlawful occupiers from its land. In such a case, the occupiers are entitled to rely on the safeguards created by the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998.

[9] In the present matter the applicants seek a final interdict in perpetuity that they may not be evicted from the land in question without a court order. There may be grounds for such an eviction, for instance in a counter spoliation and it would not be possible and appropriate for the Court at this time to pre-judge such an event. The applicants are not in occupation of the respondent's land, and if they seize the land it would possibly or even probably be a *mala fide* act. An interdict granted now to prevent such a counter spoliation would not be an appropriate order and I am of the view that another court will not come to a different conclusion.

[10] The Council is an organ of state and should approach the Court for the appropriate order if and when an order is required, and the law must then be complied with.[3]

[11] No case is made out for the order sought.

Third prayer: To direct the respondents to compensate each individual who their shacks were abolished and burned a sum of R2 000 each

[12] It is trite that damages must be claimed in action proceedings.

[13] No case is made out for a damages claim in the amount of R2 000 or indeed any amount, and this was quite correctly conceded in argument.

Fourth prayer: The Respondents be directed to restore the applicants

[14] It is not possible to attach a sensible meaning to the prayer.

Fifth prayer: In the event that the Respondents evict the Applicants the Respondents must provide an alternative accommodation with immediate effect

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[3] See s 4 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act and *Occupiers, Berea v De Wet NO* 2017 (5) SA 346 (CC) paras 39 to 57. See also *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 36; *Machele v Mailula* 2010 (2) SA 257 (CC) para 15; *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 (6) SA 294 (SCA) paras 11 to 25.

[15] The applicants have not been in occupation of the Council's property and no case is made out for an order that the Council provide them with accommodation.

Sixth prayer: The Court to direct the Respondents not to bypass the proceedings of the appeal court, in the matter still pending

[16] The relief sought in this prayer relates, it is claimed, to the pending appeal in a matter that was heard in the Gauteng Division, Pretoria.

[17] The suspension of the order granted in the matter in the Pretoria High Court is governed by section 18 of the Superior Courts Act, 10 of 2013.

The applicable principles in an application for leave to appeal

[18] Section 17(1)(a)(i) and (ii) of the Superior Courts Act, 10 of 2013 provides that leave to appeal may only be given where the judge or judges concerned are of the opinion that the appeal would have a reasonable prospect of success or there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration. Once such an opinion is formed leave may not be refused.

[19] In *KwaZulu-Natal Law Society v Sharma*[4] Van Zyl J held that the test enunciated in *S v Smith*[5] still holds good:

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4 [2017] JOL 37724 (KZP) para 29.
5 2012 (1) SACR 567 (SCA) para 7.

> *"In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal."*

[20] In an *obiter dictum* the Land Claims Court in *Mont Chevaux Trust (IT 2012/28) v Tina Goosen*[6] held that the test for leave to appeal is more stringent under the Superior Courts Act of 2013 than it was under the repealed Supreme Court Act, 59 of 1959. The sentiment in *Mont Chevaux Trust* was echoed by Shongwe JA in the Supreme Court of Appeal in *S v Notshokovu*.[7]

[21] No sound, rational basis is suggested for a submission that there are reasonable prospects for success on appeal. The applicants approached the Court for urgent relief on papers that were defective in that the papers did not adequately identify the property with which their application was concerned with, and failed to identify the right that entitles them to occupation of the respondent's property. On their version of the facts the property belonged to a third party, who or which they failed to cite as a respondent.

[22] I therefore make the order as set out above.

J MOORCROFT

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

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6 2014 JDR 2325 (LCC), [2014] ZALCC 20 para 6.

7 [2016] ZASCA 112 para 2. See also Van Loggerenberg and Bertelsmann *Erasmus: Superior Court Practice* A2-55; *The Acting National Director of Public Prosecution v Democratic Alliance* [2016] ZAGPPHC 489, JOL 36123 (GP) para 25; *South African Breweries (Pty) Ltd v Commissioner of the South African Revenue Services* [2017] ZAGPPHC 340 para 5; *Lakaje N.O v MEC: Department of Health* [2019] JOL 45564 (FB) para 5; *Nwafor v Minister of Home Affairs* [2021] JOL 50310 (SCA), 2021 JDR 0948 (SCA) paras 25 and 26.

GAUTENG DIVISION
JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected 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 of the judgment is deemed to be **10 June 2022**

ATTORNEY FOR THE APPLICANTS:	Ms M K Bareki
INSTRUCTED BY:	Kagiso Rakhuba Attorneys
COUNSEL FOR RESPONDENTS:	S Zimema
INSTRUCTED BY:	Renqe Fa Inc Attorneys
DATE OF THE HEARING:	9 June 2022
DATE OF JUDGMENT:	10 June 2022