



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

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

SIGNATURE

DATE: 8 March 2023

Case No. 00052/2023

In the matter between:

JEROME BADENHORST

First Applicant

**THE UNLAWFUL OCCUPIERS OF THE IMMOVABLE
PROPERTIES AT PORTION 102, HOLGATFONTEIN 36
IR NIGEL, also known as MACKENZIEVILLE EXTENSION**

Second &
Further Applicants

and

CITY OF EKURHULENI METROPOLITAN MUNICIPALITY

First Respondent

THE SHERIFF OF THE HIGH COURT, NIGEL

Second Respondent

THE SOUTH AFRICAN POLICE SERVICES, NIGEL

Third Respondent

**CITY OF EKURHULENI METROPOLITAN POLICE
DEPARTMENT**

Fourth Respondent

JUDGMENT

WILSON J:

- 1 On 3 March 2023, I made an order declaring that the first, third and fourth respondents' execution of an eviction order in the absence of the second respondent, the Sheriff, on 28 February 2023, was unlawful. The eviction order was issued by Molahlehi J on 9 June 2021.
- 2 Having found the eviction order to have been unlawfully executed, I directed the first, third and fourth respondents – the Ekurhuleni Municipality, the South African Police Services (SAPS) and the Ekurhuleni Metropolitan Police Department (EMPD) – to restore the applicants to the properties from which they had been unlawfully evicted. I also made further orders suspending the execution of the order of Molahlehi J pending my judgment on further relief sought by the applicants. That relief involved a stay of Molahlehi J's eviction order pending an investigation of the applicants' need for alternative accommodation.
- 3 On Monday 6 March 2023, the first respondent, the Ekurhuleni Municipality, applied for leave to appeal against the declaration that its execution of the eviction order was unlawful. However, it did not seek leave to appeal against the order that the applicants be restored to the properties from which they were evicted, or against my order suspending the execution of the eviction order pending my judgment on the application for the stay the applicants seek. The Ekurhuleni Municipality requested that I reduce my reasons for declaring the execution of the eviction order unlawful to writing. I give those reasons in this judgment. My judgment on the stay the applicants sought remains reserved, and will be delivered in due course.

The unlawfulness of the execution of the eviction order

- 4 Molahleli J issued the eviction order under section 4 of the Prevention of Illegal Eviction from, and Unlawful Occupation of Land Act 19 of 1998 (“the PIE Act”). It is common cause that the eviction order was carried out in the Sheriff’s absence. The execution of the order was accordingly in breach of section 4 (11) of the PIE Act, which states that “the sheriff must at all times be present during” an “eviction, demolition or removal”.
- 5 Section 4 (11) has an obvious purpose: to help ensure that evictions from homes are humanely carried out. It is trite that section 26 of the Constitution, 1996 requires that eviction orders be executed humanely (*Modder East Squatters and Another v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd* [2004] 3 All SA 169 (SCA), paragraph 26). The presence of the Sheriff assists in ensuring that an eviction order under the PIE Act is carried out in a lawful, orderly and humane manner.
- 6 There is good reason to believe that the way that the Ekurhuleni Municipality, the SAPS and the EMPD executed the eviction order against the applicants in this case was neither humane nor orderly, and that the absence of the Sheriff may have facilitated some of the less fortunate conduct the applicants alleged. The eviction commenced without notice at 5am. I was informed from the bar that it involved the use of tear gas and rubber bullets. 500 families were targeted, about 250 of whom were removed before I stayed the execution of the order in urgent court at around 11am

that morning. Significant numbers of people appear to have been left on the streets. At least 700 children were targeted.

7 If this is true, it is unacceptable. But without the Sheriff's presence, it is impossible, at this stage, to make an independent assessment of what really happened. That underscores the essential role the Sheriff plays.

8 Because the Sheriff was not present, the order was executed in breach of the PIE Act. The eviction accordingly took place *ultra vires* the statute and was unlawful. The eviction was, as a result, no more than a spoliation. I treated it as such.

The meaning of the eviction order

9 Mr. Sithole, who appeared for the Ekurhuleni Municipality, argued that the absence of the Sheriff did not render the execution of the eviction order unlawful. He argued that paragraph 3 the eviction order makes clear that those charged with the execution of the eviction order were "the City of Ekurhuleni Police Services and or the South African Police Services and or assisted by [sic] the Sheriff of this Court or his lawful deputy and a Locksmith" (my emphasis). Mr. Sithole submitted that the effect of this language was that the eviction order could be carried out by either the Ekurhuleni Municipality, or the SAPS, or the Sheriff working with a locksmith, or, indeed, by any combination of these agencies.

10 However, whatever the ambiguities arising from paragraph 3 of the eviction order, that the Sheriff was required to be present is in fact clear from paragraph 4 of the eviction order, which refers to the execution of the

eviction order by the “Sheriff and/or his/her authorised deputy”. This is consistent with section 4 (11) of the PIE Act and section 43 (1) of the Superior Courts Act, which requires the Sheriff to “execute all sentences, judgments, writs, summonses, rules, orders, warrants, commands and processes of any Superior Court directed to the sheriff and must make return of the manner of execution thereof to the court and to the party at whose instance they were issued”.

- 11 This places the correct textual interpretation of the eviction order beyond doubt. If any textual ambiguity remains (it does not) then it must be resolved by choosing a construction of the eviction order that requires the Sheriff’s presence over one that does not. This is because judgments and orders of this court must where possible be interpreted consistently with the statutes they are meant to enforce.
- 12 Having reached this conclusion, it was unnecessary for me to consider Mr. Sithole’s further submission that I had no power to reverse the execution of the eviction order, as that would entail my unlawful assumption of an appellate jurisdiction. Since what I did was construe the eviction order and then find that its fundamental lawful intent – that the Sheriff be present at the eviction – had been ignored, there can be no question of my usurping appellate jurisdiction.
- 13 I did not, in any event, set aside, vary or correct the eviction order. I merely declared that it had been unlawfully executed. The effect of that order is no more than that the consequences of the steps taken to implement the order on 28 February 2023 must be reversed. It does not affect the validity of the

order in any way. If I ultimately lift the suspension I placed on the order (which, I emphasise, is not appealed against) and refuse the stay the applicants seek, Ekurhuleni will be at liberty to execute the order again – this time, it is to be hoped, in a manner consistent with the order’s own terms and the applicable statutory requirements.

- 14 There is accordingly no sense in which I purported to exercise appellate powers.

The pleaded case

- 15 It was finally argued that the declaration that the execution of the eviction order was unlawful could not be granted because the applicants had not specifically asked for that relief, and that a case based on the absence of the Sheriff had not been pleaded from the outset.

- 16 The applicants did raise the absence of the Sheriff in their replying affidavit. Mr. Brown, who appeared for the applicants, urged me conclude that the applicants had been spoliated because the order had not been lawfully executed. Mr. Sithole sought neither to strike out the new matter raised in reply, nor to file further affidavits or argument to deal with the new contention. He informed me that I could accept that it was common cause that the Sheriff was not present when the eviction order was executed.

- 17 It is well-established that a court is at large, within the confines of fairness, to decide any point that arises on the papers, and to grant relief consequent upon that decision (*Robinson v Randfontein Estates GM Co Ltd* 1925 AD 173 at 198). This extends to ruling on facts that are raised for the first time in

reply in exceptional cases. In deciding whether to have regard to the new matter, a court ought generally to consider “(i) whether all the facts necessary to determine the new matter raised in the replying affidavit were placed before the court; (ii) whether the determination of the new matter will prejudice the respondent in a manner that could not be put right by orders in respect of postponement and costs; (iii) whether the new matter was known to the applicant when the application was launched; and (iv) whether the disallowance of the new matter will result in unnecessary waste of costs”. (*Mostert v Firstrand Bank Ltd t/a RMB Private Bank* 2018 (4) SA 443 (SCA), paragraph 13).

- 18 Here the material fact – the absence of the Sheriff - was common cause. Ekurhuleni Municipality could have been in no doubt what the ultimate aim of introducing the material fact was: to regain possession – however temporarily – of the homes from which the applicants had been removed. There is accordingly no question of prejudice to Ekurhuleni Municipality in my having regard to the absence of the Sheriff. Mr. Brown informed me that neither the absence of the Sheriff, and nor its legal significance was known to the applicants when they launched the application. The absence of the Sheriff is a separate and discrete issue that has no impact on the merits of the applicants’ application to stay the execution of the eviction order pending a further investigation of their need for alternative accommodation, judgment on which I have reserved. Having regard to the Sheriff’s absence accordingly causes no prejudice to Ekurhuleni Municipality’s case in opposition to that relief. There was accordingly no unfairness of any sort – and Mr. Sithole did not suggest that there was.

19 To this I would only add that imprecision in pleading or poorly framed relief in an urgent application ought never to be allowed to get in the way of correcting a clear – and in this case egregious – illegality, especially where the material facts are common cause. Indeed, it has been held that this should be the approach “no matter how the case was pleaded” (*Maphango v Aengus Lifestyle Properties* 2012 (3) SA 531 (CC), paragraph 152).

20 It was for these reasons that I declared the execution of the eviction order unlawful.

S D J WILSON
Judge of the High Court

HEARD ON: 3 March 2023

DECIDED ON: 8 March 2023

For the Applicants: D Brown
Instructed by Chris Billings Attorneys

For the First Respondent: E Sithole
Instructed by Lebea Inc Attorneys