

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 035234/2022

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
05 FEBRUARY 2024	_____
DATE	SIGNATURE

In the matter between:

SUNSET RIDGE ESTATE HOME-OWNERS ASSOCIATION Applicant

and

JOHANNES HENDRIK VAN DEVENTER First Respondent

BIANCA SANDERSON N.O Second Respondent

THE CITY OF TSHWANE METROPOLITAN Third Respondent
MUNICIPALITY

MEMBER OF THE EXECUTIVE COUNCIL Fourth Respondent
GAUTENG DEPARTMENT OF HUMAN SETTLEMENTS

MINISTER OF NATIONAL DEPARTMENT OF Fifth Respondent
HUMAN SETTLEMENTS

THE OCCUPANTS OF THE JOBICA PROPERTY Sixth Respondent
(Portion 25 of the Farm R[...] T28535/2002)

JUDGMENT

MOGALE AJ

INTRODUCTION

[1] This application was enrolled by the applicant on the unopposed roll of 06 December 2023 against the respondents, wherein the applicant sought an order for default judgment to be granted against the first, second, and third respondents.

[2] This application relates to the occupation of a property known as Portion 25 of farm [...] R[...], held by title deed T35132/2002 and 8,5653 hectares in extent (*“the Jobica property”*).

THE PARTIES

[3] The applicant is a homeowners association and the governing body of the township Sunset Ridge Estate (*“the Estate”*), situated on the property adjacent to the Jobica property. The estate is a residential development of approximately 14,000m² in size with 16 immovable properties situated on the land. The estate falls within the urban development edge of the City of Tshwane. The applicant represents the owners of the properties situated in the estate.

[4] The first respondent is Johannes Hendrik Van Deventer N.O, in his capacity as a trustee for the time being of the Jobica Trust (registration number:- IT 3656/01) hereinafter referred to as (*“the Trust”*).

[5] The second respondent is Bianca Sanderson N.O, in her capacity as a trustee for the time being of the Trust.

[6] The third respondent is the City of Tshwane Metropolitan Municipality, a Metropolitan Municipality in the local sphere of Government duly established as envisaged in section 12 of the Local Government Municipal Structures Act 17 of 1998.

[7] The fourth respondent is a Member of the Executive Council, Gauteng Department of Human Settlement who is cited in his official capacity as the head of the Provincial Department of Human Settlement.

[8] The fifth respondent is the Minister of Human Settlement, cited herein in her official capacity as head of the National Department of Human Settlement.

[9] The sixth respondent is an unidentifiable group of individuals (*“occupants of the Jobica property”*) who illegally and unlawfully occupied the Jobica property. The Jobica property is owned by the Jobica Trust, of whom the First and Second Respondents are the trustees for the time being. It is currently zoned as *“undetermined”* and as such only allows for the erection of a single dwelling on such a property, save where an application is made and granted to erect a further dwelling. Furthermore, given its zoning, the land use on the property is limited and predominantly allows for agriculture-related activities.

THE APPLICATION

[10] In their founding affidavit, the applicant sought an order that the Court declare that the occupants of the Jobica property are declared as:

- 10.1. illegally and unlawfully occupying Portion 25 of Farm [...] R[...] held by title deed T35132/2002 and 8.5653 ha in extent ("the Jobica property").
- 10.2. occupying the Jobica Property without the consent of the Jobica Trust (registration number: IT 3656/01) ("the Trust");
- 10.3. occupying the property without the consent of the third respondent.
- 10.4. occupying the property in contravention of the Tshwane Town Planning Scheme 2008 (Revised 2014) and the third respondent's by-laws;
- 10.5. carrying on illegal and nuisance-causing activities on the Jobica Property by:
 - 10.5.1 by erecting approximately 250 illegal structures without the consent of the first, second, and/or third respondents;
 - 10.5.2 formulating an illegal dumping site that poses a health and safety risk, not only for the residents of the Sunset Ridge Estate but also for the occupants of the Jobica Property.
 - 10.5.3 illegally tapping and making use of water from a fire hydrant source, causing interference with:
 - i. the supply of emergency water supply in the event of a need arising to utilize same; and
 - ii. the water supply to the occupants of the Sunset Ridge Estate.
 - 10.5.4 creating an illegal electrical supply to the main electricity supply to the area which also services the occupation of the Sunset Ridge Estate.
 - 10.5.5 noise pollution and peace disturbance.
 - 10.5.6 urinating and defecating in the open veld on the Jobica Property in the absence of service infrastructure installed. Thus, causing a health and safety risk for the occupants of the Jobica Property, for the surrounding areas, including the occupants of the Sunset Ridge Estate.
 - 10.5.7 tapping water from the fire hydrant situated adjacent to the Jobica Property.
 - 10.5.8 making use of illegal electricity connections; and
 - 10.5.9 making use of open fires for cooking and heating purposes.

[11] That the occupants of the Jobica Property be interdicted and restrained from continuing with the unlawful and nuisance-causing activities referred to above.

[12] That the third respondent be ordered to investigate such unlawful and nuisance-causing activities occurring at the Jobica property within seven (7) days from the date of this order.

[13] That the third respondent be ordered to develop and implement an action plan within thirty (30) days from the date of this order, to prevent the continuation of the illegal and nuisance-causing activities.

[14] The third respondent provides a report to the applicant and the Court of the actions taken to comply with the order in prayer 2 above, within 45 days from the date of this order.

[15] The third respondent institutes proceedings in a competent Court for the eviction and/or relocation of the occupants from the Jobica Property within three (3) months from the date of this order.

[16] That the first to the third respondents be ordered to pay the costs of this application, jointly and severally, the one paying, the other to be absolved.

APPLICABLE LAW

[17] Rule 31(2)(a) of the Uniform Rules of Court¹ empowers the plaintiff to apply for a default judgment when the time period within which the defendant could serve and file his notice of intention to defend has passed without the respondent notifying the Plaintiff of his intention to defend the matter. The defendants were served with the applicant's notice of motion, founding affidavit, and notice of set down by way of a substituted service on 31 May 2023 in the main action. The respondents failed to enter an appearance to defend within the prescribed period, therefore entitling the applicant to apply for an order to be granted on a default basis.

[18] With regard to the application for default judgment, there is a fundamental question that appears not to have been seriously ventilated by our courts. The question relates to whether a court faced with an application for default judgment should simply be expected to function as a rubberstamp by granting the court order on the basis that the defendant has failed to enter an appearance to defend. I find that before any court order is granted, the court has the duty to investigate the matter and ascertain whether the relief sought is in accordance with the law and should be made an order of the court. I am of the view that a court is duty-bound to approach the evidence with an inquiring mind, more in particular when a matter proceeds by way of a default judgment.

[19] For me to be able to consider the matter before me, I put forth a request to the applicant's legal representative to provide me with brief heads of arguments dealing with the applicable law and the legal principles in support of their application. The applicant duly complied with the request and I appreciate the efforts and assistance in this regard.

BACKGROUND

[20] The applicant seeks a number of declaratory orders and consequential orders

¹ Rule 31(2)(a) provides that: "Whenever in an action the claim or, if there is more than one claim, any of the claims is not for a debt or liquidated demand and a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff may set the action down as provided in subrule (4) for default judgment and the court may, after hearing evidence, grant judgment against the defendant or make such order as it deems fit."

to compel the State actors, being the third defendant, to take effective action. Given the numerous assertions of the State's omission to resolve the matter and the orders being sought, it is unfortunate that the parties representing the State did not play a more active role in the proceedings.

[21] The applicant is a homeowner's association of an estate that is currently situated next to an informal settlement consisting of about 250 structures, with approximately 700 people who have been residing there for more than 12 years. The circumstances under which this came to be are unclear and the second, third, and sixth respondents did not play an active role in the proceedings to provide clarity on how this came to be.

[22] The Applicant argued that there was no other alternative remedy left but to approach the Court for assistance. All the attempts to engage with either the Jobica Trust and/or the Third Respondent have proven to be fruitless. The situation continues to escalate at the Jobica property and will likely amplify if it is not addressed sooner rather than later.

ISSUES FOR DETERMINATION

[23] In considering the application, this Court has to determine whether the relief sought is in accordance with the law and should be made an order of court. In determining that, the following legal questions need to be addressed:

- a. Does the applicant have locus standi to bring this application?
- b. Is the declaratory relief sought that the sixth respondents are unlawful occupiers competent?
- c. Is relief sought by the applicant to compel the Municipality to comply competent?
- d. Can the sixth respondent be interdicted and restrained from continuing with the unlawful and nuisance-causing activities referred to above?

Is the declaratory relief that the members of the sixth respondent are an unlawful occupier competent?

[24] The source of a court's declaratory powers comes from section 21(1)(c) of the Superior Courts Act 13 of 2013 ("Superior Court Act"). It provides as follows:

"Persons over whom and matters in relation to which Divisions have jurisdiction
(1) A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to the law take cognisance, and has the power—

...

(c) in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future, or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination."

[25] The wording is similar to previous legislation containing empowering provisions for the exercise of this power. Discussing what it meant to have an "existing, future or

contingent right”, Watermeyer JA in *Durban City Council v Association of Building Societies*² held that:

“The question of whether or not an order should be made under this section has to be examined in two stages. First, the Court must be satisfied that the applicant is a person interested in an ‘existing, future or contingent right or obligation,’ and then if satisfied on that point, the Court must decide whether the case is a proper one for the exercise of the discretion conferred on it. Clearly, the interest of an applicant must be a real one, not merely an abstract or intellectual interest. But what is meant by a real interest in a right or an obligation? ... Inherent in the concept of a right is the idea that it resides in a determinate person. ‘There cannot be a right,’ says Salmond, ‘without a subject in whom it inheres.’ Prima facie, therefore, it would seem that the persons interested in a right are those in whom it inheres or against whom it avails.”

[26] Once a right or sufficient interest is established, that does not in itself entitle an applicant to the relief sought. The section then requires a court to exercise, after having balanced all relevant factors, its discretion on whether or not to grant the declaratory relief.³

Locus Standi

[27] I now turn to consider the declarators in relation to the effect that the sixth respondents are illegal and unlawful occupiers. The applicant contends that the respondents are unlawful and illegal occupiers based on how the land was zoned by the third respondent. The applicant further submits that the lack of access to services, and overpopulation has given rise to the nuisance-causing activities, and that they are occupying the property without the permission of the Trust. The applicant thus seeks declarations from this Court to that effect. The applicant claims that it has *locus standi* in these proceedings as it has an interest in this relief, and its residents have the right to live in an environment where the law is upheld.

[28] It is unclear why the aforementioned grounds entitle the applicant to an interest in this particular relief sought from either the founding affidavit or the heads of argument pertaining to declaring the occupation of the Jobica property illegal and unlawful. While it has been set out by the applicant that it experiences numerous difficulties due to the occupation by the sixth respondent it is not clear what it is that it seeks from these declarations declaring that the members of the sixth respondent are illegal and unlawful occupiers. I am left with no choice but to exercise my own discretion as to this aspect based on the facts and law as I understand them. It is my view as I see it, that there exist two possible grounds of interest that grants the applicant an interest in this particular relief.

[29] The first possible ground is that there are a variety of rights of the members of the applicant that the applicant alleges are violated by what it terms as the sixth respondent’s illegal and unlawful occupation. The applicant believes that this declaratory relief is a way to vindicate those rights. In the first place, I do not believe that this constitutes an existing, contingent, or future right in terms of section 21 of the Superior Courts Act. The applicant is not someone or an institution that has a right or obligation pertaining to the declaration of the legal status of the sixth respondent

² 1942 AD 27 at para 32.

³ *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* (237/2004) [2005] ZASCA 50; [2006] 1 All SA 103 (SCA); 2005 (6) SA 205 (SCA) at paragraph 17.

as an illegal and unlawful occupier. The interest that a party seeks to vindicate through declaratory relief has to be one related to their own rights and not those of another.⁴

[30] The right to seek an order pertaining to a finding that characterizes the sixth respondent as illegal and unlawful occupiers is reserved only to the owner/owners of the property, being the second and third respondents (the Trust), and the sixth respondent as characterized by the *Durban City Council*⁵ decision. It has meaning only to them and whatever relations may exist between them. A neighbor does not obtain rights against unlawful occupiers arising from the fact that their occupation is illegal. The neighbor may have rights to the peaceful possession of its property free from nuisance but that is not right grounded in the lawfulness or otherwise of the person who causes the nuisance's occupation. It is a right that exists regardless of the lawfulness or otherwise of the occupation. The interests that the applicant seeks to protect do not constitute an interest for the application sought which is contemplated in section 21 of the Superior Courts Act. The applicant also obtains no comparative advantage from this declaratory order and thus it ought not to be granted.⁶

[31] The case of *Four-Wheel Drive Accessory Distributors CC v Leshni Rattan NO*⁷ does assist the applicant, as it applies a broad authority on *locus standi* and does not specify the specific contours of the interest required for declaratory relief, although it has similar dimensions. The interest asserted by this applicant and most of the relief it seeks is simply too remote. This is dispositive of the issue of whether declaratory relief and the existence of this interest are a necessary precondition for the Court to exercise discretion on whether to grant the declaratory relief.⁸ Absent of this interest, the Court is not vested with an interest on whether to exercise its discretion or not.⁹

[32] Further, even if it did, and I still struggle to see any reasonable interpretation of section 21 of the Superior Courts Act where it would, this would not be an appropriate instance in which this Court should exercise its discretion in favour of the granting of the declarator. First, there is insufficient argument in the papers on why this relief is appropriate. Secondly, the appropriateness of the declaratory relief relies on evidence of how they came to be on the property which is in the possession of the Trustees and the sixth respondents, both of whom took no part in these proceedings. Thirdly, it is a question to be decided by a court considering any future eviction which may be instituted in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act ("PIE Act")¹⁰

[33] The second possible ground for the relief sought related to the rights of the parties may be that this relief would allow the municipality to apply for an eviction of the occupiers of Jobica and that would later down the line protect the interests of the members of the applicant's rights which are currently violated by the alleged

⁴ See also: *Ex parte Morris* 1954 (3) SA 153 (W) at 155H; *Milani v SA Medical and Dental Council* 1990 (1) SA 899 (T) at 903A; *Asmal v Asmal* 1991 (4) SA 262 (N) at 265G; *Unicorn Lines (Pty) Ltd v Commissioner of Customs and Excise* 1997 (1) SA 369 (D) at 375 C; *Preston v Vredendal Co-operative Winery Ltd* 2001 (1) SA 244 (E) at 248J -249I.

⁵ *Supra* at fn 2.

⁶ *Adbro Investment Co Ltd v Minister of the Interior* 1961 (3) SA 283 (T) at 285 B – D.

⁷ 2019 (3) SA 451 (SCA) at para 19

⁸ *Supra* fn 4, at para 19.

⁹ *Id.*

¹⁰ Act 19 of 1998.

violations of rights. As to the first step of the test for declaratory relief, this would also not create an existing, contingent, or future right for the applicants. However, it is also not true that this declaration is necessarily based on the arguments raised by the applicant. The lawfulness of the occupation would only be relevant to the third respondent if it was the owner of the property. However, where a municipality exercises its discretion to apply for the eviction of persons who have erected structures illegally and unlawfully on private land, then the application for eviction is in terms of section 6 of the PIE Act¹¹, and the lawfulness or otherwise the occupation is not a factor. Therefore, there can never be a right to declaratory relief contingent on the need for the municipality to evict the alleged unlawful occupiers.

Is the relief to compel the Municipality competent?

[34] The applicant contends that the third respondent is failing in its constitutional obligations. The first is the obligation to prevent violations of its zoning laws. The applicant further argues that the third respondent is in violation of various constitutional and statutory obligations in relation to the occupation of the sixth respondent.

[35] The compelling of evictions was considered in *Abahlali Basemjondolo Movement SA and Another v Premier of the Province of Kwazulu-Natal and Others (Abahlali)*¹². In *Abahlali* there was a dispute over the constitutionality of section 16 of the KwaZulu-Natal Elimination and Prevention of Re-emergence of Slums Act¹³ (“Slums Act”). This provision obliged a landowner to evict unlawful occupiers once a notice had been issued to that effect upon notice of the Member of the Executive Council in the Gazette. Where the owner failed to do so, it obliged the relevant municipality to institute proceedings in terms of section 6 of the PIE Act.

[36] At issue were that the properties, similarly, placed to the current property in this application, were without a proper infrastructure, sanitation, or secure tenure and that it was overcrowded.¹⁴ The Constitutional Court first turned its attention to the effect of compelling an eviction at the discretion of either the municipality or the landowner. The court held that section 16 had the effect of taking the discretion away of whether to institute an eviction based on the evidence before it.¹⁵ Ordinarily, a municipality or landowner would decide whether it would be just and equitable to seek an eviction. However, section 16 of the Slums Act took that discretion away.¹⁶

[37] The Constitutional Court held that this was a violation of section 26(2) of the Constitution. Section 16 of the Slums Act made it compulsory to evict illegal or unlawful occupiers, whereas the PIE Act left this question at the discretion of the landowner and municipality.¹⁷ The erosion of that discretion, had the impact of violating the protections afforded to the occupiers against the arbitrary institution of proceedings.¹⁸

¹¹ Act 19 of 1998

¹² (CCT12/09) [2009] ZACC 31; 2010 (2) BCLR 99 (CC).

¹³ Act 6 of 2007.

¹⁴ *Supra* fn 12, at paras 104 and 105.

¹⁵ *Supra* fn 12, at para 110.

¹⁶ *Id.*

¹⁷ *Supra* fn 12, at para 112.

¹⁸ *Id.*

[38] Next, the Constitutional Court considered the obligation that an eviction be sought as a last resort and that the obligation be a reasonable obligation. Section 2(1)(b) of the Housing Act¹⁹ and Chapter 13 of the National Housing Code required that there needed to be negotiation in relocations and of the occupiers of the land that evictions needed to be a last resort.

[39] The Constitutional Court held that, “*put otherwise, if in fact institution of eviction proceedings under section 16 may the object of the Slums Act be resorted to only as a measure of last resort and only after reasonable engagement, then its obligatory provisions serve no useful purpose in advancing*”. If it provided for these then it would no longer be compelling eviction.²⁰ Thus by its nature, compelling an eviction necessarily removes a discretion.

[40] More specific to the present circumstances, the court in *Ekurhuleni Metropolitan Municipality v Harmse and Others*²¹ considered whether it was appropriate for a court to grant an order for a municipality to compel a property owner to institute eviction proceedings against its tenants. The Ekurhuleni municipality sought an interdict against the continued occupation of a property that it said was being occupied against the zoning laws. This is similar to one of the grounds of unlawfulness raised by the applicants in this case. The court held that the substance of this interdict would be to compel the landowner to evict the applicants as it would be the only way to ensure compliance.

[41] The court in *Ekurhuleni* held that the relief compelling an eviction was not permissible for the same reasons as the court in *Abahlali*.²² The court in *Ekurhuleni* also holds that such a court order would be a violation of section 26(2) of the Constitution as it is irrational, overbroad, and invasive of the protections against arbitrary evictions.²³ Further, seeking to protect important interests such as zoning and proper coordinated development is not sufficient reason to allow this.²⁴

[42] The court in *Ekurhuleni* further holds that the approach of compelling evictions is also at odds with the municipality’s obligations towards conducting a meaningful engagement and is at odds with the authority of *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v the City of Johannesburg*.²⁵ The court in *Ekurhuleni* considers that the effect of the *Olivia Road* judgment is that only once the municipality has engaged or attempted to engage the occupiers of the land, could the municipality decide to proceed with an eviction application. This would require a record of the engagement.²⁶ This obligation would exist regardless of whether PIE exists or not.²⁷

¹⁹ 107 of 1997

²⁰ *Supra* fn 12, at para 115.

²¹ (0014030/2017) [2023] ZAGPJHC 860

²² *Id*, at para 22.

²³ *Id* at paragraph 24.

²⁴ *Supra* fn 12, at para 121; *Ekurhuleni* at paragraph 25.

²⁵ 2008 (3) SA 208 (CC).

²⁶ *Supra* fn 22 at para 34; The also refers to *City of Johannesburg Metropolitan Municipality v K2016498847 (Pty) Ltd* 2022 (3) SA 497 (GJ) at paragraphs 22 – 24.

²⁷ *Ekurhuleni* at paragraph 41.

[43] When dealing with poor people, of which the applicant accept that the sixth respondent is, then the consultation contemplated in *Olivia Road* becomes even more important. The municipality might very well decide that an eviction is the only way forward. A municipality might also reasonably decide not to evict the occupiers after having weighed up the availability of alternatives, the profile of the persons, the suitability of rezoning, etc. It would be premature for the Court to pronounce on the exercise of this discretion with the limited information on hand. The authorities simply do not provide for the Court to exercise its powers in this way.

Can the sixth respondent be interdicted and restrained from continuing with the unlawful and nuisance-causing activities referred to above?

[44] The applicant argued that the sixth respondent continued to conduct illegal and nuisance causing activities on the property, amongst other, pollution, noise pollution, and peace disturbance. The formation of the illegal dumping site created by the sixth respondent holds an immense health and safety risk for the residents of Sunset Ridge Estate as well as the residents of the Jobica Property. The extreme noise pollution and peace disturbance is unbearable to the residents of Sunset Ridge Estate.

[45] The principles of the common law relevant to the relations between neighbours may impose certain limitations on the landowners. This may be in the following forms: nuisance, encroachment, lateral support, and the drainage of surface waters.²⁸ The neighbours enjoy a reciprocal right to use and enjoy their respective land in a manner that is conducive to their health, well-being, and comfort.²⁹ For example, neighbours may not cause damage or destruction to one another's property.³⁰ When called upon to intervene, the court has a wide discretion to grant such order as deemed necessary to offer the most reasonable and equitable relief³¹

[46] One of the limitations of the neighbour law imposed on the landowners is in the form of a nuisance.³² A limitation in the form of a private nuisance³³ is when there is interference by a neighbour with an owner's use and enjoyment of his or her land through an interference with the comfort of human existence on the land.³⁴ The corollary of this is that through the ownership of the land, a landowner is entitled to inhabit and occupy the land in personal physical comfort, convenience, and well-being.³⁵ The violation of this interest occurs when the subject land or premises thereon is invaded by substances or phenomena such as foul odour, smoke, gas, fumes, noise, or vibration, often in excessive quantity or levels.³⁶ These may give rise

²⁸ *Ibid*

²⁹ Van Wyk Land Administration at par 55

³⁰ *Ibid*

³¹ Van der Merwe on Things at para 168

³² Van Wyk Land Administration at par 55 relying, among others, on *Regal v African Superslate (Pty) Ltd* 1963 1 SA 102 (A); *Gien v Gien* 1979 2 SA 1113 (T) and *Pappalardo v Hau* 2010 2 All SA 338 (SCA).

³³ In Muller, G *et al.* 'Silberberg and Schoeman's: The Law of Property', 6th ed, LexisNexis (online version) (hereafter *Silberberg and Schoeman's Law of Property*) at par 6.2 states that there are three main categories of the limitations which may be imposed on the ownership of property: public law limitations (imposed on all owners of a particular kind of property to benefit society or certain sections of society); restrictions imposed in the interests of neighbour relations, and individual restrictions.

³⁴ Church on Nuisance at para 170

³⁵ *Ibid*

³⁶ Church on Nuisance at para 170

to a cause of action in nuisance.

[47] In determining whether the alleged interference goes beyond what a neighbour can be expected to tolerate, the court in *Gien v Gien*³⁷ held that:

"The right of ownership is the most comprehensive real right that a person can have in respect of a thing. The point of departure is that a person can, in respect of immovable property, do with and on his property, as he pleases. This apparently unfettered freedom is, however, a half-truth. The absolute power of an owner is limited by the restrictions imposed thereupon by the law."

[48] Accordingly, where landowners exercise their *ius utendi* and it interferes with or disturbs the neighbouring landowner's similar right of use, the law limits both their rights by imposing reciprocal obligations on them³⁸.

[49] The Constitutional Court in *Van der Merwe v Taylor*³⁹ added a constitutional element to the concept of ownership laid down in *Gien*. The court described the concept of ownership as potentially conferring upon the owner the most complete or comprehensive right in or control over a thing. The court held further that:

"The most comprehensive control over the property does not imply unfettered freedom to do with the thing as one pleases. However comprehensive, and although protected against arbitrary deprivation under section 25(1), ownership like any other right, is not absolute."

[50] It further held that⁴⁰ the courts are called upon to balance competing interests in a principled way and promote the constitutional vision of a caring society, based on good neighborliness and shared concern. The spirit of *ubuntu*, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalized, and operational declaration in our evolving new society of the need for human interdependence, respect, and concern"

[51] With reference to contiguity, neighbour law in general and nuisance law in particular rest on the assumption that nuisance usually involves at least two properties⁴¹ that is situated more or less closely together, although they do not have to be strictly adjacent. It is equally clear that the nuisance could emanate from neighbouring land although it is not caused by the owner or the current occupier or user of the land, just like nuisance could affect not only the owner but also the tenant

³⁷ 1972 (2) SA 1113 (T) at 1120C-E

³⁸ *Ibid*

³⁹ 2008 1 SA 1 (CC) at para 26

⁴⁰ *Ibid* at para 36-37

⁴¹ Nuisance supposes, but does not necessarily require, two or more privately-owned land plots, but the notion of neighbouring erven is interpreted widely. Nuisance could emanate from the use of public streets, e.g., noisy motorcycles or general street noise, which means that public land such as streets or pavements is sometimes regarded as the neighbouring land from where the nuisance originates. In *Malherbe v Ceres Municipality* 1951 (4) SA 510 (A), the alleged nuisance caused by falling leaves emanated from trees planted on sidewalks on public streets. Nuisance caused by overflying airplanes could similarly be said to emanate from use of the airport (regularly low-flying aircraft would generally only occur when there is an airport or airfield in the vicinity), which may be some distance away, just as water pollution on one piece of land could emanate from dumping that took place on land far upstream.

or occupier of the neighbouring land.

[52] The applicant argued that the occupants of Jobica Property are poor, they therefore cannot financially afford to provide for themselves with some necessities to limit some of the nuisance causing activities, and the third respondent must remedy the situation. I find that the lawfulness of the remedy would only be relevant to the third respondent if it was the owner of the property

[53] The first and second respondents as owners of the property are aware of the illegal and nuisance activities taking place on the Jobica Property but it does not appear that they have the capacity or means to remedy the nuisance activities that occur on its property. I find that the applicant has established that there is a nuisance causing activities occurring on the Jobica Property and that the nuisance affects the rights of the applicant, therefore a proper case has been set out. The occupants of the Jobica Property have interfered with the applicant's use and enjoyment of their land that comes with the comfort of human existence on the property, however disturbed by the sixth respondent's continued nuisance causing activities.⁴²

[54] I find that this court has the duty to balance competing interests between neighbors in a principled way and promote the constitutional vision of a caring society, based on good neighborliness and the spirit of *ubuntu*. The fact that the occupants of Jobica Property have control over the property and that they don't have adequate infrastructure does not imply unfettered freedom to do things as they please. There is an immense health and safety risk for the applicant as well as the residents of the Jobica Property, extreme noise pollution which is an issue of concern, and this cannot be ignored. I consider this nuisance interference to be a violation of the applicant's rights to physical comfort, convenience, and ownership. I find that the first and the second respondents ought to remedy the continued nuisance activities that continue on the Jobica Property.

The ability of a municipality to be required to provide basic services regardless of the consent of the owner

[55] The municipality's obligations to provide services are located across the legal landscape. These are included in the Constitution,⁴³ the Municipal Systems Act, the Water Services Act⁴⁴, and numerous other pieces of legislation. However, this may be difficult in the instance where no permission has been obtained from the landowner. Neither the landowner nor the unlawful occupiers participated in this case. There is no evidence that the consent of the landowner to provide services by the third respondent was sought.

[56] Municipalities have a special cluster of relationships that flow from the common law and those in public law depending on the issue.⁴⁵ In *Joseph and Others v City of Johannesburg and Others*⁴⁶ it was stated that in the provision of electricity, these were

⁴² Church on Nuisance at para 170

⁴³ Section 27 and Schedule 4 Part B of the Constitution.

⁴⁴ Act 108 of 1997. Sect

⁴⁵ *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* (CCT 22/08) [2009] ZACC 16; 2009 (9) BCLR 847 (CC) ; 2010 (3) SA 454 (CC) at paragraph 343.

⁴⁶ (CCT 43/09) [2009] ZACC 30; 2010 (3) BCLR 212 (CC) ; 2010 (4) SA 55 (CC).

present as they are in the provision of other services. The municipality has a duty to ensure the provision of services in a manner that is consistent with its constitutional obligations.⁴⁷ The overarching feature of this duty that the municipality has is that it exists directly between the residents and the municipality. It is not dependent on their consent. However, given that the landowner's permission may be required for access, its relevance needs to be determined.

[57] The balancing exercise a court needs to exercise is between the rights of the neighbor, the landowner and the occupiers. However, in this case, these are not alleged. The application for services is brought by the applicants in their own interest, in relation to a property that is privately owned. There is no evidence from the municipality concerning their attempts to provide its services. There is no evidence from the occupiers that they have attempted to obtain services. Furthermore, the application is not brought in terms of the Promotion of Administrative Justice Act 3 2000 ("PAJA") as required by the *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others*⁴⁸ and *Joseph* authorities. The process provided for in PAJA is important because it guarantees a party access to information and reasons which assists the court even where the Municipality takes no active part in the case. This is wholly inappropriate to make the order in the circumstances.

Conclusion

[58] I find it inappropriate for the Court to grant the declaratory relief sought by the applicant citing that the sixth respondent is an unlawful occupier. The relief is sought by members of the applicant with no direct and substantial interest in the relief. Public interest is not asserted for *locus standi*, it is not established in any of the prayers sought. It is my view that the applicant has no standing to seek the declaratory relief. The order to compel the eviction proceedings is impermissible in terms of the relevant authorities. When dealing with poor people, consultation as contemplated in *Olivia Road*, becomes more important. The continued nuisance causing activities by the occupants of the Jobica Property is intolerable, it is against the spirit of *ubuntu* and good neighborliness to the occupants of Sunset Ridge Estate or applicants, as a result, it must be remedied. Lastly, it is my view that there is a duty to provide basic services, but there is no case made out for such a service to be rendered by the third respondent.

[59] I am aware that both the first, the second and the sixth respondent failed to participate in these proceedings but that does not prevent this court from issuing an order for the resolution of a dispute between the applicants and the occupants of Jobica Property in the most reasonable and equitable manner.

[60] As a result, the following order is made.

1. The application declaring that the occupants of the Jobica Property (collectively cited as the sixth respondent) illegally and unlawfully occupiers of Portion 25 of Farm

⁴⁷ *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others* [2004] ZACC 9; 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC) at paragraph 38.

⁴⁸ [2009] ZACC 16.

[...] R[...] held the title deed T35132/2002 and 8.5653 HA is refused.

2. The relief sought by the applicant to compel the third respondent to provide basic services to Jobica Property is refused.

3. The first and the second respondents are directed within 90 (ninety) days from the date of this order to take steps, either directly or indirectly remediate the nuisance on Jobica Property, Portion 25 of Farm [...] R[...], Gauteng Province with the title deed T35132/2002 and 8.5653 HA which is interfering with use and enjoyment of Sunset Ridge Estate (“the Estate”) with the registered address at [...] D[...] S[...], R[...], Agricultural Holdings, Mooikloof, Pretoria, Gauteng Province.

4. The first and the second respondents must furnish a written report to the applicant within 30 (thirty) days of steps taken to remedy the situation.

5. The remediation is directed to reasonable compliance with the applicable health and safety legislation and to ensure that the use and occupation of the occupiers of Jobica Property do not pose a threat to the safety and well-being of the occupiers of Sunset Ridge Estate and their property.

6. The first and the second respondents are directed to take reasonable steps to prevent the nuisance stated in the notice of motion from re-occurring in the future

7. The applicant is granted leave to approach this Court on the same papers, supplemented insofar as it may be necessary, for the orders declaring the first and the second respondents to be in contempt of the orders as per paragraphs 3 to 6 of this order.

8. The first and the second respondents are to pay the costs of this application, jointly and severally, the one paying, the other to be absolved.

K J MOGALE

Acting Judge of the High Court, Pretoria,
Gauteng Division

Electronically submitted.

Delivered: This Judgment was prepared and authored by the Judges whose names are reflected and is handed down electronically by circulation to the parties/their legal representatives by email and uploading to the electronic file of this matter on Case Lines. The date for hand-down is deemed to be 05 February 2023

Date of hearing: 06 December 2023

Date of the judgment: 05 February 2024

Appearances

Counsel for the Applicant : Adv. L W DE BEER
Instructed by : Tshwane Society of Advocates

Counsel for the Respondents : No appearance