

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 2023-059368

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

Date

Signature

In the matter between:

YG PROPERTY INVESTMENTS (PTY) LTD

Applicant

and

EKURHULENI METROPOLITAN MUNICIPALITY

1st Respondent

EKURHULENI METROPOLITAN POLICE DEPARTMENT

2nd Respondent

Order: 3 October 2023

Reasons: 19 January 2024

REASONS FOR THE ORDER

MOVSHOVICH AJ:

Introduction

1. On 3 October 2023, I granted an order in the following terms:

1. *"The application is enrolled and determined as an urgent application in terms of Uniform Rule 6(12). The applicant's failure to comply with the prescribed rules concerning time periods, form and service is condoned.*
2. *A rule nisi is issued with a return date determined by the Registrar, which shall be no earlier than six weeks and no later than four months from the date of this order, calling on the respondents and any other intervening parties with a direct and substantial interest in the order in paragraphs and below to show cause why the order in those paragraphs should not be confirmed:*
 - 2.1 *The respondents are to enforce the following by-laws and sections thereof:*
 - 2.1.1 *The Ekurhuleni Metropolitan Municipality Public Health By-Laws:*
 - 2.1.1.1 *Chapter 2, part 1, section 3 (1), (2), (3), (5) and (6);*
 - 2.1.1.2 *Chapter 2, part 2, section 5;*
 - 2.1.1.3 *Chapter 2, part 2, section 6 and 8;*
 - 2.1.2 *The Ekurhuleni Metropolitan Municipality Police Services By-Laws:*
 - 2.1.2.1 *Chapter 2, section 32;*
 - 2.1.2.2 *Chapter 2, section 33;*
 - 2.1.2.3 *Chapter 2, section 34;*
 - 2.1.2.4 *Chapter 2, section 36;*
 - 2.1.2.5 *Chapter 2, section 42;*
 - 2.1.2.6 *Chapter 2, section 43 (2), (3) and (4);*

2.1.2.7 Chapter 2, section 44;

2.1.3 *The Ekurhuleni Metropolitan Municipality Town Planning Scheme, 2014:*

2.1.3.1 section 13.3,

by removing the movable items, including but not limited to clothing, bedding, furniture, appliances, building material, bottles, refuse and refuse bags from the sidewalk, road, and open spaces adjacent to, Kempton Village, situate at the intersection/corner of 1 Long Street, and End street Kempton Park, ("the contentious area"), after serving the requisite notices of contravention, which notices are to be served within 2 days from the date of the confirmation of the rule nisi; and

2.2 *The second respondent is, within two days of the confirmation of the rule nisi, to provide the applicant's attorneys, with a cellular number, alternatively, the second respondent is to appoint officers, contactable on a cellular phone and number, to be provided by the applicant, to enable the applicant to contact the second respondent/ its officers, on a 24-hour basis to:*

2.2.1 *attend to, and address contraventions of the by-laws, as and when same occurs in the contentious area; and*

2.2.2 *attend to, address, and investigate instances of loitering, public indecency, drinking in public, blockading of the applicant's property, public disturbance, and interference with, and harassment of the applicant's tenants, employees or security personnel at the property, situated at 1 Long Street Kempton Park ("the property"); and*

2.2.3 *attend to, and address, attempts by persons attempting unlawfully to invade the property.*

3. *Pending the return date of the rule nisi, the respondents are directed to enforce the following by-laws and sections in and around the property and the contentious area:*

3.1 *The Ekurhuleni Metropolitan Municipality Public Health By-Laws:*

3.1.1 *Chapter 2, part 1, section 3 (1), (2), (3), (5) and (6);*

3.1.2 *Chapter 2, part 2, section 5;*

3.1.3 *Chapter 2, part 2, section 6 and 8;*

3.2 *The Ekurhuleni Metropolitan Municipality Police Services By-Laws:*

3.2.1 *Chapter 2, section 32;*

3.2.2 *Chapter 2, section 33;*

3.2.3 *Chapter 2, section 34;*

3.2.4 *Chapter 2, section 36;*

3.2.5 *Chapter 2, section 42;*

3.2.6 *Chapter 2, section 43 (2), (3) and (4);*

3.2.7 *Chapter 2, section 44;*

3.3 *The Ekurhuleni Metropolitan Municipality Town Planning Scheme, 2014:*

3.3.1 *section 13.3.*

4. *The costs of the application are reserved for determination on the return date, save that the costs occasioned by the hearings on 4 and 6 July 2023 are to be paid by the respondents, jointly and severally, the one paying, the other to be absolved.*
5. *A copy of this order shall be served by the applicants on all parties who may have an interest in the relief which is the subject of the rule nisi by affixing within 5 days of the date of this order:*
 - 5.1 *twenty copies of this order in prominent places on the outside of the property and on structures in the contentious area; together with*
 - 5.2 *twenty notices:*
 - 5.2.1 *setting forth particulars of the legal representatives of the applicant where electronic copies of the notice of motion and founding affidavit (together with annexes) and other papers in the application may be obtained by any interested party; and*
 - 5.2.2 *indicating that any application for intervention in the main application by those who have a direct and substantial interest in the relief set forth in and above shall be delivered within 15 court days of the date of this order.*
6. *The reasons for this order will be handed down in due course."*
2. Below are the reasons for the order, as contemplated in paragraph 6 thereof.

Background

3. This was an urgent application launched by the applicant against the respondents for the purposes of obtaining final, *alternatively* interim, relief to force the

respondents to perform what the applicant alleged were the respondents' statutory and regulatory responsibilities.

4. Below is a brief summary of facts as they appeared largely from the applicant's papers, but which were not substantively challenged by the respondents.
5. The applicant is a social housing provider accredited with the Social Housing Regulatory Authority. A social housing provider is an entity which assists the government with provision of social housing to those in need. At the property, the applicant provided 312 social housing units since 2018.
6. In 2022, however, it was subject to what it contends was a stratagem to bring it to its knees by collective action by a certain group whom it terms "the core instigators". The core instigators refused to pay rental since about July 2022, and employed threats and intimidation to secure other residents' support for a boycott. Approximately 50% of the residents did not pay rental from August 2022 ("**the core group**").
7. The applicant as a social housing provider must, however, ensure collection of 95% of rental to break even.
8. The rental boycott created an untenable situation.
9. Members of the core group expelled the applicant's manager from the property, intimidated the applicant's security guards, expanded in number and continued not to pay their rental.
10. The applicant sought interdictory and ejectment relief from this Court on several occasions since August 2022. I do not intend to rehearse the entire litigation history, but such relief was granted on more than one occasion. The core group was,

however, successful in reversing one of the ejection orders, which led to further rental boycott by others and meant that some of the property units were reoccupied.

11. The property was in chaos as at the end of 2022 as a result of the actions of the core group and the outstanding debt had ballooned to nearly R 3 million by the end of October 2023.
12. In the circumstances, the applicant obtained an eviction order against the core group from the Honourable Strijdom AJ on 23 May 2023, by which time the debt had increased to approximately R 6 million.
13. The eviction order was executed and the core group was evicted on 30 May 2023.
14. The events which followed the eviction are what gave rise to these proceedings.
15. In the weeks which followed the eviction, the conduct of the evictees and others included the following:
 - 15.1 Some of the evictees (the identity of the perpetrators is not precisely known) have left their goods in the immediate vicinity of the property, on the sidewalks, near ingress and egress points to the property, with the effect of inconveniencing the residents of the property, intimidating the potential residents of the property, creating nuisance and a chaotic scene.
 - 15.2 Leaving goods nearby also raised the prospect that these persons were intending to reoccupy the property, despite eviction, and to make it appear that they have made the property their home, thus requiring the applicant once more to seek eviction formally in court.
 - 15.3 These persons also left rubbish in close proximity to the property, with similar effects to the above, and constituting a health and safety risk.

- 15.4 Goods have been placed all around the perimeter of the property, disrupting the lives of lawful occupants of the property and creating a potential hazard in cases of emergency.
- 15.5 Some of the evictees loiter around the property, in shifts, acting as lookouts. They ostensibly "guard" the goods, but also cause a nuisance and harass, intimidate and threaten the residents of the property, prospective tenants, the applicant's agents and security guards. They also occupy temporary structures which they have erected on the street in close proximity to the property and someone delivers alcoholic beverages to them on a regular basis. They play loud music and scream at all hours of the day, right next to the property, causing disruption to the lives and sleep of the residents. The evictees have threatened to burn down the building which stands on the property.
- 15.6 The evictees urinate and defecate on the sidewalk next to the property at will.
- 15.7 None of the prospective tenants has agreed to move into the property on account of the conduct of the evictees or others as set forth above and existing residents have indicated an intention to leave.
- 15.8 The evictees and others have tried to regain entry by force to the property on at least two occasions.
- 15.9 It appears that the only reason that an incursion has been repelled is additional, and costly, private security hired by the applicant.
- 15.10 The disorder, however, continued to reign around the property, and rendered life for existing residents intolerable and the ability on the part of the applicant to attract new tenants practically impossible.

16. The above facts are not issuably denied, but are noted by the respondents. In their heads of argument, the respondents contended that they denied certain of the allegations. But these were bald denials at best, without any countervailing factual version. For the purposes of final relief, that would effectively constitute an admission,¹ let alone for the purposes of interim relief.
17. On the back of these undisputed facts, the applicant sought to enlist the practical assistance of the South African Police Service and then the respondents. There is some dispute in the papers as to the extent to which the respondents have been rendering assistance. The applicant says that the respondents have effectively washed their hands of this matter and deny any obligation to enforce the municipal by-laws and other laws. The respondents claim that they have moved or intended to move such items of the evictees as were blocking traffic flow. It does not seem to me to be a material dispute. What is clear is that most if not all of the chaotic behaviour of the evictees and others as outlined above was continuing despite requests to the respondents to deal with it.
18. In those circumstances, the applicant brought this application on an urgent basis requiring the respondents to enforce various municipal legislation which the applicant alleged obliged the respondents to act.
19. The applicant sought not only enforcement of the by-laws in general, but also sought to prescribe precisely what steps the respondents were required to take. This is reflected in the hanging paragraph immediately following paragraph 2.1.3.1 of the 3 October 2023 order ("**the specific enforcement relief**").

¹ Even a bald denial is not sufficient to raise a bona fide dispute of fact, let alone a noting of an allegation. The authorities are too numerous to mention. The *locus classicus* in this regard is *Wightman t/a J W Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA), para [13].

20. The respondents' response to the urgent application was largely a series of "points" which the respondents averred were dispositive of the relief sought. I shall summarise the key points below. Given the nature of the 3 October 2023 order, I do not intend to deal exhaustively with each of them, especially as some of these issues will or may have to be addressed in the judgment on final relief.

Urgency

21. The respondents made extensive submissions trying to rationalise why this matter was not urgent and why any urgency was self-created, given the yawning chasms between the various eviction/reinstatement proceedings.

22. I do not think that there is any merit in the respondents' arguments in this regard. The matter is clearly urgent. The undisputed facts illustrate that there is ongoing mayhem outside the property, and this is having a direct and deleterious impact on dozens of persons and may lead to the collapse of the social housing venture and the applicant itself. The cause for urgency arose shortly after the eviction was effected on 30 May 2023 and in the intervening period up to 4 July 2023, the applicant was trying to resolve the matter extra-curially and then launched proceedings. Commercial urgency is sufficient in its own right, but there is also a reasonable apprehension of physical harm and health and safety emergency. It seems to me that urgency of this type of matter is axiomatic and the applicant would not be able to obtain substantial relief in the ordinary course.

Non-joinder and rule *nisi*

23. The respondents raised the point that the evictees and others who may be causing the nuisance or other harm have not been, but should have been, joined to these proceedings. Joinder of necessity is only applicable where the party has a "*direct*

and substantial interest in the outcome of the litigation".² Those whose rights or interests are not potentially imperilled or prejudicially affected by the order do not have a substantial interest in the outcome.³

24. It seems to me that here there was a material non-joinder. It is correct that the orders sought require action by the respondents. But they are directed potentially to third parties who have been engaging in the conduct set forth in paragraph above (and their possessions) and the specific enforcement relief underscores this.
25. In those circumstances, although (as I set out in the balance of these reasons) I am of the view that a compelling case has been made on the papers before me for the relief sought, I do not intend to grant final relief and this is an aspect which should be adjudicated in due course, with all interested parties having been afforded the opportunity to participate. Leaving the applicant remediless in the interim is not, however, appropriate.
26. Interim relief which does not specifically adversely affect the rights or interests of third parties who are not presently party to these proceedings, as I indicate below, meets the exigencies of the case, given all the circumstances. I specifically decline, whether on an interim or final basis, to grant the specific enforcement relief, and the adjudication of this relief will have to await a hearing in due course, once all those with a direct and substantial interest in the matter and desire to participate in the proceedings have been joined.
27. Given that the identity of all those who are involved in the activities described in paragraph could not be readily identified, a different mechanism for service of the

² *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA), para [85].

³ *Judicial Service Commission and Another v Cape Bar Council and Another* 2013 (1) SA 170 (SCA), paras [12]-[14].

order had to be determined. In my view, a rule *nisi* is tailored to the present scenario. Three features in particular inform this:

- 27.1 The need for an alternative service mechanism to bring the proceedings to the attention of the evictees and others in the vicinity of the property;
 - 27.2 The grant of an interim remedy; and
 - 27.3 The fact that the applicant does not need to supplement its papers, or launch additional proceedings, for the purposes of articulating the final relief it seeks and is content with the contents of its founding papers in this matter, albeit the proceedings were brought urgently.
28. In the context of the above, and the fact that the 3 October 2023 order is interim and inherently temporary in nature, what I say below are *prima facie* findings, save for the aspect of costs, for the purposes of concluding on the need for and sustainability of the interim relief and other aspects of the rule *nisi*.
29. In that light, I deal with the respondents' remaining arguments.

The applicant's remedy is to enforce the eviction orders

30. The respondents averred that the relief sought by the applicant was inappropriate and amounted to an impermissible attempt to involve or burden the respondents in circumstances where the applicant's remedy was in enforcing its eviction order.
31. I do not think there is any merit in this argument. First, the impugned conduct set forth in is alleged to have occurred almost exclusively outside the property. As such, the eviction orders would not be applicable. Second, the eviction orders have, in fact, been executed and the evictees and their belongings were removed from the property. Third, it is apparent that at least a substantial portion of the by-laws on

which the applicant relies is applicable in precisely the place where the impugned conduct has been occurring since eviction in May 2023. Fourth, and in any event, the remedies in question (common law remedy of eviction and a remedy based on enforcement of a municipal by-law) are not mutually exclusive. There is nothing which suggests that the applicant, if it has standing to do so, may not invoke the authority of any organ of state to fulfil its legal responsibilities in addition to any rights the applicant may have in law.

Non-compliance with rule 41A

32. Rule 41A was introduced in 2019 into the Uniform Rules of Court to facilitate the settlement of disputes through alternative dispute resolution ("**ADR**") mechanisms. The purpose of the Rule is plainly to force the parties upfront to consider whether mediation is appropriate and may curtail unnecessary waste of judicial, pecuniary and other resources. It is correct that the applicant has not complied with this Rule.
33. Is this fatal to the application? The answer is plainly no. First, the applicant has sought condonation of non-compliance with the Rules. The Court under rule 6(12) and more generally in terms of the Uniform Rules and section 173 of the Constitution plainly has the power to condone non-compliance with Rule 41A. Second, while the Rule uses the word "shall" and thus requires, absent another dispensation ordered by Court, both parties to deliver notices either agreeing to or rejecting mediation, the failure to do so does not invalidate the process issued. It is simply a further notice which is required to be delivered. If one of the parties has failed to deliver such notice, it may be called upon by the other party to do so in terms of Rule 30A. This will ordinarily not preclude the proceedings from carrying on, nor will it invalidate what the party which has failed to deliver a Rule 41A notice has done in the proceedings.

34. Third, the only circumstances in which Rule 41A will have immediate effect is if both parties agree to a mediation. In that event, the proceedings are suspended pending the outcome of the mediation. Fourth, the nub of the sanction a party stands to suffer by not agreeing to mediation (and, by extension, by not delivering a notice under rule 41A at all) is that a court will take into account its failure or refusal to agree to mediation in the context of the appropriate costs award at the end of the proceedings. Logically, in such a case, a party may have to be liable for legal costs for a part or the whole of the matter in circumstances where the matter would likely have been successfully mediated to conclusion without incurring of those costs.
35. Urgent proceedings do not easily accommodate ADR diversions. A party bringing urgent proceedings sets them down for a particular week because it needs relief – or at least a hearing – that week. It cannot afford to suspend the urgent proceedings in the hope that something may materialise by way of mediation. It seems to me more likely that in the context of urgent proceedings, mediation has a smaller role to play and in any event would be undertaken in parallel to, not substitution of, the legal process. In any event, if the applicant refused to mediate, it can hardly be suggested that it would add significantly to the matter for the applicant to deliver a formal notice of refusal. This would be an exercise in form, rather than substance. Finally, the respondents have not sought to enforce Rule 41A by way of a Rule 30A notice.
36. In my view, the non-compliance with Rule 41A should be condoned, given all the circumstances.

Are the respondents responsible for enforcing the bylaws?

37. The respondents argue that their role is supervisory in nature and that the obligations in terms of the bylaws set forth in paragraphs 3.1 to 3.3.1 of the 3

October 2023 Order ("the relevant bylaws") fall on the public (including the applicant), and not the respondents. What the implications are of this is unclear. While the respondents in answer and in argument tepidly acknowledge some duty to enforce, in heads of argument they state that such duty is "*subject to the mechanisms that are listed in the by-laws and Town Planning Scheme*". It is not clarified what precise further mechanisms were supposed to be followed in this case under each of the relevant bylaws, and how the applicant has failed in any respect in this regard. It is apparent from the record that, at least on a *prima facie* basis, the respondents took few to no steps to enforce the relevant bylaws. The confusion created by the statements made by the respondents in papers before me and in their conduct requires to be clarified. There is a suggestion that the relevant bylaws are required to be enforced by the property owners and users of facilities in some way or that the obligations to comply with the relevant bylaws are somehow to be equated with the duty to enforce such bylaws.

38. In my view, it is clear that enforcement of the relevant bylaws falls within the respondents' remit. Of course, the parties subject to the bylaws are required to obey them. That is not the question. The question is who *enforces* the bylaw if it has been breached. That would ordinarily be a state or municipal body with a law enforcement function. It cannot logically be otherwise.
39. The two respondents in this matter are (i) the municipality (Ekurhuleni Metropolitan Municipality) within whose jurisdiction and territory the impugned conduct is occurring and which was responsible for enacting the relevant bylaws; and (ii) the municipal police service (Ekurhuleni Metropolitan Police Service) with jurisdiction for policing in the territory of the aforesaid municipality.

40. The municipality has certain areas of competence in terms of the Constitution.

These are listed in schedule 5 to the Constitution and include:

40.1 control of public nuisance;

40.2 municipal roads;

40.3 noise pollution;

40.4 public places; and

40.5 refuse removal.

41. The municipality has the right, power and duty to make and administer bylaws within its areas of competence (section 156 of the Constitution).

42. Some of the above constitutional injunctions are given effect by the Local Government: Municipal Systems Act, 2000 ("**MSA**"). The MSA is clear that municipalities have the powers and functions assigned to them under the Constitution, but also are required to exercise their authority by enacting and implementing, *inter alia*, their bylaws (sections 8 and 11(3) of the MSA).

43. It is also apparent that the law enforcement function in relation to bylaws is intended to be performed principally by the municipal police service. Section 64E of the South African Police Service Act, 1995 states that the function of the relevant police service includes "*policing of municipal by-laws and regulations which are the responsibility of the municipality in question*".

44. The relevant bylaws are clearly bylaws that fall within the jurisdiction of the first respondent and I think it is equally clear that:

- 44.1 it is the first respondent which is principally responsible for their implementation; and
- 44.2 it is the second respondent which is principally responsible for policing (including ensuring compliance with) the bylaws which the first respondent is required to implement (including the relevant bylaws).
45. In the above circumstances, it is difficult to understand the respondents' reticence to enforce their own bylaws.
46. It is apparent in my view that the bylaws in question in this matter are, and are in law required to be, administered and enforced by the respondents. Legal obligations of this nature strike at the very heart of an ordered society governed by law and must be fulfilled without delay.

Do the relevant bylaws prohibit the impugned conduct?

47. Given the view I have taken on the non-joinder point and the relief I have granted in the 3 October 2023 Order, I do not intend or need to deal with this question in detail. I thus address it very briefly and at a *prima facie* level based on the evidence before me. This question should properly be the subject of the hearing on the merits on the return date, which would also take account of any submissions by any other parties with a direct and substantial interest.
48. It seems to me at a *prima facie* level that there is much force in the applicant's submissions that the relevant bylaws have been contravened in the manner described in the applicant's papers. The very purpose of most of the relevant bylaws is to ensure that streets and public places (which includes pavements, sidewalks, squares and public roads):

- 48.1 are kept in a clean and sanitary condition;
 - 48.2 are free of indecent behaviour;
 - 48.3 are not used to perpetrate a nuisance or disturbance of the public peace, violence or riotous behaviour; and
 - 48.4 are not used in such a manner as to create a public health hazard.
49. *Prima facie*, the conduct as described in the founding papers of the applicant indeed undermines the above objectives and dictates, and transgresses the relevant bylaws, but I need not come to a final view in this regard.

Relief granted

50. I granted the relief granted in the 3 October 2023 Order on the basis of the above considerations and the *prima facie* case established on the papers to cater for:
- 50.1 service on and the joinder of any additional interested parties;
 - 50.2 the relief which would need to be confirmed on the return date;
 - 50.3 the obligations with which the respondents would need to comply in the interim.
51. Despite the fact that I found that there was non-joinder, I do not think this constituted substantial success on the part of the respondents and the respondents acted unreasonably in opposing the relief to be granted to the applicant despite the fact that they did not issuably dispute any of the facts concerning malfeasance perpetrated around the property. The respondents also either did not recognise their obligations to enforce the relevant bylaws or, where they did, they did not act in accordance with any such recognition or with the requisite expedition which would be expected of a state body tasked with weighty law enforcement obligations, and

on which the applicant and other members of the public place reliance. In the circumstances, it was important, as part of the interim relief, to grant an order compelling the respondents to act in accordance with the enforcement duties. There is no good reason why the respondents should have opposed a rule *nisi* or interim relief, pending joinder, even when this was mooted in argument by the applicant.

52. Instead, the respondents took a wide variety of "points" and argued at length before me to try to kick out this case in its entirety. All but one of those points was without any merit. The respondents tried to deflect attention from themselves (and their enforcement duty and capacity) and rather blame the applicant and others for the situation or suggest that the applicant should seek remedies elsewhere. A responsible litigant, especially a state body, would not have acted in this fashion, but would have expended every resource to try to deal with the very real and shocking events on the ground, which would likely have an irreversible adverse effect not only on the applicant, but on residents and the provision of social housing more generally. It would also try to avert a hearing and not oppose all possible legal relief sought by a party in the applicant's position until (and after) the bitter end.
53. Moreover, it is apparent from what I have stated above that I was satisfied that at least a compelling *prima facie* case for the relief sought had been established by the applicant against the respondents. Given the non-joinder, however, some of the more specific actions sought by the applicant could not form part of the interim relief, and would have to await confirmation on the return date.
54. In the above circumstances, including the applicant's success before me and the respondents' conduct, in the exercise of my discretion as to costs, I decided to award costs for the urgent hearing dates of 4 and 6 July 2024, on the ordinary scale,

against the respondents. It was appropriate for the balance of the costs to be left for determination on the return date.

Hand-down and date of reasons

55. These reasons are handed down electronically by circulation to the parties or their legal representatives by email and by uploading the judgment onto Caselines. The date and time for hand down of the reasons are deemed to be 19:00 on 19 January 2024.

VM MOVSHOVICH

ACTING JUDGE OF THE HIGH COURT

Applicants' Counsel: C van der Merwe

Applicants' Attorneys: Shaheed Dollie Inc

Respondents' Counsel: R Ram SC and H Mutenga

Respondents' Attorneys: KM Mmuoe Attorneys

Date of Order: 3 October 2023

Date of Reasons: 19 January 2024