REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 2023-078684

(1) REPORTABLE: Yes☐/ No ☒
(2) OF INTEREST TO OTHER JUDGES: Yes☐ / No ☒
(3) REVISED: Yes ☐ / No ☒

Date: 08 September 2023 WJ

In the matter between:

NAKAMPE RECTOR SEALE	**FIRST APPLICANT**
THE RABIE RIDGE COMMUNITY	**SECOND TO 291ST APPLICANTS**

and

THE CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY	**FIRST RESPONDENT**
MMC FOR HOUSING CITY OF JOHANNESBURG METROPOLITAN MUNCIPALIATY ANTHEA NATASHA LEITCH N.O.	**SECOND RESPONDENT**

JUDGMENT

DU PLESSIS AJ

[1] The Respondents filed an application for leave to appeal against a judgment[1] in favour of the Applicants in an urgent application in this court for, among other things, the restoration of dwellings and an interdict against the unlawful eviction of the Applicants. The parties will be referred to as they were in the urgent application for ease of reference.

[1] Summary of the Judgment

[2] The Applicants brought the urgent application after the Respondents demolished their homes and structures. The Respondents insist that they were not evicting the Applicants but merely executing a 2017 order from the High Court, Johannesburg, interdicting "unknown occupiers" from "invading and taking possession of the property" and "invading and erecting houses/structures on the said property". I found, in essence, that the 2017 order cannot be used, as the order does not bind the Applicants since they are not part of the "unknown occupiers" in 2017, and that such an order used indefinitely amounts to a decree and not a court order, as stated line with various judgments referred to. Where the order is used to demolish unoccupied structures, it is against s 26(3) of the Constitution.

[3] I was satisfied that on the evidence before the court, it is not only unoccupied structures that were demolished but also occupied structures, amounting to eviction.

[4] The Respondents seek leave to appeal against the judgment on various grounds, namely the finding that the Applicants were evicted; rejecting the contention that the Respondents were merely enforcing the 2017 order; not finding that the matter is *res judicata*; not finding that the issues are *lis pendens* given that there are other cases dealing with the same community; not finding that the conduct of the Applicants was contemptuous of the 2017 order; not postponing a finding of unconstitutionality; not finding that the Applicants should first challenge the 2017 order; ordering an R1 500 payment to restore the demolished shacks; granting the

[1] Seale and Others v City of Johannesburg Metropolitan Municipality and Another (2023/078684) [2023] ZAGPPHC 754 (25 August 2023).

final interdicts that bar them from executing the 2017 order; and awarding punitive costs.

[2] The law of leave to appeal

[5] Section 17(1)(a) of the Superior Courts Act 10 of 2013 ("the Act") provides that leave to appeal may be granted where the judge concerned is of the opinion that:

i. the appeal would have a reasonable prospect of success in that another court would come to a different conclusion (section 17(1)(a)(i)); or

ii. there is some other compelling reason why the appeal should be heard (section 17(1)(a)(ii)).

[6] In *MEC for Health, Eastern Cape v Mkhitha,*[2] it was held

> "[16] Once again it is necessary to say that leave to appeal, especially to this court, must not be granted unless there truly is a reasonable prospect of success. Section 17(1)(a) of the Superior Courts Act 10 of 2013 makes it clear that leave to appeal may only be given where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success; or there is some other compelling reason why it should be heard.
>
> [17] An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal."

[7] The question is thus whether another court *would* come to a different conclusion, requiring more than a mere possibility, namely, a sense of certainty that another court would come to a different conclusion.

[3] Discussion

[8] The Applicants sought a constitutional remedy for being spoliated, more specifically "relief […] under section 38 of the Constitution […] for the reconstruction of the destroyed homes and emergency damages for the Applicant's basic personal possessions".[3]

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[2] [2016] ZASCA 176 (footnotes omitted)

[3] Par 59 of the FA.

[9] S 38 of the Constitution states

> 38. Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. […] (own emphasis)

[10] The relief granted should, therefore, be seen in the context of 1) the reconstruction of the destroyed homes and 2) the "appropriate relief" in s 38 of the Constitution.

[11] During argument for leave to appeal, Mr Mokhare focussed on three issues: the 2017 order, constitutional damages and the declarator. In my judgment, I will address these three points to show that another court would not come to a different conclusion.

(i) The 2017 order

[12] The bulk of the Respondents' case for leave to appeal rests on their argument that the 2017 order authorises them to dismantle the structures. In the urgent application, they stated that the interdict is only used to dismantle unoccupied structures. During the leave to appeal hearing, the argument was that eviction is allowed with a court order, and the 2017 is a court order.

[13] They also persist with the argument in this leave to appeal that the Applicants must first set aside the 2017 order. Until then, the Respondents are well in their rights to dismantle the structures utilising the 2017 order. That is because s 165(5) of the Constitution states that a court order binds all to whom it applies, and the order thus binds any person invading the property.

[14] I have dealt with the 2017 order in the judgment and referred to case law. The arguments need not be repeated in detail here. I found that the 2017 order applies only to the people who, *at the time of granting the order,* intended to invade or have invaded the property. While it is acceptable in eviction proceedings to cite occupiers as a defined group when proceedings are brought against all occupiers of a particular piece of land, I was not pointed to any authority that a court may grant an order against a future abstract class of persons. These are not distinct

parties. Such an order would be an order against the public at large, and is not competent in law.

[15] The 2017 order does not bind anyone and everyone who may sometime in the future "intend to invade" the property. These are people who, when the order was granted, may not even have intended to invade, the property. The Applicants were not parties to that order and are not bound by it. *Sliom v Wallach's Printing and Publishing Co Ltd*[4] is authority for the rule that judgment against a person who had not been legally cited before the court is a nullity and can be disregarded. S 165(5) of the Constitution is then also not applicable.

[16] Moreover, their assertion in urgent court that they only dismantle unoccupied structures that do not require a court order in line with s 26 is not supported by the evidence and, therefore, fails. Applying the well-known *Plascon Evans*-rule,[5] the Respondents' version that the Applicants were not evicted was refuted by the inspection *in loco*. The Respondents' version is implausible, and the Applicants' version was accepted. My findings in that regard are captured in the judgment. People occupying structures can only be evicted with a valid court order in terms of the *Prevention of Illegal Eviction and Unlawful Occupation of Land Act*,[6] after a court takes all relevant circumstances into account. An interdict is not such an order.

[17] Additionally, I found that *even if* these structures were unoccupied, they could only be dismantled with a valid court order. That is because *once the structures are erected*, the Applicants have established possession.[7] This is also in line with case law set out in the judgment.

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[4] 1925 TPD 65.

[5] *Plascon-Evans Paints (TVL) Ltd. v Van Riebeck Paints (Pty) Ltd*. (53/84) [1984] ZASCA 51.

[6] 19 of 1998.

[7] Even if I am wrong on this, and the 2017 order interdicts can be used, the interdict is against "invading and taking possession of the property", including erecting houses/structures. In line with the case law cited in the judgment, the interdict is no longer applicable once the structures are erected, as possession is established.

(ii) Money instead of restoration

[18] The second argument was that constitutional damages were postponed to part B, and that the R1500 still amounted to constitutional damages. However, the judgment made it clear that the payment is part of the duty to restore should the Respondents not be able to restore the structures themselves, and as such, falls under "appropriate relief" in s 38 of the Constitution. It is likewise in line with case law.[8] Another court would not come to a different conclusion.

(iii) The declarator

[19] The Respondents on appeal argue that prayers 2, 3 and 4 were abandoned or deferred to part B due to the complexities. However, during argument in the urgent court, Mr Mosikili for the Respondents addressed me on every prayer individually. As far as prayer 2 is concerned, he stated that it is not urgent because Crutchfield J, in *her* order, stated that it was not urgent. He expressly stated that prayer 4 was moved to part B, which is why the court neither considered nor ordered the R3 500 constitutional damages. This ground must accordingly also fail.

[20] As for the other grounds of appeal listed in the application for leave to appeal, another court would not come to a different conclusion. Therefore, having considered the grounds for leave to appeal and having heard counsel for the Respondents and Applicants, I am of the view that another court would not come to a different conclusion. There are no reasonable prospects of success on appeal.

[4] Order

[21] I, therefore, make the following order:

1. The application for leave to appeal is dismissed, with costs.

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[8] *Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality* [2007] SCA 70; *Ngomane & Others v City of Johannesburg Metropolitan Municipality & Another* [2018] ZASCA; *Florah Tjabadi & Others v City of Ekhurleni Metropolitan Municipality and Others* (Case No: 22423/2019).

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WJ DU PLESSIS

Acting Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. It will be sent to the parties/their legal representatives by email.

Counsel for the applicant:	Mr WR Mokhare SC
	Mr T Mosikili
	Mr V Qithi
Instructed by:	Popela Maake Attorneys
Counsel for the Respondent:	Ms Coetzee
Instructed by:	Lawyers for Human Rights
Date of the hearing:	08 September 2023
Date of judgment:	08 September 2023