IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 003382/2022

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

4 APRIL 2023

Date Signature

In the matter between:

CITY OF TSHWANE METROPOLITAN MUNICIPALITY First Applicant

and

UNKNOWN PROTESTERS/REFUGEES First Respondent

MINISTER OF HOME AFFAIRS Second Respondent

MINISTER OF POLICE Third Respondent

NATIONAL COMMISSIONER OF POLICE	Fourth Respondent
PROVINCIAL COMMISSIONER OF POLICE GAUTENG	Fifth Respondent
UNHCR REGIONAL OFFICE FOR SOUTHERN AFRICA	Sixth Respondent
THE MINISTER OF THE DEPARTMENT OF SOCIAL DEVELOPMENT	Seventh Respondent
THE MEC FOR THE GAUTENG DEPARTMENT OF SOCIAL DEVELOPMENT	Eight Respondent
RAB PROPERTY INVESTMENTS (PTY) LTD	Ninth Respondent
BROOKLYN AND EASTERN AREAS CITIZENS ASSOCIATION	Tenth Respondent
WATERKLOOF HOMEOWNERS' ASSOCIATION	Eleventh Respondent

NEUKIRCHER J:

1] Before me is an application brought by the applicant[1] (CoT) in terms of the provisions of Rule 42(1)(b) and s4(12) of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act No. 19 of 1998 (PIE), as read with s173 of the Constitution.

---

[1] The City of Tshwane

2] Given the multiple bases upon which the application is premised, it is apposite to quote the 3 provisions that informed the hearing before me:

2.1 rule 42(1)(b) states:

"42 Variation and Rescission of Orders

(1) The court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary:

… (b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission…"

2.2 S4(12) of PIE states:

"*4. Eviction of unlawful occupiers —*

(12) Any order for the eviction of an unlawful occupier or for the demolition or removal of buildings or structures in terms of this section is subject to the conditions deemed reasonable by the court, and the court may, on good cause shown, vary any condition for an eviction order."

2.3 s173 of the Constitution provides:

"The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

3] Whilst it is clear that a court has the discretion, either *mero motu* or on application, to re-visit its judgment or order if the meaning is uncertain and it is sought to give effect to its true intention[2], in doing so the sense and substance of the order must not be altered.[3] Thus, a court's powers under Rule 42 are limited and the reason is obvious: once judgment is handed down, it becomes *functus officio* and its authority over the subject matter terminated.[4] There are, however, certain exceptions to this rule.[5]

4] In **HLB International (South Africa) (Pty) Ltd v MWRK Accountants and Consultants (Pty) Ltd**[6] it was confirmed that Rule 42(1)(b) had been interpreted, against the background of the common law principle of certainty of judgments, to allow a court to vary its own judgment in accordance with its true intention by substituting more accurate or intelligent language, provided that the substance of the order was not affected. The court's inherent power to depart from the general principle in the event of a patent error was held to be consistent with the doctrine of *res judicata* and s173 of the Constitution.

BACKGROUND

5] Between 9 and 10 May 2022 the 2nd respondent (the Department of Home Affairs) (DoHA) dropped off two groups of 25 people each, including women

---

[2] Firestone South Africa (pty) Ltd v Gentiruco AG 1977 (4) SA 298 (A) at 306F-307A; Mostert NO v Old Mutual Life Assurance CO (SA) Ltd 2002 (1) SA 82 (A) at 86D

[3] Mostert NO ibid

[4] Tshivhase Royal Council v Tshivhase 1992 (4) SA 852 (A) at 862I; First National Bank of SA Ltd v Jurgens 1993 (1) SA 245 (W) at 246J-247A; Minister of Justice v Ntuli 1997 (3) SA 772 (CC) at 78-C-F and 781J

[5] Firestone South Africa supra

[6] 2022 (5) SA 373 (SCA) at pars [19]-[23]

and children, at the United Nations Refugee Agency (UNHCR)[7] in Waterkloof Road, Pretoria (the premises). These two groups comprised persons who had, in terms of an order issued in 2019, been evicted from these same premises and, as a result of events that had unfolded[8] thereafter, been placed at Lindela Repatriation Centre in Gauteng which is run by the DoHA.

6] The history leading up to the events of 14 June 2022 has been set out in the judgment dated 30 August 2022, and they are not repeated. Suffice it to say that by the time that CoT launched its urgent application in June 2022, the number of Protestors had swelled to approximately 70 and they had settled themselves in make-shift shelters using *inter alia* sheets of plastic.

7] The situation was intolerable on all fronts: to the residents and homeowners of the area and, importantly in respect of the basic human rights of the Protestors, but bearing in mind that women and children are part of that group, the situation is of immense concern on a humanitarian level.

8] But the Protestors have remained steadfast in their demands: although they fled from countries such as the DRC, Burundi and Ethiopia and they were adamant that they did not want to remain in South Africa because of the extreme xenophobia to which they have been exposed since their arrival, they demanded that the UNHCR resettle them in Europe, Canada and the USA.

---

[7] The 6th respondent

[8] Which are set out in the first judgment dated 30 August 2022

This, of course, led to an impasse as the UNCHA have refused their demands and the Protestors have refused to integrate into South African society. They thus remained camped at the premises.

9] At the hearing before me in June 2022, the Protestors were represented and made submissions. Because of the nature of the matter and the extreme urgency with which it was brought, I granted certain interdictory relief aimed and preventing illegal conduct, provided *pro bono* representation for the Protestors, joined various Government Departments and requested report-backs, and joined Lawyers for Human Rights as *amicus curiae* – all in an attempt to find a solution to the issue.

10] The return date of the *rule nisi* was 4 August 2022 and by that time the *amicus* had filed a report. Reports were also received from the Minister of Police and the Department of Social Development. Whilst the CoT filed a supplementary affidavit, they chose not to file a replying affidavit after receipt of the submissions by the *amicus* - which *inter alia* addressed issues pertaining the temporary housing – this despite a direct invitation from me to do so. Thus the CoT chose to argue the matter on the papers as they stood on 4 August 2022. The main judgment makes it clear that the CoT had chosen to make certain submissions, but not to place “concrete evidence” before me.[9]

[9] Judgment at par 29

11] The submissions made by the CoT were *inter alia* the following:

11.1 *"22.3 the CoT was unable to provide temporary housing for the Protestors. According to counsel, the CoT simply did not have any temporary shelters set up or available for this. This meant that they would have to engage with the Department of Human Settlements to provide the shelter, they would have to pay the Department of Housing and they simply had no budget to do so. The argument was that in any event, that temporary accommodation may be a "tent on a vacant piece of land "somewhere" which the occupiers would in any event not be satisfied with." ";*

11.2 *"27] As stated, the CoT argued that it simply did not have the budget to accommodate the Protestors. Its rationale was that, were this court to make an order obliging it to do so, it would have to contract with the Department of Human Settlements to find accommodation for the Protestors which would come with a concomitant expense to the CoT which had simply not been budgeted for and for which the CoT had no budget. It also stated that there were no centres that had been set up to cater for people in the position of these Protestors."*

11.3 *"32] The fact of the matter is that the CoT is obliged to provide the occupiers with "suitable alternative accommodation." The CoT argues that, no matter what they do, the Protestors will never be satisfied as their ultimate goal is the attainment of their settlement in overseas countries. "*

12] The submissions as regards the relocation of and provision of temporary housing to the Protestors were made on the basis of the common cause fact that everyone was *ad idem* that the Protestors could not remain where they were and an eviction order had to be granted.

13] The issue of temporary housing was the thorny issue: in this regard the DoHA had made a tender, which was repeated before me in open court that the Protestors would be accommodated at Lindela in a separate section,[10] that families would be able to reside together and they would be provided with food, bedding and all other necessities, and they would be free to come and go as they wished. The DoHA also offered to provide transport for the Protestors from the premises to Lindela.

14] I found that the CoT could not simply abdicate its responsibility to provide "suitable alternate accommodation" to the Protestors and although the *amicus* was of the view that Lindela was not suitable accommodation (mainly because of the complaints of the Protestors) that was not the reason that I did not make the tender part of the court order. The reason is to be found in paragraph 34 of the judgment which states:

"Ultimately, how the CoT fulfils its mandate set out in Section 6(1)(3)(c) of PIE, and with whom it partners to achieve that, must be left to them. To dictate anything else would, in my view, at this stage, constitute an

[10] With the important distinction that they would be provided accommodation but would not be detained

impermissible judicial overreach."

15] The intention was at all times that the CoT and DoHA would be left to iron out the manner in which the tender would be implemented. There was never an intention expressed in the judgment that I did not consider the tender an acceptable one.

THIS APPLICATION

16] On 20 September 2022 the CoT filed an application for Leave to Appeal. During that hearing it transpired that their main issue was paragraph 2 of the order which reads:

"The First Applicant shall provide those occupiers present at the affected area, and only those persons who are present and who have not voluntarily vacated the affected area, with temporary accommodation in Tshwane for a period of 6 months." (my emphasis)

17] It is the words "in Tshwane" that have caused some consternation as, although Lindela is in Gauteng, it is not in Tshwane – this is a clear mistake.

18] As stated, at the time that the judgment was handed down, it was my intention to leave the DoHA and the CoT to sort out the logistics of accommodating those of the Protestors that wished to go to Lindela, and it certainly was not

my intention to exclude the DoHA's tender from being implemented. Unfortunately, because of the delineation of the geographical area to Tshwane, that was the effect of paragraph 2 of the order. I indicated at the hearing of the application for leave to appeal that this was a patent error (especially given the content of paragraph 34 of the judgment) and it could be remedied by a Rule 42 application. I was told that this would be prepared in the following week – unfortunately it took many weeks longer than it should have to launch.

THE RULE 42 APPLICATION

19] The present application is not confined to the patent error in paragraph 2 of the order: the CoT also asks that a paragraph 2.2 be inserted, in terms of s4(12) of PIE, as read with s173 of the Constitution, so that the order will now read:

"2.1 "The First Applicant shall provide those occupiers present at the affected area, and only those persons who are present and who have not voluntarily vacated the affected area, with temporary accommodation for a period of 6 months.

2.2 In order for the First Applicant to comply with its obligations to provide temporary accommodation as set out in paragraph 2.1 above, the Second Respondent (in accordance with its tender) is directed:

2.2.1 to move the refugees to Lindela;

2.2.2 provide accommodation at Lindela in a separate section where food, bedding and other necessities will be provided

and all families will be kept together;

2.2.3 the facility will not be a detention facility and the refugees will be free to come and go as they please."

20] The extension of the order is sought as subsequent to the application for leave to appeal of 18 October 2022, the CoT's attorney (Mr Pillay) made contact with Ms Moodley of the State Attorney[11] to arrange for the removal and relocation of the Protestors to Lindela in accordance with the DoHA's tender. She informed him however that *"the DHA was not inclined to honour their undertaking absent a court order directing them to do so."* Thus, the additional paragraph 2.2 to the order is necessary to formalise the DoHA's undertaking.

21] Mr Ndlovu, is the Deputy Director Deportations at the DoHA,[12] and he states in his affidavit that he was present in court at the hearing of 4 August 2022. According to him, the invitation made to house the Protestors was conditional upon the court making the tender an order of court. He states that within the DoHA there was some confusion as to which of the CoT or the DoHA had the obligation to provide the accommodation, given the history of the matter, and when I did not make their tender an order, it clarified matters for the DoHA According to him, the tender lapsed (or was withdrawn) as a result and is *"no longer available"* as the DoHA does not want to incur a "*binding obligation*". He states that, irrespective of the situation, the offer is no longer available and

[11] Who represents the DoHA
[12] And the deponent to the answering affidavit

the court cannot make a tender that is withdrawn an order of court.

22] He then states that *"…proper channels must be followed, i.e. authorisation, prior to officials from the Department entering into Memorandums of Understanding or legal contracts that are binding in nature, more especially where there is no legal obligation on the Department to assume these responsibilities/obligations."* And this is where that explanation ends on the papers. A full explanation of these processes was attempted in court, but I was not prepared to entertain it. The reason for this is obvious – a party can only prepare their case based on what has been stated under oath. The affidavits constitute the evidence that is before court and no submissions from the bar can replace this. An attempt to supplement one's case by making submissions from the bar amounts to little more than trial by ambush.

23] In my view, the conduct of the DoHA leaves much to be desired:

23.1 at the hearing on 4 August 2022, the State Attorney, acting on behalf of the DoHA made an unequivocal tender. The tender was made, as is stated in par 8 of the DoHA's affidavit *"on humanitarian grounds"* to house the Protestors;

23.2 at no stage was I informed of the processes within the DoHA that were necessary to formalise the tender;

23.3 at no stage was I given any indication that this tender was a conditional one and the fact that this has been added to justify the sudden withdrawal of the tender is unacceptable. In fact, the DoHA's

attorney, at the hearing of the Rule 42 application, informed me that he had had the transcript of the proceedings of 4 August 2022 typed and it indeed confirms that the tender was unconditional. He also informed me that at no stage was it ever said that a condition of the tender was that it had to be made an order of court. Those transcripts were unfortunately not made available to any of the other parties or to the court, but I accept what the DoHA's attorney has stated.[13]

24] The CoT asks that the DoHA's tender be made an order of court in terms of s4(12) PIE and s173 of the Constitution. They do so on the basis that a tender, once made and accepted, cannot be withdrawn. This is indeed so. In **Pieters & Co v Solomon**[14] the court stated the following:

"When a man makes an offer in plain and unambiguous language, which is understood in its ordinary sense by the person to whom it is addressed, and accepted by him bona fide in that sense, then there is a concluded contract. Any expressed reservations hidden in the mind of the promisor are in such circumstances irrelevant. He cannot be heard to say that he meant his promise to be subject to a condition which he omitted to mention, and of which the other party was unaware."

25] That is precisely the situation that has reared its head here: the DoHA now protests that the offer made was conditional upon it being made an order of court. Nowhere in any of its previous papers or in submissions on 4 August 2022 was this communicated to any of the other parties or to the court.

---

[13] He quite correctly pointed out the true position as an officer of the court

[14] 1911 AD 121

26] As was stated in **Ngwalangwala v Auto Protection Insurance Co Ltd (in liquidation**)[15], the withdrawal of an offer or tender by a defendant would require a good reason such that it was made under a mistake of fact or was induced by fraud or that no legal basis exists for the claim by the plaintiff. In the absence of some such reason, a mere change of mind by a defendant or a reconsideration of tactics would be no basis for requesting a court to exercise its discretion in its favour by allowing it to resile from the position previously taken up.[16]

27] Thus returning to this matter, the judgment when read as a whole, evinces the following intention:

27.1 to hold CoT responsible for providing the Protestors with suitable temporary accommodation for a period of 6 months;

27.2 to provide for a circumstance where the CoT could partner with another stakeholder to execute its obligation;

27.3 to acknowledge the tender made by the DoHA without shifting the principal obligation from the CoT to the DoHA.

28] The only patent error in the original judgment is that the words “in Tshwane” should have read “in Gauteng”. Mr Ally on behalf of the *amicus* has submitted that were the words ”in Tshwane” to be deleted it would create a dangerous precedent as by doing so Municipalities across the country would simply shift their obligations onto other Governmental Departments or Municipalities so

[15] 1965 (3) SA 601 (A) at 609

[16] Also Turbo Prop Service Centre CC v Crook t/a Honest Air 1997 (4) SA 758 (W) at 764H-I/J

avoiding their obligations and making it someone else's problem. But that ignores the fact that I have already stated that in this matter the obligation to find suitable temporary accommodation is that of the CoT. Furthermore, this matter cannot be used as a precedent in any other matter because of the very unique set of facts and the DoHA tender – that is not the case anywhere else. Thus this case cannot stand as a precedent for any other matter.

29] In any event, s41(1)(h) of the Constitution imposes a duty on all state organs co-operate with and support one another. This duty has been stressed in **Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd and Other**[17] and holds even truer in the present circumstances.[18]

30] In any event, it does not seem that any of the parties before me have taken issue with the patent error in prayer 2. The CoT wants the words "In Tshwane" deleted in their entirety – that was not the intention of the order. The intention was that it should have read "in Gauteng". Both the DoHA and the *amicus* have argued that the Protestors are not represented before me and have not been consulted about whether they agree to the proposed order. But this again ignores the following

30.1 the Protestors were represented in person at the initial hearing in June 2022 and made submissions;

30.2 I specifically appointed an attorney and an advocate to represent them *pro bono* at the return date of 4 August 2022. They had to withdraw

[17] (CCT 44/22) [2022] ZACC 44 (23 December 2022)

[18] Also, City of Johannesburg v Changing Tides 74 (Pty)Ltd and Others 2012 (6) SA 294 (SCA) at par [14]: *"What is clear and relevant for present purposes is that the State, at all levels of government, owes constitutional obligations to those in need of housing and in particular to those whose needs are of an emergency character, such as those faced with homelessness in consequence of an eviction."*

because the Protestors refused to engage with them at all;

30.3 they were aware of the date of hearing of 4 August 2022 and they failed to appear;

30.4 the Protestors cannot dictate where the temporary housing should be located as **City of Johannesburg v Rand Properties (Pty) Ltd**[19] clearly states *"[t]he Constitution does not give a person a right to housing at state expense at a locality of that person's choice."*[20]

THE ORDER

31] The conundrum presented is that in the judgment I had stated it would not be permissible for the court to interject itself into agreements made between 2 parties. The intention was however always that, given the tender, to leave it to the CoT and the DoHA to sort out between themselves the nitty gritty of implementing the terms of the accepted offer. Because of the conduct of DoHA, it is clear that without an order stating the terms of the tender, the DoHA cannot be taken at its word. In a Constitutional dispensation such as ours, where the citizenry looks to their leaders for leadership and values, this is one example that makes one hang one's head in shame. It is for this reason that I am of the view that s4(12) of PIE must be utilised to make the order an effective one.

32] Given the above, it is not necessary to consider whether s173 of the Constitution would have been and equal, or more suitable, remedy.

---

[19] 2007 (6) SA 417 (SCA) at par [44]

[20] Grobler v Phillips and Others 2023 (1) SA 321 (CC) at par [36]

COSTS

33] In my view, the opposition to the application has been frivolous and borders on vexatious. The DoHA has not come to court with clean hands and for this reason it must pay the costs of this application including the costs of 2 counsel.

ORDER

34] The order I make is the following:

1. Paragraph 2 of the order of 15 August 2022 is deleted and replaced with the following:

"2.1 "The First Applicant shall provide those occupiers present at the affected area, and only those persons who are present and who have not voluntarily vacated the affected area, with temporary accommodation for a period of 6 months.

2.2 In order for the First Applicant to comply with its obligations to provide temporary accommodation as set out in paragraph 2.1 above, the Second Respondent (in accordance with its tender) is directed:

2.2.1 to move the refugees to Lindela;

2.2.2 provide accommodation at Lindela in a separate section where food, bedding and other necessities will be provided and all families will be kept together;

2.2.3 the facility will not be a detention facility and the refugees will be free to come and go as they please."

2. The Second Respondent is ordered to pay the costs of the application, including the costs of the 10th and 11th respondents and the *amicus curiae,* which costs shall include the costs of two counsel.

_____

B NEUKIRCHER

JUDGE OF THE HIGH COURT

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 by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 4 April 2023.

Appearances:

For Applicant	:	Adv AG South SC and Adv v Mabuza
Instructed by	:	Lawtons Africa
For 2nd Respondent	:	Mr Meier and Mr Moodley
Instructed by	:	State Attorney, Pretoria
For 10th and 11th Respondents	:	Adv Erasmus SC
For amicus	:	Mr Ally
Heard on	:	16 March 2023