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

A

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE:~~YES~~/**NO**
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/**NO**
(3) REVISED **NO**

DATE: 2 MARCH 2023.....

SIGNATURE: .....

Case No. 2023-011837

In the matter between:

MKHATSHWA, OWEN **1ST APPLICANT**

MAGURU, EMMANUEL **2ND TO 32ND APPLICANTS PER THE NOTICE OF MOTION**

And

NEW AFRICA DEVELOPMENT (PTY) LTD **1ST RESPONDENT**

SEEK SECURITY (PTY) LTD **2ND RESPONDENT**

MONITOR NET SECURITY PROTECTION AND TRAINING SERVICES **3RD RESPONDENT**

NEW AFRICA DEVELOPMENT PROPERTY INCOME FUND (PTY) LTD **4TH RESPONDENT**

Coram: Millar J

Heard on: 28 February 2023

Delivered: 2 March 2023 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the Gauteng Division and by release to SAFLII. The date and time for hand-down is deemed to be 09H30 on 2 March 2023.

ORDER

It is ordered: -

1. That the first and fourth respondents are to immediately restore to the 32 applicants, unrestricted access to the property situated at 151 Theron Street, Centurion (the property located opposite to the Irene United Reformed Church of South Africa on Theron Street in Centurion, Gauteng ("the property").

2. That the first and fourth respondents are to restore the personal possessions which include all building materials and waste confiscated from the 32 applicants.

3. That the first and fourth respondents are interdicted and restrained from ordering, directing, or instructing any person whether as agent or service provider or any other party from harassing, intimidating, or threatening the 32 applicants, either individually or collectively, on the property referred to in paragraph 1 of this order.

4. That the first and fourth respondents are interdicted and restrained from ordering, directing, or instructing any person whether as agent or service provider or any other party from further perpetrating any unlawful dispossession of the 32 applicants of their dwellings and/or possessions, or from evicting them from the property, without the leave of the court.

5. That should the first and fourth respondents not restore to the 32 applicants access within 24 hours of the granting of this order, that the sheriff of the High Court, together with the assistance of the South African Police Service (if necessary) is ordered to take such steps as may be necessary to provide for the unrestricted access granted in terms of this order.

6. That the first and fourth respondents be ordered to immediately reconstruct and restore the shelters of the 32 applicants within 48 hours of the granting of this order alternatively, and in the event that the first and fourth respondents are unable to do so, to pay an amount of R5000.00 (Five Thousand Rand) for each of the 32 applicants as listed in annexure "NM 1" of the Notice of Motion as compensation therefore, to be paid into the following account of Lawyers for Human Rights:

Account Name: LHR Litigation Account
Bank: Standard Bank

Account Type: Cheque Account
Branch Code: 0145
Account Number: […]
Reference: A429

7. Ordering the first and fourth respondents to pay costs of this application on the scale as between attorney and client which costs are to include the costs consequent upon the employment of two counsel.

JUDGMENT

MILLAR J

1. The applicants make a living as waste reclaimers. They spend their time collecting waste from around Centurion and then sell it. In the present application, the 32 applicants had as their base of operations, since at least 2018, an undeveloped property situated at 151 Theron Avenue opposite the United Reform Church of South Africa in Lyttleton. The property is adjacent to the Waterkloof Air Force Base and hence the applicants are known by the moniker of the 'Airfield Community'.

2. The first and fourth respondents (respondents) are the developers and owners of the property. It is the case for the applicants that on 10 January 2023 they were informed by a Mr. Slabbert that the property was to be fenced and cleaned for an expected residential property development. Besides Mr. Slabbert and the persons who were sent to carry out the work requested by the respondents; the South African Police were also present.

3. The applicants were informed that the property would be fenced and that their access removed and that if they did not leave the property, they would be fenced in. The applicants asked for the court order in terms of which they were directed to leave and were informed that *"the owner does not need a notice or court order to remove people from his own property."* The applicants notified their attorney of what was occurring, and they subsequently arrived at the property to inform Mr. Slabbert that they could not evict the applicants without a court order. Despite this the property clearing and fencing continued.

4. On 11 January 2023, fence posts were erected, and the applicants were informed that their shelters were to be removed to facilitate the property clearing. The applicants' attorneys were again informed and again arrived to engage with Mr. Slabbert. Notwithstanding that the property clearing continued that day and the erection of the fence progressed, the applicants' shelters were left undisturbed and accessible although impeded by the property clearing work.

5. On 13 January 2023, Mr. Slabbert informed the applicants that they had 30 minutes to pack their belongings and to vacate the property. The applicants refused, having nowhere else to go, and called their attorney once again. The applicants were not removed from the property, but it was fenced in such a manner that the applicants, although they could enter and exit, could not do so in the way that they had prior to the fence being erected. The effect of this was to severely hamper the way in which the applicants had previously been able to enter and exit the property.

6. On 17 January 2023 Mr. Slabbert arrived at the property in the morning and told the applicants to leave the property and to load their goods onto the trucks that had arrived. When the applicants refused, a bulldozer was used to demolish their shelters and the demolished shelters together with all the possessions of the applicants were loaded onto trucks and removed. The applicants were powerless to stop what was occurring. They described what occurred as:

> *"When we tried taking pictures of what was taking place, we were told that we are not allowed to take any pictures, the employees of the Second and Third Respondents said they would 'klap'[1] us if we took pictures, we therefore stood and watched as our community was being destroyed and personal belongings being taken."*

7. The applicants were left with no option but to seek shelter under a nearby freeway bridge. This is where they remain to the present.

8. The respondents for their part while denying the events of 10 to 17 January 2023 as contended by the applicants, did not seriously place this in issue. The gist of the respondents' case was that the process of clearing the property had begun 4 months earlier, the applicants had been well aware of the respondents' intentions and that the further clearing of the property on 10 January 2023 was to prepare for the erection of the fence.

9. The applicants have sought an order restoring possession to them of the property and for the restoration of their shelters – a *mandament van spolie*. Such applications are by their very nature urgent and are brought as such.

10. The respondents oppose the application. Their opposition is based on what the respondents contend is a lack of true urgency as well as the failure of the applicants to make out a case for the orders sought.

11. The challenge to the urgency was predicated on the basis that the applicants had been told 4 months beforehand that the property would be cleaned, and a fence installed to secure it. The erection of the fence was commenced on 10 January 2023 and they were evicted on 17 January 2023. The present application was brought some 3 weeks later.

---

[1] An Afrikaans word meaning in this context "to slap".

12. The respondents for their part contended that the applicants ought to have brought an application when they were first notified that the respondents were going to clear and fence the property, being months ago at worst, and at best immediately after they were removed from the property on 17 January 2023.

13. It was argued for the respondents that since the applicants, it was common cause, had at all times been assisted by Lawyers for Human Rights, they were well aware of and able to exercise their right to bring an application against the respondents sooner. The delay in bringing the application from when they were first informed was months and the delay from the time that they were removed from the property was weeks. It was argued that on either basis, the application was not urgent.

14. During argument, It was argued for the applicants, that the reason for the delay in the bringing of the application after 17 January 2023 was because between the 32 applicants, given their particular circumstances, they had only one cell phone which had become lost during the eviction on 17 January 2023. It thus took time for them to make contact with Lawyers for Human Rights before they could be instructed, and the application brought.

15. I enquired from counsel for the respondents whether in considering urgency regard should be had to the specific circumstances of the applicants. The question posed was whether there was a difference between the situation where litigants who were immediately able to telephone their attorney was different to one those whose circumstances prevented this. Counsel for the respondents argued that the individual circumstances ought not to be taken into account and that urgency ought to be decided objectively.

16. There is no dispute between the applicants and the respondents regarding the representation of the applicants by Lawyers for Human Rights or that on a number of occasions prior to their removal from the property, they had telephoned their attorneys who had come to the property to assist them. It is

somewhat inexplicable that at the time that they most needed to consult their attorneys, they would not unless there was some good reason.

17. I cannot divorce the precarious socio-economic circumstances of the applicants from my consideration of urgency. If I were to do so, the ineluctable inference to be drawn is that only those who have the means to immediately instruct a legal representative would be entitled to a hearing on a matter which in my view is self-evidently urgent. Urgency is not only to be determined only on the speed with which the matter can be brought before court but also on the substance of the matter. The loss of a home is an unquestionably urgent matter.

18. I am persuaded that the matter is urgent and properly before the court. The decision in this matter does not turn on urgency. It turns on whether or not the applicants have made out a case for the order which they seek.

19. The respondents argued that the applicants did not reside on the property. They argued that since the applicants as waste pickers went out and about to collect waste and often spent time or slept at places in anticipation of being able to reclaim waste, it could not be said that they resided on the property. Furthermore, since they only returned to the property to bring the waste for storage before selling it on, there was no residence, permanence or possession of the property by them. This argument was predicated on the basis that despite an invitation having been extended by the respondents to the applicants to “prove” that they resided on the property, the applicants had not done so.

20. This argument is in my view without merit. It is common cause between the parties that the applicants were on the property and that their presence was of such a duration and of such a nature that it was clear that there was some, at least as far as the applicants were concerned, permanence. Indeed, the property was, by all accounts, the economic heart of the Airfield Community.

21. In the present instance, residence is not a pre-requisite for possession of the property. However, the respondents sought to argue that the applicants

although using and conducting their business from the premises, did not reside there. This argument was presented to raise a dispute of fact and to obviate any compliance on the part of the respondents with the PIE Act.[2] If the applicants were not resident on the property, then their possession would be in issue and furthermore there would be no prescribed statutory process to be followed to lawfully remove them. This is in my view, contrived and a red herring.

22. The photographs taken by Lawyers for Human Rights before 17 January 2023, demonstrate beyond any doubt that at least some of the shelters located on the property were in fact also homes which were occupied by the applicants. This besides the fact that they were also in possession of the property for purposes of their business.

23. The order sought by the applicants is the *mandament van spolie.* I was referred to *Ivanov v North West Gambling Board & Others*[3] in which it was stated:

> *"The historical background and the general principles underlying the mandament van spolie are well established. Spoliation is the wrongful deprivation of another's right of possession. The aim of spoliation is to prevent self-help. It seeks to prevent from taking the law into their own hands. An applicant upon proof of two requirements is entitled to a mandament van spolie restoring the status quo ante. The first is proof that the applicant was in possession of the spoliated thing. The cause for possession is irrelevant – that is why possession by a thief is protected. The second is the wrongful deprivation of possession. The fact that possession is wrongful or illegal is irrelevant, as that would go the merits of the dispute."*

24. I was also referred to *Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality and Others*[4] in which it was held:

---

2 Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998.

3 2012 (6) SA 67 (SCA) at 75B-D.

4 2007 (6) SA 511 (SCA) at 520B-C.

> *"Under it, anyone illicitly deprived of property is entitled to be restored to possession before anything else is debated or decided (spoliatus ante omnia restituendus est). Even an unlawful possession – a fraud, a thief or a robber – is entitled to the mandament's protection. The principle is that illicit deprivation must be remedied before the courts will decide competing claims to the object or property."*

25. It is not in issue that the applicants were in physical possession of the property or that they were unlawfully (without an order of court) deprived of possession by the conduct of the respondents.[5] There is furthermore, no suggestion that the possession of the property was at least until 10 January 2023 both peaceful and undisturbed. It was also never suggested that the property was left vacant and unattended at any time.

26. The respondents however argued that restoring the *status quo ante* was neither feasible nor possible. To begin with, the property was located in close proximity to the Waterkloof Airforce Base. Additionally, the property was designated by the Gauteng Department of Environment and Rural Development as part of a threatened eco-system which is in the high control zone and cannot be developed for urban settlement and lastly, that it was adjacent to the Lyttleton Dolomite Mine.

27. The 3 arguments against the restoration are predicated on objections to the proposed development of the property by the respondents. These objections were raised by various parties and relate to various proposed developments of the property spanning the period 2007 to 2016. The applicants live in extremely humble circumstances with neither electricity nor running water and to suggest

---

[5] *Yeko v Qana* 1973 (4) SA 735 (A) at 735C-D*"The very essence of the remedy against spoliation is that the possession enjoyed by the party who asked for the spoliation order must be established. As has so often been said by our Courts, the possession which must be proved is not possession in the juridical sense; it may be enough if the holding by the applicant was with the intention of securing some benefit for himself.".* See also *Stocks Housing (Cape) (Pty) LTD v Executive Director, Department of Education and Culture Services and Others* 1996 (4) SA 231 (C) at 240B-D.

that any construction or activity by them would, now at least 5 years after the fact, present a danger is simply not capable of any fair-minded support.

28. It was argued on behalf of the applicants that having regard to the length of time that they had "resided and sorted and stored their waste on the premises", with the knowledge of the respondents, if there truly was a danger to either the applicants or any other party in consequence of their presence on the property, legal action would have been instituted in consequence of this. This must be so.

29. The respondents were aware, at least from 10 January 2023 when the applicants sought the assistance of their attorney, that they were represented. Despite the apparent danger at no stage until the present proceedings were either the applicants or their representatives ever informed of it.

30. In *Administrator of Cape of Good Hope and Another v Ntshwaqela and Others*[6] it was held:

> *"In the context of the mandament van spolie, impossibility is a question of fact, and where it is contended that an order should not be granted because it cannot be complied with, it must be shown that compliance is impossible on the facts.*
>
> *An order to restore possession of a movable is generally performed by the physical handing over of the article. In the case of an order to restore possession of an immovable, on the other hand, there can in the nature of things be no physical handing over. Such an order may be mandatory in part, as where it requires the spoliator to vacate the property, or to procure that it be vacated, or to hand over the keys to the premises, or to remove fences or other obstacles or to perform other acts requisite for the restitution of the status quo. And it is prohibitory or hindering the spoliatus in resuming possession."*

---

6 1990 (1) SA 705 (A) at 720G-H

31. In the present matter, the removal of the applicants from the property together with the destruction of their shelters and the loss of their personal belongings have caused irreparable harm.[7] They are presently sheltering under a freeway bridge – a situation which will persist until their restoration of access to the property and the reconstruction of their shelters has been effected.

32. The applicants sought a punitive order for costs. Having regard to the circumstances of the matter, I am persuaded that a punitive order for costs is appropriate. Additionally, having regard to the nature of the matter and its importance to the applicants, I am of the view that it was a necessary, wise, and reasonable precaution to engage two counsel. It is for these reasons that I intend to make the costs order that I do.

33. Accordingly, it is ordered:

    33.1 That the first and fourth respondents are to immediately restore to the 32 applicants, unrestricted access to the property situated at 151 Theron Street, Centurion (the property located opposite to the Irene United Reformed Church of South Africa on Theron Street in Centurion, Gauteng ("the property").

---

[7] In *Machele and Others v Mailula and Others* 2010 (2) SA 257 (CC) it was held*: "…the sudden loss of one's home is an indignity for anyone..".*

33.2 That the first and fourth respondents are to restore the personal possessions which include all building materials and waste confiscated from the 32 applicants.

33.3 That the first and fourth respondents are interdicted and restrained from ordering, directing, or instructing any person whether as agent or service provider or any other party from harassing, intimidating, or threatening the 32 applicants, either individually or collectively, on the property referred to in paragraph 34.1 of this order.

33.4 That the first and fourth respondents are interdicted and restrained from ordering, directing, or instructing any person whether as agent or service provider or any other party from further perpetrating any unlawful dispossession of the 32 applicants of their dwellings and/or possessions, or from evicting them from the property, without the leave of the court.

33.5 That should the first and fourth fespondents not restore to the 32 applicants access within 24 hours of the granting of this order, that the sheriff of the High Court, together with the assistance of the South African Police Service (if necessary) is ordered to take such steps as may be necessary to provide for the unrestricted access granted in terms of this order.

33.6 That the first and fourth respondents be ordered to immediately reconstruct and restore the shelters of the 32 applicants within 48 hours of the granting of this order alternatively, and in the event that the first and fourth Respondents are unable to do so, to pay an amount of R5000 (five thousand rand) for each of the 32 applicants as listed in annexure "NM 1" of the Notice of Motion as compensation therefore, to be paid into the following account of Lawyers for Human Rights:

Account Name: LHR Litigation Account
Bank: Standard Bank
Account Type: Cheque Account
Branch Code: 0145
Account Number: […]
Reference: A429

34.7 Ordering the first and fourth respondents to pay the applicants costs of this application on the scale as between attorney and client which costs are to include the costs consequent upon the employment of two counsel.

_____

A MILLAR
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HEARD ON:	28 FEBRUARY 2023
JUDGMENT DELIVERED ON:	2 MARCH 2023
COUNSEL FOR THE APPLICANTS:	ADV. A DE VOS SC
	ADV. M COETZEE
INSTRUCTED BY:	LAWYERS FOR HUMAN RIGHTS
REFERENCE:	LHR/LOU/A429

COUNSEL FOR THE 1ST & 4TH RESPONDENTS:	ADV. M MAJOZI
INSTRUCTED BY:	IVAN PAUW & PARTNERS
REFERENCE:	P KRUGER/pvdh/KN0098

APPLICATION WITHDRAWN AGAINST THE 2ND AND 3RD RESPONDENTS.