**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

DATE: **27 February 2024**

SIGNATURE:.....

**Case No. 099668/2023**

In the matter between:

**SONO, H** **FIRST APPLICANT**

**DE-WAGENDRIFT COMMUNITY** **SECOND APPLICANT**

And

**CITY OF TSHWANE METROPOLITAN MUNICIPALITY** **FIRST RESPONDENT**

**DEPARTMENT OF HUMAN SETTLEMENTS: GAUTENG** **SECOND RESPONDENT**

***Coram:*** Millar J

***Heard on:*** 20 February 2024

***Delivered:*** 27 February 2024 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 10H00 on 27 February 2024.

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**ORDER**

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**It is Ordered**:

[1] Part A of the application is dismissed.

[2] There is no order as to costs.

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## JUDGMENT

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**MILLAR J**

[1] The applicants, some 143 persons in total, brought an urgent application on 3 October 2023 against the respondents. The application was in two parts. Part A which was enrolled for hearing on the urgent roll for 17 October 2023 and again on 20 October 2023 was for orders to set aside what was said to have been the illegal eviction of the applicants together with ancillary relief which included a restoration of occupation and the return of all building materials that had been

removed. An interdict was also sought against further eviction pending the hearing and decision of Part B in which orders were sought of both a declaratory and mandatory nature relating to what were contended to be the respondents' constitutional obligations in respect of the provision of housing to the applicants.

[2] The urgent application was not decided on 17 or 20 October 2023 because of a dispute relating to the authority of the first applicant to act on behalf of all the others. This remains in issue although the applicants did supplement the papers, they filed with confirmatory affidavits by most of the applicants confirming the authority of the Mr. Sono to act on their behalf. For the purposes of this judgment, I accept that the applicants are all properly before the court.

[3] Part A of the application was enrolled for hearing on the opposed roll, and this is what was came before me.

[4] It is common cause that on 22 September 2023 certain structures were removed by the first respondent from portion 79 of the farm De-Wagendrift. Portion 79 was acquired by the first respondent and developed into a township to accommodate residents of an informal community in the area. After the declaration of the township and installation of services, the community was divided into two groups, A and B. Both Group A and Group B were moved into the township without incident.

[5] After these two groups were moved, there remained 15 unoccupied stands. According to the first respondent, these stands could not be occupied by the present applicants who call themselves Group C.

[6] This was because *inter alia:*

[6.1] Firstly, Sanral who is responsible for the Moloto Road which the township adjoins expressed safety concerns if there were to be residents occupying certain stands too close to the road and

[6.2] Secondly, certain stands had been earmarked for the extension of the adjoining local clinic at the request of the Department of Health and

[6.3] Thirdly, Eskom also expressed safety concerns in respect of other stands because of their proximity to electrical infrastructure. These are the reasons the 15 stands were not allocated for occupation and could not lawfully be occupied by anyone.

[7] The applicants did not accept that they would for safety reasons have to wait for other property to be acquired for them and so proceeded to erect structures on the unoccupied stands.

[8] It is apposite to mention at this juncture that while the applicants filed founding papers and the respondent's answering papers, no reply was filed by the applicants. It was held in *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd*[1] that *"It seems to me that where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavit justify such an order."*[2] (my underlining)This is the approach I intend to take in the consideration of this matter.

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1 1957 (4) SA 234 (C) an approach approved in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

2 *Ibid* at 235E-G.

[9] While the order sought in Part A of the present matter is not a final order but a *mandament van spolie*, it is nevertheless necessary for the applicants to make out a case for the order sought. In *Knox v Second Lifestyle Properties Pty Ltd* [3] it was held:

> *"It is trite that in an application for spoliation, the applicants need to show only two grounds namely:*
>
> *20.1 That there were in peaceful and undisturbed possession of the thing, and*
>
> *20.2 that they have been unlawfully deprived of that possession. See in this regard Yeko v Qana 1973 (4) SA 735A.*
>
> *[21] Once an applicant establishes these two grounds, he is entitled to relief in terms of the mandament van spolie."*

[10] Decision of this application turns on a single issue – whether the applicants were in peaceful and undisturbed possession of the structures that were demolished and that this was unlawful.

[11] On this aspect, it is the case for the applicants that "*In March 2023, we decided to move ourselves and proceeded to occupy the already demarcated stands that had been earmarked for Group 3. One of the primary reasons for this move was in order to protect our interests in the demarcated area under[sic] and to prevent the property that had been earmarked and demarcated for the Applicants from being invaded by other third parties.*" They went on to assert that the first respondent knew of their occupation and that "*We continued in a peaceful and undisturbed occupation from March 2023 till August 2023."*

[12] On 23 August 2023 notices were given by a security company acting on behalf of the first respondent. The notice informed them to cease and desist

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[3] [2012] ZAGPPHC 223 (11 October 2012) at paras [20]- [21].

immediately with all building activities on the site. A copy of the notice was affixed to each structure and photographs taken to show that this had been done.

[13] On 24 August 2023 the applicants' attorneys wrote to the first respondent complaining that the relocation of Group 3 had not proceeded as anticipated and asserting the right to occupy the vacant stands in consequence of this. The letter makes no mention of the fact that the applicants were alleged to have been in occupation since March 2023. This was only asserted for the first time in the founding affidavit.

[14] The applicants furnished photographs taken in which the demolition and removal of the structures is depicted. There was also reference to a video although this could not be accessed on caselines. The first respondent for its part also furnished various photographs of the structures taken on 3 August 2023 when the notices were affixed to the structures. Those photographs show that the majority of the structures were incomplete, having neither a roof nor doors or windows in most cases.

[15] Common to all the photographs furnished by the parties is the absence of any indication that the structures were occupied and used as dwellings or homes by any of the applicants. Furthermore, the photographs taken on 23 August 2023 do not depict at all the presence of any persons or personal possessions which would be indicative of any occupation or possession. It is the case for the first respondent that the applicants were not in peaceful and undisturbed possession.[4]

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[4] *Stocks Housing (Cape) (Pty) LTD v Executive Director, Department of Education and Culture Services and Others* 1996 (4) SA 231 (C) at 240B-D.

[16] On the version of the applicants, they were in occupation since March 2023, some six months before the structures were demolished. This was not disclosed initially

on 24 March 2023 and is neither borne out by the photographs taken on either 3 or 22 September 2023.

[17] In my view, the applicants were not in possession or occupation but had proceeded to commence construction of structures in order to protect a preference they believed they had, to being allocated the 15 vacant stands. The true reason was to discourage any other possible illegal occupiers from doing so and hence the fact that there was no indication of anyone actually occupying the structures.

[18] Notice was given on 3 August 2023 of the first respondents intention to demolish the structures and it is highly improbable that if the applicants had been in possession or occupying since then, they would not be able to place some evidence before the court. Simply put, there is nothing before the court upon which a finding may be made that the applicants were either in possession or occupation of the structures.

[19] In the absence of a reply, the peaceful and undisturbed occupation of the applicants having been placed in issue[5] by the respondents, I am unable to find that the applicants have made out a case for the relief sought.

[20] Insofar as costs are concerned, while the applicants have not succeeded in Part A of their application, the issues raised in Part B seem to me to of significance and importance. For this reason, I am of the view that in respect of Part A there should be no order as to costs.

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5 *Ivanov v North West Gambling Board & Others* 2012 (6) SA 67 (SCA) at 75B-D.

[21] In the circumstances it is ordered:

[21.1] Part A of the application is dismissed.

[21.2] There is no order as to costs.

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**A MILLAR**

**JUDGE OF THE HIGH COURT**
**GAUTENG DIVISION, PRETORIA**

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| HEARD ON: | 20 FEBRUARY 2024 |
| JUDGMENT DELIVERED ON: | 27 FEBRUARY 2024 |
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| COUNSEL FOR THE APPLICANT: | ADV. Z MAHAMBA |
| INSTRUCTED BY: | LAWYERS FOR HUMAN RIGHTS |
| REFERENCE: | MS. N SHONGWE |
| | |
| COUNSEL FOR THE FIRST RESPONDENT: | ADV. S MBEKI |
| INSTRUCTED BY: | LEEPILE ATTORNEYS INC. |
| REFERENCE: | MR. K LEEPILE |