



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case no: 6620/2020

In the matter between:

MSUNDUZI MUNICIPALITY

APPLICANT

and

NGCWETI SAKHEPHI GWALA

FIRST RESPONDENT

ALL PERSONS UNLAWFULLY INVADING

AND/OR UNLAWFULLY DISRUPTING

AND/OR UNLAWFULLY BUILDING ON

APPLICANT'S PROJECT SITE/PROPERTY

SECOND RESPONDENT

Coram: Koen J

Heard: 16 May 2022

Delivered: 18 May 2022

ORDER

The rule *nisi* issued on 25 September 2020 is, subject to certain amendments, confirmed in the terms set out in paragraph 12 below.

JUDGMENT

Koen J

[1] On 25 September 2020, Van Zyl J granted the following order:

(1) A Rule *Nisi* hereby issues calling upon the Respondents to show cause on or before 9h30 on the 10th of November 2020 why Orders in the following terms should not be made final:

- (a) The First and Second Respondents are hereby interdicted and restrained from congregating at and/or loitering at, invading, occupying, accessing, damaging, digging up, building on, dealing with and/or blockading the Applicant's immovable property more fully described as Portion 1 of Erf 3127, Pietermaritzburg and as reflected in annexures "MK1", "MK2" and "MK3" to Applicant's Founding Affidavit (hereinafter "the property").
- (b) The First and Second Respondents are hereby interdicted and restrained from threatening, intimidating, attacking, harming, harassing and/or in any manner whatsoever assaulting, attempting to assault, killing and/or attempting to kill any of Applicant's functionaries and employees.
- (c) The First and Second Respondents are hereby interdicted and restrained from perpetuating or causing or inciting any violence, public or otherwise, at the property.
- (d) The First and Second Respondents are hereby directed to immediately demolish and remove all unoccupied structures built by the respondents on the property.
- (e) Failing First and Second Respondent's compliance with these Orders within five (5) days of grant of, the Applicant and/or the Sheriff exercising jurisdiction over the area of the property is hereby granted authority to demolish and remove all unoccupied structures built or erected by the First and/or Second Respondents on the property.
- (f) The First and Second Respondents are directed to pay the Applicant's costs of suit jointly and severally on the attorney–client scale, such costs to include the costs of demolition and removal incurred by the Applicant and/or by the Sheriff pursuant to prayer (1)(e) above, save that any party making unsuccessful opposition to this Application shall also be liable jointly and severally with the First and Second Respondents for Applicant's costs of suit on the attorney–client scale.

(2) The above Prayers (1)(a) to (1)(c) *inclusive* shall operate as interim interdicts and relief pending the final determination of this Application.

(3) The costs of the Application on 25th September 2020 for interim relief are reserved.

(4) The Applicants are given leave to effect service by:

4.1 Serving a copy of this order and the application papers on the First Respondent in terms of the High Court Rules of Court;

4.2 Serving a copy of this order and the application papers on the Second Respondent by affixing same on the main gate to the property as well as by affixing same at prominent points along the fence surrounding the property.'

[2] Service of the order was duly effected. An application was brought for various parties to intervene, but that application was not proceeded with. The applicant now seeks confirmation of the aforesaid rule, which was opposed by the first respondent only.

[3] It is not in dispute that the applicant is the registered owner of the property more correctly described as the Remainder of Portion 1 of Erf 3127, Pietermaritzburg (and not simply 'Portion 1 of Erf 3127') in terms of deed of grant number 81 of 1945.

[4] It is the applicant's case that the respondents invaded/moved onto the property unlawfully during July 2020, and that they have subsequently erected structures thereon. The property consisted of a large tract of vacant land allocated, and earmarked, for human settlement development in terms of the applicant's Municipal Integrated Development Plan, and reserved for development through the erection and provision of Reconstruction and Development Program housing. The applicant maintains that the structures are all unoccupied, whereas the first respondent contends that his son, Mr Ndumiso Mkhize, resides on a stand, which he says was allocated to him, the first respondent. At the time that the rule *nisi* was sought, the original relief claimed in subparagraph (d) was amended to confine the structures to be demolished, to 'unoccupied' structures only. It also appears from photographs annexed to the founding papers that the first respondent has erected a permanent concrete block structure with windows and doors, completed up to roof level, on the property

[5] The relief claimed by the applicant is vindicatory relief. Because possession of an owner's property by another is prima facie wrongful, it is not necessary for the applicant to allege or prove that the respondents' possession is wrongful or against the wishes of the applicant. Even if the allegation is made that the first respondent's presence on the property is unlawful, it does not draw any onus.¹ Should the respondents wish to rely on a right to possession, then they must allege and prove that right.²

[6] The first respondent claims that he is entitled to the property and does not dispute that he is in possession thereof. In his answering affidavit, he details how promises were made to him relating to the property, allegedly by officials from the applicant, or by councillors of the council of the applicant. I do not intend summarising these contentions, as they are best read in their full context in the answering affidavit. Briefly, however, the first respondent claims to have been allocated a municipal service stand; that this site was identified or pointed out by officials of the applicant, particularly a 'senior person' named Ms Madiba (who the applicant in reply contends is not an employee of the applicant but is in fact an occupant from an informal settlement on the property); that the first respondent waited in vain for the stand to be formally allocated to him; that he was referred to the then deputy municipal manager who advised him to apply for an alternative service site but that he was in the meantime to 'hold onto the service stand'; that he put a fence around his stand; that following the advice of municipal officials, he erected a corrugated iron structure on the property; and thereafter, from February 2020, commenced building a brick structure on the property. He does not, however, allege that any person gave him permission to erect any such structure, but that the persons mentioned by him were well aware of his actions and did not protest. These allegations are in many instances denied in reply. However, even assuming these allegations to be established in relation to the first respondent, on the test in *Plascon-Evans Paints v Van Riebeeck Paints*,³ the applicant's reply that any such

¹ *Singh v Santam Insurance Limited* 1997 (1) SA 291 (A); [1997] 1 All SA 525 (A).

² *Woerman NO and Schutte NNO v Masondo and others* 2002 (1) SA 811 (SCA); [2002] 2 All SA 53 (A).

³ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

promises would not be legally binding on the applicant, could not be disputed. Neither did Ms Ngcobo, appearing for the first respondent, contend to the contrary in argument.

[7] The legal position is that a municipality may only transfer or otherwise dispose of its assets in terms of section 14(2) of the Local Government: Municipal Finance Management Act ('the MFMA').⁴ No such transfer or disposition is permissible, unless it has been decided by the council that the asset in question is not required 'to provide the minimum level of basic municipal services'. The granting of a right to use a municipal asset is furthermore regulated in terms of the Asset Transfer Regulations,⁵ promulgated under the MFMA, specifically regulations 34 to 36, which require *inter alia* approval by the council or, if there has been a delegation in terms of regulation 34(4), by the accounting officer, being the municipal manager. The relevant municipal manager at the time denies that there was any such approval. Indeed, an extract from WhatsApp messages annexed to the first respondent's answering affidavit indicates that such negotiations, as there were in regard to the property, were still subject to the contingent 'if EXCO approves'. EXCO's approval was thus still outstanding.

[8] Not only was no such disposition approved by the council of the applicant, but no deed of alienation, as required in terms of the Alienation of Land Act,⁶ was ever concluded.

[9] Ms Ngcobo sought to rely on the decision in *Modderfontein Squatters v Modderklip Boerdery (Pty) Ltd*.⁷ That judgement, however, dealt with a claim for damages by a landowner where a municipality had failed to act against unlawful invaders. It does not find application in the context of the relief presently being claimed.

[10] Negotiations which fell short of an enforceable right being agreed to for the transfer of ownership of a portion of the property to the first respondent, even if a

⁴ Local Government: Municipal Finance Management Act 56 of 2003.

⁵ Municipal Asset Transfer Regulations, GN R878, GG 31346, 22 August 2008.

⁶ Alienation of Land Act 68 of 1981.

⁷ *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, amici curiae); President of the Republic of South Africa and others v Modderklip Boerdery (Pty) Ltd (Agri SA And Legal Resources Centre, amici curiae)* 2004 (6) SA 40 (SCA).

pactum de contrahendo to enter into a sale, cannot, unless there is compliance with the formalities prescribed by the Alienation of Land Act,⁸ defeat the applicant's rights of ownership in and to the property. This would also be so having regard to the first respondent's constitutional right of access to housing, when balanced against the constitutional imperative pursued by the applicant to give effect to its obligations in respect of housing, which it seeks to implement in respect of the property.

[11] The rule *nisi* accordingly falls to be confirmed but subject to some amendments. These include, firstly, an amendment of the property description in subparagraph (a); secondly, pruning the width of the restrictions in subparagraph (b) in so far as they go beyond the allegations in the founding affidavit; amending the time allowed in subparagraph (e) to permit a reasonable time for the demolition and removal of any unoccupied structures; and amending the ambit of paragraph (f) to restrict the costs order to party and party costs but including the costs reserved on 25 September 2020. An appropriate costs order is that the costs, including the reserved costs of 25 September 2020, be paid by the first and second respondents, jointly and severally, and that the further costs of opposition thereafter be paid by the first respondent, as he had been unsuccessful in his opposition.

[12] The rule *nisi* issued on 25 September 2020 is accordingly confirmed in the following amended terms, to take account of the above:

(a) The first and second respondents are hereby interdicted and restrained from congregating at and/or loitering at, invading, occupying, accessing, damaging, digging up, building on, dealing with and/or blockading the applicant's immovable property more fully described as Remainder of Portion 1 of Erf 3127, Pietermaritzburg and as reflected in an annexures "MK1", "MK2" and "MK3" to the applicants founding affidavit ('the property').

(b) The first and second respondents are hereby interdicted and restrained from threatening, intimidating, attacking, harming, harassing and/or in any manner

⁸ *Docrat v Willemse and others* 1989 (1) SA 487 (N).

whatsoever assaulting, and/or attempting to assault any of the applicant's functionaries and employees.

(c) The first and second respondents are hereby interdicted and restrained from perpetuating or causing or inciting any violence, public or otherwise, at the property.

(d) The first and second respondents are hereby directed to demolish and remove all unoccupied structures built by the respondents on the property.

(e) Failing the first and second respondents' compliance with these orders within one month of the grant of this order, the applicant and/or the sheriff exercising jurisdiction over the area of the property are hereby granted authority to demolish and remove all unoccupied structures built or erected by the first and/or second respondents on the property.

(f) The first and second respondents are directed to pay the applicant's costs up to and including the costs reserved on 25 September 2020, jointly and severally, and the first respondent is directed to pay the applicant's costs after 25 September 2020, such costs to include the costs of demolition and removal incurred by the applicant and/or by the sheriff pursuant to prayer (1)(e) above in respect of any structure of the first respondent.

KOEN J

APPEARANCES

For the applicant:

Mr V. Moodley

Instructed by:

Matthew Francis Inc

Pietermaritzburg

For the first respondent:

Ms T Ngcobo

Instructed by:

Tenza Zondi Inc

Pietermaritzburg