THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

No precedential significance

Case No: 025/2011

In the matter between:

CITY OF TSHWANE METROPOLITAN MUNICIPALITY	**APPELLANT**
and	
THE MAMELODI HOSTEL RESIDENTS ASSOCIATION	**FIRST RESPONDENT**
DANIEL SELLO	**SECOND RESPONDENT**
THOSE PERSONS LISTED IN ANNEXURE "A"	**THIRD RESPONDENT**

Neutral citation: *City of Tshwane Metropolitan Municipality v The Mamelodi Hostel Residents Association* (025/2011) [2011] ZASCA 227
(30 November 2011)

Coram: **MTHIYANE, VAN HEERDEN, MAYA, SHONGWE and MAJIEDT JJA**

Heard: **15 NOVEMBER 2011**

Delivered: **30 NOVEMBER 2011**

Summary: Spoliation order – eviction – whether removal of the residents' roof coverings constituted eviction – whether eviction lawful.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Omar AJ sitting as court of first instance):

1 The appeal is upheld to the extent that the order in paragraph 1.2 of the rule nisi, as confirmed by the court below, is amended to read:

'1.2 First to Third respondents are ordered jointly and severally to restore the roof structures and roof covering of Block J of the Mamelodi Hostels to at least an equivalent of the condition they were in prior to destruction thereof on 15 November 2009, and to restore possession thereof to the applicants.'

2 The appeal is otherwise dismissed with costs, including the costs of two counsel.

JUDGMENT

MAJIEDT JA (MTHIYANE, VAN HEERDEN, MAYA, SHONGWE JA concurring):

[1] On 15 November 2011 this court made an ex tempore order as set out above and indicated that the reasons for that order would follow. These are the reasons.

[2] During the colonial and apartheid eras, thousands of migrant labourers (almost exclusively male) were employed on the mines in what is now known as Gauteng Province. They were accommodated in single male hostels, which today remain as a grim legacy of those times. This appeal concerns

one such hostel, namely Block J of the Mamelodi West hostel complex. In the court below the respondents obtained confirmation of a rule nisi which restored to them their occupation of Block J. With leave of the court below (Omar AJ, sitting as court of first instance in the North Gauteng High Court, Pretoria) they appeal to this Court against that order.

[3] The interim order, issued by Du Plessis AJ on an unopposed basis,[1] reads as follows:

'1. A rule nisi is issued against First to Third Respondents[2], with return date in the urgent court on 24 November 2009, calling on the Respondents to show cause why the following order should not be made final:

1.1 First to Third Respondents are ordered to immediately stop demolishing hostel structures in Mamelodi West.

1.2 First to Third Respondents are ordered to immediately restore the roof structures and roof covering of Block J of the Mamelodi Hostels to the condition it was in prior to the destruction thereof on 15 November 2009, and to restore possession thereof to the Applicants.

1.3 First Respondent is ordered not to continue with the demolition of hostels in the hostel precincts of Mamelodi West before they have either:

a. followed procedures prescribed in Part 3, Chapter 10 of the Housing Code as published in terms of section 4 of the Housing Act 107 of 1997,
   and
b. have obtained a court order for eviction.

1.4 First to Third Respondents are ordered to pay the costs of this application on an attorney and client scale.

2. Paragraphs 1.1 to 1.3 above shall have immediate effect pending the return date.

---

[1]Although the appellant was duly served with the urgent spoliation application papers, there was no appearance on its behalf at the hearing.
[2]In the high court the appellant was the first respondent, the Minister of Safety and Security was the second respondent, while the MEC for Human Settlements was the third respondent.

3. Costs of 16 November 2009 to be costs in the cause.'

[4] The appellant, City of Tshwane Metropolitan Municipality (the City), in due compliance with its constitutional obligation to erect adequate housing for its inhabitants[3] and in accordance with a comprehensive national housing plan known as the Integrated Residential Development Programme, began addressing human settlement inefficiencies, including an extensive hostel redevelopment programme. It is common cause that Block J, like so many other single male hostels, is badly dilapidated, to the point of allegedly being unsafe and uninhabitable. Considerable planning, information sessions and negotiations with hostel dwellers have gone into the hostel redevelopment programme in Mamelodi since 2004. On 15 November 2009 City officials, aided by private contractors and under the watchful eye of a large police contingent, removed the roof structures and roof covering of Block J, while the occupants were still inside it. This gave rise to the urgent spoliation proceedings before Du Plessis AJ.

[5] The first respondent is the Mamelodi Hostel Residents Association, an unincorporated body representing Mamelodi Hostel residents (the Association). A challenge in the court below to its legal standing to sue found no favour with the learned judge and no appeal has been noted against his order in that regard. The second respondent, Mr Daniel Sello, is the chairperson of the Association's Executive Committee and the deponent to the respondents' founding and replying affidavits. The third respondent consists of a large number of persons who were in occupation of Block J on 15 November 2009 and who refused to vacate their dwellings.

[3]Section 26(2) of the Constitution states: 'The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.' (ie the right under s 26(1) to have access to adequate housing).'

[6] It is not disputed that the respondents, as spoliation applicants, needed only to prove that they were in peaceful and undisturbed possession on that day and that they were unlawfully deprived of such possession. Before us the City's counsel was driven to concede that the Block J occupants were in peaceful and undisturbed possession when the roof structures and covering were removed. The City's main defence is that the occupants had consented to the removal as a first step in demolishing Block J. In addition, it contended that alternative accommodation had been arranged and was available to the Block J dwellers. This latter contention can be dismissed without more. Omar AJ correctly held that that is an irrelevant consideration in spoliation proceedings. It is relevant in eviction proceedings.[4]

[7] The City's main defence is fraught with a myriad of difficulties. First s 26(3) of the Constitution prohibits evictions and demolitions without a court order. It reads:

'No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.'

PIE is the legislative tool which further expands on this right. It is common cause that the City did not seek an eviction of the Block J dwellers prior to the events of 15 November 2009. The respondents sued on the mandament van spolie. In *Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality*[5] this Court discussed[6] whether there is a need to develop this common law remedy to afford broader relief. The court formulated instead an appropriate constitutional remedy. The requirements for the mandament van spolie have been outlined above – the merits regarding competing claims to the object are irrelevant, the only consideration is that unlawful deprivation must be remedied before all else.[7] The City's reliance on an alleged agreement to the demolition must therefore fail. The respondents proved in

[4]Section 6(3)(*c*) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE); *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) at para 28.
[5]*Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality* 2007 (6) SA 511 (SCA).
[6]para 20.
[7]Ibid, para 21.

the court below that they were in peaceful and undisturbed possession and were unlawfully deprived of their possession, ie that deprivation commenced when the roof structures and covering were removed as a first step of eviction, while they were still in the property.

[8] But even if the City could have sought refuge in consent or agreement by the respondents, such consent or agreement was not proved on the papers. I interpose to mention that the appeal record is in a lamentable state. Numerous annexures were omitted altogether, while others were incomplete, including Annexure SLR 12 to the City's answering affidavit on which the City placed particular reliance. This annexure is the minutes of a meeting held by City officials to verify the list of Block J dwellers. This state of affairs is exacerbated by the fact that the City had to seek, and was granted, condonation for the late filing of its notice of appeal in this Court. But the City pressed on nevertheless, intimating that it was content to argue the appeal on the defective record. The notices referred to during argument establish no more than that there had been an ongoing process of engagement, notification and information sessions between the City and hostel dwellers, including those in Block J. But nowhere does the respondents' consent to the proposed demolition and their concomitant relocation appear; on the contrary, the founding papers contain a letter written by the respondents' attorneys to the City Manager, dated 21 July 2009, in which the City was notified that the hostel dwellers refused to relocate, unless they received certain assurances. There was no response to this letter.

[9] And even if the City could have relied on an agreement which had been proved and even if the respondents had been proved to be in breach thereof and had been in unlawful occupation, the summary deprivation of possession by the City was untenable. Eviction proceedings under PIE would have had to be launched. And the City would have been obliged to engage in meaningful consultation with the respondents prior to obtaining an eviction order.[8]

[8]Section 2(1)(*b*) of the Housing Act 107 of 1997:

[10] In summary therefore, the respondents have proved the requirements for a spoliation order and the appeal must therefore fail. Two final aspects require attention. Before us the City cautioned against the difficulties it may face if the order in para 1.2 of the rule nisi above should remain extant. Its primary difficulties are that the roof coverings are constructed of asbestos (which has been prohibited by the authorities) and that it may not be possible to erect roof coverings on the unsafe hostel buildings. The order was accordingly amended to address this concern. En passant, and with reference to the alleged unsafeness of the building, it begs the question how the Block J dwellers have been able to live in those premises for the last two years. And one is reminded of the adage that 'every man's (and woman's) home is his (or her) castle'. The facts and conclusions in *Tswelopele* provide ample illustration of the point. Lastly, mention must be made of the laudable efforts of the City to meet its constitutional obligation to provide adequate housing. Much has been done by it to work towards alleviating the hostel dwellers' plight. But this is a delicate process and there have been difficulties, judging by previous litigation between it and hostel dwellers as well as *Tswelopele* where it was also involved in unlawful evictions. Reasonableness ought to prevail so that the City is able, in constructive engagement with the hostel dwellers, to find lasting solutions to the problem.

[11] For these reasons the following order was issued:

1 The appeal is upheld to the extent that the order in paragraph 1.2 of the rule nisi as confirmed by the court below is amended to read:

'1.2 First to Third respondents are ordered jointly and severally to restore the roof structures and roof covering of Block J of the Mamelodi Hostels to at

---

'National, provincial and local spheres of government must-

(a) . . .

(b) consult meaningfully with individuals and communities affected by housing development.'

And see, generally: *Port Elizabeth Municipality v Various Occupiers*, supra, para 43; *Occupiers of 51 Olivia Road and 197 Main Street, Johannesburg v City of Johannesburg* 2008 (3) SA 208 (CC) para 13.

least an equivalent of the condition they were in prior to destruction thereof on 15 November 2009, and to restore possession thereof to the applicants.'

2 The appeal is otherwise dismissed with costs, including the costs of two counsel.

_____
S A MAJIEDT
JUDGE OF APPEAL

APPEARANCES:

Counsel for appellants	:	N CASSIM SC
Instructed by	:	Moduka More Attorneys, Pretoria Matsepe's Attorneys, Bloemfontein
Counsel for respondents	:	R JANSEN (WITH M DEWRANCE)
Instructed by	:	Gilflan du Plessis Attorneys, Pretoria Webbers Attorneys, Bloemfontein