REPUBLIC OF SOUTH AFRICA

IN THE LAND CLAIMS COURT OF SOUTH AFRICA

(HELD AT THE WESTERN CAPE HIGH COURT)

CASE NO: LCC 128/2014

In the matter between:

Zanemvule Mpume — Applicant

and

Drakenstein Municipality — First Respondent

Astral Operations Ltd T/A
County Fair Foods — Second Respondent

JUDGMENT

Carelse J:

[1] This is an application for an interim order that the applicant and his family be provided with temporary emergency accommodation by either the first or second respondent, pending determination of another application brought by the applicant ("the main application"), the details of which are set out later in this judgment. This Court must also determine an application to join the second respondent in this interim application ("Astral") to the main application.

[2] Both respondents oppose the application for interim relief. Only Astral opposes the joinder application. The first respondent ("the Municipality") abides the decision of the Court in the joinder application, but it is worth noting that it was the Municipality which raised the question of non-joiner of Astral in the main application.

[3] Both the main application and this application for interim relief have their roots in an order this Court granted on 3 February 2016, by agreement between Astral and the applicant, in an application Astral had brought to evict the applicant and those occupying through him from its property. The applications are brought under the same case number as the eviction application. The order of 3 February directed the applicant and all other persons occupying the property under him to vacate the property by 29 April 2016. In the event they did not vacate the sheriff was directed to evict them from the property on 3 May 2016. Astral was directed to pay the applicant an amount of R10 000 once the applicant had vacated the property. The applicant was evicted while these proceedings were before this Court, on 18 May 2016, but has declined to accept the R10 000 so as not to prejudice his rights.

[4] The applicant has brought a number of applications, in an attempt to remedy the situation in which he finds himself, and, because of the manner in which events have played out, including the applicant's change of attorney mid-stream. It is necessary for me to set out in detail both the various applications and the applicant's various attempts to amend the relief sought as part of the background of this matter. It must be borne in mind that it is necessary both for purposes of the joinder application and for purposes of the interim relief sought to examine the relief sought in the main application.

Factual and procedural background

[5] On 26 April 2016, the applicant launched the main application against only the Municipality, urgently seeking an order compelling the Municipality to provide emergency accommodation to the applicant and those persons occupying the property under him, alternatively that the Municipality pay him an amount of R10 000 towards relocation costs.

[6] The applicant states in his founding affidavit that he had agreed to the eviction order because he had been informed that he could obtain emergency housing, and that emergency housing would be available in April 2016, but that he was then informed in mid-April that it would not be available.

[7] On 3 May 2016 at a pre- trial conference the Municipality was directed to provide information relating to emergency housing to the applicant's erstwhile attorney Mr. Moodaley. The matter was postponed until 27 May 2016 to hold a further pre-trial conference.

[8] On 9 May 2016, Mr Moodaley withdrew as the applicant's attorney of record. On 17 May 2016, Mr van der Merwe came on record. Astral sent a letter to the applicant's attorneys on 17 May 2016 at 14h27 informing them that Astral intended to proceed with the execution of the court order dated 3 February 2016.

[9] The applicant launched an urgent application within hours for, *inter alia*, variation of the court order of 3 February 2016, to include a prayer making the eviction conditional upon either the Municipality or Astral ensuring that the applicant and those holding under him are accommodated in alternative accommodation without the loss of the protection of rights conferred upon him as a long term occupier; Astral's joinder in the main application, and the stay of the eviction and warrant pending the determination of the main application. I will refer to this application as the 17 May application.

[10] The 17 May application was served by email on the attorneys of both respondents on 17 May 2016 at 16h36. At 18h28 Astral served its notice of opposition. While the application was serving before this court at some time after 11h15 on 18 May 2016 the sheriff commenced with the eviction. At 12h47 second respondent's attorneys advised the applicant's attorneys that applicant had been evicted and his home demolished.

[11] Based on these events the applicant launched this application for urgent interim relief on 18 May 2016. The relief initially sought included an order restoring the applicant and his family to the property from which they had been evicted, as well as an alternative prayer that either Astral or the Municipality provide urgent temporary shelter. The relief was interim, pending the final determination of the 17 May application.

[12] At the telephonic pre-trial conference held on 27 May 2016, the applicant undertook to file notices of his intention to amend the relief sought in both the urgent application launched on 18 May 2016 and in the main application launched on 26 April 2016. These were filed on 31 May.

[13] The amendment to the urgent interim relief sought simply abandons the prayer for restoration, and amends the prayer for temporary shelter pending the determination of the 17 May application to a prayer for temporary emergency accommodation pending the determination of the main application. It is substantially the same as the original notice of motion, save for the abandonment, which the applicant is entitled to do without amending.

[14] The amendment to the relief sought in the main application now sought rescission of the eviction order, setting aside of the settlement agreement, leave to defend the eviction application, joinder of the applicant's wife in the eviction application, leave to file supplementary answering and replying affidavits, an order for restoration if the eviction application is not successful, and, alternatively, amendment of the eviction order to make provision for suitable alternative accommodation before the eviction may take place.

[15] Although there is no withdrawal of the relief sought in the 17 May application, it is clear that the intention is to encapsulate most it within the main application. In any event, until the amendment of the relief sought in the main application is effected, withdrawal of the 17 May application would be premature. The prayer for the joinder of Astral, however, still had

to be determined. It was agreed at a telephonic pre-trial conference held on 3 June 2016 that joinder was the only remaining live issue in the 17 May application.[1]

[16] By the time this matter was heard, on 10 June 2016, Astral had filed a notice of objection only to the notice of intention to amend the urgent interim relief sought. It was still within the time period for objecting to the notice of intention to amend the main application. Astral's counsel indicated that an objection to the amendment of the main application would be forthcoming.

[17] The objection to the amendment of the urgent interim relief was not argued, and in view of the similarity between the original relief sought and the amended relief, it is my view that this is not of consequence.

[18] The Municipality has not objected to either amendment.

[19] This Court must therefore decide the applicant's entitlement to the interim order (which is a mandamus, or a positive interdict), and the joinder of Astral in the main application.

The legal framework governing interim interdicts

[20] The requirements for the granting of an interim order are common cause. The applicant must establish the following:

20.1 The right which is the subject – matter of the main application and which is sought to be protected by means of interim relief is clear or, if not clear, is

[1] This was based on an assumption that the amendment to the main application would be successful.

prima facie established , though open to some doubt. A *prima facie* right (a "right on the face of it") must be an actual right, a mere interest is not sufficient.

20.2 A reasonable apprehension of irreparable harm if the interim interdict is not granted:

20.2.1 If the applicant can show a *prima facie* right, then an interim interdict will only be granted if the harm to the applicant is likely to be irreparable if the interim relief is not granted and the relief sought in the main application is eventually granted.

20.3 There is no alternative satisfactory remedy available to the applicant:

20.3.1 This requirement is linked to the previous requirement, namely that in addition to there being a reasonable apprehension of irreparable harm, there must also be no alternative satisfactory remedy available.

20.4 The balance of convenience is in favour of granting the interim relief:[2]

9.4.1 Ultimately the grant or refusal of an interim interdict lies in the exercise of judicial discretion by the court. In exercising its discretion a court must take into account the balance of convenience in relation to both the applicant and the respondent, and decide whether the balance

[2] *LF Boshoff Investments (Pty) Ltd v Cape Town Municipality ; Cape Town Municipality v LF Boshoff Investments (Pty) Ltd* 1969 (2) SA 256 (C) at 267 B-E.

> of convenience leans in favour of the applicant or the respondent. A court may also take into account the applicant's prospects of success in relation to whether or not it is likely that the applicant will ultimately be able to show a clear right, which would tilt the balance of convenience in the applicant's favour.[3]

[21] The approach to be adopted by a Court in determining whether or not an applicant has established a *prima facie* right has been laid done in the well-known case of *Webster v Mitchell* 1948(1) SA 1186W in which the court held:

> In an application for a temporary interdict, applicant's right need not be shown by a balance of probabilities; it is sufficient if such right is *prima facie* established, though open to some doubt. The proper manner of approach is to take the facts as set out by the applicant together with any facts set out by the inherent probabilities; the applicant could on those facts obtain final relief at a trial. The facts set up in contradiction by respondent should then be considered, and if serious doubt is thrown upon the case of applicant he could not succeed.

[22] The issue I am required to determine is whether or not the applicant has in fact established the four requisites necessary to obtain an interim interdict in the terms sought. It is not disputed that the eviction has rendered the applicant and those who reside under him homeless, nor does the Municipality dispute that the eviction has triggered an obligation by the Municipality to provide temporary emergency accommodation within its resources. It is also common cause that the applicant and his spouse are categorized as people with "special needs" and will likely be considered for permanent housing. They have been on the list for permanent

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[3] *Olympic Passenger Sevices at 383 D-F; Eriksen Motors (Welkom) Pty Ltd v Protea Motors , Warrenton* 1973 (3) SA 685(A) at 691 F-G.

housing since 2001. As a result the applicant submits that the Municipality's obligations in terms of Chapter 12 of the National Housing Code ("Chapter 12"), and its own housing policy, are triggered. At the outset I must point out that the applicant does not attack the Municipality's housing policy.

[23] For these reasons, I am convinced that there is not, at present, so clearly articulated an obligation on the part of Astral to provide temporary emergency accommodation, particularly when the Notice of Motion in its current, unamended, form, seeks no relief against Astral. I therefore consider first whether the applicant has established a *prima facie* right to interim relief against the Municipality.

Prima facie right

[24] The Municipality attacks the applicant's prayer for interim emergency housing[4] on the basis that the applicant has not established a *prima facie* right to the relief sought in the intended amendment to the main application. During argument the Municipality conceded that the applicant indeed has a right to temporary emergency housing in the event that the applicant faces homelessness even if the eviction was lawful. There can be no doubt that the applicant finds himself in a crisis situation as a result of homelessness. The Municipality has therefore conceded the applicant's *prima facie* right to the unamended relief sought against it in the main application.

[25] Notwithstanding this the Municipality submits that the difficulty for the applicant is that he is unable to show that the right which is the subject–matter of the main application (if

[4] Notice of applicant's intention to amend page 33.

amended), which is what the applicant seeks to protect by means of the interim interdict, is *prima facie* established. The Municipality submits that the applicant seeks to establish a *prima facie* right to a rescission of the eviction order which is vigorously opposed by Astral. That being so a *prima facie* right to the rescission of an eviction order does not establish a *prima facie* right to temporary emergency housing. Furthermore, no relief was sought against the Municipality in the original eviction application. All that the applicant may be able to establish is the right to a rescission of the eviction order, the relief in the main application. The Municipality submits that the right sought to be protected in the main application, the rescission of the eviction order is substantially different from the interim relief which is temporary emergency housing.

[26] The "amended" relief sought in the main application seeks *inter alia* the rescission of the eviction order and the rehearing of the eviction application and, in the alternative, that the applicant and/ or the Municipality make available to the applicant and those occupying with him "suitable alternative accommodation ... ".[5] The Municipality submits that the suitable alternative accommodation sought is not emergency housing. I disagree. Nowhere in ESTA is emergency housing expressly mentioned yet parties seek such relief under ESTA. ESTA expressly provides for suitable alternative accommodation. I see no reason why the relief sought by the applicant for suitable alternative accommodation cannot include temporary emergency housing. Even if I am wrong, I see no reason why paragraph 10 in the amended notice of motion (if it is amended) in which applicant will seek "further and/or alternative relief" cannot include emergency housing.

[5] Page 38 para 9.1.

[27] The applicant submits that on the Municipality's own version it has not put itself in a position in which it is able to provide emergency housing to any persons who find themselves in need, including special needs persons, that the Municipality has not allocated any funds from its own budget to provide for emergency housing, and that as such it has failed to implement its emergency housing policy in a manner that is constitutionally compliant. The applicant has, on this basis, established a *prima facie* right to the main relief sought against the Municipality in that it will force the Municipality to implement its housing policy in a manner consistent with the Constitution. The applicant has not challenged the housing policy and having regard to what I stated in the previous paragraph it is not, in my view, necessary to decide this issue for the purposes of this judgment. In my view the applicant has established a *prima facie* right to the relief sought against the Municipality in both the "amended" and unamended main application.

A well- grounded apprehension of irreparable harm

[28] The Municipality's contention is that there is no evidence of a well-grounded apprehension of irreparable harm. I disagree. The applicant and his family slept in the street on the very first night of their eviction. The applicant and his wife are elderly persons. One of their minor grandchildren who ordinarily lives with them is epileptic. They have been living at different homes for a maximum of 2 days at a time. There is manifest uncertainty of where the applicant and his family will live on a day to day basis .That the applicant and his family have no security of tenure is an unequivocal demonstration that there is a well-grounded apprehension

of irreparable harm to their personal security and property, not to mention their human dignity.

The balance of convenience

[29] The Municipality submits that the balance of convenience does not favour the applicant because the Municipality cannot provide emergency housing to the applicant at this point in time.

[30] The Municipality has put up its own emergency housing policy[6] which was adopted in December 2015. It is expressly stated at the beginning of the report that "the implementation of this policy is subject to the availability of resources as contemplated in s26(2) of the Constitution of the RSA, within the municipality." People in emergency circumstances are defined as follows:

> "people who find themselves without shelter due to circumstances beyond their control which may include but not be restricted to:
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> a) Becoming homeless as a result of a declared state of disaster as declared by the Executive Mayor, where assistance is required, including cases where initial remedial measures have been taken in terms of the Disaster Management Act 2002, (Act No. 57 of 2002) by government , to alleviate the immediate crisis situation:
>
> b) Are evicted , through lawful means, from land and/or unsafe buildings

[6] JC1 page 341.

c) Are displaced or threatened with imminent displacement as a result of a state of civil conflict or unrest, or situations of like occurrences provided that no other accommodation options are available..."[7]

[31] According to the objectives of the Municipality's housing plan an emergency situation may also include an instance where "the court orders the Drakenstein Municipality to provide alternative emergency accommodation to those affected."

[31] In the applicant's founding affidavit it is alleged that there is a real and imminent danger of substantial injury or damage to applicant's person and property and if the relief is not granted applicant and his family will be rendered homeless.[8] This is not denied in the Municipality's answering affidavit attested to by Ms de Beer. However, in the Municipality's supplementary affidavit deposed to by Mr Carstens, in response to the allegation that applicant will be rendered homeless, the Municipality states, oddly, that the applicant has not put up any evidence of any real or imminent risk or harm.[9] The applicant states in his supplementary replying affidavit that he and his family are homeless and are dependent on friends and family. On the day he was evicted he and his family slept outside. The family is split up and is temporarily accommodated on a day to day basis. They are unable to remain with any

[7] JCI page 341 of the record.
[8] Founding affidavit par 20 page 178.
[9] Page 334 para 22.

particular person for more than a day or two. As a result the applicant and his family are in an extreme state of crisis.[10]

[32] The Municipality concedes that it does not have a formal waiting list for emergency housing. The Municipality submits that each case is dealt with on a case by case basis in terms of its housing policy.[11] According to the housing report submitted by the Municipality it has only made provision for three emergency housing projects. The first is Gouda where 25 housing units were identified for emergency. Because of a land invasion these units are currently not available. The Municipality has launched proceedings for their eviction. The other two projects, Vlakkeland and Simondium are still in its planning stage.[12] In its housing report the Municipality states that it has applied for funding from Province which has not been finalized. The Municipality's version is that it will not be able to provide emergency housing in the foreseeable future. The Municipality however also insists that it will be in a position to fully implement its policy once it receives funding from Province. The Municipality appears to have adopted the approach that emergency housing is dependent on funding from Province. This is clearly contrary to the decision in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Ltd) and Another* 2012 (2) SA 104 (CC). It bears emphasis that the applicant has not sought to attack the housing policy of the Municipality.

[10] Page 398 para 34 , 35 , 36 and 37.
[11] Page 342.
[12] Page 305 par 117.

[33] The main thrust of the Municipality's case, which is relevant to the balance of convenience, is that it lacks the resources to provide emergency housing, even temporary, to the applicant and all those who occupy through him. The Municipality has put up no evidence to support the allegation that it lacks the resources to provide temporary emergency housing. It has made bald allegations without any substantiation. It appears to have adopted the attitude that the Province is responsible. The Municipality has failed to put up its own budget or plans it may have for providing temporary emergency housing, and for responding to situations like that in which the applicant finds himself. Importantly the Municipality knew as far back as 2014 that the applicant was facing possible eviction and had already categorized the applicant as a "special needs" person. The Municipality has had at least two years to plan and at the very least budget for the case of the applicant. It has not provided any evidence of its plans to circumvent the possibility that the eviction would render the applicant and all those who occupy through him homeless. The Municipality has not produced any evidence in the context of how it deals with categories of special needs persons in need of emergency housing. Instead, the Municipality has adopted a general, one size fits all approach to the question of temporary emergency accommodation.

[34] The Municipality submits that although the applicant's home has been demolished and his family members are being accommodated separately by family and friends, it is in fact the Municipality who will be prejudiced if it is compelled to provide temporary emergency housing when it claims it is unable to do so. I disagree. This is not a case of a large group of persons. It is a small group of approximately five people. It is untenable that the family must be separated. In my view the balance of convenience favours the applicant to the extent

that the applicant and all those occupying under him will be rendered homeless when all the Municipality has to do has to do is provide temporary emergency housing in some form pending the final determination of the main application, and the Municipality has provided no evidence to support its bald allegation that it lacks the necessary resources.

No alternative remedy

[35] The Municipality submits that the applicant and all those who occupy through him have alternative temporary accommodation despite it being clear that the applicant and his family for all intents and purposes are living from pillar to post. Every second day they have to move and they do not live together. In my view the stance of the Municipality is at the very least insensitive. It also does not take into account that there are children involved, that one of the children is epileptic, and that the best interests of the child must also be considered. The further submission is that the R10 000 offered by Astral in the main application would have provided applicant with an alternative remedy to the extent that applicant would have been able to rent accommodation for a period whilst looking for more permanent alternative accommodation. The applicant submits that the R10 000 emanates from the eviction application and was earmarked for relocation costs. In fact applicant submits that if Astral was willing to provide the R10 000 specifically towards emergency housing and if Astral accepted that the acceptance of the R10 000 in no way derogated from his rights in the main application it could very well have been alternative relief. Astral refused. In my view the R10 000 is clearly for relocation costs stemming from the eviction, and not for temporary emergency housing, and the applicant would only be entitled to it if the eviction was final. In the result the applicant

does not have an alternative remedy. The concern that if applicant is granted temporary emergency housing by the Municipality, it would amount to queue jumping, is misplaced. The question of queue jumping is not a relevant consideration when temporary emergency housing is concerned. The Municipality is not being ordered to provide permanent alternative accommodation.

[36] During argument the Municipality conceded that its very own housing policy records that an emergency circumstance includes a situation where the court orders the Drakenstein Municipality to provide alternative emergency accommodation to affected persons. It accepted that, if this court granted same the Municipality would be obliged to do so.

[37] I am not satisfied that the Municipality has shown that it lacks the resources to provide temporary emergency housing to the applicant. Having regard to the aforegoing I am satisfied that the applicant has made out a case against the Municipality for interim emergency housing pending the finalization of the main application.

[38] There is therefore no need for me to consider whether a case for interim relief has been made out against Astral.

The joinder application

[39] The applicant's notice of intention to amend its main relief in which applicant seeks *inter alia* to join Astral. The *dies* has not expired for Astral to file its notice of objection to the amendment. During argument it was apparent that Astral was vehemently opposing the

amendment. Although Astral's joinder becomes unnecessary if the amendment is not granted, Astral may not oppose the amendment if it is not joined.

[40] In it answering affidavit the Municipality raised the issue of non- joinder of Astral. Astral opposes its joinder on the grounds that there is no prospect of success in the amendment that is sought in respect of the main application. Even if the amendment is granted there is no prospect of success on the merits, so Astral submits. It is trite law that a party must be joined in the proceedings if it has a direct and substantial interest in any order the Court might make or when an order cannot be made without prejudicing that party. The rescission of the eviction order relates directly to Astral. If the order is granted it would have a direct bearing on the applicant. So would the application for relief in terms of section 14 of ESTA. In my view Astral does have a direct interest in the main application. In the exercise of my discretion I hereby order that Astral be joined to the main application as the second respondent.

Further conduct of the matter and order

[41] In so far as the main relief is concerned a pre-trial conference must be held within 10 days of the grant of this order to obtain the necessary directives relating to the main application and the application to amend applicant's notice of intention to amend. No submissions were made in relation to costs. I make no order for costs.

[42] In the result I make the following order:

[1] The Municipality is to provide temporary emergency housing for the applicant and all those who occupy under him pending the finalization of the main application.

[2] Astral is joined to the main application as the second respondent

[3] A pre-trial conference will held within 10 days of the grant of this order for directives relating to the main application as well as the application to amend.

[4] No order as to costs is made.

It is so ordered,

Carelse J
Judge of the Land Claims Court

I agree,

Yacoob AJ
Acting Judge of the Land Claims Court

Counsel for the Applicant: Advocate M Adhikari
Instructed by: JD Van der Merwe Attorneys

Counsel for First Respondent: Advocate RMG Fitzgerald
Instructed by: Van Der Spuy Attorneys

Counsel for Second Respondent: Advocate C Joubert SC
Instructed by: Werksmans Attorneys