

**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG**

CASE NUMBER: UM123/2021

In the matter between:-

RUSTENBURG LOCAL MUNICIPALITY

Applicant

And

JOHN MOLUBI

1st Respondent

NANIKI JOSEPHINE MAGANO

2nd Respondent

NOXOLO EUNICE QULU

3rd Respondent

MS KENEILWE

4th Respondent

MR SITHOLE

5th Respondent

MR TUMISANG

6th Respondent

MS MAKI

7th Respondent

MS NXALO

8th Respondent

MR LUCKY RAMORORA

9th Respondent

MR SH MARRINGUE	10 th Respondent
MR MOALUSI	11 th Respondent
MR MASHIGO	12 th Respondent
ANY PERSON WHO ASSOICIATES WITH ALL THE RESPONDENTS ABOVE AND WHO INTENDS TO KEEP POSESSION OF THE FARM R[...] 2[...], RUSTENBURG	13 th Respondent
PROVINCIAL COMMISSIONER OF THE POLICE	14 th Respondent
STATION COMMANDER OF RUSTENBURG POLICE STATION	15 th Respondent
STATION COMMANDER OF PHOKENG POLICE STATION	16 th Respondent

ORDER

The following order is made:

- (i) The *rule nisi* granted on 30 September 2021 is confirmed.
- (ii) The 1st, 2nd, 4th to 13th respondents are ordered to restore to the applicant full possession and access to the property situated at Farm R[...] 2[...], Portion 1, Rustenburg, including removing illegal incomplete structures erected on the applicant's property.

- (iii) That the 1st, 2nd, 4th to 13th respondents refrain from spoliating, dispossessing or otherwise interfering with the applicant's possession of the property.
- (iv) That, should the 1st, 2nd, 4th to 13th respondents fail to comply with this Court Order within a period of 7 (seven) calendar days after this Court Order is brought to their attention by affixing it on the property and serving it by Sherriff, the Sherriff with the assistance of the 14th to 16th respondents, who are members of the South African Police Service (SAPS) are ordered to take the necessary and reasonable steps to implement this Court Order.
- (v) Each party is ordered to pay its own costs.

JUDGMENT

FMM REID (WAS SNYMAN) J:

- [1] This is an application for confirmation of a *rule nisi* issued on an urgent basis on 30 September 2021 which *inter alia* ordered the 1st to 13th respondents to restore to the applicant (the Municipality) full possession and access to the property situated at Farm 2[...], Portion 1, R[...], Rustenburg (the property). The *rule nisi* included removing the structures erected on the property and that the respondents are to refrain from spoliating and possessing the property.
- [2] The application is opposed by Ms PN Ngqalo, who is a person that fits the description of the 13th respondent. The remainder of the respondents do not oppose the application. Ms Ngqalo does, however, attach a list with names and signatures of 132 (one hundred and thirty two) people whom she represents, and who can be classified under the description of the 13th respondent.

[3] Adv Moagi appears on behalf of the applicant and Adv Mopedi appears on behalf of the 13th respondent (the respondent).

[4] The order of spoliation is sought against the respondents (excluding the 3rd respondent).

[5] The applicant claims that the dispossession of the property was unlawful. The following facts are not in dispute:

5.1. That the applicant was in possession of the property prior to the respondent's occupancy.

5.2. That the respondent occupied the property from August 2021 and that the applicant became aware of the dispossession during early September 2021, where after the applicant launched the urgent application resulting in the current *rule nisi* sought to be confirmed in this application.

5.3. The *rule nisi* had the effect that the respondents, save for the 13th respondent, were evicted from the property.

5.4. The applicant bought the property in 2018 and maintained the property by cutting the grass and maintaining the fence surrounding the property.

5.5. That the respondent is an employee of the applicant.

5.6. That the respondent was aware of the eviction of other occupants on the property per the court order that was issued by Djaje J (as she then was) but she did not evict the property as the other respondents did.

5.7. It is common cause that the respondent is currently in possession of the property.

[6] It is in dispute whether the property is used as residential property. it is disputed that the applicant was in peaceful and undisturbed possession of the property.

Factual background

[7] The respondent claims that she and her late husband had the permission of the applicant to occupy the property. As such the respondent claims that a legitimate expectation was created that she is entitled to occupy the property. The respondent states that she and her late husband approached the Mayor in 2014, who gave them permission to occupy the property. When the respondent and her late husband visited the Mayor, they were informed that Portion 1 belongs to the Municipality and was bought by the Municipality with the intention to establish a township. The applicant states further that after their meeting with the Mayor and the Executive Committee of the applicant, a promise was made to the people that they may occupy the farm. The respondent states that the people were unsure where the property was and employees of the Municipality took them to the farm that the respondent is currently occupying. She states that there was no fence and the property was abandoned. The respondent and her late husband vacated the property at some stage after 2014.

[8] The respondent further states that she and her late husband occupied the property from 2019 when they were informed that the property now belongs to the Royal Bafokeng. In terms of a verbal agreement the respondent and her late husband were granted permission to occupy the property.

[9] The applicant seeks the court to confirm that there was an eviction of people using the property, which use included grazing of the land. The

applicant states that the property is not occupied and that the **Prevention of Illegal Eviction Act 19 of 1998 (PIE)** is not applicable. This is denied by the respondent.

- [10] In the answering affidavit the respondent attaches photos which has the purpose to indicate that there are people occupying the property. The photos are that of children and food being prepared in front of informal settlement. The argument on behalf of the respondent is that this indicates that the property is in residential use. The applicant denies that and the argument of the applicant is that there is no evidence in support of the allegation that the photos support the alleged occupation of the respondent. There is no confirmatory affidavit indicating who the children are, when the photo was taken, and who the “owner” is of the informal structure apparently used as a home (informally referred to as a “shack”).
- [11] The respondent also attaches aerial photographs in support of the argument that the property is occupied by people who stay in shacks. Since the respondent cannot identify the photographer, the court cannot regard the photographs as evidence before it and the aerial photos are rejected as hearsay.
- [12] It is argued on behalf of the respondent that an entity which purchased a property it should be demarcated to provide peaceful and undisturbed possession. The respondent argues that in the event that the property is not fenced, and no-one is found there, the respondent rightfully occupied the property from 26 August 2021. The respondent deny that the Municipality visited the farm, thus enforcing her reasonable apprehension of permission from the Municipality to stay on the property.
- [13] It is argued on behalf of the respondent that the following supports the argument of the respondent that the Municipality was not in

undisturbed possession of the property:

- 13.1. That the grass was not cut as alleged by the Municipality;
- 13.2. That no visitations to the property were made by the Municipality as alleged;
- 13.3. As a result it is argued that the property was not in the undisturbed possession of the Municipality, but occupied by the respondents.

[14] The respondents argue that the applicant is not entitled to confirmation of the *rule nisi* on the following grounds:

- 14.1. The applicant should have brought an application for eviction in terms of PIE; and
- 14.2. The applicant did not prove lawful and undisturbed possession of the property.

[15] In reply it is argued that the respondent did not state that she occupied the property. The respondent is gainfully employed as a general worker at Waste Management in the employ of the applicant and would not be left without recourse if the spoliation application succeeds.

[16] The applicant requests a cost order against the respondent since her actions (on her own version) indicate that she is contemptuous and relocated to a property when others were evicted.

Legislative framework

[17] In **Bisschoff and Others v Welbeplan Boerdery (Pty) Ltd** 2021 (5) SA 54 (SCA) the Supreme Court of Appeal unanimously held that:

“For a spoliation order there must be unlawful spoliation, ie a disturbance of possession without the consent and against the will of the possessor. A minimum threshold or degree of actual physical interference or deceit sufficiently grave to qualify as effective deprivation of possession was required; the disturbance substantial enough to effectively end or frustrate the complainant's control over the property.”

[18] In **Richtersveld Community and Others v Alexkor Ltd and Another** 2003 (6) SA 104 (SCA) it was held paragraph 23 that uninterrupted presence on the property does not necessarily amount to possession at common law for the purpose of an indigenous right of occupation.

[19] The **Prevention of Illegal Eviction from and Unlawful Occupation of Land Act** 19 of 1998 details a specific procedure to be followed in evicting any person occupying a property as a residence. The photo's attached to the opposing affidavit do not indicate that the people on the photos are resident on the property at the stage that the application was launched. In the answering affidavit it is clear that the people who were resident at the property (save for the respondent) are no longer resident on the property. it is stated as follows in the answering affidavit:

“41. I also attach the confirmatory affidavit of Sello Mokhutswane, Mannetjie Molefe and Dikeledi Elizabeth Modimola who are residents of Farm R[...] 2[...] Portion 1 who have lived there since 26 August 2021 and who's fully built shacks were demolished on 6 October 2021.

42. Sello Mokhutswane will also confirm that annexures PPN04, PPN05 and PPN07 depict pictures of the remains of his shack and some items which were left behind. The rest of his property including pots, clothes and toiletries were taken away

by the Sherriff on 6 October 2021.

43. More than 80% of the shacks had already been occupied by families including women, children and the elderly. The picture of a woman with her child is attached and marked PPN03.

44. Dikeledi Elizabeth Modimola has also been living in the farm with her child (sic) years 04 years old daughter... Her shack was also demolished on 6 October 2021.”

- [20] The above quotations do not support the version of the respondent that she was in undisturbed possession of the property. It supports the version of the applicant that steps were taken during October 2021 to evict unlawful occupants from the property.

Conclusion

- [21] In order to establish whether the applicant had lawful and undisturbed possession of the property prior to the respondent's occupancy thereof, I take cognisance of the common cause facts that an eviction has taken place in October 2021 during which the unlawful occupiers were evicted from their shacks.
- [22] Prior to the eviction, the respondent states that she and her late husband requested permission from the Mayor that they can occupy the property. This indicates that the respondent was aware thereof that the property is in the possession of the Municipality.
- [23] The dispute whether the property was in the possession of the respondent, is answered by the principle established in **Richtersveld Community and Others v Alexkor Ltd and Another** 2003 (6) SA 104 (SCA) that uninterrupted presence on the property would not necessarily amount to possession of the property. The respondent's

claim that she has possession of the property by virtue of being resident on the property, is not sufficient to establish uninterrupted presence of the property.

[24] The following factors lead me to the conclusion that the applicant was in undisturbed possession of the property prior to the respondent taking up residence on the property:

24.1. That there was an eviction during October 2021 during which the unlawful occupiers were evicted from the property.

24.2. That the respondent state that she is homeless since she was evicted during October 2021.

24.3. That the property is maintained by the applicant.

24.4. That it is common cause that the applicant is the owner of the property.

24.5. That the respondent and her late husband sought the permission of the Mayor to occupy the property.

24.6. As such, I find that the applicant was in lawful and undisturbed possession of the property before the respondent's occupation thereof.

[25] In the premise, the applicant is entitled to the confirmation of the *rule nisi*.

Costs

[26] The normal rule is that the successful party is entitled to its costs.

[27] The applicant asks for a punitive cost order against the respondent on

the basis of the respondent's persistent conduct.

[28] I am not inclined to grant a punitive cost order against the respondent, on the basis that she is a 58 year old woman and she acted on advice of her legal representatives. The respondent also laboured under the impression that she was entitled to possession of the property since she claims that she and her late husband had received verbal permission to occupy such property.

[29] In the circumstances, I deem it fair to deviate from the norm and find that it would be just and fair that each party be ordered to pay its own costs.

Order

The following order is hereby made:

- (vi) The *rule nisi* granted on 30 September 2021 is confirmed.
- (vii) The 1st, 2nd, 4th to 13th respondents are ordered to restore to the applicant full possession and access to the property situated at Farm R[...] 2[...], Portion 1, Rustenburg, including removing illegal incomplete structures erected on the applicant's property.
- (viii) That the 1st, 2nd, 4th to 13th respondents refrain from spoliating, dispossessing or otherwise interfering with the applicant's possession of the property.
- (ix) That, should the 1st, 2nd, 4th to 13th respondents fail to comply with this Court Order within a period of 7 (seven) calendar days after this Court Order is brought to their attention by affixing it on the property and serving it by Sherriff, the Sherriff with the assistance of the 14th to 16th respondents, who are members of the South African Police Service (SAPS) are ordered to take the necessary and reasonable steps to implement this Court Order.

(x) Each party is ordered to pay its own costs.

**FMM REID (WAS SNYMAN)
JUDGE OF THE HIGH COURT
NORTH WEST DIVISION MAHIKENG**

DATE OF APPEARANCE: 24 FEBRUARY 2023

DATE OF JUDGMENT: 22 JUNE 2023

APPEARANCE FOR APPLICANT: ADV MOAGI

INSTRUCTED BY: VANVELDEN-DUFFEY ATTORNEYS

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