THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable
Case no: 889/2017

In the matter between:

MOGALE CITY LOCAL MUNICIPALITY **APPELLANT**

and

BLACK TAD INVESTMENTS CC **RESPONDENT**

Neutral citation: *Mogale City Local Municipality v Black Tad Investments CC* (889/17) [2018] ZASCA 74 (31 May 2018)

Coram: Shongwe ADP, Mbha, Van der Merwe and Mocumie JJA and Plasket AJA

Heard: 8 May 2018

Delivered: 31 May 2018

Summary: Eviction – whether the municipality owed alleged unlawful occupiers on privately owned land statutory and constitutional obligation to provide temporary emergency accommodation – question answered positively – court found that municipality failed to comply with such obligation.

ORDER

On appeal from: Gauteng Local Division, Johannesburg (Dippenaar AJ sitting as court of first instance):

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

JUDGMENT

Shongwe ADP (Mbha, Van der Merwe and Mocumie JJA and Plasket AJA concurring)

[1] This appeal concerns an interlocutory structural interdict granted by the court a quo against the appellant, (Mogale City Local Municipality). The essence of the order was a declaration that the appellant owed the occupiers of Stand 48 Steynsvlei, a statutory and constitutional obligation to provide them with emergency accommodation in terms of the Emergency Housing Programme (EHP). The court a quo also declared that the appellant failed to make adequate provision for temporary emergency accommodation for the occupiers. The appellant appeals against these orders with the leave of the court a quo.

[2] The background is that on 25 September 2013 Black Tad Investments CC (the respondent) the registered owner of Holding No 48, Steynsvlei Agricultural Holdings (the property), launched eviction proceedings against certain alleged illegal occupiers (the eviction application.) The appellant was cited as a party in the eviction proceedings. The appellant, however elected not to be party to the proceedings and did not file an answering affidavit. On 10 October 2014 the

respondent launched an interlocutory application for an order against the appellant to obtain certain information and present a formal and comprehensive report to the court. The appellant again, for unknown reasons, elected not to participate in these proceedings. On 7 November 2014 the court (Tshabalala J) granted an order on an unopposed basis. I consider it important to restate the terms of the entire order:

'1. The Second Respondent provide a list of names and other details of the First Respondent who shall require emergency and/or alternative accommodation upon granting of an eviction order within 10 (TEN) days of this Court Order being granted.

2. The Second Respondent is to file a comprehensive report regarding the availability of alternative and/or emergency accommodation in terms of Section 4 (7) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, within 30 (Thirty) calender days from granting of the order.

3. The Second Respondent's report to contain on the following:-

3.1 the Second Respondent's information on the Applicant's property;

3.2 the Second Respondent's information on the First Respondent;

3.3 whether an eviction order is likely to result in all or any of the occupiers becoming homeless;

3.4 if so, steps the Second Respondent proposes to alleviate the possible homelessness;

3.5 implications for the owners of delaying the eviction; and

3.6 the Second Respondent's engagement with the First Respondent.

4. The Second Respondent's report be supported by substantiating documents reflecting the Second Respondents findings in relation to the report.

5. The Second Respondent is to pay the costs of this application should the application be opposed.'

[3] The order of 7 November 2014 required the appellant to file a report within 30 days of the said order being granted. The appellant once more failed to comply with this portion of the order. After several efforts by the respondent including a threat to launch contempt of court proceedings, the appellant filed a report only on 30 January 2015. The said report is vague, and devoid of any

facts. In my considered view it could not assist the court in any way. However, the report contains a significant concession that the occupiers live in deplorable conditions and that the eviction application is likely to render some or all of the occupiers homeless. In my view, this provided all the more reason for the appellant to seriously consider its positive involvement to participate and comply with its legislative and constitutional obligations.

[4] Because the respondent considered the report to be meaningless and of no assistance, it wrote a letter to the appellant pointing out that it was clear that the appellant had not engaged the occupiers and had failed to set out in its report what it will do to provide the occupiers with temporary accommodation upon eviction. A meaningful report by the appellant is crucial and necessary to enable the court dealing with the eviction application to consider all relevant circumstances to avoid rendering the occupiers homeless. The appellant's failure to provide a proper report will necessarily exacerbate delay of the eviction proceedings. Thus the owner would be prejudiced in its endeavour to protect its right of ownership. The letter sought an undertaking within five days by the appellant to cause an investigation into the occupiers' personal circumstances and to file a further report setting out its findings of such investigations and engagement. The appellant once again failed to give such an undertaking hence the respondent felt obliged to approach the court seeking a declaratory order that the appellant owed the occupiers a statutory and constitutional obligation to provide them with emergency accommodation in terms of the EHP.

[5] The court a quo found the report to be vague and general in its terms and that it did not illustrate that the respondent had taken any meaningful steps to address the plight of the occupiers. It found further that, on the papers, the appellant did not dispute that it owed the occupiers a statutory and constitutional

obligation to provide them with emergency accommodation in terms of the EHP. The court a quo also found that the appellant did not dispute that it was infringing upon the respondent's constitutional right – it referred to *Modderfontein Squatters v Modderklip Boerdery* 2004 (6) SA 40 para 31. It concluded that it was satisfied that the appellant was in breach of its statutory and constitutional duties owed to the respondent and the occupiers – who are faced with the threat of imminent eviction and that the respondent was entitled to the relief sought.

[6] The appellant in its answering affidavit conceded that the occupiers were 'extremely poor and cannot afford to pay market-related rentals for the nearby residential accommodation.' It further contended that at the time the eviction application was launched it did not have any alternative accommodation available and that it still did not have suitable alternative land to accommodate the occupiers. The appellant made reference to possible available land at Portion II of the farm Horingklip 178 IQ, a nearby farm in respect of which it had commenced with an application for the establishment of a township. But that the application must first be finalised before it can begin planning for the relocation of the occupiers. However, what is significant is the admission that the occupiers must also be consulted once the establishment of the township is completed and that meaningful engagement be undertaken with them and their legal representatives.

[7] Before this court the appellant raised an issue which it did not raise in its answering affidavit. It argued that the property which is the subject of the appeal is an agricultural holding and therefore the eviction application should have been launched in terms of the Extension of Security of Tenure Act 62 of 1997 (ESTA) and not in terms of the Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998 (PIE). Counsel for the appellant

conceded that this defence was not pertinently raised in the appellant's answering affidavit, but argued that it was implied in the facts of the case. It is trite that the purpose of pleadings is to define the issues for the parties and the court. In application proceedings, the affidavit does not only constitute evidence, but it also fulfils the purpose of pleadings. In other words they must set out the cause of action or defence in clear and unequivocal terms to enable all concerned to know what case to meet. (See *Diggers Development (Pty) Ltd v City of Matlosana & another* [2012] 1 All SA 428 (SCA) para 18; *Naidoo v Sunker* [2012] JOL 28488 (SCA).) A party is duty bound to allege in its affidavit all material facts upon which it relies. A trial by ambush is impermissible. (See also *Swissborough Diamond Mines v Government of the Republic of South Africa* 1999 (2) SA 279 (T) at 323F – 324C; *Molusi & others v Voges NO & others* (CCT96/15) [2016] ZACC 6; 2016 (3) SA 370 (CC); 2016 (7) BCLR 839 (CC) (1-3-2016).) In the result the issue was not properly raised and cannot be determined by this court.

[8] The appellant contended that it should not be expected or ordered to provide emergency accommodation at this stage because this will entail the municipality spending public money irrespective of the merits and outcome of the eviction application. The order granted by the court a quo may appear to be too wide, however, the appellant in this matter displayed indifference, defiance and a non-co-operative attitude, hence the court a quo wished to cover all bases. Notwithstanding the order of Tshabalala J, the appellant elected not to comply. Counsel for the appellant conceded that the appellant has a general duty to provide emergency accommodation to the occupiers and also acknowledged the possibility of the occupiers being rendered homeless. This court cannot be expected to decide the merits of the eviction application i.e whether PIE or ESTA is applicable, however, it is duty bound to assist the court dealing with the eviction application to arrive at a just and equitable solution by having all

the facts and circumstances necessary before an eviction order is granted or refused.

[9] The respondent contended that it could not prosecute its eviction application without the appellant discharging its obligations to the court and to the occupiers. It further contended that in terms of s 26 of the Constitution a general obligation on municipalities is placed to make a contingency plan for people facing eviction. This duty exists irrespective of whether the eviction is sought under PIE or ESTA. The respondent further argued that the court below was correct in granting appropriate relief in the form of a structural interdict directing the manner in which the appellant was to remedy its breaches of the Constitution. I agree, the reasoning and conclusion of the court a quo cannot be faulted.

[10] Section 26 of the Constitution obliges the State to take reasonable legislative and other measures to bring about the realisation of the right of access to adequate housing. To give effect to this obligation the State enacted the Housing Act 107 of 1997 which empowered the Minister to publish the National Housing Code in terms of s 4 of the Housing Act. Section 4(3) provides that the Minister must furnish a copy of the code to every provincial government and municipality. The Minister of Human Settlements, being the functionary responsible for the administration of the Housing Act and as part of the code, promulgated the EHP. The main objective of this programme is to provide temporary assistance in the form of secure access to land. Clause 2.3.1 (e) of the EHP provides that the programme will apply to emergency situations of exceptional housing need, such as the one in this case, which are referred to as emergencies. An emergency will exist when the Member of the Executive Council (MEC), on application by a municipality (the appellant in this case) agrees that persons affected owing to situations beyond control: ‘Are evicted or

threatened with imminent eviction from land or from unsafe buildings, or situations where pro-active steps ought to be taken to forestall such consequences.' The appellant having been given more than one opportunity failed even to attempt to take advantage of applying to the MEC for assistance.

[11] In *Government of the RSA v Grootboom & others* 2001 (1) SA 46 (CC) paras 93 – 95, Yacoob J observed that:

'[93] This case shows the desperation of hundreds of thousands of people living in deplorable conditions throughout the country. The Constitution obliges the State to act positively to ameliorate these conditions. The obligation is to provide access to housing, health-care, sufficient food and water, and social security to those unable to support themselves and their dependants. The State must also foster conditions to enable citizens to gain access to land on an equitable basis. Those in need have a corresponding right to demand that this be done.

[95] Neither section 26 nor section 28 entitles the respondents to claim shelter or housing immediately upon demand. The High Court order ought therefore not to have been made. However, section 26 does oblige the State to devise and implement a coherent, co-ordinated programme designed to meet its section 26 obligations. The programme that has been adopted and was in force in the Cape Metro at the time that this application was brought, fell short of the obligations imposed upon the State by section 26(2) in that it failed to provide for any form of relief to those desperately in need of access to housing.'

The reason to act positively is that the court seized with the eviction application must consider in assessing whether it is just and equitable to evict the occupiers under s 4(7) of PIE, whether land can be made available by the appellant for the relocation of such occupiers. (See *City of Johannesburg v Changing Tides* 2012 (6) SA 294 (SCA) paras 12, 18, 19 and 25.) In *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty)* 2012 (2) SA 104 para 47 – 65) a local authority (like the appellant in this case) was held to be obliged to have a plan to address the needs of occupiers facing the danger of being rendered homeless as a result of their eviction from their homes.

[12] Evictions in our country, are a serious social problem, which to a great extent has been influenced by the socio-economic and political milieu, the poverty of the majority of the population accompanied by the deleterious system of apartheid. Thus, the owners of land, the occupiers and the state, in this case especially the municipality, must focus and be mindful that this social-ill needs to be resolved by all concerned by finding a solution. In other words it is a responsibility requiring a collective resolution.

[13] In conclusion, I cannot find any fault in the reasoning and order of the court quo. The structural interdict asked for by the respondent is well-founded and appropriate relief in the circumstances. I am of the view that the appellant owes the occupiers a statutory and constitutional duty to provide them with emergency accommodation. Further, that the appellant failed to make adequate provision for such temporary emergency accommodation and thus is in breach of the statutory and constitutional obligation owed by it to the respondent and the occupiers.

[14] Regarding costs, it is trite that the court considering the issue of costs exercises a judicial discretion. The appellant is unsuccessful and the respondent is the successful party. It follows as a matter of principle that costs should follow the result. (See *Affordable Medicines Trust & others v Minister of Health & others* 2006 (3) SA 247 (CC); 2005 (6) BCLR 529; [2005] ZACC 3 para 139; *Biowatch Trust v Registrar, Genetic Resources & another* 2009 (6) SA 232 (CC) paras 21 – 23).) I find no cogent reason to deviate from these authorities.

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

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

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J B Z Shongwe

Acting Deputy President

Supreme Court of Appeal

Appearances

For the Appellant:	J J Botha Instructed by: Smith van der Watt Incorporated, Krugerdorp; Symington De Kok, Bloemfontein
For the Appellant:	A W Pullinger (with him D Mokale) Instructed by: SSLR Incorporated, Weltevredenpark; Rossouws, Bloemfontein