IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CONSTITUTIONAL COURT CASE NO:
(HIGH COURT CASE NO: 33786/2010 NGHC)
(SUPREME COURT OF APPEAL CASE NO: SCA 180/2011)

In the matter between:-

THE OCCUPIERS OF PORTIONS 124 AND 150 OF FARM ZANDFONTEIN 317 J.R. Applicants

and

BROOKWAY PROPERTY 30 (PTY) LTD First Respondent

THE CITY OF TSHWANE Second Respondent

FIRST RESPONDENT'S OPPOSING AFFIDAVIT

I, the undersigned,

HENDRIK CHRISTOFFEL DE BEER

do hereby state under oath as follows:

1.

1.1 I am an adult male businessman and a director of the First Respondent with registered address situated at 204 Xcel Park,

Rodericks Road, Lynnwood, Pretoria.

1.2 I am duly authorised to make this affidavit on behalf of the First Respondent.

1.3 The facts and allegations herein contained fall within my personal knowledge, unless stated to the contrary, and are both true and correct.

2.

As a matter of convenience I refer to the Second Respondent as the City of Tshwane.

3.

The properties in issue are described as Portion 150 “(Portion 150)”, Portion 124 (a portion of Portion 10) “(Portion 124)”, Remaining Portion of Portion 37 (a portion of Portion 17) “(Portion 37)”, Remaining Portion of Portion 21 (a portion of portion 17) “(Portion 21)”, Remaining Portion of Portion 38 a portion of Portion 17 “(Portion 38)”, Remaining Portion of Portion 39 (a portion of Portion 17) “(Portion 39)” and Portion 227 all of the farm Zandfontein J.R., (hereinafter jointly referred to as “the properties”).

4.

The properties are seven properties which together are approximately 210 hectares in extent. The properties fall within the neighbourhood of Kirkney, directly adjacent to Pretoria Gardens. The neighbourhood is at the foot of the Witwaters Mountain, situated in a township area of Pretoria. The properties are zoned for residential and/or light industrial purposes.

5.

The First Respondent purchased the properties in 2007, and at the time of purchasing same there were no unlawful occupiers on it.

6.

The properties are earmarked for development purposes, i.e. a shopping complex and 12 000 residential units. The First Respondent has already done a complete development study during 2009, and is in the process of obtaining the relevant approvals.

7.

The First Respondent obtained aerial photographs from the City of Tshwane, which photographs were presented to the Court *a quo*. The photographs were taken during 2005, 2007 and 2009 respectively. The

photographs clearly show that there were no land invasions during 2005 and 2007.

8.

Unknown people gradually invaded the properties since beginning 2009.

9.

There were approximately 65 unlawful shacks during March 2009, and this unlawful occupation gradually expanded to approximately 400 shacks at the time of the application in the Court *a quo*.

10.

The unlawful occupiers created various problems, and without limiting same the following:

10.1 the occupation is without any planning and infrastructure;

10.2 there is no sewerage reticulation, water supply, electricity, fire safety measurements etc.;

10.3 some of the water is drawn from a dam situated on the properties, and there is no safeguard against pollution and/or disease. Sewerage also flow back into the dam. Some of the drinking water is

also illegally obtained in containers from the adjacent neighbourhood;

10.4 the natural environment is put under pressure and natural vegetation is used for the building of shacks and/or firewood;

10.5 open fires are made for cooking food and/or heating purposes, and this creates a fire hazard;

10.6 crime and other illegal activities are rife in the area;

10.7 the noise levels are ever increasing;

10.8 the property values in the vicinity have dropped.

11.

The residents of the adjacent township also intervened as a party to the application, under the name of Wesmoot Residence Association, and have raised several complaints relating to prejudice that they have suffered as a result of the unlawful occupation.

12.

There is still a rapid growth of unlawful occupiers on the properties, despite an interdict that was obtained against new invaders. If the situation is left to remain, the problems will become exponentially bigger.

13.

The City of Tshwane has dismally failed in addressing its social responsibility to both the unlawful occupiers as well as the property owners. They simply allowed the informal occupiers to invade, and thereafter took the view that there is no alternative land available and/or it will be a timeous process to make such alternative land available.

14.

Similar situations have recently occurred in other areas within the City of Tshwane's jurisdiction, for instance:

14.1 the Remaining Extent of the farm Skurweplaas 353, J.R., Tshwane, Gauteng;

14.2 portion R25 of the farm Mooiplaats 355 J.R., Tshwane, Gauteng;

14.3 both the aforementioned properties are situated towards the south of

Pretoria and land invasions occurred under similar circumstances;

14.4 applications were brought by PPC Aggregate Quarries (Pty) Ltd (Case Number 12289/2010 NGHC) and Golden Thread (Case Number 3492/2010 NGHC), which applications were successful;

14.5 the unlawful occupiers in those cases, being represented by the same legal representatives as in the present matter, applied for leave to appeal to the SCA, and both applications were dismissed.

15.

The City of Tshwane vigorously opposed the present application in the Court *a quo*, relying on various technical defences, and even did so more than the unlawful occupiers themselves.

16.

The following were the material disputes raised by the Respondents in the Court *a quo*:

16.1 it was alleged that the unlawful occupiers were occupiers in terms of the Extension of Security of Tenure Act, 1997 (ESTA) as they had or on or after 4 February 1997 stayed on the properties with the consent of the owners. It was suggested that proceedings in terms

of ESTA needed to be instituted in the Land Claims Court or the Magistrate's Court;

16.2 alternatively, it was argued that the First Respondent was proceeding with the matter as an urgent application and that there was no proper compliance with section 5 of the Prevention of Illegal Eviction From Unlawful Occupation of Land Act, 1998 (the PIE Act);

16.3 it was also argued that the City of Tshwane does not have a duty to provide housing, including alternative accommodation. In this respect it was stated that the City of Tshwane merely had a duty to assist with the planning of alternative accommodation or emergency accommodation and to execute such plans in conjunction with the Provincial and National Organs of State with funding provided by lastmentioned;

16.4 the gist of the argument raised by the unlawful occupiers were that they were willing to vacate, but they needed adequate alternative accommodation and sufficient time (two years) for the City of Tshwane to provide them with same.

17.

The simple answers to the aforesaid were that:

17.1 the evidence presented by some of the unlawful occupiers relating to the point in time and circumstances of their unlawful occupation was vague in the extreme. This had to be considered with reference to the evidence of the previous owner of the properties, one Botha, which indicated that there were no occupation of the properties before 2009, and definitely that no consent was granted by anyone for the unlawful occupiers to stay there. The Corobrick factory to which reference was made, as a place where accommodation was granted to employees by consent, is a different piece of land as the properties in question. This also had to be considered in the light of the aerial photographs which were made available by the City of Tshwane, which indicated clearly that there was no occupation during the years preceding 2009. The preponderance of probabilities thus showed that there was no earlier occupation and definitely no consent granted to any of the unlawful occupiers to be present. ESTA was thus not applicable;

17.2 although the First Respondent's application initially was brought as an urgent application and an interim interdict was obtained to

prevent new invaders, the urgent application fell on the wayside and the application was proceded by agreement between the parties on the normal opposed roll. The notice served also covered the requirements of section 4(2) of the PIE Act. The argument relating to section 5(2) of the PIE Act became irrelevant;

17.3 the City of Tshwane has a duty to provide alternative emergency accommodation. The required period of two years, as suggested, would have been unreasonable under the circumstances, as the First Respondent may have found that nothing was done after the lapsing of such a period of time and that the situation has then deteriorated.

18.

The Applicant requested leave to appeal in the court *a quo*, which application was dismissed. The Applicant thereafter approached the SCA for leave to appeal, and that application was dismissed on the 29th of June 2011.

19.

I now answer the affidavit of Masenyane John Makhubela ("the Deponent").

20.

AD PARAGRAPH 1 THEREOF

20.1 I admit that the Deponent resides on the properties known as portions 124 and 150 of the farm Zandfontein. The name Melusi settlement is a name created by the Applicants.

20.2 I deny the facts deposed to by the Deponent and that same falls within his personal knowledge and are true and correct.

21.

AD PARAGRAPH 2 THEREOF

21.1 I take note that the Deponent deposes to the affidavit on behalf of other unknown persons, but deny that he is entitled to do so both on a factual and legal basis.

21.2 The opposing affidavit in the Court *a quo* does not state that he deposed to the affidavit in any representative capacity, and no proper powers of attorney were presented that allowed him to do so.

22.

AD PARAGRAPH 3 THEREOF

22.1 It is admitted that there were approximately 400 shacks at the time of the application in the Court *a quo.*

22.2 No proper power of attorney formed part of the papers in the *court a quo.*

22.3 No evidence was presented in the affidavits that 800 adults were residing on the properties, and I dispute same as well as the current attempt to supplement the papers that were placed before the Court *a quo*.

23.

AD PARAGRAPH 4 THEREOF

The citation of the First Respondent is admitted as well as the fact that the First Respondent is the owner of the properties referred to above.

24.

AD PARAGRAPHS 5, 6, 7 (THE INTRODUCTORY PORTION), 7.1 AND 7.2 THEREOF

The contents are admitted.

25.

AD PARAGRAPH 7.3 THEREOF

I deny that there were any *bona fide* disputes of fact in respect of all important aspects of the case. The only ostensible dispute was relating to the issue as to when some of the occupiers started to occupy the properties as there was an attempt to rely on ESTA to say that a few of them were in occupation on the 4th of February 1997 with the consent of the then owners, and that they thereafter remained present. This so called dispute was without any merit, as it clearly appeared from the evidence and especially the photographs that there were no unlawful occupiers on the relevant properties during 2005 and 2007. It therefore clearly appeared that the unlawful occupation only commenced thereafter. The Applicants stated that they were willing to relocate to alternative

accommodation and acknowledged that they were unlawfully occupying the properties. They required alternative accommodation over a period of 2 years from the Second Respondent. Whilst First Respondent is also of the view that Second Respondent had to alleviate the Applicants plight, the period of 2 years was unreasonable.

26.

AD PARAGRAPH 7.4 THEREOF

26.1 I did not state in First Respondent's affidavits that the invasion occurred since January 2010. I stated that it occurred since the beginning of 2009. The initial occupation during March 2009 was approximately 65 unlawful shacks which gradually increased to 400 shacks at the time when I approached the court for *a quo* for relief.

26.2 Since then there was an increase in the numbers of unlawful occupiers, despite the court interdict and order. The fact is that the Second Respondent did nothing to alleviate the problems on the land since the beginning of 2009 to date.

27.

AD PARAGRAPH 7.5 THEREOF

27.1 First Respondent is faced with a dilemma as it was deprived of its property without just compensation contrary to the provisions of Section 26 of the Constitution, Act 108 of 1996 ('the Constitution"). First Respondent approached the courts for relief, but it's attempt was stifled by procedural postponements and applications for leave to appeal. In the meantime, all the normal obligations still rested upon the First Respondent as owner of the properties, such as the duty to pay rates to the City of Tshwane. The Applicant at the end of the day found itself in a financial predicament, as all the current obligations needed to be paid and the value of the properties were diminished and could not be sold.

27.2 The First Respondent accepts that the unlawful occupiers are also finding themselves in a difficult position, and that they are poor people with no were to go. A balance needed to be struck and the City of Tshwane had to step in to provide alternative emergency accommodation.

27.3 The First Respondent, however, finds it unacceptable that the City of

Tshwane tried to avert its responsibilities by fighting the First Respondent's applications with tooth and nail and failing to provide sustainable solutions to the problems.

28.

AD PARAGRAPH 7.6 THEREOF

The application was initially brought as an urgent application, but it was later agreed between the parties that it should be proceeded with on the normal roll. It was not adjudicated on the basis of an urgent application.

29.

AD PARAGRAPH 8 THEREOF

The contents are admitted.

30.

AD PARAGRAPHS 9, 10, 11 AND 12 THEREOF

30.1 The reasons for the court order are properly set out in the judgment

of Murphy J;

30.2 The Applicants required the court order to state that no eviction may take place unless the City of Tshwane has provided alternative accommodation;

30.3 Such an order would have been open ended, as it would have allowed the City of Tshwane to never comply with any of the obligations and to allow the unlawful occupants to remain on the property indefinitely;

30.4 The argument that the order made in the court *a quo* is self-defeating, can not be correct. The City of Tshwane was compelled by way of a court order to fulfil their obligations, and the unlawful occupiers had the right to approach the court to force them to do so. The First Respondent's rights also had to be considered.

30.5 It could not have been expected from the First Respondent to a wait indefinitely for the Second Respondent to fulfil its duties and obligations, whilst there was a steadfast growth of the unlawful occupation on its land. If their was no cutting off date the order would have been without effect as the unlawful occupiers would never have been compelled to leave the property should the Second

Respondent have failed to provide alternative emergency accommodation.

30.6 The order of the Court *a quo* was thus legally permissible, as it compelled the City of Tshwane to provide such alternative emergency accommodation within a specific period of time.

31.

AD PARAGRAPHS 13,14, 15, 16, 17, 18 AND 19 THEREOF

31.1 The four month period was reasonable under the circumstances, especially as the City of Tshwane was in any event aware of the unlawful occupation since the beginning of 2009;

31.2 To say that there is no basis in law to make such an order is without foundation. This is an equitable decision that the Court *a quo* made in terms of the PIE Act, after considering all the relevant circumstances;

31.3 The agreement referred to by the Deponent was one that was entered into between the Applicants and the City of Tshwane. The

First Respondent was never a party thereto. The two year period which they have unilaterally decided upon was unreasonable. It did not bind the First Respondent nor the Court *a quo*. All that the City of Tshwane needed to provide is emergency alternative accommodation. The emergency alternative accommodation is supposed to be a contingency plan that had to be in place at the time of the application;

31.4 The Applicants themselves are also authors of their own fate. They applied for leave to appeal to the Court *a quo*, and thereafter to the SCA. This allowed the City of Tshwane to escape its liabilities by arguing that the time period for providing emergency alternative accommodation was suspended. More than a year has elapsed since the First Respondent brought the application during June 2010, and nothing was done to address the problems.

32.

AD PARAGRAPHS 20, 21, 22, 23, 24 AND 25 THEREOF

32.1 I have already alluded to the facts as set out above, and allegations contrary to same are denied;

32.2 The facts relating to the case are **President of the RSA v Modderklip Boerdery and Others 2005 (5) SA 3 CC** was different to the case under consideration. In that case there were already 40 000 shacks at the time of the application;

32.3 I take note that the Deponent now presents evidence (which did not form part of the papers in the Court *a quo*) that the City of Tshwane is in the process of obtaining emergency funding for emergency alternative accommodation. This is an unsubstantiated allegation and amounts to hearsay. Should this be true, the City of Tshwane will be able to provide alternative emergency accommodation soon.

32.4 I have already indicated that I never said that the unlawful occupation commenced during January 2010. I stated in Applicant's affidavits that it started beginning 2009. The attempt to say that I made a false allegation is without any merit, and in any event not relevant to the proceedings.

32.5 The fact remains that there were no ESTA occupiers, i.e. people residing on the properties in issue on February 1997 with the consent of the then owners. The period of six months, referred to in Section 4 (6) of the Pie Act, was not applicable as the unlawful

occupiers were present on the land for a period exceeding 6 months. In fact, whether the occupation commenced at the beginning of 2009 or a few months earlier, is irrelevant as ESTA was not applicable. The evidence was that the unlawful occupies came onto the property since the beginning of 2009 and that they were present without the owners consent.

33.

AD PARAGRAPHS 26, 27, 28, 29, 30, 31, 32, 33, 34 AND 35 THEREOF

33.1 I have already dealt with the facts pertaining to the matter, as set out above. Allegations contrary to same are denied.

33.2 The defence that some of the unlawful occupiers were ESTA occupiers was opportunistic and unsubstantiated. The Court *a quo* correctly rejected such vague and unsubstantiated allegations, which is contrary to the probabilities as indicated by the evidence and the photographs.

33.3 The contents of the questionnaires were randomly completed, mostly by the same person as is evident from their handwriting. It

was not confirmed under oath. Insofar as some of the questionnaires suggested that people were present on the properties since 2005, it was simply untrue, and contrary to the preponderance of probabilities as appeared from the evidence placed before the Court *a quo*.

33.4 As it appeared from the evidence, the Corobrick factory was situated on a different piece of land than the properties in issue. The Deponent and unlawful occupiers did therefore not reside on the properties and no one gave them any consent to do so.

34.

AD PARAGRAPHS 36, 37, 38, 39, 40 AND 41 THEREOF

34.1 The photographs supplied by the City of Tshwane showed the relevant area. It clearly showed the growth of the unlawful occupation if compared with the previous years.

34.2 The Respondents and their representatives had ample opportunity to put their case before the court, as the matter was in any event postponed on at least one occasion. The fact is that they could not put any convincing evidence before the court to show that they were

staying on the properties for a longer period of time and/or that they received consent from the owners to do so. This was the main defence and they failed in same.

35.

AD PARAGRAPHS 42 AND 43 THEREOF

35.1 The contents are denied.

35.2 The Applicant's attorneys circulated forms in the unlawful establishment to obtain information relating to unlawful occupiers commencement of occupation and/or particulars.

35.3 The records obtained was clearly inaccurate. Nothing prevented them from obtaining information from those who wanted to allege that they were residing on the same properties, on the February 1997 and thereafter with the owners consent. The fact is that there were no such people, and the reliance on such early occupation date was merely opportunistic and without any foundation.

36.

AD PARAGRAPHS 44 THEREOF

I deny that the Applicant did not have sufficient time to file answering affidavits in this matter. However, the Deponent fails to inform this court that the unlawful occupiers were in fact willing to vacate the properties on condition that alternative accommodation be granted. Apart from referring to the few unlawful occupiers who purportedly resided on the properties for a period since February 1997, no one else came forward with such defences. In fact, the defence was rather that the fast majority were recently unlawfully occupying the properties but that they were prepared to relocate if alternative accommodation was given by the City of Tshwane.

SIGNED AT PRETORIA ON THIS THE ___ DAY OF AUGUST 2011.

_____

DEPONENT

I certify that the Deponent acknowledged that he/she knows and understands the contents of this affidavit, that he/she has no objection to the making of the

prescribed oath and that he/she considers this oath to be binding on his/her conscience. I also certify that this affidavit was signed in my presence at PRETORIA on this _____ day of August 2011 and that the Regulations contained in Government Notice R1258 of 21 July 1972, as amended by Government Notice R1648 of 19 August 1977, have been complied with.

_____

COMMISSIONER OF OATHS