

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT:

CASE NUMBER A *QUO*: 1413/2009 NWHC

In the matter between:

PONTSO DOREEN MOTSWAGAE **First Applicant**

FOURTEEN OTHERS **Second to Fifteenth Applicants**

and

RUSTENBURG LOCAL MUNICIPALITY **First Respondent**

PROMPTIQUE TR 9 CC **Second Respondent**

**FOUNDING AFFIDAVIT
APPLICATION FOR LEAVE TO APPEAL**

I, the undersigned,

PONTSO DOREEN MOTSWAGAE

hereby make oath and state:

1. I am the First Applicant, an adult female resident at Stand 1441, Thlabane Extension 1, Rustenburg, North West Province.

2. The facts herein fall within my personal knowledge, unless otherwise apparent, and are both true and correct. Where I make legal submissions, I do so on the advice of my legal representatives.

THE PARTIES

3. The personal details of the Second to fourteenth Applicants (further Applicants) are set out in a schedule, which I annex hereto as Annexure “**FA1**”. The further Applicants and I are all female residents at Thlabane Extension 1, Rustenburg. As appears from Annexure “**FA1**”, most of the Applicants have stayed in their homes for more than twenty five years.
4. The First Respondent is the Rustenburg Local Municipality. The First Respondent is the successor in title to the Local Authorities which were in control of Thlabane, which area fell within a statutory trust area owned by the South African Native Trust. The First Respondent is in the process of implementing a housing project that envisages the demolition of our homes. As such it describes itself as the implementing agent of the project. The First Respondent also brought a counterclaim in the court *a quo*. The relief granted in terms of this counterclaim is also the subject matter of this application.

5. The Second Respondent is Promptique TR 9 CC. It is a close corporation that does civil and construction work and was at all relevant times busy with the implementation of the housing project referred to as “Tlhabane Hostels upgrade”. Second Respondent never opposed or participated in the proceedings *a quo*. Applicants do not seek any order for costs against the Second Respondent.

NATURE OF THIS APPLICATION

6. This is an application for leave to appeal against the whole of the judgment and order of the honourable Mr Justice Hendricks in the North West High Court, Mafikeng, under case number 1413/2009 NWHC, in which he dismissed the Applicants’ application for interdictory relief.
7. The relief sought was aimed at preventing the respondents from unlawfully disturbing and/or interfering with the applicants’ peaceful possession of their homes by entering upon the properties, demolishing the structures on the properties or threatening the applicants in any way whatsoever.
8. The court also granted the relief sought in the first respondent’s counter-application in which it sought an interdict against the Applicants not to interfere with the construction activities. Leave to appeal is also sought against this judgment and order.

9. I attach the judgment and order as Annexure **“FA2”** and **“FA3”** respectively.
10. An application for leave to appeal was refused by the North West High Court, Mafikeng on 7 February 2012. I attach this order as Annexure **“FA4”**.
11. A subsequent application for leave to appeal to the Supreme Court of Appeal was refused by the SCA on 10 May 2012 per Van Heerden and Tshiqi JJA. I attach a copy of this order as Annexure **“FA5”**.
12. The application in the court *a quo* concerns the first respondent's hostel redevelopment programme, which, despite its name, envisaged the complete demolition of the Applicants homes and the alleged construction of 83 high density rental accommodation units.
13. Although the houses in which we live are called “hostels”, they are in fact self standing four roomed house structures typical of black townships in the pre -1994 era. I annex photos hereto as **“FA6”** and **“FA7”** which show the type of houses at issue herein.
14. Despite the clear requirements of inclusivity for such a development contained in Chapter 10(3)(b) of the Housing Code as well as the Applicants claims to ownership, the first respondent unilaterally

decided on the form of the redevelopment, which would require the removal of the Applicants and other similarly situated women from our homes and the community in which we have lived in for more than twenty years. The applicants were not even guaranteed new RDP houses as required by par 10(3)(c) of the housing code. We were merely told to apply for RDP housing.

15. When the Applicants' unwillingness to accept the first respondent's decision became clear, the second respondent began construction work on the properties on which we live, despite our continued occupation. This necessitated the urgent application for the relief set out above.

BACKGROUND

16. The Applicants and I sought an interdict based on the following factors:

- 16.1. As a result of the discriminatory property ownership framework of the past, particularly towards black females, the Applicants and I were prevented from obtaining so-called Deeds of Grant or Permissions to Occupy in respect of our houses. In terms of the applicable regulations, houses in a black area had to be allocated to the male head of the house or another male relative.

- 16.2. It is for this reason that the homes we were allocated are referred to as female hostels. We, however, assert that the provisions of the Upgrading of Land Tenure Rights Act, 112 of 1991 (Upgrading Act) provides us with a legitimate claim to ownership of the properties we occupy and a Deed of Grant is not the sole means of obtaining ownership through this Act.
- 16.3. We were occupants of the houses, which had been our homes for many years. We therefore have clear rights which require that the terms of the Housing Code, which gives effect to the constitutional right to housing; as well as general legal principles, be followed. Had we been male, we would have been granted the same permits as other male occupiers in the area.
- 16.4. The stands are all registered in the name of the Provincial Government. However, its ownership has always been notional.
- 16.5. The unannounced arrival on 9 April and 26 May 2009 of a bulldozer and the commencement of excavation work adjacent to the foundation of my house, particularly in the light of the first respondent's stated intention to demolish

our houses, constituted an injury actually committed or at the very least reasonably apprehended.

- 16.6. No Alternative remedies were available.
- 16.7. Chapter 10 of the Housing Code sets out the clear requirements for hostel re-developments. These requirements intended to ensure the inclusion and meaningful contribution of the hostel occupiers. These requirements were not complied with.

ERROS OF THE COURT A QUO

17. The High Court respectfully erred in the following respects:
 - 17.1. It found that there was no contractual or legal basis for the Applicants' occupation of the houses known as the Tlhabane Female Hostel. We had no claim to ownership due to our inability to provide Deeds of Grant and no clear right to the properties in question existed. In this regard the court implicitly regarded the first respondent as if it were a private owner of the stands. I respectfully submit that such an approach is incorrect. It is rather our rights, however, limited by past laws that should be regarded as ownership rights.

- 17.2. That my and the further Applicants' right to privacy and our right to remain in peaceful undisturbed possession of our houses had not been affected by the construction activities. The learned judge erred in not regarding the relief the applicants sought as essentially being relief aimed against spoliation. Such relief is in essence provisional and not a final determination of the disputes. In spoliation proceedings a more robust approach to factual disputes is often followed to ensure that people are not encouraged by legal niceties to take the law into their own hands.
- 17.3. An alternative remedy existed in the form of a review of the administrative decision taken on 30 August 2004. The other Applicants and I should have pursued this remedy if we were unhappy as a result of the housing and construction process. The decision of August 2004 was far from being a final decision. It was supposed to be subject to inclusive negotiations and a lawfull process of identifying the beneficiaries. The First Respondent would have complained bitterly about an application being premature if a review had been brought immediately after the August 2004 decision. I set out the correct facts herebelow.

- 17.4. No consideration was given to the first respondent's clear failure to comply with the provision of the Housing Code and that its actions were in violation of Chapter 10 dealing with hostel redevelopment:
18. The learned judge further made a number of serious technical errors relating to the record and what constituted the record. The learned judge made his findings on the basis that the Applicants had not filed a reply in the main application and had not filed an answer to the counterclaim. This assertion is simply wrong. It is not known on what basis the court a quo made this finding, as the replying affidavit was part of the indexed record and was referred to in both the written heads of argument and oral argument.
19. The learned Judge further respectfully erred in granting the counterclaim, also on the mistaken assumption that no answer had been filed. The correct position is that the counterclaim wasn't even before the court a quo. The First Respondent's representatives indicated that they were not continuing with the counterclaim. This understanding was placed on record by the Applicant's legal representative, and appears as follows in the transcribed record:

Van Nieuwenhuizen (for applicants) at p 10, line 15 -...If I understand my colleague correctly, which was not indicated to me earlier, the counter application is not proceeded with. M Lord, then it is only the main application that is before the court...

BACKGROUND TO APPLICANTS' OCCUPATION AND CLEAR RIGHT

20. Under the legislative framework of the past, residents of Tlhabane were not permitted to own the houses in which they resided. The area previously fell within one of the South African Native Trust areas. This land is now owned by the North West Provincial Government.
21. In terms of the apartheid era legislation black females were further discriminated against and were regarded as minors. We could thus not own property or access the so-called Deeds of Grant, which were issued in terms of Proclamation R293 of 1962 - "Regulations for the Administration and Control of Townships in Bantu Areas".
22. The Applicants and I, as single women, were therefore only able to obtain housing in the single female hostels and were issued with "Certificates of Occupation of a Letting Unit for Residential Purposes" issued in terms of Proclamation R293 of 1962. I annex my own certificate issued to me in 1994 for Site 1455 as annexure "**FA8**". I unfortunately cannot find a similar certificate issued to me in respect of site 1441, on which I currently reside. It was not possible to occupy a house in Tlhabane without a document issued in terms of Proclamation R293 of 1962.

23. Although the houses in which we reside were referred to as hostels, they are in fact self-standing four room houses typical of township houses of the pre-1994 era. The hostel houses in which we reside do not differ from the “non-hostel” houses on neighbouring properties. Each hostel house, however, is divided into two living units. Each hostel house is located on a fairly large erf and has its own fenced in garden. The two photographs annexed hereto as Annexure “**FA6** and “**FA7**” show the general nature of the houses. I further annex an aerial photograph as Annexure “**FA9**” which shows the layout of the township. I annex a diagram indicating the affected Tlhabane hostel development stands within Tlhabane Extension 1, as Annexure “**FA10**”. Our houses in no way resemble the high density hostels typical of the apartheid era.
24. As a single woman it was not possible to obtain housing in terms of one of the limited forms of tenure permitted within the area. The houses we were allocated were therefore issued in the name of the Tlhabane Female Hostels and the other applicants and I were listed as “Members of family permitted to reside in unit”. Neighbouring male-headed households were able to access Deeds of Grant.
25. Although it was in dispute *a quo* whether the Applicants had leases in terms of pre-1994 legislation, our de facto possession of the houses was undisturbed. In terms of the Upgrading Act, our entitlement to become owners must be investigated. I am advised

that it is not necessary to analyse the Acts in detail here, save to state that all persons occupying state properties in terms of apartheid regulations, even putative holders as defined in the Upgrading Act, are entitled to have their rights upgraded, and once a township register has been opened, to have it converted to full ownership.

26. The process of transferring 'old stock' housing within Tlhabane into ownership is currently taking place. On 6 February 2009 the residents of Tlhabane female hostel received a letter from the North West Housing Corporation informing us that old stock houses, such as the ones we occupy, would be transferred in ownership to qualifying beneficiaries. I attach this letter as Annexure "FA11".

27. I, like the other applicants believe that we should acquire ownership of the houses we reside in. The arbitrary and gender discriminatory laws of the past, which prevented us from acquiring the same form of title granted to males and which necessitated the labelling of our houses as "female hostels", cannot continue under the Constitution. The first respondent's actions in relation to the hostel redevelopment, however, continue to perpetuate the discrimination of the past.

CHAPTER 10 OF HOUSING CODE – HOSTEL RE-DEVELOPMENT

28. The Housing Code is a document setting out government objectives and policy in relation to the provision of housing. The document is enacted in terms of the Housing Act, 107 of 1997. Chapter 10 of the Housing Code deals with public sector hostel re-development and sets out the rules for the public sector hostel redevelopment programme. I attach a copy of chapter 10 as Annexure “**FA12**”.

29. The Chapter sets out numerous principles which must be adhered to and prescribes the process to be followed when embarking on a hostel redevelopment programme. The Chapter further requires the formation of a Local Negotiating Group (LNG), which will comprise various stakeholders including hostel dwellers and the municipality. The hostel residents and municipality will engage at the highest level of the decision making process. All decisions regarding the form of redevelopment, planning and design must involve the LNG and acquire its final approval.

30. The principles applicable to a hostel redevelopment are the following:
 - 30.1. need for urban development;

 - 30.2. a participative and inclusive process in which the hostel residents will play a central role in the planning and design of the hostel redevelopment;

- 30.3. the eligibility of hostel residents for accommodation under the scheme;
- 30.4. affordability and community needs, as determined in terms of a socio-economic survey, which will form the basis of the planning for a proposed redevelopment;
- 30.5. displacement, no redevelopment will be consider if it will result in the displacement of hostel residents, unless alternative accommodation is secured and proof of acceptance by the displacees is provided;
- 30.6. every effort should be made to accommodate “single women”, “who were married in community of property or have customary marriage and are presently barred from ownership”;
- 30.7. cost recovery and sustainability;
- 30.8. employment creation;
- 30.9. institutional development and capacity building, which will ensure hostel residents acquire the skills necessary to participate in the planning and ongoing management of the redevelopment;

30.10. budget;

30.11. equity both within hostels and between hostel residents and neighbouring communities. Alternative accommodation, if necessary, must be in-line with that provided in the redevelopment and that available to residents within the broader community.

THE HOUSING PROJECT, PUBLIC PARTICIPATION AND COMPLIANCE WITH THE HOUSING CODE.

31. On 24 August 2004 the First Respondent motivated to its council that the Tlhabane female hostels, which “are exclusively allocated to single women and pensioners (female) at a nominal fee” be upgraded. I attach as Annexure “**FA13**” the memorandum which served before the First Respondent’s mayoral committee.

32. This memorandum states that the *“occupied hostels need redevelopment in order to enhance the living conditions of their occupants. This objective can be achieved through the consolidation of the adjacent stands and building of flats/new houses for family units as designed in Annexure B.”* (emphasis added).

33. As this decision was intended to benefit the hostel residents, such as the further Applicants and me, and would require the first respondent to follow the inclusive participatory process required by Chapter 10 of the Housing Code through which our interests as residents were safeguarded, we had no wish to challenge the Municipality's decision. The final council decision was taken on 30 August 2004.
34. On 5 May 2005 a meeting was held to inform the hostel residents of the proposed redevelopment. Most of the applicants attended this meeting. We were informed by officials of the First Respondent that a contractor would renovate our houses. We were further told that after the renovation the houses would be given to us. At this stage no mention was made of the payment of rent and we were led to believe that we would be given the title deeds to the properties.
35. The LNG was also elected. Ms Tosi Letlape and I were elected to represent the Tlhabane hostel residents on the LNG. I attach as Annexure "**FA14**" the minutes of this meeting. This was the first and last time that we as the representatives of the Tlhabane Female Hostels were involved in a meeting of the LNG. I believe that the LNG never met again.
36. The next meeting held by the first respondent was on 1 May 2006. At this meeting we were informed that our houses would be

renovated and sold back to us. As there are two persons residing in each house, councillor Pule suggested we discuss the matter amongst ourselves in order to decide who the purchaser would be. We were informed that the houses did not belong to the municipality but to the North West Housing Corporation.

37. On 18 October 2006 a meeting known as an Imbizo was held between the mayor, councillors and the broader community. During this meeting we raised our concerns about the upgrading and general state of our houses. The mayor's response was that they would repair the houses after which we would be chased away – *"Re ile go le kaba"*.
38. After the meeting we wrote a letter to the North West Housing Corporation (NWHC) voicing our concerns. We did not receive a response and realized that our names had not been included in the letter. On 22 November 2006, a further letter with our names included was faxed to the NWHC. We did not send the letter to the Municipality as we were under the impression that the houses belonged to the NWHC. I attach a copy of the letter hereto as annexure **"FA15"**.
39. From 2005 to 2007 the First Respondent allegedly put the redevelopment project out to tender.

40. In 2007 a further meeting was called by the mayor. It was a general meeting held at Tlhabane Stadium and the whole community was invited. The main purpose of the meeting was to thank the people for the elections. During the meeting, however, it was mentioned that our houses would be demolished in order to build flats. This was the first time that any mention was made about demolishing our houses. This threat was followed-up with a letter addressed to the Tenants of the Tlhabane female hostels. This letter, attached as Annexure "**FA16**", informed us that the First Respondent is in the process of re-developing the hostels, which process will involve the demolition of the hostels. Alternative accommodation would be made available in Seraleng in an RDP project.
41. We became extremely concerned and as we did not have the necessary funds for legal advice, requested Mr Geoff Moeletsi, the chairperson of Kgetse ya Tsie Forum, a civic organisation, to assist us. Mr. Moletso introduced us to our present attorney.
42. Our attorney addressed a letter dated 3 September 2007 to the First Respondent. I attach this letter as Annexure "**FA17**". No response was received from the First Respondent until allegedly the 10th June 2008. I attach this correspondence received through the First Respondent's answering affidavit as annexure "**FA18**".

43. On 13 February 2008 another public meeting was held. At this meeting I was told to write down my name and apply for an RDP house in Seraleng, which is about 12 km from where our houses are located. All the hostel residents were instructed to do this.
44. The contractor appointed for the redevelopment was introduced to us and we were shown plans of the proposed new buildings. We were informed that only persons who earn at least R2500.00 per month will qualify to rent premises in the new building. None of the applicants earn R2500.00 per month. I, together with the further Applicants then informed Councillor Pule that we have a legal representative, who had written a letter to the first respondent in 2007. Mr. Pule stated that he had no knowledge of the letter and refused to take a copy of the letter I attempted to hand him. Thereafter a heated argument ensued and the meeting could not continue.
45. The next meeting took place on 20 February 2008. The purpose of this meeting was to once again inform us that we needed to move to RDP houses. Before the meeting the situation was explained to the Director of Human Settlements and Planning, who took our copy of the letter and undertook to contact our attorney and deal with the issue. We received two letters from the Director shortly thereafter. I attached these letters dated 18 February 2007 (should

be 2008) and 25 June 2008 as Annexure “**FA19**” and Annexure “**FA20**” respectively.

46. On 20 February 2008 the First Respondent allegedly entered into a service level agreement with Phepedi Engineers. The second respondent had already been appointed at this stage.
47. In May 2008 a notice from the First Respondent was distributed to the residents of the Tlhabane female hostels. This notice informed the residents that construction would continue and that those who disrupt the project will be evicted. I attached this notice as well as a translation thereof as annexure “**FA21**”.
48. In February 2009 we received the previously mentioned letter from the North West Housing Corporation, attached hereto as Annexure “**FA11**”. This letter dealt with the transfer into ownership of “old stock” housing.
49. On 11 February 2009 another meeting took place at the Assemblies of God church. I attended this meeting together with most of the other Applicants. We were informed that 83 family units would be constructed, construction would commence within 6 months, we could rent units in the development but that we should apply for RDP housing. Those present were informed that the RDP houses we could possibly access would now be in Karlien Park. It was

further alleged that the first respondent had contacted our attorney, who was "*very happy*". I attach the minutes of this meeting as annexure "**FA22**".

50. To the contrary, our attorney, Ms Du Plessis, spoke to councillor Pule and told him that the first respondent had not followed the process as prescribed in the Housing Code, did not engage meaningfully with the residents and had in a highhanded manner already decided, long before the residents were informed of the First Respondent's plans, that the Tlhabane Female Hostel residents will have to move from their community to RDP Housing.
51. It was clear from this meeting that, according to the First Respondent, if we wished to acquire ownership we would have to leave the community in which we had resided for many years and await the allocation of an RDP house to which we may, if we qualified, obtain ownership.
52. When we alleged that we were entitled to ownership, the First Respondent insisted that we produce Deeds of Grant. Due to our gender, race and marital status we were never able to obtain such Deeds of Grant. The First Respondent failed to consider this aspect and its refusal to consider our situation, created as a result of past discrimination, particularly in the light of the Housing Code noting our vulnerability, is particularly concerning.

53. Despite the further Applicants and my obvious dissatisfaction, a survey conducted by Mr. Kenny Mokono was conducted in March 2009. Not all the residents were reflected therein.
54. In April 2009 a notice concerning another public meeting dealing with subsidy administration was issued to the residents of Tlhabane female hostels.
55. On Good Friday, 10 April 2009 the contractor began to mark out building sites on our properties.
56. On Sunday, 19 April 2009 a bulldozer came to my home and began digging a trench right against the foundation of my house. I was extremely upset. Some of the Applicants joined me and we began to argue with the contractor. I told the contractor to fill up the trench, which he did. I attach a photograph taken of the filled up trench as Annexure "**FA23**". We immediately contacted our attorney, who came to visit our houses on 4 May 2009.
57. On 6 May 2009 another meeting was held at the Assemblies of God Church. As it was clear the First Respondent had already decided on its course of action and was unwilling to engage on any of the Applicants concerns, we decided not to attend this meeting. Due to our non-attendance the First Respondent proceeded to appoint a new "steering committee". A representative from the North West

Housing Corporation was also present to explain the handing over of old stock houses in the area. He apparently informed those present that the female hostels were owned by the Municipality which was entitled to do what it wished with the houses. I attach the minutes of this meeting as Annexure "**FA24**".

58. On 12 May 2009 our attorney addressed another letter to the First Respondent to which no response was received. I attach a copy of this letter as Annexure "**FA25**".
59. On 26 May 2009 a bulldozer arrived yet again and started to open up the part dug trench.
60. In June 2009 the First Respondent's Directorate for planning and human development compiled a memorandum and investigation report dealing with the Tlhabane hostels. The reports allege that the buildings are at risk of collapsing at any time and that the general condition of the houses is unsightly and degrades the image of the area. The reports recommend that the houses be demolished. I attach these reports as annexure "**FA26**" and "**FA27**".
61. The actions of the First Respondent have left me fearful to leave my house. I have stopped going to church on Sundays as I am afraid that upon my return my home will have been demolished. My

peaceful occupation of my home has been disturbed and is under serious threat.

62. The first respondent has completely failed to comply with the rules set out in the Housing Code. The LNG, of which I am an elected member, failed to meet even once. The alleged public participation process was simply a series of meetings to inform us of decisions that had already been taken. The further Applicants and I do not wish to move out of the community in which we reside, we would have preferred the redevelopment to take the form of an ownership redevelopment scheme as provided for in the Housing Code and have unsuccessfully attempted over a number of years to convey this position to the first respondent.

CONSTITUTIONAL ISSUES RAISED.

63. The Housing Code was enacted in terms of the Housing Act and is intended to give effect to the section 26 Housing Right contained in the Constitution. The application of a law intended to give effect to a constitutional right raises a constitutional issue.
64. The project of the First Respondent as presently envisaged, will result in our homes being demolished and our eviction. This violates our rights as contained in section 26(3) of the constitution.

65. The rights of tenure which we held in our homes were, and remains, insecure as a result of past discriminatory legislation. In terms of the provisions of section 25(6) of the constitution, read with the provisions of the Upgrading Act, we are entitled to have our tenure upgraded. This also raises a constitutional issue.
66. The discrimination against black women in the apartheid and colonial era is also apparent from our case. The case therefor also raises an issue of gender discrimination in the past that leads to greater vulnerability in the present.

THE INTERESTS OF JUSTICE

67. I respectfully submit that our appeal has good merits. I have referred to the various errors of the court *a quo*. I persist in those contentions.
68. The position of black women in the legal processes which provide for upgrading of tenure, has not received much judicial attention, and this case can give valuable guidance to state institutions as to what their duties are towards black women when implementing legislation providing for upgrading of tenure and for state subsidised housing.

CONCLUSION

69. I therefor humbly request that leave to appeal be granted as requested in the notice of motion.

Deponent

Thus signed and sworn to before me on this day of May 2012, by the deponent who declared that she knows and understands the content of this statement, that it is the truth and that she has no objection to taking the prescribed oath and that she regards the oath as binding on her conscience.

Commissioner of oaths

Name:

Designation:

Address: