

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No: CCT

Case No a quo: 1413/2009 NWHC

In the matter between:-

**PONTSO DOREEN MOTSWAGAE
FOURTEEN OTHERS**

First Applicant
Second to Fifteenth Applicants

and

**RUSTENBURG LOCAL MUNICIPALITY
PROMPTIQUE TR 9 CC**

First Respondent
Second Respondent

**FIRST RESPONDENT'S ANSWERING AFFIDAVIT IN OPPOSITION TO
THE APPLICANTS' APPLICATION FOR LEAVE TO APPEAL**

I, the undersigned,

JAN CASPER PIETERS

do hereby make oath and state as follows:

1. I am the Director: Planning and Human Settlement of the Rustenburg Local Municipality (the first respondent) and as such I am duly authorised to depose to this affidavit and to oppose the relief claimed by the applicants herein. The provision of housing falls under this Directorate and all policy decisions and

development schemes relating thereto are managed and controlled in this Directorate.

2. The facts herein contained fall within my personal knowledge, unless the contrary appears from the context and are both true and correct to the best of my knowledge and belief.
3. I have read the founding affidavit of Ms Pontsho Doreen Motswagae (the first applicant) and wish to respond thereto.

INTRODUCTION

4. The applicants rely on the following issues in order to place the matter before the Constitutional Court:
 - 4.1. The right of hearing and the constitutionality of the specific housing;
 - 4.2. The applicants' right to upgrade their tenure to ownership of units in the development which would have been higher density housing units;
 - 4.3. The allegation of discriminating legislation and the *locus standi* of Black women to litigate.

5. Not one of these issues were either ventilated or considered by the Court *a quo*.
6. I am advised that this Honourable Court will, only in exceptional circumstances, act as a court of first instance. As will appear hereinafter the Constitutional rights on which the applicants rely were not violated and their right to housing was acknowledge throughout.
7. In the circumstances there is no finding in the Court *a quo* or the Supreme Court of Appeal that can form part of an appeal to the Constitutional Court.
8. For this reason alone, I am advised that the application should be dismissed with costs.
9. It may assist this Honourable Court if I summarise the issues between the parties upfront before I deal *ad seriatim* with the allegations contained in the founding affidavit.
10. The *lis* between the parties was never of a constitutional nature or the right of the applicants to housing. These constitutional rights were at all stages recognised and were never violated by the Municipality. The dispute between the parties was of a factual nature and related to the question whether the Municipality was

entitled to install engineering services in close proximity to the housing structures on the land in question.

11. The applicants and other inhabitants were unhappy to participate in a housing project. The constitutional obligations of the Municipality and the administrative processes were not the applicant's cause of action. This came as an after-thought.
12. In the housing project the applicants followed the route of not attending community meetings on the instructions of their legal advisers. If the applicants contend that they in fact obtained ownership of the land, no process to claim ownership was ever followed in the application to the Court *a quo* consequently this issue was not ventilated. The end result of their conduct was fatal to the applicants on the normal principles based on interim relief.
13. The relief sought was dismissed, leave to appeal to the Court *a quo* was unsuccessful and the Supreme Court of Appeal dismissed their appeal.
14. The Municipality was established on 5 December 2002 as a category B municipality, as provided for in the Constitution. Its predecessors-in-title were the Local Authorities in control of the

Thlabane Area, which initially was a statutory Trust known as South African Native Trust.

15. The Municipality has a constitutional obligation towards, *inter alia*, the applicants and is obliged to provide services to its communities in a sustainable manner.
16. In compliance with its constitutional obligations the Municipality must fulfil the objectives mentioned in the preamble to the Constitution to improve the quality of life to all citizens and in doing so must respect, protect, promote and fulfil the rights contained in the Bill of Rights. The appeal of the applicants is not directed at the decisions which the Municipality took in compliance of these obligations. The attack is against the court order to dismiss the interdict granted by the Court *a quo* in which no constitutional issue was raised.
17. The Thlabane hostel dwellings, which form the basis of this application, are erected on land owned by the North-West Provincial government on several stands in the Thlabane Unit 1 Township. The Municipality takes part in the national housing project, together with the provincial authorities. The North-West Province made the land available to the Municipality for its housing project. The North-West Housing Corporation is currently

attending to transfer of ownership of all the Thlabane Unit 1 township stands to the Municipality.

18. With the background set out above, it was never the Municipality's strategy in its housing program to render the inhabitants, including the applicants of the Thlabane hostels homeless. By means of a protracted public participation process, the Municipality has since 2005 attempted to engage with the inhabitants of the Thlabane hostels in a meaningful manner in order to redevelop the Thlabane hostels for the benefit of all interested parties.
19. The Thlabane hostels redevelopment program forms part of the Municipality's Integrated Development Plan ("the IDP"). In terms of Chapter 5 of the Systems Act, a Municipality is obliged to undertake development in accordance with its IDP.
20. The applicants derailed the public participation process of the Municipality to engage with the occupants of the Thlabane hostels in a meaningful manner. At all relevant stages the Municipality was alive to the fact that the redevelopment of the Thlabane hostels would result in a temporary resettlement of families or the provision of alternative accommodation to them, which responsibility the Municipality throughout accepted.

21. The obligation of the Municipality in respect of homeless people, through the operation of the Constitution, made an eviction order as contended by the applicants meaningless and illogical. Eviction by means of a court process would be a last resort for the Municipality and was only considered after an engagement process and meaningful discussions appeared to be fruitless. The details of the negotiations between the Municipality and, inter alia, some of the applicants form part of the first respondent answering affidavit before the Court *a quo*.
22. It was unfortunate that an application had to be launched. Meaningful discussions between parties is a two-way process in which the applicants were requested to participate. However, the applicants were pivotal in destroying this process over a period of time. Shortly before the launch of the application, the applicants' attorney, Du Plessis, terminated the negotiating process by instructing the applicants not to attend a meeting relating to the redevelopment process which was scheduled for 6 May 2009.
23. The redevelopment of the Thlabane hostels was by that time at a very advanced and critical stage.
24. As stated, it was never the intention of the Municipality to evict the applicants or render them homeless. The applicants were at all

times made aware of this fact. Being aware of the applicant's intentions, the applicant nevertheless launched an application against the Municipality to prohibit it from unlawfully disturbing and/or interfering with the applicants' peaceful possession of their property and a further interdict prohibiting the Municipality:

24.1. to enter upon the properties of the applicants;

24.2. to demolish the structures on the properties;

24.3. to threaten the applicants in any way whatsoever.

25. The costs sought by the applicants in the urgent application were reserved, to be determined after the consideration of the applicants' request for the finalisation of arbitration proceedings. It is common cause that no arbitration proceedings was instituted by the applicants.

26. The housing project which forms the basis of the dispute between the parties was initiated during 2004 and the principle thereof was to redevelop the hostels into high-density units for successful participants in such housing scheme. The administrative decision to redevelop the land is not in dispute and was taken by the Municipality on 20 August 2004. This decision did not form part of any relief sought by the applicant.

27. The Municipality contends that the applicants are unlawful occupiers of the unsafe structures which do not comply with certain land use provisions. The applicants' right to privacy and to remain in the structures on the land had not been affected by the construction activities in the area of the Thlabane hostels, which related to the installation of services, not the demolishing of structures.
28. In brief, the applicants sought an urgent final interdict against the Municipality and the second respondent, a contractor, for "unlawful disturbing and/or interfering" with the applicant's peaceful possession of certain stands in Thlabane Unit 1 township.
29. The specific acts which the applicants sought an interdict against were for the entering upon the land, the demolishing of structures and the apparent threats made against the applicants. The applicants vaguely referred to the finalisation of arbitration proceedings, which they would or would not bring. No facts were set out in the founding affidavit in order to substantiate the relief sought relating to the arbitration proceedings.
30. The Municipality, by way of counter-application, sought an order restraining the applicants from interfering with the contractors in

the execution of a Service Level Agreement and tendered alternative accommodation to the applicants. The Municipality relied on the answering affidavit for its counter-application.

31. The fact that the applicants inhabit rooms in dilapidated structures, which is known as the Thlabane Female Hostels is not in dispute.
32. The Municipality denied that all the applicants were inhabitants of the hostels and contended that only 7 of the applicants could be identified in a survey which had been carried out by the Municipality for this purpose.
33. The Municipality and the Contractor, the second respondent, had entered into a the Service Level Agreement in terms whereof the Contractor was obliged to upgrade and install engineering services to the Thlabane female hostels.
34. The Municipality, North-West Province and North West Housing Corporation (an entity established as such in terms of section 2(1) of the North West Housing Corporation Act, Act 83 of 1982, jointly seek to eventually demolish the hostels and erect high-density residential units for participants who are the successful applicants for the housing project. The North West Province is the registered

owner of the land and the structures in question. The North West Housing Corporation has contributed financially towards the housing project and both statutory entities condoned the Municipality's conduct in the application.

35. The statutory bodies of the North West Province and the North West Housing Corporation were not parties to the proceedings but, as stated supported the Municipality therein and in its counter-application.
36. The applicants failed to satisfy the well-known requirements for a final interdict. The applicants contended that the construction work which was then being carried out on the land was in fact an infringement of their clear right and that the relief sought in their application was the only remedy available. The Municipality contended that it respected the personal rights of the applicants, their right to privacy and their right to remain in the structures pending the implementation of the housing project to install engineering services. The Municipality, by means of its housing project and to carry out the said engineering services claimed the right to enter onto the land and to install the services in the interim prior to the demolition of the dilapidated structures. The aspect of demolition did not form part of the *lis* between the parties.

37. The applicants right to privacy and to remain in the structures on the land were not affected by the construction activities.
38. The applicants are unlawful occupiers of the structures which do not comply with health requirements and building control regulations. The applicants' peaceful possession and structures on the land had not been interfered with according to the Municipality.
39. I now deal *seriatim* with the allegations made by the first applicant herein.
40. **AD PARAGRAPHS 1 to 3**
- 40.1. I note the citation of the first applicant and the other applicants herein.
- 40.2. The Municipality denies that all the allegations contained in Ms Motswagae's affidavit are true and correct and that the legal submissions on which she relies are correct in all respects. I will refer to these aspects where they appear in the founding affidavit.
- 40.3. The Municipality denies that all the applicants are inhabitants of the hostels and contend that only seven of

the applicants could be identified in a survey conducted by an official of the Municipality, Mr K Mokono.

41. AD PARAGRAPHS 4 AND 5

41.1. I take note of the contents of these paragraphs.

41.2. The North West Province is the registered owner of the land upon which the hostels were erected. The buildings thereon were erected in 1970 and consist of 4-roomed dwellings.

41.3. According to inspections carried out by the Municipality's Health and Building Control Departments, the hostels were described as being in a dilapidated state where two different households share limited space and entrances. The living conditions pose a health hazard and threat and there is insufficient cross-ventilation thus creating a risk for transmission of communicable diseases. The living conditions in the hostels are such that there is no privacy for the inhabitants due to the limited space and it is not conducive to raise healthy and functional children or a functional family in such area.

42. AD PARAGRAPHS 6 TO 11

I admit the contents of these paragraphs

43. **AD PARAGRAPH 12**

43.1. The contents of this paragraph are wrong.

43.2. The application in the Court *a quo* was to stop the construction work in close proximity to the Thlabane hostels. The relief was not directed at the hostel development program.

44. **AD PARAGRAPH 13**

I have already dealt with the structures and the nature thereof as well as the circumstances under which the applicants live.

45. **AD PARAGRAPHS 14 AND 15**

The contents of these paragraphs are denied. The principles which were raised in respect of the housing Code were stated by the Municipality in its answering affidavit. The applicants did not rely on the processes followed in the housing project nor in the participation process followed as part of its cause of action. As will appear from what it stated hereunder, it is untrue that the applicants were merely told to take certain action. The housing

process was explained in detail over a long period not only to the applicants but also the community at large.

46. **AD PARAGRAPH 16**

46.1. The contents of these paragraphs are denied. It was never part of the applicants' cause of action.

46.2. A total misconception is created in this paragraph when the applicants refer to ownership of the houses. Ownership of the structures has never passed to any of the applicants. The Thlabane hostels form part of a housing project governed by certain legislative provisions and housing is governed by the provisions of the Housing Act, No. 107 of 1997 ("the Housing Act").

46.3. Chapter 10 of the Housing Act provides for the redevelopment of existing hostels such as the Thlabane hostels. The Housing Code provides that single-sex hostels such as the Thlabane female hostels be upgraded in a participation process described in such Code. In compliance with these principles and in relation to the 28 stands on which these hostels had been erected, be redeveloped into high-density units to accommodate more

people in need of low cost housing. On 30 August 2004 the Municipality accepted the proposals of the Directorate of Planning and Development to redevelop the Thlabane hostel.

46.4. The Municipality was entitled to enter onto the land and to install engineering services thereon. The shortage of land to erect so-called RDP housing and the principle of densification motivated the Municipality to use its land in proclaimed townships to maximum benefit. To enable it to obtain funds from the Housing Department of the North-West Province the Municipality is bound to comply with the principles of the Housing Act.

46.5. The statement that "bulldozers arrived unannounced" is emotive and without any factual basis. The Municipality followed a protracted public participation process before it commenced the work of installing engineering services on its own land in close proximity to the Thlabane hostel.

47. AD PARAGRAPH 17.1

47.1. The contents of this paragraph are denied.

47.2. At no stage was the *locus standi* in the housing project part of the applicants' cause of action. Although the applicants loosely referred to the hostels as "our homes", they never claimed ownership thereof in the application that served before the Court *a quo*.

47.3. The applicants were considered as unlawful occupants of the Thlabane hostels as they had abused the occupation of the unsafe and unhealthy structures.

47.4. It was not the applicants' case in the Court *a quo* that they were entitled to ownership of the units in terms of a Deed of Grant or that the principles of the Deed of Grant were discriminatory. Consequently, the claim to ownership was never ventilated in the Court *a quo*.

48. **AD PARAGRAPHS 17.2, 17.3 AND 17.4**

The criticism against the Court *a quo* in the application of the factual question as to whether the applicants were spoliated was confirmed on appeal and the applicants' reasoning in these paragraphs is, with respect, incorrect.

49. **AD PARAGRAPHS 18 AND 19**

49.1. The contents of these paragraphs are denied.

49.2. It is correct that the Municipality indicated that it had waived its counter-application during the hearing of the matter. I am advised that a litigating party who institutes a counter-application may withdraw such proceedings in terms of the provisions of rule 41 of the Uniform Rules of Court. Once a matter has been set down for hearing it is not competent for the party who has instituted such proceedings, in this case the Municipality, to withdraw the counter-application without the consent of all the parties or the leave of the Court. The Court has a discretion to consider whether or not to grant such leave and the question of injustice to the other party is germane to the exercise of the Court's discretion.

49.3. The applicants failed to state the manner in which the Court *a quo* has allegedly faulted in the grant of the counter-application.

50. **AD PARAGRAPHS 20 TO 27**

50.1. The contents of these paragraphs are denied.

- 50.2. These paragraphs relate to the applicants claim based on their ownership and discriminating procedures in respect of the units in which the applicants live.
- 50.3. As stated hereinabove, these aspects were never ventilated in the Court *a quo* and the Municipality did not have an opportunity to respond thereto.
- 50.4. The *de facto* facts which appear in the affidavits indicate the manner in which the housing project was implemented, which process and facts do not contain discriminatory procedures and legislation. For ease of reference I summarise these procedures as follows:
- 50.5. The applicants were aware of the housing project since 5 May 2005 when the first meeting took place at which the housing project was introduced to the community and the applicants. At this meeting the applicants were assured that no-one would be left homeless.
- 50.6. Subsequent thereto several public meetings took place, namely 13 February 2008, 15 May 2008 and 12 February 2009. The applicants derailed the public meeting held on

12 February 2009 when they refused to participate in the housing project any longer.

- 50.7. The applicants failed to contest the administrative decision for the implementation of the housing project, which was the remedy that should have been followed had they felt unhappy because of the housing and the construction process.
- 50.8. The Municipality is entitled to carry out construction work relating to engineering services, subject thereto that the applicants are not evicted or the structures in which the applicants live are not demolished. This was never part of the applicants' case.
- 50.9. In its counter-application the Municipality again tendered alternative accommodation to the applicants, which the applicants rejected.
- 50.10. The contents and provisions of the housing project did not form part of the relief claimed by the applicants. The allegations in this paragraph are therefore irrelevant having regard to the fact that at all relevant times

alternative accommodation was tendered to the applicants.

51. AD PARAGRAPHS 28 TO 39

Insofar that these paragraphs give a correct summary of Chapter 10 of the Housing Code, the contents thereof are admitted.

52. AD PARAGRAPHS 31 TO 62

52.1. The averments in these paragraphs were dealt with fully in the affidavits in the Court *a quo*. For ease of reference I summarise the differences between the applicants and the Municipality hereunder.

52.2. As indicated, several public meetings took place in which the housing project was widely discussed.

52.3. The applicants, on the instructions of their attorney, took the decision to derail the negotiations between the applicants and the Municipality. The unlawful conduct was stated in detail in the Municipality's answering affidavit and the applicants real motive was set out by the Municipality, i.e. to abuse the current unhealthy and

unsafe circumstances of the hostels due to the fact that the accommodation therein was free.

52.4. On 13 February 2008, under the leadership of one Jeff Moletsi, the applicants disrupted the meeting by screaming and shouting and through their conduct made it impossible to proceed with the meeting. It was clear from their conduct that this was a pre-planned strategy to derail the redevelopment program. The meeting was also attended by the project manager who was to execute the construction of the residential facilities.

52.5. In response to the manner in which the meeting was disrupted, the Municipality addressed and distributed further notices to the occupants on 15 May 2008 in the Sesotho language, the contents of which read as follows:

"We are informing you that despite what happened with the last meeting, we are going to continue with the construction as agreed.

We are dissatisfied about the behaviour of some tenants that are trying to disrupt our agreements. We pledge to the occupants to work hand in hand with the contractor and assist him with everything to run quickly and smoothly.

Legal action will be taken against those who are disrupting the project and they will be evicted from Thlabane Female Hostel.

Your assistance will help in improving your living conditions and assist the Government with housing delivery.

Yours faithfully,

Director: Planning and Human Settlement"

- 52.6. This was directed against Mr Moletsi and the parties who assisted him in disrupting the public participation process.
- 52.7. On 11 February 2009 a follow up meeting was held at a venue known as Assemblies of God Church in close proximity to the Thlabane hostel. The purpose of this meeting was to inform the affected parties of the progress of the Thlabane hostel regarding the development program and address further concerns of the community in this regard. Except for the 6th, 10th, 12th and 14th applicants, the meeting was attended by all the applicants.
- 52.8. Prior to April 2009 a further notice was distributed to the occupants and affected parties in which the occupants were informed of a meeting and of certain subsidies and administration processes whereby they could apply for

RDP housing. A further redevelopment meeting was held on 6 May 2009, which was not attended by the applicants. The attorney acting for the applicants informed the councillor who chaired the meeting, Councillor Pule, that she had instructed the applicants not to attend this meeting.

52.9. As the applicants did not attend the meeting and due to the fact that the 1st and 10th applicants had been appointed as representatives of the applicants and affected persons to participate in the management of the project, the Municipality was obliged to appoint a new steering committee to manage the process, as appears from the minutes of the meeting.

52.10. In respect of the applicants' cause of action for the urgent application, the bulldozers dug trenches next to the hostels in close proximity to stand 1441 Thlabane, the following is of importance:

52.10.1. the project manager and the contractors carrying out the construction work subjected themselves to safety requirements;

52.10.2. at no stage was any structure demolished;

52.10.3. construction was taking place within accepted safety norms;

52.10.4. safety precautions were sufficient to ensure that the inhabitants of the hostels could still reside in their houses whilst construction was taking place.

52.11. The remainder of the contents of this paragraph are denied.

The conduct by the Municipality is not unlawful. Relief was not sought as referred to in this paragraph.

53. **AD PARAGRAPHS 63 TO 68**

53.1. The issues in these paragraphs are of a legal nature relating to the applicants:

53.1.1.right of tenure;

53.1.2.past discriminating legislation; and

53.1.3.position of black women in the legal processes.

- 53.2. These issues and the applicants' claims were not ventilated in the Court *a quo*. No old order rights were enforced or valued in the Court *a quo*.
- 53.3. The question relating to the position of black women in the legal process was never ventilated or decided on by the Court *a quo*.
- 53.4. The entitlement of the applicants' right to occupation has been acknowledged throughout by the Municipality. The practical difficulties that the Municipality experienced was that the hostels in which the applicants live was unsafe. The hostel forms part of a housing policy on which the Municipality has embarked since 2004. The applicants have, since at least 2005, been aware of this policy and the practical effect thereon on the Thlabane Hostels.
- 53.5. Since 2008 the applicants have done everything in their power to derail the participation process. The applicants did not raise these objections in a legitimate manner and followed militant procedures to derail the community processes.

53.6. The applicants' claim in respect of the right to housing was acknowledge at all times.

54. In the premises it is contended that the application should be dismissed, with costs.

DEPONENT

I hereby certify that the deponent declares that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit was signed and sworn to before me at _____ on this _____ day of JUNE 2012 and the Regulations contained in Government Notice R1258 of 21 July 1972, as amended, have been complied with.

Before me

COMMISSIONER OF OATHS