

IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG
(REPUBLIC OF SOUTH AFRICA)

CASE NUMBER: 36133/2010

In the matter between:

ELIAS NTSIZWANE AND 162 OTHERS

Applicants

and

GAUTENG PROVINCIAL HOUSING
ADVISORY BOARD

First Respondent

MINISTER OF HUMAN SETTLEMENT

Second Respondent

BEASLEY AJ

1. This application concerns a township known as Lenasia Extension 13. It is common cause that the land is owned by the Gauteng Provincial Government. Over the past two years the Applicants all claim to have purchased vacant stands in the township and some of them have commenced building houses on their stands. Unfortunately, it has since transpired that they have all been the victims of a widespread fraud perpetrated by persons who have recently been arrested. Needless to say the Applicants have not acquired any legal title or right over the stands which they believed they had bought. When the truth came out the Housing Board of the Province indicated that the Applicants would have to vacate the stands and that those who had erected structures would have

to demolish same. After matters dragged on for some time, the Respondent resorted to drastic action. In September 2010 it summarily and without notice started demolishing a number of houses. This resulted in the Applicants bringing an urgent application to interdict any further demolitions.

2. On 13 September 2010 this Court issued an interim order by consent. Effectively the Respondent was interdicted from all further demolitions while the Applicants were interdicted from carrying out any further building works. Provisions was also made for the filing of further affidavits. Although not expressly stated in the Court Order it was clearly intended that the interdicts should operate until the final outcome of the application.

The Respondent then brought a counter-application. It sought an order evicting the Applicants from the land and a further order for demolition of the structures already erected. In the meantime the number of applicants grew from the original 168 to a total of 437. These were also "purchasers" who had been victims of the fraud.

I have referred to the cited Respondents as "the Respondent". This is because the true respondent is the Provincial Government represented by the MEC of the Housing Department.

After the grant of the interim Order, the Applicants were invited to make representations to the Respondent concerning their own particular circumstances. However, it seems that only 11 of the Applicants responded to this invitation.

3. On 29 March 2011 the matter came before Willis J. By consent the matter was removed from the roll and referred to mediation. The Applicants were required to provide affidavits setting out how they had acquired the stands, whether they had title deeds, whether they were on the waiting list for a

housing subsidy, details of their income and so on. The outcome was that only three of the Applicants satisfied the requirements for a housing subsidy and their applications were under consideration at the time when the matter came to Court.

4. The application which came before me therefore had two legs: first, the grant of a final interdict (as sought by the Applicants); second, the order for eviction as sought by the Respondent.

It is necessary to sketch a little more of the background to the application. The Applicants all claim to be in the "middle-income" group. They paid between R20-60 000.00 for the stands. Those who had erected houses on the stands had been in a position to afford and pay for this. In their papers, the Applicants tendered to buy the stands from the Respondent. Also, some of the Applicants had acquired more than one stand.

As against this, the Respondent pointed out that the land was earmarked for persons who were in need of subsidised housing. Further, the Respondent had a list of over one million people who were waiting to be settled. According to the Respondent the Applicants were effectively jumping the queue in the waiting list thus prejudicing the rights of other applicants. As noted above, only three of the Applicants had actually put their names on the waiting list.

5. I now turn to the two issues before me. It is trite law that in seeking a final interdict the applicants must show the existence of a clear or definite right as a matter of substantive law.

(See: Prest: The Law and Practice of Interdicts, page 43)

Counsel for the Applicants argued that, while the Applicants could not claim any rights of ownership, nevertheless they were to be regarded as lawful occupiers in that they occupied with the express or tacit consent of

the Respondent. In this regard he referred to the provisions of the PIE Act (Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998). In the Act "*unlawful occupier*" is defined as a person who occupies land without the express or tacit consent of the owner. In turn, "*consent*" is defined as "*... the express or tacit consent, whether in writing or otherwise, of the owner or person in charge to the occupation by the occupier of the land...* ". In this regard he referred me to the case of Residence of Joe Slovo Community v Thubelisha Homes 2010 (3) SA 454 CC.

The problem created for the Applicants in adopting this argument is that, assuming such consent exists, it may be terminated at any time by the Respondent for good cause and on reasonable notice.

(See: the judgment of Moseneke B C J in the residence of Joe Slovo case, paras 157 et seq)

It is quite clear from the voluminous papers in this matter that any purported consent given by the Respondent (which the latter denies) has long been terminated. On the Applicants version this "consent use" (to quote a phrase well-known in town planning matters) is to endure in perpetuity. This cannot be right. I also doubt that the Respondent has the powers to grant such consent in the particular circumstances of this case since it would be in conflict with the objects of this particular housing programme i.e. to benefit those in need of housing subsidies and not those middle-income earners who are able to afford housing.

It follows that a final interdict cannot be granted. However, as far as the costs of the urgent application are concerned, the Applicants were fully entitled to approach this Court for relief. Accordingly, they must get the costs of the urgent application.

6. I now turn to the counter-application. The Respondent's case is that the Applicants have never enjoyed the Respondent's consent as contended for. According to the Respondent the Applicants are "unlawful" occupiers in terms of the PIE Act. This means that the Orders for eviction must follow the provisions of the Act. (In a sense this redounds to the benefit of the Applicants in that they are brought within the confines and protections afforded under the Act – which they do not enjoy on their version).
7. The counter-application was brought in accordance with s 6 of the Act. This provides as follows:

"6 Eviction at instance of organ of State.

- (1) An organ of State may institute proceedings for the eviction of an unlawful occupier from land which falls within its area of jurisdiction... and the Court may grant such an order if it is just and equitable to do so, after considering all the relevant circumstances, and if –
 - (a) the consent of that organ of State is required for the erection of a building or structure on that land or for the occupation of the land, and the unlawful occupier is occupying a building or structure on that land without such consent having been obtained; or
 - (b) it is in the public interest to grant such an order... "

The section goes on to provide that, when considering whether it is "just and equitable" to grant an order for eviction the Court must have regard to

the circumstances under which the land was occupied and the building was erected; the period of occupation in respect of the land; and the availability of suitable alternative accommodation.

As far as the Court's powers under s (1) (a) are concerned, the words "without such consent" also cover a case where consent was given but is later withdrawn.

However, for the purposes of this case, I am satisfied that the overriding consideration to be applied is that of the "public interest" prescribed in s (1) (b). The need for adequate housing, particularly among those who cannot afford it, is at the very forefront of what may be termed "public interest". On the facts of the present case, Government land which has been designated for subsidised housing for those in the low socio-economic group is presently being occupied by a group of people who are able to afford to pay for their own housing. However unfortunate it may be for the Applicants in finding themselves in a position which they do, this cannot override the public interest. In my opinion there is no defence to the counter-application and the same result is achieved whether the Applicants are to be regarded as lawful or unlawful occupiers.

8. I have given some thought to the form of Order which should be issued. In practical terms most of the stands which are involved in the application remain vacant. On others, structures of varying stages of completeness have been put up. Nowhere in the papers has it been suggested that the Respondent may wish to take over any of the structures. On the contrary the avowed intention is to demolish all of these. I think it would be only fair to those Applicants who have erected structures to be given the right to remove same. There may be fixtures or materials worth saving before demolition takes place.

Although the number of applicants increased during the course of the

matter, the Respondent seeks relief only against those Applicants enumerated in annexure MM2 to the Notice of Motion. They appear to be about 120 in number.

Finally I should mention that the Respondent sought a contempt order against certain Applicants who, in breach of the Interim Order, carried out further building works after the date of the Order and in breach thereof. Given the circumstances of this case, I do not propose making any such Order.

In the result, I make the following Order:

1. Those Applicants whose names appear on annexure MM2 to the Notice of Motion are hereby ordered to vacate those stands identified next to their names on annexure MM2.
 2. Those Applicants who have erected structures on their stands are ordered to remove or demolish same within 30 days of service of this Order.
 3. In the event of failure so to remove or demolish within the time period the Respondent shall have the right to do so.
 4. Costs
 - 4.1 The costs of the urgent application are to be paid by the Respondent.
 - 4.2 The costs of the counter-application are to be paid by the Applicants named in annexure MM2 to the Notice of Motion.
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ANNEXURE - MM2

COURT CASE APPLICANTS LIST

	NAME	STAND	STATUS OF OWNERSHIP
1	Eleas Ntsizwane	10662 Ext 13	Privately owned
2	George Mokgele	5438/9 Ext	Gauteng Provincial Gov
3	Jessie Tshabalala	5438 Ext 4	Gauteng Provincial Gov
4	JJ Ramusia	5584/26 Ext	Gauteng Provincial Gov
5	L E Mfupa	11340 Ext 13	Gauteng Provincial Gov
6	Isaac Kunene	5472 Ext4	Gauteng Provincial Gov
7	Portia Nkosi	6434 Ext 4	Gauteng Provincial Gov
8	Ingile Nkabinde	3565 Ext 4	Gauteng Provincial Gov
9	Grace Matthews	5817 Ext 4	Gauteng Provincial Gov
10	Mduduzi Ndlovu	5428 Ext 4	Gauteng Provincial Gov
11	Gcabashe Ntombikayise	5584/12 Ext 8	Gauteng Provincial Gov
12	Nelly Koitheng	6429 Ext 4	Gauteng Provincial Gov
	Lindiwe Lunga	11290 Ext 13	Privately owned
	Mirriam P Kudi	11365 Ext 13	Privately owned
13	Precias Sibeko	4828	Gauteng Provincial Gov
14	L Malhlekane	4400 Ext 4	Gauteng Provincial Gov
15	Martin Sithole	10967 Ext 13	Privately owned
16	Ronald Maletse	5895 Ext 4	Gauteng Provincial Gov
17	Walter Dube	4481 Ext4	Gauteng Provincial Gov
18	Valeria Dube	4480 Ext 4	Gauteng Provincial Gov
	Errol Baloyi	4941 Ext 4	Privately owned
19	Dennis Baloyi	6214 ext 4	Gauteng Provincial Gov
20	Minah Mkorwana	11268 Ext 13	Gauteng Provincial Gov
21	Julius Mvela	11318 Ext 13	Gauteng Provincial Gov
22	Lloyd Chauke	11383 Ext 13	Gauteng Provincial Gov
23	T G Mathalemus	6289 Ext 4	Gauteng Provincial Gov
24	T Rutsane	10561 Ext 13	Gauteng Provincial Gov
25	V Mlobedzi	6290 Ext 4	Gauteng Provincial Gov
26	Titus Zonci	4798 Ext 4	Gauteng Provincial Gov
27	Lebogang Ntuli	3912 ext 4	Gauteng Provincial Gov
28	Mmabatho Ntsele	11262 Ext 13	Gauteng Provincial Gov
	Sibongile Dlamini	4872 Ext 4	Privately owned
	N G Mathebula	5088 Ext 4	Privately owned
29	P L Mathebula	5763 Ext 4	Gauteng Provincial Gov
30	Mcedisi Myezo	11327 Ext 13	Gauteng Provincial Gov
31	Z Mathebula	10743 Ext 13	Gauteng Provincial Gov
32	Lucky Mbhele	5711 Ext 4	Gauteng Provincial Gov
	N Duma (Zungu)	4348 Ext 4	Privately owned
33	T Rasila	9297 Ext 4	Gauteng Provincial Gov
34	Walter Dube	11866 Ext 13	Gauteng Provincial Gov

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35	Lungile Dlamini	4249 Ext 4	Gauteng Provincial Gov
36	Thoko Makhalemele	11317 Ext 13	Gauteng Provincial Gov
37	Sibusiso J Miya	11477 Ext 13	Gauteng Provincial Gov
	NAME	STAND	STATUS OF OWNERSHIP
38	Motshidisis Mpande	5854 Ext 4	Gauteng Provincial Gov
39	Nonhlanhla Maduna	10690 Ext 13	Privately owned
39	Siyabonga Tshaba	11233 ext 13	Gauteng Provincial Gov
40	Sibusiso Mabaso	10973 ext 13	Gauteng Provincial Gov
41	Norman Nkgudi	5818 Ext 13	Gauteng Provincial Gov
	M E Masenya	11325 Ext 13	Privately owned
42	M L Masenya	11379 ext 13	Gauteng Provincial Gov
43	Poto Mzwamandla	5853 Ext 4	Gauteng Provincial Gov
44	Doris T Masenya	11377 Ext 13	Gauteng Provincial Gov
45	Abraham Mdumbe	5802/15 Ext 8	Gauteng Provincial Gov
46	Rose Fenyane	11289 Ext 13	Gauteng Provincial Gov
47	V Mnguni	6428 Ext 13	Gauteng Provincial Gov
	N Gama		
48	Peter Bopape	11887 Ext 13	Gauteng Provincial Gov
49	Wilfred M Ndlovu	4646 Ext 4	Gauteng Provincial Gov
50	Banakele Ntsibande	4909 Ext 4	Gauteng Provincial Gov
51	Penelope Mokone	4895 Ext 4	Gauteng Provincial Gov
52	D J L Roderick	10562 Ext 13	Gauteng Provincial Gov
53	Petience Ngubeni	5898 Ext 4	Gauteng Provincial Gov
54	Anna N Serame	11745 Ext 13	Gauteng Provincial Gov
55	Shadrack Masemane	11352 Ext 13	Gauteng Provincial Gov
56	Noluthando Masemane	11352 Ext 13	Gauteng Provincial Gov
57	Baile Mchunu	11344 Ext 13	Gauteng Provincial Gov
58	Collin Bunga	11583 Ext 13	Gauteng Provincial Gov
59	Luke Magodla	4586 Ext 4	Gauteng Provincial Gov
60	Aaron	4387 Ext 4	Gauteng Provincial Gov
61	Mfundo Mbatha	4392 Ext 4	Gauteng Provincial Gov
62	Andile Mbatha	4393 Ext 4	Gauteng Provincial Gov
63	Peter Ntsele	3746 Ext 4	Gauteng Provincial Gov
64	M M Khumalo	4371 Ext 4	Gauteng Provincial Gov
65	C S Khumalo	4372 Ext 4	Gauteng Provincial Gov
	Sandile Matsaba	10565 Ext 13	Privately owned
66	Calvin Mazibuko	11188 Ext 13	Gauteng Provincial Gov
67	Elizabeth Syneepers	11855 ext 13	Gauteng Provincial Gov
68	Lunga Nkabinde	4739 ext 4	Gauteng Provincial Gov
69	Siboleke Tilana	3641 Ext 4	Gauteng Provincial Gov
70	Jeremiah Ngwira	12135 Ext 13	Gauteng Provincial Gov
71	Tshuma J Simphiwe	4247 Ext 4	Gauteng Provincial Gov
72	Gladys Rakgwedi	5900 Ex 4	Gauteng Provincial Gov
73	Gwen Mathebula	3261 ext 3	Gauteng Provincial Gov
74	Patricia M Sibiya	5876 Ext 4	Gauteng Provincial Gov
75	Wison Simelane	5021 Ext 4	Gauteng Provincial Gov



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	NAME	STAND	STATUS OF OWNERSHIP
76	S Mfandu	6388 Ext 4	Gauteng Provincial Gov
77	M J Mashele	10961 Ext 13	Gauteng Provincial Gov
78	Thabiso Lepule	5029 Ext 4	Gauteng Provincial Gov
79	I Modutoane	6119 Ext 4	Gauteng Provincial Gov
80	Felicia Ngobo	5762 Ext 4	Gauteng Provincial Gov
81	Lerato Mofokeng	6090/16	Gauteng Provincial Gov
82	Mamphe N Nzame la	6090/ 23	Gauteng Provincial Gov
83	Ntabiseng Molefe	12184 Ext 13	Gauteng Provincial Gov
84	V Mothobi	5259 Ext4	Gauteng Provincial Gov
85	Sizwe X Mfaba	5919 Ext 4	Gauteng Provincial Gov
86	Olga N Hintsho	5523 Ext 13	Gauteng Provincial Gov
87	S H Litau	11818 Ext 13	Gauteng Provincial Gov
88	S Moya	11275 Ext 13	Gauteng Provincial Gov
89	L J Slater	5527 Ext 4	Gauteng Provincial Gov
90	Prudence Luvuno	11601 Ext 13	Gauteng Provincial Gov
91	G Bilusa	11901 Ext 13	Gauteng Provincial Gov
92	E Mohale	10560 Ext 13	Privately owned
93	Sweetness N Slate	11250 Ext 13	Privately owned
94	Makhosazana Msi	4827 Ext 4	Gauteng Provincial Gov
95	Tinyiko Ngoben	11970 Ext 13	Gauteng Provincial Gov
96	Sizani Ntsibande	4896 Ext 4	Gauteng Provincial Gov
97	Aaron Khanye	5535 ext 4	Gauteng Provincial Gov
98	Ephraim Mini	11782 Ext 13	Gauteng Provincial Gov
99	Joyce Modah	6464 ext 4	Gauteng Provincial Gov
100	Nqobile M batha	5925 Ext 4	Gauteng Provincial Gov
101	Phindile Vunye	5620 Ext 4	Gauteng Provincial Gov
102	Sabelo Hlatshway	5691 Ext 4	Gauteng Provincial Gov
103	Qhamukile Nzuza	5693 Ext 4	Gauteng Provincial Gov
104	C Mogadi	5690 Ext 4	Gauteng Provincial Gov
105	Beauty Mokoena	4829 Ext 4	Gauteng Provincial Gov
106	Xolisile	5079 Ext 4	Gauteng Provincial Gov
107	Phyllis Malinga	5853 Ext 4	Gauteng Provincial Gov
108	Zandile Zondi	5025 Ext 4	Gauteng Provincial Gov
109	Mr & Mrs Cndi	5975 Ext 4	Privately owned
110	Dorcas Monakali	4879 Ext 4	Gauteng Provincial Gov
111	P Rutsane	6291 Ext 4	Gauteng Provincial Gov
112	Nozibusiso T Nkos	3911 Ext 4	Gauteng Provincial Gov
113	Pule Mhyayi	6171 Ext 4	Gauteng Provincial Gov
114	Doris T Masenya	11377 Ext 13	Gauteng Provincial Gov
115	Ben Yeni	4907 Ext 4	Gauteng Provincial Gov
116	Lydia Sethabathala	6298 Ext 4	Gauteng Provincial Gov
117	E M Malindi	6170 Ext 4	Gauteng Provincial Gov
118	B R Dlamini	11455 Ext 13	Gauteng Provincial Gov
119	M N Malinga	10600 Ext 13	Gauteng Provincial Gov
120	Brenda Shokani	4248 Ext 13	Gauteng Provincial Gov

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	NAME	STAND	STATUS OF OWNERSHIP
118	Samuel Mfupa	11499 Ext 13	Gauteng Provincial Gov
119	Sentle Sedietso	11496 Ext 13	Gauteng Provincial Gov
120	David Mfopa	11295 Ext 13	Gauteng Provincial Gov
121	David Baatjie	11494 Ext 13	Gauteng Provincial Gov
122	Lebohang Ramakgula	6450 Ext 8	Gauteng Provincial Gov
123	Sikhosana A Sonto	11430 Ext 13	Gauteng Provincial Gov
	Sharon N Ntuli	11292 Ext 13	Privately owned

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