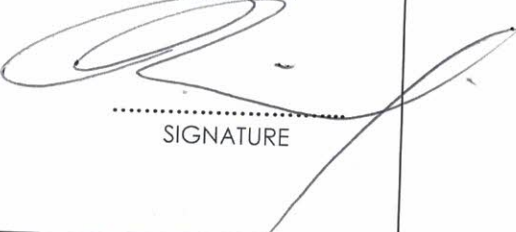




GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2019/25865

| | |
|--|---|
| (1) | REPORTABLE: YES |
| (2) | OF INTEREST TO OTHER JUDGES: YES |
| (3) | REVISED. |
| 22 August 2018 | |
|  SIGNATURE | |

In the matter between:

CITY OF EKURHULENI METROPOLITAN MUNICIPALITY

Applicant

and

**THE UNKNOWN INDIVIDUALS TRESPASSING AND/OR
ATTEMPTING TO INVADE AND OR SETTLE ON THE
IMMOVEABLE PROPERTY DESCRIBED AS FARM RIET-
FONTEIN 153 (AND ALSO KNOWN AS PALM RIDGE
EXTENSIONS 10, 18 TO 30)**

SOUTH AFRICAN POLICE SERVICES (EDEN PARK)

First Respondent

**CITY OF EKURHULENI METROPOLITAN
POLICE DEPARTMENT**

Second Respondent

TEMI CONSTRUCTION

Third Respondent

MOKGOLOKWANE CIVILS

Fourth Respondent

BUYANEMPUMELELO TRADING CC

Fifth Respondent

MOTHEO GROUP

Sixth Respondent

Seventh Respondent

REASONS FOR ORDER

SPILG, J

INTRODUCTION

1. On 24 July 2019 the City of Ekurhuleni Metropolitan Municipality (*"the Metro"*) brought an urgent application without notice for the issue of a *rule nisi* to operate with immediate effect. It sought orders against the first respondent or *"any other interested person/s or group/s"*;
:
 - a. interdicting them from *"trespassing, invading, marking the structures and or settling on the complete or incomplete houses, slaps and vacant land"* on the Farm Rietfontein 153 (*the Development*)
 - b. interdicting them from intimidating, harassing, provoking or insulting the third to seventh respondents who are building contractors engaged at the Development to construct in total some 5670 houses of which 670 are earmarked for military veterans
 - c. directing the removal of heir markings on the houses and slaps and requiring them to remove their movable property from the sites, failing which the sheriff would be entitled to do so;
2. The Metro was unaware of the identities of those who were attempting to occupy the Development and therefore;
 - a. cited them as *"The Unknown Individuals Trespassing and/or Attempting to Invade and/or Settle on the Immoveable Property described as Farm Rietfontein 153 (and also known as Palm Ridge Extensions 10, 18 to 30)"*.

I will refer to them as the *affected persons*
 - b. sought an additional order in line with the procedure identified by the full court in *Mtshali and others v Masawi and others* 2017 (4) SA 632 (GJ) at para 201, requiring those who intended opposing the application to identify themselves by name and physical address;

The applicant also sought an order which would automatically result in the joinder of any person who so identified himself or herself.

3. In addition the Metro applied for an order directing the South African Police Services at Eden Park and the City of Ekurhuleni Metropolitan Police Department in Germiston (SAPS and EMPD) to prevent the first respondents from trespassing, attempting to invade, settle on, mark or take occupation of any of the structures or vacant land on the Development.

THE METRO'S CASE

4. The Metro relies on its rights of ownership and contends that all those who attempted to invade the Development were thwarted.

The facts relied on to support the application are straight forward: In fulfilling its constitutional obligation under s 26 to provide adequate housing for people within its jurisdiction the Metro bought and took transfer of the land on which the Development is situated. It then proceeded to establish a township and contractors were appointed for both the civil works and to construct RDP houses.¹

5. The Metro had also identified the beneficiaries entitled to qualify for housing in the development. They are members of a group referred to in the papers as the Palm Ridge Community *"and other people who have been identified to qualify for the government grant and have passed the means test."*

In addition there are a number of families, up to a maximum of 50, who are entitled to be relocated to the Development in terms of a Land Claims Court order granted on 16 April 2018.

6. By 22 July 2019, of the intended 6000 homes some 1900, in varying degrees of completion, had been built. Moreover agreements had been concluded with the

¹ This refers to housing which forms an essential component of the Reconstruction and Development Programme, an integrated socio-economic upliftment program introduced in 1994 in order to establish a more equal society after the country became a democracy

first group of beneficiaries in terms of which they would be given occupation by mid-August 2019

The applicant avers that on the previous day, 21 July, members of the Palm Ridge Community advised the Metro's senior officials that unknown people were attempting to occupy the area and the structures, marking some of the homes with their names. Photographs attached to the papers show the names of individuals scrawled on the walls of the houses they intended appropriating.

7. The applicant also alleged that Palm Ridge community members intended to counter any attempt to invade the development by guarding homes and making their own marks on the walls.
8. The founding affidavit then described how the contractors were being constantly harassed and unable to carry out their work. It mentioned that criminal charges had been laid. The papers also revealed that the intervention of both SAPS and the EMPD had been sought in order to stabilise the situation and enable constructive engagement between the community and those seeking to invade the land.

INTERIM ORDER

9. Based on the disclosed facts this was a clear case for granting urgent interim relief. The rule was to operate with immediate effect and any person or group of persons who failed to comply with the order was to show cause on 1 August why they should not be held in contempt of court. Once again the court was conscious of the rationale for identifying those subject to the order and in requiring individuals who intended challenging the order to identify themselves.

SUBSEQUENT EVENTS

10. By 1 August Mamane Attorneys had placed themselves on record as

representing the intended occupiers. However they needed an opportunity to prepare papers and to comply with that part of the order requiring the individual identification of those who opposed the application. The rule was extended to 14 August and Mamane Attorneys were ordered to properly identify the members of the cited first respondent who they represented.

11. On 14 August *Adv Sithole* who represented the Metro advised that Mamane had withdrawn as attorneys and in their notice identified the Legal Resources Centre as the first respondent's new attorneys. The court was filled with individuals who identified themselves as part of the first respondent while many more were outside the court entrance. However there was no legal representative in court appearing on their behalf.

12. *Adv Sithole* quite properly contacted *Attorney Nel* of the LRC who he understood was dealing with the matter on behalf of those who were in court. In order to ensure that there was no unnecessary delay I spoke to her in the presence of all those in court. *Atty. Nel* indicated that at that stage the LRC was considering its position and that the first respondent was contemplating bringing its own substantive application against the Metro.

13. This raised two concerns. Firstly, it appeared that two parallel processes were being contemplated before different courts. This suggested that those wishing to oppose the present application may themselves be seeking to hold up the process of transfer to the beneficiaries identified by the applicant which itself would require urgent court intervention to prevent an already explosive situation from worsening.

I was also concerned that there would be no proper identification of those against whom the application had been brought despite their possibly choosing another forum in which to litigate. This would obviously continue to frustrate the effectiveness of the existing order I granted because disputes can arise as to who falls or fell into the category of persons cited as the first respondent.

14. It was therefore made plain that my order regarding identifying those wishing to oppose the application had to be complied with, that I required an explanatory

affidavit and that I would only allow two more days for this to be done. The rule was then extended to Friday 16 August.

15. I recall that already on 14 August it became apparent that at least some those who were attending court believed, rightly or wrongly, that they had genuine grievances which they were entitled to ventilate including that some had been on lists for RDP housing since the mid-to late-1990s yet people who they did not know were now the recipients of homes in the Development.

16. Attorney Nel filed an affidavit. It was only on reading the affidavit that it became clear that the LRC was unaware that Mamane Attorneys had identified them as the first respondent's new attorneys.

This was not the case. The LRC had been approached by a group of persons who claimed to be affected by the order I had made. The LRC indicated that they were unlikely to be able to handle the case as they were already over-committed but would attempt to find another organisation which might be able to provide legal assistance. By the time the LRC had deposed to their affidavit a number of organisations and individual firms had been contacted, but none was able to assist.

17. The affidavit confirmed that the LRC only became aware on 15 August that Mamane attorneys had incorrectly identified them as the new attorneys. This was due to a miscommunication by representatives of the affected persons.

18. It also became apparent that when the representatives of the affected persons approached the LRC the following issues were raised;

"interdicts are not meant to evict individuals" and

"there needs to be transparency in the allocation of RDP houses so that people do not invade."

19. When the matter was called on 19 August the court was again filled with people who claimed to be affected by the original *rule nisi*. Once more many others were

standing outside the court entrance. Atty. Nel was present and I am grateful for her assistance in so lucidly clarifying what had occurred and assisting the court in understanding the difficulties faced by organisations such as the LRC in being able to realise the objective of accessing justice; the affidavit explained the financial and manpower constraints under which they and other NGOs operated.

20. *Adv Premhid* was also present. He was on brief from Mabuza Attorneys to represent the affected persons. His attorneys had only been appointed the previous day. Within that short time they had attempted to comply with that part of the order requiring those who intended opposing the application to identify themselves.

21. There are 18 pages of names contained in lists attached to the notice of intention to oppose. The lists contain the names of individuals who intend opposing the application.

In over half the lists the individual's names are accompanied by an identity number, contact details and a physical address. In other cases only the names appear. Although a few appear to have been written out by the individuals concerned none bear any signature.

22. Perhaps more importantly for present purposes, it is possible to deduce from their different formatting that the lists were sourced from at least five different localities. Only in two of the cases do they bear a heading. The one reads "*Sunnyside Area*" and the other, which is the only type-print list is headed "*Kathorus Back Yard Dwellers*".

The addresses provided cover a number of different zones within Thokoza itself and extend to Katlehong and Eden Park. They all within the Metro's administrative jurisdiction. Another significant feature is that the majority of persons who provided identity numbers were born between 1976 and 1983. The oldest person was born in 1959 and the youngest in 1997.

This court therefore does not have before it an amorphous mass. They are individuals who generally are in their mid-30s to 40s, the overwhelming majority

of whom were entitled to vote in the first democratic elections, no doubt filled with aspirations of hope, a better life and above all being treated equally and with the fairness and dignity that would come with freedom.

23. The lists and what I believe I could gather from those in attendance in court on 14 August, as subsequently confirmed in Attorney Nel's affidavit, suggest that many of those affected believe that they had a prior and stronger right to the houses than do the beneficiaries identified by the Metro.

It also became evident on that occasion or at the hearing on 14 August that at least some of the much older people present in court had placed their names over 30 years ago on official lists for RDP housing and believed that beneficiaries identified by the officials in the Metro had jumped the queue. In another case before me during the same urgent court week other respondents, who had participated in an abortive land invasion on different land but within the same Metro, claimed that corrupt officials had improperly allocated homes to others and also that there were those who used their influence to obtain an additional property which they would then on-sell or rent.

24. Clearly at this stage I have no answering affidavit and the newly appointed attorneys must comply with the terms of the *rule nisi* which requires that those who wish to oppose the application are properly identified before court. It is equally clear that there are those who believe that they are affected by the order I made if only because of the first issue that was noted by Atty. Nel in her affidavit. I also cannot ignore the fact that well over 500 names appear on the lists attached to the notice of intention to oppose filed on 15 August each of whom claims (at least at face value) to be affected by the proposed order.

25. Ordinarily when a respondent appears in urgent court proceedings without papers and seeks an extension the court will, among other aspects, enquire as to the basis of the defence.

26. Although Adv Sithole on behalf of the Metro indicated that he wished to supplement the founding papers first. It is evident that the applicant cannot predict the basis of any defence that might be raised at this stage or anticipate

any other issues that the affected persons may claim an entitlement to raise in these proceedings. I therefore considered that the most expeditious manner of dealing with the case was to ensure that the attorney acting for those present first complied with my order regarding the identification of all their clients in respect of whom they had filed their notice of intention to oppose and that a brief affidavit be filed setting out the right claimed or the right they contend has been infringed and which entitles them to oppose the application.

In view of the number of people involved I suggested to their counsel that it may be necessary to hold a meeting of all those who claim to be affected and that a resolution can be signed, with the details required in terms of the *rule nisi*, confirming their intention to oppose and any other relief they believe they are entitled to in respect of this matter.

27. A day or two later I was advised that the applicant was not in agreement with the draft prepared by Adv Premhid. I then heard their representations.

It appeared that Mabuza attorneys did not wish to run the risk of non-compliance and basically repeated in the draft order the suggestions I had made; which was no more than what we as counsel had done when representing communities or groups whether in industrial action cases, political issues or subsequently in land restitution claims.

However it was also apparent that the formulation of the order presented to me for endorsement was couched in terms which suggested that I had already made substantive orders regarding the right to participate and had extended the issues beyond the scope of what the applicant contended was currently before me.

28. It has been my intention to do no more than ensure that all those who claimed an entitlement to oppose the application did so without any consideration of the merits of such entitlement.

I however appreciate Adv Sithole's concern that the manner in which the draft was prepared by opposing counsel may be construed as broadening the issues

prior to the court first deciding whether it is permissible to do so procedurally or substantively; in particular there may be individuals who would first require leave to intervene and be joined because they are in fact not a party to the current proceedings.

29. Although the problem arises from the broad description that the applicant appeared to have been compelled to adopt in citing the first respondent, it is nonetheless entitled to know which of the persons represented by Mabuza Attorneys are actually affected by the order granted and who are in truth attempting to be joined on other grounds and what the grounds are in order to enable the applicant to challenge the competency of doing so, if it is so minded.

In this regard it is evident that the Metro relies on the enforcement of rights of ownership. Nonetheless it claimed to have brought the application in order *“to protect its By Laws and prevent people from taking the law into their own hands by invading the houses built by the applicant in compliance with its constitutional mandate”* and then proceeded to state: *“Critically, it was estimated and agreed between the applicant and the intended beneficiaries that the first group of beneficiaries will be given their houses mid-August 2019”*.

The applicant's papers also warned that the beneficiaries may themselves take occupation of the structures, even if incomplete, that the conduct of those against whom the order is sought has the potential of disrupting peace in the area, disrupting the Metro's objectives and should the Metro not be granted the order then there is a likelihood that the unlawful activity will increase, that more people will be mobilized and invade the project which will lead to the unlawful appropriation of homes and stands in the Development by others.

30. On the Metro's own papers the situation is simmering and it is unlikely that it will be able to *“hold the line”* so to speak or continue to deploy both their own police units and those of SAPS indefinitely. The matter therefore continues to fester and remains urgent before me.

31. There therefore appear to be two broad categories of people who are being

represented by Mabuza Attorneys; those who fit the description of the persons cited as the first respondent and those who contend that they are entitled to be joined in the proceedings. In my view the applicant is entitled to know who falls within the first category and challenge either the joinder of anyone who does not. I am alive to the risk that an inadvertent joinder may otherwise occur because of the introduction of the automatic joinder provision in the order, which makes perfect sense and ordinarily would present no difficulties.

ORDER

32. I did not intend to be prescriptive as to how Mabuza Attorneys could best ensure that all those who were referred to in the description of the first respondent and who may be subject to the relief sought were identified as parties, bearing in mind that in terms of the order sought they would be automatically joined.

I leave it to the legal representatives to decide how to go about calling meetings to obtain a mandate from each of those to whom the *rule nisi* applies. To the extent that there are those who fall outside the description of the first respondent, and claim an entitlement to be joined despite not being affected by the actual relief sought they will have to be separately identified and will also have to identify the basis on which they believe they are entitled to be joined in the proceeding and describe the relief they believe they are entitled to seek in the proceedings currently before me.

33. In order to achieve procedural regularity and avoid the risk of misjoinder the following order is made so that the individuals affected by the order can be identified and distinguished from anyone else who believes that he or she is entitled to be joined in these proceedings and to identify the basis of the opposition to the *rule nisi* and any right contended for the following order is made:

1. *The rule nisi issued by the Court on 24 July 2019 is extended to 5 September 2019.*
2. *By 27 August 2019 separate lists shall be drawn of:*
 - 2.1 *The identity of those persons who are represented by Mabuza Attorneys- together with their physical address, identity number and signature- and who fall within the description of the first respondent and contend that they should not be subject to the relief sought by the applicant. In addition the list must indicate the terms of the mandate given to the attorneys in respect of the relief such persons seek;*
 - 2.2 *The identity of any other persons who are represented by Mabuza Attorneys- together with their physical address, identity number and their signature- who do not fall within the description of the first respondent and are not affected by the order sought by the applicant. In addition the list must indicate the terms of the mandate given to the attorneys in respect of the relief they seek;*
 - 2.3 *The lists shall further:*
 - (a) *Be organised in such a way that they group together family heads and their dependents if any*
 - (b) *In addition be grouped by reference to the community to which the persons belong or come from if they contend that their rights are determined by reference to membership of the community in question;*
 - (c) *Identify the rights, if any, the persons seek to assert before the court as the basis for opposing the confirmation of the rule nisi referred to above;*
 - (d) *Identify the rights, if any, the persons seek to assert before the court as the basis for any counter-application or extended relief and entitlement to be joined as a party;*
 - 2.4 *The lists will be attached to an affidavit in respect of which the following further*

details are addressed:

- (a) A brief historical account of the relevant issues that affect the persons participating in these proceedings and the basis on which they seek to be joined if they are not among those who fall within the description of the cited first respondent and are not affected by the relief sought by the applicant;*
 - (b) The rights they seek to assert in these proceedings, whether those rights are claimed by assertion or by reference to their infringement;*
 - (c) Whether any counter-application or extended relief is intended to be sought by any category of persons, and if so which category, by means of a collateral defence, if any, including a brief outline in respect thereof.*
3. *The documents referred to above shall be delivered by no later than 28 August 2019.*
4. *The parties will attend a hearing before Judge Spilg on 5 September 2019 at which such issues as are capable of being determined will be dealt with or at which the rule will be extended so that further affidavits may be filed, including any supplementary affidavit by the applicant.*
5. *The costs of 16 August 2019 will be costs in the cause.*



SPILG, J

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|---------------------------------------|--|
| DATES OF HEARING: | 24 July, 1, 14, 16 and 19 August 2019 |
| DATE OF WRITTEN ORDER AND REASONS: | 22 August 2019 |
| FOR APPLICANT: | Adv E Sithole Jose & Associates |
| FOR FIRST RESPONDENT: | Adv K Premhid Mabuza Attorney |
| FOR LEGAL RESOURCES CENTRE: | Attorney LJ Nel |