

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 17272/20

- (1) REPORTABLE: ~~YES~~/NO  
(2) OF INTEREST TO OTHER JUDGES: YES/NO  
(3) REVISED: YES/~~NO~~

Date: 1/10/2020

In the matter between:

**ELIAS WILLIAM MASANGO  
MASANGO INDUSTRIES (PTY) LTD  
NELSON JALI  
QEDA NGCOBO  
STEVE MILLION  
MDUDUZI MDLULI  
ERNEST MATHONSI  
NKOSIKHONA MNGUNI  
MISHECK SPONDO  
NOSIPHO NGUBANE  
TROMPIES NGWENYA  
ANELE JACU  
VESI MBUKISENI  
BONGANI NGUBANE  
MUSA HLATSWA YO  
ALFRED DAMBUZA  
NKULULEKO NDLOVU  
THEMBA SHOKA  
BERNAD NDABA  
FIGHTON NYONI  
MANDLA MPOFU  
MZIWENDODA KHANYE  
TAWANDA KUNZA**

1<sup>st</sup> Applicant  
2<sup>nd</sup> Applicant  
3<sup>rd</sup> Applicant  
4<sup>th</sup> Applicant  
5<sup>th</sup> Applicant  
6<sup>th</sup> Applicant  
7<sup>th</sup> Applicant  
8<sup>th</sup> Applicant  
9<sup>th</sup> Applicant  
10<sup>th</sup> Applicant  
11<sup>th</sup> Applicant  
12<sup>th</sup> Applicant  
13<sup>th</sup> Applicant  
14<sup>th</sup> Applicant  
15<sup>th</sup> Applicant  
16<sup>th</sup> Applicant  
17<sup>th</sup> Applicant  
18<sup>th</sup> Applicant  
19<sup>th</sup> Applicant  
20<sup>th</sup> Applicant  
21<sup>st</sup> Applicant  
22<sup>nd</sup> Applicant  
23<sup>rd</sup> Applicant

**NOKUTHULA NDLOVU**  
**JENET NDULINI**  
**LIHLE NDULINI**  
**HLUPHEPH DORIS SIBIYA**  
**MANDOZA LEBELE**  
**REANARD MUHAMED**  
**KWANELE MPOFU**  
**QHINGA NTSHAYINTSHAY**  
**NGQQABUTHO MHLANGA**  
**BHEKI JALI**  
**THABISILE ZULU**  
**LENARD BANAD**  
**NDUDUE NDEBELE**  
**THAMI KHUMALO**  
**CIPHO MUCHARI**  
**O'BRIAN NGUENYA**

24<sup>th</sup> Applicant  
 25<sup>th</sup> Applicant  
 26<sup>th</sup> Applicant  
 27<sup>th</sup> Applicant  
 28<sup>th</sup> Applicant  
 29<sup>th</sup> Applicant  
 30<sup>th</sup> Applicant  
 31<sup>st</sup> Applicant  
 32<sup>nd</sup> Applicant  
 33<sup>rd</sup> Applicant  
 34<sup>th</sup> Applicant  
 35<sup>th</sup> Applicant  
 36<sup>th</sup> Applicant  
 37<sup>th</sup> Applicant  
 38<sup>th</sup> Applicant  
 39<sup>th</sup> Applicant

and

**SUNSET BAY TRADING 156 (PTY) LTD**  
**SIBONGINKOSI MAGAGULA**  
**NATHAN LEN**

First Respondent  
 Second Respondent  
 Third Respondent

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## JUDGMENT

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### STRYDOM J:

[1] This is a spoliation application brought by 39 applicants (hereinafter referred to as “the applicants”) against the first respondent (hereinafter referred to as “Sunset Bay”) and the second and third respondents.

[2] Apart from a prayer directing that this application be dealt with as one of urgency, the applicants are seeking the following relief:

“2. That the respondents, forthwith restore occupation of the property, situated next to the Francois Oberholzer M2 Freeway, on the southern side and borders on Dennis Road and Wemmerpan Road, Village Main, Johannesburg (‘the property’), to the 1<sup>st</sup> to 39<sup>th</sup> applicants.

3. That the respondents be ordered, within 24 hours of this order, to deliver and erect 22 x six-person tents for the 3<sup>rd</sup> to 39<sup>th</sup> applicants to reside in and deliver and erect 5 x portable cabin toilets fitted with wash basins + water and 5 x portable cabin showers + water, at the property, until the respondents have rebuilt the 3<sup>rd</sup> to 39<sup>th</sup> applicants' 22 residences and communicable ablution facilities with five showers, five bathrooms, five toilets, five washing basins, laundry facilities and storage rooms, at the property, at the respondents' own cost.
4. That the respondents be ordered, within 14 days of this order, to rebuild the 3<sup>rd</sup> to 39<sup>th</sup> applicants' 22 residences and communal ablution facilities with the five showers, five bathrooms, five toilets, five washing basins, laundry facilities and storage rooms, at the property.
5. That the respondents and any one on their behalf, are interdicted and restrained from damaging and/or demolishing the residences and communal ablution facilities of the 3<sup>rd</sup> to 39<sup>th</sup> applicants at the property and from harassing and/or evicting the 3<sup>rd</sup> to 39<sup>th</sup> applicants from the property.
6. That costs of this application be paid by the respondents, jointly and severally, the one paying the other to be absolved on the scale as between attorney and client."

[3] There has been ongoing litigation between some of the applicants and some of the respondents pertaining to the property which is owned by Sunset Bay. There were 22 rooms and communal ablution facilities with five showers, five bathrooms, five toilets, five washing basins, laundry facilities and storage rooms ("the structures") erected on the property.

[4] It is alleged by the applicants that they were in undisturbed possession of these structures on the property and that they were unlawfully deprived from their possession by the respondents on 18 September 2020. On this date, according to the applicants, unknown people came in two minibus taxis and totally demolished the structures. Photographs were attached to the founding papers evidencing the total destruction which had rendered the units to mere rubble and thereby the applicants were deprived of their undisturbed possession.

- [5] It was common cause that there was ongoing litigation for the eviction of the alleged unlawful occupiers and that the demolition of the structures on the property was unlawful.
- [6] The only issue as far as the spoliation application is concerned, is who was responsible for the destruction and, if it is to be found to be the respondents, what remedy should be ordered, if any.
- [7] Before dealing with the merits of the application the court should first deal with the urgency of the matter as this application was brought on an extremely urgent basis with only one day afforded to the respondents to file answering affidavits.

### **Urgency**

- [8] According to the applicants, the second applicant, Mr Magagula, became aware of the demolition of the structures, which took place on 18 September 2020, on Monday 21 September 2020 on his return from an area where there was no cell phone reception.
- [9] On Monday 21 September 2020, during the late afternoon, papers were emailed to the respondents' attorney. The amended notice of motion indicated that the matter is set down in this court for hearing on Wednesday 23 September 2020, at 10h00. The respondents were required to file a notice of their intention to oppose the application by 12h00 on 22 September 2020 and file an answering affidavit on or before 9h00 on 23 September 2020, an hour before the hearing.
- [10] The applicants' basis for the extreme urgency was premised on the fact that their primary residences and that of their families were demolished leaving them stranded. They required urgent redress immediately as should they bring the application in ordinary cause their need of housing would not be satisfied in the interim.
- [11] The applicants failed to set out any reasons why the application was not prepared and timelines set for a complete application, ready and paginated by

12 noon on Thursday, to be set down for hearing on the next Tuesday as required by paragraph 9.23 of the Practice Manual of this court (“the Practice Manual”). The applicants failed to explain in any detail why it was set down with effectively one court day’s notice.

- [12] Despite the short notice, the respondents however managed to file an answering affidavit in the limited time afforded. No replying affidavit was filed.
- [13] I am of the view that the applicants breached the requirements set in the Practice Manual but, despite this, this court is will condone the applicants’ failure for the obvious reason that the applicants were rendered without housing and shelter through unlawful actions by people who demolished structures on the property.

### **Background circumstances**

- [14] Before dealing with the merits of the matter, a brief synopsis of the history of previous and ongoing litigation between the parties should be considered. Papers in these matters filed in this court pertaining to the other applications were uploaded on CaseLines although they were not properly cross-referenced in the current founding affidavit. Before me the previous case history became common cause.

- 14.1 During or about February 2019, Sunset Bay launched an eviction application pertaining to the property against the first and second applicants (therein cited as the first and second respondents). An order under Case No. 4269/19 was granted on 5 March 2019.
- 14.2 During or about April 2019, 27 applicants brought an application under the same case number of 4269/10 for the stay of execution pending a rescission application now also citing the Sheriff of the High Court, Johannesburg Central. Pursuant to this application a written undertaking was provided by Sunset Bay not to execute pending the finalisation of the rescission application mentioned in Part B of that application. This application is still pending.

- 14.3 On or about August 2019, Sunset Bay launched a further application for eviction of 33 respondents (the majority of whom are the same as in the current application) from Portion 97 of the Farm Turffontein. This application became opposed and an answering affidavit was filed. This litigation is also still pending.
- 14.4 During or about July 2020, Sunset Bay, with the current second and third respondents, filed an urgent application under Case No. 17272/20 in which the first respondent was cited as follows:
- “The unknown individuals who entered and/or trespassed and/or attempted to settle on the immovable property known as Unit 1 and 2 of Remaining Extent of Portion 51 (a portion of portion 44) of the Farm Turffontein 96, Registration Division IR, the Province of Gauteng.”
- 14.5 The second respondent was Elias William Masango (the first applicant in the current application), with the police being the third and fourth respondents. In this application, an order was obtained from this court from my brother Spilg J in the form of a rule nisi ordering the first and second respondents to immediately restore the possession of two units on this property to Sunset Bay and Mr Magagula (the second respondent in this current application).
- 14.6 The respondents in that application filed an answering affidavit and that application is also still pending. This matter was on the court roll on 26 August 2020 and the rule was extended to 14 October 2020.
- [15] Whilst the abovementioned matters were still pending, the structures were demolished and the current application was launched, referred to by the applicants as a “counter application”, under the same case number as the matter in which Judge Spilg made an order despite the fact that all the parties in this application and the counter application do not correspond.
- [16] The applicant also served a notice in terms of which the return date of 14 October 2020 was anticipated, to this urgent court to be heard on 23 September 2020.

- [17] In my view, the respondents correctly pointed out that the return date of the rule nisi could not be anticipated as the current applicants in their capacity as respondents in the previous application were parties that consented to the extension of the return day of 14 October 2020.<sup>1</sup>
- [18] During argument before this court, counsel for the applicants, Mr van der Merwe, abandoned the notice of anticipation and continued to argue the spoliation application, not as a counter application, but as a substantive application.

### **The spoliation application**

- [19] It is trite that in order to obtain a spoliation order, two allegations must be made and proven:

- 19.1 That the applicants were in undisturbed possession of the property; and
- 19.2 That the respondents deprived them of their possession forcibly or wrongfully against their consent.

- [20] As far as the first requirement is concerned, the respondent denied that the applicants were in possession of the property and the structures thereon. The denial is bare and unsubstantiated. In previous litigation the same parties featured and at least two of the current respondents claimed for the eviction of the current applicants. The court is satisfied that the applicants have shown on a balance of probabilities that they were the occupants of the structures on the property and that they were deprived of their possession in an unlawful manner without a court order.
- [21] The situation pertaining to the so called units 1 and 2 is on a somewhat different footing. Mr Magagula, the second respondent, obtained possession of these units but was spoiled. This led to the court order made by my brother Spilg J, in terms of which he ordered, pending a return day, for the restoration of possession of these units to Sunset Bay and Mr Magagula by Mr

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<sup>1</sup> See *Peacock Television Company (Pty) Ltd v Transkei Development Corporation* 1998 (2) SA 259 (Tk) at 262G.



Masango, the current first applicant. It is not clear on the papers before me to what extent this order was executed but what transpired thereafter was that some unknown people came and demolished all units, including units 1 and 2 and effectively evicted the occupants from all units. The question remains who was responsible for this.

**Who was responsible for depriving the applicants of their possession?**

- [22] In the founding affidavit, it is alleged that two taxis filled with persons (the “demolishers”) appointed by the agents of Sunset Bay obtained these unknown people on two occasions to demolish the houses of the applicants. The agents are the second and third respondents. Apart from this allegation, there is no further evidence to be found in the founding affidavit as to who was responsible for the destruction.
- [23] On 22 September 2020, at 4:33pm, the applicants emailed a confirmatory affidavit of one Matikwane Mgobodi Mathews to the respondents’ attorney. There is no reference to this affidavit in the founding papers and the status of this affidavit, referred to as a “confirmatory affidavit”, will be dealt with later in this judgment. The answering affidavit filed by the respondents did not deal with this affidavit. The reason is obvious. This affidavit was not referred to in the founding affidavit.
- [24] In the answering affidavit, deposed to by Mr Kevin Garth Schroeder, a director of Sunset Bay, reference was made to two confirmatory affidavits deposed to by the second and third respondents. These affidavits were not attached to the answering affidavit. During the hearing of this matter the court was informed that this was an oversight. The court ruled that these affidavits could be uploaded on to CaseLines and once this has happened same would form part of the papers. This was subsequently done and copies thereof were also emailed to the court’s registrar.
- [25] In the answering affidavit it was admitted that the second and third respondents were acting as the agents of Sunset Bay. The respondents however denied that they were responsible for demolishing the structures. It



is asserted that the respondents all along attempted to amicably and peacefully negotiate with the occupiers of the property to vacate. Two agreements evidencing that occupiers were paid money to leave units 1 and 2 were attached to the answering affidavit.

- [26] It is further averred that on 15 September 2020, which was three days after the initial partial demolition of the structures, Sunset Bay's attorneys wrote to the attorneys of the applicants and stated that Sunset Bay had no knowledge of the men that attended at the premises and demolished the structures. It was further denied that the third respondent instructed anyone to demolish the structures. Further, that the respondents at all times acted lawfully and respected the rule of law. It was pointed out that Mr Masango is the person who acted unlawfully by depriving the occupants of units 1 and 2 from their undisturbed possession and that a complaint had been laid with the South African Police Service.
- [27] The question for consideration by this court is if the applicants, on a balance of probabilities, have proven that it was the respondents, acting jointly, who were responsible for sending the people to the property to demolish the structures.
- [28] Before the probabilities can be considered the facts should first be established. Clearly there exist a dispute of fact in this matter, which in motion proceedings would be decided on the version of the respondents, together with the undisputed facts contained in the founding affidavit, unless it can be said that the denial by the respondents of a fact alleged by the applicant is not such as to raise a real, genuine or bona fide dispute of fact.<sup>2</sup>
- [29] To consider this, the starting point is to consider the facts alleged by the applicants. It is stated that the second and third respondents, the agents of Sunset Bay, appointed the people in the taxis to demolish the structures. No factual foundation is laid for this allegation, which is stated as a fact. This allegation, in my view, is nothing more than a conclusion based on speculation and on the applicants' own believe. If this statement had its origin in hearsay evidence, nothing to this effect was stated in the founding affidavit. The

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<sup>2</sup> *Plascon Evans Paints v Van Riebeeck Paints* 1984 (3) SA 623 (AD) at 634E-I and 635A-C.

veracity of this allegation stands unsupported by any evidence. Before reliance can be placed on a statement contained in an affidavit the court must be satisfied by the inherent credibility of the applicants' factual averment.<sup>3</sup>

[30] The respondents specifically denied this statement made on behalf of the applicants. Mr Van der Merwe, on behalf of the applicants, argued that the statements about the involvement of the respondents required more than a bare denial. He referred the court to the well-known case of *Soffiantini v Mould*<sup>4</sup> and urged the court to take a robust, common sense approach to this dispute on motion.

[31] In the matter of *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*<sup>5</sup> it was found that a bare denial of an applicant's material averments cannot be regarded as sufficient to defeat an applicant's right to secure relief by motion proceedings in appropriate cases. Enough must be stated by respondent to enable the court to conduct a preliminary examination and to ascertain whether the denials are not fictitious intended merely to delay the hearing. The question remains if this is an appropriate case to apply this test. In my view, should a respondent possess no more facts to counter an allegation save to deny the allegation, it cannot be expected of a respondent to provide further facts. If a respondent, as in this case, is accused of demolishing a structure but knows nothing about it, it cannot be expected of such a respondent to place further facts before the court, save to deny the allegation. In my view

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<sup>3</sup> See *Plascon Evans* supra at 635 A-B where it was found as follows

"If in such a case a respondent has not availed himself of his right to apply for the deponent's concern to be called for cross examination under rule 6(5)(g) of the Uniform Rules of Court (*Peter Sen v Cuthbert and Co Ltd* 1945 AD 420 at 428; the *Room Hire* case supra at 1164) and the court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks."

<sup>4</sup> *Soffiantini v Mould* 1956 (4) SA \_\_\_\_ EDLD at 154 G-H:

"It is necessary to make a robust, common sense approach to a dispute on motion as otherwise the effective function of the court can be hamstrung and circumvented by the most simple and blatant stratagem. The court must not hesitate to decide an issue of fact on affidavit merely because it may be difficult to do so. Justice can be defeated or seriously impeded and delayed by an over-fastidious approach to a dispute raised in affidavits."

<sup>5</sup> 1949 (3) SA 1155 (T) at 1163.

this is not an appropriate case where more factual allegations are required beyond the denial.

[32] Accordingly, I am of the view that the bare denial of the respondents would create a real factual dispute which cannot be decided on the papers before this court. The parties, for the obvious reason that the matter was urgent, did not ask this court to refer the matter for the hearing of oral evidence.

[33] In the *Plascon Evans* matter the court indicated that there may be exceptions to the general rule, as, for example, where the allegations or denials of the respondent are so far fetched or clearly untenable that the court is justified in rejecting them merely on the papers. In such a case the version of the applicants will prevail. To consider this a court will have to weigh the probabilities in light of common cause or undisputed facts. In casu, the question may rightly be asked who else would have had an interest in the destruction of the structures but the applicants. On the other hand, the court must consider that the respondents, before the destruction, did not revert to self-help and sought the intervention of the courts. There was a return date set not too far in the future. The question may rightly be asked why the respondents would now, whilst litigation is still pending, take the law into their own hands? In my view the denial by respondents that they are not responsible for the destruction is not so far fetched and untenable that it cannot be accepted. There may be other people opposed to the applicants' occupation of the structures for whatever reason. This remains speculation and it is not for this court to venture in that direction. Similarly, it could not have been expected of the respondents to suggest who else could have been responsible for the destruction. It should also be noted that according to the applicants they were occupying the property with the knowledge and consent of Mr Schroeder, the director of Sunset Bay the owner of the property. If this was indeed the case why would respondents destruct its own property, rendering people, living on the property with consent, homeless?

[34] The applicants emailed a further affidavit to the respondents' attorney after the application was served. This affidavit was referred to as a "confirmatory affidavit" by applicants but has not been mentioned or alluded to in the

founding affidavit. It was deposed to by an unknown person who is not one of the applicants. In this affidavit the deponent refers to meetings with the third respondent who needed assistance to evict the people from the place occupied by Mr Masango, the first applicant. It is stated that nothing came about as a result of the meeting. The name of a further person with the name of Masikane is mentioned and he even threatened to shoot the first applicant.

[35] As this affidavit was not part of the application when launched the respondents never answered the allegations made therein. An applicant must establish his case in the founding affidavit. As these further allegations were not contained in the founding affidavit the court cannot place reliance thereon in deciding this application. Moreover, the allegations contained in the affidavit are not such as to infer that the respondents were responsible for the destruction of the structures.

[36] To conclude, this is not a case where the court should take a robust, common sense approach and find that respondents were responsible for the destruction and spoilation of the applicants. Insufficient factual particularity has been provided by the applicants for this court to find that respondents' denial of participation should be rejected.

[37] The applicants have shown that their possession of the property was unlawfully taken away from them but failed to prove that the respondents were responsible for this. Consequently, the respondents cannot be ordered to restore occupation of the property, as prayed for in prayer 2 of the notice of motion, nor be ordered to provide temporary housing or reconstruction of the structures. The application falls to be dismissed and cost should follow the result.

[38] The following order is made:

38.1 This application is dismissed with costs.

A handwritten signature in black ink, appearing to be 'R. M. M.', is written over a horizontal line.

**R. STRYDOM**  
**JUDGE OF THE HIGH COURT**  
**GAUTENG LOCAL DIVISION**  
**JOHANNESBURG**

**Date of hearing:** 23 September 2020

**Date of Judgment:** 1 October 2020 -

**Counsel for the Applicant:** Adv. Van der Merwe

**Counsel for the Respondent:** Adv. Bester