REPUBLIC OF SOUTH AFRICA

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

Case No: 10803/2019

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

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SIGNATURE **DATE:**11 November 2021

In the matter between:

CITY OF EKURHULENI
METROPOLITAN MUNICIPALITY **Applicant**

and

THE RESIDENTS OF THE IMMOVABLE PROPERTY
KNOWN AS TWATWA EXTENSION 34
(Barcelona Ext. 24):
(whose names are set out on Annexure A) **First respondent**

SOUTH AFRICAN POLICE SERVICES (TWATWA) **Second respondent**

CITY OF EKURHULENI METROPOLITAN POLICE DEPARTMENT **Third respondent**

JUDGMENT

MANOIM J

INTRODUCTION

[1] This is an application to confirm a rule nisi that was granted by Tsoka J on 5 April 2019. The application was meant to be returnable on 30 April 2019. Yet it only came before me for confirmation on 11 October 2021, thus two-and-a- half years after the rule was granted. This extraordinary delay explains the difficulty I have with this matter.

[2] On 5 April 2019, the applicant, the City of Ekurhuleni (the City) brought an application to interdict a group of people described collectively as, the first respondent from invading open land owned by the City popularly known as Barcelona Extension 34. (the property). The factual basis upon which the order sought was premised was that, the respondents were trespassers but not yet occupiers.

[3] The first respondents engaged the services of an attorney from the LAIC Law Clinic. On the day the matter came to court, the attorney had traffic difficulties and so arrived late; by then the order had been granted and court had adjourned.

[4] The first respondent then filed an answering affidavit but only in July 2019 thus long after the date set as the return day.

BACKGROUND

[5] In May 2019, the first respondents brought an urgent interdict against the City which the latter opposed. Although this application has served before two judges, I am advised that it has yet to be heard.

[6] In September 2019, the first respondents brought yet another urgent application. This one served before Makume J who dismissed the action.

[7] This intervening litigation partially, although not completely, explains why it has taken so long for the subject of the *rule nisi* confirmation to be heard.

[8] It is also common cause that at some stage – there is no agreement exactly when the first respondents were in occupation of the property and that pursuant to the order of Tsoka J, these homes had been knocked down and destroyed sometime in September 2019.

[9] Since September 2019, the property has been vacant. This is why at the beginning of the hearing I asked if the matter had not become moot. The answer from the first respondent's attorney Mr. Mdabe was that, although his clients were no longer on the land, and it was not clear how many wanted to return to it, the principle of the matter was important to enable the court to a decide in view of potential future negotiations over the land between the leaders of the group and the City. For the City, Mr Sithole contended that whilst the relief was moot, having the Tsoka J order confirmed would remove any residual dispute that might exist between the parties.

[10] The crux of the dispute turns on whether members of the first respondent group were in occupation of the property at the time the interdict was brought before Tsoka J in April 2019. If they were, the argument is that the City had not complied with the procedural safeguards that occupiers enjoy under the PIE legislation in particular since the first respondents claim to have occupied the property for more than six months prior to the litigation, imposing greater obligations on the City. The first respondent has other points it raises but this is the key issue.

[11] The City contends that the first respondents were not occupiers at the time of the order (although it concedes that occupation took place later on, it must be noted that occupation must have been unlawful given the Tsoka J order then in existence.) and hence there is no question of non-compliance with PIE. The City also contends that the effect of the Makume J decision dismissing the urgent application related to the subject matter of the Tsoka J and hence on the point of whether there had been occupation at the time the order was granted, this matter has now been decided.

[12] In his judgment Makume J identified the issues he had to decide in this way:

> *"In this application the Applicants seeks an order staying or suspending the order by Tsoka J. Secondly declaring that the Applicant is in an emergency housing situation and to provide such emergency having accommodation to the Applicants."*

[13] One of the issues Makume J had to determine was whether the first respondents were still in occupation of the property. An inspection *in loco* by counsel was ordered by the judge which proved indecisive as to the question of whether the first respondents were still in occupation or not. He was shown photos of the destroyed structures and as he put it *"… nothing more*." Makume J found that when the City and its servants destroyed the structures in September 2019, they did so lawfully in terms of Tsoka J's order. On that basis Tsoka J dismissed the application for urgent relief by the first respondents.

[14] The City argues that this means that the point of whether there was occupation has now been decided by Makume J. On the basis of his decision occupation at the relevant time was not established. The first respondent contends that since the order has not yet been confirmed the point is still open before this court to determine.

[15] I accept that notwithstanding the decision of Makume J he was deciding an interdict and not confirming Tsoka J's *rule nisi*. This then, means that I must still determine whether the rule should be confirmed.

[16] However, this is now two and half years later. It is now common cause that at some stage the first respondents were in occupation of the property but have not been there since September 2019. The dispute is about whether they were in occupation when the order was granted (the first respondents version) in which case the City acted unlawfully or whether they only took occupation after the order was granted (the City's version) in which case they had occupied in defiance of a court order. But if they are no longer there and haven't been for over two years there seems little point in engaging, *post facto,* in an abstract analysis of the papers to decide if the order should not have been granted. The occupiers are no longer occupying the property and if they seek to occupy it again whether or not the order is confirmed (simply a matter of what the *status quo* was on the 5 April 2019) will have no bearing on the later situation. In short the issue of occupation is now moot.

[17] In an oft cited passage, Ackerman J in ***National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*** **2000 (2) SA 1 (CC),** said the following:

> *"A case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law"*[1]

[18] Here Ackerman J referred to an earlier case of ***JT Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others*** **1996** (12) BCLR 1599 (CC); 1997 (3) SA 514 (CC), where Didcott J said the following at para 17:

> *"[T]here can hardly be a clearer instance of issues that are wholly academic, of issues exciting no interest but an historical one, than those on which our ruling is wanted have now become."*

[19] In ***Afriforum NPC and others v Eskom Holdings Soc Ltd and others*** **[2017] 3 All SA 663 (GP)** Murphy J at paragraph 112 stated:

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[1] See paragraph 21 and the quote cited is contained in footnote 18

"A prerequisite for deciding an issue despite the fact that it is moot is that any order the court may make must have some practical effect on the parties or someone else. Relevant factors include the nature and extent of the practical effect that any possible order might have, the importance of the issue, its complexity and the fullness or otherwise of the argument that has been advanced by the parties."

[20] The same can be said of this matter. It is too late to come to any conclusion of whether the first respondents were indeed in occupation on 5 April 2019. Such a point is now entirely moot. It would have no practical effect.

[21] Does this then mean that this court should make no order at all if the matter has become moot? I am of the view that confirming the order would at least quell some points of controversy and can easily and readily be dealt with. First the point was taken that the City does not own the land. This is not correct, the City owns the property, and its supplementary affidavit establishes that. The fact that the land has not yet been proclaimed does not detract from the fact that the City owns it. Another point related to the deficiency of the Notice of Motion because it was incorrectly dated. But that point is also moot given that the first respondent was aware of proceedings on the day and its attorney had attempted to get to court but due to traffic congestion on the day arrived too late at court. Thus, the error did not cause any prejudice.

[22] Then there was a point that the City had ignored drawing the attention of the court to a letter written to one of its executives from the attorney for the LAIC which indicated that the first respondents were in occupation of the property. This letter was written, and it is alleged must have been received by the City, prior to the Tsoka J order being granted. However even if this was so, the body of the letter refers not to the property (called Barcelona), but to Winnie Mandela; it is common cause that this property is in Tembisa. Thus, the City did not need to raise the

existence of this letter, assuming it had it, in the proceedings in relation to the property.[2]

[23] The City was also criticised for not including in its papers, the history of earlier evictions, for which the City, and the second and third respondents had been responsible for in 2018. The City denies it needed to do so as these, on its version, were again situations where the City acted against trespassers not occupiers. Whilst I cannot decide the correctness of this point now, I would agree full disclosure of this history would have been appropriate, but it too is now moot.

[24] The remaining points raised by the first respondent for me to consider are all related to whether the first respondents were occupants and since this point is now moot for the reasons I have explained, so too are all of these.

[25] The problem for the first respondents is that they embarked on ancillary litigation which failed and did not attend timeously to opposing the interdict that led to the Tsoka J order.[3] Had they done so perhaps the issues may not now be moot.

[26] I have no basis not to confirm the rule nisi and will do so. The City has not sought costs, so I make no order in this regard.

ORDER:-

[27] In the result the following order is made:

1. The rule nisi given by Tsoka J on 5 April 2019 is confirmed.
2. There is no order as to costs.

[2] In the 're' section of the letter. it refers to the property as Barcelona as it is popularly known .However in the body of the letter in two places it refers to Winnie Mandela. The reasonable reader would assume it was referring to the latter and not the former.

[3] This is not to detract from the enormous energy the LAIC has put into this litigation. The answering affidavit required the input of the personal circumstances of more than 100 people.

N. MANOIM

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION

JOHANNESBURG

Date of hearing: 11 October 2021

Date of order and reasons 11 November 2021

Appearances

Applicant: Mr. E. Sithole instructed by Modiga Attorneys

Respondent. Mr. L. Mdabe of the LAIC Law Clinic.