



Republic of South Africa  
In the High Court of South Africa  
(Western Cape Division, Cape Town)

CASE NO: 6084/15

In the matter between:

**DENEL SOC LIMITED**

Applicant

and

**PERSONS WHOSE IDENTITIES ARE TO THE  
APPLICANTS UNKNOWN AND WHO HAVE  
ATTEMPTED OR ARE THREATENING TO  
UNLAWFULLY OCCUPY ERF 52676, KHAYELITSHA**

Respondent

and

**XOLANI JACK AND EIGHTY APPLICANTS LISTED IN  
ANNEXURE "A" TO THE APPLICANT'S NOTICE OF  
COUNTER-APPLICATION**

One Hundred and Ten  
Applicants

and

**DENEL SOC LIMITED**

First Respondent

**STATION COMMANDER NOLUNGILE POLICE  
STATION, KHAYELITSHA SHERIFF OF KHAYELITSHA**

Second Respondent

**MINISTER OF POLICE**

Fourth Respondent

**CITY OF CAPE TOWN**

Fifth Respondent

CASE NO: 6143/15

**DENEL SOC LIMITED**

Applicant

and

**THE UNLAWFUL OCCUPIERS OF ERF 52676,  
KHAYELITSHA**

First Respondent

**THE CITY OF CAPE TOWN**

Second Respondent

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**JUDGMENT: DELIVERED ON 24 JUNE 2015**

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**MANCA AJ:**

1. The applicant is Denel Soc Limited ("Denel").
2. Denel owns vacant land situated in Khayelitsha, known as Erf 52676, Khayelitsha ("the property"). Denel has been negotiating with the City of Cape Town ("the City") and the National Housing Development Agency for some time with a view to selling the property. If that is done it is anticipated that the City and/or the Housing Development Agency could develop low cost housing on the property.
3. The property, which is adjacent to an established informal settlement in Khayelitsha known as T Section, is fenced off and Denel employs a private security company, West Run Security ("West Run") in order to secure the property. One of West Run's principal tasks is to guard against any unlawful invasion of the property.
4. There are three applications before this Court, all of which have their genesis in an invasion of the property by a large number of people on Monday, 6 April 2015.

5. In the first application Denel seeks an order interdicting and restraining an unknown number of persons from, *inter alia*, entering upon or commencing to occupy the property and from commencing to erect or occupy any structure on the property ("the interdict application").
6. On the evening of 7 April 2015 Denel obtained an interim interdict, in the form of a rule *nisi*, on the terms sought by it. The interim order, however, made it clear that it was not to apply to persons in occupation of the property when the interdict application was launched. The interdict application is opposed by a group of persons who allege that they were in occupation of the property and were unlawfully removed from the property subsequent to the implementation of the interim interdict granted under the interdict application. For the sake of convenience I will refer to these persons as the respondents.
7. The second application is a spoliation application which the respondents have brought by way of a counter-application to the interdict application. In that application the respondents seek an order directing their return to the property and the reconstruction of their dwellings which they allege were demolished pursuant to the implementation of the interim order. They also seek an order declaring that the conduct and actions of Denel, the Sheriff of Khayelitsha ("the Sheriff"), the City and the South African Police ("the Police") in demolishing and/or dismantling the informal structures erected by them on the property to be unlawful. The Sheriff, the

Police and the City have been joined as respondents in the spoliation application. The spoliation application is opposed by Denel, the City and the Police. The Sheriff, who has filed an affidavit, abides the Court's decision.

8. In the third application Denel seeks the eviction of persons who breach the interdict by entering or re-entering and/or occupying the property ("the eviction application"). A rule *nisi* operating as an interim interdict was granted on 10 April 2015 and subsequently extended. It is common cause that when the interdict application was launched there was no one in occupation of the property other than Denel. That remains the position.
9. All of the applications were consolidated pursuant to an order of this Court dated 21 April 2015. The purpose of a consolidation is, in broad terms, to have issues which are substantially similar tried at a single hearing and to ensure that one finding concerning a factual dispute involving a number of parties can be made.<sup>1</sup>
10. Answering and replying affidavits have been delivered in all the applications.
11. In my view, the real issue between the parties is whether the respondents were unlawfully dispossessed of the property when the interim order in the

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<sup>1</sup> Erasmus, *Superior Court Practice*, at B1-98A and B1-99.

interdict application was implemented on 8 April 2015.

12. This is so because the respondents do not dispute Denel's entitlement to the interdict but allege that they were not part of the group of people who invaded the property on 6 April 2015. The respondents allege that they had been in occupation of the property since February 2015 and that, accordingly, the interdict did not operate against them. In fact, in their answering affidavit, which served as the founding affidavit in the spoliation application, they conceded that Denel was entitled to protect its property from further unlawful occupation. Their whole case was, and is, that they were in occupation of the property prior to 6 April 2015 and that they were unlawfully dispossessed on 8 April 2015 when the interim order was implemented.
13. It follows that if the respondents were already in occupation of the property prior to 6 April 2015 and that they were unlawfully dispossessed of that property, in contravention of the terms of the interim order, they will be entitled to an order returning them to the property pursuant to their spoliation application. It also follows that, if they were dispossessed of the property unlawfully by the Sheriff and/or the City and/or the Police in purported implementation of the interim interdict, they will be entitled to an order declaring the action of those persons to be unlawful.
14. The eviction application, which was launched on 8 April 2015, and in respect of which an interim interdict operating as a rule *nisi* was granted

on 10 April 2015, was launched at a time when there were no persons occupying the property. The order which was granted catered for the prospective unlawful occupation of the property.

15. In my view, if the respondents succeed in their spoliation application, they will be entitled to return to the property and will not be prevented from returning by the eviction order.
16. The consolidated application was argued on the papers and none of the parties sought to refer any of the issues in dispute to oral evidence.
17. The consequence is that, to the extent that Denel and the respondents seek final relief on motion, they both must, in the event of conflict, accept the version set up by their opponent when the latter's allegations are, in the opinion of the Court, not such as to raise a real, genuine or *bona fide* dispute of fact or are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers.<sup>2</sup>
18. A real and genuine dispute of fact exists where the Court is satisfied that the party who purported to raise the dispute had seriously and unambiguously addressed the disputed facts. Where a party rests his case on a bald assertion or a bare denial, in circumstances where that party must necessarily be able to provide evidence in support of the

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<sup>2</sup> *Wightman t/a JW Construction v Headfour (Pty) Ltd & Another* 2008 (3) SA 371 (SCA) at paragraph [12].

allegation on denial, the Court would generally have difficulty in finding that the test was satisfied.<sup>3</sup>

19. In the present case the respondents simply allege, without any further elaboration whatsoever, that they have been in occupation of the property since February 2015. Although there are 110 applicants in the counter-application, none of them have stated when in February 2015 they moved onto the property, where they came from, how they built their houses, who resided in their houses and how many houses were on the property when, on their own version, a large number of people invaded the property on 6 April 2015.
20. As I have indicated, Denel, the City and the Police delivered answering affidavits to the spoliation application. The answering affidavits delivered by Denel and the City dealt extensively with the issue of whether or not any of the respondents had been in occupation of the property prior to 6 April 2015, as alleged by them.<sup>4</sup> The affidavit delivered by the Police dealt with their role during the period 6 to 8 April 2015.<sup>5</sup>
21. All of these answering affidavits dealt with the issues in great detail and the affidavits delivered on behalf of the City and the Police were not

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<sup>3</sup> *Wightman (supra)* at paragraph [13].

<sup>4</sup> The City asked for costs in the event that the counter-application was dismissed. The Police did not.

<sup>5</sup> The affidavit delivered by the Police made it clear that they placed a monitoring role and did not

replied to. The affidavits deposed to by the City and Denel incorporated video footage taken on 7 April 2015 at the property. Neither the authenticity of the video footage nor the contents thereof was challenged by the respondents. Although the respondents delivered a replying affidavit to Denel's answering affidavit, the deponent made no attempt to deal with the factual issues contained therein and the allegations contained therein amounted to nothing more than a bare denial of those issues which were disputed.

22. The picture which emerges from those affidavits is that there were no persons in occupation of the property prior to 6 April 2015. West Run regularly patrolled the property and detailed reports were made on a daily basis of any activity which took place on the property which might in any way impinge on its security. There were no recorded incidents of any persons being in any sort of occupation of the property prior to 6 April 2015. This was confirmed in the affidavit deposed to by Mr Henry of the City, who knew the property and regularly patrolled in that area.
23. By contrast, it appeared that a large number of people descended on the property on Monday, 6 April 2012, which was a public holiday.
24. These people entered the property with a view to erecting informal structures thereon. To this end they began clearing the ground by, *inter*

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take part in the removal of any structures from the property.



*alia*, lighting fires and demarcating stands by placing pegs in the ground. They prevented the Fire Department from putting out the fires.

25. Law enforcement officials from the City and the Police attended at the property very soon after the first group of people came onto the property.
26. On 7 April Mr West of West Run informed the persons attempting to occupy the property that they were on the property illegally and that they should remove themselves. This was also told to them by the officer in charge of the SAPS members who were on the scene.
27. At about early evening on 7 April 2015 there were somewhere between 20 to 30 incomplete structures on the property. These structures were unoccupied and contained no personal possessions.
28. On the morning of 8 April 2015 there were approximately 10 to 15 people on the property. At that stage there were approximately 10 structures that had either one, two, three or four side sheets (made mostly of corrugated iron or wooden planks), together with a roof. There were about four structures that had four side barriers and a roof. None of these structures were occupied and there was no furniture in any of the structures. There were also approximately another 30 structures in various states of construction. Some consisted only of four poles, others had one side sheet and some just had four pegs. None of these structures had a roof

and were incapable of occupation.

29. Law enforcement reconvened at the property on the morning of 8 April 2015. At approximately 09h10 the Sheriff arrived at the property and commenced reading out the order to those present and provided copies to them.
30. Shortly thereafter, the City's law enforcement officials moved onto the property and dismantled all the unoccupied structures.
31. There were no occupied structures on the property. The materials were removed from the site of the invasion to a different part of the property identified by Denel and remain there.
32. In order to succeed in their spoliation application the respondents must establish that there were in peaceful and undisturbed possession of the property and that they were unlawfully deprived of such possession.<sup>6</sup>
33. Having regard to the facts to which I have referred, there can be no doubt that the respondents had not been in occupation of the property since February 2015, as alleged by them.
34. Notwithstanding their evidence to the effect that they were not part of the group of people who came onto the property on 6 April 2015 and who

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<sup>6</sup> *Nino Bonino v De Lange* 1906 TS 120 and *Scoop Industries (Pty) Ltd v Langlaagte Estate and GM Co Ltd (in Vol Liq)* 1948 (1) SA 91 (W).

began to demarcate stands and erect structures thereon, Mr Twalo, who appeared for the respondents, argued that the respondents were nevertheless in occupation of the property and had been dispossessed of that occupation by the manner in which the interim order was implemented. They were accordingly entitled to protection under the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act ("PIE").

35. It is accordingly necessary for me to decide whether the respondents, who could only have come onto the property during the land invasion which commenced on 6 April 2015, were in occupation of the property and entitled to protection by virtue of the terms of the interim order and PIE.
36. In *Fischer v Ramahlele*<sup>7</sup> the SCA held that the mere existence and the intention of the builder of an informal structure to occupy it is not sufficient to determine that such a person is an unlawful occupier and entitled to protection under PIE. This is because the nature of the possession upon which the *mandament van spolie* is based involves factual control as well as the intention to derive some benefit from the land.
37. The facts in this case indicate that from the moment the respondents entered onto the property they were met, firstly with a presence of law enforcement officials who monitored their activities, and then secondly

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<sup>7</sup> 2014 (4) SA 614 (SCA) at para [22].

were told by West Run that their presence on the property was illegal and that they should remove themselves.

38. It is also clear that during the period 6 April 2015 to 8 April 2015 - when the interim order was implemented - that the respondents were in the process of attempting to occupy the property and that their occupation could not be said to be peaceful, stable and undisturbed.
39. What the respondents were attempting to do, despite being told that their conduct was illegal, was to wrest possession of the property from Denel.
40. A person cannot be said to be in occupation of property when he or she is involved in a resisted process of trying to assert possession and the *mandament van spolie* will not be of assistance to him or her if the best he or she can prove is an attempt to grab possession to which there is continued resistance.<sup>8</sup>
41. In this case, the attempt to grab possession of the property, which met with resistance from the outset, is not protectable under the *mandament*.
42. None of the persons who came onto the property on 6 April 2015 were, in any sense, in occupation of the property when the interim interdict was granted on 7 April 2015 or when the order was implemented on 8 April 2015.

43. It accordingly follows that the spoliation application must fail and that Denel is entitled to confirmation of the interdict.
44. It also follows that the Sheriff and the City did not act unlawfully in removing the structures from the property.<sup>9</sup>
45. The remaining question is whether or not the eviction order should be confirmed.
46. I am of the view that no legitimate purpose would be served in confirming the eviction order. If any persons attempt to or do occupy the property in the future, the law must take its course and an anticipatory eviction order will not, in my view, be binding on an as yet unknown group of people.
47. In this regard I point out that, in deciding whether or not it is just and equitable to grant an eviction order, a Court must have regard to the circumstances under which the unlawful occupier occupied the land, the period that the unlawful occupier has resided on the land and the availability to the unlawful occupier of suitable similar accommodation or land.<sup>10</sup>
48. It goes without saying that I cannot have regard to any of these factors

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<sup>8</sup> *Mbangi & Others v Dobsonville City Council* 1991 (2) SA 380 (W).

<sup>9</sup> As I have indicated, the Police did not remove any structures.

<sup>10</sup> S 6(3) of PIE.

should I grant an eviction order in anticipation that one or more of the respondents, who are not in occupation of the property, may in the future re-occupy the property. The interim eviction order accordingly falls to be discharged.

49. Denel launched two striking-out applications during the course of these proceedings, both of which were argued before me. The first striking out application related to photographs annexed to the respondent's answering affidavit in the interdict application. The complaint was that the photographs were not properly authenticated and were thus irrelevant. The second striking out application related to the respondents' answering affidavits in the eviction application. In essence the complaint was that they had not been properly deposed to and were accordingly not affidavits in the true sense. Whilst there may well be some merit to both of those applications, it is unnecessary for me to rule thereon as my decision in regard thereto will make no difference to the result.

50. In the circumstances I make the following order:

- (1) The interim interdict granted by this Court on 7 April 2015 under Case No. 6084/15 by Samela J and thereafter extended, is confirmed.
- (2) The spoliation application and the further relief sought by the respondents in the counter-application under Case No. 6084/15 is

dismissed.

- (3) The interim eviction order granted by Samela J on 10 April 2015 under Case No. 6142/15, and thereafter extended, is discharged.
- (4) The respondents are ordered to pay the costs occasioned by Denel and the City under Case No. 6084/15, jointly and severally, the one paying the other to be absolved, such costs to include the costs of two counsel, where employed, and the costs incurred in the striking out applications.
- (5) There is no costs order in Case No. 6142/15.

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MANCA AJ

Acting Judge of the High Court