IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 20830/22

In the matter between

RASH MAKHUBELA APPLICANT

AND

STELLENBOSCH DISTRICT MUNICIPALITY RESPONDENT

Date of Hearing: 07 December 2022

Date of Judgment: 15 March 2023 (to be delivered via email to the respective counsel)

JUDGMENT

THULARE J

[1] The applicant sought an urgent order against the respondent to restore to the applicant and other stakeholders unrestricted access to an initiation school at Idas Valley. The initiation school commenced on 25 November 2022 and was to run until

the first week in January 2023. The application was opposed on two grounds. Firstly, the respondent denied that the applicant, other parents and medical personnel were in possession of the property from 25 November 2022 and that they were wrongfully dispossessed of the property. Secondly, the respondent alleged that as the owner of the property, it had a statutory obligation in terms of the Veld Fires Forest Act, 1998 (VFFA), and that the restriction of access other than the identified persons was a step taken by the respondent to ameliorate the risk of veld fires on the property.

[2] The issue is whether the applicant and other caregivers, parents and medical personnel are to have unrestricted access to the property restored.

[3] The applicant was a member of the *Basotho* tribe. He was a principal at the school which he conducted under the guidance and supervision of the Nyanga Initiation Forum, Stellenbosch Initiation Forum and the *Basotho-Mahlubi* Metro NPO with number 274-516. He oversaw initiates and was obliged to ensure amongst others that they were fed, hydrated and given the necessary care. Indigenous communities around the metro have historically conducted initiation schools at the site, which occupation over the years had been peaceful and undisturbed.

[4] The initiation forums received communication from the respondent on 8 November 2022 that the people, African tribes to be precise, would not be granted access to the site to hold initiation schools. The African tribes commenced with the initiation schools, as a culture of right of passage to manhood on 25 November 2022 at the site. The men and the aspirant initiates established a camp on the site. The Fora earlier referred to in this judgment, including the Congress of Traditional Leaders of South Africa (Contralesa) took the respondent's refusal of access to court on an urgent basis under case number 20135/22. It was whilst the matter was pending in court that the applicant's tribe also moved in and set camp while the matter was before the court.

[5] The respondent's Municipal Police (MunPol) sought to evict the applicant, the initiates and other stakeholders of his school from the camp. The applicant and others resisted and informed the respondent that the matter was pending before the

courts, and that the respondent needed a court order authorizing their evacuation from the site before they can be forcefully removed. The MunPol on site called for back-up to increase the necessary manpower, and indicated that they acted on the instructions of management. The applicant and other stakeholders sought the intervention of the South African Police Service (SAPS) and it was through that intervention that MunPol did not proceed to forcefully evacuate the school.

[6] The school operated under very challenging and severe circumstances because of the restricted access controlled by MunPol on the respondent's instructions. The MunPol stood at two entrance points to the site, had locked the gates with padlocks and did not allow cars to enter the nature reserve into the camps of the initiates. This hindered provision of necessities such as food, water, medical equipment etc, which placed the lives of the initiates at high risk. This made it difficult for the disabled and elderly who wanted to visit their blood relatives amongst the initiates. The distance between the gates and the camps was about 8 to 10 kilometres and took longer on foot and dangerous at night. Most parents could only visit their children in the evening after work.

[7] The first two weeks was a very sensitive period for the initiation, which made it necessary for the elders to be present in order to oversee the processes. This was aimed to avoid preventable deaths and botched circumcisions. Having visits from as many men as possible assisted the initiates in many ways, which included optimal care, training and teaching and also contributed to the initiate's mental fortitude required to complete the course. On 3 December 2022 the applicant was denied access to the site by MunPol and was forced to return home with the essentials that he was carrying. Upon receipt of a report that one of the initiates was coughing blood and needed medical care, he brought this to the attention of the MunPol and pleaded with them to allow a vehicle on to the site to collect the initiate for medical attention and this was declined. He informed his lawyers, who wrote to the respondent's lawyers and that communication was not responded to. The request for intervention of the Provincial Standing Committee on Arts and Culture also did not receive a response. The leaders approached the Public Protector, the Human Rights Commission and the Commission for Cultural and Linguistic Communities for intervention.

[8] Once an initiate had been in a *Kgotla,* he could not be returned home without competing the entire process. It was believed that this would amount to indignation of untold proportions not only for the initiate but for their parents and families. The conduct of the respondent, if it continued, would affect the dignity of the school, the initiates and their blood relations. The applicant relied on his and the stakeholders' constitutional rights to enjoy their culture and practice their religion as envisaged in section 31 of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996) (the Constitution). The deprival of unhindered access to the initiation school had dire and direct consequences on the health and lives of the initiates in particular, and the smooth running of the school in general.

[9] The respondent's denial that the applicant was a principal of an initiation school and was in possession of the property as of 25 November 2022 or anytime thereafter was because the applicant was not on a list provided to the respondent. The respondent's case was that when the school commenced, the respondent was given 24 initiates and seven names of persons who were identified as the principals and caregivers as envisaged in section 21 of the Customary Initiation Act, 2021 (CIA). These seven persons identified as principals and caregivers were in occupation of the property and took care of the initiates at that time. The respondent acceded to the request by the seven for access to water and entry of vehicles on site. There were also three others identified as elders. These elders were identified as experts and emergency persons who had the knowledge and expertise to deal with any health issues that may arise at the school. The applicant was not on those two lists of ten persons. These ten were given unrestricted access to visit the school at any time when they had to do so and were allowed by the respondent to come as and when they deemed it necessary. Consequently, according to the respondent, the only persons that were in possession of the property had rights of access were the 24 initiates and the ten others comprising of principals, caregivers and elders.

[10] According to the respondent, it was the owner of the property and had statutory obligations in terms of the VFFA, to comply with the rules set by the Winelands Fire Protection Association and had to abide therewith. The restriction of persons other than the ten was a step taken by the respondent to comply with its statutory obligations in terms of the VFFA to take steps to ameliorate the risk of veld fires in

the property. The property was the bearer of fynbos and other natural vegetation which was prone to catching fires if not properly managed. It was a management exercise of the risk which informed the formulation of the list of identified persons. The respondent also managed the property in terms of its constitutional and statutory obligations as envisaged in section 24 of the Constitution and other applicable legislation.

[11] There were other private properties adjacent to the property and the respondent owed the owners a statutory obligation to take all necessary steps t prevent the risk of fires emanating from the fynbos which could catch fire if not managed. In terms of the VFFA there was strict liability on the part of the respondent should a fire break out in its property. The respondent was advised that should it fail to manage and control the property as envisaged in the VFFA, it could be viewed as gross negligence which will exonerate the insurers of properties from taking liability for the insured and look upon the respondent to take such insured liability. According to the respondent, it would be dereliction of duty if it acceded to the applicant's demands, despite the fact that the applicant had not made out a case for the remedy sought.

[12] The respondent's position was that there were already ten persons who were trusted and competent experts to attend to any health and nutrition requirements of the initiates, and that the applicant's inability to access the initiation school by virtue of not being on the list furnished to the respondent would not place the health and nutrition needs of the initiates at risk. The respondent, according to its papers, wanted the names and identities of all the caregivers and parents, according to it, to enable it to fulfil its statutory obligations to manage access to a protected and fire sensitive area. The respondent's case was further that the applicant had no *locus standi* to act on behalf of medical personnel as he was not a medical doctor or a nurse, or traditional surgeon as envisaged in the CIA.

[13] In *Bisschoff & Others v Welbeplan Boerdery (Pty) Ltd* 2021 (5) SA 54 (SCA) at para 5 it was said:

"[5] … The requirements for the mandament van spolie are trite: (a) peaceful and undisturbed possession of a thing; and (b) unlawful deprivation of such possession. The mandament van spolie is rooted in the rule of law and its main purpose is to

preserve public order by preventing persons from taking the law into their own hands."

In *Ngqukumba v Minister of Safety and Security & Others* 2014 (5) SA 112 (CC) at para 10 to 13 it was said:

"[10] The essence of the *mandament van spolie* is the restoration before all else of unlawfully deprived possession to the possessor. It finds expression in the maxim *spoliatus ante omnia restituendus est* (the despoiled person must be restored to possession before all else).[17] The spoliation order is meant to prevent the taking of possession otherwise than in accordance with the law. Its underlying philosophy is that no one should resort to self-help to obtain or regain possession. The main purpose of the *mandament van spolie* is to preserve public order by restraining persons from taking the law into their own hands and by inducing them to follow due process.[20]

[11] This applies equally whether the despoiler is an individual or a government entity or functionary. In *Vena* the then Appellate Division, now the Supreme Court of Appeal, endorsed *Sithole*:

"The Court came to the conclusion that the section was not worded so clearly as to detract from the general principle of law '. . . that there shall be no spoliation by any person, be it an individual, or a government department or a municipality or any similar body'. . . . What the learned Judge said at 117D-F bears repetition:

'[T]he clear principle of our law is that, ordinarily speaking, persons are not entitled to take the law into their own hands to enforce their rights. There is a legal process by which the enforcement of rights is carried out. Normally speaking, it is carried out as a result of an order of court being put into effect through the proper officers of the law such as the sheriff, deputy sheriff, messenger of the magistrate's court or his deputies, reinforced if necessary, by the aid of the police or some such authority; in most civilised countries there exists the same principle that no person enforces his legal rights himself. For very obvious reasons that is so; if it were not so, breaches of the peace, for instance, would be very common. It is clear, therefore, that if you want

to enforce a right you must get the officers of the law to assist you in the attainment of your rights.'

That this is a fundamental principle of our law admits of no doubt." (Emphasis added.)

[12] A spoliation order is available even against government entities for the simple reason that unfortunately excesses by those entities do occur. Those excesses, like acts of self-help by individuals, may lead to breaches of the peace: that is what the spoliation order, which is deeply rooted in the rule of law, seeks to avert.[23] The likely consequences aside, the rule of law must be vindicated. The spoliation order serves exactly that purpose.

[13] It matters not that a government entity may be purporting to act under colour of a law, statutory or otherwise. The real issue is whether it is properly acting within the law. After all, the principle of legality requires of state organs always to act in terms of the law. Surely then, it should make no difference that, in dispossessing an individual of an object unlawfully, the police purported to act under colour of the search and seizure powers contained in the Criminal Procedure Act. Non compliance with the provisions of the Criminal Procedure Act in seizing a person's goods is unlawful. This unlawfulness, plus the other requirement for a spoliation order (namely, having been in possession immediately prior to being despoiled) satisfy the requisites for the order. All that the despoiled person need prove is that—

(a) she was in possession of the object; and

(b) she was deprived of possession unlawfully."

[14] Courts ordinarily bend over backwards to assist parties, especially in urgent matters, in ensuring that justice is done. However, it remains the responsibility of the parties to ensure that what they place before the courts, can and should assist the courts to pronounce justice. The application against the respondent was served and filed, and heard on the 7th of December 2022. In order to afford the respondent an opportunity to file an answer, at its request, the matter was rolled to the following

day, the 8th. It is an understatement to say that the respondent presented a 'cut and paste' which purported to be an answering affidavit.

[15] Page 17, which is the last page of the purported answering affidavit, the alleged commissioner of oaths certified that the declaration made by Anna Maria Cornelia De Beer was signed in their presence on 24 February 2022. In other words, the deponent to the respondent's answering affidavit deposed to that affidavit more than 9 months before the application was lodged. Moreover, although Melissa van Wyk suggests that she was a commissioner of oaths and had obtained an LLB from the University of the Western Cape, she did not do the due diligence expected of someone in her position, acting as a commissioner of oaths as envisaged in the relevant legislative provision, and did not comply with the basic tenets of those requirements. Her industry failed to answer simple and basic questions like: "Where is Melissa van Wyk to be found and who is she?"

[16] To stand in direct contra-distinction to the evidence of Makhubela that he had over 50 initiates in Ida Valley on 7 December 2022 as a principal who oversaw an initiation school, irrelevant speculative opinions were not sufficient. De Beer did not say that she had been to Ida Valley on or about 7 or 8 December 2022 and that there were at that time only 24 initiates. It is not even clear from the purported affidavit as to what the source of her information was, as she did not say that at any stage she was at Ida Valley contemporaneous with the initiation school period. Nowhere does De Beer even suggest that she was at any stage prepared, which was the least she could do, to give Makhubela an audience. It seems that from the ivory towers of her offices, she simply issued decrees without the alacrity of spirit to at least understand the true facts. A gut feeling from De Beer, that Makhubela is not a principal of an initiation school or that there were no more than 50 initiates in his school in Ida Valley on or about 7 December 2022, is irrelevant. From her own purported affidavit, she had access to other principals who were already at the site, who could have supplemented her version, if true. Moreover, she had Municipal Police members on site and their commanding officer could have helped the Municipality on the true facts.

[17] The less said about De Beer's ignorance and what is my view is in fact refusal to understand African culture in general, and an initiation school in particular, the

better. Just to cite a classic example, the Legislature took the definition of a ‘family member’ from African culture when it defined the term in the Children’s Act, 2005 (Act No. 38 of 2005). The concept is defined as follows in section 1:

'family member', in relation to a child, means-

(a) a parent of the child;

(b) any other person who has parental responsibilities and rights in respect of the child;

(c) a grandparent, brother, sister, uncle, aunt or cousin of the child; or

(d) any other person with whom the child has developed a significant relationship, based on psychological or emotional attachment, which resembles a family relationship; “

Furthermore, the section defines “care-giver” as follows:

“'care-giver' means any person other than a parent or guardian, who factually cares for a child and includes-

(a) a foster parent;

(b) a person who cares for a child with the implied or express consent of a parent or guardian of the child;

(c) a person who cares for a child whilst the child is in temporary safe care;

(d) the person at the head of a child and youth care centre where a child has been placed;

(e) the person at the head of a shelter;

(f) a child and youth care worker who cares for a child who is without appropriate family care in the community; and

(g) the child at the head of a child-headed household;”

[18] Truth sometimes seems strange to those who do not know. An adult in common and statutory law remains a child, as an initiate. The involvement of paternal and/or maternal uncles and where unknown or unavailable any distant blood relation or if needs be any adult in the child's initiation process, just like in other processes like marriage, is very central in Africa. Clearly De Beer has no knowledge of *isiduko* or *ukuzithutha.* She has no functional literacy of the importance of the teachings inherent in *isiduko* and the pride of knowing *ukuzithutha.* She has no clue on the true nature, scope and content of an initiation school, its desired outcomes and its contribution to a family, relatives, community and society. I was unable to allow De Beer to cause the initiation school in Ida Valley to produce *imbiza engakabadle or ukupheka unobenani* with African young men.

[19] "At local level the City of Cape Town Metropolitan Municipality and the Stellenbosch District Municipality struggle with violent crime and Gender-based violence committed in the main by young men. At Provincial and national level the struggle is with Gender-based violence and corruption. The country needs all hands on deck against these social ills. The Stellenbosch Municipality does not know the analysis of *ixabiso le ntembeko* and *isimilo nemigaqo yokuziphatha*. It has no appreciation for the Basotho - *Mahlubi* teachings that *motho ke motho ka batho.* African families, clans and tribes can contribute through and by enjoying their culture. Sadly, Stellenbosch Municipality has positioned itself in the same league as Mr Mafe, the man accused of putting Parliament on fire, to wit, as a suspect in the destruction of the people's Institutions using the fire. Whilst Mafe opened 2022, the Stellenbosch Municipality closed that year in the same note and style.

[20] De Beer does not even attempt to make a link between the protection against veld fires and the initiation school. What is clear, is that she built a speculative case of the initiation school causing veld fires. There were no facts set out which sustained a reasonable apprehension that there would be veld fires in Ida Valley, caused by the initiation school, if unrestricted access was allowed. The respondent did not even have a chamber in its heart to consider any mitigating measures that those responsible for the initiation school would have factored into the discussions to allay its fears, if there was proper engagement with the custodians of culture in our

democratic and constitutional milieu. The inherent assumption that the concerns of the Municipality were beyond the comprehension of those in the initiation school community is condescending and disrespectful.

[21] The applicant's case was that the initiation school community was not consulted prior to the decision being made. At best the Municipality's answer is that this allegation was noted. The applicant said that the initiation school community received a whatsapp message from a Municipal official that the Municipality would not grant them access to hold initiation at Idas Valley. The respondent in answer simply noted the allegation. The applicant alleged that on 8 November 2022 the Municipality informed the initiation school community that they will not be granted access, which decision they immediately took to the courts. The answer is simply to note the allegation.

[22] Stellenbosch District Municipality is simply cold, aloof and unjustifiably removed from its obligation to respect, protect, promote and fulfil the values to which South Africa bound itself as a nation. It is imperative to repeat what is contained in section 1(a) of the Constitution. It reads:

"Republic of South Africa

1. The Republic of South Africa is one, sovereign, democratic state founded on the following values:

(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms."

In the preamble, the Constitution reads:

"We, the people of South Africa,

Recognise the injustices of the past; …

Believe that South Africa belongs to all who live in it, united in our diversity.

We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to –

Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;

Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law …

Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations …"

[23] The deployment of the Municipal Police to simply cordon off the area around Ida Valley where the initiation school was underway, to prevent a principal, family members and care-givers to initiates who enjoyed the culture of initiation, which included unrestricted access to the initiates, was heavy handed and unlawful. The closing off of the area and the prevention of movement into Ida Valley to the initiates, deprived the principal, family members and care-givers of control and power over the site and the initiates. The principal, family members and care-givers were dispossessed of Ida Valley and the initiates. It is not for De Beer to question the cogency of the need for traditional healers at an initiation school, for which she did not provide, according to her purported answer. Suffice it to mention that they are generally a necessary component, for those of that faith, to also be allowed access to the site and the initiates.

[24] The attitude of the respondent, as demonstrated by De Beer, is that the Stellenbosch District Municipality is simply out of breath to keep up with the nation at work to construct a democratic and constitutional dispensation, especially for an African child in its jurisdiction. De Beer, who is the Acting Municipal Manager for the Stellenbosch Municipality, is simply crying out loud for social context training. This call is necessary to be heeded, urgently, before she does a lot of damage to the project of nation building. She clearly lacks that element of equal concern and respect which is expected of a Municipal Manager in a transitional phase from apartheid to an ideal constitutional state.

[25] The national body of law, like the VFFA, was never some magic wand or what in school was called "a duster" to simply erase 'the chalk from the blackboard' which are, the rights to enjoy one's culture of initiation in Stellenbosch. The right to enjoy

one's culture, because of our history in South Africa, is written in blood and tears in the hearts of African people in particular and Blacks in general. In my view, where the intended action of the Municipality like Stellenbosch tended to infringe on those rights, there was a need for adequate consultation with all interested and affected parties before a decision was considered. Where constitutional rights were in issue, the balance of convenience favoured the protection of those rights. This premise was necessary especially where the sacred right to be heard before the decision was taken, was simply disregarded.

[26] For these reasons I found that the applicant and other caregivers, parents and medical personnel are to have unrestricted access to the property restored and I made the following order:

1. The respondent is directed to restore and grant unrestricted access to:

1.1. Care-givers;

1.2. Parents and family members of the initiates. Parents, family-members and care-givers were to be given a broader meaning, including a meaning similar to the meanings in the Children's Act, 2005.

1.3 Medical Personnel, also to include traditional healers and herbs-persons and

1.4 Mr Makhubela the applicant as the principal.

2. The respondent to pay the costs.

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DM THULARE

JUDGE OF THE HIGH COURT