



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case No. 17978/15

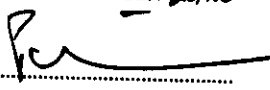
In the matter between:

8/6/2016

THE RESIDENTS OF ARTHURSTONE VILLAGE

Applicant

and

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: YES /NO
(2)	OF INTEREST TO OTHERS JUDGES: YES /NO
(3)	REVISED
08/06/2016	
DATE	SIGNATURE

AMASHAGANA TRIBAL AUTHORITY & OTHERS

First Respondent

BUSHBUCKRIDGE LOCAL MUNICIPALITY

Second Respondent

THE MAGISTRATE OF THULAMHASHE

Third Respondent

JUDGMENT

VAN NIEKERK, AJ

[1] This is an application for the review of an order granted by the Third Respondent in terms whereof occupiers of land situated within the

municipal area of Second Respondent was evicted and their homes demolished.

[2]The Applicants are referred to in the Founding Affidavit as "*The Residents of Arthurstone Village*" who resided on land known as "*Arthurstone Farm*" which is situated in the jurisdiction of the Second Respondent being "*The Bushbuckridge Local Municipality*". Arthurstone Farm comprises of some 3700 hectares of Government owned land zoned for commercial use. In an affidavit under Case no. 363/12 in the Magistrate's Court for the district of Mhala held at Thulamahashe (where the Third Respondent exercises powers and functions as Magistrate) a certain Mpisame Erick Mxumalo deposed to an affidavit stating the following:

"I am an adult male person and duly appointed in terms of the Black Administration Act as the Chief of the Amashagana Tribe of Mhala Bushbuckridge Mpumalanga Province and the Chief of the Applicant. the Applicant is in charge of various farms situated in the Magisterial area of Mhala which have been duly allocated to it as tribal land and which land is administered by the Applicant for the benefit of the members of the Amashagana Tribe and the community at large in an orderly and dignified way. The farm Arthurstone forms part of the number of farms over which the Applicant is in charge."

[3] It is the same person who deposed to the Answering Affidavit in this application on behalf of the First Respondent, and it is also common cause in this application (as it was alleged in the proceedings referred to *supra*)

that the land known as Arthurstone Farm is administered by the First Respondent *qua* the Government. First Respondent therefore does so as an Organ of State as defined in terms of Section 239 of the Constitution of the Republic of South Africa read in conjunction with Section 212(2)(b) of the Constitution of the Republic of South Africa.

[4] The Third Respondent is the Magistrate of Thulamahashe who granted the order for the eviction of the Applicants which is the subject of the order for review as sought in the Notice of Motion in this application.

[5] The deponent of the affidavit in support of the relief as claimed in the Notice of Motion on behalf of the Applicants is a Commissioner of the South African Human Rights Commission which was established in terms of Section 181(1)(b) of the Constitution of the Republic of South Africa Act ("*the Constitution*") and in terms of Section 184(2)(a) and (b) of the Constitution, the Commission is enjoined to investigate and to report on the observance of human rights and take such steps to secure appropriate redress when human rights have been violated. The deponent then describes the Applicants in the Founding Affidavit as follows:

"The applicants constitute the heads of household which constitute the evicted members of the Arthurstone Village, a community of approximately 150 individuals residing on the Arthurstone Farm in the district of Bushbuckridge, Mpumalanga".

[6] The deponent thereafter sets out in the Founding Affidavit a background of events leading up to the eventual granting of an eviction and demolition

order by the Third Respondent on the application of the First Respondent against the Applicants which is summarised as follows:

- [6.1] On the 8th of March 2013 the Applicants lodged a complaint with the Commission alleging violations of their human rights in that on the 7th of March 2013 they were evicted by the First and Second Respondents from their houses and their shelters which were situated on Arthurstone Farm and which houses and shelters were demolished by the First Respondent;
- [6.2] The Commission's Provincial Office in Mpumalanga did certain investigations and onsite inspections, consulted *inter alia* with members of the First Respondent and the Second Respondent, obtained copies of the application launched in the Magistrate's Court of Thulamahashe in terms of which such eviction and demolition order was sought, and in general compiled a substantial amount of information relating to the dispute between the Applicants and the First Respondent revolving around the Applicants' occupation of the land in question;
- [6.3] The Commission were *inter alia* informed that many of the applicants paid revenue to the First Respondent for occupation.
- [6.4] The Commission further established that the demolitions and evictions effected school children, elderly persons, households headed by woman, and households headed by children (orphans) and that the demolitions took place during the day whilst parents were at work, the children were at school, but that a house

belonging to a relative of the Induna Makama were not destroyed. It was only subsequent to the Commission consulting with the First Respondent that the Commission was informed that the failure to demolish two of the houses (including that of the relative of the Induna Makama) that it was an error and that same would be demolished in the next couple of weeks;

- [6.5] The investigation by the Commission further revealed that most if not all of the applicants who were evicted and whose homes were demolished resided permanently on the land in question, whilst many of the homes were still under construction and the applicants lived either in the constructed portion of the building whilst other lived in more informal shelters on the farm. This was confirmed by five applicants who deposed to Confirming affidavits and which was attached to the Founding Affidavit and included the affidavit of a 35 year old female widower who lived with 3 school going children on the land in question and who seemed to survive on Government grants, a 67 year old woman, living with 6 school going children whose only means of support is a monthly old age grant, and another 61 year unemployed woman living with 5 children whom she supports on a monthly old age grant;
- [6.6] A copy of the contents of the Court file in the Magistrate's Court of Thulamahashe obtained by the Commission revealed that the First Respondent brought an application in terms of Sections 4 and 5 of the Prevention of Illegal Eviction from and Unlawful Occupation of

Land Act 19 of 1998 (*"the PIE Act"*) wherein 13 respondents were cited by their names, and the 15th respondent was the Bushbuckridge Local Municipality who is the Second Respondent in this application. The deponent to the Founding Affidavit is Mpisame Erick Mxumalo already referred to *supra*, and on the same day that the Notice of Motion was issued out of that Court being the 11th of September 2012, the Third Respondent made an interim order restraining the respondents in that application from invading the land situated at the farm Arthurstone, interdicting them from erecting any structures on the aforesaid land, and authorising the Sheriff or the Police and directing them to remove any structures that might have been erected by any of the respondents and further ordered that the aforesaid orders operate as a rule *nisi* pending the final order, and granting a return date of 11 October 2012 calling on the respondents to show cause why the order should not be made final. On the 11th of October 2012 the aforesaid interim order was made a final order by the Third Respondent;

- [6.7] Some five months later the demolition order was executed and except for a copy of the application which was attached to a pole, no notice was given to the Applicants.
- [7] Obviously, the effect of execution of the order evicting the Applicants from the land and demolishing their homes was devastating upon the Applicants. Attached to the application are *inter alia* reports of social workers who dealt with the aftermath of the event, and it is, to say the

least, saddening to read as it describes the trauma of loss of what the people perceive to be their "*homes*" in circumstances where they already experienced extreme hardship and suffering brought about by their socio-economic conditions.

- [8] Where the pre-amble to the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 reads:

"AND WHEREAS special consideration should be given to the rights of the elderly, children, disabled persons and particularly households headed by woman, and that it should be recognised that the needs of these group should be considered;"

It clearly refers to the class of personae referred to in the investigation of the Commission.

- [9] The effect of the relief as claimed in the Notice of Motion is namely that the rule *nisi* granted by the Third Respondent on 11 September 2012 and confirmed on 11 October 2012 which resulted in the demolition and eviction, be reviewed and set aside, and the remainder of the relief as sought in the Notice of Motion is a *sequelae* of such order being set aside. In terms of Section 38 of the Constitution anyone listed in that section has the right to approach a competent court, alleging that a right in the bill of rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court in terms of Section 38 of the Constitution includes anyone acting in the public interest and anyone acting as a member of, or in the interest of, a group or class of persons and anyone acting on behalf

of another person who cannot act in their own name. It is the Applicants' case that the decision of the Third Respondent infringed their fundamental rights as set out in Section 26(3) of the Constitution which confers on everyone the right to have access to adequate housing, and the prohibition that no one may be evicted from their home, or have their home demolished, without an order of Court made after consulting all the relevant circumstances and that no legislation may permit arbitrary evictions. In terms of the same Section, the State is enjoined to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right to adequate housing.

- [10] The PIE Act flows from Section 26(3) of the Constitution and contains various mandatory requirements that must be complied with before the granting of an order for eviction and/or demolition can be said to be "lawful". The review by a Superior Court of a decision of an inferior Court which was alleged to be an infringement of a fundamental right is of a wide ranging nature and the Court of review can decide the matter *de novo*.

Vide: Erasmus Superior Court Practice, 2nd Edition

Volume 1 at A22-32 and authorities quoted there

This Court must therefore review the proceedings which led to the Third Respondent granting the final eviction and demolition order, and if it is found that there was not substantial compliance with the provisions of the PIE Act, such order may be set aside. It is therefore necessary to determine whether there was substantial compliance with the PIE Act prior

to and when the final order was granted by Third Respondent on 11 October 2012.

[11] In the affidavit in support of the relief as claimed in the Notice of Motion a number of non-compliance (with the PIE Act) issues are raised. Certain of the material issues in respect of which there was non-compliance will be referred to hereinlater. The First and Second Respondents, in their respective Opposing Affidavits join issue with the alleged non-compliance. At the time when the application was argued, Heads of Argument was filed on behalf of the Applicants again highlighting the issues of non-compliance, and the Second Respondent's Counsel, properly and responsibly, conceded such material non-compliance in Heads of Argument filed on behalf of the Second Respondent. First Respondent's counsel, not only in Heads of Argument filed on behalf of the First Respondent but also during argument of the matter in open Court persisted that there was "*substantial compliance*" and urged me to dismiss the application. First Respondent further raised a point *in limine* to the effect that the application for review was not brought within a reasonable period of time and should, on that ground, be dismissed. I will deal with the aforesaid two issues hereunder.

[12] In deciding whether or not the proceedings were instituted within a reasonable period of time, the approach as set out in ***Guwetha v Transkei Development Corporation Ltd & Others 2006 (2) 603 (SCA)*** must be followed. Having regard to the explanation of the Commissioner on behalf of the Human Rights Commission setting out in detail the process of

investigation, collation of information, and background leading to the eventual institution of this application, the Applicants' prospect of success on the merits, and weighing up the prejudice which the Applicants will continue to suffer should the application be dismissed on that ground alone against the prejudice which the Respondents would suffer in the event of this matter being fully ventilated in Court, and further considering the fact that the Applicants are proverbially delivered out into the hands of third parties (in this case the Commission) insofar as the litigation was concerned, I have no hesitation in granting any condonation that may be necessary and dismissing this point *in limine*. I further am of the view that, considering the objective facts of this matter, a point *in limine* such as that taken by the First Respondent is, to say the least, uncalled for. The First Respondent is an Organ of State for the reasons as set out *supra*, has an obligation to uphold the values of the Constitution without fear or favour, is in fact the custodian of State owned property which is administered by the First Respondent as a trustee *viz-a-viz* the persons who reside there, and in my view is therefore expected to fulfil its fiduciary duties with *uberrimae fides*. This it clearly did not do.

- [13] The material non-compliance with the provisions of the PIE Act are as set out hereunder. I mention that this is not an exhaustive list but serves to illustrate the issue of substantial non-compliance. The examples listed hereunder are conceded by the Second Respondent and being objective facts, cannot be generally placed in dispute by the First Respondent. They are:

- [13.1] In terms of Section 4(7) of PIE the Third Respondent was enjoined to consider whether land had been made available or could reasonably have been made available by the Second Respondent. This was not done;
- [13.2] In terms of Section 4(7) of PIE the Third Respondent was enjoined to consider the rights and needs of the elderly, children, disabled persons and households headed by woman. Again, this was not done;
- [13.3] In terms of Section 4(2) of PIE at least 14 days before the hearing of the proceedings contemplated the Court must serve written and effective notice of the proceedings on the unlawful occupiers and the municipality having jurisdiction. It is clear on the papers before me that there was non-compliance with this proviso. Counsel for First Respondent attempted to convince me that the affixation of the application on a pole, suffice. I strongly disagree.
- [14] The Third Respondent clearly derelicted its duties in ensuring that there was compliance with the Constitutional imperatives and the applicable law, in this case the PIE Act and numerous decisions pertaining to the proper application of the provisions of the PIE Act as delivered by the Constitutional Court and should never have granted the order in the circumstances as it did. I am particularly concerned about the fact that the Third Respondent allowed the matter to be proceeded with on a so-called "*urgent basis*" without there being any proper grounds for urgency in the application before it, and for failing to adopt a proactive role in enquiring

what the effect of the order granted by the Third Respondent would be on the persons affected thereby. In my view the Third Respondent simply adopted a passive role and proverbially rubber stamped the application brought before it, without applying an independent judicial mind to the proceedings. The very least that the Third Respondent could have done, was to insist on a report or affidavit or information from the Second Respondent on the issue of the provision of alternative accommodation. The Third Respondent should also have been aware of the provision of Section 6 of the PIE Act, and failing any facts being set out in the application why the granting of the order is in the public interest, should either have dismissed the application on that ground alone or at least have insisted on the supplementation of the papers on that issue.

- [15] In the premises, the order *nisi* granted by the Third Respondent on 11 September 2012 and confirmed on 11 October 2012 is set aside and it is declared that the eviction of the Applicants and their dependents from the Arthurstone Farm and the demolition of their houses is declared unlawful. The issue then remains as to what is competent relief that should be granted ancillary to the aforesaid. Having discussed this issue in open Court during argument with Counsel for the Second Respondent as well as the Applicants (Counsel for the First Respondent was most uncooperative in this regard) it was clear that the Second Respondent accept its responsibility to assist in restoring the Applicants into a position where they at least be afforded shelter, privacy and amenities. I am further of the view that any order that I make in this regard should be monitored by the South

African Human Rights Commission in terms of their authority afforded to them as referred to *supra* and should be permitted to set the matter down on the same papers or supplement this application should the need arise as a result of non-compliance with this order by any party.

- [16] I am further of the view that the Third Respondent's dereliction of duty is so gross and untenable that the Magistrate's Commission should be directed to investigate the conduct of the Third Respondent to determine whether or not disciplinary and/or any other steps should be taken against the relevant Magistrate.
- [17] As far as the costs of the application is concerned, and for the reasons as set out above, I have no hesitation in finding that the First Respondent should pay the costs of the application. Applicants seek an order for costs against the First and Second Respondents jointly. Although the Second Respondent initially opposed the application, it became clear after the filing of Heads of Argument on behalf of the Second Respondent that the Second Respondent accepted its obligations *viz-a-viz* the Applicants in terms of the relevant legislation, and made the necessary and proper concessions which is to be expected of an organ of State in litigation. Had the First Respondent adopted the same responsible *modus operandi*, there would not have been any necessity to pursue this matter to its finality. I am therefore of the view that the Second Respondent should be ordered to pay the costs of the application jointly and severally with the First Respondent, with the proviso that the Second Respondent's costs be

restricted to the costs incurred up and until the date of the filing of the Applicants' Replying Affidavit.

[18] In the premises, I make an order in the following terms:

- [1] The order *nisi* by the Third Respondent dated 11 September 2012 and confirmed on 11 October 2012 in terms whereof the Applicants were evicted from the Arthurstone Farm is hereby reviewed and set aside, and the resultant eviction of the Applicants and their dependents and the demolition of their houses and shelters on the Arthurstone Farm is hereby declared unlawful;
- [2] The First Respondent is ordered to construct for the Applicants who were evicted and who still require them, temporary habitable dwellings that afford shelter, privacy and amenities at least equivalent to those that were destroyed by the demolition, at a site on the Arthurstone Farm in the immediate vicinity where the Applicants resided prior to the eviction and demolition of their homes, which construction is to be completed within 30 (thirty) days from date of this order;
- [3] The First and Second Respondents are ordered, jointly and severally, to construct for the Applicants who were evicted, permanent habitable dwellings that afford shelter, privacy and amenities at least equivalent to those that were destroyed at a site to be agreed upon between the parties and which construction is to be completed within 4 (four) months from date of this order;

- [4] The aforementioned orders shall operate under the auspices and supervision of the South African Human Rights Commission, and should there be non-compliance with this order, the South African Human Rights Commission, shall be permitted to set the matter down for hearing on the same papers *alternatively* with supplemented papers;
- [5] The Registrar of this Court is requested to forward this judgement to the Magistrate's Commission who are requested to investigate the circumstances relating to the granting of the orders on 11 September 2012 and 11 October 2012 in order to determine whether disciplinary or other steps should be taken against the Magistrate who granted such order;
- [6] The First and Second Respondents are ordered to pay the costs of the application jointly and severally, with the proviso that the costs in respect of which the Second Respondent is liable shall be limited to costs incurred up until the 8th of May 2015 being the date of service of the Applicant's reply to the Second Respondent's Opposing Affidavit.



**PA VAN NIEKERK
ACTING JUDGE OF THE HIGH COURT**

Date heard:	6 June 2016
Counsel for Applicant:	Adv K Moreno
Attorney for Applicant:	Norton Rose Fulbright
Counsel for 1st Respondent:	Adv HW Sibuyi, Adv MD Skhosana
Attorney for 1st Respondent:	Phungo Incorporated
Counsel for 2nd Respondent:	Adv T Seleke
Attorney for 2nd Respondent:	Mculu Incorporated
Judgment delivered:	8 June 2016