

Market tactics outrageous

Municipality's action unlawful, autocratic and unconstitutional

Daily News Tuesday July 07 2009

THOSE who made sacrifices in the Struggle against apartheid did so for a democratic society. A society that recognises the right to human dignity that must resonate in our conscience, even when we follow the due process of the law or act as an official of the government.

The self-help remedy of the eThekweni Municipality as the landlord of the Early Morning Market was unlawful and an affront to human dignity.

The traders who are deemed to be subtenants or "illegal" tenants cannot be dispossessed by unlawful means.

Traders who are in arrears or refuse to hand over their stalls, or are subtenants, cannot be prevented from trading without a court order.

Yes, there is a serious moral dilemma and legal implications for those traders allegedly acting as absentee landlords: not paying rentals to the Municipality but extorting higher rentals from their tenants (subtenants / traders). We must not lose sight of the fact that traders who act unscrupulously must face the legal consequences of their action, historical sentiments aside.

The municipality, however, does not have the right to use the metro police and its officials to bar entry to the traders, be they absentee landlords, so called illegal traders or those in breach.

The Municipality as a landlord is not exempt from the provisions of the country's constitution. It cannot use its own laws and policies to circumvent or supplant the common law. In doing so,

our constitutional democracy becomes blurred by an autocratic approach or dictatorship.

Unlawful interference of possessory rights is one way in which a person exercises unwarranted power and is not allowed in our law.

On Saturday, June 13, 2009 Ndlovu J granted an order restoring possession and occupation of the stalls to the traders. It was a spoliation order, which is a form of interdict formerly used in Roman law that protected the person's possession by stopping interference or disturbance. The right to ownership or the right to possess or any dispute related to it, was not decided through the interdict.

In keeping with this fundamental rule, Ndlovu J handed down an interim order and the judge who will make the final order will have to confirm the right to trade.

Just over hundred years ago, Innes CJ¹ summarised the Roman law and Roman-Dutch position that Ndlovu J applied: -

"It is a fundamental principle that no man is allowed to take the law into his own hands, no one is permitted to dispossess another forcibly or wrongfully and against his consent of the possession of property, whether movable or immovable.

"If he does so, the court will summarily restore the *status quo ante*, and will do that as a preliminary to any

¹ *Nino Bonino v De Lange* 1906 TS 120.

inquiry or investigation into the merits of the dispute.”

Our courts do not consider the reason for the illegal action even if rental is owed or some traders have acted unscrupulously.

The rationale of granting a spoliation order is to protect the law. The unlawful action and brute force of the municipality as the landlord cannot and must not be allowed in a democratic society.

An unlawful action against an unlawful occupier does not equate to a just solution.

As for the arrear rentals and other matters related to the Early Morning Market, the municipality failed to resolve these eleven years ago or acted in bad faith.

The Organisation of Civic rights (OCR), between 1998 to 2000, under a specific mandate from the traders, engaged with the then North and South Central local councils.

A flurry of correspondence and meetings ensued with officials that included Vidu Vedalanker (CEO), Krish Kumar, Sbu' Sithole, Jacqui Subban, Dean Botha (ex Metro police put in charge of informal trading), councillors and mayors when the Municipality threatened to put up for tender the stalls of traders who allegedly breached their agreements.

The numerous pleas to address the arrears, absentee landlords and the abolition of surcharge that operated as an oppressive restraint, were ignored and a draft agreement abandoned.

The many unresolved issues are now being transposed with the pending development of the so called mall.

The municipality failed to act decisively against the errant absentee landlords, the challenges that faced all stakeholders, and the growing polarisation. It also failed through its consultants to engage constructively and in-depth with the traders-unlike the exhaustive process with the flyover project.

Respect for human dignity is the essence of community development. There is an urgent need to re-commit to a transparent and democratic process with all stakeholders so that consultation becomes much more than tokenism. At the same time, decisive action must be taken against those who breach their contractual obligation or break the law.

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