

SOUTH AFRICA / JUDGMENT

Democratic Alliance and Another v Mangaung Metropolitan Municipality and Others (21 January 2025) (1330/2024) [2025] ZAFSHC 13 (21 January 2025)

[2025] ZAFSHC 13

COURT

Free State High Court, Bloemfontein

BEFORE

Mbhele

CASE / FILE NUMBER

1330/2024

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IN

THE HIGH COURT OF SOUTH AFRICA

FREE

STATE DIVISION, BLOEMFONTEIN

Reportable / Not

reportable

Case no: 1330/2024

In

the matter between:

THE
DEMOCRATIC ALLIANCE
1ST
APPLICANT
FREEDOM
FRONT PLUS
2ND
APPLICANT
and
MANGAUNG
METROPOLITAN MUNICIPALITY
1ST
RESPONDENT
THE
MUNICIPAL MANAGER OF THE MANGAUNG
METROPOLITAN
MUNICIPALITY
2ND

RESPONDENT
MINISTER
OF POLICE
3RD
RESPONDENT
Neutral
citation: The
Democratic Alliance & Another v Mangaung Metropolitan
Municipality & 2 Others

Coram: Mbhele, DJP

Heard: 01 August
2024

Delivered: 21
January 2025

Summary: Land invasion – execution of a
court order – whether the police failed to act in line with
their constitutional mandate
– no evidence to show that the
police failed to act in line with their constitutional mandate.
ORDER
1.
The application is dismissed.
2.
Each party to pay their own costs.

JUDGMENT

Mbhele, DJP

INTRODUCTION:

[1] On 02 March 2024 Chesiwe, J granted an order in favour of the first respondent (the municipality) in relation to the initial stages of land grabbing by several people on subdivision 5 of the farm Brandkop 702, Bloemfontein, Lourierpark (the property). Several meetings were held between various stakeholders involved in the execution of the order. During these meetings it became apparent that there were shortcomings in the 2nd March order (the order) and practicality of the execution of the order. Amongst other issues were the clarity on the involvement of the members of the police (SAPS). The municipality approached Chesiwe, J for variation of the order and the following amendments were effected on 06 March 2024:

‘1. Condonation is granted in respect of the applicant’s non-compliance with the usual forms and manner of service as prescribed by the Uniform Rules of Court as well as the applicant’s non-compliance with Rule 41A, and it is directed that the matter be enrolled and heard on an urgent ex parte basis, with evidence to be given by viva voce evidence as opposed to affidavits;

2. The court order granted on 2 March 2024 is varied in the following respects:

2.1 By amending the description of the 1st, 2nd and 3rd Respondents in the heading and wherever else reference is made to them as follows:

“1st Respondent:

ALL PERSONS SEEKING TO UNLAWFULLY APPROPRIATE,
OCCUPY, MARK OUT STANDS AND/OR ERECT STRUCTURES
ON ANY PORTION OF SUBDIVISION 5 OF THE FARM
BRANDKOP 702, BLOEMFONTEIN, EXTENSION 148,
BLOEMFONTEIN AND/OR ANY ADJACENT MUNICIPAL PROPERTIES

2nd Respondent:

ALL OWNERS AND/OR BUILDERS OF INCOMPLETE AND/OR
UNOCCUPIED STRUCTURES UNLAWFULLY CONSTRUCTED
ON SUBDIVISION 5 OF THE FARM BRANDKOP 702,
BLOEMFONTEIN, EXTENSION 148, BLOEMFONTEIN
AND/OR ANY ADJACENT MUNICIPAL PROPERTIES

3rd Respondent:

ALL OCCUPIERS OF COMPLETED STRUCTURES
BLOEMFONTEIN AND EXTENSION 148, BLOEMFONTEIN
AND/OR ANY ADJACENT MUNICIPAL PROPERTIES”

2.2 By amending the existing Paragraph 2.1 thereof to read as follows:

“2.1. Declaring and confirming that the following properties are owned by the applicant and that the respondents have no entitlement in law or otherwise to occupy, seize or inhabit same:

- (a) SUBDIVISION 5 OF THE FARM BRANDKOP 702, BLOEMFONTEIN;
- (b) EXTENSION 148, BLOEMFONTEIN; and/or
- (c) ANY ADJACENT MUNICIPAL PROPERTIES

(Hereinafter referred to as “the property”).”

2.3 By renumbering the existing Paragraph 2.3.7 to 2.3.8 and inserting a new Paragraph 2.3.7 to read as follows:

“2.3.7. Providing their names or other details to any person or institution apart from the applicant, promising or purporting to register or otherwise entitle them to any land from the applicant;”

2.4 By amending the renumbered Paragraph 2.3.8 to read as follows:

“2.3.8. Directly or indirectly inciting, taunting, encouraging, instigating, prompting and/or provoking other individuals to perform any of the acts described in paragraphs 2.3.1 to 2.3.7 above;”

2.5 By amending the existing Paragraph 2.4 thereof to read as follows:

“2.4. The Sheriff(s) of this Honourable Court and/or the officials, agents or employees of the applicant are authorised and directed to remove and expel from the property any of the 1st or 2nd respondents who refuse to comply with paragraphs 2.2 and 2.3 above, and furthermore to demolish and/or remove any incomplete and unoccupied structures or building materials found on the property in contravention with this order;”

2.6 By amending the existing Paragraph 2.5 thereof to read as follows:

“2.5. In so far as any completed structures are found to exist on the property, the Sheriff(s) and/or the officials, agents or employees of the applicant, with the assistance of the South African Police Services, are authorised and directed:”

2.7 By amending the existing Paragraph 2.6 thereof to read as follows:

“2.6. Pending the finalization of any application(s) by the applicant in terms of the Prevention of Illegal Eviction and Occupation of Land Act 19 of 1998, the 3rd respondents are interdicted and prohibited from:”

2.8 By renumbering the existing Paragraph 2.6.7 to 2.6.8 and inserting a new Paragraph 2.6.7 to read as follows:

“2.6.7. Providing their names or other details to any person or institution apart from the applicant, promising or purporting to register or otherwise entitle them to any land from the applicant;”

2.9 By amending the renumbered Paragraph 2.6.8 to read as follows:

“2.6.8. Directly or indirectly inciting, taunting, encouraging, instigating, prompting and/or provoking other individuals to perform any of the acts described in paragraphs 2.6.1 to 2.6.7 above;”

2.10 By renumbering the existing Paragraph 2.7 to 2.8 and inserting a new Paragraph 2.7 to read as follows:

“2.7. In the event of any of the 1st, 2nd or 3rd Respondents obstructing the aforesaid Sheriff(s) and/or officials, agents or employees of the applicant in carrying out any of their functions in terms of this order, the South African Police Services are authorised and directed to take such steps as they may deem appropriate in the exercise of their functions;”

2.11 By amending the existing Paragraph 3 thereof to read as follows:

“3. The relief in paragraphs 2.2 to 2.7 above shall serve as an interim interdict with immediate effect;”

3. Service of this amended order is to be effected in the following manner:

3.1 By the Sheriff(s) of the Honourable Court and/or South African Police Services and/or officials, agents or employees of the applicant handing out 20 (TWENTY) copies of this amended order to 1st and 2nd respondents found on the property.

3.2 By handing a copy of this amended order to the occupiers of each completed and occupied structures (the 3rd respondents) and/or by affixing a copy of this amended order to each such completed and numbered structure.

3.3 By keeping a copy of this amended order at the main reception of the Bram Fischer Building, Markgraaff Street, Bloemfontein, for inspection and so that any respondent who requests a copy during normal office hours may be supplied with one;

3.4. By the Sheriff(s) of the Honourable Court, if necessary, reading out the amended order, in ENGLISH and SESOTHO, by megaphone at such places and occasions on the property as may be deemed necessary to bring the order to the notice of the respondents;

3.5 By handing a copy of this amended order to any respondents who are removed or expelled from the property pursuant to paragraph 2.4 of the amended order.’

[2] Subsequent to the variation of the order the applicant (the DA) approached this court on 8 March 2024 seeking the following order:

‘1. The Applicant’s non-adherence to this court’s rules related to time periods and service is condoned and the application is heard as an urgent one in terms of Rule 6(12) of the Uniform Rules of Court.

2. In so far as this is shown necessary, the Applicant’s failure to comply with section 35 of the General Law Amendment Act is condoned.

3. A rule nisi do issue, returnable upon such a date as the court deems meet, calling upon the Respondents to show cause, if any, why the following order should not be made final:

3.1 It is declared that the First Respondent’s failure, refusal and/or neglect to take any and all necessary and reasonable steps to carry into Immediate effect this court’s order of 2 March 2024, issued under case 1248/2024 (“the court order”), is unlawful.

3.2 The First Respondent is ordered to take immediate steps to enforce the court order.

3.3 It is declared that the Second Respondent's failure, refusal and/or neglect to immediately execute the abovementioned court order is unlawful.

3.4 The Second Respondent is ordered to immediately take all reasonable steps to give effect to the order.

3.5 The First- and Second Respondents are ordered to take immediate steps to enforce the provisions of the provisions of the statutory and regulatory scheme set out in the National Building Regulations and Building Standards Act, No. 103 of 1997, the Regulations promulgated in terms of this Act, and the First Respondents town planning scheme, to the extent that these legislations apply to the property better known as Subdivision 5 of the farm Brandkop 702, Bloemfontein and Extension 148, Bloemfontein, and further to the extent that information dwellings are being erected and/or have been erected on this property unlawfully.

3.6 It is declared that the failure, refusal and/or neglect of the South African Police Services to prevent, combat and investigate the trespass and unlawful occupation of the abovementioned property by unknown persons, is unlawful.

3.7 The Third Respondent is ordered to take immediate and necessary steps to ensure that the members of the South African Police Services prevent, combat, and investigate the trespass and unlawful occupation of the abovementioned property.

3.8 The Respondents are ordered to weekly, before 12h00 on the Friday of each succeeding week after the granting of this order, report to the Applicants and to this court on the steps they are taking to implement the terms of the order mentioned hereinabove.

3.9 The Respondents are ordered to pay the costs of this application jointly and severally, payment by one the others to be absolved.

4. The order contained in prayers 3.2, 3.4 and 3.7 above shall serve as an interdict with immediate effect, pending the finalisation of this application.
5. The Sheriff is instructed to serve this order upon the unlawful occupiers, collectively, of the property by means of the following:

5.1. The display of the order at a prominent place at the property

5.2. The reading out of the order to any person asking for it, and the provision of carbon copies of the order similarly.

5.3. The announcement of the order by loud haulier

6 Concerning any person able to show that he or she is an unlawful occupier of the property, such a person shall have the right to anticipate the return date of this order with no less than 48 hours' notice to all parties concerned, and ask for whatever relief such a person may have been advised is feasible.'

- [3] The first applicant withdrew the application against the first and second respondent with each party paying its own costs. The second applicant (FF PLUS) abides by the decision of the court. The facts are mainly common cause. During early March 2024, unknown people moved into Lourierpark, a property owned by the municipality and erected dwelling structures on the land without the municipality's permission or authorization. It is common cause that the property is constituted of a vast unfenced empty land. In addition to the court order, the municipality laid criminal charges. The number of land invaders kept on swelling even after the grant of the order. It was later estimated that about 2000 people moved into the property. This, according to the DA, happened in the presence of the members of the SAPS.
- [4] The order sought by municipality distinguished the occupiers into 3 categories:
- Those people who were in the process of carting building materials to the property;
 - Those who have already started constructing dwellings and
 - Those who have already erected complete dwelling structures.

The parties are ad idem that the category of people who had already erected dwelling structures, their rights are protected in terms of the Prevention of Illegal Eviction from Unlawful Occupation of Land Act 19 of 1998 (PIE).

- [5] The gravamen of the DA's complaint is that the third respondent failed to prevent, combat and investigate the trespass and unlawful occupation of the property by unknown persons, an obligation imposed on him by the Constitution. It is for this reason that it seeks an order declaring the actions of the SAPS unlawful and in violation of their constitutional mandate. The DA laments that the property has been zoned as agricultural land with no basic services and that its occupation by land grabbers violates the Spatial Planning and Land Use Management Act 16 of 2013(SPLUMA). It contends that after the land grabbers came to the knowledge of the court order they continued to invade the property and erect dwelling structures in full view of the members of the SAPS who stood idle and made no arrests. Upon perusal of the founding affidavit alone, I could not tell whether criminal charges of trespass were laid with the SAPS, if so, when and against whom were such charges laid. I shall assume that the affidavit by the municipality is admissible as evidence even though the application was withdrawn against the municipality and its Municipal Manager. This is the only affidavit, although scanty on detail, from which I could glean that there were trespass charges laid. There is no information on the identity of the people against whom charges were laid, regard being had that the third respondents had to be treated differently in terms of the court order.
- [6] This land grab was described as the most significant in the history of Bloemfontein, and one of its kind, owing to the number of invaders and the speed at which they took occupation of the property. On the 5th March 2024 the Municipality informed the interested parties that due to lack of capacity and logistical means to execute the order on the part of the Sheriffs

for Bloemfontein East and West jointly, a third party (the Red Ants Eviction Services) had been employed by the Sheriff, at the cost of Municipality, to provide support in the execution of the order.

[7] The Sheriff, Bloemfontein East, gave the following account of the execution process in the return of service:

‘1. With reference to the Court Order dated 2 March 2024 with Notice of Motion and subsequent amended Order date 6 March 2024, the following actions are recorded in execution of the said Orders and relate to action of both Sheriff Bloemfontein East and West.

Occupiers of 1st , 2nd and 3rd Respondents were found in the jurisdiction of both Sheriff Bloemfontein East and Sheriff Bloemfontein West; thus, the logistical arrangements necessitated a joint project between the abovementioned Sheriff’s offices.

2. On this 02nd day of March at 19:00 the Order of Court dated 2 March 2024 with Notice of Motion was served by reading out the order in English and Sesotho by megaphone at Subdivision 5 of the farm Brandkop 702 and Extension 148, Bloemfontein in terms of Paragraph 5.4 of the Order of Court dated 2 March 2024.

As it was already almost dark and extremely dangerous, it was impossible to identify and mark completed and occupied structures as per Paragraph 2.5 of the Court Order and most of the occupiers/crowds of people were not inside their shacks, but were gathering outside, where they were using alcohol and an unruly atmosphere prevailed.

Due to the above reasons, service in terms of Paragraph 5.1, 5.2 and 5.5 was not effected and nobody was removed and expelled from the property at this time. Deputy sheriffs left the area at 21:30. It was unsafe for deputy sheriffs to proceed with further execution.

3. Thereafter, various planning meetings were arranged and attended, as follows:

3.1 4 March 2024 at 12:00 - Municipal Managers’ office, Glass House Building.

3.2 5 March 2024 at 07:00 - Visited unlawfully occupied premises with representatives of Red Ants to assess the situation and obtain a quotation.

3.3 6 March 2024 at 08:30 - Mangaung Metropolitan Municipality Committee Room, 1st Floor Bram Fisher Building.

3.4 6 March 2024 at 10:30 - Phatsoane Henney offices.

3.5 6 March at 11:00 - SAPS Park Road.

3.6 7 March 2024 at 19:15 – 20:15 - Planning meeting at SAPS Park Road.

4. During planning meetings various shortcomings in the order were identified and the applicant approached the Court on the evening of 6 March 2024 and an amended order was thereupon issued. Subsequently, the amended Court order dated 6 March 2024 was served and executed on 08 March 2024 from 4:30 am to 19:00 pm and continued on 9 March 2024 from 08:00 am to 17:00 pm.

5. With reference to Paragraph 5 of 2 March 2024 Order and Paragraph 3 of the 6 March 2024 Order, service was effected in the following manner:

5.1 In terms of Paragraph 3.1 of the amended Order dated 6 March 2024, by handing out at least 20 copies to 1st and 2nd respondents found on the property and simultaneously, copies of the Order dated 3 March 2024 in terms of paragraph 5.1 thereof and

5.2 By handing and explaining the nature and exigency thereof to the occupiers of each completed and occupied structure (the 3rd respondents) and or by affixing a copy to each such completed and numbered structure, of the Court Order dated 6 March 2024 in terms of paragraph 3.2 and simultaneously a copy of Court Order dated 2 March 2024 in terms of paragraph 5.2 thereof, and

5.3 By reading out the Amended Order dated 6 March 2024 in English and Sesotho in terms of paragraph 3.4 by megaphone on 8 March 2024 at 05:45 am to bring the order to the notice of the respondents.

5.4 By handing a copy to any respondents who were removed or expelled from the property pursuant to paragraph 2.4 of both Court Orders, in terms of Court Order dated 6 March 2024 paragraph 3.5 and simultaneously copies of the Court Order dated 2 March 2024 in terms of paragraph 5.5

6. After reading out the Amended Court Order on 8 March 2024 at 05:45 am, the 1st and 2nd respondents who refused to comply with paragraphs 2.2 and 2.3 of the Court Order were removed and expelled from the property. Furthermore,

any incomplete and unoccupied structures or building materials found on the property were demolished and/or removed. Approximately 565 such structures were removed. This figure does not account for occupiers who voluntarily removed their own structures. Furthermore,

all markers of proposed new stands, including poles, steel rods, danger tape, rope, wire, rocks, etc, were removed from the occupied

premises.

7. All completed structures found to exist on the property were dealt with in the following manner as prescribed in paragraph 2.5:

7.1. Para 2.5.1 Structures occupied by any 3rd respondents were identified,

7.2. Para 2.5.2 Each such completed and occupied structure was marked with a chronological number with paint on the exterior of the structure,

7.3. Para 2.5.3 Photographs of the completed, occupied and numbered structures were photographed by a drone operated by the Red Ants,

7.4 Para 2.5.4 The following information as prescribed in the Order dated 2 March 2024 was obtained from the occupiers (3rd respondents) of each completed, occupied and subsequently numbered structure:

- (a) number of structures,
- (b) name of occupier,
- (c) sex of all occupiers,
- (d) identity number of all occupiers,
- (e) details of any disabilities,
- (f) where each occupier resided prior to taking occupation and
- (g) whether each of the occupiers are employed.

See enclose register with 194 identified structures and their occupants, marked Annexure A

8. Execution of Court order was carried out with the assistance of the South African Police Services guarding safety and the officials, agents or employees of the applicant.

Red Ant Eviction Services (Pty) Ltd was appointed to attend to demolishing and removal of all incomplete and unoccupied structures, and removal of building materials found on the property. They attended to the photos and video recordings. They also provided additional security ensuring the safety of the Sheriff Teams executing the Order.

Removal and demolishing were completed on 9 March 2024 at 17:00.'

- [8] The SAPS avers that the intervention by its officials was sufficient to bring the situation under control and to assist in the execution of the court order by the Sheriff. The SAPS deployed 70 officers on the property and 24 people were arrested in the process. The officials intervened between the residents of Lourierpark and the land grabbers and managed to quell an otherwise tumultuous situation and confrontation which broke out between the two groups. It however laments that although there was a need for additional capacity which would require summoning its members from other stations around the Free State, they managed to remove a huge number of land grabbers, leaving out those that have fully erected and occupied shacks.
- [9] The SAPS denies that it failed to give effect to the court order with the commensurate expedience it required. The SAPS contends that its officials applied situational appropriateness to manage the situation and ensure that there was protection of lives and

that imminent confrontation between the two groups is avoided. The SAPS submit that its members did all that was necessary to maintain law and order and ensure the execution of the order in line with their constitutional mandate, regard being had that it was the sheriff who had an obligation to execute the court order with their assistance.

[10] The SAPS further submitted that where a person's liberty is likely to be infringed by the arrest, the SAPS had to be careful particularly where there is no threat of physical harm and it must show that the violation of the freedom and security of the person is reasonably justifiable. It further contended that the DA failed to set out in clear terms what was lacking in the intervention by the SAPS officials or what more should have been done to meet the acceptable threshold.

[11] Section 205(2) and (3) of The Constitution[1] provides as follows:

'2. National legislation must establish the powers and functions of the police service and must enable the police service to discharge its responsibilities effectively, taking into account the requirements of the provinces.

3. The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.'

[12] Section 14 of the South African Police Act[2] provides that the National or Provincial Commissioner may employ members for service in the preservation of life.

[13] The question is whether the members of the SAPS complied with their constitutional obligation to prevent, combat, investigate crime, maintain public order, protect and secure the inhabitants of the Republic and their property, uphold and enforce the law when posted at Lourierpark. When the DA approached court on 08 March 2023 the order of the 2nd March had already been amended and substituted with the 6th March order in terms of which the SAPS had to assist the Sheriffs in the execution of the order to evict people from the property. The undisputed evidence shows that there were arrests made pursuant the Court order and that the SAPS assisted the Sheriff to remove the illegal occupants.

[14] The uncontroverted Sheriff's return shows that the land grabbers made it difficult to be identified according to how they were categorized in the court order because the complete structures were left unoccupied. There were people scattered all over the place on the property with no way of telling who of them are first, second or third respondents. It follows that further investigation was required to categorize the occupiers according to the court order and that the SAPS would not, without formalities, arrest anybody they find within the occupied property. In any case, arrest is but one of the methods to secure arraignment of a person before court. It cannot be used to punish or evict a person from the property. Since it affects the liberty of an individual, it is generally used as a measure of last resort. I accept that in certain circumstances, like where there is a continuous threat to public order or where measures like removing people from the scene have failed or were found to be

ineffective, the police may effect arrests on a grand scale. One has to scrutinize the conduct of the police under these circumstances.

- [15] The DA finds support for its assertion that the SAPS must be found to have breached their constitutional duty from the *Impangele Logistics (Pty) Ltd and Another v All Truck Drivers Foundation and 12 Others*[3], where the court found that the police were derelict of their duties when they failed to maintain public order at the request by parties whose assets were being destroyed and forcefully removed by violent striking employees and were obligated by the constitution to respond and intervene. The DA's reliance on *Impangele* is misplaced in that the facts and circumstances therein are distinguishable from the facts and circumstances surrounding this

matter. In *Impangele* the applicants approached the SAPS several times, over a period of 3 months, seeking assistance from the SAPS to restore order at their workplace and recover their vehicles that were forcefully taken by the striking employees. The SAPS blatantly refused to intervene and informed them that they should first obtain a court order to enable them to come to the applicant's assistance.

- [16] The circumstances surrounding this matter are completely different and cannot be compared with the circumstance in *Impangele*. In this matter the SAPS officials responded to the scene, 24 people were arrested, they assisted the Sheriff to execute the order and remove a large number of illegal occupants. They, further, intervened and calmed the situation in a standoff between the residents of *Lourierpark* and land grabbers.
- [17] The SAPS contended that different considerations apply in the enforcement of the *Trespass Act*[4] where vacant land is occupied by homeless people in an attempt to give effect to their right to access housing, particularly where the occupied land belongs to municipality which is enjoined by law to fulfill that right. For example, SAPS cannot summarily arrest people who unlawfully occupied land for housing unless they are satisfied that an infringement of a person's right to freedom and security is justified.
- [18] In its assertion that it had no obligation to execute the court order, which was the responsibility of the Sheriff, the SAPS postulates the following with regard to their duties and responsibilities during land grabs:

18.1 First: SAPS is not responsible for evictions (that is the duty of the Sheriff); SAPS can merely assist with the maintenance of law and order during evictions, and can also merely do so pursuant to a valid court order. In *Modderfontein Squatters, Great Benoni City Council v Modderklip Boerdery (Pty) Ltd; President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd*[5] the following remarks were made:

[29] The other cross-reference in the order was to s 165(4) of the Constitution, which requires of organs of state, through legislative and other measures, *ia*, to assist the courts to ensure their effectiveness. As far as this is concerned, *De Villiers J* found that the SAPS had failed in its duty to investigate the complaints laid and to protect the property of *Modderklip*. That finding is

reflected in para 1.5 of the order. The eviction order authorised the sheriff to request members of the SAPS to assist her in evicting – something envisaged by s 4(11) of PIE.[6] Modderklip apparently thought that this placed a duty on the SAPS to effect the eviction. This appears from the formulation of the notice of motion. But Modderklip erred. The order did not and could not require the SAPS to execute it. Concerning the failure to investigate and prosecute, it is true that the SAPS did neither but that does not mean that it failed in its constitutional duties.’

18.2 Second: SAPS is not responsible for securing people’s properties; that is the primary responsibility of the landowner. See *Mkontwana v Nelson Mandela Metropolitan Municipality and Another*.[7]

18.3 Third: SAPS has no obligation to prevent occupation of private property by homeless persons where it is not reasonable or practical to take preventative measures (for example, because of budgetary or capacity constraints). In *JR 209 Investments v City of Tshwane Metropolitan Municipality and Others*[8] the Court remarked as follows:

‘[17] As pointed out earlier the relevant subject properties extend a good measure of 167 [hectares]. It is indeed so that there is a legal duty on the first and second respondents [the municipality and the SAPS] to, inter alia, prevent commission of crime, such as trespassing or illegal invasion on the property of the applicant. In this regard it is apposite to cite the following: ‘The existence of a legal duty to avoid or prevent loss is a conclusion of law depending upon the consideration of all the circumstances of each particular case and depending on the interplay of many factors which have to be considered. The issue, in essence, is one of reasonableness, determined with reference to the legal perception of the community as assessed by the Court’ [Vide *Van Eeden v Minister of Safety and Security* 2001(4) SA 646 TPD at 653D].

[18] The extent of the property of the applicant, just on the outside border is vast and would require a large contingency of manpower deployed to police for purposes of preventing the encroachment and trespassing complained of. In my view, it would be unreasonable to expect of the first and second respondents to deploy manpower to prevent trespass or even illegal dumping on the relevant property. Such deployment would come with great financial constraints to their purse, and severe criticism from the public which would frown upon such deployment for the protection of an individual’s private property.’

The SAPS pointed out that because of limited resources and the vastness of the occupied property they could not promptly stop land grabbers from continuing to move into the property. They however managed to remove a lot of land grabbers and make some arrests.’ They responded effectively within their limited resources.

18.4 Fourth: SAPS can only arrest persons as a last resort, and where an infringement of a person’s right to freedom and security of the person is justified in all the circumstances, and can also only make an arrest of a person reasonably suspected of having committed, or being about to commit, a crime when there is a reasonable likelihood of a prosecution (and a custodial sentence).[9]

18.5 Fifth: SAPS cannot arrest pursuant to charges of trespass in order to enable a landowner to secure an eviction of allegedly unlawful occupiers in this manner, and thus to enable an eviction other than in terms of s 26(1) of the Constitution and PIE; while a court sentencing someone found guilty of trespassing must also take into account the circumstances relevant to PIE, when sentencing a person who has unlawfully entered land in an endeavor to find a home.[10]

18.6 Sixth: SAPS must ensure that any unlawful occupiers are treated with the requisite dignity and respect; SAPS is also under no duty to assist with the evictions of unlawful occupiers when eviction would be ineffective or inhumane, due to the absence of alternative land on which the occupiers could reside, and should not be seen to be aligned with one side. In the *Government of the RSA v Grootboom*[11] Yacoob J remarked as follows:

‘[82] All levels of government must ensure that the housing programme is reasonably and appropriately implemented in the light of all the provisions in the Constitution. All implementation mechanisms, and all state action in relation to housing falls to be assessed against the requirements of section 26 of the Constitution. Every step at every level of government must be consistent with the constitutional obligation to take reasonable measures to provide adequate housing

[83] But section 26 is not the only provision relevant to a decision as to whether state action at any particular level of government is reasonable and consistent with the Constitution. The proposition that rights are interrelated and are all equally important is not merely a theoretical postulate. The concept has immense human and practical significance in a society founded on human dignity, equality and freedom. It is fundamental to an evaluation of the reasonableness of state action that account be taken of the inherent dignity of human beings. The Constitution will be worth infinitely less than its paper if the reasonableness of state action concerned with housing is determined without regard to the fundamental constitutional value of human dignity. Section 26, read in the context of the Bill of Rights as a whole, must mean that the respondents have a right to reasonable action by the state in all circumstances and with particular regard to human dignity. In short, I emphasise that human beings are required to be treated as human beings. This is the backdrop against which the conduct of

the respondents towards the appellants must be seen.’

[19] The SAPS set out circumstances in which its officials can intervene in land grab matters. On the other hand, the DA was not able to articulate in clear detail where the intervention by the SAPS was inadequate and what more could the SAPS have done to reach the desired level of intervention. The fact that the municipality had laid trespass charges against the land invaders does not necessarily mean that the SAPS had to arrest every individual they found on the property. This was no ordinary trespass case, there were certain fundamental rights that required protection in the process of the SAPS executing their duties. They had an obligation to treat the illegal occupants with dignity and respect that is required by the Constitution. The contention by the SAPS that they had to be certain that the individuals

concerned had alternative accommodation before removing them from the property finds support in the established jurisprudence.

- [20] The SAPS are called upon to be careful in execution of their duties. What the 2017 instruction^[12] seeks to achieve is to prevent a situation where the SAPS are exposed to litigation because they arrested all and sundry. There was a need for the police to identify occupants of the property and classify them according to the categorization in the court order in order to give effect thereto.
- [21] The police operate on discretion. They are entitled to exercise their discretion whether to arrest or not provided that such discretion is exercised judiciously. It follows that they have to weigh many options before deciding whom and how to arrest. I have already mentioned that there is no evidence before me to show against whom the trespass charges were laid. Compounding the problem, is that the DA brought no evidence to show that the decision of the police to only arrest 24 people out of a crowd of 2000 – 2500 was irrational. I am unable to find that the SAPS failed in executing their constitutional mandate. The application must fail.

COSTS:

- [22] Costs are in the discretion of the court. The FF Plus filed its notice to abide on 17 May 2024 simultaneously with its replying affidavit and failed to tender costs. The municipality seeks a cost order against the FF Plus until the date of the notice to abide. I take note that at the time this application was brought parties wanted a solution to a crisis that was unfolding at Lourierpark. I cannot say that they were unreasonable at the time. This is the kind of matter in which fairness dictates that each party should bear their own costs.

- [23] I, therefore, make the following order.

ORDER:

MBHELE, DJP

Appearances: For the 1st Applicant: Adv S Grobler, SC Instructed by: Moolman & Pienaar Inc c/o Horn & Van Rensburg Bloemfontein For the 1st & 2nd Respondent: Adv C Snyman Instructed by: PH Attorneys Bloemfontein For the 3rd Respondent: Adv SS Jonase Instructed by: State Attorney Bloemfontein

- [1] Constitution Act 108 of 1996
- [2] The South African Police Act 68 of 1995
- [3] Impangele Logistics Pty Ltd and Another v All Truck Drivers Foundation and 12 Others, Case No. 3647/2019, Mpumalanga Division Local Seat, 25 October 2019.
- [4] The Trespass Act 6 of 1959.

[5] Modderfontein Squatters, Great Benoni City Council v Modderklip Boerdery (Pty) Ltd; President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd 2004 (6) SA 40 (SCA) at paras 29-30;

[6] It reads: 'A court may, at the request of the sheriff, authorise any person to assist the sheriff to carry out an order for eviction, demolition or removal subject to conditions determined by the court: Provided that the sheriff must at all times be present during such eviction, demolition or removal.'

[7] Mkontwana v Nelson Mandela Metropolitan Municipality and Another 2005 (1) SA 530 (CC) at para 59; Modderklip 'This unlawful occupation benefits neither the property nor the owner and, in most cases, is prejudicial to both. It is nevertheless the duty of the owner to safeguard the property, to take reasonable steps to ensure that it is not unlawfully occupied and, if it is, to take reasonable steps to ensure the eviction of the occupier. If the owner performs such duties diligently, unlawful occupiers will not, in the ordinary course, remain on the property for a long period.'

[7] Mkontwana v Nelson Mandela Metropolitan Municipality and Another 2005 (1) SA 530 (CC) at para 59; Modderklip

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[8] JR 209 Investments v City of Tshwane Metropolitan Municipality and Others (Case No. 76139/2015) [2015] ZAGPPHC 1024 (13 November 2015) at paras 17-18

[9] Sex Worker Education & Advocacy Task Force (SWEAT) v Minister of Safety and Security 2009 (6) SA 513 (WCC) at paras 17-28: '[26] Whilst accepting that police officers are constitutionally obliged to carry out arrests as part of their crime prevention duties, and that the discretion whether or not to prosecute any particular case vests in the NPA in terms of sec 179(2) of the Constitution, it should be borne in mind that the peace officer making an arrest must do so with the object of bringing the arrestee under the physical control of the State to enable the prosecuting authority to institute criminal proceedings in appropriate cases. I agree with the submission on behalf of applicant, that in the circumstances prevailing in the instant matter, the peace officers who effected the arrests of the sex workers during the relevant period, did not do so with the required object or purpose of having the sex workers prosecuted. This is so because they knew with a high degree of probability that no prosecutions would follow.'

[9] Sex Worker Education & Advocacy Task Force (SWEAT) v Minister of Safety and Security 2009 (6) SA 513 (WCC) at paras 17-28:

[26] Whilst accepting that police officers are constitutionally obliged to carry out arrests as part of their crime prevention duties, and that the discretion whether or not to prosecute any particular case vests in the NPA in terms of sec 179(2) of the Constitution, it should be borne in mind that the peace officer making an arrest must do so with the object of bringing the arrestee under the physical control of the State to enable the prosecuting authority to institute criminal proceedings in appropriate cases. I agree with the submission on behalf of applicant, that in the circumstances prevailing in the instant matter, the peace officers who effected the arrests of the sex workers during the relevant period, did not do so with the required object or purpose of having the sex workers prosecuted. This is so because they knew with a high degree of probability that no prosecutions would follow.'

[10] S v Koko 2006

(1) SACR 15 (C) at para 24: 'The case is the clearest possible support for the viewpoint that the Director of Public Prosecutions should guard against prosecutions

under section 1 of Act 6 of 1959 [the Trespass Act] being used by owners and persons in charge of land and/ or buildings as a means to procure the eviction of persons from their home without compliance with onerous, but clearly statutory provisions of the PIE Act, especially where the duration of the occupation has not been of a merely transitory nature.'

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[11] Government of the RSA v Grootboom 2001

(1) SA 46 at para 82-83.

[12] National Instruction 7 of 2017, Unlawful occupation of land and evictions.

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