

SOUTH AFRICA / JUDGMENT

South African Human Rights Commission and Others v City of Cape Town and Others (8631/2020) [2020] ZAWCHC 84; 2021 (2) SA 565 (WCC) (25 August 2020) [2020] ZAWCHC 84

COURT

Western Cape High Court, Cape Town

BEFORE

Y.S. Meer, R. Allie

CASE / FILE NUMBER

8631/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

[WESTERN

CAPE DIVISION, CAPE TOWN]

REPORTABLE

Case

No.: 8631/2020

Before

the Hon. Ms Justice Meer et the Hon. Ms Justice Allie

Hearing:

20 and 21 August 2020

Judgment

Delivered: 25

August 2020

In

the matter between:

SOUTH
AFRICAN HUMAN RIGHTS COMMISSION First
Applicant
HOUSING
ASSEMBLY Second
Applicant
BULELANI
QOLANI Third
Applicant
and
THE
CITY OF CAPE
TOWN First
Respondent
THE
MINISTER OF HUMAN SETTLEMENTS Second
Respondent
THE
MINISTER OF CO-OPERATIVE GOVENANCE Third
Respondent
AND
TRADITIONAL AFFAIRS
NATIONAL
COMMISSIONER: Fourth
Respondent
SOUTH
AFRICAN POLICE
MINISTER
OF
POLICE Fifth
Respondent
WESTERN
CAPE PROVINCIAL COMMISSIONER: Sixth
Respondent
SOUTH
AFRICAN POLICE SERVICE
ECONOMIC
FREEDOM FIGHTERS First
Intervening Applicant
THE
PERSONS WHO CURRENTLY OCCUPY Second
Intervening Applicant
ERF
544, PORTION 1, MFULENI

JUDGMENT

DELIVERED ON 25 AUGUST 2020

MEER, J:

[1] On 1 July 2020 the nation was shocked by a video that went viral on social media depicting a naked man being dragged out of his shack in an informal settlement by officials of the City of Cape Town, who thereafter demolished the shack. The image, reminiscent of apartheid era brutal forced removals, depicted Mr Bulelani Qolani, the Third Applicant in these proceedings. Those dragging him were members of the Anti-Land Invasion Unit (“ALIU”), of the City of Cape Town, a specialised unit tasked inter alia with determining, without a court order, which structures should be demolished, primarily in informal settlements and on land that

becomes occupied. This disturbing incident, together with several other demolitions effected without court orders in the greater Cape Town area during the current national state of disaster, [1] have prompted this application, Part A of which is before us for urgent interim relief, pending the finalisation of Part B. The

application seeks inter alia to inject judicial oversight into evictions and demolitions during the national state of disaster in informal settlements in particular,

where the most vulnerable reside.

[2] The application is brought in two parts. Part A of the application is urgent and seeks the following interim interdictory

relief pending the final determination of the relief sought in Part B:

2.1 The first respondent, its Anti-Land Invasion Unit (“ALIU”), and any private contractors appointed by the first respondent to do the same or similar work or to perform the same or similar functions as the ALIU, are interdicted and restrained from evicting persons from, and demolishing, any informal dwelling, hut, shack, tent or similar structure or any other form of temporary or permanent

dwelling or shelter, whether occupied or unoccupied, throughout the City Metropole, while the state of disaster promulgated by the third respondent in terms of section 23(1)(b) of the Disaster Management Act 57 of 2002, as amended, remains in place, except in terms of an order of court duly obtained;

2.2 To the extent that the first respondent and its authorised agents (such as the ALIU and the private contractors aforementioned) evict and/or demolish any informal dwelling, hut, shack, tent or similar structure or any other form of temporary or permanent dwelling or shelter, whether occupied or unoccupied, in terms of a Court Order that they do so in a manner that is lawful and respects and upholds the dignity of the evicted persons, and that they are expressly

prohibited from using excessive force, and/or destroying and/or confiscating the materials which is the property of the evictees; alternatively, it is declared that all or any evictions and/or demolitions aforementioned (including those effected in terms of a court order) be done in a manner that is lawful and respects and upholds the dignity of the evicted persons, and that they are expressly prohibited from using excessive force, and/or from

destroying and/or confiscating the materials which is the property of the evictees;

2.3 To the extent that any evictions and/or demolitions are authorised by Court Order that the South African Police Service, when its members are present during an eviction or demolition, is directed to ensure that the said evictions and/or demolitions are done lawfully and in conformity with the Constitution, in accordance

with the SAPS' constitutional duty to protect the dignity of the persons evicted;

2.4 The first respondent is interdicted and restrained from considering, adjudicating, and awarding any bids or tenders received in response to Tender 308S/2019/20 'Demolition of illegal and formal and informal structures in the City of Cape Town.'

Part B seeks a review and declaratory relief relating to Part A.

[3] The Intervening Applicants seek interdictory relief on the same terms as paragraph 2 of Part A above. In the alternative to the relief sought in paragraph 2.1 above, they seek an order interdicting and restraining the evictions and demolitions as referred to in paragraph 2.1 unless the First Respondent provides temporary emergency accommodation or the evictions/demolitions occur in terms of a court order. Furthermore, they seek an order that the First Respondent be directed to return building material and personal possessions seized from the Second Applicant between 1 May 2020 to date as well as the payment of R2000 to each occupant for loss of personal belongings.

Parties

[4] The First Applicant is the South African Human Rights Commission ("the Commission"), a state institution specifically

mandated to promote respect for human rights and monitor and assess the observance thereof. The Commission is authorised in terms of section 14(3)(b) of the South African Human Rights Commission Act 40 of 2013 to bring proceedings in its own name which it does in this application.

[5] The Second Applicant, the Housing Assembly, describes itself as a membership based social justice movement whose objective is to advance rights to housing and address housing inequality in South Africa. The Second Applicant brings this application as an association acting in the interests of its members in terms of section 38(e) of the Constitution and in the public interest in terms of section 38(d) of the Constitution.

[6] The Third Applicant is a former occupant of an informal dwelling which was demolished at Ethembeni informal settlement in Khayelitsha,

Cape Town on 1 July 2020 by ALIU officials of the First Respondent.

[7] An application to intervene in the public interest in terms of section 38(d) of the Constitution was granted to the Economic Freedom Fighters (“EFF”) and the persons who currently occupy Erf 544, Portion 1, Mfuleni (commonly known as Zwelethu)[2]. I shall refer to them as the Intervening Applicants.

[8] The First Respondent, the City of Cape Town, (“the City”) opposes the application. The Fourth, Fifth and Sixth Respondents

oppose the relief sought at prayer 2.3 of the Notice of Motion pertaining to the South African Police Service. The Second and Third Respondents have not filed intentions to oppose the application or any other pleadings.

Factual

Background

[9] The Applicants and the Intervening Parties detail the following demolition operations carried out by the ALIU during Alert Levels 4 and 3 of the national state of disaster declared in terms of section 23(1)(b) of the Disaster Management Act 57 of 2002, pursuant to the COVID-19 pandemic (“DMA”). They point out that these operations occurred notwithstanding the provision in Regulations 19[3] and 36(1)[4] of Alert Levels 4 and 3 respectively, that evictions be suspended until the last day of the Alert Level period, unless a court decides that it is not just and equitable to evict. I pause to mention that Regulation 53(1)[5] of Alert Level 2, which is currently applicable, prohibits evictions and demolitions without court orders.

Demolitions and evictions in Empolweni Informal Settlement, Makhaza Khayelitsha during Alert Level 4

[10] On 09 to 11 April 2020 the ALIU and private contractors instructed by the City demolished structures in the Empolweni Informal Settlement in Makhaza Khayelitsha. The land on which these informal dwellings were erected, Erf 18332 Khayelitsha, is owned by the City.

[11] Urgent relief was sought and granted by this Court to a number of occupiers whose structures had been demolished. The application for such relief, which was opposed by the City, sought inter alia orders to the effect that occupants may only be removed from the property and structures demolished through an order of eviction in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (“PIE”).

- [12] In its opposition to the application an ALIU Senior Field Officer, Mr Jason Buchner, stated in an affidavit that not a single structure that was demolished was occupied. He went on to state that:

“None of the unlawful occupiers including the Applicants have the protection of section 26(3) of the Constitution of the Republic of South Africa 1996 . . . and the Prevention of Illegal Eviction from an Unlawful Occupation of Land Act, No. 19 of 1998 (“the PIE Act”) insofar as the property is concerned. Some of the structures which were taken down by the contractor were complete and others were still in the process of being erected. Some just had frames while others lacked roofs, doors and/or windows. All of the structures which were taken down at the property by the contractor were either partially built or complete, but none were occupied.”

- [13] Buchner went on to state in his affidavit that because the City was entitled to counter-spoliate, the City required no eviction order authorising its conduct and demolition operations. Buchner also recorded that ALIU was accompanied by thirty law enforcement officers of the City and that members of SAPS attached to the Harare Police Station were also present. This is not denied by the Fourth to Sixth Respondents, the police respondents.
- [14] On 17 April 2020 this Court granted an interim order inter alia ordering the City to return building materials confiscated from the Empolweni property and authorising the occupiers to re-erect and occupy structures on the property for as long as the lockdown continued.

Demolitions during the national state of disaster in Hangberg, Hout Bay 19 June 2020, during Alert Level 3

- [15] On 20 June 2020 the Commission received a complaint from the Hangberg Community in Hout Bay alleging that on 19 June 2020 City officials demolished a structure located at Erf 5606, Hout Bay and evicted residents without obtaining a court order and in contravention of the COVID-19 DMA Regulations. The Commission directed a letter to the City on 22 June 2020 recording that it was unlawful,

unconstitutional and a criminal offence to evict any person without first obtaining a court order in terms of section 4 of PIE. The Commission requested a meeting with the City and sought an assurance that it would halt further demolitions of that particular property pending the meeting.

- [16] The City declined to meet on the grounds that the complainants were legally represented and the matter was pending before the High Court, Western Cape Division. On 15 July 2020 this Court declared the City’s conduct to be unlawful and unconstitutional, stating that in the absence of an eviction order expressly stating that it is just and equitable to do so, demolitions of homes cannot be carried out lawfully during Alert Levels 3 and 4. The Court harshly condemned the demolitions categorising them as inhumane, heartless and done with scant regard to safety, security and health particularly in the light of the COVID-19 pandemic.

Demolitions at Ethembeni Informal Settlement, Khayelitsha on 1 July 2020 during Alert Level 3

[17] On 1 July 2020 City officials and the ALIU demolished further structures at the Ethembeni Informal Settlement in Khayelitsha.

One of the structures demolished was occupied by Mr Bulelani Qolani, the Third Applicant. Video footage of this incident as aforementioned shows City officials dragging Mr Qolani out of his shack, naked and in full view of surrounding residents, whereafter they demolished his shack.

[18] An affidavit by Mr Qolani states whilst the law enforcement officers were approaching, he went into his dwelling, and prepared to bath. He stood outside his dwelling naked and asked to be allowed to finish his bath. The law enforcement officers sprayed his neighbour with pepper spray and forcibly gained entry into Mr Qolani's dwelling, carrying batons and guns. On entering his structure, they were already pushing up the roof to tear it apart. He asked to be shown an eviction order and told them it was illegal to evict during the lockdown period. They ignored his requests, he said, handled him physically and violently, pepper sprayed him and forcefully removed him from his house, whilst still naked and in full view of residents. As Mr Qolani tried to re-enter his house, he states they shoved him to the ground and one official knelt on his back while another held him down to stop him moving. Eventually, after quite a struggle, Mr Qolani got back into his house and sat on his bed, his head bleeding and in pain. Whilst he was still inside, he states, the demolition was completed.

[19] The Commission directed a letter to the City on 1 July 2020 stating it had received reports that in addition to the eviction of Mr Qolani, the City had demolished at least four shacks and evicted the occupants thereof at Ethembeni in contravention of section 8(1) of PIE. It requested a meeting with the City.

[20] The City responded on 2 July 2020 stating inter alia the following:

"In order to protect the City's interests, the City's anti-land invasion unit is required to take the necessary action and demolish any illegally erected structure so as to safeguard the City's interests."

Concerning Mr Qolani, the letter stated that as the City's agents approached his structure he moved into the structure, undressed

himself, came back out naked, then moved back into the structure whereafter, the law enforcement tried to remove him. It is further stated that this

"appears to be a calculated and deliberate act to thwart the law enforcement action and is the latest trend whereby people undress themselves when police conduct operations in response to illegal actions, the intention being to cause the police to discontinue the operation due to the discomfort created by the actions of the persons disrobing."

[21] The City declined the Commission's request for a meeting, claiming the matter was sub judice and the meeting would serve no purpose. On 3 July 2020 the Commission's attorneys wrote to the City demanding undertakings that demolitions and evictions would only take

place in terms of court orders and requesting the names and details of all City employees depicted in the video footage recording of the incident, who authorised the demolitions at Ethembeni Settlement on 1 July 2020, and details of any disciplinary steps initiated. The City was also asked to immediately suspend any consideration of an adjudication of bids received from tenderers in respect of Tender 308 S/2019/20 “Demolition of Illegal and Formal and Informal Structures in the City of Cape Town”. The City refused to grant any of the undertakings sought.

[22] In its answering affidavit, the City states that in the Qolani matter the City has taken decisive action and has suspended the employees involved. They will be subject to disciplinary proceedings conducted by the City’s attorneys. The Applicants question the objectivity of proceedings conducted by the City’s attorneys. In heads of argument Mr Rosenberg for the City, states that the founding affidavit astutely avoids dealing with how and when Mr Qolani is alleged to have taken occupation of his structure. Mr Rosenberg submitted that Mr Qolani’s dwelling was an unoccupied structure as it had been erected a day before the demolition.

[23] Mr Qolani states –

“I have been publicly humiliated and my dignity has been deeply violated..... The conduct of the City Officials to me was cruel, inhumane and degrading . . . I seek the relief in the Notice of Motion to vindicate the gross violation of my right to dignity perpetrated by the city officials on 1 July 2020.”

Demolitions in Ocean View on 15 May 2020 as recorded by Second Applicant during Alert Level 3

[24] Ms Kashiefa Achmat, chairperson of the Second Applicant, was contacted by an Ocean View community member on 15 May 2020 regarding

evictions and demolitions that were being carried out by City law enforcement officials and the ALIU in the informal settlement on Erf 5144 Kommetjie township, Ocean View. The property is privately owned by the Ocean View Development Trust. Ms Achmat proceeded to the property on the morning of Friday 15 May 2020. On her arrival she saw that structures had been demolished and material confiscated. She noticed that the officials had left some of the furniture of occupiers unattended but other belongings and furniture had been damaged. Video footage of the demolition captures the devastation of the sight and distress caused. Ms Achmat states that the demolitions took place without the approval or consent of the owner. Ms Achmat records that this was not the first time the Second Applicant had been called to intervene in evictions and demolitions in the area. In February 2020 she was also asked to intervene in an unlawful eviction and demolition very similar to the one of 15 May 2020. In both instances no court orders were presented to the community.

[25] On 18 May 2020 her attorneys wrote to the City advising that the conduct of its officials was unlawful, and demanding a written

undertaking that no further such demolitions and evictions would occur on the property and that building materials be returned,

alternatively that payment of compensation be made. The City responded on 21 May 2020 denying that an eviction was conducted on the said date and time. Instead, the City stated the ALIU had acted within its mandate to demolish illegally erected structures

provided that they are unoccupied.

Evictions in Zwelethu, Mfuleni on 13 July 2020 during Alert Level 3

[26] On 13 July 2020 the City demolished structures on land owned by the Western Cape Nature Conservation Board in Mfuleni, commonly known as Zwelethu, which adjoins City-owned land. The founding affidavit of Mr Ziwe Sigenu for the Second Intervening Applicant states that the residents of Zwelethu have been the subject of at least seven unlawful evictions, carried out in the absence of a court order – a violation of section 26 of the Constitution and the provisions of PIE.

[27] Many of the residents of Zwelethu, Mr Sigenu states, began their occupation of the property in March 2020 as a result of being evicted from rented shacks in townships in and around Mfuleni as backroom dwellers. They are desperately poor, unemployed and occupied the property at Mfuleni out of desperation, not choice. The choice for many, he continues, was either to sleep on the streets or find an empty patch of land where they could shelter, especially given the growing threat of coronavirus and the need to social distance and isolate within one's home.

[28] Zwelethu, he states, comprises of approximately 120 homes including approximately 41 woman-headed households, 117 minor children of varied ages, one elderly person and one disabled person. The first evictions and demolitions occurred towards the end of May 2020. Further evictions and demolitions occurred in quick succession on 19 June, 2 July, 8 July 2020, 9 July 2020, 11 July 2020 and 13 July 2020. The City confirms that the ALIU attended at the property on these dates with law enforcement, adding that on certain dates Metro Police and the SAPS accompanied the ALIU and stating that law enforcement, Metro Police and the SAPS were armed.

[29] Mr Sigenu states that the actions of the ALIU have been the same on each occasion. They arrive in the early hours of the morning armed with protective gear and weapons. Without asking questions or producing documents, they begin demolishing homes regardless of whether these evince occupation or not. If the ALIU finds any furniture inside a dwelling, they either demolish the shack as is or remove the furniture first. Building material and personal possessions are confiscated. Photographs and video footage depict the devastation. Mr Sigenu states that these actions will continue should the Court not grant the interdict against evictions. Currently the community is opposing an application by the Western Cape Nature Conservation Board served on 11 July 2020, seeking to interdict persons from occupying the property and to demolish their homes.

- [30] The City contends that the Second Intervening Applicants rely on video evidence which does not support their contentions and takes issue with inter alia the date of the footage. It disputes that the occupants of the Western Cape Nature Conservation Board property have been in occupation since March 2020 as they claim.
- [31] The City's answering affidavit records that the property was vacant until around 17 June 2020. On 18 June 2020 the ALIU discovered and removed 18 unoccupied structures that had been erected on the site. When the ALIU left that property, there were no structures there. The ALIU returned to the property on 19 June 2020 and noted 6 new unoccupied structures had been erected. These were removed. Unlawful occupiers threw stones at the ALIU and law enforcement officers. On 28 June 2020, the ALIU was once again alerted to a fresh attempt to occupy the City-owned property. On that date, the ALIU removed 21 newly erected unoccupied structures. The unlawful occupiers became extremely violent on that occasion. Stones were thrown and windscreens and windows of ALIU vehicles were damaged. A law enforcement officer was injured and had to be hospitalised. The ALIU was unable to remove any building materials due to the volatility of the situation. The ALIU returned on 29 June 2020 and removed a further 15 newly erected unoccupied structures. On this occasion and due to the violence which had ensued on the previous day, they were accompanied by the City's Metro Police and the SAPS, Public Order Policing Unit as well as law enforcement.
- [32] On 4 July 2020 after once again receiving a complaint, the ALIU together with Metro Police attended at the City property and discovered 4 unoccupied structures on the City property. The Metro Police advised the unlawful occupiers to remove 3 of the structures. It was unclear whether one of the structures was occupied or unoccupied. Again, on 8 July 2020 in response to a complaint, the ALIU removed 8 unoccupied structures. Five occupied structures were not removed. Once again there were incidents of stone throwing. Given the constant attempts to occupy the City's property, the City decided it would be prudent to obtain an interdict to prevent further attempts to occupy the property.
- [33] The ALIU returned to the City property on 10 July 2020. On that date the rate of unlawful occupation it contends had increased substantially. The ALIU demolished 90 unoccupied structures on that date. There were an additional 45 occupied structures on the properties on that date which were not removed. When the ALIU left the property on 10 July 2020, there were 50 occupied structures on the property. By this stage the City's property was fully occupied and thus no purpose would be served in obtaining an interdict to protect the property. The ALIU returned to the property on 11 July 2020 and on that date it removed 606 unoccupied structures and removed building materials of approximately 200 of those structures from the Western Cape Nature Conservation Board property. There were approximately 1000 occupied structures which had been erected on the properties by 11 July 2020, none of which were removed. On 13 July 2020 the ALIU returned to the Cape Nature

property accompanied by Mr Nthantiso of the Cape Nature property. Three hundred and twenty-seven unoccupied structures were removed. A further 200 newly erected occupied structures were not removed. When the ALIU left the Cape Nature property on 13 July 2020 there were approximately 1 200 occupied structures.

- [34] The affidavit goes on to state that on 14 July 2020 ALIU removed 65 unoccupied structures from the Cape Nature property at that stage there were approximately 2000 occupied structures which were not removed. On 15 July 2020, the ALIU removed 143 structures and building material in respect of 137 of those structures from the Western Cape Nature Conservation Board property.

At that stage, 3000 occupied structures on the properties existed and these were not removed. On 17 July 2020 a further 164

unoccupied structures were removed from the Western Cape Nature Conservation Board property.

- [35] The unlawful occupation of the property is of great concern to the City as water mains which service the Delft, Khayelitsha, Mfuleni and Blue Downs areas run under the property. The City will not be able to access these water mains to effect emergency repairs or routine maintenance should the unlawful occupation continue. This will be prejudicial to thousands of City residents, which can be ill-afforded during the COVID-19 pandemic.

- [36] Against this factual background, I turn to consider each of the interim interdicts sought by the Applicants.

Interdictory Relief sought at Prayer 2.1

- [37] To recap, the relief sought at prayer 2.1 seeks to interdict evictions from and demolitions of occupied or unoccupied structures

without a court order during the national state of disaster.

The requirement of a prima facie right

- [38] The Applicants state that they rely on four clear rights:

1. The provisions of section 8(1) of PIE which stipulates that “no person may evict an unlawful occupier except on the authority of an order of a competent court”;
2. The requirements of section 26(3) of the Constitution which states that “no-one may be evicted from their home or have their home demolished, without an order of court made after considering all relevant circumstances. No legislation may permit arbitrary evictions”;
3. The provisions of section 34 of the Constitution which states that “everyone has the right to have any dispute that can be resolved by application of law decided in a fair public hearing before court or where appropriate another independent and impartial tribunal or forum”;
and

4. The provisions of Regulation 36 of the DMA Regulations[6] which provide that a person may not be evicted from his or her land or home during the period of Alert Level 3 period and that judicial discretion is required to be exercised in the execution of eviction orders during the Alert Level 3 period. I note, as stated above, that this has since been replaced by Regulation 53 during the current Alert Level 2 of lockdown, which provides for evictions in terms of court orders only.

Prima facie right to the relief sought in respect of occupied structures

- [39] Insofar as the Applicants seek relief related to occupied structures, the City accepts that occupied structures attract the protection of PIE and that therefore such evictions cannot occur in the absence of court orders. It contends, however, that the Applicants are not entitled to an order interdicting the City from evicting persons from occupied structures or demolishing

occupied structures as the City does not engage in the conduct complained of. It is contended that the evidence on which the Applicants rely for such relief is disputed and the evidence put up by the City throws serious doubt on the Applicants' version, as discussed further below. The City therefore concedes that it is not entitled to evict and demolish in respect of occupied structures without a court order during the state of disaster and it makes this concession notwithstanding its opposition to the interdict on the basis of the evidence.

- [40] The City does not accept that unoccupied structures attract the protection of PIE. It does not accept that evictions from and

demolitions of unoccupied structures can only occur in terms of court orders. The City contends inter alia that unoccupied structures are not homes as defined in PIE and that neither PIE nor the Constitution prohibits the City from demolishing structures that are not homes. The City is entitled to counter spoliare in respect of unoccupied structures and therefore does not require a court order for the demolition of such structures. The City further contends that a structure which is in the process of being erected cannot constitute a home within the meaning of section 26(3) of the Constitution. That is because the objective element, namely a shelter from the elements, is not present in respect of a structure that is being erected. Nor would a completed structure constitute a home if the would-be occupier has not yet moved into it or if it is not regularly occupied by a would-be occupier, contends the City.

- [41] I am unable to agree with the City that it does not engage in evictions from occupied structures and that the evidence put up by it throws serious doubt on the Applicants' version. One need look no further than the undisputed image of Mr Qolani being dragged out of an occupied structure housing a bed to know that this is not so. Mr Qolani's evidence moreover that his shack was occupied is not disputed.

- [42] The judgment and court orders granted in the Empolweni and Hangberg matters by this Court in April and July respectively also are suggestive of the fact that occupied structures were demolished. In both cases, the City was ordered in the interim to return building

material and the applicants were permitted to erect and occupy their structures. In the Hangberg matter, the judgment referred to the City's unconstitutional conduct in repeatedly demolishing the home of Mr Phillips, of which he was in peaceful and undisturbed possession.

[43] The evidence of Ms Achmat of furniture being removed from dwellings during the Ocean View evictions on 20 May 2020 too gainsays the City's submission that demolitions of occupied homes does not occur without court orders. If unoccupied, why furniture?

[44] The evidence of Mr Sigenu pertaining to the evictions and demolitions of the Zwelethu community, namely that if the ALIU finds any furniture on the inside of a shack they either demolish the shack as is or the furniture will be thrown outside, is met with the response that the ALIU only takes action to remove unlawfully erected structures when those are clearly unoccupied and/or vacant. No explanation is given as to how a decision is arrived at that a furnished shack can clearly be unoccupied.

[45] I am satisfied that from the evidence pertaining to the above demolitions, the Applicants have established a *prima facie*, if not a clear right, to the interdictory relief in respect of occupied structures sought at paragraph 2.1 of the Notice of Motion.

Prima facie right to the relief sought at 2.1 in respect of unoccupied structures

First category of relief: Purposive interpretation of PIE

[46] In support of their stance that evictions from unoccupied structures absent court orders should be interdicted, the Applicants argue as follows for a purposive interpretation of PIE and contend that the City's reliance on counter spoliation is unconstitutional:

46.1 Section 8(1) of PIE prohibits the eviction of an unlawful occupier except on the authority of an order of a competent court. Section 4(10) provides that a court that makes an order for eviction of occupiers may also order the demolition of structures occupied by such persons;

46.2 PIE defines the term "building or structure" broadly to include "any hut, shack, tent, or similar structure of any other form of temporary or permanent dwelling or shelter";

46.3 Any interpretation of PIE must be in accordance with section 39(2) of the Constitution which requires that legislation must be interpreted in a manner that promotes the spirit, purport and objects of the Bill of Rights. PIE was adopted with the objective of addressing the manifest abuses of human rights, of homeless and landless people occasioned by the Prevention of Illegal Squatting Act 52 of 1991 and its authorisation of powers of summary demolition without the need for judicial oversight;

46.4 Therefore, properly interpreted, the provisions of PIE, including sections 8(1) and 4(10), require that if there is any doubt about whether a structure is occupied for residential purposes, or whether a structure is complete or fully built, an organ of state or private person must obtain a court order before it may evict a person from, or demolish that structure or building;

46.5 This interpretative approach does not unduly limit the rights of land owners, as PIE expressly provides for urgent evictions at section 5.

[47] I am inclined to agree that such an interpretation promotes the rights in the Bill of Rights, in accordance with the provisions of section 39(2) of the Constitution.[7] including the right to have evictions and demolitions of homes subject to judicial oversight in terms of section 26(3) of the Constitution. It ensures that the occupier's constitutional rights to dignity, housing, safety and security of the person and life are protected.[8] Prima facie, this argument passes muster and may well take precedence over the City's reliance on the common law principle of counter-spoliation, a matter to be decided at Part B of this application.

Second category of relief: How the ALIU determines whether structures are occupied

[48] The Applicants contend that the City's position that the ALIU is entitled to demolish structures it has determined to be unoccupied based solely on visual observations is in violation of section 34 of the Constitution, the right of access to a fair public hearing and is contrary to the common law rule of natural justice which requires disputes to be heard by an impartial and unbiased tribunal. City officials, in their own discretion, decide whether a structure is occupied or a home and no provision is made for a person affected by that decision to have recourse to a court before a structure is destroyed, they contend. Occupiers, they contend, are deprived of possession of their structures by City officials who sit in judgment of their own cause.

[49] In a similar vein, the Intervening Applicants contend that the City has failed to point to any policy, rule, or legislation that may shed light on how it determines what is occupied and unoccupied. Whilst the City says that its officers know what is occupied because they have received training, it is submitted that the City has not taken the Court into its confidence about what training it provides to the ALIU, how they determine whether a structure is occupied and whether any due process is observed when ALIU decides to demolish a structure. It does this, contend the Intervening Applicants, in circumstances where it has a duty to account. In this regard, I was referred to *Kalil N.O. and Others v Mangaung Metropolitan Municipality and Others* [2014] ZASCA 90 at paragraph 30 where it was stated that it is the duty of government officials at national, provincial and municipal Levels to take the court into their confidence and fully explain the facts so that an informed decision can be taken in the interests of the public and good governance. It is contended that the City has failed plainly to do that even after being given an opportunity to file a supplementary affidavit. In the absence of an explanation or justification of how the City determines what is occupied, the ineluctable conclusion to draw, contends the Intervening Applicant, is that the City merely guesses.

Discussion in respect of unoccupied structures

- [50] The City has in my view not provided a substantial response to the charge of the Applicants and Intervening Applicants that ALIU determines which dwellings are unoccupied and singled out for demolition in an arbitrary, capricious and unfettered manner. The City has failed to point to any policy, rule, or legislation that sheds light on how it determines what is occupied and unoccupied. Mr Rosenberg for the City was not able to point me to any evidence which indicated any policy employed by the ALIU, let alone one that was not arbitrary.
- [51] In fact, the evidence pertaining to Mr Qolani's demolition puts paid to the City's submission that ALIU officials are able to discern occupied from unoccupied structures and demolish only the latter, given that his structure was clearly occupied, yet demolished. There is also evidence that during one of the Mfuleni demolitions it was a Metro Police member who decided what was unoccupied. There is merit in the submission that the manner in which ALIU determines what should be demolished, should not be countenanced, especially during the national state of disaster.
- [52] There is also merit in the submission that the *nemo iudex in sua casa* rule of natural justice and section 34 of the Constitution is infringed. I am moreover inclined to agree that taken to its logical conclusion, occupiers are deprived of possession of their structures by a City official who sits in judgement of his or her own case. As was stated in *S v Mamabolo* [2001] ZACC 17; 2001 (5) BCLR 449 (CC) at para 55, a procedure which rolls into one the complainant, prosecutor, witness and judge – or appears to do so – is irreconcilable with standards of fairness.
- [53] In *Ndlovu v Bekker* 2002 (4) All SA 384 (SCA) at paragraph 20, it was stated that the purpose of the PIE Act is to subject buildings and structures that “perform the function of a form of dwelling or shelter for humans” to the protection of PIE.
- [54] Judicial oversight as sought by the Applicants and Intervening Applicants is, in the circumstances, warranted. Budgetary and the many housing challenges the City faces do not detract from my view. This is buoyed by the characterisation of the right in section 26(3) as a negative right[9] – being a right which would simply require the actor to refrain from an unlawful action. Nor does the fear of land incursions, which Mr Rosenberg submitted was the prejudice the City would face, if court orders would have to be obtained for demolitions and evictions of unoccupied structures in the interim. Land invasions or incursions do not occur because of court orders or judicial oversight. Land invasions are driven by homelessness, poverty and desperation.
- [55] It is the poorest of the poor, the homeless, downtrodden and unemployed who seek refuge in informal settlements and erect structures to provide shelter. Whether such structures are complete, incomplete, or in the process of being built, they are capable of providing shelter from the elements especially during the winter season we are now experiencing. This, is especially so during the catastrophic times we are forced to endure while the coronavirus pandemic rages. It is entirely apt for the courts to decide who is to be deprived of their

shelter and for ALIU officials to be relieved of this burden until Part B of the relief sought is determined. The Applicants and Intervening Applicants have in my view established a prima facie right to vindicate their rights and interdict the City from demolishing unoccupied structures without court orders during the national state of disaster.

The absence of an alternative remedy

[56] The Applicants have shown there is nothing short of a court order that will stop the City from its conduct. The City has not been prepared to grant undertakings sought by the Applicants. There is, in the circumstances, no alternative remedy.

Irreparable harm

[57] Whilst demolitions without court orders continue unabated, thousands of vulnerable people will continue to be subjected to arbitrary demolitions by ALIU and face the irreparable harm of being homeless. As the Applicants point out, that not only leaves them homeless, it violates their dignity, threatens their health and multiple other constitutional rights that can only be enjoyed when one has shelter.

Balance of convenience

[58] The balance of convenience in my view is clearly in favour of granting the interdict and preventing thousands of vulnerable persons being rendered homeless during the catastrophic era of the COVID-19 pandemic. This must take precedence over the City's concerns based on a range of budgetary and statistical information in its answering affidavit that the interim relief will impact negatively on City's ability to provide access to adequate housing, as well as its concerns about land incursions addressed above.

[59] In view of all of the above, I find that the Applicants and Intervening Applicants have established the requirements for interim

relief in relation to prayer 2.1 of the Notice of Motion. This being so, it is not necessary for me to consider the relief in the

alternative pertaining to emergency housing that was sought by the Intervening Applicants. I note, however, that a court granting an order pertaining to evictions and/or demolitions would in any event be required to consider the aspect of emergency housing.[10]

Interdictory relief sought at prayer 2.2 of the Notice of Motion

[60] The second form of relief sought is an order to ensure that when evictions and demolitions are carried out in terms of a court order, the City and its agents conduct themselves in a manner that is lawful and respects and upholds the dignity of the evicted persons, and that they are expressly prohibited from using force and/or from destroying/confiscating the material which is the property of the evictee. Alternatively, a declaration to this effect is sought.

- [61] Whilst the City does not contest that it is required to respect people's rights when it evicts them, the City contends that the Applicants are not entitled to the interdictory or declaratory relief under prayer 2.2, as the Applicants have not established that the City uses excessive force in preventing unlawful land occupations.
- [62] One need look no further than the disturbing Qolani incident to establish this is simply not so. Excessive force was clearly evident and the Applicants submit that the conduct of the officials constituted torture as defined in the Prevention and Combating of Torture of Persons Act 13 of 2013 and is prohibited by section 12(1)(d) of the Constitution. There can be no doubt, as the Applicants state, that the treatment of Mr Qolani was inconsistent with human dignity. A clear right to the interdict sought has been established. The evidence pertaining to the Hangberg, Empolweni, Mfuleni and Ocean View evictions has in my view established *prima facie* that the constitutional rights to dignity, security and freedom of the person and life were infringed.
- [63] The pattern of violent behaviour and the absence of any evidence that it will not be repeated is a reasonable apprehension of irreparable harm.
- [64] There is no alternative remedy to protect the violation of the dignity and bodily integrity of residents. As is contended by the Applicants, the balance of convenience self-evidently favours the relief. The City cannot be harmed by complying with the law. The Applicants have accordingly made out a case for the interim interdictory relief at prayer 2.1.

The relief sought at prayer 2.3: Conduct of SAPS

- [65] Prayer 2.3 seeks to compel SAPS to ensure that evictions and/or demolitions are done lawfully and in accordance with the SAPS'

constitutional duty to protect the dignity of persons evicted.

- [66] In opposing the relief, the Fourth to Sixth Respondents contends that the mandate of SAPS does not include policing the City of Cape Town. It polices crime. Ms Williams for the police respondents emphasised that it is the Sheriff and not SAPS that executes court orders and the mandate of SAPS is not to shadow evictions. Mr Arendse for the Applicants emphasised that SAPS was being asked to neither execute orders nor perform an oversight role of evictions. SAPS, on the City's version, is regularly present at evictions. The Applicants ask only that SAPS, when present at evictions/demolitions, responds to calls from all persons about unlawful behaviour and treats both state officials and private persons equally.
- [67] Ms Williams further submitted that the Applicants were not entitled to relief against SAPS as there was no evidence that SAPS was present at the evictions under discussion in this matter. This is not so. The affidavit of Mr Buchner, a senior ALIU officer, attested to in opposition to the application by Empolweni occupiers as referred to above, states that members of SAPS attached to the Harare police station were in attendance on 9 April 2020 during the Empolweni demolitions. Similarly, the City's answering affidavit refers to the

presence of the SAPS and the Metro Police during the Mfuleni demolitions on 29 June and during some of the other demolitions. The City also describes SAPS as playing a supportive role to its officials during demolitions to ensure their safety. The presence of SAPS on these occasions did not prevent the infringement of the rights to dignity and safety of occupiers as alleged.

- [68] The Applicants correctly contend that they have a prima facie right to demand that SAPS perform its constitutional obligations to prevent crime during evictions and demolitions. There is in my view a reasonable apprehension of harm in the light of the evidence of excessive force and failure to respect the dignity of residents. The City has not provided an undertaking that demolitions and evictions without court orders will not continue. I am satisfied that there is no alternative remedy.
- [69] The balance of convenience favours the granting of the relief. As is stated by the Applicants, SAPS cannot suffer by being told to perform its legal obligations. By contrast, vulnerable people who risk being rendered homeless will suffer intensely. The Applicants and Intervening Applicants are accordingly entitled to the relief at prayer 2.3.

Prayer 2.5: Interdicting the demolitions tender

- [70] The Applicants seek an interim interdict preventing the City from considering or adjudicating any bids or awarding Tender No

308S/2019/20 for the “Demolition of Illegal Formal and Informal Structures in the City of Cape Town”, which was advertised on 12 June 2020. They seek this relief pending the finalisation of the review of the tender in Part B of this application which is set down for hearing in October 2020. We were informed by Mr Rosenberg that the City’s current tender extends until 31 December 2020.

- [71] The Applicants take issue with the tender for inter alia the following reasons:

71.1 The payment and penalties structure in the tender documents creates a perverse incentive for the successful tenderer to demolish as many structures as quickly as possible without asking questions;

71.2 There are no clear guidelines or protocols in place for determining whether or not a structure is occupied. There is no express

requirement that the successful tenderer must comply with the requirements of PIE.

- [72] In response, the City insists that contractors will only demolish if instructed to do so on instructions of the ALIU.

However, the City also states that it does not have sufficient ALIU officers to attend at every site to remove every structure. In reply, the Applicant aptly points out that this necessarily implies that private contractors will have the discretion to regard which structures to demolish. The ALIU cannot perform a policing or supervisory role if it is not present on a site.

- [73] In considering the relief sought, I am mindful that the Applicants have established a prima facie right to the relief sought at paragraphs 2.1 to 2.3. encompassing inter alia their rights to housing, dignity, security and health. The absence of an express requirement in the tender document that PIE must be complied with threatens these rights. Prima facie, it would seem to me that these rights are also threatened by the payments and penalties structure which the Applicants take issue with. These provide inter alia for the successful tenderer to be paid per structure demolished and per ton of building materials remove, for demolitions to be completed within 1 to 8 hours of the contractor receiving instructions, and a penalty of R2000 per day for failure to adhere to this time period.
- [74] Supervision by the ALIU, as suggested by the City, is no answer to the Applicants' concerns, given my finding concerning the arbitrary manner in which the ALIU takes decisions, and in any case, as the City says the ALIU will not be present on all sites. This implies that ALIU's arbitrary discretion would be passed on to a tenderer who is incentivised to secure many demolitions.
- [75] In light of the above, I find that the Applicants have established a prima facie right to prevent the City from considering any tender bids pending the review in Part B. If the tender is awarded and executed, affected occupiers will in all likelihood continue to suffer the irreparable harm of the violation of their constitutional rights to inter alia housing and dignity occasioned by arbitrary conduct without judicial oversight. Given that the current tender extends until December 2020 and the Part B hearing is set down for October, the City will suffer minimal harm if the interdict is granted. The balance of convenience favours the granting of the interdict.
- [76] The Applicants and Intervening Applicants are accordingly entitled to the interdict they seek at prayer 2.5 of the notice of motion.

The return of the building material and personal possessions as sought by the Intervening Applicant at paragraph 5 of its Notice of Motion

- [77] It is common cause that the City has seized the building material of the occupiers represented by the Intervening Applicants. It is thus not so, as contended by the City, that the Intervening Applicants did not provide a factual basis for the relief sought at paragraph 5 of their notice of motion. Mr Ngcukaitobi submitted at the hearing that his clients were advised by the City to collect their building material on 13 August 2020. They hired a truck at a cost of R1500 and arrived to collect their material, only to be informed by the City that the collection would not happen on that day. A letter from their attorney to the City of 14 August 2020 questioning these events has evinced no response. This information was not gainsaid by the legal representatives for the City. This sequence of events is disquieting. It would be fair in the circumstances for the Second Intervening Applicants to have their building materials delivered to the site it was removed from by the City.

[78] I am also of the view that compensation for loss of personal possessions in the sum of R2000 per person, as sought, would be fair in all the circumstances. A list of the names of affected persons must be provided to the City by the Second Intervening

Applicant's attorney as soon as possible. Should there be any disagreement as to entitlement to compensation once the list is presented, the parties may approach the Court for relief.

Costs

[79] As the separate and distinct issues raised in Part A have now been determined, there is in my view no reason for these costs to stand over for determination with Part B, as suggested by the First Respondent. Nor do I believe that the Intervening Applicants should be mulcted with the costs of the First Respondent occasioned by the postponement of the hearing on 25 July 2020. It was not due to the Intervention Application issued on 14 July 2020 that the matter was postponed. The postponement was at the instance of Judge Wille, seized with the matter at that stage, who took the view that the matter was not ripe for hearing and should be referred to a two judge bench, such as this Court is presently constituted. Each party should accordingly bear their own costs in respect of the postponement on 25 July 2020.

[80] In view of all of the above I grant the following order:

Pending the final determination of the relief sought in Part B of the Notice of Motion:

1.1 The First Respondent, its Anti-Land Invasion Unit ("ALIU"), and any private contractors appointed by the First Respondent to do the same or similar work or to perform the same or similar functions as the ALIU, are interdicted and restrained from evicting persons from, and demolishing, any informal dwelling, hut, shack, tent or similar structure or any other form of temporary or permanent dwelling or shelter, whether occupied or unoccupied, throughout the City Metropole, while the state of disaster promulgated by the Third Respondent in terms of section 23(1)(b) of the Disaster Management Act 57 of 2002, as amended, remains in place, except in terms of an order of court duly obtained;

1.2 To the extent that the First Respondent and its authorised agents (such as the ALIU and the private contractors aforementioned) evict and/or demolish any informal dwelling, hut shack, tent or similar structure or any other form of temporary or permanent dwelling or shelter, whether occupied or unoccupied, in terms of a court order, that they do so in a manner that is lawful and respects and upholds the dignity of the evicted persons, and that they are expressly prohibited from using excessive force, and/or from destroying and/or confiscating the materials which is the property of the evictees;

1.3 To the extent that any evictions and/or demolitions are authorised by court order, that the South African Police Service, when its members are present during an eviction or demolition is directed to ensure that the said evictions and/or demolitions are done lawfully and in conformity with the Constitution, in accordance with the SAPS' Constitutional duty to protect the dignity of the persons evicted.

1.4 The First Respondent is interdicted and restrained from considering, adjudicating and awarding any bids or tenders received in response to Tender 308S/2019/20 “Demolition of illegal and informal structures in the City of Cape Town.

2. The First Respondent is directed to return within a week of the date of this order all building materials and personal possessions seized by its Anti-Land Invasion Unit from the Second Applicant between the period 1 May 2020 to date.

2.1 The Attorney for the Second Intervening Party is directed to furnish the First Respondent with a list of names of those persons claiming compensation in the sum of R2000 each in lieu of loss of personal belongings.

2.2 The First Respondent is ordered to pay the sum of R2000 to each person whose entitlement to compensation is agreed upon. In the event of any disagreement by the First Respondent as to entitlement to compensation once the list is presented, the parties may approach the Court for relief.

3. The First Respondent shall pay the cost of the application save for the costs occasioned by the postponement of the hearing on 25 July 2020. Each party shall bear their own costs in respect of 25 July 2020. The Fourth, Fifth and Sixth Respondents shall bear the costs occasioned by their opposition to the relief sought at prayer 2.3 of the Notice of Motion.

JUDGE Y.S. MEER

ALLIE, J:

I agree.

JUDGE R. ALLIE

[1] The national state of disaster was declared on 15 March 2020 in terms of the Disaster Management Act, 57 of 2002 and was most recently extended on 15 August 2020 to 15 September 2020 (GN 889 in GG 43616).

[2] The application for leave to intervene, which was opposed by the First Respondent, was granted at the hearing on an application of the principles established in *Lawyers for Human Rights v Minister for Home Affairs*

[2004] ZACC 12, *Ferreira v Levin and Others*

[1995] ZACC 13 and *Democratic Alliance and Others v Acting National Director of Public Prosecutions*

[2012] ZASCA at para 44. A point in limine by the First Respondent pertaining to the failure to join the Western Cape Nature Conservation Board, the owner of the property where the Second Intervening Applicants reside, was also considered and dismissed at the hearing. I was not satisfied that the landowner had a direct and substantial interest which would be affected prejudicially so as to warrant the postponement of the application for its joinder. In *Gory v Kolver* N.O. [2006] ZACC 20 at para 12 it was stated that even if the applicant is able to show a direct and substantial interest, a court has an over-riding power to grant or to refuse intervention in the interests of justice. The interests of justice in my view did not necessitate the joinder nor the postponement of the matter, which is clearly urgent.

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[3] GN 480 in GG 43258 (29 April 2020).

[4] GN 608 in GG 43364 (28 May 2020).

[5] GN 891 in GG 43620 (17 August 2020).

[6] GN 608 in GG 43364 (28 May 2020).

[7] See Muller, G “Evicting unlawful occupiers for health and safety reasons in post-apartheid South Africa” SALJ (132)3, p 616-638 at 623-625.

[8] This also accords with international and regional law on the issue of forced evictions, which recognise the interrelatedness of rights. See, for example, the UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 7: The right to adequate housing (Art.11.1): forced evictions, 20 May 1997, E/1998/22 at para 4; the Basic Principles and Guidelines on Development-Based Evictions and Displacement ((2007) UN doc. A/HRC/4/18,

5 February 2007) at para 47; the preamble of the African Charter on Human and Peoples' Rights (Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982)) and Government of the Republic of South Africa v Grootboom 2001

(1) SA 46 (CC) at paras 23 and 34.

[9] Government of the Republic of South Africa v Grootboom 2001

(1) SA 46 (CC) at para 34.

[10] See, for example, Regulation 53(2)(f) and 53(3) of the DMA Regulations (GN 891 in GG 43620, 17 August 2020), pertaining to

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