

SOUTH AFRICA / JUDGMENT

Turnover Trading 191 (Proprietary) Limited v Moshela and Others (77405/2018) [2020] ZAGPPHC 240 (2 June 2020) [2020] ZAGPPHC 240

COURT

North Gauteng High Court, Pretoria

BEFORE

Fabricius

CASE / FILE NUMBER

77405/2018

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO. 77405/2018

REPORTABLE:

NO
OF
INTEREST TO OTHER JUDGES: YES
REVISED
2/6/2020
In

the matter between:

TURNOVER
TRADING 191 (PROPRIETARY) LIMITED
Applicant
and
MOSEHLA,
APRIL AND THE FURTHER OCCUPIERS
OF
PORTION 147 OF THE FARM LYTTTELTON 381-JR
CENTURION
LISTED IN ANNEXURE "A" TO THE NOTICE
OF
MOTION
First Respondents
THE
REMAINING OCCUPIERS OF PORTION 147

OF
THE FARM LYTTELTON 381-JR CENTURION
Second Respondents
THE
CITY OF TSHWANE METROPOLITAN MUNICIPALITY
Third Respondent
THE
MUNICIPAL MANAGER OF THE CITY OF TSHWANE
METROPOLITAN
MUNICIPALITY
Fourth Respondent
HAZELTON
PUMPS
INTERNATIONAL
(PROPRIETARY) LIMITED
Fifth Respondent
RENT
TRUST
Sixth Respondent

JUDGMENT

FABRICIUS J

INTRODUCTION

[1] This is an opposed eviction application that has been winding its way through the Court for some 3 years. Ultimately, I was presented with about 3000 pages of affidavits, annexures and reports, although in the light of various judgments of the Constitutional Court and the Supreme Court of Appeal, the law can be regarded as settled. Once there is no lawful defence to the unlawful occupation, the art really is to formulate an order that takes account of the Statute and the authorities.

[2] In this case Court orders were ignored or not fully complied with, well- established Rules of Court were discarded and the law of evidence ignored at random. Ultimately I, after enquiring what actually had to be read, was faced with about 1000 pages. Neither the first and second respondents nor the third Respondent can look upon

this litigation with pride. In the light of the relevant settled legal principles I have followed the line of thinking adopted by applicant's counsel, with which I agree. It would have burdened this judgment with unnecessary detail if I had to repeat the whole sad history of this litigation with a full analysis of the respondents versions which by –and - large are either irrelevant,

inadmissible, or not in line with binding precedent. The essential or material facts are actually common cause. Speculative arguments in affidavits have not impressed me.

- [3] The applicant is the registered owner of the immovable property known as Portion 147 of the Farm Lyttleton, 381-JR ("the Property"). The Property is occupied by the first and second respondents ("the Occupiers"), since early 2017. The Occupiers are a group of some 60 individuals, mostly illegal foreign nationals, who carry on business as waste recyclers from the Property. For purposes of convenience, they live there too.
- [4] The use of the Property for waste recycling is an offence, and is carried on in contravention of an interdict against such conduct granted on 2/5/18 by myself. It has since been ignored and in my Order they will not be compensated for material collected in defiance thereof. The applicant took transfer of the Property on 28 September 2015. It paid some R20,5 million for the Property.
- [5] The applicant intends to develop a hotel and conference centre on the Property. To this end, it has concluded a contract with an international hotel chain. This contract obliges the applicant to meet certain deadlines in relation to the development of the hotel conference centre. The applicant's failure to meet these deadlines may entitle the said hotel chain to cancel the agreement.
- [6] Should the contract to build the hotel conference centre be cancelled the applicant will, conservatively, make a direct loss of some R35 million. These costs include:
- 6.1 first, the loss of the Property consequent upon the Occupiers' continued occupation of thereof;
- 6.2. second, the applicant's holding costs to date, including interest paid on loans to purchase the Property and charges levied on the Property by the City; and
- 6.3. third, the costs of consultants, town planners, architects, engineers and its legal team for purposes of this litigation in the amount of some R9 million.
- [7] The applicant will also suffer a loss, in today's money, of some R400 million over the next ten years, which figure represents the applicant's projected earnings before interest, taxes, depreciation and amortisation. That is the applicant's contention.
- [8] The loss of the Property to the Occupiers will have a substantial impact on the applicant.
- [9] At all material times prior to mid-2017 the Property was vacant.
- [10] The Occupiers invaded the Property in or during the beginning of 2017 to establish a base for their waste recycling business.
- [11] The Occupiers invaded the Property because "[w]aste recycling informed [their] decision to reside on the [P]roperty, [they] did not elect to begin recycling after [they] had resided on the [P]roperty", they " ...need to live where [they] work ..." and because "... it is cost effective".

[12] Notwithstanding that the Occupiers carry on their business unlawfully at the Property and in contempt of a court order, they contend for a right to continue to occupy the Property and to continue to conduct their business thereat. They claim that they have "a right to work".

[13] This "right to work", ostensibly, trumps section 1(c) of the Constitution, the applicant's rights in terms of section 25 of the Constitution, the third respondent's ("the City") Town-Planning Scheme, 2008 (revised

2014) ("the Scheme") and court orders.

[14] The Occupiers are so adamant in the assertion of their right to break the law that they have contended, on several occasions, that the City should simply expropriate the Property to allow them to continue to live on the Property, and carry on their recycling business thereat. Applicants submit that this is plainly unreasonable and unconstitutional, because the law does not allow for a recycling business to be carried-on on the same land where people are accommodated.

[15] The applicant set out to enforce its constitutional rights by recognising, first, that the Occupiers would be rendered homeless if evicted from the Property. The applicant engaged at length with the City because it is the City that owes certain obligations to the applicant, the Occupiers and this Court. In this regard it is settled law that:

"... the state, at all levels of government, owes constitutional obligations to those in need of housing and in particular to those whose needs are of an emergency character, such as those faced with homelessness in consequence of an eviction. Those obligations arise under s 26 of the Constitution and exist separately from any question of whether it is just and equitable for a court to grant an eviction order. As Harms DP said in *City of Johannesburg v Rand Properties (Pty) Ltd and Others*, in relation to persons in crisis with no access to land, no roof over their heads and living in intolerable conditions: 'Eviction, at the very least, triggers an obligation resting on the city to provide emergency and basic shelter to any affected respondent. '"

See: *City of Johannesburg v Changing Tides 74 P(Pty) Ltd and Others* 2012 (6) SA 294 (SCA) at [14].

[16] When it transpired that the City had no plan, budget or policy to address the emergency that the Occupiers would face, the applicant urgently approached this Court for the relief claimed in Part A of its notice of motion ("Part A"). In part A of its notice of motion, the applicant claimed an order, inter alia, that:

"2. It is declared that the CITY OF TSHWANE METROPOLITAN MUNICIPALITY owes all the occupants of the property known as Portion 147, Farm Lyttelton 381 - Jr, Centurion ("the property"? a statutory and constitutional obligation to provide them with emergency accommodation in terms of the Emergency Housing Plan ("the EHP"?."

[17] Part A was opposed by the City and the Occupiers.

[18] In Part A, the City contended that it was not in breach of its constitutional and statutory obligations, whereas the Occupiers sought the dismissal of the application because their need for the Property extended beyond mere accommodation.

[19] On 18 December 2018, this Court handed down judgment in Part A. It ordered, inter alia, that:

"[the City] ... owes all of the occupants of the property known as Portion 147, Farm Lyttleton 381-JR, Centurion ('the Property') a constitutional duty to provide them with emergency accommodation in terms of the Emergency Housing Plan contained in Chapter 12 of the Housing Code promulgated in terms of the Housing Act, Act 107 of 1997..." ("Stoop AJ's Order")

[20] Stoop AJ's judgment and order is final and definitive of the City's obligations to the Occupiers arising from section 26 of the Constitution, the Housing Act, 1997, and the Housing Code.

[21] Part B of the applicant's application, being the part of the application which is before me, is one for the eviction of the Occupiers from the Property. It is brought in terms of section 4 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 1998 ("PIE").

[22] The jurisdictional facts to found the relief claimed are common cause. The applicant is the registered owner of the Property. The Occupiers occupy the Property without any consent to do so and without any right in law to do so. They are "unlawful occupiers" as contemplated in section 1 of PIE. An "unlawful occupier" is defined as "a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land ... "

[23] The Supreme Court of Appeal has said:

"... A court hearing an application for eviction at the instance of a private person or body, owing no obligations to provide housing or achieve the gradual realisation of the right of access to housing in terms of s 26(1) of the Constitution, is faced with two separate enquiries. First it must decide whether it is just and equitable to grant an eviction order having regard to all relevant factors. Under s 4(7) those factors include the availability of alternative land or accommodation. The weight to be attached to that factor must be assessed in the light of the property owner's protected rights under s 25 of the Constitution, and on the footing that a limitation of those rights in favour of the occupiers will ordinarily be limited in duration. Once the court decides that there is no defence to the claim for eviction and that it would be just and equitable to grant an eviction order, it is obliged to grant that order. Before doing

so, however, it must consider what justice and equity demand in relation to the date of implementation of that order and it must

consider what conditions must be attached to that order. In that second enquiry it must consider the impact of an eviction order on the occupiers and whether they may be rendered homeless thereby or need emergency assistance to relocate elsewhere. The order that it grants as a result of these two discrete enquiries is a single order. Accordingly it cannot be granted until both

enquiries have been undertaken and the conclusion reached that the grant of an eviction order, effective from a specified date, is just and equitable. Nor can the enquiry be concluded until the court is satisfied that it is in possession of all the information necessary to make both findings based on justice and equity."

See: *City of Johannesburg v Changing Tides 74 (Pty) Ltd* supra at par [25].

[24] I am therefore required to determine, therefore, whether the eviction of the Occupiers from the Property is just and equitable, and under what conditions an eviction order should be granted.

[25] The Supreme Court of Appeal in *Changing Tides* supra at par [19] has also said:

"In most instances where the owner of property seeks the eviction of unlawful occupiers, whether from land or the buildings situated on the land, and demonstrates a need for possession and that there is no valid defence to that claim, it will be just and equitable to grant an eviction order. That is consistent with the jurisprudence that has developed around this topic ... "

[26] The Occupiers claim no right of possession of the Property that is stronger than that of the applicant as owner.

[27] On 14 February 2020 the City tendered temporary emergency accommodation to the Occupiers, in terms of Stoop AJ's order, at Erf 8 Sunderland Ridge ("Erf 8"). The Occupiers rejected the City's tender. This was its 8th report.

[28] The Occupiers' case is that Erf 8 is too far away from the Property and would, consequently, infringe upon their right to work.

[29] The Occupiers' case, therefore, is that they must be given land, by the City, which is within a reasonable proximity of the Property where they can live and carry on their business, so they argue and unless and until these demands are met, their eviction from the Property will not be just and equitable.

[30] The Occupiers' demands are relevant to the question whether their eviction from the Property is just and equitable.

[31] The Constitutional Court has recognised that PIE protects unlawful occupiers (as defined in PIE) from arbitrary evictions from their homes.

See: *The City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties* 2012 (2) SA 104 (CC) at [17] to [18].

[32] It has recognised, further, that business activities do not fall within the ambit of the right protected by PIE. In *MC Denneboom* the Constitutional Court was required to address the difference between unlawful occupation of land for business purposes and unlawful occupation of land for accommodation purposes. It distinguished the rights of each genre of occupant and said:

"[16] Section 26(3) of the Constitution provides:

'No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.'

PIE gives practical effect to this right and regulates the eviction of unlawful occupiers, even those who reside on commercial premises. Having no right to reside on the property, Mr Chiloane is an 'unlawful occupier' under the Act and thus enjoys its protections....

[17] The eviction of commercial occupants and juristic persons does not, however, fall within PIE's remit. As the Supreme Court of Appeal

correctly held in *Ndlovu*, the Act does not apply to the eviction of juristic persons and persons who do not use buildings and structures

as 'a form of dwelling or shelter'. Mr Phayane therefore was not obliged to comply with the requirements of PIE in seeking the eviction of Denneboom and persons working for it or working for Mr Chiloane, provided those persons do not also reside on the property. The high court's order was thus justified in respect of these persons."

See: *MC Denneboom Service Station v Phayane* 2015 (1) SA 54 (CC)

[33] The Occupiers cannot, therefore, rely on an infringement of their "right to work" as a basis to resist their eviction from the Property; the Occupiers' business interests are commercial interests, not protected by PIE, and not part of the relevant circumstances the Court is required to consider under section 4(7) of PIE in the discharge of its duties thereunder. This is really the crux of the applicant's argument.

[34] The relevant considerations that the Court must consider are limited to "legally relevant" circumstances. In order for a circumstance to be "legally relevant" it must be causally tied to the right in question. The right in question concerns the right of access to adequate housing on a progressive basis, as contemplated in section 26 of the Constitution, not the right to conduct business. There is no precedent in our law that entitles a person unlawfully occupying another person's property (for purposes of an unlawful business undertaking) to resist their eviction simply on the basis that the business undertaking conducted on another's property is the source of their livelihood. This was Mr Pullinger's additional contention and it was sound.

[35] The question of the City's obligations to the Occupiers was determined in Part A. Stoop AJ's order is *res judicata* and it is not open for me to reconsider it.

[36] The Occupiers' demand for land for purposes of their recycling business and for their accommodation offends both the Scheme and the principle of Rule of Law. The Occupiers demand something that the law does not permit. They simply cannot demand land to carry-on their business and reside on. As was said by the Supreme Court of Appeal in *Hotz and Others v University of Cape Town* 2017 (2) SA 485 (SCA) at 501B:

"...the principle of legality precludes a court from granting legal recognition and enforcement to unlawful conduct. To do so is 'the very antithesis of the rule of law.'"

[37] The case before me therefore concerns only whether it is just and equitable for the Occupiers to be evicted from the Property and under what conditions. It has nothing to do with the City's waste management programs, or its alleged failure to have integrated the Occupiers' business into it. It also has nothing to do with the Occupiers' business activities.

[38] Under the first enquiry, the question is whether the Occupiers' eviction is just and equitable, taking into account the conflicting rights of the applicant in and to the Property' on the one hand, and the Occupiers' right not to be evicted without a court order granted after consideration of all legally relevant circumstances.

See: *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7; 2005 (1) SA 217 (CC) at 229 A.

[39] The Occupiers' continued occupation of the Property is unsafe, so it was contended. The Property is situated below the flood line. It has flooded on three previous occasions, resulting in the death of at least one occupier.

[40] Under this enquiry, the consideration about the availability of land is whether there is Temporary Emergency Accommodation available to the Occupiers that complies with the requirements of the law.

See: *Changing Tides* supra at par [25].

[41] Under the second enquiry, the nature of the Temporary Emergency Accommodation receives more attention. That attention is directed at how the Occupiers will enjoy that emergency relief because, "[i]n considering the grant of an eviction order the court is concerned with the plight of those who, as a result of poverty and disadvantage, are unable to make alternative accommodation arrangements themselves and require assistance from the local authority to do. It is particularly concerned to ensure, so far as possible, that those who face homelessness are provided at least with temporary emergency accommodation ...". This dictum appears in *Changing Tides* supra at par [47].

[42] It is the applicant's case that the Occupiers' eviction from the Property is just and equitable. The Occupiers cannot demand to be permitted to remain on the Property to carry on their business until the City provides suitable land to them. The Occupiers' purpose for being on the Property is an unlawful purpose. The Occupiers have neither a right to occupy the Property nor a right to conduct business thereon. To the extent that the Occupiers have a right to work (as they assert), it is a right that must be exercised lawfully. This is the most

fundamental premise of all conduct in our country.

[43] The fifth and sixth respondents ("the Intervening Parties") brought an urgent application on 31 January 2020, under case number 7106/2020, to be joined as interested parties to the Eviction

Application ("the Urgent Application"). Interdicts were also sought, but not in accordance with the Rules relating to urgency, nor in line with any relevant authorities or directives.

[44] The fifth respondent conducts its business at 33 Van Tonder Road, Sunderland Ridge ("the Premises"), and the sixth respondent is the owner of all the members' interest in the entity that owns the Premises.

[45] On 17 February 2020, Mr Justice Tuchten joined the Intervening Parties as fifth and sixth respondents without making a finding on whether the Intervening Parties have an interest in the Eviction Application. The learned Judge ordered:

"1. The First and Second Applicants in the intervention application brought under case number 7106/2020 ("the Intervention Application") are granted leave to intervene as Fifth and Sixth Respondents in this application under case number 77405/18 ("the Eviction Application").

2. The order made in paragraph 1 above is made without making a finding on whether the First and Second Applicants in the Intervention Application have an interest in the Eviction Application."

[46] On 23 March 2020, the Intervening Parties filed an affidavit styled "intervention affidavit" setting out their objection to the Occupiers' relocation to Erf 8.

[47] In that affidavit:

47.1 the Intervening Parties fail to make out a case for a direct and substantial interest in the outcome of Part B. Therefore, they have no locus standi to intervene in the Eviction Application;

47.2 the only basis for objecting to the Occupiers' relocation (an alleged illegality in terms of the Scheme and Spatial Planning and Land Use Management Act, 2013 ("SPLUMA") is factually and legally incorrect;

47.3 the intervention affidavit is replete with hearsay evidence and conclusions with no primary facts to support them, and should be

struck from the record.

[48] This was applicant's contention in the context of the intervention application.

[49] It is clear from the intervention affidavit that the Intervening Parties have become involved in the Eviction Application on the sole basis that they do not wish to have poor people, and more particularly waste pickers such as the Occupiers, living within their area.

[50] Having regards to all the circumstances, the applicant therefore seeks an order for eviction to be linked to the provision of suitable Temporary Emergency Accommodation to the Occupiers.

[51] The form of the order that will be sought is that made by the Constitutional Court in *Blue Moonlight* supra, and is set out in full in under the heading "Relief Sought".

ADMISSION OF AFFIDAVITS

[52] Certain affidavits were filed by the LHR on behalf of the Occupiers and by the Intervening Parties. It appears both sets of affidavits suffer from the same difficulty. Both sets were filed late, are replete with inadmissible hearsay and opinion evidence, and are accompanied by condonation applications that do not make out a case for "good cause" as envisaged in Rule 27(3) of the Rules of Court.

APPLICABLE PRINCIPLES

[53] In *Quartermark Investments (Pty) Ltd v Mkhwanazi and Another* 2014 (3) SA 96 (SCA) at [13] the Supreme Court of Appeal said:

"... It is trite that in motion proceedings affidavits fulfil the dual role of pleadings and evidence. They serve to define not only the issues between the parties but also to place the essential evidence before the court. They must therefore contain the factual averments that are sufficient to support the cause of action or defence sought to be made out. Furthermore, an applicant must raise the issues as well as the evidence upon which it relies to discharge the onus of proof resting on it, in the founding affidavit."

[54] This proposition holds true in relation to answering affidavits.

[55] In *Die Oros (Pty) Ltd and Another v Telefon Beverages cc and Others* 2003 (4) SA 207 (C) at [28] the court said:

"It is trite law that the affidavits in motion proceedings serve to define not only the issues between the parties, but also to place the essential evidence before the court for the benefit of not only the court, but also the parties. The affidavits in motion proceedings must contain factual averments that are sufficient to support the cause of action on which the relief that is being sought is based. Facts may either be primary or secondary. Primary facts are those capable of being used for the drawing of inferences as to the existence or non-existence of other facts. Such further facts, in relation to primary facts, are called secondary facts. Secondary facts, in the absence of the primary facts on which they are based, are nothing more than a deponent's own conclusions and accordingly do not constitute evidential material capable of supporting a cause of action. "

[56] Primary facts must necessarily be tendered by a competent witness.

[57] In terms of section 3(1) of the Law of Evidence Amendment Act, 1988, hearsay evidence shall not be admitted as evidence in criminal or civil proceedings.

[58] There are certain limited cases where hearsay evidence will be admissible, they include sections 3(1)(a) to (c): First, consent to the admission of hearsay; second, the person upon whose credibility the evidence depends testifies; and finally, when it is in the interests of justice to admit such evidence. There is no application by either the Occupiers or the Intervening Parties in terms of section 3(1)(c) for the admission of hearsay evidence.

[59] In *Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC and Another 2010 (5) SA 112 (KZP)*, the court dealt with the competence of a litigant's attorney to depose to affidavits concerning facts peculiarly within the litigant's own knowledge. Although the context of the discussion was an application for summary judgment, the Court's rationale is apposite in all cases. The Court's rationale asks the question, "is the evidence admissible?" Put differently, if it were a trial matter not a motion matter, "could the said attorney enter the witness box and present admissible evidence?"

[60] In answering the foregoing questions in the negative, Wallis J (as he then was) said:

"[7] The requirement that the founding affidavit be deposed to by the applicant or some other person who can swear positively to the facts precludes the affidavit being deposed to by someone whose knowledge of those facts

is purely a matter of hearsay. Thus a person who deposes to such an affidavit on the basis that their information comes from another source, whether another person or from documents, is not a person who can swear positively to the facts giving rise to the claim. It is for that reason that the application for summary judgment in *Rafael & Co v Standard Produce Co (Pty) Limited* was held to be defective. The deponent to the affidavit was the applicant's Cape Town attorney and the court said (at 245 D):

"There is nothing from the circumstances of his making of this affidavit which can lead the court to the conclusion that it is within his knowledge. The ordinary presumption would be that they are facts which have come within his knowledge through his acting for the applicants in this matter."

An affidavit by an attorney based on information given to the attorney by the client does not comply with the rule because the attorney is not in a position to swear positively to the facts. Such an affidavit is nothing more than an affidavit of information and belief containing inadmissible hearsay. An application founded on such an affidavit is as a result defective."

[61] Where the evidence is inadmissible because it is hearsay or opinion, it falls to be struck out.

[62] Rule 27(3) of the Uniform Rules of Court provides that "the court may, on good cause shown, condone any non-compliance with these rules."

[63] In *Standard Bank General Insurance Co Ltd v Eversafe (Pty) Ltd 2000 (3) SA 87 (W)* the court held:

"[12] It is well-established that an applicant for any relief in terms of Rule 27 has the burden of actually proving, as opposed to merely alleging, the good cause that is stated in Rule 27(1) as a jurisdictional prerequisite to the exercise of the Court's discretion. The applicant for any such relief must, at least, furnish an explanation of his default sufficiently full to enable the Court to understand how it really came about and to assess his conduct and motives. Where there has been a long delay, the Court should require the party in default to satisfy the Court that the relief sought should be granted. This is, in my view, particularly so when the applicant for the relief is the dominus litis plaintiff. ...

[15] As far as prejudice is concerned, it is contended by Mr De Jager that it is not sufficient for the plaintiff to show that condonation will not result in prejudice to the first defendant. This, in my view, is quite clearly correct. An applicant for relief under Rule 27 must show good cause and the question of prejudice does not arise if it is unable to do so. In any event, I am satisfied that the first defendant would suffer prejudice if the application were granted but, in the light of the absence of good cause, I need not deal with the grounds upon which this conclusion is based."

[64] The Constitutional Court in *Grootboom v National Prosecuting Authority* 2014 (2) SA 68 (CC) has held that the test of whether an application for condonation should be granted is the interests of justice. It held:

"[20] The respondents were late in filing their answering affidavits as well as their written submissions. This delay put a serious hurdle in the way of their quest to be heard in this Court: they had to apply for condonation. It is axiomatic that condoning a party's non-compliance with the rules of court or directions is an indulgence. The court seized with the matter has a discretion whether to grant condonation.

[21] The failure by parties to comply with the rules of court or directions is not of recent origin. Non-compliance has bedevilled our courts at various levels for a long time. Even this Court has not been spared the irritation and inconvenience flowing from a failure by parties to abide by the Rules of this Court.

[23] It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the noncompliance with the rules or court's directions. Of great significance, the explanation must be reasonable enough to excuse the default.

[65] The applicant seeking condonation should file an affidavit satisfactorily explaining the delay. The explanation must be sufficiently full, detailed, accurate and should be a reasonable explanation covering the entire period of the delay. See: *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae)*

[2007] ZACC 24; 2008 (2) SA 472 (CC) at 477E; and *Uitenhage Transitional Local Council v SARS* 2004 (1) SA 292 (SCA) at [6]. This has not been done in the present instance.

THE ADMISSIBILITY OF THE OCCUPIERS' SUPPLEMENTARY ANSWERING AFFIDAVIT DATED 23 OCTOBER 2019 AND MS DU PLESSIS'S AFFIDAVITS DATED 4 NOVEMBER 2019 AND 17 JANUARY 2020

[66] The Rules of Court prescribe that, ordinarily, there are only three sets of affidavits filed of record in application proceedings. These are the founding, answering and replying affidavits. The rule provides, further, that further affidavits may be filed in the discretion of the Court.

[67] On 2 September 2019, at the behest of, and by consent between the parties, an order was made. Paragraphs 1 and 2 of the order provide:

"1. The rule nisi granted by Kollapen Jon 16 August 2019 is confirmed.

2. Any person joined in terms of prayer 1 supra, shall file answering affidavits, if any, on or before 20 September 2019."

"5. The Third Respondent shall file a progress report on or before 11 November 2019." ("the Consent Order")

[68] Accordingly, this Court permitted the filing of an answering affidavit by those people joined to these proceedings in terms of paragraph 1 of its order. It also permitted all those individuals who are now before the Court to comment on the temporary emergency accommodation tendered in the City's report of 27 August 2019.

[69] The Occupiers did not do so as pointed out by the applicant's counsel:

69.1 First, no person joined in terms of paragraph 1 of the Consent Order is identified in the supplementary answering affidavit. That being so, these individuals have not placed a version before this Court. It is accepted that they make common cause with the original Occupiers who filed their answering affidavit in January 2019. It is also accepted that these individuals will be rendered homeless if evicted. In addition, it is accepted that Mr Acting Justice Stoop's order caters for these individuals.

69.2 Second, in paragraphs 37 to 56 of the supplementary answering affidavit, the Occupiers purport to comment, in the most bald and sketchy terms, upon the temporary emergency accommodation that the City had tendered in its report of 27 August 2019. This report is no longer relevant.

69.3 Third, the Occupiers then seek to place new grounds on which they purport to resist their eviction before the Court. This is in paragraphs 26 to 36 and 57 to 62. This is a new case made out some 11 months after the answering affidavit was filed, after heads of argument were filed, and after this matter had previously come before Court.

[70] The Occupiers were obliged to approach the Court for leave to file this affidavit. They have refused to do so. It is settled law that parties cannot simply file affidavits as they see fit.

[71] In *Sealed Africa (Pty) Ltd v Kelly and Another* 2006 (3) SA 65 0/V) the court said that:

"[t]he filing of further affidavits after the replying affidavit has been filed is a matter for the discretion of the court. In the absence of leave being granted by the Court for the filing of such affidavits, parties

are not entitled to simply, by their own arrangement file as many affidavits as they wish ..."

[72] In *Standard Bank of SA Ltd v Sewpersadh and Another* 2005 (4) SA 148 (C) the court said:

"[10] The Court is vested with the discretion. There is thus no official who can decide on this, not even the Registrar of this Court. A fortiori no litigant may take it upon himself to simply file further affidavits without first having obtained the leave of the Court to do so. The Court will exercise its discretion to admit further affidavits only if there are

special circumstances which warrant it or if the Court considers such a course advisable. In *Bangtoo Bros and Others v National Transport Commission and Others* 1973 (4) SA 667 (N) it was held among other things that a litigant who seeks to serve an additional affidavit is under a duty to provide an explanation that negatives ma/a fides or culpable remissness as the cause of the facts and/or information not being put before the Court at an earlier stage. There

must furthermore be a proper and satisfactory explanation as to why the information contained in the affidavit was not put up earlier, and what is more important, the Court must be satisfied that no prejudice is caused to the opposite party that cannot be remedied by an appropriate order as to costs."

[73] This ratio was approved by the Supreme Court of Appeal in *Hano Trading CC v JR 209 Investments (Pty) Ltd and Another* 2013 (1) SA 161 (SCA) at [13] and [14].

[74] In any litigation, the first question about evidence that is tendered, be it orally or by way of affidavit, is that of relevance. Anything irrelevant is per se inadmissible.

[75] Fundamentally, the Occupiers' supplementary answering affidavit is not admissible because it does not contain any evidence which advances this case. As explained in *Die Oros supra*, bald conclusions are not admissible evidence.

[76] To the extent that the Occupiers' supplementary answering affidavit purports to articulate dispute between the City and the Occupiers in relation to waste management, this is not an issue before me. It does not, and should not, enter into my deliberations.

[77] On 4 November 2019, the Occupiers brought a condonation application. It is deposed to by their attorney, Ms Du Plessis. In that affidavit, aside from misrepresenting the terms of the Consent Order and its ambit, she seeks to explain, only, the LHR's failure to have complied timeously with the consent order.

- [78] The facts, such as there are in Ms Du Plessis' affidavit, fail to make out a proper case for condonation. In particular, it does not properly explain the causes, effects and duration of the alleged impediments to filing an affidavit timeously as required in *Uitenhage Transitional Local Council v SARS* 2004 (1) SA 292 (SCA) at [6].
- [79] Vague and generalised allegations, such as those in Ms Du Plessis' affidavit, simply do not suffice. The dicta in *Quartermark* and *Die Dros* supra make this amply clear. The applicant gave notice that these issues will be raised in answer to the condonation application on 11 November 2019.
- [80] It was in relation to the vague and generalised allegations made by Ms Du Plessis that the applicant delivered a notice in terms of Rule 35(12).
- [81] The LHR have refused to make the documents referred to in her affidavit available for inspection citing legal professional privilege. Of course this does not avail her. Having discussed the content in her affidavit, that privilege falls away. In *South African Airways SOC v BDFM Publishers (Pty) Ltd and others* 2016 (2) SA 561 (GJ) the court said that if confidentiality is lost, the privilege falls away.
- [82] It is difficult to conclude, in the circumstances, that the indulgence that has been sought has been sought bona fide when the facts upon which reliance is placed are withheld from the applicant and the Court.
- [83] Ms Du Plessis also deposed an affidavit entitled "Occupiers' commentary in response to the City's accommodation proposal dated 2 December 2019".
- [84] Ms Du Plessis deposes to a number of objections that her clients, the Occupiers, have in respect of Erf 8 (as tendered by the City in its report of 2 December 2019).
- [85] These are not Ms Du Plessis' objections. They are the Occupiers' objections.

The source of the objections is not Ms Du Plessis but one (or more) of her clients who told her so. The facts to which Ms Du Plessis deposes do not fall within her personal knowledge.

- [86] There are no confirmatory affidavits by any of the Occupiers is attached to Ms Du Plessis' commentary. Even if there were, it is dubious that this passes muster. In *Drift Supersand (Pty) Ltd v Mogale City Local Municipality and Another* [2017] AIISA 624 (SCA) at [31], the Supreme Court of Appeal voiced its disapproval of such practices saying:

"... the Municipality adopted the sloppy method of adducing evidence by way of a hearsay allegation made by Mr Mashitisho supported by a so-called "confirmatory affidavit" by Mr Van Wyk, who stated no more than that he had read the affidavit of Mr Mashitisho and "confirmed the contents thereof in so far as it relates to me and any of activities". This might be an acceptable way of placing noncontentious or formal evidence before

court, but where, as here, the evidence of a particular witness is crucial, a court is entitled to expect the actual witness who can depose to the events in question to do so under oath. Without doing so, a hearsay statement supported merely by a confirmatory affidavit, in many instances, loses cogency."

[87] Accordingly, both questions in relation to the competence of Ms Du Plessis as a witness that were formulated in relation above to the proposition in Shackleton supra must be answered in the negative.

[88] It is not competent for Ms Du Plessis to depose to an affidavit on behalf of her clients in respect of facts that do not fall within her personal knowledge. The credibility of such information is based on another source (i.e. the Occupiers). Such evidence is inadmissible hearsay. I agree with these contentions.

THE ADMISSIBILITY OF THE INTERVENING PARTIES' AFFIDAVIT

[89] The Intervening Parties filed their affidavit on 23 March 2020. It is some 20 calendar days (almost 1 month) out of time as per the order of Mr Justice Tuchten of 17 February 2020.

[90] The Intervening Parties have failed to provide a reasonable and satisfactory explanation covering the entire period of delay as required in Uitenhage supra.

[91] The Intervening Parties rely on certain unsubstantiated conclusions to explain the delay, being:

91.1 the papers in the main application are voluminous;

91.2 the conflicting diary schedules of the Intervening Parties' attorneys and counsel;

91.3 the Intervening Parties could only consult with the property valuator they intend to use on 23 March 2020;

91.4 the City only provided the "policy in respect of informal structures" on 16 March 2020;

91.5 the Intervening Parties awaited a video recording from the City regarding incidents of 31 January 2020; and

91.6 the Intervening Parties had to wait for the City to reply to the Occupiers' request in terms of Rules 35(12) and

(14) because such information is crucial to the Intervening Parties' case.

[92] None of the abovementioned statements establish good cause for condoning the Intervening Parties' late filing of their affidavit. I agree with these submissions.

- [93] The extent of the papers in the Eviction Application is not an excuse for the late filing of an affidavit. The Intervening Parties were provided with a copy of the Eviction Application on 24 January 2020, some 58 days prior to the filing of the intervention affidavit. The Intervening Parties provided no explanation for the alleged necessity to read further affidavits.
- [94] The alleged scheduling conflict between the Intervening Parties' counsel and attorneys is not a valid explanation for their failure to comply with the court order.
- [95] In *D'Anos v Hey/on Court (Pty) Ltd* 1950 (1) SA 324 (C) at 335 to 336 the court said:
- "... the non-availability of counsel cannot be allowed to thwart the bringing before the Court of the matter in issue. In all but the rarest of cases, other suitable counsel will be available. The test is not the convenience of counsel; it is the reasonable convenience of the parties - and by that I mean both parties - and the requirement of getting through the Court's work which must be the dominant considerations. The availability of counsel is a subsidiary consideration. A party's predilection for a particular counsel to take his case can, in my view, seldom, if indeed ever, be regarded as a decisive objection to a date of set down which is in all other respects reasonable and acceptable to both parties."
- [96] Therefore, the non-availability of counsel is not a reason for an indulgence to be granted, as there is an ethical duty on attorneys and counsel not to take on work that they cannot pay proper attention to.
- [97] Further, the order made by Mr Justice Tuchten was a consent order, negotiated by the parties at the time that it was made. There is no explanation why the Intervening Parties' attorneys and counsel were unable to comply with something they had agreed to. This required much more than a three-line paragraph advancing a bald conclusion.
- [98] The Intervening Parties' reliance on the alleged necessity to meet with a property valuator self-evidently has no bearing on this case. The Intervening Parties do not rely, in any manner, on alleged property evaluations. Even if they were to do so, a financial interest in a matter does not give rise to a direct and substantial interest in another discreet piece of litigation.
- [99] The Intervening Parties' ostensible reliance on receipt of the City's policy on informal structures on 16 March 2020 self-evidently has no bearing on their case. They cannot rely on the Occupiers' notices in terms of Rules 35(12) and (14). Even if these notices suspended the time periods for the filing of affidavits (which they do not), they could only be relied upon by the Occupiers' to explain their delay. It is not permissible for the Intervening Parties to piggy-back on the Occupiers' dilatoriness to try explain away their dilatory conduct.

- [100] The video to which the Intervening Parties refer relates to events that took place on 31 January 2020. These events might have been relevant to the Urgent Application. In fact, the events recorded in the video was the reason the Intervening Parties avoided arguing their Urgent Application on 31 January 2020.
- [101] The alleged video footage has nothing to do with the case of illegality upon which the Intervening Parties now rely in their answering affidavit to the Eviction Application.
- [102] In the circumstances, the Intervening Parties have not made a case for condonation of the late filing of the intervention affidavit. In the circumstances, it would be an exercise in futility to permit the late filing of Intervening Parties' affidavit where good cause has not been established, and would serve only to prejudice the applicant further, especially, in circumstances where they enjoy no prospects of success. Again I cannot criticize the applicant's for these

submissions.

THE INTERVENING PARTIES' LOCUS STAND/

- [103] The fifth respondent carries on business at 33 Van Tonder Road, Sunderland Ridge¹⁴⁴ ("the Premises").
- [104] The Intervening Parties allege that the Premises where the fifth respondent (as tenant) conducts its business is owned by Stand 39 and 40 Sunderland Ridge CC (an entity not before court).
- [105] The sixth respondent is alleged to own all the members' interest in Sunderland Ridge Ext 2 Properties CC.¹⁴⁶ That Close Corporation is similarly not a party to these proceedings.
- [106] In relation to shareholders of a juristic person, the law has been settled since the late 1800's, when the House of Lords proclaimed that there is a separation between a company and its shareholders. See: *Salomon v A Salomon & Co Ltd* [1896] UKHL 1,
- [1897] AC 22. In *Barlow v The Friend P. & P. Co., Ltd* 1090 ORC 110, Maasdorp CJ said:
- "the general principles laid down in the case of *Salomons v Salomons & Co., Ltd.*, that cannot be disputed. In civil matters it is quite true that a company and its constituent shareholders are separate personae, and what a company does cannot affect the rights of the shareholders."
- [107] The sixth respondent has no direct and substantial interest in the outcome of this application as a result.
- [108] As such, insofar as a court-sanctioned resettlement of the Occupiers affects the rights of the owner of the Premises, the Intervening Parties are not the bearer of such rights and no such case is made out.

[109] The Intervening Parties were required to make out a case for a direct and substantial interest in the outcome of this application.

[110] The Constitutional Court in *Pheko v Ekurhuleni Metropolitan Municipality* (No 2) 2015 (5) SA 600 (CC) at [56], in considering the question of joinder (analogous to the question of the right to intervene), held:

"The test for joinder requires that a litigant has a direct and substantial interest in the subject matter of the litigation, that is, a legal interest in the subject matter of the litigation which may be affected by the decision of the Court. This view of what constitutes a direct and substantial interest has been explained and endorsed in a number of decisions by our courts."

[111] In *SA Riding for the Disabled Association v Regional Land Claims Commissioner* 2017 (5) SA (CC) at [9] the Constitutional Court stated that:

"It is now settled that an applicant for intervention must meet the direct and substantial interest test in order to succeed. What constitutes a direct and substantial interest is the legal interest in the subject-matter of the case which could be prejudicially affected by

the order of the Court. This means that the applicant must show that it has a right adversely affected or likely to be affected by the order sought. But the applicant does not have to satisfy the court at the stage of intervention that it will succeed. It is sufficient for such applicant to make allegations which, if proved, would entitle it to relief."

[112] The Intervening Parties rely on the following (unsubstantiated) allegations as a basis for asserting that they have locus standi in the Eviction Application:

112.1 there is no zoning in the Scheme that allows waste recycling and residential use simultaneously;

112.2 the Occupiers will conduct their waste recycling business in the same area in which the Mooiplaas residents conduct their business;

112.3 the fact that 70% of the Occupiers are foreigners will lead to extreme unrest with the Mooiplaas residents;

112.4 the Occupiers will make open fires to prepare their food and to keep warm, and this poses a risk to the Premises, surrounding businesses and the Mooiplaas community;

112.5 without the provision of stormwater lines, the housing of the Occupiers, the Premises, nearby businesses and the Mooiplaas community are at risk for water damage and floods;

112.6 Erf 8 is located at the entrance 'to the industrial parK' and this will cause risk to traffic;

112.7 Erf 8 was initially meant to be utilised as a taxi rank in order to alleviate the transport situation of the Mooiplaas community;

112.8 The Occupiers recycling at Erf 8 "will in all probability lead to health risks" for the Intervening Parties' employees, the surrounding businesses' employees, employees at the nearby farms and the Mooiplaas community;

112.9 The Occupiers' waste recycling enterprises will attract heavy vehicles (collecting recycling material) onto Erf 8 which will cause risk to the community of the Occupiers.

[113] The majority of these allegations are irrelevant hearsay. Further, none of the conclusions are supported by any primary facts and are mere conclusions reflecting the deponent's opinion. I agree with these submissions.

[114] The (inadmissible) opinions expressed in the Intervening Parties' affidavit are premised on:

114.1 the assumption that the Occupiers will store and sort recyclable waste at Erf 8. By now it is overwhelmingly clear that the City will not permit this; and

114.2 the unfortunate and unsustainable logical leap that, in the absence of electricity being provided at Erf 8, the Occupiers will use fire for purposes of cooking and heating, and that this will cause a danger to the Premises.

[115] The Intervening Parties have, therefore, not made out a case, as envisaged in Quartermark and Die Oros, supra that they have a direct and substantial interest in the outcome of the application.

115.1 The allegation that Erf 8 borders the Premises, and is "directly adjacent" thereto, is demonstrably untrue. In the City's answering affidavit to the Urgent Application, it attaches a satellite image map obtained from Google Maps which demonstrates that the Premises is 900 meters from Erf 8 (and a 12 minute walk therefrom). There has been no challenge thereto by the Intervening Parties.

115.2 The Premises is situated at 33 Van Tonder Road, Sunderland Ridge. It is, therefore, not even adjacent to Erf 8, and is clearly accessed from Van Tonder Street. The Intervening Parties are not even making use of Ellman Street to access the Premises.¹⁶⁷

[116] All and any allegations regarding the Mooiplaas community are hearsay, irrelevant and inadmissible.¹⁶⁸ There are no confirmatory affidavits by any of the Mooiplaas community members or the Mooiplaas community leader.

[117] The allegation that the Occupiers will conduct their waste recycling in the same area as the Mooiplaas residents is speculative, opinion evidence and is inadmissible.

[118] The allegation that the Occupiers will use open fires to make food and keep warm is speculative and irrational:

118.1 There is no rational connection between the allegation that the Occupiers will make open fires to prepare food and keep warm, and the alleged risk to the Premises (some 900 meters away) and the nearby farms and the Mooiplaas community. There is no substantiation for the allegation. The distance to the Mooiplaas informal settlement (which is said to be in danger) is not even provided. Importantly, the Mooiplaas informal settlement is not alleged to be adjacent to, abutting, or even in the proximity of Erf 8.

118.2 It is an unfortunate logical leap that, in the absence of electricity being provided at Erf 8, the Occupiers will use fire for cooking and heating and that any fires will be open, uncontrolled and will spread to the Premises, hundreds of meters away. There is further no evidence provided that there is sufficient combustible material that, if ignited, could cause a runaway fire of the nature hypothesised by the Intervening Parties.

[119] The allegation that the relocation of the Occupiers to Erf 8 is illegal for alleged lack of compliance with the Scheme and SPLUMA has no merit, and is legally incorrect. This will be dealt with *infra*.

[120] The contention that Erf 8 is not appropriately zoned is based on no more than supposition. The correct position in regard to the use rights accruing to Erf 8 has been set out by the City in its latest report dated 14 February 2020.

[121] The Intervening Parties do not rely on the principles in, *inter alia*, *Patz v Green & Co* 1907 TS 427 to found an interest. Their alleged interest is pegged squarely on an unsubstantiated allegation of risk to the Premises and/or the lives and well-being of the fifth respondent's employees.

[122] Again, the alleged risk is pegged to the supposition that the Occupiers will recycle at Erf 8 which is untrue. The Intervening Parties' failure to draw a rational link between the two properties (Erf 8 and the Premises) and the alleged risks, is demonstrative of:

- (1) the contrived nature of the Intervening Parties' objection to relocation of the Occupiers; and
- (2) the absence of any real interest in the Eviction Application, and (3) a desire to prevent waste pickers living near their business. The result of the above submissions with which I agree, is that the Intervening Parties have no *locus standi* in these proceedings.

THE LEGALITY OF TEMPORARY EMERGENCY ACCOMODATION ON ERF 8

[123] The Intervening Parties resist the provision of Temporary Emergency Accommodation to the Occupiers on Erf 8 on the strength of the conclusion that such a use contravenes the Scheme. The Intervening Parties have simply not adhered to the salutary rule in *Quartermark supra* in that:

123.1 the Intervening Parties neither alleges nor proves the existence of a Town Planning Scheme in relation to Erf 8, let alone that the Scheme is applicable thereto;

123.2 the Intervening Parties have failed to allege or prove the primary and secondary use rights accruing to Erf 8;

123.3 the Intervening Parties fail to allege or prove the ambit of those primary and secondary use rights.

[124] Accordingly, any contention that the use of Erf 8, for purposes of temporary emergency accommodation, is unlawful is no more than a conclusion. As pointed out by the Court in *Die Dros supra*, this conclusion has no probative value and cannot found a case for a litigant.

[125] It follows then that the Intervening Parties have failed to make out a case for the illegality on which they rely. It follows then that their intervention was vexatious is an abuse of process. This argument too is sound and supported by the facts.

[126] Nonetheless, I consider the illegality argument and show that it is untenable for the following reasons.

[127] Erf 8 is owned by the City.¹⁷⁶ As the owner of Erf 8, the City is entitled to put it to any use as may be permitted in law. This is one of the incidents of ownership.

[128] On 13 November 2014, the 2014 revision of the Scheme came into operation as an adopted and approved Land Use Scheme, as contemplated in section 24 of SPLUMA.

[129] As such, the Scheme has force of law and binds all landowners and land users, including a municipality, organs of state and state-owned enterprises.

[130] Section 26(2)(a) of SPLUMA is permissive. It allows the use of land and the buildings erected thereon to be used only for the purposes indicated in the applicable zoning. Section 58 of SPLUMA creates an offence for the use of land or the buildings erected thereon contrary to the use permitted by the applicable zoning.

[131] These two provisions give recognition to age old principles of planning law. As explained by the Court in *Muangisa, Ntangu-Reare v City of Johannesburg*

Metropolitan Municipality, an unreported decision of the South Gauteng High Court under case number 25745/12 dated 15 November 2012, town planning schemes are:

"... a unique piece of legislative arrangement in terms whereof each erf within the geographical area covered by a Scheme has a specific zoning attached to it, which zoning permits only certain uses specified in the scheme itself.

No provision is made in a scheme for grey areas. An occupier or an owner of an erf either uses the property for the purposes permitted by the scheme or he does not

The City's obligation to enforce the scheme is an integral part of the operation of the Scheme."

[132] Accordingly, it is necessary to have regard to the zoning of Erf 8 to test whether the Intervening Parties' assertion of illegality is sustainable.

[133] This discussion, therefore, will depart from the premise that the Scheme applies to Erf 8 and that the zoning applicable thereto is "Industrial 1".

[134] Clause 14 of the Scheme gives effect to section 26 of SPLUMA by stipulating the purpose for which land and buildings erected on that land may be used.

[135] Clause 14(3) of the Scheme provides:

"The following Table B indicates for each of the Use Zones purpose in Column (3), for which buildings may be erected and used or land used, in Column (4), for which buildings may be erected and used or land used only with the consent of the Municipality, and in Column (5) for which buildings may not be erected and used, nor land used;"

[136] Erf 8 falls into use Zone 10. In terms of column (2) of Table B, its primary use right is "Industrial 1".

[137] In column (4) of Table B, secondary use rights accruing to Erf 8 are set out. These rights may (ordinarily and subject to clause 17 of the Scheme) be exercised only with the City's written consent pursuant to an application made for such a use in terms of clause 16 of the Scheme.

[138] One of the secondary use rights accruing to Erf 8 is that of "Municipal Transitional Settlements" ("MTS").

[139] MTS is defined as:

"Land and buildings used for the settlement of persons in temporary Dwelling-Units and the provision of ancillary structures and services while permanent Dwelling-Units are being formalised in terms of the relevant legislation subject to Schedule 27".

[140] There is no definition of a "temporary Dwelling-Unif" in the Scheme.

[141] Clause 17 of the Scheme regulates exemptions to clause 16 thereof. The relevant portion of clause 17 provides:

"17. Without prejudice to any of the powers of the Municipality derived from any other law or any provision of this Scheme, nothing in Clauses 14(3) or 16 of the Scheme shall be construed as granting powers to the Municipality to prohibit or restrict:

- (5) The placement of Informal Structure(s) on any Council owned land or street reserves and on any other property subject to the Municipality's approved "policy in respect of informal structures (including containers) on the properties of the City Tshwane."

[142] Clause 17 is, therefore, a saving provision. It "saves" the City's power, as landowner, to place such informal structures on its land as it sees fit. There is an additional saving provision in the Scheme. Clause 32 thereof provides:

"32. Nothing in this Scheme shall prevent the erection, use or maintenance of any building, works or land by the Municipality on its own property."

[143] This blanket saving provision permits the City, irrespective of anything stated hereinabove, to provide temporary emergency accommodation to the Occupiers or any other person in need of same on its own land.

[144] Accordingly, and in terms of clause 17(5) and/or 32 of the Scheme:

144.1. No consent use application is necessary for the City to use Erf 8 for a MTS;

144.2. The City is expressly permitted to use Erf 8 for temporary emergency accommodation in terms of Stoop AJ's order;

144.3. There is no requirement or obligation that the City rezone its land.

[145] In the circumstances, the City may erect the temporary informal structures of the nature described in its report of 14 February 2020 on Erf 8, and the illegality contended for by the Intervening Parties does not arise. I have considered this analysis and am in agreement with it.

THE ENQUIRIES IN TERMS OF PIE

FIRST ENQUIRY IN TERMS OF SECTION 4(7) OF PIE

[146] The first enquiry concerns the question whether it is just and equitable to grant an eviction order against the Occupiers, having taken into account the relevant circumstances.

[147] Section 4(7) of PIE provides:

"If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women."

[148] In *Changing Tides* supra, the Supreme Court of Appeal described the enquiry as follows:

"... The first enquiry is that under s 4(7), the court must determine whether it is just and equitable to order eviction having considered all relevant circumstances. Among those circumstances the availability of alternative land and the rights and needs of people falling in specific vulnerable groups are singled out for consideration ...".

[149] Section 4(7) is an empowering provision. It gives effect to section 26(3) of the Constitution by listing certain legally relevant considerations that must be taken into account, before determining that an eviction order is to be granted.

[150] I am, therefore, tasked to evaluate the eighth report filed by the City (on 14 February 2020)¹⁸⁷ in order to determine if the eviction of the Occupiers is just and equitable in terms of section 4(7) of PIE. In conducting this enquiry, I must consider: the Occupiers' right to adequate housing entrenched in section 26 of the Constitution, balanced against the applicant's right not to be arbitrarily deprived of its property in terms of section 25 of the Constitution. I agree obviously that this is settled law.

THE 8TH REPORT OF THE THIRD RESPONDENT:

[151] The only relevant report is now that of 14 February 2020.

[152] In its report, the City tenders Erf 8 and provides the following details in respect thereof:

152.1 Erf 8 is owned by the City and located 15 kilometres from the Property (there are no available properties suitable for the provision of temporary emergency accommodation closer to the Property).

152.2 Erf 8 is zoned for "industrial 1" use in terms of the Scheme which allows for use as a "municipal transitional settlement".

152.3 Erf 8 is adequately zoned for provision of Temporary Emergency Accommodation.

152.4 The City will provide 109 temporary housing units constructed from polycarbonate material with the structural design that has the

strength, stability and durability for a lifespan of 25 years.

152.5 Each temporary unit shall have a roof, be water resistant and be 30m² in size. There are currently 66 occupiers at the Property,

thus the number of units offered would be sufficient.

152.6 Erf 8 will be access controlled and will have an ongoing security plan to prevent invasion of Erf 8. The City will provide 10 chemical toilets and no less than one toilet per five families. In addition, the City will provide five water points and no less than one water point per 25 families.

152.7 The City has cleared, demarcated and pegged Erf 8.

152.8 The City will transport the Occupiers and their personal belongings, on the date as ordered by the court, by using one five-ton truck, one TLP truck and one tipper truck.

152.9 The City will provide temporary emergency accommodation to the Occupiers for a period of six months. Thereafter:

152.9.1 the City will evaluate which of the Occupiers qualify for RDP/subsidised housing and make application therefor within the six-month period; and

152.9.2 the City will assess the Occupiers' immigration status.

152.10 The City needs 48 hours' notice to install the temporary emergency accommodation on Erf 8, and to have it ready for occupation by the Occupiers. But for the City requiring 48 hours' notice (i.e. 48 hours of the court's direction to do so), Erf 8 is for all intents

and purposes in situ, and ready for occupation by the Occupiers.

[153] In terms of engagement, the City sets out its two occasions of face-to-face engagement with the Occupiers:

153.1 On 16 May 2019, when the City attended at the Property and obtained information from 74 of the Occupiers present at the Property.

153.2 On 31 January 2020, when Mr Sella Chipu (the Divisional Head of Human Settlements and Planning Policy of Housing) on behalf of the

City, with members of his staff, attended the Property. It was communicated to the Occupiers that the City is in a position to

relocate the Occupiers to Erf 8 on a voluntary basis. The spokesperson for the Occupiers objected to the voluntary relocation on the basis that Erf 8 is far away, and the Occupiers will not be able to continue with their waste recycling enterprise at Erf 8.

[154] The City will not permit the Occupiers to continue with their waste recycling enterprise at Erf 8204, and the City makes it clear that it will relocate all the Occupiers to Erf 8 regardless of their immigration status.

[155] It is clear from the City's present tender, read with paragraph 1 of Mr Acting Justice Stoop's order, that the Occupiers will not be rendered homeless by eviction.

[156] The Occupiers' complaint about the City not engaging with them for purposes of obtaining particulars of their personal circumstances is less than frank.

156.1 First, it appears that the Occupiers' complaint about a lack of engagement falls away if their demands are acceded to.

156.2 Second, the Occupiers suggest in their answering affidavit that the information provided by their attorneys to the City is sufficient. Moreover, there is no dispute that the Occupiers will be left homeless in the absence of being provided with temporary accommodation from the City. The City has been ordered to provide temporary accommodation and the location of that Property appears from the Report.

156.3 Third, the obligation to place such facts as are considered to be relevant to the eviction order must be put up by the Occupiers.

156.3.1 In *Changing Tides* supra at par [48] the Supreme Court of Appeal held that the City has no right to demand information from the Occupiers, and that the easiest way to obtain information of the Occupiers is for the Occupiers' attorneys to provide such information to the City. The Court said that "... the easiest way to obtain the necessary information and furnish it to the City is by the LRC preparing a list of those of its clients who require temporary emergency accommodation, with the details of their names, ages, family circumstances, sources of income and having annexed to it appropriate proof of identity "

156.3.2 In *Occupiers, Berea v De Wet* 2017 (5) SA 346 at [47] the Constitutional Court said that "... [t]he obligation to provide the relevant information is first and foremost on the parties to the proceedings. As officers of the court, attorneys and advocates must furnish the court with all relevant information that is in their possession in order for the court to properly interrogate the justice and equity of ordering an eviction."

156.4 Fourth, it appears that numerous requests for information, including proof of lawful residence in the country, have been made to the LHR and these have been ignored.

[157] The LHR (as officers of the court and the Occupiers' legal representatives) have put up some facts that support the conclusion that the Occupiers will be homeless if evicted without the provision of temporary accommodation by the City. The Occupiers have not raised a complaint that the rights of any woman and children are being infringed. I must accept that in the event that there was such a complaint, it would have been raised.

[158] As such, the relevant facts about the circumstances of the Occupiers are before the Court. I agree that this is so.

IS THE OCCUPIERS' BUSINESS A LEGALLY RELEVANT CONSIDERATION FOR PURPOSES OF THE FIRST ENQUIRY?

[159] The Occupiers' primary concern is that being a place to conduct their business activities at their place of abode, is legally relevant consideration.

[160] At no time prior to the delivery of the Occupiers' supplementary answering affidavit did they contend for a blanket "right to work", entailing the provision of land on which to carry on their business activities. Even now it is dubious as to whether they have asserted such a right.

[161] The Occupiers' case appears to be that (insofar as the supplementary answering affidavit is accepted into the record) the City ought to have adopted a policy in terms of which their business activities are integrated into the City's waste management plan. The Occupiers, accordingly, criticise the City for having not done so.

- [162] They fail to articulate, however, any obligation on the City to have acted in this manner. Moreover, there is no suggestion that even if the City had such a policy, it would allow for what the Occupiers demand. The applicable legislation does not permit one to live on the same land where a waste recycling undertaking is carried on nor does my order referred to in par [4] above.
- [163] The outcome demanded by the Occupiers would be patently unlawful and, notwithstanding the faint suggestion that this Court should permit an illegality or could permit the commission of an offence, in the exercise of its discretion this is not a proposition that is supported in law.
- [164] The Supreme Court of Appeal in *Hotz supra* made it abundantly clear that a court cannot permit an illegality. The notion that the court has a discretion to permit the commission of an offence has been specifically considered in relation to town planning in, inter alia, *United Technical Equipment Co (Pty) Ltd v Johannesburg City Council* 1987 (4) SA 343 (T) at 348 H to J, *Bitou Local Municipality v Timber Two Processors CC and Another* 2009 (5) SA 618 (C) at [25] to [35] and the authorities therein cited and more recently in *Makgosi Properties (Pty) Ltd v Edwin Herold Fichard NO and Others* an unreported decision of the Gauteng Local Division dated 12 July 2016 under case number 24249/2015 where Meyer J, after surveying the applicable authorities, said:
- "... no such discretion exists where the wrong complaint amounts to a crime, except where maximum de minimis non curat lex (the law is not concerned with trivial) applies ... Absent such discretion, a court has to '... uphold the rule of law, refuse to countenance an ongoing statutory contravention and enforce the provisions of the Act."
- [165] The applicants have not suggested that the ongoing offence being committed at the Property is trivial, nor can they. Section 58 of SPLUMA contemplates a fine or incarceration for contravening the provisions of a Land Use Scheme.

THE PURPOSE OF S4(7) OF PIE:

- [166] The purpose of PIE was considered by the Constitutional Court in *Blue Moonlight supra*. It said:
- "[34] The South African constitutional order recognises the social and historical context of property and related rights. The protection against arbitrary deprivation of property in s 25 of the Constitution is balanced by the right of access to adequate housing in s 26(1) and the right not to be evicted arbitrarily from one's home in s 26(3). This court noted in *FNB*:
- 'The purpose of section 25 has to be seen both as protecting existing private property rights as well as serving the public interest, mainly in the sphere of land reform but not limited thereto, and also as striking a proportionate balance between these two functions.' (Footnote omitted.)
- [35] Historical context is relevant to one's understanding of the constitutional protection against arbitrary deprivation of property

and to access to adequate housing. Apartheid legislation undermined both the right of access to adequate housing and the right to property. Section 25 prohibits arbitrary deprivation of property, but also addresses the need to redress the grossly unequal social conditions. Section 26 highlights the transformative vision of the Constitution.

- [36] PIE was adopted with the manifest objective of overcoming past abuses like the displacement and relocation of people. It acknowledges their quest for homes, while recognising that no one may be deprived arbitrarily of property. The preamble quotes ss 25(1) and 26(3) of the Constitution. In PE Municipality it was stated that the court is required 'to balance out and reconcile the opposed claims in as just a manner as possible, taking account of all of the interests involved and the specific factors relevant in each particular case!'"
- [167] The above dictum highlights that PIE and section 26 of the Constitution concern the conflict between the constitutional right not to be arbitrarily deprived of property against the right not to be evicted without an order of court made after due and proper consideration of the facts.
- [168] PIE is squarely legislation that gives effect to section 26(3) of the Constitution on the one hand, and to section 25(1) of the Constitution on the other.
- [169] Relevant circumstances are thus axiomatically limited to circumstances that concern the competing rights of access to housing on the one side, and to the unlawfully occupied property on the other. This interpretation accords with that of the Supreme Court of Appeal in *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA) at [19], where it was said that "[u]nless the occupier opposes and discloses circumstances relevant to the eviction order, the owner, in principle, will be entitled to an order for eviction."
- [170] The Occupiers have a right to claim access to temporary accommodation to prevent homelessness. This is an element of the right of access to adequate housing in section 26(1) of the Constitution. Business activities are not protected under section 26 of the Constitution nor are they protected by PIE.
- [171] Similarly, the City's obligation to provide emergency accommodation is one that flows from the Housing Act, 1997. The purpose of emergency housing is to ameliorate the consequences of a housing emergency occasioned by an eviction that will lead to homelessness. In *Blue Moonlight supra*, the Constitutional Court pointed out the aim of the emergency housing program as being one "... which aims to assist people who, for reasons beyond their control, find themselves in an emergency housing situation that they are unable to address ..."
- [172] The purpose of the Emergency Housing Programme ("the EHP") and the EHP's role are to be found in the Constitutional Court's decision in *Government of the Republic of South Africa v Grootboom and Others* 2001 (1) SA 46 (CC).

[173] The Constitutional Court's conclusion was:

"[93] This case shows the desperation of hundreds of thousands of people living in deplorable conditions throughout the country. The Constitution obliges the state to act positively to ameliorate these conditions. The obligation is to provide access to housing, health-care, sufficient food and water, and social security to those unable to support themselves and their dependants. The state must also foster conditions to enable citizens to gain access to land on an equitable basis. Those in need have a corresponding right to demand that this be done. I am conscious that it is an extremely difficult task for the state to meet these obligations in the conditions that prevail in our country. This is recognised by the Constitution which expressly provides that the state is not obliged to go beyond available resources or to realise these rights immediately. I stress however, that despite all these qualifications, these are rights, and the Constitution obliges the state to give effect to them. This is an obligation that courts can, and in appropriate circumstances, must enforce.

[95] Neither section 26 nor section 28 entitles the applicants to claim shelter or housing immediately upon demand. The High Court order ought therefore not to have been made. However, section 26 does oblige the state to devise and implement a coherent, co-ordinated programme designed to meet its section 26 obligations. The programme that has been adopted and was in force in the Cape Metro at the time that this application was brought, fell short of the obligations imposed upon the state by section 26(2) in that it failed to provide for any form of relief to those desperately in need of access to housing."

[174] It is apparent from Grootboom that there is no right to demand the provision of housing immediately, or even in a location of choice. Concomitantly, there is no right to demand business premises or prescribe the location thereof.

[175] The Occupiers' contention that the Court should make such an order against the City offends the principle of legality, in circumstances where there is no zoning in the Scheme which permits recycling (an industrial use) and residential use on the same land.

[176] In *Lester v Ndlambe Municipality and Another* 2015 (6) SA 283 (SCA) at [24] to [75] the Supreme Court of Appeal dealt with the principle of legality, and held that the courts have a duty to ensure that the doctrine of legality is upheld, and cannot condone unlawful conduct. The Court also referred to the dictum of Chaskalson CJ in *Pharmaceutical Manufacturers of SA: In re Ex parte President of the Republic of South Africa and others* [2000] ZACC 1; 2000 (2) SA 674 (CC) at [20], wherein it was said that:

"[t]he exercise of all public power must comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law."

[177] In *Lester*, the Supreme Court of Appeal concluded its discussion on the principle of legality by referring to what was said by Harms, J (as he then was) in *United Technical Equipment* by saying:

"The respondent has not only a statutory duty but also a moral duty to uphold the law and to see to due compliance with its town planning scheme. It would in general be wrong to whittle away the obligation of the respondent as a public authority to uphold the law. A lenient approach could be an open invitation to members of the public to follow the course adopted by the appellant, namely to use land illegally with a hope that the use will be legalised in due course and that pending finalisation the illegal use will be protected indirectly by the suspension of an interdict."

[178] Courts are required to uphold the rule of law and cannot permit unlawful conduct. The Court can also not make an order that compels the City to act in a manner that contravenes the Scheme and SPLUMA for the reasons aforesaid. This is a further reason why business premises is not a relevant consideration under PIE. I agree that applicant's counsel has accurately summarised the applicable legal principles.

[179] Consequently, the Occupiers' objection to the Temporary Emergency Accommodation as is tendered to them, and which does not allow for a recycling business to carry on, is not relevant to this matter because:

179.1 temporary accommodation in terms of the Emergency Housing Program provided by the City to an unlawful occupier of land pursuant to his/her eviction is directed at ameliorating the short term housing emergency which that eviction occasions. It is not there to address permanent housing needs and, axiomatically, does not include considerations of suitable business premises;

179.2 in terms of the Scheme, there is no permissible residential use under "industrial" zoning;

179.3 the City cannot rezone the proposed land to suit the demands of the Occupiers. This is not legally permissible in terms of SPLUMA

which requires the City to have a spatial development framework which guides any other law (i.e. the Scheme) relating to land use and development.

[180] The Occupiers' belated assertion that they have a right to work premised upon various international instruments does not avail them either. The reasons are manifest. First, the international instruments do not trump domestic law. South African domestic law has, at its apex, the Constitution. Section 22 of the Constitution affords rights to citizens to "choose their trade profession or occupation freely". It provides further that this right may regulated by law.

[181] The Scheme and waste management laws regulate, in this case, the manner in which and the place at which waste recycling may be carried on. These prohibit waste recycling from being carried on at the same place as where one resides.

[182] There is no suggestion that this prohibition is unlawful or unconstitutional. This means that the international instruments do not actually have application in this case. There is no suggestion that this Court is called upon to interpret section 22 of the Constitution. This is because, fundamentally, the Occupiers have failed to make out a case that they are citizens of the Republic, and that the laws regulating the practice of their trade, profession or occupation are unreasonably and unjustifiably infringed upon.

[183] In the circumstances, it is just and equitable for the Occupiers to be evicted from the Property, and that the City be ordered to provide emergency accommodation to the Occupiers.

SECOND ENQUIRY IN TERMS OF SECTION 4(8) OF PIE:

[184] In *Changing Tides* supra at par [12] the second enquiry in terms of PIE was summarised as follows:

"Once the conclusion has been reached that eviction would be just and equitable the court enters upon the second enquiry. It must then consider what conditions should attach to the eviction order and what date would be just and equitable upon which the eviction order should take effect. Once again the date that it determines must be one that is just and equitable to all parties."

[185] Section 4(8) of PIE provides:

"If the court is satisfied that all the requirements of this section have been complied with and that no valid defence has been raised by the unlawful occupier, it must grant an order for the eviction of the unlawful occupier, and determine -

- (a) a just and equitable date on which the unlawful occupier must vacate the land under the circumstances; and
- (b) the date on which an eviction order may be carried out if the unlawful occupier has not vacated the land on the date contemplated in paragraph (a)."

[186] The accommodation to be provided to the Occupiers at Erf 8 is basically in situ, and the City has stated that it merely needs 48 hours' notice to ensure that all the housing units are installed at Erf 8. It would, therefore, be just and equitable for the court to order that the Occupiers be evicted within 48 hours of the granting of the eviction order. I have taken these considerations into account and am satisfied that an eviction order is justifiable on the on the bases put to me.

CONCLUSION

AND COSTS:

[187] The following submission were made:

- [188] The purpose of PIE is not to expropriate a private landowner's land. The private landowner retains the protection of section 25 of the Constitution. PIE serves merely to delay or suspend the exercise of the applicant's full property rights until it is just and equitable to evict the Occupiers.
- [189] In this case, it is just and equitable to evict the Occupiers. Any risk of homelessness which may render the Occupiers' eviction not just or equitable has been addressed.
- [190] It would not be just and equitable to the applicant (and would defeat the applicant's section 25 rights) if the Occupiers were allowed to remain on the Property any longer than 30 days, or until such time as they are provided with accommodation that allows them to conduct their waste recycling business.
- [191] Such a position would be an abuse of PIE, and the legal obligations that the Constitution places on the State to assist individuals who are facing housing emergencies.
- [192] If the Occupiers' complaint is in relation to there not being any legalisation in place that allows occupiers to work on the same premises where they live, then this issue must be taken up with the legislature, and cannot be enforced against the applicant. It can also not be used to delay the applicant any further in its desire to develop the Property and fulfil its contractual obligations.
- [193] In the circumstances, it is just and equitable in terms of section 4(7) of PIE to grant an order for the eviction of the Occupiers from the Property. The City has provided a report which is compliant with Stoop AJ's Order and the Constitution.
- [194] The Occupiers have raised no valid defence to their eviction, and the Intervening Parties have no locus standi to object to the relocation of the Occupiers to Erf 8. I agree with these submissions. It is also clear that the accommodation to be provided will immeasurably enhance the occupiers dignity and health and safety in these times when Regulations under the Disaster Management Act are in force. It is difficult to judge how long the present level 3 will be maintained so I have provided for the suspension of this order as appears from par 2.

COSTS:

- [195] Applicant's counsel made the following submissions:
- [196] Mr Justice Tuchten, on 17 February 2020, reserved the costs in respect of the intervention application (including the Urgent Application) and the costs occasioned by the Eviction Application (including the costs in respect of the various postponements thereof).

- [197] The Intervening Parties are liable to pay the costs occasioned by the intervention application, including the costs incurred in respect of the urgent application brought on 31 January 2020. The Intervening Parties have no interest in the Eviction Application, and their application was ill-conceived and without merit. In those circumstances, the Intervening Parties should be ordered to pay the costs on a punitive scale.
- [198] The applicant was constrained to approach the Court in Part A because the City had failed to take its obligations pursuant to Blue Moonlight supra seriously. Had the City taken its obligations seriously and been in a position before the commencement of this litigation to engage with the Occupiers and make a meaningful tender of Temporary Emergency Accommodation, the applicant would not be in the position it has found itself in this litigation.
- [199] Even after this Court found the City to be in breach of its Constitutional and statutory obligations, it took case management, an opposed application and eight reports before the City was able to tender a meaningful report that discharges its obligations. These reports occasioned a delay and a postponement.
- [200] All delays and postponements in the Eviction Application were as a result of the City's failure to comply with a court order and, therefore, those costs should be borne by the City.
- [201] There is no reason that the ordinary rule in Constitutional litigation against the State in relation to costs should not apply and the City be ordered to pay the applicant's costs, including the costs of two counsel that have been incurred in the Eviction Application.
- [202] I agree with their submissions. They are sound.

THE ORDER:

- [203] I requested applicant's counsel to provide one with a suitable draft order which would deal with all the issues raised alone, as also the present lock-down situation in terms of the Disaster Management Act 57 of 2002 as amended. I have made suitable amendments and the following order is made with annexure A thereto:

Having read the documents filed of record, heard counsel and considered the matter it is ordered that:

1. The first and second respondents and all persons occupying by, through or under them (collectively, 'the Occupiers) are evicted from the immovable property Portion 147, of the Farm Lyttleton, 381-JR ('the Property).
2. The Occupiers are ordered to vacate the Property within 30 days of the Alert 3 referred to in section 19 of the Government Notice No. R.480 published in the Government Gazette No. 43258 of 29 April 2020 ('Alert Level 3') coming to an end, failing which, the Sheriff of this court, or his lawfully appointed deputy, is authorised and directed to evict the Occupiers from the Property.

3. The third respondent ('the City') is ordered to provide all Occupiers of the Property (including but not limited the Occupiers whose names appear in the document attached as 'A') with temporary emergency accommodation in terms of the Emergency Housing Programme

of the National Housing Code, 2009, provided that they are still resident at the Property and have not voluntarily vacated it.

4. Without limited the order in 3 above, the City is ordered to:

4.1 erect no less than 109 temporary housing units on Erf 8 Sunderland Ridge, 21 Ellman Street, Sunderland Ridge, Centurion ('Erf 8) constructed from polycarbonate material with the structural design that has the strength, stability and durability for a lifespan of 25 years. Each temporary unit will have a roof, be water resistance and be not less than 20m² in size;

4.2 provide access control on Erf 8 and to have an ongoing security plan prevent invasion of Erf 8 or the carrying on of any unlawful activities thereat;

4.3 provide 10 chemical toilets and no less than one toilet per five families at Erf 8;

4.4 provide five water point and no less than one water point per 25 families at Erf 8;

4.5 assist in the Occupiers' relocation to Erf 8, by providing transport for the Occupiers, and their personal belongings, in the form of one five-ton truck, one TLP truck and one tipper truck.

5. The City shall erect the structures referred to in paragraph 4.1 and provide the amenities referred to in paragraphs 4.2, 4.3 and

4.4 at Erf 8 no later than 20 days after alert 3 comes to an end and shall provide the assistance to the Occupiers referred to in paragraph 4.5 no later than 10 days thereafter.

6. The temporary emergency accommodation referred to in paragraph 4 above shall be provided by the City to the Occupiers for a period

of six months during which time the City shall:

6.1 Ascertain the immigration status of the Occupiers with the assistance of the Department of Home Affairs;

6.2 Evaluate which of the Occupiers qualify for RDO/subsidised housing and make application therefor.

6.3 The Sheriff of this court or his lawfully appointed deputy is authorised to dispose of any structures, waste material or recyclable

material that remains on the Property 30 days of Alert Level 3 comes to an end, and the order in paragraph 2 above has been executed.

6.4 The City is ordered to pay the applicant's costs of the eviction application, including all costs previously reserved, including the costs consequent upon the employment of two counsel.

6.5 The fifth and sixth respondents' have no interest in the eviction applicant and their objection to the Occupiers' relocation to Erf 8 is dismissed.

6.6 The fifth and sixth respondents are ordered, jointly and severally, the one paying the other to be absolved, to pay the applicant's costs incurred in

the urgent application under case number 7106/2020 and the applicant's costs in relation to their intervention in this matter on the scale as between attorney and client, which costs are to include the costs consequent upon the employment of two counsel.

H FABRICIUS

JUDGE OF THE HIGH COURT OF SOUTH AFRICA,

GAUTENG DIVISION

DATE OF HEARING: NO ORAL HEARING (BY AGREEMENT)

SET DOWN FOR 21 & 22 MAY 2020

DATE OF JUDGMENT: 2 June 2020

APPEARANCES:

FOR THE APPLICANT:

AW PULLINGER

C VAN DER LINDE

INSTRUCTED BY: ADAMS AND ADAMS

FIRST AND SECOND RESPONDENTS ("THE OCCUPIERS"):

A DE VOS SC

M RAKGOALE

INSTRUCTED BY: LAWYERS FOR HUMAN RIGHTS

THIRD AND FOURTH RESPONDENTS ("THE CITY"):

A SOUTH SC

GEGAN

INSTRUCTED BY: DIALE MOGASHOA ATTORNEYS

FIFTH AND SIXTH RESPONDENTS ("THE INTERVENING PARTIES"):

A VANWYK

INSTRUCTED BY: VERMAAK BEESLAAR ATTORNEYS

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