CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 108/13

In the matter between:

JABULANI ZULU AND 389 OTHERS Appellants

and

ETHEKWINI MUNICIPALITY First Respondent

MINISTER OF POLICE Second Respondent

MEMBER OF THE EXECUTIVE COUNCIL FOR HUMAN SETTLEMENTS AND PUBLIC WORKS, KWAZULU-NATAL Third Respondent

and

ABAHLALI BASEMJONDOLO MOVEMENT SOUTH AFRICA Amicus Curiae

Neutral citation: *Zulu and Others v eThekwini Municipality and Others* [2014] ZACC 17

Coram: Moseneke ACJ, Skweyiya ADCJ, Cameron J, Dambuza AJ, Froneman J, Jafta J, Khampepe J, Madlanga J, Majiedt AJ, Van der Westhuizen J and Zondo J

Heard on: 12 February 2014

Decided on: 6 June 2014

Summary: Demolition of shacks — invasion of government land — locus standi — leave to intervene in proceedings where no interim demolition and eviction order granted — allegations of the party

whose locus standi is challenged to be taken as true for determination of locus standi — appellants have locus standi to intervene in proceedings brought by MEC for demolition of their structures — demolition of someone's structure — act of eviction itself — constitutionality of interim eviction order granted without compliance with Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 — not necessary for Court to decide constitutionality of such interim order when not on appeal and when there is another interim order protecting the appellants' rights in the interim

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ORDER

On appeal from the KwaZulu-Natal High Court, Durban (Kruger J):

1. The appeal is upheld.

2. The First and Third respondents must pay the appellants' costs jointly and severally.

3. The order by Kruger J refusing the appellants leave to intervene in the proceedings under case number 3329/2013 is set aside and replaced with the following:

   "(a) The applicants are granted leave to intervene in these proceedings as the third and further respondents.

   (b) Costs shall be costs in the cause."

JUDGMENT

ZONDO J (Moseneke ACJ, Skweyiya ADCJ, Cameron J, Dambuza AJ, Jafta J, Khampepe J, Madlanga J and Majiedt AJ concurring):

Introduction

[1] The appellants brought an application for leave to appeal against an order made by Kruger J in the KwaZulu-Natal High Court, Durban (High Court) refusing them leave to intervene in certain proceedings that had been initiated by the Member of the Executive Council for Human Settlements and Public Works, KwaZulu-Natal (MEC). We granted the appellants leave to appeal and set the appeal down for hearing.

The parties

[2] The appellants are various persons who say they live on a property which they call Madlala Village in Durban. The official description of that property is Erf 1112, Mobeni, Durban. The property appears to be near a township called Lamontville Township. In their affidavits the first and third respondents refer to the property as the Lamontville property. I propose to do the same in this judgment.

[3] The first respondent is the eThekwini Municipality (Municipality). It is the implementing agent and developer of a low-cost housing project called the Lamontville Ministerial Housing Project which relates to the Lamontville property.

The Lamontville property falls within the area of the Municipality. The second respondent is the Minister of Police. He has been cited in these proceedings because he was a party in the High Court proceedings in which an order was granted that gave rise to these proceedings. The third respondent is the MEC. In her official capacity the MEC is cited as the owner of a number of immovable properties located in KwaZulu-Natal (properties). The Lamontville property is one of those properties.

Background

[4] The appellants say that some of them have lived on the Lamontville property since September 2012 whereas others moved onto the property later. Prior to that, they lived at Lamontville Township where they rented backrooms from property owners. They state that at some point, when they still lived at Lamontville Township, they were promised RDP houses by a certain Mr Gumede who was either a councillor or an official of the Municipality but that promise was not honoured.

[5] The appellants say that, after some time, the rental charged by the property owners at Lamontville Township became unaffordable and they moved onto the Lamontville property from about September 2012. They built their informal homes on the property. The appellants' version is that the Municipality's Land Invasion Control Unit (Control Unit) came to the Lamontville property and demolished their homes soon after they had built their structures in September 2012. The Control Unit's function is to deal with land invasions within the municipal area. It

seems to owe its existence and to derive its powers from the Municipality's housing policy.

[6] The appellants rebuilt their homes after the Control Unit had left. They further state that, thereafter, the Control Unit regularly visited the Lamontville property, evicted them and demolished their homes but, on each occasion, they rebuilt their homes. They say that from September 2012 there have been 24 occasions on which they have been subjected to the demolition of their homes by the Control Unit. They point out that the Municipality carried out the demolitions and evictions without any court order.

[7] The Municipality's and MEC's version is that in September 2012 they became aware that there was a group of people poised to invade the Lamontville property. The Control Unit went onto the Lamontville property. The Municipality says that, upon arrival on the property, the Control Unit found that there were people who were trying to invade the Lamontville property and had put up some structures that were not complete. The Municipality says that the people concerned were told that they had no right to occupy the property or to build structures on the property and that doing so was illegal. The Control Unit demolished a number of structures on the property. The Municipality says that the structures it demolished were half completed and were not occupied. It states that, subsequent to the demolitions, the Control Unit regularly patrolled the Lamontville property to make sure that the property was not invaded. According to the Municipality the Control Unit achieved this goal. The Municipality

denies that the appellants have lived on the Lamontville property since September 2012 and that they continue to do so.

[8] The Municipality points out that the Lamontville property has been designated for low-cost housing for a group of people who have already been identified. It accuses the appellants of seeking to invade the Lamontville property in order to jump the queue of those waiting to be allocated houses. The appellants deny this accusation.

The MEC's application to the High Court

[9] The MEC says that, after September 2012, she learnt of other attempts or threats by other groups of people to invade other properties owned by her. To deal with the attempts to invade the properties, the Municipality and the MEC had sometimes needed the assistance of the South African Police Service. As time went on, the South African Police Service indicated that it would not provide assistance unless an order of court authorising such assistance was obtained. In due course the MEC instituted an application in the High Court for various orders in respect of the properties, including the Lamontville property.

[10] The application that the MEC brought in the High Court was launched under case no 3329/2013 on or about 28 March 2013. It was against the Municipality and the Minister of Police as the first and second respondents respectively. In the founding affidavit the deponent acknowledged that there were people occupying the

Lamontville property. She said that she only disputed those people's right to occupy the Lamontville property. She also acknowledged that the Legal Resources Centre (LRC) was representing those people in negotiations with the MEC's officials. She also said in the founding affidavit: "The applicant (i.e. MEC) proposes, in due course, and should its negotiations with the LRC fail, to launch proceedings for their eviction."

[11] The MEC's application under case no 3329/2013 came before Koen J on 28 March 2013. Koen J issued a rule nisi with an interim interdict. The relevant terms of the order were as follows:

> "1. That a rule nisi do hereby issue calling upon the respondents and any and all other interested persons to show cause to this Honourable Court on the 11th day of April 2013 at 09h30 or so soon hereafter as the matter may be heard why an order in the following terms should not be granted:
>
> 1.1 that the First and Second respondents are hereby authorised to take all reasonable and necessary steps:
>
> 1.1.1 to prevent any persons from invading and/or occupying and/or undertaking the construction of any structures and/or placing any material upon the immovable properties described in 'NOM1-37' to the notice of motion.
>
> 1.1.2 to remove any materials placed by any persons upon the aforementioned properties;
>
> 1.1.3 to dismantle and/or demolish any structure or structures that may be constructed upon the afore-mentioned properties subsequent to the grant of this order.
>
> 1.2 interdicting and restraining any persons from invading and/or occupying and/or undertaking the construction of any structures and/or placing of any material upon any of the aforementioned properties.

1.3 that any respondent or respondents or any other party who opposes this application be ordered to pay the costs occasioned thereby jointly and severally, in the event that more than one respondent does so.

2. That paragraphs 1.1 and 1.2 hereof shall operate as an interim order with immediate effect pending the return date of the rule nisi."

The immovable properties to which reference is made in the order included the Lamontville property. For convenience I refer to this order as the interim order.

The appellants' application to interdict evictions and demolitions

[12] On 25 April 2013 the appellants launched an application in the High Court under case no 4431/2013 against the present respondents. They sought various orders including an interdict restraining the respondents from demolishing their homes or evicting them or removing their belongings without an order of court. In their affidavits the appellants set out how they came to be on the Lamontville property, how they had been subjected to evictions and how the Municipality had demolished their homes on many occasions since September 2012 without any court order. They also sought an order compelling the Municipality to rebuild their homes that it had demolished.

[13] In due course the Municipality delivered its answering affidavit to the appellants' application under case no 4431/2013. In that affidavit the Municipality stated that it had demolished structures on the Lamontville property both before and after April 2013. Some of the structures that were demolished were complete while others were incomplete.

Application for leave to intervene in the MEC's application in the High Court

[14] The appellants brought an application for leave to intervene in the proceedings in which the interim order had been made. They did this ahead of the return day of the rule nisi. The appellants complained that the MEC had not cited them in that application even though the order sought affected them as it related to the property on which they live. The appellants also drew attention to the fact that, although in the founding affidavit before Koen J the MEC had acknowledged that there were people occupying the Lamontville property, the Court had granted the interim order without insisting that those people be joined. The appellants contended that they had a direct and substantial interest in the proceedings and, therefore, had locus standi (standing). The Municipality and MEC opposed the appellants' application. They contended that the appellants had no locus standi in the proceedings as the interim order did not affect them or their rights since it only related to invasions or attempted invasions that occurred or would occur after the grant of that order.

[15] The appellants' application was heard by Kruger J who dismissed it. No reasons are available for the dismissal of the application. The appellants applied to the High Court for leave to appeal but that application, too, was refused. They petitioned the Supreme Court of Appeal for leave to appeal but the petition was also dismissed.

The appeal

[16] The narrow question we are required to determine is whether or not the High Court was correct in refusing the appellants leave to intervene. All three respondents oppose the appeal. Whether the High Court was correct in refusing the appellants leave to intervene depends upon whether the appellants had locus standi in the proceedings in which they sought leave to intervene. That in turn will be determined by whether the appellants had a direct and substantial interest in those proceedings. Whether they had such an interest will depend upon whether the order affected their rights or interests adversely or had the potential to affect their rights or interests.

[17] Before us counsel for the Municipality and counsel for the MEC contended that the appellants had no standing in the proceedings in which the interim order was granted. In support of this contention they submitted that, on the appellants' version, the appellants had already been living on the Lamontville property when the interim order was granted and that order did not apply to persons who were already in occupation of the Lamontville property when it was granted. In this regard counsel contended that the interim order was not intended to affect, or to apply to, the appellants or to persons who claimed to have been in occupation of the Lamontville property prior to its grant.

[18] In its written submissions in this Court the Municipality adopted the same stance. It referred to a statement in the MEC's founding affidavit in the interim order

matter where she, too, had acknowledged that there were people occupying the Lamontville property but disputed their right to occupy the property. The Municipality also quoted a statement from the MEC's founding affidavit where she proposed to launch eviction proceedings in due course against the people occupying the Lamontville property if the negotiations with the LRC failed. It needs to be pointed out that the appellants were represented by the LRC in negotiations with the MEC's department.

[19] The Municipality said in its written submissions:[1]

> "It was and is self-evident that *no* relief was sought or granted against the appellants in the application."

The Municipality also said:[2]

> "The [Municipality] accordingly argues that the [interim order] was directed at preventing the invasion of the Lamontville property and other properties *subsequent* to the date of the grant thereof."

In paragraph 30.2 it stated:

> "The Order did not justify the eviction of any persons (including the Lamontville occupiers and the appellants) who were admittedly in occupation of the Lamontville property *prior* to the date of the grant thereof."

[1] In para 28.

[2] In para 30.1.

[20] In their answering affidavit filed in this Court, the second respondent and the MEC contended that the interim order did not affect the appellants or their rights and that, for that reason, the appellants had no direct and substantial interest in the interim order proceedings. The deponent said:[3]

> "The [appellants] have misconstrued the [interim] order. It does not interfere with or affect the entrenched rights of the [appellants] who claim that they were in occupation of the Lamontville property prior to the grant of the order. The [appellants] are asserting such rights in any event in the application under case no: 4431/2013."

Then followed this:[4]

> "It was clearly not the intention of the respondents or indeed of the [MEC] to secure the eviction of the [appellants] or the persons who were already in occupation of any of the properties including the Lamontville property through the order. . . .
>
> The [appellants] have misconstrued or are misstating the implications arising from the grant of the order. As far as the [appellants] are concerned their entrenched rights as occupiers of the Lamontville property are totally unaffected by the grant of the order. These rights will be addressed in the proceedings under case no: 4431/2013 *alternatively* in any proceedings launched by the [MEC] for their eviction from the Lamontville property."

[21] In determining whether a person has standing in a matter, a court is required to assume that the allegations made by that person in the case are true or correct.[5] Accordingly we must decide this appeal on the basis that the averments by the appellants that they built shacks on the Lamontville property and have lived there

[3] In para 54.

[4] In paras 64 and 77.

[5] *Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others* [2012] ZACC 28; 2013 (3) BCLR 251 (CC) at para 32.

since around September 2012 are true. That also means that we must accept, for purposes of this appeal, that the Control Unit has demolished the appellants' shacks or homes on 24 occasions after each of which the appellants rebuilt them.

[22] The answering affidavit delivered by the Municipality in response to the appellants' urgent application launched on 14 February 2014 supports the appellants' case that the appellants live on the Lamontville property. I say this because in that affidavit the Municipality acknowledges that both before and after April 2013 the structures that it demolished included many completed structures. The fact that there were completed structures on the property makes it likely that there were people living in those structures.

[23] It is now necessary to determine whether the appellants had standing in the interim order proceedings. To do that, we must consider whether that order could adversely affect the appellants or their rights or interests.

[24] Paragraph 1.1.1 of the interim order authorised the Municipality and second respondent to take all reasonable steps to prevent any persons from, inter alia, "occupying" the Lamontville property. There is nothing in that part of the order to suggest that the occupation of the property that was to be prevented did not include continuing occupation that had commenced prior to the grant of the order. Indeed, the order seems wide enough to include the prevention of the continuation of such

occupation. That means that in terms of that part of the order the appellants could be prevented from continuing to occupy the Lamontville property.

[25] Preventing the appellants from continuing to occupy the property would amount to their eviction because they would be precluded from either returning to their homes after a temporary absence or because they would be kicked out of their homes to prevent them from continuing to occupy the property. This means that, to this extent, that part of the interim order is an eviction order.

[26] Paragraph 1.2 of the interim order interdicted any person from "occupying . . . any structures . . . upon [the Lamontville property]". This part is open to a reading that it applies to continuing occupation of structures on the property which had commenced prior to the grant of the interim order. Therefore, it could be used by the respondents to restrain the appellants from continuing to occupy structures that had been built on the property prior to the grant of the interim order. Furthermore, to enforce this part of the order the Municipality and the second respondent could get the South African Police Service to physically restrain the appellants from continuing to occupy their shacks. This means that, when the appellants returned from work, they could be restrained physically by police officers from having access to their homes. That also makes this paragraph an eviction order.

[27] Based on the above, there can be no doubt that the interim order authorised the taking of steps which could have the effect of evicting from the Lamontville property

persons who were already living on the property or had completed building their homes on the property when that order was granted. Even on the Municipality's and the MEC's version, when a person has built his or her shack on the property of another, that is an act of occupation of the latter's property and eviction protections apply if that person is to be prevented from occupying that shack.

[28] The Municipality argued that the interim order did not apply to people who were in occupation of the Lamontville property before the order was granted. Despite this argument, the Municipality says that the appellants did not live on the Lamontville property before the interim order. On this approach, the Municipality could well enforce the interim order against the appellants if they were found on the Lamontville property on the basis that they must have started living there after the grant of the interim order.

[29] Given the above, I conclude that the appellants have a direct and substantial interest in the interim order proceedings and in the discharge of the rule nisi. That gives them standing to intervene in those proceedings and challenge, as they wish to do, the grant of the order without their having been cited. This will also enable them to make submissions on the correctness or otherwise of that order in the light of its effect, the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act[6] (PIE) and this Court's jurisprudence.[7] The High Court erred

[6] 19 of 1998.

[7] See, for example, *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7; 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC).

in dismissing their application for leave to intervene. That being the case, the appeal must succeed.

[30] Before I make the order I propose to say something about events that took place on the Lamontville property the day after the hearing of this appeal. The hearing took place on 12 February 2014. It is common cause between the appellants and the Municipality that the day after the hearing, namely 13 February 2014, the Municipality demolished a number of structures on the Lamontville property.

[31] The following day two of the appellants brought an urgent application in the High Court to restrain the respondents from, among others, demolishing their shacks without an order of court. It was heard by Jeffrey AJ. The Municipality admitted that it had demolished structures on that day and said that the interim order authorised it to do so and this Court had not suspended the operation of that order. Its defence was not that the shacks or structures it demolished on 13 February 2014 were not those of the appellants. Jeffrey AJ granted a rule nisi with an interim interdict restraining any further demolitions of the applicants' shacks and their eviction without an order of court. It was indicated that other appellants would be joined in those proceedings so that they could also benefit from that order.

[32] The lawfulness or otherwise of the demolitions is the subject of certain proceedings launched on 14 February 2014 that are pending in the High Court. For that reason I shall not say anything about that issue. I shall confine my remarks to the

appropriateness or otherwise of those demolitions in the light of the stance taken by the Municipality and the MEC in these proceedings on whether the interim order affected the appellants.

[33] Notwithstanding the respondents' stance in this Court on whether the interim order applied to the appellants, as pointed out already the Municipality relied on the interim order in demolishing some of the appellants' shacks on 13 February 2014. The Registrar of this Court issued a letter at the instance of the Acting Chief Justice seeking clarification of these demolitions. In response, the Municipality's attorneys admitted that on 13 February 2014 the Municipality had demolished a number of structures on the Lamontville property on the authority of the interim order. They said that there was no discrepancy between carrying out those demolitions on the strength of that order and the stance that the Municipality had taken before this Court on the applicability of the interim order to the appellants. The Municipality persisted in the same stance in an affidavit it subsequently delivered dealing with those demolitions. That affidavit was filed late and the Municipality has applied for condonation in this regard. It is not necessary to go into details about the issue of condonation. I am satisfied that it is in the interests of justice to grant condonation.

[34] An affidavit was furnished to the Court that was deposed to on 11 March 2014 by Mr Clement Xulu, a Legal Advisor in the Legal Services Department of the Municipality. This is an affidavit which was filed in the High Court by the Municipality in the proceedings before Jeffrey AJ. Those proceedings relate to the

urgent application that was launched by two of the appellants on 14 February 2014 to interdict the Municipality from carrying out further demolitions on the Lamontville property.

[35] In his affidavit Mr Xulu set out various demolitions that the Municipality had carried out during the period from 6 May 2013 to 13 February 2014. The Municipality says that, in carrying out those demolitions, including the ones of 13 February 2014, it was implementing the interim order. In those incidents no less than 272 structures were demolished about 93 of which were half-built and the rest fully built. Was there a discrepancy between the stance taken by the Municipality at the hearing on the interim order and its conduct on 13 February 2014? The Municipality's case is not that the structures or shacks that it demolished on 13 February 2014 had nothing to do with the appellants nor that the structures did not belong to the appellants. It impliedly accepted that the structures related to or may have belonged to the appellants but relies upon the interim order for its authority to carry out those demolitions. In other words, prior to the hearing and at the hearing before us the respondents said that the interim order did not apply to the appellants but, after the hearing, the Municipality said that the order applied to the appellants and the demolitions were carried out on the strength of it.

[36] There is an inconsistency between the Municipality's stance on the interim order before this Court prior to and on 12 February 2014 and its reliance upon that order in carrying out the demolitions of 13 February 2014. The Municipality has

taken two contradictory positions on the interim order in this matter. Having taken the stance that the Municipality took at the hearing, it was totally unacceptable that the day after the hearing it took a contrary position and carried out the demolitions that it did.

[37] There was argument before us to the effect that in these proceedings we should reach the interim order and set it aside. I would not extend this appeal to the correctness or otherwise of that order because it is not on appeal before us. Once we have overturned the order refusing the appellants leave to intervene and granted the appellants leave to intervene, the appellants will be able to anticipate the extended return day of the rule nisi in the interim order proceedings and be able to seek its discharge. It also appears from the Municipality's affidavit dealing with the demolitions of 13 February 2014 that, after the order granted by Jeffrey AJ, the demolitions on the Lamontville property have stopped. In my view this Court should allow the High Court proceedings to take their normal course. There are already about three cases pending before the High Court between the appellants and the respondents which are all connected with the demolition of structures on the Lamontville property. The parties must be given an opportunity to find a way of bringing them to finality in one way or another.

[38] In the result the following order is made:

1. The appeal is upheld.

2. The First and Third respondents must pay the appellants' costs jointly and severally.

3. The order by Kruger J refusing the appellants leave to intervene in the proceedings under case number 3329/2013 is set aside and replaced with the following:

"(a) The applicants are granted leave to intervene in these proceedings as the third and further respondents.

(b) Costs shall be costs in the cause."

VAN DER WESTHUIZEN J (Froneman J concurring):

Introduction

[39] I agree with the reasoning and conclusion of my Colleague, Zondo J, in the main judgment that the Madlala Village residents (appellants) should have been granted leave to intervene based on their direct and substantial interest in the matter. I therefore agree that the appeal on this point must be upheld. I also support the finding that the interim order issued by Koen J is effectively an eviction order;[8] and that the conduct of the first respondent (Municipality) is totally unacceptable in view of submissions made on its behalf to this Court.[9] I am grateful to the main judgment for its thorough exposition of the facts and procedural history.

[8] Main judgment at [25]-[27].

[9] Id at [36].

[40] Two issues need to be addressed further. The first is the lawfulness and constitutionality of the interim order. The second is the conduct of the Municipality.

Interim order

[41] The main judgment's finding that the interim order is an eviction order should be carried to its logical conclusion – a finding that the order is unlawful. Why is it desirable and perhaps necessary to reach this point? And are we able to reach it in the circumstances of this case? As I hope to illustrate below, this Court *ought* to decide this issue and *can* reach the issue of constitutionality.

[42] The main judgment is correct that "there can be no doubt that the interim order authorised the taking of steps which could have the effect of evicting from the Lamontville property persons who were already living on the property or had completed building their homes on the property" when it was granted.[10] Indeed, the finding that the appellants should have been granted leave to intervene – on the basis that they have a direct and substantial interest in the matter – is premised on the fact that the appellants were evicted on multiple occasions and remain vulnerable to eviction.

[43] This aspect is crucial. In view of our country's history of colonialism and apartheid, dispossession of land and gross discrimination, as well as prevailing poverty and inequality, issues around housing are central to our constitutional

[10] Id at [27].

democracy. Section 25(1) of the Constitution states that no one may be deprived of property, except in terms of a law of general application, and that no law may permit arbitrary deprivation. Section 26(3) guarantees that, unless and until a court has issued an order after considering all the relevant circumstances, no one may be evicted from her home or have her home demolished, and that no legislation may permit arbitrary evictions.

[44] Eviction is governed by the provisions of PIE, which aim to ensure that the most vulnerable among us are protected. Its rules and requirements are not optional.[11] The interim order authorises evictions – and has been used as authority for at least three evictions – without providing the unlawful occupiers a hearing and ensuring that they were protected to the extent required by law. An order of this nature deprives unlawful occupiers of rights enshrined in the Constitution and recalls a time when the destitute and landless were considered unworthy of a hearing before they were unceremoniously removed from the land where they had tried to make their homes.

[45] At the very least, an eviction order could not lawfully have been issued without judicial determination that it was just and equitable to do so, considering all relevant circumstances and having allowed affected persons, especially the most vulnerable, to

[11] See, for example, *Ndlovu v Ngcobo, Bekker and Another v Jika* [2002] ZASCA 87; 2003 (1) SA 113 (SCA) at para 3:

> "PIE has its roots, inter alia, in section 26(3) of the Bill of Rights, which provides that 'no one may be evicted from their home without an order of court made after consideration of all the relevant circumstances'. . . . It invests in the courts the right and duty to make the order, which, in the circumstances of the case, would be just and equitable and it prescribes some circumstances that have to be taken into account in determining the terms of the eviction."

present evidence of their circumstances in a hearing.[12] The order was issued without consideration of those persons whom it would impact, in obvious contravention of PIE and in direct violation of underlying constitutional rights. I would find that the interim order is unlawful and therefore unconstitutional on the basis that it negates the Madlala Village residents' rights (as well as those of unnamed others) under PIE and section 26(3) of the Constitution.

[46] Not for a moment do I doubt the seriousness of illegal land invasions. But serious too is the illegal eviction of vulnerable individuals with nowhere else to live. This was the motivation for the enactment of PIE and its protective measures which are intended to ensure due process and sufficient consideration of housing needs prior to eviction. As state organs, the respondents have failed in their constitutional obligations by repeatedly evicting (or, as the case may be, sanctioning the eviction of) the Madlala Village residents without an appropriate court order.

[47] It is not only desirable, but necessary, to reach the interim order because of the uncertainty concerning (a) future litigation in this case; (b) whether Jeffrey AJ's order will prevent further unlawful evictions arising from the interim order for all those potentially affected; and (c) the legality of orders of this type. It is true, as the main judgment points out, that, having been granted leave to intervene, the Madlala Village residents will be able to argue that the rule nisi should be discharged. This, however, does not necessarily mean that they will succeed, in which case they will again have to

[12] See section 4(6) and (7) of PIE.

make a circuit through the courts. Even if they are successful, they may suffer – and have already suffered – undue prejudice from the delay.

[48] I also have difficulty understanding how the main judgment can find that this order is an eviction order, which is inevitably unlawful insofar as it was issued in contravention – or disregard – of the provisions of PIE, and yet allow proceedings to continue in the High Court to determine whether it should be confirmed. On this basis, it ought to be clear that the order cannot or should not be confirmed, which in turn ought to make the High Court proceedings an empty and futile formality.

[49] The order of Jeffrey AJ – issued on the application of two of the Madlala Village residents after demolitions carried out a day after the hearing in this Court – does not necessarily mean that the demolitions will cease. Jeffrey AJ's order provided interim relief, but seems to apply only to the two Madlala Village residents who launched the application. It does not apply explicitly to the other appellants, or to any other individuals who may be living on any of the other properties and who remain vulnerable to sudden eviction on the basis of Koen J's order. Correspondence received from attorneys should not be the basis for a finding on the scope of the order.[13]

[13] As noted in [75] of Moseneke ACJ's judgment, this Court received a letter from the Madlala Village residents' attorneys noting that they held "instructions to supplement the papers in [the urgent matter] to include further applicants." To date we have not received any updates on the matter and the interim order – as far as we know – applies only to two of the appellants. This Court should be slow to limit its responsibilities on the basis of correspondence from attorneys providing assurance that others in a vulnerable position will be adequately protected.

[50] Furthermore, it is necessary that this Court establish legal certainty on orders like the interim order. This order was not an isolated or unique incident – it seems that other courts have issued similar orders, at least one of which has been found to be constitutionally problematic.[14] Many people may well be affected by this Court's determination that it is unacceptable for court orders to sidestep the protections in PIE.

[51] This Court has found that even when a decision lacks practical value to the parties before the Court, there are circumstances in which it may be in the interests of justice to determine a matter for broader public benefit, to establish legal certainty, or to achieve another public purpose.[15] It has also on occasion noted that "the litigants before the Court should not be singled out for the grant of relief, but relief should be afforded to all people who are in the same situation as the litigants".[16] A decision by this Court would benefit not only those in a similar situation to the Madlala Village residents, but also the public at large.

[14] In *Fischer and Another v Persons Unknown* [2014] ZAWCHC 32; 2014 (3) SA 291 (WCC) Gamble J dealt with an order identical in substance to the interim order in this case. His judgment found that the City of Cape Town's conduct in terms of the order was unconstitutional and he implied that the order itself was invalid. In *Fischer and Another v Ramahlele and Others* [2014] ZASCA 88 the Supreme Court of Appeal remitted the case to the High Court for the hearing of oral evidence without deciding the issue of the constitutionality of the City of Cape Town's conduct. The *Fischer* decisions further indicate the existence of other persons in the same position as the litigants before this Court, and the resultant need for this Court to state unequivocally that land-invasion-control orders like the one issued by Koen J, to the extent that they authorise evictions and carte blanche demolition of structures, are unconstitutional. More problematic is that the order requested by the MEC is a form order – in other words, it has been requested and issued in an almost identical form in multiple cases. There are at least two cases decided in 1996 and 1997 from which the form order requested by the MEC appears to have originated. In 1997, the Prevention of Illegal Squatting Act 51 of 1951 (PISA) was still in force. In *Ndlovu* above n 11 at para 12, the Supreme Court of Appeal made explicit that PIE "not only repealed PISA but in a sense also inverted it" by decriminalising squatting and making eviction subject to a number of onerous requirements.

[15] *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and Others* [2009] ZACC 8; 2009 (4) SA 222 (CC); 2009 (7) BCLR 637 (CC) at para 40, where it was indicated that even where an issue does not have immediate impact on the parties' positions, a court may deal with an issue if "its immediate resolution will be in the public interest", and *Radio Pretoria v Chairperson, Independent Communications Authority of South Africa and Another* [2004] ZACC 24; 2005 (4) SA 319 (CC); 2005 (3) BCLR 231 (CC) at para 22.

[16] *S v Bhulwana; S v Gwadiso* [1995] ZACC 11; 1996 (1) SA 388 (CC); 1995 (12) BCLR 1579 (CC) at para 32.

[52] All of the above would be of little practical significance if we are procedurally unable to reach the unlawfulness of the interim order in the circumstances of this case. So, can we reach it? This case initially reached us framed as an appeal against the order of Kruger J. Prior to set-down and in response to directions from the Chief Justice, however, the Madlala Village residents asked the Court to speak to the "fundamental question" of the constitutionality of the interim order.[17] This response was served on all of the respondents, who dealt with the issue. The appellants likewise dealt directly with it in their written submissions. During oral argument, counsel for the Municipality summarised the appellants' complaint as one which challenges the order as unconstitutional and overbroad. The submissions of the amicus curiae (friend of the Court) focused almost exclusively on the question of constitutionality. And several questions and comments from the bench dealt with the issue.[18] I consider the issue to be squarely before us, as it has effectively become the subject of the appeal.

[17] While in their formal pleadings the appellants did not address the constitutionality of the interim order directly, in their response to the Chief Justice's directions dated 1 October 2013, they did prior to set-down ask this Court to speak to this issue. The appellants' first response to these directions was this:

> "The fundamental question in the application under CCT: 108/13 is the constitutionality of the order issued by Koen J which authorises the Municipality and the Minister of Police to evict people without affording them the protection of PIE."

[18] For example, during hearing, counsel for the Municipality stated that if the appellants wanted to complain about the interim order, they needed to return and seek a declarator. In response, Moseneke ACJ noted: "But the order is before us. And all the papers complain about this order." The "sudden death" of the interim order was repeatedly raised as a possible remedy, and both the Madlala Village residents and the amicus curiae agreed it was the best option.

[53] Although the order is "interim" or "interlocutory", it may be appealed because it is indeed determinative of rights and obligations.[19] Provided a dispute relates to a constitutional matter, there is no absolute rule preventing an appeal against an interim order.[20] The qualifier is the interests of justice, since interim orders can be reconsidered and altered by the court of first instance.[21] It is therefore possible for this Court to hear an appeal against an interim order if, first, it relates to a constitutional matter and, second, it is in the interests of justice that it be heard.

[54] A number of factors assist in the determination of the interests of justice, including—

(a) the nature and importance of the constitutional issue raised;[22]

(b) whether irreparable harm would result if leave to appeal were not granted;[23]

(c) whether the interim order is final in its effect;[24] and

(d) whether allowing the appeal would thwart the judicial role of the review court.[25]

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[19] See *South African Informal Traders Forum and Others v City of Johannesburg and Others; South African National Traders Retail Association v City of Johannesburg and Others* [2014] ZACC 8 (*SAITF*); *Machele and Others v Mailula and Others* [2009] ZACC 7; 2010 (2) SA 257 (CC); 2009 (8) BCLR 767 (CC) (*Machele*); and *Khumalo and Others v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) (*Khumalo*) at paras 6 and 8. See also *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* [2010] ZACC 6; 2012 (4) SA 618 (CC); 2010 (5) BCLR 457 (CC) (*ITAC*) at para 50; and *Minister of Health and Others v Treatment Action Campaign and Others (No 1)* [2002] ZACC 16; 2002 (5) SA 703 (CC); 2002 (10) BCLR 1033 (CC) (*Treatment Action Campaign*) at para 12.

[20] *SAITF* id at para 17.

[21] See *ITAC* above n 19 at para 50 for a discussion of the policy considerations underlying a court's hesitancy to hear appeals of interim orders.

[22] Id at para 55.

[23] Id and *Machele* above n 19 at para 24.

[24] *Khumalo* above n 19 at para 8.

[55] These factors must be considered in light of the particular facts and circumstances of the matter at hand.[26] The interim order deals squarely with an important constitutional matter. It directly affects the Madlala Village residents' right under section 26 of the Constitution not to be arbitrarily evicted from their homes, because it sidesteps the provisions of PIE.

[56] This Court held in *Machele* that the primary concern is whether irreparable harm would result if leave to appeal were not granted in matters such as this, where the injustice falls on the party seeking to appeal the order.[27] Irreparable harm must be balanced by any potential harm to the respondents if the interim order is overturned on appeal.[28]

[57] It is not difficult to see how the interim order issued by Koen J and extended by Kruger J causes irreparable harm. It has deprived people of their homes. The Madlala Village residents provided evidence that the Municipality or others acting on its behalf had destroyed their homes at least three times since the issuance of Koen J's interim order. Each time, their shelters have been dismantled, their tools seized, and the materials with which they had built their informal structures either taken or

[25] *SAITF* above n 19 at para 22 and the other cases cited in n 19 above.

[26] *ITAC* above n 19 at para 41. See also *SAITF* above n 19 at para 20 and the other cases referred to in n 19 above.

[27] *Machele* above n 19 at paras 22-3. Although *Machele* dealt with an order of execution, which is different to an interim order, the same analysis applies. No one factor is necessarily determinative of the entire enquiry; the relative weight of each factor will vary according to the particular facts of each case. However, in *Treatment Action Campaign* above n 19 at para 12, this Court held that if irreparable harm cannot be shown, the request to appeal an interim order will generally fail.

[28] *Machele* above n 19 at paras 28-32.

destroyed. All of this happened without apparent regard to the provisions of PIE or to whether these persons were occupying the land before the order was issued.

[58] In *Machele* this Court suspended the execution order[29] even though the applicants were not the "poorest of the poor".[30] In this case, the interim order may very well be used as an eviction order by the Municipality, since it was so used the day after oral argument in this Court. The Madlala Village residents live in abject poverty and the order effectively strips them of protection for the very little they have, including their homes. They have been chased from place to place and evicted each time they arrive and establish a new home. The order permits such treatment to continue in perpetuity, presumably across 1 568 properties owned by the MEC. The harm is irreparable.

[59] The Municipality argued that the harm to the Madlala Village residents does not outweigh the burden that overturning the order would place on the Municipality's housing schedule, contending that this would allow "orchestrated land invasions" to continue. This argument is untenable. Any illegal land-grab that may occur can probably be prevented by the ordinary exercise of police powers and the availability of court interdicts. The Municipality has provided no evidence that the eviction of current occupants on the authority of an unlawful order is justified by the purpose of preventing future orchestrated land invasions. Any potential hardship to the

[29] The current case is distinguishable in this regard because in *Machele* the merits of the order were squarely before the Supreme Court of Appeal and leave to appeal was already granted on the validity of that order.

[30] *Machele* above n 19 at para 28.

Municipality is outweighed by the harm caused to the Madlala Village residents, if the interim order were left intact.

[60] The order is also final in its effect. This test is not, however, set in stone. Rather, as indicated in *Mkhize*,[31] insofar as a decision has "a definite bearing on" rights and obligations, it may be subject to appeal. It is clear in this case that the order has a definite bearing on the Madlala Village residents' rights because they have already been infringed. The terms of the order allow the Municipality to evict the Madlala Village residents and destroy their belongings at any time, in spite of the fact that they have lived on the property since September 2012.[32] Few things are more final than being dispossessed of one's home, particularly when that home is destroyed.

[61] By invalidating this order, this Court will simply affirm the legal position that the Municipality has to abide by the applicable provisions of PIE when carrying out evictions.[33] Furthermore, there is no other court to which the Madlala Village residents can turn for relief.[34] Jeffrey AJ's order did not diminish the need for this Court to speak to the constitutionality of the interim order. On the contrary, if this Court were to declare this order constitutionally invalid, it may save the appellants, other affected persons, and people subject to similar orders, substantial prejudice that

[31] *Absa Bank Ltd v Mkhize and Another; Absa Bank Ltd v Chetty; Absa Bank Ltd v Mlipha* [2013] ZASCA 139; [2014] 1 All SA 1 (SCA) at para 17, citing *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* [1996] ZASCA 2; 1996 (3) SA 1 (AD) at paras 13-4.

[32] Note that other individuals not before this Court who may live on any of the many properties subject to Koen J's order may also be evicted without requisite due process.

[33] See [44]-[46] above.

[34] See [49] above.

would result if they were made to wait for the High Court to determine whether the interim order should be finalised.[35]

[62] It follows from the above that this Court is not barred from pronouncing on the validity of the interim order. The Constitution gives this Court the power to make "any order that is just and equitable".[36] This power is aimed at achieving justice and equity, rather than at trapping litigants in the unfairness that strict adherence to technical procedures may produce. In *Hoërskool Ermelo* the Court found that "[t]his ample and flexible remedial jurisdiction . . . permits [this Court] . . . [to identify] the actual underlying dispute between the parties"[37] and to craft an order resolving the dispute. This case illustrates some of the reasons for the inclusion of this clause in the Constitution: where there are blatant infringements of fundamental rights relating to basic human needs (such as shelter), this flexible remedial power allows this Court to "scratch the surface to get to the real substance below".[38]

[63] Simply upholding the appeal – as the main judgment does – and leaving the High Court to decide the fate of a patently unlawful interim order, would hardly be just and equitable as far as the appellants, others in their position and the legal order are concerned. In the circumstances of this case, we know that the Koen J order is

[35] See *SAITF* above n 19 at para 22 and *United Democratic Movement v President of the Republic of South Africa and Others (African Christian Democratic Party and Others Intervening; Institute for Democracy in South Africa and Another as Amici Curiae) (No 1)* [2002] ZACC 33; 2003 (1) SA 488 (CC); 2002 (11) BCLR 1179 (CC) at para 12.

[36] Section 172(1)(b).

[37] *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* [2009] ZACC 32; 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 (CC) (*Hoërskool Ermelo*) at para 97.

[38] *Head of Department, Department of Education, Free State Province v Welkom High School and Others* [2013] ZACC 25; 2014 (2) SA 228 (CC); 2013 (9) BCLR 989 (CC) at para 130.

unconstitutional. Therefore, the appellants will either be once again denied justice in the High Court and eventually return to this Court, or they will succeed in discharging the rule nisi but will have no definitive statement regarding the constitutionality of this type of order. It is just to give them – and others in their position[39] – the benefit of a clear statement of constitutionality now. The law is and should be for the protection of people and their rights, not for courts to indulge in futile, circular processes.

[64] I would thus find the interim order to be in contravention of PIE and consequently unlawful and constitutionally invalid.

Conduct of the state parties

[65] I agree with the main judgment on the conduct of the state parties. More should be said, however, especially about the Municipality. In my view, the very integrity of the judicial process in our young democracy – and of our country's apex Court – is at stake.

[66] This Court has come to expect much from state parties as litigants. We rely on them and their legal representatives. We have to be able to do so. It is of utmost importance that state entities – which represent the people under their jurisdiction and bear significant duties under PIE and the Constitution – show respect for the courts. Argument presented to this Court on behalf of the Municipality appeared continuously

[39] See *Fischer* above n 14 for an example of a similar order which affected a number of people in substantially similar positions to the Madlala Village residents.

to blur the distinction between concepts like "demolition" and "eviction"[40] and drew in the spectre of "land invasions". We were assured that the interim order was not an eviction order and was not regarded as one by the Municipality. We were also told that evictions had never taken place – nor would they ever take place – on the basis of that order.

[67] Upon examining the relevant papers, I am inclined to believe that the Municipality was indeed responsible for evictions of the Madlala Village residents prior to its appearance before this Court. More importantly, further evictions happened the very day after the hearing. The Municipality's attorneys of record stated in a letter dated 14 February 2014 that "removal of materials and demolition of structures" occurred. How this could not amount to eviction is not clear at all.

[68] This Court directed the parties on 26 February 2014 to make submissions or provide information on affidavit clarifying whether there was a discrepancy between the Municipality's submissions made during the hearing and its attorneys' letter of

[40] The definition of "evict" in PIE reads—

> "to deprive a person of occupation of a building or structure, or the land on which such building or structure is erected, against his or her will, and 'eviction' has a corresponding meaning".

Thus, it is clear that eviction constitutes the deprivation of either (1) the occupation of a building or structure, or (2) the land on which such building or structure is located. Demolition is just a particularly permanent means of such deprivation. This Court has emphasised that section 26 – including the provisions protecting against unlawful evictions and demolitions – must be read as a whole. See, for example, *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* [2004] ZACC 25; 2005 (2) SA 140 (CC); 2005 (1) BCLR 78 (CC) at para 28:

> "[I]t is important to emphasise that section 26 of the Constitution must be read as a whole. . . . Section 26(3) is the provision which speaks directly to the practice of forced removals and summary eviction from land and which guarantees that a person will not be evicted from his or her home or have his or her home demolished without an order of court considering all of the circumstances relevant to the particular case. The whole section, however, is aimed at creating a new dispensation in which every person has adequate housing and in which the state may not interfere with such access unless it would be justifiable to do so."

14 February 2014. In particular, given the alleged unlawful evictions, the Court requested further clarity on the interpretation and application of the interim order by the Municipality to date.

[69] In the Municipality's submissions in response to the directions, it doggedly persists with the points it pursued throughout the proceedings. It denies the existence of any discrepancy between the submissions made during hearing and the attorneys' letter of 14 February 2014 and disputes that it engaged in any unauthorised evictions. The submissions on the interpretation of the order put forward by the Municipality, the conduct of the Municipality in demolishing structures, and the explanations offered in this Court remain troublingly inconsistent.

[70] Proper and reliable instruction from clients is indispensable for counsel to fulfil their ethical and legal duty to the Court.[41] All this rings with even greater resonance when an organ of state is one of the litigating parties. The Constitution imposes a positive duty on organs of state to assist courts and to ensure their effectiveness. Section 165(4) of the Constitution provides:

> "Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts."

[41] *De Lacy and Another v South African Post Office* [2011] ZACC 17; 2011 (9) BCLR 905 (CC) at paras 119-20 and *Van der Berg v General Council of the Bar of South Africa* [2007] ZASCA 16; [2007] 2 All SA 499 (SCA) at paras 15-6 (noting that although counsel need not believe all the evidence a client instructs her to put before a court, it is another thing entirely if it is clear that the evidence is false or misleading).

[71] This duty echoes obligations of organs of state under section 7(2) of the Constitution to respect, protect, promote, and fulfil the rights in the Bill of Rights, including "the right to have any dispute that can be resolved by the application of law decided in a fair public hearing".[42] Failing to fulfil these obligations falls short of the constitutional mandate. Further, government officials have a duty not only to discharge their functions, but also to account for when they have not. A court should be able to rely on the submissions of organs of state. Otherwise our very constitutional order would be undermined.

MOSENEKE ACJ (Skweyiya ADCJ, Cameron J, Dambuza AJ, Khampepe J, Madlanga J and Majiedt AJ concurring):

[72] I have read the main judgment by my Colleague Zondo J and the concurring judgment by my Colleague Van der Westhuizen J. I agree with the identical outcome they reach and the reasons Zondo J advances. I also agree with the reasoning of the concurring judgment on the inappropriateness of the conduct of the Municipality. But I respectfully disagree with its stance that this Court must determine the constitutional validity of the interim order of Koen J[43] (first interim order).

[73] The concurring judgment holds that the first interim order is inconsistent with the Constitution and PIE and thus invalid. The concurring judgment may or may not be correct in taking this stance. That, however, is not the point. In my respectful view

[42] Section 34 of the Constitution.

[43] The case was brought under case number 3329/2013 in the KwaZulu-Natal High Court, Durban. The terms of the order which Koen J made on 28 March 2013 are set out at [11] above.

it is unnecessary for it to reach and decide the constitutional validity of the first interim order.

[74] This is so for several reasons. The important ones are that, first, the appeal before this Court against the granting of the first interim order was directed against only the ruling of the High Court that the appellants had no standing to intervene in those proceedings. Second, the appeal was never aimed at declaring the interim relief inconsistent with the Constitution and other law. The parties did not ask this Court to declare the first interim order inconsistent with the Constitution and PIE, there is no valid reason why it should do so on its own either.

[75] Third, when the interests of justice so dictate, this Court may hear an appeal against a temporary interdict.[44] Even so, here the first interim order is not appealable. It does not threaten pending, ongoing and irreparable harm. Nor does the balance of convenience favour this Court assuming an appellate power over the first interim order beyond the dispute over the standing of the appellants in the High Court. The pending and irreparable harm has been arrested by an intervening temporary restraining order. After the appeal hearing in this Court, but before our judgment, two of the appellants sought urgent temporary relief from the High Court (second interim interdict). That Court forestalled the possible irreparable harm to the two applicants

[44] *SAITF* above n 19 at paras 17-21; *Magidiwana and Others v President of the Republic of South Africa and Others* [2013] ZACC 27; 2013 (11) BCLR 1251 (CC) at paras 6-8; *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* [2012] ZACC 18; 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC) at paras 22-5; and *ITAC* above n 19 at paras 41 and 46-59.

by granting them an interim interdict against their eviction pending a return date.[45] In response to an enquiry by this Court, the legal representatives of the applicants made it plain that they were instructed to supplement the papers in order to include all of the appellants in this Court in the High Court proceedings. The second interim order granted by the High Court to the two cited applicants would thus be extended, beyond the two applicants, to all other appellants.[46]

[76] Absent some special consideration, it is not in the interests of justice for this Court to traverse the same field or anticipate the decision of the High Court on the return date. What is more, declaring the first interim order inconsistent with the

[45] On 14 February 2014, the KwaZulu-Natal High Court, under case number 1762/2014 made the following order:

> "1. A rule nisi do hereby issue calling upon the 1st respondent or any other interested party to show on the 11th day of March 2014 at 09h30 as to why the following order should not be made:
>
> (a) That the 1st respondent is interdicted and restrained from evicting the applicants from the informal settlement situated at Madlala Village, Lamontville without a valid court order.
>
> (b) That the 1st respondent is interdicted and restrained from removing any materials placed at Madlala Village by the 1st applicant and the 2nd applicant from the date of the granting of this order.
>
> (c) It is declared that the demolition of the informal houses of the applicants carried out by the 1st respondent on 13th February 2014 was unlawful.
>
> (d) That the 1st respondent is directed to pay the costs of this application on an attorney and client scale.
>
> 2. That the orders referred to paragraphs 1(a) and 1(b) shall operate as interim relief pending the determination of this application.
>
> 3. That the costs of two counsel for today are reserved."

[46] The LRC, acting on behalf of the appellants, addressed a letter to the Registrar of this Court on 14 February 2014 which, in relevant part, reads:

> "An urgent application was enrolled for hearing before the Durban High Court at midday today, under case number 1762/2014. The application was brought on behalf of two applicants listed in CCT 108/13. Given the time constraints within which the urgent application was brought, it was not possible to consult with all the applicants. We hold instructions to supplement the papers in case number 1762/2014 to include further applicants."

Constitution and PIE in this appeal does not bring the appellants relief they do not already have.

For the Appellants:	Advocate L Broster SC, Advocate S Linscott and Advocate I Veerasamy instructed by the Legal Resources Centre.
For the First Respondent:	Advocate T Norman SC and Advocate N Bhagwandeen instructed by Gcolotela Peter Inc.
For the Second and Third Respondents:	Advocate V Gajoo SC and Advocate F Abraham instructed by the State Attorney.
For the Amicus Curiae:	Advocate S Wilson instructed by SERI-SA Law Clinic.