IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CONSTITUTIONAL COURT CASE NO:

(HIGH COURT CASE NO: 33786/2010 NGHC)

(SUPREME COURT OF APPEAL CASE NO: SCA 180/2011)

In the matter between:

THE OCCUPIERS OF PORTIONS 124 AND 150 OF

THE FARM ZANDFONTEIN 317JR **Applicants**

and

BROOKWAY PROPERTY 30 (Pty) LTD **First Respondent**

THE CITY OF TSHWANE **Second Respondent**

FOUNDING AFFIDAVIT IN APPLICATION FOR LEAVE TO APPEAL

I, the undersigned,

MASENYANE JOHN MAKHUBELA

hereby make oath and state:

THE PARTIES

1.

I am an adult male, born in 1955 and presently resident in the informal settlement known as Melusi ("the informal settlement"), situated on Portions 124 and 150 of the farm Zandfontein 317 JR ("the property"). The facts herein fall within my personal knowledge unless is otherwise apparent and are both true and correct. Where I make legal submissions, I do so on advice.

2.

I make this affidavit in my personal capacity as well as on behalf of all other occupants of the informal settlement which is situated on Portions 124 and 150 of the farm Zandfontein. I respectfully submit that it is appropriate that I do so, both on behalf of those occupants that have given powers of attorney to our attorneys of record, as well as those that have not been able to do so. The occupants all face eviction and effort was made to obtain as many powers of attorney as possible.

3.

As will be apparent from the allegations below, during the proceedings *a quo*, it was placed on record that the informal settlement consists of approximately 400 dwellings. Our attorneys managed to obtain powers of attorneys from 429 adults. I do not know exactly how many adults live in this informal settlement, but I believe it is an accurate guess to say

that it would be no more than 800. Under the circumstances I respectfully submit that I am properly authorised to depose to this affidavit.

4.

The first respondent is Brookway Properties 30 (Pty) Ltd, the owner of the land in question, being Portions 124 and 150 of the farm Zandfontein 317 JR. The first respondent is a private company duly registered and incorporated. It should be noted at this stage that the first respondent owns a number of other pieces of vacant land adjacent to the portions mentioned. In total, the contiguous land owned by the first respondent on the farm Zandfontein is approximately 200 hectares in size.

5.

The second respondent is the City of Tshwane Metropolitan Municipality. The land in question falls within its municipal jurisdiction. In fact, as will be apparent, the land is situated on the urban edge of the area called Pretoria, more specifically to the west thereof. As is apparent from the judgment and court orders made *a quo*, the second respondent is directly affected by the present litigation as a number of obligations were placed on it by the court *a quo*.

THE JUDGMENTS AND ORDERS IN THE COURT *A QUO:*

6.

I annex hereto the following judgments and orders as required by Rule 19(3) of the Rules of this Honourable Court:

6.1. A copy of the court order which is being appealed against dated 30 September 2010, as annexure **"MJM1"**;

6.2. The judgment against which we seek leave to appeal, dated 30 September 2010, as annexure **"MJM2"**;

6.3. The order of the Supreme Court of Appeal refusing leave to appeal, dated 29 June 2011, as annexure "**MJM3**".

7.

I respectfully submit that it is evident from the order and judgment (MJM 1 and MJM2) that the present case involves an eviction order given in the form of a structural interdict. In other words, an order that obliges the Second Respondent to take a range of steps and to achieve certain outcomes within prescribed periods. The background to this order is as follows:

7.1 The First Respondent is the owner of a number of portions of the farm Zandfontein 317 JR, which properties border the Pretoria urban edge.

7.2 The Applicants are informal occupants on this land, more specifically on portions 124 and 150 thereof.

7.3 There are disputes of fact in respect of all other important aspects of the case.

7.4 First Respondent initially stated that his land was vacant when he purchased it in 2007 and that it was invaded in January 2010. Applicants allege that there has been

people present on some of these portions for a very long time, although it was conceded that the greater majority of people did settle there unlawfully after September 2009.

7.5 The Applicants are all persons who are looking for a place to settle in the urban area and don't have any other place to settle lawfully. They form part of the broader phenomenon of urbanisation. These facts are dealt with in greater detail below when the judgment appealed against is analysed.

7.6 The First Respondent then brought an urgent eviction application in June 2010 in terms of the provisions of The Prevention of Unlawful Eviction and Occupation Act 19 of 1998 (PIE). This application eventually resulted in the eviction order which is the subject matter of this application.

THE CENTRAL COMPLAINT AGAINST THE ORDER

8.

From the order of the High Court as a whole, it is evident that the Court ordered the second respondent to take a number of steps to ensure that the occupants of the informal settlement are not left on the side of the road and homeless, but that an orderly relocation take place to alternative land.

9.

However, as is apparent from paragraphs (ix) and (x) of the court order, if the second respondent does not comply with its obligations in terms of the court order, the entire community is liable to be evicted at any time after 15 March 2011. The order then becomes a simple eviction order, and the entire structural interdict then falls away. In the final analysis, the order is self defeating.

10.

Such an eviction could mean that the entire community is thrown out onto the side of the road. It is submitted here that this consequence of the order is legally impermissible if consideration is given to a number of the provisions of the Constitution.

11.

It is further submitted that the order, more specifically the aspect thereof which permits an eviction onto the side of the road, is at odds with the kind of orders granted in other authoritative matters dealing with informal settlements.

See: **Government of the RSA v Grootboom** 2001(1) SA 46 CC at par 4 and 98.

President of the RSA v Modderklip Boerdery and others 2005(5) SA 3 CC at par 68 (c)

Occupiers of 51 Olivia Road v City of Johannnesburg 2008 (3) SA 208 CC at par 13 and 14.

12.

I respectfully submit that the notional possibility that the applicants can return to Court to seek an amendment of the order or seek to enforce the duties imposed on the second respondent, does not remove the fatal flaw from the order. Most communities in our situation have difficulty accessing legal services, and even when they can, they have limited resources to constantly approach a Court in the event of non-compliance by a local authority. This could result in endless litigation where the applicants must constantly go back to court to seek a postponement of the eviction and enforcement of the order. A **Modderklip (supra)** type order is far more satisfactory, and is in any event binding authority. If the authority fails to fulfil its obligations, the land owner is compensated.

ERRORS IN THE MAIN JUDGMENT *A QUO:*

13.

I now deal more fully with all the errors which we respectfully submit was made in the judgment *a quo*.

The time period set for relocation:

14.

The court order (par. (v) thereof) gives four months for the second respondent to apply for emergency funding and to identify alternative land for the occupiers.

15.

There is absolutely no basis in law or in the facts of this matter which can justify this part of the order as being workable or justifiable. The time period was determined arbitrarily.

16.

In fact, the applicants (occupiers) and the second respondent had reached an agreement in the Court *a quo* which they placed on record. This agreement allowed for a period of two years. First, a period of six months for the identification of suitable alternative land, and thereafter a period of eighteen months to complete all the administrative requirements, environmental approvals and township approvals necessary.

17.

Although there is no specific evidence relating to the time period that such a process takes, it can be assumed that such processes cannot happen in a short space of time. In addition,

litigants and courts should, with respect, defer to the time periods suggested by housing authorities, as long as such periods are reasonable. A municipality cannot simply relocate people to another area. It may be unlawful to do so.

18.

The learned Court *a quo* therefore erred in not allowing for more time for the second respondent to obtain the necessary funding and alternative land. The Court erred in finding that the second respondent could not explain why it needed so much time.

19.

In fact, the second respondent did explain that it needed approximately six months to identify alternative land, and then that it needed a further eighteen months to finalise the necessary applications and procedures to settle the occupiers. The second respondent cannot be expected to simply settle people on an informal basis in an alternative location. This will simply elicit legal objections from the established community in the area of where people are being relocated to. Eighteen months is not an unreasonable time to finalise the various township establishment procedures.

The allegations in respect of a land invasion and the factual findings in respect thereof:

20.

It is common cause that the first respondent purchased the properties during 2007.

See: **par. 7 of the main judgment, annexure "MJM2"**.

21.

The first respondent alleged in the Court *a quo* that he first became aware of a land invasion in progress during May 2010. According to the principal shareholder and director of the first respondent, a Mr. de Beer, he was informed by the owner of an adjacent business, a Mr. Botha, that the land invasion had started in January 2010. As appears below, this allegation about when the occupiers started settling on the land, was false.

See: **par. 8 of the main judgment, annexure "MJM2"**.

22.

The first respondent then brought urgent proceedings under the PIE Act (Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998) for an eviction.

The First Respondent's allegations in this regard were patently incorrect. Aerial photographs of 2009, produced by the parties in answer and reply, shows that there were 60 to 70 shacks on the property in early 2009 and certainly by September 2009. There was admittedly a rapid growth at some stage, as the July 2010 aerial photographs show a settlement with 400 shacks. This latter number was in any event common cause during the hearing. I annex two photographs from 2009 and one from 2010 as **MJM 4**, **MJM 5** and **MJM 6** hereto.

See: par 7 and 28 of the main judgment (MJM2)

24.

In any event, the case of **Modderklip (supra)** also involved a land invasion. It simply doesn't make sense, with respect, to throw a large number of people onto the side of the road.

See: par 3 and 4 of the Modderklip judgment (supra)

25.

As matters have transpired since the judgment, it is common cause that the City of Tshwane have not complied with any of the obligations imposed upon it in terms of paragraphs (ii) and (v) of the order.. However, the second respondent is in the process of obtaining emergency funding for a project which will accommodate the applicants. The exact detail and the extent

of progress is not known. However, what this illustrates is that the time periods laid down by the Court were unrealistically short.

The ESTA allegations

26.

The Court *a quo* erred in rejecting the applicants' assertion that some of them enjoy rights in terms of the Extension of Security of Tenure Act 62 of 1997 (ESTA).

See: **par. 12 – 14 of the judgment.**

27.

The Court rejected these assertions despite the fact that the applicants filed a bundle of filled in questionnaires which give some personal details of the occupants. According to these questionnaires, it is true that most of the occupants settled during 2009. However, there are a sizable number of people that settled between the period 2005 to 2007. There are also a number of people who have been living on the land for many years. I annex some of these filled in questionnaires as annexures **MJM 7"a"** to **"e"**, purely as example. It is obliviously not appropriate to burden these papers with voluminous evidential material. The court erred in ignoring the facts contained in these questionnaires.

28.

In terms of the provisions of section 3 of ESTA, especially sections 3(4) and (5) thereof, it is highly probable that a number of the applicants enjoyed ESTA rights. The applicants (occupiers) did not raise the issue of jurisdiction in the Court *a quo*. They consented to the jurisdiction of the High Court but did insist that their ESTA rights nevertheless be protected.

29.

It is submitted that the Court therefore had jurisdiction by virtue of the provisions of section 17(2) of ESTA. It should be noted that the second respondent did object to the Court *a quo* exercising jurisdiction. However, although the second respondent was clearly a party to the proceedings for purposes of the PIE Act, it was not a party for purposes of the ESTA proceedings. The Court should therefore have exercised its ESTA jurisdiction and should have ordered an investigation into the personal and social circumstances of the occupiers as required by section 9(3) of ESTA.

30.

It was also incorrect for the Court *a quo* to find that the counterclaim and offer of settlement which the occupiers made, in which they were willing to accept that they were unlawful occupiers, was at odds with their allegations that they are ESTA occupiers. The document which the Court *a quo* refers to at the end of par. 14 of its judgment, was a settlement proposal which, in return for the above concession, made substantial demands on behalf of

the occupiers. Such a settlement offer can simply not form the basis of rejecting the occupiers' evidence. The counterclaim was not proceeded with, but also represented the only type of relief that could be obtained in the High Court. Paragraph 65 which the court refers to in paragraph 10 of the judgment, does not contain allegations, it contains the content of a proposed order which demands the release of emergency relief. Such relief cannot be obtained for lawful occupiers.

31.

It is furthermore inherently probable that farm land at the borders of an urban area, will have occupiers whose occupation has its origins in previous peri-urban activities such as farming and industrial businesses. In *casu*, there was a quarry and it is common cause that there was a brick factory in the area which housed workers.

32.

The learned Judge *a quo* respectfully erred in rejecting my allegations that I was an employee at the previous brick factory of Corobrick and that I have lived on the land since at least 1977. The Court *a quo* found (in par. 23 thereof) that my allegations were vague. This finding is, with respect, unfair. It is clear from the papers that the Corobrick factory was in the very near vicinity of where the informal settlement is at present. Furthermore, there is uncontested evidence that the local police and social workers informed all the people living in makeshift housing in the area, to gather on Portions 124 and 150. I stated as follows in par. 9 of my answering affidavit:

"I do not know who the government officials were that requested us to settle in an orderly manner on portions 124 and 150. However, I do know that a Police officer from the local Police Office at Hercules, namely Captain Rampiswane, was involved as well as three other officials who identified themselves as "social workers"."

33.

No attempt was made by either respondents, being parties with considerable resources, to obtain the evidence of Captain Rampiswane. It must therefor be accepted that what happened in the period 2008 to 2009 was that government officials instructed shack dwellers in the vicinity to congregate in one place.

34.

Considering the large area of land purchased by the first respondent, it is highly probable that all the informal occupiers, or most of them, that were so congregated on Portions 124 and 150, were from land presently owned by the first respondent. In terms of the provisions of section 24 of ESTA, the first respondent remains the person saddled with the ESTA obligations of all the land it owns.

35.

The Court further erred in par. 27 of its judgment (p. 20) in requiring that actual consent is a prerequisite for enjoying ESTA rights. In fact, consent can be either implied or deemed. In terms of section 3(5) of ESTA, and considering the probabilities of the case, it is obvious that many people were living on the land openly for longer than three years.

The incorrect approach to disputes of fact

36.

The learned Judge further respectfully erred by rejecting the occupiers' allegations as set out in par. 28 of the judgment.

37.

First, the aerial photographs of 2009 shows that the deponent of the first respondent was disingenuous.

38.

Second, the aerial photographs of 2005 and 2007 does not show the entire 200 hectare area. It is not clear which part of the total landholding it shows. It does, however, include Portions 124 and 150, but, as alleged by the occupiers, this was the area to which the people were moved to during 2008 and 2009 and where they were asked to congregate. The aerial photographs were in any event never formally proven or admitted. The court could not, with respect, make this finding.

39.

The Court *a quo* further erred in rejecting evidence of the occupiers, and coupled with this, erred in not investigating the matter as required by ESTA. The findings in this regard were extremely unfair, considering the difficulty that the occupiers had in presenting their case, as well as the difficulties that poor communities generally have to present their case in Court. That is precisely why section 9 of ESTA provides for external investigation. The following are the salient facts in this regard:

39.1 It simply was not possible for 400 households to place all their circumstances before the Court by way of affidavit.

39.2 The rule *nisi* was served on the occupiers towards the end of June 2010. We instructed our attorneys during the last week of June 2010 and filed our answering affidavits during the last week of July 2010.

39.3 It should, with respect, be kept in mind that our attorneys can only consult with communities such as ours over weekends. During weekdays most of the people are at work or elsewhere busy in the informal sector. An urgent application such as the present, allows for precious little time to meet with the community, explain what the matter is all about and to obtain the necessary evidence.

39.4 In par. 42 of my founding affidavit *a quo*, I specifically stated as follows:

> *"Our legal representatives are in the process of gathering as much of the information as is possible considering the time constraints. It will, of course, be impossible to give a full picture of all the people in the settlement and all their personal circumstances. For this very reason I respectfully submit that an eviction can never be just and equitable and at best an ordered relocation can be ordered."*

39.5 Section 26(3) of the Constitution requires that all relevant circumstances must be considered before an eviction can be ordered. The PIE Act, section 7(2) thereof, furthermore requires that an eviction order must be just and equitable.

39.6 The present situation where we can all simply be evicted from the land onto the side of the road cannot, with respect, ever be just and equitable. Such an eviction will violate our rights to dignity, and will expose us to the elements, which will further violate our rights to security and family life.

39.7 The first respondent chose to bring an urgent application. The applicant occupiers cannot be blamed for the fact that the process is inherently imperfect due to urgency and due to the limitations of motion proceedings.

39.8 In addition, section 5(1)(a), (b) and (c) of the PIE Act places additional limitations on the bringing of an urgent application. None of these requirements were met and the Court *a quo* should have dismissed the application on this basis alone, or should have ordered that the matter proceed in the ordinary course.

40

The Court *a quo* furthermore erred in accepting the evidence that there were no occupants on the first respondent's land at the time when it purchased the land in 2007. First, those allegations of the first respondent were expressly denied and evidence to the contrary was presented. One such witness, a Ms. Mathole, pertinently alleged that she had been living on the farm Zandfontein since her birth in 1977. It cannot be expected of such a witness to identify the portion of the farm Zandfontein on which she lived. It can also not be expected of lawyers representing 400 poor families to embark on field investigations to identify the exact locations where people came from.

41

Secondly, it is inherently improbable that a piece of land 200 hectares in size on the urban edge of a metropolis, has no erstwhile farm workers or occupiers thereon.

42

To expect of the legal representatives of some 400 households, to lodge an independent enquiry in respect of each and every person as to exactly which portion or part of the farm Zandfontein they used to live on, is unrealistic, and in fact, impossible.

43

For this reason the ESTA Act makes provision for a probation enquiry, and the PIE Act makes provision for mediation (section 7).

44

I therefore respectfully submit that another Court may reasonably come to a different finding, more specifically may find that the second respondent should have been granted more time, and secondly that the order should have been framed in such a manner that it did not permit an eviction of occupiers onto the side of the road. Rather, it should have been framed in such a way that the landowner has efficient remedies against the second respondent in the event that it failed to perform adequately and timeously.

45

WHEREFORE I respectfully pray that leave to appeal be granted to the above Honourable Court as prayed for in the notice of motion.

_____

DEPONENT

Thus signed and sworn to before me at Pretoria on this _____ day of July 2011, the deponent having acknowledged that he knows and understands the contents of this affidavit, that it is both true and correct to the best of his knowledge and belief, that he has no objection to taking the prescribed oath and that the prescribed oath will be binding on his conscience.

_____

COMMISSIONER OF OATHS

Full names :

Designation :

Address :