

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No: 108/13

In the application of –

AB AHLALI BASEMJONDOLO MOVEMENT SA

First Applicant

AARON MKHALISEMI MZIMELA

Second Applicant

**THE FURTHER RESIDENTS OF THE CATO CREST
INFORMAL SETTLEMENT LISTED IN ANNEXURE
“A” TO THE APPLICANTS’ FOUNDING AFFIDAVIT**

Third to Thirty-
First Applicants

In the matter between –

JABULANI ZULU AND 389 OTHERS

Appellants

and

ETHEKWINI MUNICIPALITY

First Respondent

MINISTER OF POLICE

Second Respondent

**MEC FOR HUMAN SETTLEMENTS AND
PUBLIC WORKS FOR THE PROVINCE OF
KWAZULU-NATAL**

Third Respondent

FOUNDING AFFIDAVIT

I, the undersigned –

AARON MKHALISEMI MZIMELA

do hereby make oath and say that –

1 I am an adult man. I am currently unemployed. I reside at the Cato Crest Informal Settlement (“Cato Crest”). This is my home. I have resided here for 7 years. I am the second applicant in these proceedings.

2 The facts and allegations contained herein are all within my personal knowledge, unless the contrary appears from the context. They are, to the best of my knowledge and belief, true and correct in all respects.

3 Where I make submissions of law, I do so on the advice of the applicants’ legal representatives.

4 I am authorised to depose to this affidavit on behalf of the applicants.

5 The first applicant is a national association of shack dwellers which exists separate from its members and has the capacity to sue and be sued in its own name. Its main objects include –

5.1 improving the lives and living conditions of shack dwellers, with a special focus on asserting the human dignity of shack dwellers;

- 5.2 fully democratising the internal governance of all settlements;
 - 5.3 developing and sustaining co-operative projects aimed at generating income for shack dwellers;
 - 5.4 ensuring that shack dwellers are aware of all their rights under South African law and are able to access and defend these rights;
 - 5.5 ensuring that shack dwellers receive the support from the state due to them by law such as, but not limited to, free access to school education, state grants, health care and disaster relief; and
 - 5.6 working to advance the status and rights of women and children within the settlements.
- 6 The second to thirty-first applicants are all residents of Cato Crest. We are also members of the first applicant. The names of the third to thirty-first applicants are set out in annexure “**A**” hereto. A copy of the first applicant’s constitution is annexure “**B**” hereto.
- 7 Throughout this affidavit, I shall refer to the first applicant as “Abahlali” and to the second to thirty first applicants as “the residents” or as “we” or “us”, as appropriate. I shall refer to the first respondent as “the municipality”, to the second respondent as “the Minister” and to the third respondent as “the MEC”.

A INTRODUCTION

8 This is an application in terms of Rules 8 and 10 of the Rules of this Court for leave to intervene as parties alternatively as *amici curiae* in the above appeal, which is set down for 12 February 2014. It arises from the applicants' direct and substantial interest in the main issue to be determined in that appeal.

9 As we understand it, that issue concerns the constitutional validity of an order of the KwaZulu-Natal High Court, Durban, granted by his Lordship Mr. Justice Koen on 28 March 2013, under case number 3329/2013. That order permits and obliges the municipality to –

9.1 “prevent any persons from invading and/or occupying and/or undertaking the construction of any structures” on specified land within the municipality’s area of jurisdiction; and

9.2 “remove any materials placed by any persons upon” that land.

10 I shall refer to this order as “the MEC Order”, because it was obtained by the MEC. The MEC Order operates against the Minister and the municipality. A copy of the MEC order is annexure “C” hereto.

- 11 As will be set out more fully below, between 13 August 2013 and 30 September 2013, the municipality evicted the residents at least seven times from our homes at Cato Crest, and then destroyed the shacks we were living in. When challenged to produce a court order authorising its conduct, the municipality relied upon the MEC order.
- 12 The applicants have brought an application under case number 9189/2013 in the KwaZulu-Natal High Court, Durban, in which we seek a final interdict restraining the municipality from evicting the residents without “a valid court order”. The main issue in that application is whether the MEC order constitutes “a valid court order”, capable of authorising our eviction from Cato Crest. An interim interdict restraining the municipality from evicting the residents and demolishing our shacks is in place pending the outcome of that application.
- 13 The applicants accordingly have a direct and substantial interest in any decision this Court may make on the validity or otherwise of the MEC Order.
- 14 Furthermore, having regard to the written submissions so far filed by the parties to the appeal, I am advised and submit that the residents have substantially different submissions to make which may be useful to the Court. I emphasise that none of these submissions will require this Court to make factual findings in relation to our pending application before the KwaZulu Natal High Court, Durban.

15 I am accordingly advised and submit that it would be in the interests of justice to grant the applicants leave to intervene in this appeal as parties. That is the relief sought in paragraph 1 of our notice of motion.

16 In any event, I submit that the applicants are sufficiently interested in the appeal to be admitted as *amici curiae*. That alternative relief is sought at paragraphs 2 and 3 of our notice of motion.

17 In the remainder of this affidavit, I will address the following issues –

17.1 The facts giving rise to the applicants' direct and substantial interest in the appeal;

17.2 An outline of the applicants' submissions. It will be submitted that they will differ from those of the other parties and will be useful to the Court;

17.3 The interests of justice, including the attitude of the parties to the appeal to our proposed intervention.

B THE APPLICANTS' DIRECT AND SUBSTANTIAL INTEREST IN THESE PROCEEDINGS

18 At the outset, I emphasise that none of the submissions the residents wish to make requires this Court to resolve any disputes relating to the

facts set out below. These facts are set out simply for the purpose of establishing the applicants' interest in the appeal.

19 The residents have lived in Cato Crest, virtually uninterrupted, for periods of between 4 and 15 years. We were originally tenants, renting backyard rooms on land claimed by other residents of the informal settlement. They were our "landlords".

20 During the course of 2012, the municipality decided to implement a housing project in the settlement. In doing so, it sought to exclude us from the housing allocation process, and instead decided to award housing to our "landlords".

21 In late 2012, we, together with about 300 other tenants, were evicted from the settlement in order to make way for housing to be constructed for our "landlords".

22 The residents, together the 300 other tenants, had nowhere else to go when we were evicted, so we built our shacks on open land in Bonela, which is adjacent to Cato Crest.

23 In May 2013, we were evicted again from Bonela. Most of the other people who had constructed shacks in Bonela scattered across the

Durban areas, and squeezed into other informal settlements where they could.

24 The residents, however, moved back across to Cato Crest, and built our shacks on a vacant piece of land on the edge of the settlement.

25 We lived peacefully and undisturbed on that land between May 2013, and 13 August 2013. On 13 August 2013, the municipality's land invasion unit evicted us from our homes on 13 August 2013. Officers from the Cato Crest Police Station oversaw the eviction. No court order was produced to justify the eviction.

26 Between 13 and 20 August, all of the residents rebuilt our homes. The municipality's land invasion unit then threatened us with eviction again.

27 We then obtained an interdict from the KwaZulu Natal High Court, Durban, on 22 August 2013. That interdict is annexed hereto and marked "D". It took the form of an undertaking from the municipality, noted in the interdict, not to demolish any of the applicants' shacks remaining at the property. By that time, all of the applicants' shacks had been rebuilt, and all of them should have been given the benefit of the interdict.

28 Nonetheless, on 2 September 2013, the municipality's land invasion unit returned to the property, evicted us, and destroyed about half of the

residents' homes again. Officers from Cato Crest Police Station were again present to oversee the eviction.

29 A second interdict was obtained, again without opposition, from the KwaZulu Natal High Court, Durban on 2 September 2013. That interdict is annexed hereto and marked "E". It restrained the municipality from evicting the residents without a valid court order.

30 The municipality returned to the property on 5 September 2013, and destroyed those of the residents' shacks that it did not destroy on 2 September 2013. Officers from Cato Crest Police Station were once again present to oversee the eviction.

31 On this occasion, the municipality's officials produced and explicitly relied upon the MEC Order.

32 Once again, all of the residents were homeless and destitute.

33 The residents, once again, tried to rebuild our homes. However, on 14 and 15 September 2013, the municipality's land invasion unit returned to the property, demolished all of our homes again, and evicted us. On this occasion the MEC Order was also produced and used to justify the eviction. The municipality was again assisted by officers from the Cato Crest Police Station.

34 None of the above facts has been disputed before the High Court, to which the MEC and the municipality are both parties. Their case is simply that –

34.1 The residents are land invaders, seeking to disrupt the allocation of formal housing in Cato Crest;

34.2 The MEC order authorises them to take the action they did; and

34.3 The residents are living on land to which the MEC order applies.

35 While the residents are far from happy with the way the housing allocation process in Cato Crest has proceeded, our objections to it are not material to this application. Our claim is not to immediately available permanent housing. It is to be left alone in peace and dignity until housing is made available to us – whenever that might be. After several years' residence in Cato Crest, we have, over the last twelve months, been evicted from pillar to post in the name of a housing development from which we have not benefitted, and from which we have not been given a fair opportunity to benefit.

36 We accept that there might not be enough housing to be allocated to all of the residents of Cato Crest, but we do not accept that this means that

we are liable to be evicted, and made homeless, especially where we have never been given the opportunity to place our case before a court.

37 The MEC order is the legal instrument being employed to remove us from the settlement without a court ever being given a real opportunity to decide, having regard to all of the relevant circumstances, whether it would be just and equitable to evict us. For as long as it stands, it will be used against us, and similarly situated persons, throughout the municipality's area of jurisdiction, many of whom are its members.

38 Abahlali, which represents the interests of several thousand residents of informal settlers throughout the municipality's area of jurisdiction, is also acutely concerned that the MEC order will be used as a way to marginalise and ignore the needs of people excluded from housing projects implemented in those settlements.

39 Having regard to all of the above, I am advised and respectfully submit that the applicants have a direct and substantial interest in the appeal.

C OUTLINE OF THE APPLICANTS' LEGAL SUBMISSIONS

40 The applicants' proposed submissions are purely legal, and fall into two categories –

40.1 First, we will submit that the MEC order is a nullity, and was of no force or effect at the time it was granted. We will further

submit that the common law principles relating to nullity form part, or at least ought to form part, of the principle of legality entrenched in section 1 (d) of the Constitution.

40.2 Second, we will submit that the MEC order was granted in breach of section 26 (3) of the Constitution, because it permitted the prospective eviction of an unknown, and unknowable, class of persons from vast areas of land without taking into account all the relevant circumstances.

41 I address each of these submissions, in turn, below.

Nullity

42 As a general rule, an order of court, even if wrong, stands until it is set aside on appeal, or is rescinded.¹ I am advised that the concept of nullity is a narrow exception to this rule.

43 An order of court is a nullity when a court lacks the jurisdiction to grant it.² Four categories of nullity have traditionally been set out in the applicable case law. These are: lack of geographical jurisdiction, non-citation, non-service of summons, or a judgment given in the absence of a mandate to

¹ *Culverwell v Beira* 1992 (4) SA 490 (W). See also *Jacobs and Others v Baumann NO and Others* 2009 (5) SA 432 (SCA).

² Voet 49.8.3: “[D]ecisions are never annulled under cover of nullity without appealing” unless “the nullity arises from a lack of jurisdiction, or of summons or of an attorney’s mandate”.

sue.³ It will be submitted that all of these categories are, in essence, species of absence of jurisdiction. In other words, a court that grants an order against a party not cited or not served, or in favour of a party who did not wish to litigate in the first place, acts beyond the powers lawfully conferred upon it – i.e. without jurisdiction.

44 This theory, underlying the concept of nullity, unpins more recent cases where orders granted in breach of statute have been declared nullities. In *Master of the High Court (North Gauteng High Court, Pretoria) v Motala NO and others*⁴ the Supreme Court of Appeal found that where, in making an order, a court usurps for itself a power expressly left to the Master by statute, its order is a nullity. In *City of Johannesburg v Changing Tides*,⁵ an order directing the Sheriff to do things which were beyond his statutorily prescribed functions was also held to be a nullity.⁶

45 In other words, because the orders in both *Motala* and *Changing Tides* were prohibited by statute, the courts that made them lacked the subject-matter jurisdiction to grant them.

46 It will be submitted on behalf of the applicants that these principles form part of the principle of legality entrenched in section 1 (d) of the

³ *Lewis and Marks v Middel* 1904 TS 291, 303. See also *Dada v Dada* 1977 (2) SA 287 (T).

⁴ 2012 (3) SA 325 (SCA).

⁵ 2012 (6) SA 294 (SCA). (“*Changing Tides*”).

⁶ *Changing Tides*, para 8.

Constitution. Where a court grants an order that it is a nullity it acts in violation of the principle of legality, and its order will be of no force or effect.

47 It is clear from the above, that an order of court is only operable only against the persons to whom it is addressed. The residents were not joined to the proceedings which resulted in the MEC order. We were given no notice of it. Indeed, none of the residents of any of the land to which the MEC order applies were joined to the proceedings.

48 Therefore the MEC Order purports to have coercive effect against persons not joined to the proceedings in which it was obtained.

49 The MEC Order is accordingly a nullity, and falls to be declared as such.

Order Granted in Violation of Section 26 (3) of the Constitution

50 The MEC Order authorises the municipality to “*prevent any persons from invading and/or occupying and/or undertaking the construction of any structures*” on specified land. It also entitles the municipality to “*remove any materials placed by any persons*” upon that land.

51 I am advised and submit that these two aspects of the order fall to be read together. The municipality is not only entitled to prevent someone

from coming on to the specified land for the first time, but to prevent them from continuing to occupy the land once they have already set up their homes by “removing materials placed by them, or any other person” on the land. This view is reinforced by the use of the words “and/or”. Both “invading” and “occupying” are to be “prevented”. In other words, both the act of “entering onto” a piece of land and “being present” on the land are to be “prevented”.

52 Accordingly, the MEC order, on its face, authorises the municipality to evict all persons who may in future establish occupation of a home on any of the specified land. The MEC Order renders it impossible for a court to have regard to the circumstances relevant at the time of eviction.

53 I am advised and submit that this is clearly inconsistent with section 26 (3) of the Constitution, which authorises a court to grant an eviction order only after it has considered all the relevant circumstances. The relevant circumstances cannot be considered before they have come into existence.

D THE INTERESTS OF JUSTICE

54 I am advised and submit that it would be in the interests of justice to grant the applicants leave to intervene in this appeal, because –

- 54.1 The contentions set out above are substantially different from those likely to be advanced by the parties to the appeal. We undertake, in any event, to ensure that we do not unnecessarily repeat the submissions of other parties. Our submissions will be of assistance to this Court.
- 54.2 The applicants have applied for leave to intervene at an early stage of these proceedings, and will, if so directed, be able to file written submissions simultaneously with the applicants, in order to allow the respondents a full opportunity to respond to our contentions.
- 54.3 The parties to the appeal have raised no objection to our intervention. I refer, in this regard, to a letter sent by the applicants' attorney of record to the parties, dated 27 November 2013, setting out the applicants' intention to make this application. That letter is annexure "F" hereto. Responses to the letter were called for by 2 December 2013. At the time I deposed to this affidavit, no responses had been received.

E CONCLUSION

55 Having regard to all of the above, I respectfully request that the Court grant the order sought in paragraph 1 alternatively paragraphs 2 and 3 of the notice of motion to which this affidavit is attached.

AARON MKHALISEMI MZIMELA

The deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and affirmed to before me at this day of . In administering this oath the requirements of Regulation R2477 dated 16 November 1984, as amended, have been fulfilled.

COMMISSIONER OF OATHS