

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT42/12

CASE NO. A QUO: 1413/2009 NWHC

In the application of:

LAWYERS FOR HUMAN RIGHTS

Applicant for leave
to be admitted as
amicus curiae

IN RE:

In the matter between:

PONTSHO DOREEN MOTSWAGAE

First Applicant

FOURTEEN OTHERS

Second to Fifteenth Applicants

and

RUSTENBURG LOCAL MUNICIPALITY

First Respondent

PROMPTIQUE TR 9CC

Second Respondent

**FOUNDING AFFIDAVIT
(RULE 10 APPLICATION FOR LEAVE TO BE ADMITTED AS AMICUS
CURIAE)**

I, the undersigned,

JACOB VAN GARDEREN

hereby make oath and state:



1. I am an adult male, and National Director of Lawyers for Human Rights with business address at Ground Floor, IDASA Democracy Centre, 357 Visagie Street, Pretoria. The facts herein fall within my personal knowledge unless is otherwise apparent and are both true and correct. I am also duly authorised to depose to this affidavit and to give instructions herein.
2. Lawyers for Human Rights (LHR) seeks to be admitted as an *amicus curiae* in this matter.
3. The details of the existing parties in this matter appear from the record and I do not repeat it herein.

LHR'S INTEREST IN THE MAIN PROCEEDINGS:

4. Lawyers for Human Rights is a public interest law firm and a registered non-profit organisation.
5. The organisation was founded in 1979 and has been involved in a wide range of human rights and public interest law activities since then. The organisation remains one of the leading legal NGO's in South Africa with six offices around South Africa and comprises of a range of human rights projects and law clinics.

6. Throughout its history Lawyers for Human Rights has acted as legal representatives, amicus or as interested party in a range of cases, including cases before this honourable court. For sake of brevity, I only refer to certain such matters:

6.1 S v Makwanyane and another 1995(3) SA 391 CC (as amicus)

6.2 LHR v Minister of Home Affairs 2004(4) SA 125 CC

6.3 MEC for Education and others v Pillay 2008(1) SA 474 CC

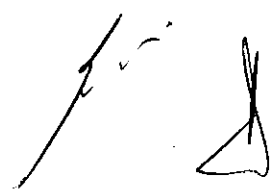
6.4 Bhe and others v Khayalitsha Magistrate and others 2005(1) SA 580 CC

6.5 Pheko and others v Ekurhuleni Metropolitan Municipality 2012(2) SA 598

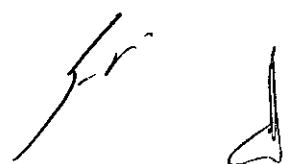
6.6 Occupiers of portion R25 of the farm Mooiplaats 355 JR v Golden Thread Ltd and others 2012(2) SA 337 CC

6.7 Occupiers of Schurweplaas 353 JR v PPC Aggregate Quarries (Pty) Ltd 2012(4) BCLR 382 CC

7. One of the specialised projects of LHR is its Land and Housing Project. This project, together with a number of its law clinics, have been active in the area of providing legal advice to clients in both urban and rural settings in respect of their housing and tenure problems.

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8. These activities involved LHR in a number of the leading cases which have come before this court in recent times.
9. This project of LHR has especially been active in areas which form part of the erstwhile Bophuthatswana, such as Ga Rangkuwa, Mabopane, Themba, Itsoseng-Soshanguve and the like. These are all areas where there is a high degree of urbanisation and are areas which were historically planned to form part of the segregated black areas bordering South Africa's industrial heartland, what is today the Gauteng Province.
10. Some of these areas fall within Gauteng and some fall in the North West Province. The areas can also further be distinguished between those that fell within the erstwhile Bophuthatswana and those that fell outside Bophuthatswana. The legislative history in respect of these areas is sometimes different.
11. The Thlabane township, although in the vicinity of Rustenburg, is one such area that previously fell within Bophuthatswana, but was intended to serve an industrial hub within the RSA. The tenure history in Thlabane would therefore have its origins in the pre-1986 legislation of South Africa and thereafter in the Bophuthatswana amendments to such tenure regimes.

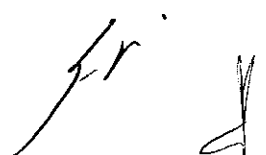
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12. LHR therefore believes that it has specific experience in such areas and its project lawyers are acquainted with the complexities and history of land tenure in these areas.
13. LHR literally has hundreds of clients in such areas. It is especially female clients of LHR that are vulnerable to loss of their tenure rights, either through operation of private law or public law.
14. The present matter, involving a state initiated housing development, is a typical example of development that affects existing tenure rights of those persons living on the land used for the development. Although the land in question is registered in the name of the state (North West Province), the tenants have tenure rights that probably entitle them to ownership of their stands.
15. Through participation in this matter as *amicus curiae*, LHR wishes to advance the rights of those of their clients who find themselves in situations comparable to that of the applicants in the main matter.

CONDONATION:

16. The parties in these proceedings filed their heads of arguments on Tuesday 25th September 2012 (First Respondent) and Wednesday 26 September 2012 (Applicant).
17. I wanted counsel to properly consider the content of these heads so as to advise whether our organisation can contribute different and/or additional arguments to those of the parties involved in the matter. For this purpose, counsel was briefed and advice given by Monday 1 October 2012, three court days after receipt of the heads.
18. The letter in terms of Rule 10(1) was then dispatched on Tuesday 2 October 2012. I annex the letter hereto as **Annexure "JG1"**, being correspondence addressed to both the parties in the main application.
19. Responses were received to our letter by Friday 5 October 2012. I annex these hereto as **Annexures "JG2", "JG3" and "JG4"**. As is apparent from **Annexure "JG3"**, the First Respondent is not prepared to grant its consent.
20. At the time of the drafting of this application, it is foreseen that this application will be lodged by Wednesday 10 October 2012, some five days outside the time period provided for in Rule 10 (5).

21. I respectfully submit that this is a matter in which the different sets of heads of argument had to be carefully considered before deciding whether to seek admission as an *amicus curiae*. Of necessity, this took a number of days, as did the correspondence required by Rule 10(1).
22. It was, I respectfully submit, almost inevitable that the time period of five days could not be complied with in this matter. I do however, believe that there is still sufficient time until the hearing of this matter to allow for heads of argument to be filed by the *amicus curiae* and that this can be done within time limits which would not prejudice any of the other parties.
23. As this is an application for admission as an *amicus curiae*, I respectfully submit that the issues involved in the matter are already known to all the parties. As a result, I respectfully submit that the abridged time period for filing of an answer by the First Respondent, if it so wishes, is fully justified. A period of 10 days would be more than enough for this purpose. This would mean that the answering affidavit would be filed by 24 October 2012.
24. As Applicant to be admitted as *amicus curiae*, we do not foresee that it would be necessary to reply in this matter.

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25. For these reasons I respectfully request that condonation be granted for the fact that this application will be filed 10 days after filing of the last set of heads of argument as opposed to 5 days, and that the time period allowed for an answering affidavit, be shortened from 15 days to 10 days.

SUBMISSIONS TO BE MADE BY LHR AND ITS GENERAL POSITION IN RESPECT OF THIS MATTER:

26. Lawyers for Human Rights wishes to make succinct submissions on the following two related issues, which it submits give an essential broader context to the present matter:

26.1 An analysis of the legislative framework regarding urban tenure as it developed through the RSA, Bophuthatswana and post-1994 eras shows that direct and indirect discrimination against women continued to be a feature of such legislation in Bophuthatswana. In order to achieve both substantive and formal equality, state institutions which bear the responsibility of implementing housing policy and projects, must be sensitive to the legislative history.

26.2 Many housing projects involve so called *in situ* upgrading of services and legal tenure. Such developments, almost always, affect those persons living on the land earmarked for development. In addition, such projects are aimed at benefiting people who have no history of tenure on the land. The present matter involves such a set of facts. The potential conflict of interests is obvious. The authorities implementing the projects must carefully distinguish between the various categories of rights holders. If they do not do so, their actions, no matter how well intended, may prove to be both unlawful and unreasonable, and as such in violation of a range of legal provisions...

The legislative framework and gender discrimination

27. The Applicants in the main application makes brief reference to the possibility of gender discrimination in the implementation of the housing project and submit that this aspect had to be investigated prior to the implementation of the project.
28. The Applicants appear to keep the issues involved in this matter mostly limited to the unlawful nature of the violation of their undisturbed possession of their homes and stands and the non-compliance with

the housing and eviction legislation. We accept that this approach is motivated by the fact that the case was not essentially pleaded as one of discrimination.

29. LHR submits that it is essential, and unavoidable, to involve the broader issues of discrimination in this matter.

30. The legislative framework in the erstwhile Bophuthatswana is as follows:

30.1 Bophuthatswana became independent in 1977. It inherited the Black Administration Act of 1927, together with its regulations such as those contained in proclamation R293, legislation that was analysed in the matter of *Western Cape Provincial Government and others: In re DVB Behuising (Pty) Ltd v North West Provincial Government* 2001(1) SA 500 CC.

30.2 In the matter of ***Western Cape Provincial Government and Others: In Re: DVB Behuising (Pty) Ltd***, this court had occasion to analyse the legislative history of urban tenure applicable to black persons. We accept this as the basis for the further analysis of the legislation as it applied to the erstwhile Bophuthatswana.

- 30.3 The Black Administration Act was repealed in Bophuthatswana in 1985 by way of the General Law Amendment Act 37 of 1985. I annex this Act hereto as **Annexure "JG5"**. Crass forms of discrimination as contained in section 11(3) were therefore eliminated from the statute book.
- 30.4 Bophuthatswana adopted the Land Control Act 39 of 1979, which preserved the R293 regulations by incorporation through section 20(3) of that act. Section 13 of this Act abolished racially discriminatory provisions in "*any law or grant*". (See: para 47 of *DVB Behuising-judgment*). This act and the regulations are attached for convenience as **Annexure "JG6"** and **"JG7"**.
- 30.5 In *Bhe (supra)* this court analysed the discriminatory nature of the law of succession enacted through section 23 of the Black Administration Act (para 91 and further). The discrimination was found in the application of the rule of male primogeniture.
- 30.6 The regulations (R293) that applied in Bophuthatswana did not expressly exclude women from being allocated erven in urban areas. However, it is clear from the provisions that refer to "*head of a family*" (reg 8 and 9) and the definition of "*family*" in the regulations, that discrimination was implied and in practice was



probably the norm. We submit no evidence is needed to establish the discrimination.

30.7 State actors implementing housing projects must be aware of this historical discrimination and the fact that women are often vulnerable as they often derived title from another family member. Also, administrative practices discriminated against women, as is evident from the "Certificates of Occupation" in the record (pp 230 and 231), where the occupants are listed as family members even though no "head of family" is registered.

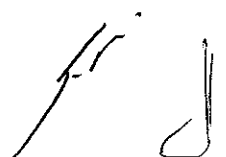
30.8 In terms of section 25A of the Upgrading of Land Tenure Rights Act 112 of 1991, this Act was made applicable to the whole of South Africa, including the erstwhile Bophuthatswana. Although section 25A excludes section 3 (and therefore schedule 2 rights), it is clear that section 2 (therefore schedule 1 rights) are included in the expanded application of this act. Schedule 1 of this act includes deeds of grant and leaseholds "as defined in regulation 1 of R293"

30.9 This legislative development introduces the second argument we advance. The rights held may have been upgraded to

ownership by operation of law and therefore enforceable against the whole world.

The need to do a proper tenure rights enquiry prior to a housing development

31. LHR submits that state institutions tasked with the implementation of housing projects, and for that matter any project aimed at fulfillment of the state's socio economic obligations, must be able to prove or illustrate that their project is legal. This must especially be the case where existing rights are affected. This is an additional requirement apart from the requirements of administrative law and eviction law as set out by the Applicants in the main proceedings.
32. In other words, where persons such as the Applicants plead facts which *prima facie* establishes unlawful conduct on the part of a state institution, such institution will have to show that its project is consistent also with the property rights of those affected.
33. To illustrate by way of an example, if some of the applicants in the main application are deemed to be owners of their properties by virtue of legislation which has converted or upgraded their rights to ownership, they would be entitled, as of right, to resist any housing



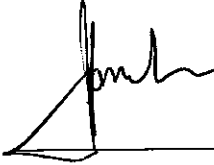
development, no matter how well intended. In fact, they would have to be expropriated and not even the possibility of using eviction laws would suffice to regularise the housing project.

34. If such legislation aimed at upgrading or conversion of tenure rights creates a statutory right to upgrade, alternatively create a legitimate expectation that upgrading would take place, a different set of obligations would rest on the state institution.
35. Such rights might qualify as statutory real rights in which event they would have to be expropriated. On the other hand, if the nature of the rights could be altered or terminated without the need of expropriation, then the administrative lawfulness of the project would have to be considered as well as the requirements of eviction laws.
36. LHR therefore submits that confining the present type of matter to the unlawfulness created by a violation of Administrative Law or the Evictions Laws, is too narrow an approach to the matter. There is a range of bases which can potentially make the housing project of the First Respondent either illegal or unlawful and the Institution responsible for the implementation of a project must conduct a substantial investigation to determine the nature of any existing rights, prior to the implementation of any project that may impact on such rights.



CONCLUSION:

37. For these reasons LHR respectfully submits that the issues concerning the legislative history should be considered in this matter as well as the broader issues of legality and existing rights. LHR's arguments will therefore not be a repetition of the arguments raised by the other parties.



DEPONENT

I certify that the Deponent has acknowledged that he knows and understands the contents of this affidavit which was signed and sworn to before me at PRETORIA on this 10TH day of OCTOBER 2012 and that the provisions of the Regulations contained in Government Notice R1258 of the 21ST JULY 1972, (as amended), have been complied with.



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