

CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO. CCT: 108/13

In the matter between:

JABULANI ZULU AND 389 OTHERS

APPLICANTS

and

ETHEKWINI MUNICIPALITY

FIRST RESPONDENT

MINISTER OF POLICE

SECOND RESPONDENT

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

THIRD RESPONDENT

**APPLICANTS' WRITTEN SUBMISSIONS IN RESPONSE TO DIRECTIONS
DATED 1 OCTOBER 2013**

1.

In response to paragraph 2(i) of the Directions the Applicants make the following submissions.

2.

There are three issues which fall to be dealt with under the application CCT: 108/13 which do not arise in the application under Case No. 4431/2013.

THE FIRST ISSUE

3.

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.

4.

The application under Case No. 4431/2013 proceeds upon the basis that the conduct of the Respondents is in breach of that order and interdictory relief is sought.

5.

The issue in CCT: 108/13 is one of principle while the issue in Case No. 4431/2013 is factual.

THE SECOND ISSUE

6.

The application under CCT: 108/13 was set up in such a way as to ensure that there would be no opposition to the relief sought.

7.

It was the Municipality and the Minister of Police that required the MEC to seek the sanction of the Court authorising them to act in the manner in which they did.

(CCT: 108/13, Vol. 2, page 59-60, para. 57).

8.

Both the Municipality and the MEC for Human Settlements have a constitutional obligation to provide housing. The relief which they sought and obtained is inconsistent with that objective. Their purpose in doing so was to use this form of the relief to evict people without a prior hearing.

9.

The question as to whether the parties to the application under CCT: 108/13 acted properly in seeking the relief in the manner in which they does not arise under Case No. 4431/2013.

THE THIRD ISSUE

10.

Koen J issued an order which authorises the Municipality and the Police to act against an unidentified group of persons described only as “land invaders”. Not only are they

authorised to take steps against these people, the same otherwise unidentified people are interdicted and restrained in terms of paragraph 1.2 of the order from occupying land identified in the schedule and undertaking the construction of any structure or placing any material on the land. In a similar context Conradie J said:-

“An order against respondents not identified by name (or perhaps individualised by description) in the process of commencing action or (in very urgent cases brought orally) on the record would have a generalised effect typical of legislation. It would be a decree and not a court order at all.

‘A distinction often made between legislative and administrative acts is that between the general and the particular. A legislative act is the creation and promulgation of a general rule of conduct without reference to particular cases. An administrative act cannot be exactly defined but it includes the adoption of a policy in making an issue of a specific direction and the application of a general rule to a particular case in accordance with the requirements of policy or expediency or administrative practice. Legal consequences flow from this distinction.

Wiechers *Administratiefreg* 2nd ed. quoting *De Smith (op cit* at 71):

‘Algemene verhoudings word deur wetgewende maatreëls geskep of gewysig. Besondere verhoudings daarenteen word deur individuele besluit geneem, geskep of gewysig.’

He then writes at 99:

‘Om tussen die verskillende administratiewe handeling te onderskei is nie net ‘n teoretiese spel nie maar ‘n praktiese noodsaaklikheid. Die objektiewe reg knoop naamlik belangrike gevolge aan die onderskeid tussen regsprekende, wetgewende en suiwer administratiewe handeling vas.’

The learned author discusses the legal effect of each type of administrative act. What emerges from this discussion strengthens my conviction that an order having generalised (legislative) effect is fundamentally objectionable.”

Kayamandi Town Committee v Mkhwaso and Others 1991 (2) SA 630 (C) at 634H-635C.

11.

The Municipality and the Police are exploiting the order of Koen J by contending that as long as the order stands they are obliged to give effect to the order. This appears from paragraph 4 of the answering affidavit in Case No. 4431/2013 where the interdictory relief sought is opposed, *in limine*, on this basis:

“4.2.1 The applicants seek an Order which essentially prevents the first respondent from carrying out the Order granted

against it on 24 March 2013. That Order has not been varied or set aside.

- 4.2.2 The first respondent is obliged to give effect to the Order of this Honourable Court without any interference.
- 4.2.3 Where the first respondent acted in terms of the Order it is improper to ask for an Order that they reconstruct the very structures they were ordered to demolish.
- 4.2.4 In the circumstances the Order sought is incompetent in law and thus unlawful.
- 4.2.5 On this basis alone the application should be dismissed with costs.”

Record, Case No. 4431/2013, page 93 – 94.

12.

The Applicants accordingly submit that it is necessary for the Court to consider the application under CCT: 108/13.

**L.B. BROSTER SC
S.J. LINSOTT
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9 October 2013**