

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO. CCT 108/2013

In the matter between:

JABULANI ZULU & 389 OTHERS

APPELLANTS

and

eTHEKWINI MUNICIPALITY

FIRST RESPONDENT

MINISTER OF POLICE

SECOND RESPONDENT

THE MEC FOR HUMAN SETTLEMENTS & PUBLIC

THIRD RESPONDENT

WORKS OF THE PROVINCE OF KWAZULU-NATAL

APPELLANTS' HEADS OF ARGUMENT

1.

Land invasion is no recent phenomenon. Its origins and causes are well documented by Yacoob J and what he said fourteen years ago about the immediate cause applies equally today:

“Each individual housing project could be expected to take years and the provision of houses for all in the area of the municipality and in the Cape Metro is likely to take a long time indeed. The desperate will be consigned to their fate for the foreseeable future unless some temporary measures exist as an integral part of the nationwide housing program. Housing authorities are understandably unable to say when housing will become available to these desperate people. The result is that people in desperate need are left without any form of assistance with no end in sight. Not only are the immediate crises not met. The consequent pressure of existing settlements inevitably results in land invasions by the desperate thereby frustrating the attainment of the medium and long-term objectives of the nationwide housing program.”

Having recognised the cause of the problem Yacoob J went on to say:

“Land invasion is inimical to the systematic provision of adequate housing on a planned basis. It may well be that the decision of a State structure, faced with the difficulty of repeated land invasions, not to provide housing in response to those invasions, would be reasonable. Reasonableness must be determined on the facts of each case.”

Government of the RSA and Others v Grootboom and Others 2001 (1) SA 46 (CC) at 79B-C and 86A-B.

It is clear from these statements that courts are obliged to consider the facts of each case involving eviction as those cases arise. The role of the municipalities in circumstances where people actually occupy land illegally, is described by Yacoob J at 84F-G in this way:

“I would have expected officials of the municipality responsible for housing to engage with these people as soon as they became aware of the occupation. I would also have thought that some effort would have been made by the municipality to resolve the difficulty on a case-by-case basis after investigation of their circumstances before the matter got out of hand.”

It is apparent that the decision to evict is reserved for the courts not the municipality or the police.

2.

The decision in *Grootboom* was reached entirely without recourse to the Prevention of Illegal Eviction from Unlawful Occupation of Land Act, 19 of 1998 (PIE) and the Housing Act 107 of 1997 because the eviction order granted in the Magistrate’s court was not challenged.

3.

PIE was considered at length in:

Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC)

In comparing the provisions of PIE to those of the Prevention of Illegal Squatting Act, 51 of 1951, the Court held at 224D:

“PIE not only repealed PISA but, in a sense, inverted it: Squatting was decriminalized and the eviction process was made subject to a number of requirements, some necessary to comply with certain demands of the Bill of Rights. The overlay between public and private law continued, but in reverse fashion, with the name, character, tone and context of the statute being turned around.”

In considering section 6 of PIE, at 232 B-D the Court held:

“Simply put, the ordinary prerequisites for the municipality to be in a position to apply for an eviction order are that the occupation is unlawful and the structures are either unauthorized, or unhealthy or unsafe. Contrary to the pre-constitutional position, however, the mere establishment of these facts does not require the court to make an eviction order. In terms of s 6, they merely trigger the court’s discretion. If they are proved, the court then may (not must) grant an eviction order if it is just and equitable to do so. In making its decision it must take account of all relevant circumstances, including the manner in which occupation was effected, its duration and the availability of suitable alternative accommodation or land.”

In dealing with the “just and equitable” requirement the Court held at 237B-C:

“The court is thus called upon to go beyond its normal functions and to engage in active judicial management

according to equitable principles of an ongoing, stressful and law-governed social process. This has major implications for the manner in which it must deal with the issues before it, how it should approach questions of evidence, the procedures it may adopt, the way in which it exercises its powers and the orders it might make. The Constitution and PIE require that, in addition to considering the lawfulness of the occupation, the court must have regard to the interests and circumstances of the occupier and pay due regard to the broader considerations of fairness and other constitutional values, so as to produce a just and equitable result.”

In the same year Langa ACJ in considering PIE and what constitutes appropriate relief under the Act said:

“Of importance also would be the general tone and purpose of legislation enacted to govern evictions, read with relevant constitutional provisions. The preamble to the Act states, for instance, that no one may be evicted

from their home or have their home demolished without an order of Court made after considering all the relevant circumstances.”

President of RSA and Another v Modderklip Boerdery (Pty) Ltd 2005 (5)

SA 3 (CC) at 25 B-C.

It is not insignificant that the legislation contemplates two separate acts constituting eviction: the first is that the person is evicted from their home and the second quite separate act is that of having their home demolished, presumably when the home is not actually occupied. Both acts amount to eviction.

4.

In granting an eviction order Van der Westhuizen J said after an exhaustive analysis of the legislation surrounding eviction including Chapter 12 of the Housing Code that:

“All relevant circumstances must be taken into account though to determine whether, under which conditions, and by which date, eviction would be just and equitable.

The availability of alternative housing for the Occupiers is one of the circumstances.”

City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another 2012 (2) SA 104 (CC) at 133 F-G.

5.

The justice and equity inquiry under PIE was taken a step further in:

Occupiers of Mooiplaats v Golden Thread Ltd and Others 2012 (2) SA 337 (CC) at 344 D-F

where, after alluding to the period of occupation falling short of six months, Yacoob J stressed that a court hearing the application is still obliged to consider all the relevant circumstances and added:

“In an inquiry of this kind a court should determine what the relevant circumstances are. Close to 200 families would have been evicted and in all probability rendered homeless consequent upon the order of the High Court. In the face of this consequence the question whether the City was reasonably capable of providing alternative land

or housing was of crucial importance. And what is more, the High Court was alive to the fact that the City did indeed own land which was vacant and which might be available for that purpose. It was impossible for the High Court to conclude that the eviction was just and equitable without investigating this aspect.”

Finally in:

City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others 2012 (6)

SA 294 (SCA) at 321 G-H

Wallis JA dealt at length with the procedural requirements of collecting the information necessary to enable a court to make a finding based on justice and equity. Crucial to that inquiry is information regarding the occupiers of the land:

“In considering the grant of an eviction order the court is concerned with the plight of those who, as a result of poverty and disadvantage, are unable to make alternative accommodation arrangements themselves and require

assistance from the local authority to do so. It is particularly concerned to ensure, so far as possible, that those who face homelessness are provided at least with temporary emergency accommodation. The ancillary orders attaching to an eviction order will not affect those who are able to find a roof for their heads and a place of shelter without assistance, nor those who for reasons of their own, such as an unwillingness to have any involvement with a public authority, will not seek assistance, even if it means nights spent on the streets. The central task is therefore to identify those who require assistance from the local authority.”

The cumulative effect of these judgments is clear. Section 26(3) of the Constitution and PIE are engaged in every case of eviction involving people illegally occupying land.

THE ORDER OF KOEN J

6.

The form of the order put before Koen J obliges the municipality and the police 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 ‘NOM 1 – 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 aforementioned properties;

1.2 interdicting and restraining any persons from invading and/or occupying and/or undertaking the construction of any structures and/or placing any material upon any of the aforementioned properties;”

The properties identified in the order amount to 1 568 and cover vast areas of the province and more particularly the municipality.

7.

The origin of the form of the order sought is to be found in:

Executive Suite (Pty) Ltd and Others v Pietermaritzburg-Msunduzi Transitional Local Council, 1997 (4) SA 695 (NPD) at 711

which was followed by:

Despatch Municipality v Sunridge Estate and Development Corporation (Pty) Ltd 1997 (4) SA 596 (SECLD).

Both judgments were delivered at a time when the Prevention of Illegal Squatting Act 52 of 1951 was still in force and while Booyesen J did not consider the effect of the Constitution, Van Rensburg J mentions section 26(3) of the Constitution in passing and records:

“... the removal of squatters without an order of Court no longer holds good”.

8.

Van Rensburg J amended the order prayed in this way:

“I should add that by the use of the word ‘permitting’ in the order interdicting the Respondent from permitting the erection of any further building or structure on its property, it is intended to convey that the Respondent must take all such steps as are necessary to prevent the erection of any further buildings or structure intended for the occupation of persons on its property.”

Page 611 J-612 A.

Koen J added the words “subsequent to the grant of this order” to paragraph 1.1.3 of the order prayed and granted the relief.

9.

The form of the order is entirely inappropriate when one has regard to:

- (a) the case-by-case analysis laid down in *Grootboom*;
- (b) the provisions of PIE; and

- (c) the lack of any concern for the fate of the people likely to be evicted in terms of the order.

10.

In addition, the valid criticism of Conradie J in:

Kayamandi Town Committee v Mkhwaso and Others 1991 (2) SA 630
(CPD) at 634 H

that the effect of the order is one typical of legislation not a court order at all is particularly apt when regard is had to the last sentence contained in section 26(3) of the Constitution which reads:-

“No legislation may permit arbitrary eviction.”

If such a course of arbitrary eviction is not open to the legislature then that result cannot be achieved legitimately by a court order.

THE FACTS BEFORE KOEN J

11.

“Our houses have been demolished and we have no place to stay.

We tried to secure shelter and now we are being chased away from the forest.

They say we must figure out what to do next and we have no idea where to go.

We intend going back to the forest on Monday.”

The founding affidavit contains a reference to an affidavit in this form, in fact deposed to by LUCKY MAJOLA but attributed to ANGEL DUMA which is said to be supported by the 71 signatories listed in annexures “B2” – “B5”.

Record, Vol. 2 paragraph 18, page 47 and pages 94-98.

12.

Leaving aside the utter desperation expressed by the deponent, the brevity and eloquence of the affidavit depicts a state of homelessness aggravated by the conduct of the police and the municipality which involved chasing people away

from the forest where they had sought shelter and placing the additional burden on those people to “figure out what to do next”; something the law obliges the municipality to do.

13.

The fact that the MEC, the police and the municipality infer from this description that the people associated with the affidavit propose to undertake the unlawful invasion of vacant properties demonstrates a complete lack of understanding of the obligations imposed upon them both by statute and the case law most recently set out by Froneman J in:

Schubart Park Residents’ Association and others v City of Tshwane Metropolitan Municipality and Others 2013 (1) SA 323 (CC) at 338 A-E.

14.

In regard to the Appellants, the discussions between the Municipality and the LRC appear to have foundered on this basis:

“The Applicants’ representatives indicated to the LRC’s representatives that since they were not convinced that

people occupying Lamontville property in particular are in fact homeless, that they would proceed with an application for their eviction therefrom.”

Record, Vol. 2, paragraph 47, page 56.

Similar sentiments are repeated in this way:

“As indicated above the Applicants’ representatives are not convinced that people who are occupying Lamontville properties are in fact homeless.”

Record, Vol. 2, paragraph 48, page 57.

And in paragraph 51 it is said:

“Although there are persons occupying property in Lamontville, it is disputed that such persons are entitled to occupy the property.”

Record, Vol. 2, paragraph 51, page 58.

These allegations demonstrate a complete disregard for the fate of the people in occupation. The emphasis throughout the founding affidavit is entirely focused on the unlawfulness of the occupation of the property without any regard for the fate of those people and without any attempt being made by the parties to the application to discern whether the people concerned were homeless.

15.

In summary, Koen J had before him allegations on oath involving the 72 people dealt with in paragraph 18 of the founding affidavit and the 390 people said to be occupying the Lamontville property and he chose to grant the order which he did without affording those people any opportunity to place their views before the Court.

16.

It is apparent from annexure NOM1-37 (page 5-41) to the notice of motion that no less than 1 568 properties spread over a vast area within the municipality are the subject matter of the relief sought. Since only 5 properties are identified in the founding affidavit as being the subject of invasion (identified in paragraphs 14, 20, 23, 33 and 34 of the founding affidavit), why the remaining properties listed in

the schedule should have been included in the relief to be granted by the Court is not clear. It is simply observed that the properties are earmarked for housing development, other public services and land banking.

Record, Vol. 2, paragraph 10, page 45.

It is then said that the police and the municipality are unable to police the properties on an on-going basis.

Record, Vol. 2, paragraph 55, page 59.

17.

It must have been this consideration that prompted Koen J to take the form of an order which had been granted by Booysen J at a time when the Prevention of Illegal Squatting Act was in place and to grant an order in the same terms despite the repeal of that Act and the jurisprudence developed by the Constitutional Court in regard to the treatment of people illegally occupying land.

18.

For the reasons set out above, it is submitted that Koen J ought to have refused the relief sought. There can be no doubt that Koen J was alive to the enormous area of land affected by his order. Equally it must have been clear to Koen J that by granting the order in perpetuity, as he did, it would have the effect that the municipality and the police could use the order to effect evictions from 28 March 2013 onwards without any need to seek the court's approval.

19.

If Koen J had considered the application of PIE before granting the order he would have found that section 5 of PIE provides for the institution of urgent proceedings where the court is satisfied that:

- “(a) there is a real and imminent danger of substantial injury or damage to any person or property if the unlawful occupier is not forthwith evicted from the land;
- (b) the likely hardship to the owner or any other affected person if an order for eviction is not granted, exceeds the likely hardship to the

unlawful occupier against whom the order is sought, if the order for eviction is granted; and

(c) there is no other effective remedy available.”

This section, it is submitted, is designed to give the owners of land urgent relief with the minimum amount of notice and it is designed to cater for the situation described by the MEC in the founding affidavit.

20.

On the papers placed before Koen J it is apparent that neither the court nor the MEC had regard to the provisions of 26 of the Constitution and the provisions of PIE. It seems that Koen J was persuaded to ignore those provisions because, in his view, the police and the municipality were unable to protect the properties listed in the order.

THE HEARING BEFORE KRUGER J

21.

Prior to this hearing the Appellants filed affidavits in answer to the *rule nisi* in which they set out their opposition to the confirmation of the rule which included the following:

“The granting of a blanket interdict with no consideration given to our personal circumstances which sanctioned the demolition of our only homes and leaves us without any shelter whatsoever. The interdict would functionally be an eviction order.”

Record, Vol. 3, paragraph 38, page 138.

and further:

“We are living in a forest in shacks constructed from plastic bags, without access to amenities. I do not have another home that I inhabit. I am not in Madlala Village as a result of an organized campaign to overthrow or

embarrass the Applicant or the First Respondent. I am simply living in the only place I currently can.”

Record, Vol. 3, paragraph 41, page 139.

In addition to relying upon PIE the Appellants contended:

“However, the Municipality is legally bound to follow the appropriate procedures for removing us from the land. Section 26(3) of the Constitution states that ‘no one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances.’”

Record, Vol. 3, paragraph 43, page 140.

22.

Quite apart from these submissions, Kruger J had before him heads of argument which drew his attention to definition of “evict” as defined in section 1 of PIE which reads:

“means to deprive a person of occupation of a building or structure on land on which such building or structure is erected against his or her will and ‘eviction’ has a corresponding meaning.”

It is clear from this definition that when an owner finds a building or structure erected on his property he is obliged to seek the leave of the court in terms of PIE before that building or structure can be demolished. Since the building or structure is defined as including:

“Any hut, shack, tent or similar structure or any other form of temporary or permanent dwelling or shelter”

there can be no doubt that the rudimentary shelters built by the Appellants fall within the meaning of PIE.

23.

Since nothing is said in PIE about the duration of the person’s occupation of a building or structure on the owner’s land, PIE is engaged from the moment of occupation. It does not help to suggest that, since the occupation might be of only

brief duration and the structure consisting of timber and plastic bags took only a short period of time to construct, this is justification for concluding that PIE does not apply, nor can it be permissible to interpret occupation in the manner in which the municipality does in its land invasion policy which defines occupation in this way:

“Occupation: The habitual physical presence or physical presence for a substantial period of time by a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land, excluding a person who is an occupier in terms of the Extension of Security of Tenure Act, 1997 and excluding a person whose informal right to land, but for the provisions of this Act, would be protected by the provisions of the Interim Protection of Informal Land Rights, 1996 and which unbroken habitual physical presence shall have extended for a period not less than 30 days and during which 30 days the person exercises peaceful and unchallenged control over the property in question.” (emphasis added).

Record, Vol. 4, pages 32 – 38.

24.

On the papers before him, Kruger J had evidence both in the founding affidavit and the affidavits filed on behalf of the Appellants which pointed to occupation of the type protected by PIE.

25.

In paragraph 24.2 of the MEC's founding affidavit and in answer to a letter received from the LRC, the deponent says in relation to the Appellants:

“24.1 The Applicant disputes that there were or are 390 residents on the Lamontville property;

24.2 The applicant disputes their municipal officials engaged in any unlawful activities. On the contrary immediately the land invasion control unit became aware of the unlawful invasion of the property and attempts to occupy the same, steps were taken to avoid or prevent such occupation from taking place. In doing so structures that may have been constructed may have been demolished

and materials brought onto the property may have been removed.”

Record, Vol. 2, paragraph 24, page 49.

Against this background Kruger J was referred in the Appellants’ heads of argument to the provisions of section 26(3) of the Constitution and to the decisions in:

Pheko and Others v Ekurhuleni Metropolitan Municipality 2012 (2) SA 598 (CC)

Tswelopele Non-Profit Organisation and Others v The City of Tshwane Metropolitan Municipality and Others 2007 (6) SA 511 (SCA).

In the debate before Kruger J it emerged that he makes no distinction between the municipality preventing somebody from physically occupying land against the owner’s will and the situation where a person moves onto unoccupied land and constructs a shelter on that land. Kruger J expressed his view in this way:

“If a homeless person, Mr A, walks onto a piece of land owned by the MEC and says I am homeless I need to find a place to live I am going to construct a shack here to live

and he is prevented from doing so. He starts clearing the bush and on the same day he is told to get out and he is removed from there. How is PIE applicable?”

Record, Vol. 4, page 17, line 11-15.

Kruger J seems to believe that if a person is removed from a property which he has occupied illegally on the same day then PIE does not apply.

26.

The approach of Kruger J and of Koen J involves giving an entirely artificial meaning to the word “prevent” as it is used in the order. In its ordinary sense “prevent” means:

“Act before, in anticipation of or in preparation for (a future event, a point in time).”

Shorter Oxford English Dictionary (6th Ed.) Vol. 2, page 2341.

When read in the context of the remainder of the order the use of the word “prevent” is simply an euphemism for eviction. The prevention of occupation once a person has come onto the property differs entirely from prevention effected before occupation occurs. It does not make sense to say that the police may prevent occupation of a property by removing somebody who has already gained access to and is in occupation of the property.

27.

The contention is dealt because it seems that the argument found favour with the judges of the Supreme Court of Appeal. The question is, however, important because the most obvious place for a homeless person to seek shelter is on vacant land belonging to the province or the municipality. The jurisprudence ought to be clear that the province and the municipality are pre-eminently the organs of State which have a constitutional duty to provide, as far as is practicable, either housing or temporary shelter to the homeless not simply to evict people without regard to where they are to go.

THE SUPREME COURT OF APPEAL

28.

The Supreme Court of Appeal was directed to section 26(3) of the Constitution and the authorities to which Kruger J was directed. In addition, reference was made to the decision in:

Motswagae and Others v Rustenburg Municipality and Another 2013 (2) SA 613 (CC) at 616 G-H

where the Court in considering leave to appeal said:

“This case raises the constitutional question of whether s 26(3) protects the undisturbed occupation of everyone’s homes absent a court order. It also raises the issue whether the municipality has acted constitutionally, lawfully and reasonably.”

The submission on behalf of the Appellants to the Supreme Court of Appeal concluded in this way:

“There is no reason in principle why when faced with unlawful occupation of the property situate within its jurisdiction, the municipality cannot approach the court

for an order and the matter can then be considered in accordance with the requirements of PIE and against the background that it is for the court to determine the circumstances in which unlawful occupiers are to be removed from property.”

29.

In regard to the issue of joinder and *locus standi* relied upon by Kruger J, the attention of the Supreme Court of Appeal was drawn to the provisions of section 38 of the Constitution which provides:

“Anyone listed in this section has the right to approach a competent court alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights.”

The reference to this section ought to have persuaded the Supreme Court of Appeal that Kruger J erred in finding that the Appellants’ application for leave to intervene fell to be dismissed. It follows that the Supreme Court of Appeal must have refused leave to appeal on the basis that section 26(3) of the Constitution and PIE were not engaged which was the principal finding of Koen J and Kruger J.

30.

The Appellants accordingly submit that there is a need to declare unequivocally that orders in the form granted by Koen J and Kruger J are simply unconstitutional, not only because they are granted in breach of section 26(3) of the Constitution and PIE but also because they give to the municipality unfettered power to evict people, to remove their possessions and to demolish their structures without restraint. In this sense the order infringes the occupier's right to personal security and privacy as well as their property rights in their materials and their belongings in the sense explained by Cameron JA in:

Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality and Others 2007 (6) SA 511 (SCA) at 516 I-517.

THE APPROACH OF THE MEC IN THIS COURT

31.

In the application for leave to appeal the following argument is advanced by the MEC. It is said in paragraph 23 of the affidavit that:

“It is, I submit, evident from the content of the Order that it was directed at future and not past conduct.”

Answering affidavit, paragraph 23, page 13.

It is said in paragraph 28 that:

“Viewed holistically the Order was intended to impact only in respect of conduct that was likely to take place subsequent to the grant thereof. It did not affect the right of any person which may have accrued prior to the grant of the Order.

Answering affidavit, paragraph 28, page 15.

It is then said at paragraph 58:

“No person has any lawful right to take occupation of any of the properties against the will of the Third Respondent. Any person who might have done so prior to the grant of the Order would be entitled to enforce

their rights in terms of section 26(2) of the Constitution and/or PIE.”

Answering affidavit, paragraph 58, page 28.

Finally it is said in paragraph 71:

“On a proper construction of the Order it does not sanction the eviction of any person without a Court Order. No evictions of any persons were undertaken pursuant to the grant of the Order.”

Answering affidavit, paragraph 71, page 34.

Inherent in this approach is the startling proposition that the constitutional rights of people occupying the properties unlawfully after the date of the order are unprotected.

32.

The argument also assumes that the homeless population of the Province of KwaZulu-Natal is static and is accommodated in existing informal settlements.

33.

Nowhere does the MEC deal with how people becoming homeless after 28 March 2013 are to be accommodated. The argument overlooks the fact that the order covers a massive area and after the date of the order any person found on that land or constructing homes on the land can be prevented from doing so by their removal and their homes being demolished without further ado.

34.

When one considers that the MEC in seeking the order confirms that:

“The Applicant does not have the means or ability to undertake the policing of the property.”

Record, Vol. 2, paragraph 56, page 59.

it is clear that the order is intended to be used to evict or remove people from the properties identified in the order after they have been found on the properties and have had an opportunity to build homes.

Record, Vol. 2, paragraph 55, page 59.

35.

The order authorizes the police and the municipality to remove those people and to demolish the structures without any inquiry whatsoever simply on the basis that after the date of the order anybody occupying the properties listed in the order may be evicted.

36.

It is therefore illogical to suggest that before the date of the order the persons occupying the properties are protected by the Constitution and PIE but from the date of the order going forward no such protection is afforded to them because a court has ruled, without knowing the circumstances in which they occupy the properties, that they must be removed without regard to where they are to go once they have been evicted in terms of the order.

37.

There is no justification for such a dramatic change to the rights afforded to homeless people and there is nothing in the order that obliges the municipality or the police to enquire into the circumstances in which the people came to occupy

the property or where those people would go once evicted in accordance with the order.

38.

Viewed in this way the effect of the order seems to offend in every respect mentioned by Cameron JA in:

Tswelopele, page 517 at para. 16

where he said:

“And it is not for nothing that the constitutional entrenchment of the right to dignity emphasizes that ‘everyone’ has inherent dignity, which must be respected and protected. Historically, police actions against the most vulnerable in this country had a distinctive racial trajectory: white police abusing blacks. The racial element may have disappeared, but what has not changed is the exposure of the most vulnerable in society to police power and their vulnerability to its abuse. Reading comparable case reports from the decades preceding these events, it is impossible not to endorse appellants’

counsel's submission that in its lack of respect for the poor and the vulnerable, and in the official hubris displayed, what happened displays a repetition of the worst of the pre-constitutional past.”

39.

Other than to sterilize vast tracts of land within the province from the effect of unlawful occupation, the order simply excuses both the courts and the municipality from undertaking the just and equitable inquiry contemplated by *Grootboom*.

40.

The Appellants accordingly seek an order in the following terms:

41.1 The appeal is upheld with costs, including the costs consequent upon the employment of two junior counsel.

41.2 The order of Koen J dated 28 March 2013 is set aside and there is substituted therefor an order in the following terms:

“The application under Case No. 3329/2013 is dismissed with costs.”

41.3 The order of Kruger J made on 10 May 2013 is set aside and the First Respondent is ordered to pay the Appellants’ costs, including the cost of counsel where applicable.

41.4 The costs of the application for leave to appeal to the Supreme Court of Appeal are to be borne by the Third Respondent.

L.B.BROSTER SC

S.J. LINSOTT

I. VEERASAMY

CHAMBERS

DURBAN

12 December 2013