

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CC CASE NO: /2013
SCA CASE NO: 412/2013
KZN HC CASE NO: 3329/2013

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

SECOND AND THIRD RESPONDENTS' ANSWERING AFFIDAVIT

I, the undersigned, **Shakilla Naicker**, do hereby make oath and say:

1.

I am the acting Senior Manager: Property Management of the **Department of Human Settlements** (*"the Department"*).

2.

By virtue of the position occupied by me, I am authorised to depose to this affidavit and to oppose this application on behalf of the **Member of the Executive Council for Human Settlements of the Province of KwaZulu-Natal** (*“the third respondent”*).

3.

For the sake of convenience, I also propose to depose to this affidavit on behalf of the second respondent and the **Member of the Executive Council for Public Works for the Province of KwaZulu-Natal** (*“the third respondent”*).

4.

The content of this affidavit is true and correct and save where I state otherwise or is indicated by the context, within my personal knowledge and belief. Certain of the information set out herein has been extracted from the records of the third respondent which, by virtue of the position occupied by me, fall under my jurisdiction and control.

5.

Legal submissions made by me herein are founded upon advice furnished to the second and third respondents by our legal representatives and are accepted as being correctly stated.

6.

I have read and had regard to:

- 6.1. the notice of application for leave to appeal dated **23 August 2013**;
- 6.2. the founding affidavit dated **23 August 2013** deposed to by **Lindelwa Shirley Mdoana** ("**Mdoana**") together with the annexures thereto,

and respond thereto as is hereinafter set forth.

7.

In doing so I propose to restrict myself to the averments made therein which warrant a response. Averments not specifically addressed or responded to by

me and which are inconsistent with the content of this affidavit must be regarded as having been denied.

8.

Before addressing the specific averments contained in the founding affidavit, I consider it appropriate to set out the relevant antecedents to the launch of the application in which the applicants sought and were denied leave to intervene.

BACKGROUND

9.

The third respondent is the owner of and exercises jurisdiction and control over the properties¹ (*"the properties"*) which are the subject of the Order² (*"the Order"*) granted by **Koen, J.** on **28 March 2013**.

10.

Most of these properties were earmarked for housing development and, in particular, the construction of low cost housing for persons in need thereof in an endeavour to fulfil the obligations imposed upon the State in terms of

¹ Annexure **B**: pages 5 – 41; pages 64 - 93

² Annexure **C**: page 42

section 26(1) of the Constitution of the Republic of South Africa Act, No. 108 of 1996 (*“the Constitution”*). The remaining properties either serve as a basis for the provision of public services and/or are earmarked for such purpose.

11.

The progress that was undertaken in the latter regard in relation to each of the said properties was particularised in the papers in the application³.

12.

The events that resulted in the launch of the application include those summarised hereunder.

13.

During or about **September 2012** the Department became aware that one of its properties located in Lamontville (*“the Lamontville property”*) was being unlawfully invaded.

³ Annexure B: pages 64 - 93

14.

The assistance of the **South African Police Services (“SAPS”)** and the **Land Invasion Control Unit (“the LICU”)** of the first respondent was invoked and they succeeding in repelling the invasion.

15.

It subsequently emerged that there was a systematic and organised campaign to invade certain properties, including those foreshadowed by the Order. More than nine (9) separate properties were targeted by the invaders. The **LICU**, assisted where necessary by the **SAPS**, took the necessary steps when we and/or they became aware of the invasions to repel the same. I am aware that at least one private property owner was obliged to engage the services of a private security company to repel the invasion of its property.

16.

Whilst the latter process was ongoing, the **Legal Resources Centre (“LRC”)** communicated with the first respondent and asserted that it represented 390 persons who claimed that they were in occupation of the Lamontville property and that they had been unlawfully evicted therefrom.

17.

Representatives of our offices met with representatives of the **LRC** and the first respondent with a view to investigating the plight of the persons whom the **LRC** was representing with a view to resolving their complaints.

18.

Investigations undertaken by our offices caused us to doubt whether the persons whom the **LRC** was representing were indeed homeless and in occupation of the property.

19.

Our doubts were based on the considerations, *inter alia*, that:

19.1 it was unlikely that some 390 persons would all become “homeless” at the same time and take occupation of the Lamontville property;

19.2 our investigations revealed that most if not all of the said persons had other accommodation in which they were living in but sought to assert that they were in occupation of the Lamontville property

purely in order to gain some preference in being allocated other housing;

19.3 no children, women or elderly persons were found on the Lamontville property which is what one would reasonably have expected if families were in occupation thereof;

19.4 furthermore, it appeared that certain persons referred to as shacklords had tried to take advantage of the situation by purporting to allocate rights to occupy the property in return for monetary consideration.

20.

The third respondent and our offices reasonably apprehended an escalation in the land invasions that were taking place and that the **LICU** would have difficulties in resisting the same because of the widespread nature thereof and the surreptitious and/or clandestine circumstances under which the invasions were taking place.

21.

The **LICU** and **SAPS** indicated at that stage that they were not prepared to protect the third respondent's properties unless their conduct was sanctioned by a Court Order authorising them to so do.

22.

The third respondent thereupon launched the application and on **28 March 2013** secured the grant by **Koen, J.** of an interim Order with immediate effect:

22.1. authorising the first and second respondents to take all reasonable and necessary steps:

22.1.1. to prevent any persons from invading and/or occupying and/or undertaking construction of any structures and/or placing any material upon the properties;

22.1.2. to remove any materials placed by such persons upon the properties;

22.1.3. to dismantle and/or demolish any structure or structures that may be constructed upon the properties ***subsequent to the grant of the Order;***

22.2. interdicting and restraining any persons from invading and/or occupying and/or undertaking the construction of any structures and/or placing of any material upon any of the properties.

23.

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

24.

I emphasise in this regard that the first and second respondents were authorised by the Order to prevent any ***future*** invasions and/or the occupation of the properties and to prevent any persons from undertaking the construction of any structures and/or placing any material upon the properties.

25.

I furthermore emphasise in this regard that paragraph 1.1.3 of the Order authorised the first and second respondents to dismantle and/or demolish any structure or structures that were constructed ***subsequent to the grant of the Order.***

26.

The founding affidavit to the application made it clear that the rights of any persons who may have been in occupation of any of the properties and who may have constructed any structures thereon and, in particular, any rights which the applicants sought to assert were ***unaffected*** by the relief sought thereby.

27.

The objective underlying the grant of the Order was to prevent unlawful land invasions which were contemplated by **Yacoob, J.** in **Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 48 CC** in the following terms:

“[92] This judgment must not be understood as approving any practice of land invasion for the purpose of coercing a State structure into providing housing on a preferential basis to those who participate in any exercise of this kind. 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.”

28.

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 persons which may have accrued **prior** to the grant of the Order.

29.

The Order was published in accordance with the requirements thereof by, **inter alia**:

- 29.1. placing a copy with a translation thereof in **isiZulu** in prominent places upon each of the properties;
- 29.2. by advertising the Order together with a translation thereof in **isiZulu** in the **Ilanga** newspaper for a period of three days consequent upon the grant of the Order.

30.

The Order has served to fulfil the purpose for which it was granted.

31.

In the immediate period after the grant thereof the intensity and scale of the invasions decreased significantly. To the extent that such invasions took place, they were repelled by the **LICU** in some instances with the assistance of the **SAPS**.

32.

The invasions have now as far as our offices are aware ceased and are no longer taking place.

33.

I have no doubt that this is because of the grant of the Order and the publication thereof.

34.

On **25 April 2013** the applicants launched an application out of the KwaZulu-Natal Durban High Court under case number 4431/2013 for, *inter alia*, an Order:

- 34.1. declaring the respondents herein to be in breach of the Order granted by **Koen, J.** on **28 March 2013**;
- 34.2. interdicting the respondents from demolishing any structures and/or dwellings and/or shelters erected by and used as a home by the applicants upon the Lamontville property;
- 34.3. ordering the respondents to construct for those individual applicants on the Lamontville property who were evicted on **19** and **24 April 2013** and who still require them temporary residential dwellings and/or structures and/or shelters at least equivalent to those that were destroyed and which are capable of being dismantled at the site at which their previous shelters were demolished.

35.

The latter application is being opposed by the respondents.

36.

The papers in the latter application reveal various disputes of fact revolving, *inter alia*, around the questions:

- 36.1. as to who precisely the persons who claim to constitute the applicants therein are. Conflicting and uncorroborated lists were put up by the **LRC** in relation thereto. The original list⁴ that was put up contained the names of 558 adults and 57 children (a total of 615). A subsequent list⁵ that was put up in support of the present application contained the names of 273 adults and 25 children (a total of 298) and not the names of the 390 applicants. Only 18 of the persons on the latter list claimed that they took occupation of the Lamontville property in September 2012. The others claimed that they took occupation subsequent thereto. Most did not indicate the dates on which they took occupation of the Lamontville property.
- 36.2. whether any of the applicants were in occupation of the Lamontville property in the sense that they were residing thereupon as at the dates suggested by them.

⁴ Annexure **B**:pages 155 – 169 (annexure **JZ 1**)

⁵ Annexure **B**:pages 170 – 191 (annexure **JZ 2**)

37.

At least thirteen (13) of the applicants were identified as being beneficiaries of the State Housing Subsidy Scheme and who had been provided with housing subsidies (and who were therefore disqualified from any further assistance from the State in respect of housing).

38.

Evidence of certain of the applicants who have traceable localities at which they were living was set out in an affidavit deposed to by one of the third respondent's investigators.

39.

Balakazi Madikizela the Senior Manager: Property Management deposed to the answering affidavit in the application on behalf of the third respondent and confirmed that in the event of it being established that any of the applicants were in fact residing upon the property and/or genuinely homeless, that the third respondent would take the necessary steps to

ensure that they are provided with temporary accommodation pending the provision of permanent accommodation.

40.

By agreement between the parties to the application it has been adjourned pending a verification process which was to be undertaken by the first respondent.

41.

The objective underlying the verification process is to:

- 41.1 verify which of the applicants are genuinely homeless and in need of accommodation in order to ensure that their housing requirements are addressed;
- 41.2 identify those of the applicants who have already been allocated homes and/or granted housing subsidies and who are therefore disqualified from any further assistance from the State in respect of their housing requirements;

41.3 identify those of the applicants who are engaged in queue-jumping in seeking to benefit from the State housing schemes.

THE APPLICATION FOR LEAVE TO INTERVENE

42.

It is trite that in an application for leave to intervene the party seeking to do so bears the onus of establishing that such party has a *direct and substantial* interest in the subject matter of the litigation and that such interest is a *legal interest* in the subject matter of the litigation which may be *prejudicially affected* by the judgment of the Court.⁶

43.

The Order affects only the rights of persons who were and/or are desirous of taking occupation of the properties foreshadowed thereby ***subsequent*** to the grant of the Order. Such persons would in any event be engaging in an illegality in trespassing upon and taking occupation of such properties in circumstances where they have no lawful right to do so. The Order does not affect and/or impact upon any of the entrenched rights of any persons

⁶ **United Watch & Diamond Company (Pty) Ltd v Disa Hotels Ltd 1972 (4) SA 409 C at 417A-C**

including the applicants who may have been in occupation of any such properties *prior* to the grant thereof.

44.

Insofar as the applicants seek to assert such rights they are doing so through the pending application under case number 4431/2013.

45.

The applicants did not in support of their application for leave to intervene assert that they had and/or have the intention to take occupation of the Lamontville property subsequent to the grant of the Order. On the contrary the application for leave to intervene was founded upon the assertion that the applicants were in occupation of the Lamontville property and were evicted therefrom. As already pointed out the rights asserted by the applicants in this regard are the subject of the application under case number 4431/2013. **These rights are unaffected by the Order.**

46.

It is submitted in the circumstances that the applicants do not have:

46.1. a *direct and substantial interest* in the subject matter of the litigation;

46.2. a *legal interest* in the subject matter of the litigation which may be *prejudicially affected* by the judgment of the Court therein.

47.

In the circumstances, the application for leave to intervene was, with respect, correctly refused by the KwaZulu-Natal High Court.

48.

The application for leave to appeal against the latter Order was also with respect, correctly refused by the KwaZulu-Natal High Court Durban and subsequently by the Supreme Court of Appeal

49.

I turn now to address the averments contained in the applicants' founding affidavit which warrant a response.

THE APPLICANTS' FOUNDING AFFIDAVIT

AD PARAGRAPH 1

50.

As far as I am aware and have been able to establish no person with the name **Lindelwa Shirley Mdoana** ("**Mdoana**") features on the lists annexures "**JZ 1**" or "**JZ 2**". It is therefore doubtful that **Mdoana** was one of parties who sought leave to intervene and is entitled to depose to the founding affidavit in this application.

AD PARAGRAPH 2

51.

I am constrained to deny the averments contained in the first sentence of paragraph 2. I dispute the correctness of the legal advice furnished to the applicants insofar as it conflicts with the content of this affidavit.

AD PARAGRAPH 3

52.

I note the averments contained in paragraph 3. I submit that the High Court and the SCA correctly ruled that the applicants had no legal right to intervene

in the application and accordingly refused the application for leave to appeal against the judgment of the High Court. I deny that it is in the interests of justice for the applicants to be granted the relief sought by them herein.

AD PARAGRAPH 4

53.

I emphasise that the objective underlying the launch of the application and the grant of the Order was pre-emptive in order to avoid or prevent threatened future land invasions which are inimical to the systematic provision of adequate housing on a planned basis. The Order was not intended to and did not interfere with or affect the entrenched rights of any of the persons including the applicants who were in occupation of any of the properties including the Lamontville property prior to the grant of the Order.

AD PARAGRAPH 5

54.

The applicants have misconstrued the Order. It does not interfere with or affect the entrenched rights of the applicants who claim that they were in occupation of the Lamontville property prior to the grant of the Order. The applicants are asserting such rights in any event in the application under case

no: 4431/2013. In the event of the disputed issues in the application being resolved in the applicants' favour the applicants would be entitled to the full benefits of their rights under section 26 of the Constitution of the Republic of South Africa Act, No. 108 of 1996 (*"the Constitution"*) and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, No. 19 of 1998 (*"PIE"*).

AD PARAGRAPH 6

55.

We have been advised and I respectfully submit that **Kruger, J.** correctly refused the application for leave to intervene on the grounds that the applicants did not and do not have any *direct* and/or *substantial* and/or *legal interest* in the grant of the Order and that the provisions of PIE were not implicated in any way.

AD PARAGRAPH 7

56.

Neither **Koen, J.** nor **Kruger, J.** were requested to furnish their full reasons underlying the grant of the Order and/or the dismissal of the application for leave to intervene. It is accepted that the SCA and even this Court do not

usually give written reasons for summarily rejecting an application for leave to appeal.⁷ I deny the averments contained in the first sentence of paragraph 7.

AD PARAGRAPH 8

57.

The Order does not contemplate or permit the eviction of persons. It restrains persons subsequent to the grant of the Order from invading or occupying or undertaking the construction of any structures and/or placing any material upon the properties. It authorises the first and second respondents to remove any materials placed upon the properties. It authorises the first and second respondents to demolish any structure or structures that may be constructed in breach of the Order subsequent to the grant thereof. The Order does not in any way affect or interfere with or impact upon the rights of any of the applicants who all claim that they were in occupation of the Lamonville property prior to the grant of the Order. I accordingly deny the averments contained in paragraph 8.

⁷ **Mphahlele v First National Bank of South Africa Limited 1999 (2) SA 667 CC at paras [8] – [19]; Beyers v Elf Regders Van Die Grondwetlike Hof 2002 (6) SA 630 CC at paras [5] – [12]**

AD PARAGRAPH 9

58.

No person has any lawful right to take occupation of any of the properties against the will of the third respondent. Any persons 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.

AD PARAGRAPH 10

59.

I have previously alluded to the fact that there is considerable uncertainty as to who precisely the applicants are and how many persons comprise the applicants. This is a matter which is subject to a verification exercise under case no: 4431/2013.

AD PARAGRAPH 11

60.

To the extent that the applicants contend and establish that they were in occupation of the Lamontville property prior to **28 March 2013** that is the date of the grant of Order by **Koen, J.** they are entitled to enforce their rights

under and in terms of section 26(2) of the Constitution and/or PIE. The Order does not in any way deprive them of any of their rights in this regard.

AD PARAGRAPHS 12, 13 AND 14

61.

I note the averments contained in paragraphs 12, 13 and 14.

AD PARAGRAPH 15

62.

I accept that there was a delay in the service of the papers in the application on the **LRC**. It appears from the endorsement on the notice of motion⁸ that the papers were served at 11h30 on **28 March 2013**.

AD PARAGRAPH 16

63.

It is apparent from the extracts referred by the applicants that **Koen, J.** was fully aware that:

⁸ Annexure **B** page 4

63.1 there was a group of persons represented by the **LRC** who claimed to be in occupation of the Lamontville property;

63.2 interactions were taking place between the **LRC** and our offices and the first respondent with a view to verifying whether such persons were indeed homeless and qualified for the allocation of housing;

63.3 the third respondent proposed to institute eviction proceedings for the eviction of such persons from the Lamontville property in the event that negotiations with the **LRC** failed.

64.

It was clearly not the intention of the respondents or indeed of the third respondent to secure the eviction of the applicants or the persons who were already in occupation of any of the properties including the Lamontville property through the Order.

65.

I accordingly deny that the applicants had any interest let alone any *legal* and/or *direct* and/or *substantial interest* in the grant of the relief sought in the application.

AD PARAGRAPHS 17 AND 18

66.

I submit that the statement made in paragraph 52 of the founding affidavit to the application is indisputable. Lawlessness and anarchy would reign if homeless persons were permitted to undertake the construction of structures upon any of the properties. I submit that the third respondent is clearly lawfully entitled to prevent persons from doing so. That was the basis underlying the grant of the Order. Land invasions cannot and should not be countenanced. Where such invasions have already taken place the invaders would be entitled to exercise their rights in terms of section 26(2) of the Constitution read with PIE.

67.

I submit that none of the authorities referred to by the applicants would have justified the refusal of the Order. On the contrary the authorities referred to fortify the basis underlying the grant of the Order. Land owners including the third respondent were and are lawfully entitled to prevent invasions of the properties owned and/or controlled by them. The application did not relate to or require the eviction of any persons in occupation of the properties. The

application was intended solely to prevent reasonably anticipated land invasions subsequent to the grant of the Order and served to fulfil such objective.

AD PARAGRAPH 19

68.

The facts in **The City of Cape Town v Rudolph & Others**⁹ are fundamentally distinguishable from those which pertain in this application. **The City of Cape Town** brought an application for the eviction of the respondents from its property which served as a public open space (“*the park*”) in a built-up area. The respondents were already in occupation of the park. The application was dismissed and a structural interdict granted against the **City of Cape Town** requiring it to take steps to accommodate the housing needs of the respondents. The application *in casu* is directed at preventing the invasion of the third respondent’s properties. Furthermore the accrued rights claimed by the applicants arising from their alleged occupation of the Lamontville property were not in any way affected by the grant of the Order. These rights are being enforced by the applicants in the proceedings under case no: 4431/2013.

⁹ 2004 (5) SA 30 (C)

AD PARAGRAPH 20

69.

In that the applicants alleged that they were already in occupation of the Lamontville property their rights were unaffected by the grant of the Order. They therefore had no *interest* let alone a *direct* and/or *substantial* and/or *legal interest* therein. None of the applicants' Constitutional rights were infringed or indeed threatened by the grant of the Order. The applicants were not entitled to intervene in the application.

AD PARAGRAPH 21

70.

The assertion that the applicants constructed habitable shacks on the Lamontville property and/or that such shacks were destroyed by the first respondent was disputed by the first respondent in the proceedings under case no: 4431/2013. I maintain that any rights claimed by the applicants as a consequence were unaffected by the grant of the Order. If indeed it is established by the applicants that such demolitions did occur they would be entitled to the grant of the relief sought in the latter application including the rebuilding of their shacks insofar as this is necessary. Their entitlement to such relief does not entitle them to intervene in the present application.

AD PARAGRAPHS 22 AND 23

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.

AD PARAGRAPH 24

72.

It is submitted that there can be no lawful objection to any land owner including the third respondent from preventing any person taking occupation of such land owner's property and constructing any structure thereon. Any such conduct would *prima facie* be unlawful. That is different from the situation where a person is already in occupation of the property. The fact in the matter of **Pontsho Doreen Motswagae and 14 Others v Rustenberg Local Municipality and Promptique TR 9 CC¹⁰** are fundamentally different from those which pertain *in casu*. In that case the Municipality undertook intrusive and objectionable construction work on the property on which the homes of the applicants were located and **Yacoob, J.** with respect correctly held that

¹⁰ [2013] ZA CC 1

the Municipality should have sought an eviction Order against the applicants. *In casu* the third respondent made it clear that the third respondent would launch an application for the eviction of the applicants in the event that the need to do so arose. The application was certainly not intended and did not provide for the eviction of the applicants from the Lamontville property.

AD PARAGRAPH 25

73.

No reference to the first respondent's **Land Protection Policy** ("*the Policy*") was made in the papers in the application. It was not the applicants' case that the first respondent relied upon the Policy in allegedly demolishing their structures. It is improper and impermissible for the applicants to seek to introduce and/or rely upon *new evidence* in the form of the Policy¹¹. Any inconsistency between the Policy and the Constitution and/or PIE is irrelevant to the relief sought herein.

AD PARAGRAPH 26

74.

I do not dispute the averments contained in paragraph 26.

¹¹ **Rail Commuters Action Group v Transnet Limited t/a Metrorail 2005 (2) SA 359 (CC) at para [36]**

AD PARAGRAPH 27

75.

I dispute that the applicant has raised any Constitutional issue warranting the grant of leave to appeal. In terms of the Order the first and second respondents were authorised to prevent land invasions of the property subsequent to the grant of the Order. The Order was not intended to and did not impact upon the accrued rights of any persons who were already in occupation of the properties as at the date of the grant of the Order. The rights claimed by the applicants were unaffected by the grant of the Order.

AD PARAGRAPH 28

76.

I deny that the applicants have demonstrated any prospects of success. I deny that it is in the interest of justice for the applicants to be granted leave to appeal.

AD PARAGRAPH 29

77.

The applicants have misconstrued or are misstating the implications arising from the grant of the Order. As far as the applicants are concerned their

entrenched rights as occupiers of the Lamontville property are totally unaffected by the grant of the Order. These rights will be addressed in the proceedings under case no: 4431/2013 *alternatively* in any proceedings launched by the third respondent for their eviction from the Lamontville property.

AD PARAGRAPH 30

78.

I submit that it would be appropriate for the application to be dismissed with costs including the costs of two Counsel.

WHEREFORE on behalf of the second and third respondents herein, I humbly pray that it may please this Honourable Court to dismiss the application with costs including the costs of two Counsel.

I CERTIFY THAT the Deponent has acknowledged that he/she knows and understands the contents of this Affidavit which was signed and sworn to before me at _____ on this _____ day of _____ 2013 under compliance with the Regulations contained in Government Notice No R1258 dated 21 July 1972 (as amended).

COMMISSIONER OF OATHS