

N THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT 42/12

CASE NO A QUO: 1413/2009

In the matter between

PONTSHO DOREEN MOTSWAGAE

First Applicant

FOURTEEN OTHERS

**Second to Fifteenth
Applicants**

And

RUSTENBURG LOCAL MUNICIPALITY

First Respondent

PROMTIQUE TR 9 CC

Second Respondent

APPLICANTS' SUPPLEMENTARY HEADS OF ARGUMENT

I INTRODUCTION

1. On 5 November 2012, the Chief Justice issued further directions inviting the parties to submit additional written argument on whether:
 - 1.1. Section 26(3) of the Constitution or any other law confers on the applicants any right not to be disturbed in the peaceful occupation and possession of their home without a court order;
 - 1.2. The premises they occupy can properly be regarded as their homes within the meaning of section 26(3) of the Constitution;
 - 1.3. The conduct authorized and caused by the first respondent has resulted and is likely to result in unlawful interference with the right of the applicants who occupy or possess their homes peacefully; and
 - 1.4. The conduct authorized and caused by the first respondent can be regarded as reasonable absent any order of court ejecting the applicants from the property concerned.

2. The Applicants answer these questions briefly as follows:
 - 2.1. Yes, section 26(3) does confer a right not to be disturbed in the peaceful occupation and possession of their home without a court order. However, that right is limited to circumstances, such as the present, where the disturbance will ultimately lead to eviction.
 - 2.2. Yes, the premises were clearly the Applicants' homes.
 - 2.3. Yes, the conduct of the First Respondent has already resulted in the disturbance of the peaceful occupation and possession of the Applicants homes. Furthermore, the intention of the First Respondent's actions was to evict the Applicants.
 - 2.4. No, the First Respondent's conduct was blatantly unreasonable in the circumstances.

3. We expand on those answers below.

II SECTION 26(3) DOES CONFER A RIGHT

4. Section 26(3) reads: “*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. No legislation may permit arbitrary evictions.*”
5. It is beyond doubt that the First Respondent intended to evict the Applicants and demolish their homes.¹ The Applicants had not consented to either the eviction or the demolition. Therefore, the First Respondent required a court order before proceeding with those acts.
6. The more difficult question posed by the Chief Justice’s directions is whether the mere disturbance of the peaceful occupation and possession of their homes required a court order. As the Applicants understand the phrase “*peaceful occupation and possession*” it includes actions short of eviction or demolition.

¹ See Part IV below.

7. In the Applicants' view, it is necessary to distinguish between two different situations. First, there is the situation where an organ of state (or a private party) wishes to disturb the peaceful occupation and possession of a person's home, but has no intention to evict the occupier or demolish her home. That would be the case, for example, if the trenches that were dug on the First Applicant's home were not the first stage in a demolition process, but to upgrade or repair water or electricity services.
8. If there is no intention to evict or demolish, then a party does not require a court order before disturbing the peaceful occupation and possession of a person's home. This is the case whether or not the disturbance would be lawful or unlawful.
9. If the occupier believes the disturbance would be unlawful, then the remedy is to seek an interdict preventing or ceasing the

action and/or a spoliation application to restore full possession and occupation.

10. This conclusion is supported by this Court's reasoning in *Schubart Park Residents' Association and Others v City of Tshwane Metropolitan Municipality and Another*.² Froneman J supported the reasoning of the Supreme Court of Appeal in *Tswelopele*³ that the *mandament van spolie* should not be developed to address situations where people's homes had been demolished. Because these situations will not concern permanent dispossession, the ordinary common-law remedies are adequately suited to deal with them.

11. The second situation is where the disturbance will ultimately lead to the eviction or demolition of the occupier's home. That was the situation here. In those situations, a person in the position of the First Respondent is obliged to obtain a court order before disturbing the peaceful occupation or possession

² [2012] ZACC 26.

³ *Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality and Others* 2007 (6) SA 511 (SCA).

of the occupier, even if the planned actions fall short of actual eviction or demolition.

12. There are two ways to reach this conclusion. Either the terms “*eviction*” or “*demolition*” in s 26(3) can be read widely to be include all preliminary steps leading up to eviction or demolition.

13. Alternatively, those preliminary steps can be regarded as an element of the general right to housing in s 26(1). As this Court held in *Jaftha v Schoeman*, “*any measure which permits a person to be deprived of existing access to adequate housing, limits the rights protected in section 26(1).*”⁴ *Jaftha* involved a section of the Magistrates’ Court Act that permitted the sale of a person’s home in execution of a judgment debt without the intervention of a judicial officer. The court held that even the threat of eviction through attachment and sale infringed s 26(1). That limitation could only be justified following the intervention of a Magistrate. The Court reached the same conclusion

⁴ *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others* [2004] ZACC 25; 2005 (2) SA 140 (CC); 2005 (1) BCLR 78 (CC) at para 34.

regarding the High Court's rules in *Gundwana v Steko Development CC and Others*.⁵

14. Similarly, preliminary steps to eviction threaten a person's peaceful occupation and possession and can only be justifiable following the intervention of an independent judicial officer. In short, if an owner seeks the eviction of people from its property against their will, it must obtain a court order before it takes any steps to evict them.

III THE PREMISES WERE THE APPLICANTS' HOMES

15. There is no doubt on the Record that the premises were the Applicants' homes. The history of the Applicants' occupation of the premises is dealt with in detail at paras 19-28 of the Applicants' Heads of Argument.

⁵ [2011] ZACC 14; 2011 (3) SA 608 (CC); 2011 (8) BCLR 792 (CC).

**IV THE CONDUCT OF THE FIRST RESPONDENT RESULTED
IN THE DISTURBANCE OF THE PEACEFUL OCCUPATION
AND POSSESSION OF THE APPLICANTS' HOMES**

16. The following facts demonstrate that the First Respondent had:
- (a) decided to evict the Applicants and demolish their homes;
 - and (b) that the digging of the trenches was the first step in that process.

16.1. The First Respondent sent a letter to the occupiers in 2007 advising them that it *“is in the process of re-developing Tlhabane Female Hostels. This process of re-development will involves (sic) the demolition of all existing female hostels and the new buildings will be erected.”*⁶

16.2. The First Respondent signed a Service Level Agreement with the Second Respondent on 20 February 2008, to be

⁶ Annexure “E” Record Vol 1, p 22.

completed on 31 December 2008, for the demolition of the Applicants' homes.⁷

16.3. On 25 June 2008, the First Respondent sent a "Final Notice" to the Applicants informing that it had "*acquired the services of a contractor to do renovations where the hostels are*" and that it had instructed the contractor to "*commence with its activities soon*".⁸ It also noted that people who were "*not satisfied with this arrangement must find their own alternative accommodation.*" The only plausible interpretation of this notice is that the First Respondent had decided to evict the Applicants and was taking steps to do so shortly.

16.4. The First Respondent (together with the Province) erected a sign next to the hostels announcing the "BUILDING OF TLHABANE HOSTELS" and identifying the First Respondent as the Implementing Agent, and the Second Respondent as the contractor.⁹ It is apparent

⁷ Annexure SLA, Record Vol 2, p 149 and p 155-156.

⁸ Annexure "PDM7" Record Vol 3, p 241, read with Record Vol 3, p 203, para 14.11.

⁹ Annexure "B" Record Vol 1, p 18.

from the sign that the decision to demolish the Applicants' homes and evict them had already been taken.

16.5. On Friday 10 April 2009, the Second Respondent began marking out building sites on the Applicants' properties.¹⁰ On Sunday 19 April 2009, a bulldozer began digging a trench next to the First Applicant's house.¹¹ Despite letters from the Applicants' attorney, the Respondents continued with their activities on 26 May 2009.¹² The First Applicant stated in her founding affidavit that the Applicants were "*living in daily in (sic) fear for our safety*".¹³

17. These facts demonstrate conclusively that the First Respondent had decided to demolish the Applicants' houses and evict them, and had begun the process of doing so. This obviously disturbed the Applicants' peaceful occupation and possession of their homes, both mentally and physically.

¹⁰ Record Vol 1, p 10, para 16.

¹¹ Record Vol 1, p 10, para 17.

¹² Record Vol 1, p 15, para 26.

¹³ Record Vol 1, p 15, para 27.

V THE FIRST RESPONDENT'S ACTIONS WERE UNREASONABLE

18. The First Respondent's actions were patently unreasonable. As detailed in the Applicants' Heads of Argument, it did not comply with Chapter 10 of the National Housing Code.¹⁴ In particular, the Municipality failed to:

18.1. Follow a proper public participation process;

18.2. Conduct a socio-economic survey;

18.3. Secure the Applicants' acceptance of alternative accommodation;

18.4. Involve the Applicants' in determining which form of development would be followed; and

18.5. Follow the prescribed four-stage process, particularly, the First Respondent did not involve the Applicants in the planning and design of the project.

¹⁴ Applicants' Heads of Argument at paras 100-112.

19. The Applicants stress that the First Respondent's actions must not only be tested against the ordinary standard of "*meaningful engagement*" established by this Court.¹⁵ The First Respondent was bound by and had to comply with the specific requirements of Chapter 10 of the Housing Code concerning redevelopments of this nature, including obtaining the consent of any displacees¹⁶ – and to engage in exhaustive attempts to facilitate inclusivity and consensus.¹⁷ Its failure to do so rendered its actions unreasonable, unlawful and unconstitutional.

NJ VAN NIEWENHUIZEN (SC)

M O'SULLIVAN

Counsel for the Applicants

Chambers, Pretoria and Cape Town

15 November 2012

¹⁵ See, for example, *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* [2008] ZACC 1; 2008 (3) SA 208 (CC) ; 2008 (5) BCLR 475 (CC).

¹⁶ Record Vol 2: "AA9" p 121 at para e.

¹⁷ *Ibid* at para b.

TABLE OF AUTHORITIES

1. *Gundwana v Steko Development CC and Others* [2011] ZACC 14; 2011 (3) SA 608 (CC); 2011 (8) BCLR 792 (CC).
2. *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others* [2004] ZACC 25; 2005 (2) SA 140 (CC); 2005 (1) BCLR 78 (CC).
3. *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* [2008] ZACC 1; 2008 (3) SA 208 (CC) ; 2008 (5) BCLR 475 (CC).
4. *Schubart Park Residents' Association and Others v City of Tshwane Metropolitan Municipality and Another* [2012] ZACC 26.
5. *Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality and Others* 2007 (6) SA 511 (SCA).