

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No. 108 / 13

In the matter between:

JABULANI ZULU AND 389 OTHERS

Appellants

and

ETHEKWINI MUNICIPALITY

First Respondent

MINISTER OF POLICE

Second Respondent

**MEC FOR HUMAN SETTLEMENTS AND
PUBLIC WORKS, KWAZULU-NATAL**

Third Respondent

and

**AB AHLALI BASEMJONDOLO MOVEMENT
SOUTH AFRICA**

Amicus Curiae

AMICUS CURIAE'S WRITTEN SUBMISSIONS

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A INTRODUCTION

1 The principal issue in this appeal is the validity of an order granted by his Lordship Mr. Justice Koen on 28 March 2013 (“the March 2013 order”).¹ The March 2013 order was obtained by the first respondent (“the MEC”) against the second respondent (“the municipality”) and the third respondent (“the Minister of Police”).

2 The March 2013 order is framed as a *rule nisi*, part of which operates as an interim interdict. It is important to set out the interdictory parts of the order now, because there is some dispute about what they mean.

3 The interim interdict in the March 2013 order reads as follows

–

1.1 [The municipality and the Minister of Police] are hereby authorised to take all reasonable and necessary steps:

1.1.1 to prevent any person from invading and/or occupying and/or undertaking the construction of any structures and/or placing any material upon the immovable properties

¹ The March 2013 order appears at pages 1 and 2 of the bundle including the statement of agreed facts, filed on 9 December 2013. It also appears as annexure “C” to the founding affidavit of Aaron Mzimela in Abahlali’s application for leave to intervene.

described in “NOM1 – 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 subsequent to the grant of this order.

1.2 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 aforementioned properties;

...

4 The appellants (“the Madlala residents”) contend that the March 2013 order authorises the eviction of an unknown and unknowable class of people from land stretching over approximately 9500 km², almost all of which is within the municipality’s area of jurisdiction (“the land”).² They say that this conflicts with the Prevention of Illegal Eviction from, and Unlawful Occupation of, Land Act 19 of 1998 (“the PIE Act”).

5 The respondents say that the March 2013 order does not authorise eviction at all.³ They say that the most the order

² Affidavit of Daniel Basckin, annexed to the appellants’ Notice in terms of Rule 31, para 7.

³ Heads of Argument filed on behalf of the MEC and the Minister (“MEC’s Heads”), para 51; Municipality’s Heads of Argument, para 51.

permits the municipality and the Minister of Police to do is prevent persons from moving on to the land after the date on which it was granted.⁴ The respondents suggest that, if a person does manage to establish a home on any of the land to which the March 2013 order applies, he may not be evicted without the PIE Act being complied with.

6 The *amicus curiae* (“Abahali”) agrees with the Madlala residents that the March 2013 order plainly authorises eviction. It does so prospectively, against many thousands of people whose identities, circumstances and needs could not have been known to Koen J when he granted it.

7 The respondents do not suggest what meaning could be ascribed, for example, to the words “*to dismantle or demolish any structures*” that would not include authority to evict a person from his home and then demolish it. Nor, with respect, could they. This is the clearest, but not the only, indication the March 2013 order is an eviction order. More will be set out below.

⁴ MEC’s Heads, para 48.

8 Abahlali also agrees with the Madlala residents that the March 2013 order conflicts with the PIE Act. But its defects go further. The March 2013 order abdicates the constitutionally-ordained role of the Court in deciding whether and when evictions should happen. It hands this function over to the Minister of Police and the municipality. Its effect is to permit them to decide – without the slightest guidance – whether and when to remove people from the land, whether a home has been established on the land at all, and when a person’s occupation of the land took place.

9 Section 26 (3) of the Constitution makes clear that these issues, as with every other question connected with eviction, are for the Courts themselves to decide. They cannot simply be handed over to the municipality and the Minister, whose attitude to the poor and vulnerable is so distressingly evident from the record. The municipality has evicted the appellants, without a court order, 25 times.⁵

10 The March 2013 order also transgresses the most basic principles of the rule of law, for at least the following reasons.

⁵ See the Record in case no. 4431/2013 (R-4431), page (p) 13, paragraph (para) 7.

10.1 In *Chief Lesapo*,⁶ this Court identified the rule against self-help as a basic feature of our Constitutional order. The rule against self-help is “*necessary for the protection of the individual against arbitrary and subjective decisions and conduct of an adversary*”.⁷ But the March 2013 order permits self-help on a massive scale. It permits the Minister and the municipality to make a number of “*arbitrary and subjective decisions*” to evict potentially thousands of people, now and in the future.

10.2 The order purports to have coercive effect against an unknowable multitude who could have had no notice of it, or of the fact that it was being sought, and who were not and – could not have been – cited on it. Yet their interests, in having access to a home, and in occupation of the land, and in not being removed from it, were clearly implicated. This, too, clearly breaches the constitutional principle of legality. But even the

⁶ *Chief Lesapo v North West Agricultural Bank and Another* 2000 (1) SA 409 (CC) (“*Chief Lesapo*”).

⁷ *Chief Lesapo*, para 18.

common law would have voided the March 2013 order for non-citation.⁸

10.3 Paragraph 1.2 of the order is an interdict against the public at large, enjoining them to obey the law. It has long been recognised that interdicts of this nature have no juristic foundation.⁹

11 These basic defects in the March 2013 order cut to the heart of the judicial function in a society based on the rule of law. A court that grants an order against an unknown, undefined class of persons, or against the public at large, does not issue an “order” at all; it grants an edict. In other words, it legislates.¹⁰ The apartheid courts recognised that a Parliament acting as a court is no court at all, and its “orders” are void.¹¹ Similarly, a court purporting to legislate is not discharging a judicial function, and its “order” is null and void in consequence.

⁸ *Lewis & Marks v Middel* 1904 TPD 291 (“*Lewis*”), 303.

⁹ *City of Cape Town v Yawa and Others* [2004] All SA 281 (C) (“*Yawa*”), 284e-h.

¹⁰ *Kayamandi Town Committee v Mkhwaso* 1991 (2) SA 630 (C) (“*Kayamandi*”), 634G-635C.

¹¹ *Minister of the Interior v Harris* 1952 (4) SA 769 (A).

12 For all of these reasons, Abahlali submits that, at best for the respondents, the March 2013 order is incompatible with sections 26 (3) and 1 (c) of the Constitution, and falls to be set aside. More fundamentally, however, the order is a nullity, and may be declared as such.

13 In the remainder of these submissions, Abahlali addresses the following issues –

13.1 Whether the March 2013 order authorises eviction;

13.2 The incompatibility of the March 2013 order with section 26 (3) of the Constitution; and

13.3 The incompatibility of the March 2013 order with the principle of legality.

B THE MARCH 2013 ORDER AUTHORISES EVICTIONS

14 The respondents assert that the March 2013 order merely authorises the municipality and the Minister of Police to prevent a person from coming on to the land. They say it does not authorise eviction. However, they do not offer an interpretation of the March 2013 order that supports this assertion. One searches the respondents' papers in vain for a serious engagement with what the March 2013 order actually says, and its overall effect.

15 While they do not expressly say so, the respondents' strenuous assertion that the March 2013 order does not authorise "eviction" seems to rely on the fact that the words "evict" or "eviction" are not used in the order. While this is true, the words that are used make clear that the March 2013 order has two purposes –

15.1 The first is to prevent anyone from coming onto the land in the first place.

15.2 The second is to discontinue occupation of the land once it has been established. Abahlali submits that this can only ever be achieved by evicting the occupants.

16 There are at least three features of the March 2013 order which confirm that it is, in fact, an eviction order.

The Power to “Dismantle and/or Demolish”

17 First, paragraph 1.1.3 of the order authorises the municipality and the Minister of Police to “*dismantle and/or demolish any structure or structures that may be constructed upon the aforementioned properties subsequent to the grant of this order*”. This clearly encompasses an eviction.

18 The respondents do not explain how an order can authorise demolition of a structure or structures on the land without also authorising the eviction of anyone who happened to be in possession or occupation of those structures. Nor could they.

19 In *Motswagae*¹² this Court held that the meaning of eviction, in section 26 (3) of the Constitution, is wider than simply

¹² *Motswagae and others v Rustenburg Municipality and Another* 2013 (2) SA 613 (CC) (“*Motswagae*”)

excluding someone from their place of residence. It also consists in the “*attenuation or obliteration of the incidents of occupation*”.¹³ To demolish someone’s home obliterates all the incidents of occupation. For the purposes of section 26 (3), therefore, “eviction” and “demolition” are synonymous. The March 2013 order clearly authorises demolition, and so also authorises eviction.

The Prevention of “Invading and/or Occupying” the Land

20 Second, in authorising the Minister of Police and the municipality to “*prevent any persons from invading and/or occupying*” the land, the order clearly refers not just to the initial act of entering on to the land, but also to a person’s continued presence on it.

21 This is clear from the distinction drawn between “invading” and “occupying”.

21.1 To “*invade*” land means to “*intrude on*” the land, or to “*enter*” it.¹⁴

¹³ *Motswagae*, para 12.

¹⁴ Concise South African Oxford Dictionary, 2002.

21.2 To “*occupy*” land means to “*reside or have one’s place of business in*”.¹⁵

22 It is accordingly clear that the order is directed not just at stopping people from entering on the land, but also from discontinuing their occupation of it. There is no way of doing that but to evict them.

23 The respondents’ written submissions place great emphasis on the use of the word “*prevent*” at paragraph 1.1.1 of the order,¹⁶ but this does not assist them. It is true that one can “*prevent*” occupation or invasion of land by stopping them before they commence. However, one can just as easily “prevent” an invasion by repelling it, or “*prevent*” the ongoing occupation of land by stopping it from continuing once it has commenced. On its face, the March 2013 order permits either form of “prevention”.

24 There is nothing in the March 2013 order which suggests that a narrow construction of “*prevent*” is intended. Indeed, the repeated use of “*and/or*” formulations, and the authorisation of

¹⁵ Concise South African Oxford Dictionary, 2002.

¹⁶ MEC’s Heads, para 48.

“all reasonable and necessary steps” strongly suggests that the powers of the municipality and the Minister of Police are intended to be as broad as possible.

25 In any event, it is unlikely that an ordinary police constable, or a security guard, charged with implementing the March 2013 order, will be concerned these niceties. The order does not itself provide any guidance on the manner of its implementation.

The Interdiction of “Invading and/or Occupying”

26 Third, the interdiction of *“any person”* from *“invading and/or occupying”* the land in paragraph 1.2 of the March 2013 order also permits an eviction. An interdict against occupation clearly permits the discontinuation of occupation by evicting the occupier. Indeed, the Supreme Court of Appeal has, in the past, chosen to frame an eviction order as an interdict against occupation.¹⁷

¹⁷ *City of Johannesburg v Rand Properties* 2007 (6) SA 417 (SCA), para 78.

Interpretation

- 27 The respondents offer no evidence outside the order to aid in its interpretation. It is true that the application before Koen J contains generalised allegations about instances of “land invasion” in Durban, but the application is itself silent on exactly what the limits of the powers conferred by the March 2013 order are.
- 28 If anything, the founding affidavit of Balakazi Madikizela suggests that the March 2013 order is intended to authorise evictions. At paragraph 57 of that affidavit¹⁸ it is recorded that the municipality’s Land Invasion Control Unit (LICU) would not act “*to protect the properties unless their conduct is sanctioned*” by a court order. The LICU did not need – and would not have asked for - a court order unless they intended to carry out evictions.
- 29 In these circumstances, one would have expected the MEC to at least attempt to re-assure the Court that the March 2013 order would not be used to evict anyone from their home if that

¹⁸ R-3329, pp59 – 60, para 57.

was not his intention. No such attempt is made, and the text of the order clearly empowers the municipality and the police to evict at will.

30 In any event, it is trite that, where a judgment or order is clear and unambiguous on its face, no extrinsic evidence is admissible to interpret it.¹⁹ Abahlali submits that the meaning of the March 2013 is clear on its face. It is an eviction order.

¹⁹ *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) 304D-H.

C VIOLATION OF SECTION 26 (3) OF THE CONSTITUTION

31 Section 26 (3) of the Constitution says –

“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.”

32 Abahlali submits that the March 2013 order is both textually and purposively incompatible with section 26 (3).

Textual Incompatibility

33 On a purely textual level, the March 2013 order is incompatible with Section 26 (3), because –

33.1 Evictions are authorised only after a Court has considered all the relevant circumstances.

33.2 The March 2013 order, however, authorises evictions prospectively, before occupation has been established, and before any of the circumstances relevant to the decision to evict have come into existence, let alone established and evaluated by a Court.

Purposive Incompatibility

- 34 It is trite that Constitutional provisions must be interpreted generously and purposively, in a manner that gives expression to the underlying values of the Constitution,²⁰ and has due regard to their social and historical context.²¹
- 35 The purpose of Section 26 (3) is to subject eviction to special judicial control.²² The historical and social context of this purpose is clear. Segregation and Apartheid depended to a great extent on controlling where black people were allowed to live, depriving them of access to land in “white” South Africa and crowding them into rural “bantustans” and urban townships.
- 36 Black people were, until the mid-1980s, formally prohibited from living in South Africa’s major urban areas, except as

²⁰ See *Mansingh v General Council of the Bar and others* 2014 (1) BCLR 85 (CC) para 16, and the cases cited there.

²¹ *Government of RSA and Others v Grootboom and Others* 2001 (1) SA 46 (CC), para 25.

²² *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) (“*Port Elizabeth Municipality*”), para 18.

employed temporary residents on the most stringent of conditions.²³

37 This need to exercise control over black people's residence resulted in a legal framework which facilitated eviction, often without a court order.²⁴ The legacy of all of this at the end of Apartheid was massive land hunger. It is a legacy that endures today. The result is literally millions of South Africans occupy land that they have no common law right to occupy. Many have been driven, and are still driven, to move onto land to which they have no right because they simply have nowhere else to go. Unlawful land occupation is a social phenomenon that is likely to persist for the foreseeable future.

38 Section 26 (3) recognises this reality, and the features of the Apartheid legal and social order that led to it. As a result, it places decisions relating to the removal of people from their homes in the hands of the Courts. A Court may only permit an eviction where it is satisfied, after considering all the relevant

²³ See for example, *Komani NO v Bantu Affairs Administration Board, Peninsula Area* 1980 (4) SA 448 (A), in which it was finally decided that a black person with a permit to reside in an urban area could do so with his spouse, even though she did not have a permit.

²⁴ The Prevention of Illegal Squatting Amendment Act 92 of 1976 provided for eviction without a court order.

circumstances, that an eviction order should be issued. The decision of whether and when to evict is for a Court, and a Court alone.

39 The March 2013 order is, at its most basic, a contrivance intended to defeat Court oversight. Although it is framed as an order against the Minister of Police and the municipality, it is really an order authorising wide-ranging coercive action against anyone who may have established a home on the land it applies to.

40 From the date on which it is granted, it gives the Minister of Police and the municipality the power to decide whether, when and how to remove people from the land. It subjects eviction to executive, rather than judicial, control. That is impermissible.

41 The respondents are at pains to suggest that the March 2013 order does not apply to people's homes. Even if that were a reasonable textual meaning to ascribe to the order (it is not), the respondents' argument still begs the question: who decides what amounts to a home, and whether to evict? The

only possible answer is the municipal officials and police officers charged with its implementation.

42 That cannot be right. This Court has expressed itself against legislation which delegates overbroad powers to executive officials, the exercise of which might infringe a constitutional right.²⁵ If legislation is subject to that standard, court orders must be similarly evaluated.

43 Section 26 (3) of the Constitution enjoins the courts to find “*concrete, case specific solutions*”²⁶ to problems that arise as a result of unlawful occupation of land. To assign a general discretion to officers of the executive to evict at will from 9500 km² of land is the very antithesis of what section 26 (3) requires, on any reasonable interpretation.

Limitation

44 The municipality makes the novel submission that, even if the March 2013 order does authorise eviction, then it constitutes a permissible limitation of section 26 (3) of the Constitution,

²⁵ *Dawood and Another v Minister of Home Affairs and Others ; Shalabi and Another v Minister of Home Affairs and Others ; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC).

²⁶ *Port Elizabeth Municipality*, para 22.

which, it claims, can be limited when the “*circumstances*” justify it.²⁷

45 One need only state this proposition to reject it. “Circumstances” do not justify limiting section 26 (3) of the Constitution. Laws of general application do. Were authority for this proposition needed, this Court provided it in *Pheko*.²⁸

46 However, even on the respondents’ own version, the reality on the ground is a far cry from the systematic “*orchestrated*” organisation of “*land invasions*” that the respondents suggest justify the March 2013 order.²⁹

47 The respondents refer on the papers to two unauthorised occupations of land. The first is the occupation of Madlala Village, which gave rise to this appeal. The second is the occupation of Bonela³⁰ which was undertaken by the applicants for leave to intervene.³¹

²⁷ Municipality’s Heads para 56.

²⁸ *Pheko v Ekurhuleni Municipality* 2012 (2) SA 598 (CC), para 34.

²⁹ MEC’s Heads, para 46; Municipality’s Heads, para 46.

³⁰ R-3329, pp52-53, para 34.

³¹ Affidavit of Aaron Mzimela, Application for Leave to Intervene, paras 22 and 23.

48 Both the appellants and the applicants for leave to intervene allege that they were driven to occupy land because they were “backyard” tenants in other informal settlements. They say that they are excluded from housing projects from which their landlords have benefitted, and evicted from their previous homes as a result.³²

49 Accordingly, the evidence suggests that the two “*land invasions*” relied upon by the respondents were in fact occupations undertaken out of necessity. This necessity was borne of the no doubt unintended consequences of the MEC and the municipality’s own housing allocation policy.

50 Whatever the truth, the facts of these cases underscore the need for careful judicial evaluation of each and every case of unlawful land occupation. It may be that people adequately housed elsewhere attempt to grab land for an ulterior purpose unconnected with any legitimate need. It may also be that desperately poor people occupy property because they were evicted from elsewhere and have nowhere else to go. We can

³² R-3329, p 55, para 43. See also the affidavit of Aaron Mzimela in the application for leave to intervene, paras 19 – 21.

never tell the difference unless a Court undertakes an examination of the relevant circumstances.

51 If anything, the facts on which the respondents rely demonstrate the need for judicial oversight, not the need to limit section 26 (3) of the Constitution.

52 For all of these reasons, the March 2013 order constitutes an invalid limitation of section 26 (3) of the Constitution. Subject to what is said about nullity below, it must be set aside for that reason.

D BREACH OF THE RULE OF LAW

Authorisation of self-help

53 The March 2013 order permits the Minister and the municipality to evict untold numbers of present and future occupants of the land without any further court oversight. It subjects present and future occupants of the land to their “*arbitrary and subjective decisions*” on whether, when and how to evict the occupants.

54 This Court has consistently held that Parliament may not authorise self-help.³³ Neither, Abahlali submits, can a Court. It would clearly be impermissible, for example, to grant a bank leave to execute on 1000 mortgage bonds in the event that a future instalment is left unpaid.³⁴

55 So, too, a Court may not grant a property owner leave to evict a person from land in the event that he or she may in future establish occupation of it. Yet that is exactly what the March

³³ *Chief Lesapo*. See also *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another*; *First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC).

³⁴ *Gundwana v Steko Development* 2011 (3) SA 608 (CC). See especially para 44.

2013 order permits, in breach of the rule against self-help, and the rule of law.

Non-Citation

56 The March 2013 order is a device intended to authorise the eviction of people in occupation of the land. It applies both to people in occupation of the land at the time it was granted, and to people who may establish occupation, or attempt to establish occupation, of the land at any time after it was granted.

57 The March 2013 order's true coercive purpose and effect is therefore not primarily against the municipality and the Minister of Police. It is against anyone who was living on the land at the time it was granted, or anyone who may live on it in future. The process adopted by the MEC was clearly intended to minimise the possibility of opposition from those parties, all of whom were, or would have been, directly and substantially interested in the proceedings leading up to it.

58 It is well-established that, except in *ex parte* applications, to which special rules apply, an order granted against a person

who has not been cited in the proceedings leading up to it is null and void. It may be disregarded without the necessity of a formal application to set it aside.³⁵

59 The respondents do not, and cannot, dispute that –

59.1 Present or future occupants of the land to which the March 2013 order applies were not joined to the proceedings.

59.2 Save for the Madlala residents, persons in occupation of the land at the time the March 2013 order was granted were not given notice of it. Potential future occupants – to which the order also applies – could not have been given notice of it.

60 Nor do the respondents allege that the land to which the March 2013 order applies was unoccupied at the time the order was granted. They could not do so, because we know that the occupants of Madlala Village were present at one of the plots of land covered by the order when it was granted.

³⁵ *Lewis*, p 303.

61 It is accordingly clear that the March 2013 order's primary purpose and effect was to authorise the eviction of an unknown – but potentially very large – number of people who were not joined to the proceedings leading up to it, or cited in the MEC's papers.

62 For this reason, the March 2013 order must be void for non-citation. It is an elementary feature of our law that a person is not bound by an order in which he is not cited, issued in proceedings of which he had no notice.

63 Since the only purpose of the March 2013 order is to operate against the very people the MEC contrived to keep out of the proceedings, it is a nullity.

64 It is no answer for the respondents to suggest that only the Minister of Police and the municipality were entitled to complain about non-citation. They had already been cited. The very purpose of holding an order void for non-citation is to ensure that it is not used coercively against a person not joined to the proceedings.

Interdicts Against the Public at Large are Unenforceable

65 Paragraph 1.2 of the March 2013 order is an interdict against the general public enjoining them not to invade, occupy or place material upon the land.

66 Interdicts of this nature against the public at large are unenforceable.³⁶ The reason for this is simple. There must be parties to a lawsuit.³⁷ There is no principle of our law that permits citation of a party to be replaced by mere notification to persons in general, at least in matters of this nature, involving the potential infringement of a range of constitutional rights.³⁸

67 The grant of a generalised order against the public at large, or against an unidentified, undefined group of persons, who have neither been joined to the proceedings nor given notice of them, strays beyond the judicial function.

68 In *Kayamandi* Conradie J remarked that –

³⁶ *Yawa*, 284e-h

³⁷ *Kayamandi*, 634D.

³⁸ *Kayamandi*, 641H-I.

“A failure to identify defendants or respondents would seem to me to be destructive of the notion that a Court’s order operates only *inter partes* . . . An order against respondents not identified by name (or perhaps by individualised description) in the process commencing action or (in very urgent cases, brought orally) on the record would have the generalised effect of legislation. It would be a decree and not a Court order at all. . . . [A]n order having generalised (legislative) effect is fundamentally objectionable.”³⁹

69 In eviction proceedings, it is, of course, permissible to cite occupiers as a defined group, by bringing proceedings against all of the occupiers of a particular piece of land.

70 However, there is no authority to be found, anywhere in our law, for the proposition that a Court may grant an order against all-comers, or against an abstract class of persons. If it does so, a Court does not adjudicate a cause of action between distinct parties. It legislates for the general public.

71 In *Harris*, the Appellate Division held that the “orders” of Parliament masquerading as a court were of no force or effect. Similarly, the March 2013 order, which is essentially legislative in effect, cannot be treated as a court order. It must be

³⁹*Kayamandi* 634H – 635C.

regarded as a nullity, because its purpose and effect is essentially legislative.

E CONCLUSION

72 For all of these reasons, Abahlali submits that the March 2013 order falls to be declared null, void and of no force or effect, alternatively, set aside in its entirety.

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23 January 2014