IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT 108/2013

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 OF THE PROVINCE OF KWAZULU-NATAL	**Third Respondent**

SECOND AND THIRD RESPONDENTS' WRITTEN ARGUMENT

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[A] THE CRISP ISSUE

1.

The crisp issue which arises for determination is whether **Kruger, J.** misdirected himself in refusing the appellants leave to intervene in the High Court in order to resist confirmation of the ***rule nisi***[1] granted by **Koen, J.** on **27 March 2013** whereby:

1.1. the eThekwini Municipality ("*the Municipality*") and the Minister of Police ("*the Minister"*) were authorised 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 properties (*"the properties"*) described in annexure **"NOM 1"** to **"NOM 37"** to the notice of motion;

[1] Volume 4: page 42 to 43: annexure "LTA 5"

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

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

1.2. any persons who were mindful of doing so were interdicted and restrained from invading and/or occupying and/or undertaking the construction of any structures and/or placing of any material upon any of the properties;

1.3. directions were issued for the publication of the Order in English and isiZulu:

1.3.1. by placing the same in prominent places upon each of the properties;

1.3.2. in the Illanga Newspaper for a period of three days consequent upon the grant of the Order.

[B] THE FACTUAL BACKGROUND

2.

The factual background underlying the grant of the Order is substantially common cause ***alternatively*** undisputed and has been set out in the document which was jointly prepared by the appellants and the Minister and the third respondent (*"the MEC"*).[2]

3.

The properties are earmarked for housing development and other public services.[3]

4.

Once developed the homes would be allocated to persons who feature on waiting lists for accommodation prepared by the Municipality in accordance with its established criteria.[4]

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[2] Agreed Statement of Facts
[3] Agreed Statement of Facts: page 7 paragraph 2
[4] Agreed Statement of Facts: page 7 paragraph 4

5.

On **25 February 2013** officials of the Department of Human Settlements (“*the Department”)* became aware that one of the properties being *Lot 532, Bonela* was being unlawfully invaded.[5]

6.

Vegetation on the property was cleared and preparations undertaken to construct structures presumably for occupation thereupon.[6]

7.

The affidavit deposed to by **Angel Duma** ***(“Duma”***) was communicated to the officials of the Department who inferred that **Duma** and persons who supported the content of her affidavit

[5] Agreed Statement of Facts: page 8 paragraph 5
[6] Agreed Statement of Facts: page 8 paragraph 7

proposed to undertake the unlawful invasion of vacant properties in the Cato Manor/Bellair and Mayville areas.[7]

8.

Properties owned by the Department in Middleton Road, Queensburgh and other properties became the target of land invaders.[8]

9.

The Land Invasion Control Unit ("*LICU*") of the Municipality succeeded in repelling the invasions until **8 March 2013**.[9]

10.

On **8 March 2013** the Department received a letter from the LRC asserting the rights of the appellants to occupy the Lamontville property.[10]

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[7] Agreed Statement of Facts: page 9: paragraphs 8 to 10
[8] Agreed Statement of Facts: page 10: paragraph 11
[9] Agreed Statement of Facts: page 10: paragraph 12

11.

The land invasions received publicity in the local press.[11]

12.

Based on the information contained in the newspaper articles and investigations undertaken by the Department it was inferred that an organised campaign of unlawful land invasions had been orchestrated and was being implemented.[12]

13.

On **11 March 2013** officials of the Department met with the representatives of the LRC with a view determining particulars of the appellants and in particular the persons being represented by the LRC. It was agreed that the LRC would prepared and submit a list of such persons to the Department in order to facilitate the

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[10] Agreed Statement of Facts: page 10: paragraph 13
[11] Agreed Statement of Facts: page 11: paragraph 14
[12] Volume 2: Founding Affidavit: page 50: paragraph 26

verification thereof with a view to determining which persons who featured thereon were homeless and in need of accommodation in order that their housing needs could be accommodated. The LRC was unable at that stage to provide such list to the Department.[13]

14.

On **13 March 2013** a group of unknown persons sought to invade the private property of one **Mansoor** in Cato Manor. **Mansoor** engaged the services of a private security company in order to repel the invasion.[14]

15.

Endeavours were thereafter undertaken to invade *Lot 1010, Bonela* (which is owned by the MEC). That endeavour was also repelled by the LICU and the Metro Police Unit ("*MPU*") of the Municipality assisted by the SAPS.[15]

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[13] Agreed Statement of Facts: page 12: paragraph 18; Volume 2: page 51: Founding Affidavit: paragraph 29

[14] Agreed Statement of Facts: page 12: paragraph 19

[15] Agreed Statement of Facts: page 12: paragraph 20

16.

During the night of **13 March 2013** endeavours were undertaken to construct four structures upon the latter property. The structures were demolished during the morning of **14 March 2013**.[16]

17.

On **14 March 2013** an article appeared in the local newspaper confirming that land invaders caused a local councillor to flee from his home.[17]

18.

On **15 March 2013** the MEC launched an urgent application out of the High Court under case no. 2778/2013 against **Duma** and her supporters for an Order interdicting them from invading and/or

[16] Agreed Statement of Facts: page 13: paragraph 21
[17] Agreed Statement of Facts: page 13: paragraph 22; Volume 2: page 105: Annexure "F"

occupying the properties owned and/or controlled by the MEC in Cato Manor.[18]

19.

On the same day at a meeting between representatives of the Department, the Municipality and the LRC a list of persons allegedly in occupation of the Lamontville Property was provided.[19]

20.

During the course of the meeting representatives of the Municipality expressed concern about the ongoing land invasions. They explained that they have a plan in place for homeless low income earners to acquire houses and that they have a target of providing 8500 units per year. They noted that problems were being experienced in accommodating people who live in so-called squatter and transit camps. **They indicated that all known and**

[18] Agreed Statement of Facts: page 13: paragraph 23
[19] Agreed Statement of Facts: page 14: paragraph 24

existing informal settlements had been audited and properly documented for accommodation purposes and wanted to know where the persons who claimed that they were living on the Lamontville Property had come from.[20]

21.

It was agreed that the list would be verified with a view to determining which of the persons who featured thereon were homeless and in need of accommodation in order that their needs could be fulfilled.[21]

22.

Doubts were expressed by the representatives of the Department whether the person who featured on the list were in fact genuinely homeless and in need of accommodation.[22]

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[20] Agreed Statement of Facts: page 14: paragraph 25
[21] Agreed Statement of Facts: page 14: paragraph 26
[22] Agreed Statement of Facts: page 15: paragraph 27

23.

The representatives of the Department indicated that in the event that negotiations with the LRC failed that an application to evict the persons in occupation of the Lamontville Property would be pursued and the LRC given notice thereof.

24.

The LICU and the Municipality indicated to the MEC that they were not "*prepared to protect the properties [against the continuing and threatened invasions] unless their conduct [was] sanctioned by an order of [the High] Court authorising them to do so.*"[23]

25.

The objective underlying the grant of the Order was to prevent unlawful invasions of the properties which were ostensibly designed to afford the invaders preference in the allocation of

[23] Volume 2: page 59: Founding affidavit: paragraph 57

housing which the State is obliged to provide to the needy in a systematic and organised basis.[24]

[C] THE ARGUMENT IN SUPPORT OF INTERVENTION

26.

In seeking leave to intervene the appellants contended that they were in occupation of one of the properties (and in particular the Lamontville Property on which they contended they established the Madlala Village) foreshadowed by the Order and that they had been unlawfully evicted therefrom.

27.

The appellants asserted that they took occupation of the Lamontville Property from **September 2012** (a date prior to the grant of the Order) and that their homes were destroyed on 24 separate occasions subsequent thereto.[25]

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[24] **Government of the Republic of South Africa and Others v Grootboom** 2001 (1) SA 48 CC at [92] per **Yacoob, J**.

[25] Volume 3: page 128: Answering Affidavit: paragraph 8

28.

They alleged that they as "*the occupiers have a clear interest in the application. Madlala Village falls within the area affected by the order and the operation of the order will directly and substantially affect its residents as it would result in [their] homes being demolished and the removals (sic) of [their] meagre assets.*"[26]

[D] THE ARGUMENT AGAINST INTERVENTION

29.

In the founding affidavit to the application for the grant of the Order the MEC acknowledged that "*although there are persons occupying [the] property in Lamontville, it is disputed that such persons are entitled to occupy the property. The Applicant proposes, in due course and should its negotiations with the LRC fail, to launch proceedings for their eviction.*"[27] It was and is self-evident that ***no*** relief was sought or granted against the appellants in the application.

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[26] Volume 3: page 128: Answering Affidavit: paragraph 11
[27] Volume 2: page 58: Founding Affidavit: paragraph 51

30.

On **25 April 2013** the appellants launched an application out of the High Court under case no. 4431/2013 for an Order directing the Municipality, the Minister and the MEC to construct for those individual appellants who were evicted from the Lamontville Property on **19** and/or **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.

31.

The MEC and the Minister accordingly argued that:

31.1. the Order was directed at preventing the invasion of the Lamontville Property and other properties ***subsequent*** to the date of the grant thereof;

31.2. the Order did not justify the eviction of any persons (including the Lamontville occupiers and those of the appellants) who were admittedly in occupation of the Lamontville Property ***prior*** to the date of the grant thereof. Nor it is submitted did the Order authorise the ***eviction*** of any persons from any of the properties subsequent to the grant thereof;

31.3. the appellants had in any event instituted separate proceedings for an Order restoring them to their occupation of the Lamontville Property;

31.4. the appellants accordingly did not have a legal interest entitling them to intervene in the application in order to seek the discharge of the Order.

[E] THE TEST FOR INTERVENTION

32.

An applicant for leave to intervene must establish:

11.1 "*a direct and substantial interest*" in the subject matter of the litigation;[28]

11.2 A *legal interest* in the subject matter of the litigation that may be *prejudicially affected* by the judgment of the Court is required.[29]"

33.

It is not sufficient for the applicant to merely state that he or she has an interest in the action: he or she must make allegations as would show that:

33.1. he or she has a ***prima facie*** case;

33.2. his or her application is:

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[28] **Henri Viljoen (Pty) Ltd v Awerbuch Bros** 1953 (2) SA 151 (O) at 167

[29] **Henri Viljoen (Pty) Ltd v Awerbuch Bros** 1953 (2) SA 151 (O) at 168-70

33.2.1. seriously made;

33.2.2. not frivolous.[30]

34.

It is sufficient for the parties seeking leave to intervene to rely on allegations which, if they can be proved in the main action, would entitle him or her to succeed.[31]

35.

Although it has been said that the Court has a discretion where a party seeks leave to intervene[32] there has been no authoritative definition of the limit of that discretion.[33]

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[30] **Elliott v Bax: In re Bax v The African Life Assurance Society Ltd** 1923 WLD 228 at 231

[31] **Ex parte Moosa: In re Hassim v Harrop-Allin** 1974 (4) SA 412 (T) at 416F

[32] **Venter v Wicht's Garage** 1927 CPD 364 at 365

[33] **United Watch & Diamond Co (Pty) Ltd v Disa Hotels Ltd** 1972 (4) SA 409 (C) at 416A

[F] APPLICATION OF THE LAW TO THE FACTS

36.

The appellants did not and do not assert that:

36.1. they have any right let alone a lawful right to take occupation of the properties including the Lamontville Property if they were not already in occupation thereof as at the date of the grant of the Order;

36.2. they have any interest in invading any of the properties foreshadowed by the Order.

37.

It has been submitted and is emphasised that the Order did not and does not affect the entrenched rights of the appellants who were in occupation prior to the grant of the Order to occupy the Lamontville Property.

38.

The Order could not have been relied upon and did not serve as a lawful basis for the eviction of the appellants from the Lamontville Property subsequent to the grant thereof.

39.

The appellants' rights in the latter regard are in any event being enforced through the application under case no. 4431/2013 which is currently pending in the High Court.

[G] IS THE ORDER A NULLITY?

40.

The ***amici curiae*** submits that the Order is a nullity in that "*the residents were not joined in the proceedings which resulted in the MEC order*"[34]

[34] Affidavit of Mzimela: pages 12 to 14; paragraphs 42 to 49

41.

In **Lewis & Marks v Middel**[35] the Court observed as follows:

> "…..*where legal proceedings are initiated against a party, and he is not cited to appear, they are null and void; and upon proof of invalidity the decision may be disregarded, in the same way as a decision given without jurisdiction without the necessity of a formal order setting it aside."*

42.

In **Dada v Dada**[36] the Court observed as follows:

> *"When an action has begun without due citation of the defendant, the subsequent proceedings are null and void and any judgment given is of no force or effect whatsoever...*
>
> *….nevertheless, when an action has begun without due citation, the defendant has a right to have the proceedings set aside."*

43.

In **Kayamandi Committee v Mkhwaso and Others**[37] the Kayamandi Town council sought an eviction order against 150

[35] 1904 (TS) 291 at 303
[36] 1997 (2) SA 287T at 288C -E

squatters from land that had been earmarked for residential development. The applicant cited only nine of the respondents and alleged that it was unable to establish the names of the remaining respondents.

44.

The Court refused to grant any order against the "*unidentified occupiers, the faceless respondents"* and held that the applicant had other remedies available to it in the form of the Prevention of Illegal Squatting Act, No. 52 of 1951.

45.

The facts that pertain ***in casu*** are fundamentally distinguishable from those in the latter cases and in the other matters in which the latter dicta were adopted.

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[37] 1991 (2) SA 630 C

46.

The first fundamental point of departure lies in the fact that the first portion of the relief sought by the MEC was granted against the Municipality and the Minister both of whom were cited as parties to the action. There is and can be no basis justifying the setting aside of the Order granted against the Municipality and the Minister.

47.

The second fundamental point of departure lies in the fact that the Order was sought against a background of orchestrated land invasions which had taken place and which the MEC apprehended on reasonable grounds would continue. It was clearly impossible for the MEC in the prevailing circumstances to establish the identities of such prospective invaders.

48.

It is important to bear in mind the obvious fact that the Order was not intended to be and is not an eviction Order. It does not authorise the eviction of any persons. Its objective was and remains to prevent the threatened obviously unlawful invasion of its properties.

49.

No persons have any lawful right to invade the MEC's properties.

50.

Despite the fact that the unknown and unidentified potential invaders were not cited as parties to the application it is submitted that this is an appropriate case in which the interdictory relief granted in favour of the MEC should be preserved.

[H] DOES THE ORDER VIOLATE SECTION 26(3) OF THE CONSTITUTION?

51.

The Order was not intended to and does not authorise the evictions of any persons from any of the properties.

52.

The Order may not be relied upon as justification for the eviction of any persons from the properties.

53.

Any evictions which may have been carried on the basis of the Order fall to be set aside.

54.

It is submitted that the Order does not violate any rights foreshadowed by section 26(3) of the Constitution.

[I] LAND INVASIONS

55.

There is and can be no question about the fact that land invasions and in particular organised land invasions which are orchestrated for the specific purpose of securing the preferential allocation of housing is inimical to the systematic provision of adequate housing on a planned basis.[38]

56.

The State is obliged to take reasonable steps where possible to ensure that land invasions do not occur.[39]

57.

In **Modderklip**[40] **Langa A C, J.** observed as follows:

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[38] **Government of the Republic of South Africa and Others v Grootboom and Others** 2001 (1) SA 46 CC at [92]

[39] *Cf* **President of the Republic of South Africa and Another v Modderklip Boerdery (Proprietary) Limited (Agri SA and Others amici curiae)** 2005 (5) SA 3 CC at [43]

[40] **President of the Republic of South Africa and Another v Modderklip Boerdery (Proprietary) Limited (Agri SA and Others amici curiae)** 2005 (5) SA 3 CC at [45]

> *"Land invasions of this scale are a matter that threatens far more than the private rights of a single property owner. Because of their capacity to be socially inflammatory they have the potential to have serious implications for stability and public peace. Failure by the State to act in an appropriate manner in the circumstances would mean that Modderklip, and others similarly placed, could not look upon the State and its organs to protect them from invasions of their properties.* ***That would be a recipe for anarchy****." (emphasis added)*

58.

The relief sought by the MEC with a view to preventing the organised campaign of orchestrated land invasions was designed to ensure that law and order was and is preserved and that the rule of law was and is not subverted".[41]

59.

The learned acting Chief Justice continued as follows:[42]

> *"The progressive realisation of access to adequate housing, as promised in the Constitution, requires careful planning and fair procedures made known in advance to those most affected. Orderly and*

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[41] *Cf* **Modderklip,** *supra,* at [46]
[42] At [49]

> *predictable processes are vital. Land invasions should always be discouraged. At the same time, for the requisite measures to operate in a reasonable manner, they must not be unduly hamstrung so as to exclude all possible adaptation to evolving circumstances."*

60.

In **Groengras Eiendomme (Proprietary) Limited and Other v Elandsfontein Unlawful Occupants and Others**[43]**, Rabie, J.** observed as follows:

> *"The occupants perpetrated this mass land invasion in a very short space of time and only from approximately a month ago and this is apparently still going on. It appears that the land invasion might have been started or, at least,* ***encouraged by persons or organisations for political or other ulterior motives****. Asking the proposed occupants to pay an amount of money, under whatever guise, could conceivably instil the perception in some that the unlawful occupation can in some way be justified and thereby luring more unsuspecting persons to occupy the land unlawfully. It is impossible to know where each of the occupants came from ....*
>
> *The property occupied is not fit for habitation. There is no infrastructure, no water, no toilet or ablution facilities and no facilities for waste and garbage disposal. The danger of disease breaking out is of*

[43] 2002 (1) SA 125 T at [28]

> *high probability and the risk of contamination also affects those living downstream on the stream running through the property and of neighbouring areas."*

61.

In a similar vein in **The City of Cape Town v Unlawful Occupiers, Erf 1800, Capricorn (Vrygrond Development) and Others**[44]**, N. C. Erasmus, J.** observed as follows:

> *"In my view, the most compelling factor weighing in applicants' favour is simply that it is imperative that land invasions are denounced and rejected as an appropriate way to enforce one's Constitutional right to access to adequate housing"*

62.

The Order that was granted by **Koen, J.** did not and cannot affect or impinge upon any of the rights of any of the appellants. Those rights are in any event being enforced through the mechanism of the application under case no. 4431/2013. In the event that the verification exercise foreshadowed thereby reveals that the

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[44] 2003 (6) SA 140 C at 151 I - J

appellants are indeed homeless and in need of accommodation the MEC has undertaken to ensure that they are provided with accommodation at the very least on a temporary basis.

63.

Should the verification exercise reveal that they are not genuinely homeless and/or in need of accommodation there would be no obligation on the part of the MEC and/or the Municipality to provide them with any accommodation.

64.

The feature which casts significant doubt on the appellants' claims is the unlikely coincidence that some 390 persons would be rendered homeless at approximately the same time i.e. in **September 2012** in circumstances where the Municipality had previously undertaken an audit and maintained proper records of the persons living informal settlements and in need of accommodation.

[I] CONCLUSION

65.

It is submitted that the High Court did not misdirect itself in any respect in refusing the application for leave to intervene.

[J] ORDER

66.

The appeal should accordingly be dismissed with costs.

V I GAJOO S.C.
F ABRAHAM

CHAMBERS
DURBAN

24 DECEMBER 2013