COPY

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO.

SCA CASE NO. 412/2013

KZN CASE NO. 3329/2013

In the matter between:

JABULANI ZULU & 389 OTHERS — **APPLICANTS**
(INTERVENING PARTY IN THE COURT A QUO)

and

THE ETHEKWINI MUNICIPALITY — **FIRST RESPONDENT**
(FIRST RESPONDENT IN THE COURT A QUO)

MINISTER OF POLICE — **SECOND RESPONDENT**
(SECOND RESPONDENT IN THE COURT A QUO)

THE MEC FOR HUMAN SETTLEMENTS & PUBIC WORKS OF THE PROVINCE OF KWAZULU-NATAL — **THIRD RESPONDENT**
(APPLICANT IN THE COURT A QUO)

APPLICANTS' FOUNDING AFFIDAVIT IN THE APPLICATION FOR LEAVE TO APPEAL

I, the undersigned,

LINDELWA SHIRLEY MDODANA

do hereby make oath and say:-

1.

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I am an adult female residing in Madlala Village situated in Ward 74 in Lamontville Township. I do not have steady employment and take temporary jobs whenever available.

2.

The facts deposed to in this affidavit are within my knowledge and are true and correct. I make legal submission in this affidavit on the basis of legal advice sought and obtained by the Applicants.

SUMMARY OF APPLICATION:

3.

The Applicants seek leave to appeal to this Honourable Court against an order made by the Supreme Court of Appeal on 5 August 2013 in which it dismissed the Applicants' application for leave to appeal against an order made by Kruger J in the KwaZulu-Natal High Court on 10 May 2013 in which he ruled that the Applicants had no right to intervene in the application.

4.

The application brought by the MEC FOR HUMAN SETTLEMENTS AND PUBLIC WORKS OF THE PROVINCE OF KWAZULU-NATAL (MEC) against the ETHEKWINI MUNICIPALITY (MUNICIPALITY) and the MINISTER OF POLICE (POLICE) involved a *rule nisi* granted by Koen J on 28 March 2013 in which the following relief was obtained:-

> "1.1 that the First and Second Respondents are hereby 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 immovable properties described in "NOM1-37" to the notice of motion;
>
> 1.1.2. to remove any materials placed by any persons upon the aforementioned properties;

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1.1.3. to dismantle and/or demolish any structure or structures that may be construed 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;

1.3 That any Respondent or Respondents or any other party who opposes this application be ordered to pay the costs occasioned thereby jointly and severally, in the event that more than one Respondent does so.

2. That paragraphs 1.1 and 1.2 hereof shall operate as interim order with immediate effect pending the return date of the *rule nisi*".

Koen J granted this relief in an *ex parte* hearing at the instance of the MEC. The basis for the relief was said to be that the properties identified were subject to invasion by people described as "land invaders" and in order to prevent such invasions and to remove the people said to be invading, the order was necessary because the POLICE and the MUNICIPALITY were not prepared to assist the MEC unless their conduct was sanctioned by an order of Court authorising them to do so.

5.

The rationale for granting the relief sought is expressed by the MEC in this way:-

> "No persons will suffer any prejudice by the grant of the relief sought by the Applicant. No persons have any lawful right to invade and/or undertake the construction of any structures on any of the Applicants' properties."

Founding affidavit, para. 52, page 58.

The application consequently raises the fundamental question of whether anybody occupying vacant land illegally, no matter how short the period of occupation, is entitled to the benefits of section 26 of the Constitution and the provisions of the Prevention of Illegal Eviction from

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Unlawful Occupation Land Act, 19 of 1998 (PIE) if the owner of the land seeks to evict the occupier.

6.

On the return date of the *rule nisi* after the Applicants had filed an opposing affidavit, Kruger J refused the Applicants' leave to intervene on two grounds:-

(a) that they had no direct and substantial interest in the matter; and

(b) that PIE was not "engaged".

Kruger J expressed his view on this issue in this way:-

> "KRUGER J: No, no, you have missed out something very important, with all due respect, Mr. Broster, it is if there is an intention by any homeless person to occupy any of the properties, then these people must prevent them from doing so. What is wrong with that? Don't even start knocking on the door of PIE. What is wrong with the order?"

7.

Both these conclusions are wrong. I am advised that everyone is entitled to the full benefit of the rights conferred by section 26 of the Constitution and the PIE Act. Neither Koen J nor Kruger J delivered a considered judgment. The attitude of Kruger J emerges from the record of the brief hearing before him to which I will refer to in more detail hereunder. The application for leave to appeal to the Supreme Court of Appeal was dismissed by Lewis JA and Willis AJA on 5 August 2013 without giving reasons.

8.

The order is designed to permit the eviction of people and the demolition of any structure that they may have constructed without the intervention of a court and without any concern for the circumstances of the people involved and any inquiry as to whether those people are actually homeless.

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9.

The order is inconsistent with section 26(2) of the Constitution and the protection of PIE.

THE PARTIES:

10.

The Applicants reside in Madlala Village which is situated in Ward 74 Lamontville Township. Madlala Village consists of a group of free standing shacks and a community of approximately 390 individuals. It is located in a forest near to the Lamontville informal settlement and the MEC claims to be the owner of the land.

11.

The village has been occupied since September 2012 and the Applicants claim that their shacks have been destroyed on 24 separate occasions and their personal belongings destroyed by the MUNICIPALITY's Land Invasion Control Unit in the presence of the POLICE.

12.

The First Respondent is THE ETHEKWINI MUNICIPALITY, a duly established Municipality with its offices at Shell House, Durban. The First Respondent is represented by their attorneys of record.

13.

The Second Respondent is the MINISTER OF POLICE which has its office at Servamus Building, 15 Ordinance Road, Durban. The Second Respondent is represented by its attorneys of record.

14.

The Third Respondent is the MEMBER OF THE EXECUTIVE COUNCIL FOR HUMAN SETTLEMENTS & PUBLIC WORKS FOR THE PROVINCE OF KWAZULU-NATAL and is represented by the State Attorney.

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THE HEARING BEFORE KOEN J:

15.

Despite an undertaking in the founding affidavit to serve a copy of the papers on the LEGAL RESOURCES CENTRE, no notice of the application was given of the hearing before Koen J which proceeded *ex parte*.

16.

The papers placed before Koen J record in paragraph 24 (page 49 of Annexure B) that on 8 March 2013 the MEC, the MUNICIPALITY and the POLICE were aware that the LEGAL RESOURCES CENTRE (LRC) represented the residents of the Lamontville property and paragraph 29 of the founding affidavit (page 51 of Annexure B) records that a meeting was convened on 11 March 2013 between representatives of the MEC, the MUNICIPALITY and the LRC. In paragraph 32 of the founding affidavit (page 52 of Annexure B) it is recorded that the LRC would provide the MEC with a list setting out the identities of the persons including their identity numbers of whom they represented and the list would have to be verified because the MEC was not convinced that the persons whom the LRC represented were homeless. Paragraph 40 of the founding affidavit (page 54 of Annexure B) records that the LRC made a list available to the MUNICIPALITY at a meeting on 15 March 2013. The record of the meeting is described in paragraphs 42 to 48 of the founding affidavit (Page 55 – 57 of Annexure B) and the MEC records at paragraph 48:-

> "As indicated above the Applicant's representatives are not convinced that people who are occupying the Lamontville property are in fact homeless. The Applicant has reason to believe that land invasions were in some instances orchestrated by shack lords who enter upon land that is vacant, erect shacks thereon and then rent

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> them out to persons who have houses that have already been allocated to them."

In paragraph 51 of the founding affidavit (page 58 of Annexure B) the MEC records:-

> "Although there are persons occupying 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."

There was therefore on the founding papers before Koen J evidence that there were people occupying the Lamontville property and that negotiations were taking place between the authorities and those people. At the very least it ought to have been apparent to Koen J that there were parties who had an interest in the application who were not before him.

17.

The basis upon which Koen J was apparently prepared to grant the order appears from paragraph 52 of the founding affidavit which reads:-

> "Save for those authorized by the Applicant, no persons have any lawful right to occupy or to undertake the construction of any structures upon the Applicant's properties and the Applicant is clearly lawfully entitled to prevent them from doing so."

The type of order envisaged by Koen J has its origins in the judgment granted in:-

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

where Booysen J relying upon the provision of an entirely different statute, the Prevention of Illegal Squatting Act 52 of 1951 (PISA), said at 710:-

> "In this case the Applicant seeks what is in the nature of an interdict and the question is not simply whether the Respondent has permitted occupation in the past but whether there is a real danger of the Respondent permitting it in future. In my view, the Respondent has had both knowledge of the intended unlawful

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erection and occupation of buildings and structures on its own property and property which it controls but has evinced a clear intention not to take steps to prevent future invasions of this nature, but merely to deal with these invasions once they have taken place. This is of no comfort to adjoining property owners or property owners in the vicinity who are aware of threatened invasions but have to wait for persons first to invade the properties before the Respondent proposes to take action."

In dealing with the history of PIE and its effect on its predecessor the PISA Harms JA had this to say:-

> "[12] It is apparent from the long title that PIE has some roots in PISA. PISA had its origin in the universal social phenomenon of urbanization. Everywhere the landless poor flocked to urban areas in search of a better life. This population shift was a threat to the policy of racial segregation. PISA was to prevent and control illegal squatting on public or private land by criminalizing squatting and by providing for a simplified eviction process. PIE, on the other hand, not only repealed PISA but in a sense also inverted it: squatting was decriminalized (subject to the Trespass Act 6 of 1959) and the eviction process was made subject to a number of onerous requirements, some necessary to comply with certain demands of the Bill of Rights, especially s26(3) (housing) and s 34 (access to courts).

Bekker and Another v Jika 2003 (1) SA 113 (SCA) at 122, para. [12].

As to the intended purpose of PIE Harms JA said at 119:-

> "[3] PIE has its roots, *inter alia*, in s26(3) of the Bill of Rights, which provides that 'no one may be evicted from their home without an order of court made after consideration of all the relevant circumstances'. *Cape Killarney Property Investments (Pty) Ltd v Mahamba and Others* 2001 (4) SA 1222 (SCA) at 1229E. It invests in the courts the right and

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> duty to make the order, which, in the circumstances of the case, would be just and equitable and it prescribes some circumstances that have to be taken into account in determining the eviction."

If any doubt existed as to the application of PIE Yacoob J said in para. [14]:-

> "Everyone is entitled to the full benefit of the rights conferred by section 26 of the Constitution. The PIE Act, the National Housing Act and the National Housing Code represent a legislative effort to give effect to the rights conferred by this constitutional mandate."

Although the judgment of Yacoob J was a minority judgment the majority in paragraph 94 of the judgment agreed with paragraphs [11] – [17] of the judgment of Yacoob J.

Abahlali Basemjondolo Movement SA Premier of the Province of KwaZulu-Natal 2010 (2) BCLR 99 (CC).

18.

It is difficult to see how Koen J could have granted the rule which he did and the interim relief if these authorities had been placed before him.

19.

The thrust of the application before Koen J was that no court ought to countenance the actions of "land invaders". A similar application brought before Selikowitz J in:-

City of Cape Town v Rudolph and Others 2004 (5) SA 39 (CPD) at 54.

dealt trenchantly with this proposition and disposed of it in this way:-

> "During the course of the hearing Mr. *Le Roux* was asked by the Court to suggest a definition of a 'land grabber' to whom PIE would not apply so that such an occupier could be distinguished from other 'unlawful occupiers'. In other words what is the distinguishing factor that characterizes a 'land grabber' and

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21.

The plight of the occupiers of Madlala Village is graphically set out in paragraphs 10 – 35 of the affidavit of JABULANI ZULU (page 128 – 137 of Annexure B). Even without the order of Koen J life at the hands of the MUNICIPALITY's officials and the POLICE is one of great misery demonstrating the need for court intervention. The statement in paragraph 11, uncontradicted by the MEC, the MUNICIPALITY and the POLICE records:-

> "From September 2012 to the present date, our shacks have been destroyed on 24 separate occasions, along with the destruction or removal of many of our personal belongings, identification documents, medications, and food provisions. The destruction has been carried out by the First Respondent's Land Control Invasion Unit, in the presence of the local South African Police Service."

Application papers (Annexure B), page 128.

22.

In heads of argument filed before Kruger J reference was made to the following statement in:-

Pheko v Ekurhuleni Metropolitan Municipality 2012 (2) SA 598 (CC) at 610 para. [35]

which reads:-

> "The Municipality's understanding of s26(3) as set out above is incorrect. The Municipality's proposition simply turns s26(3) on its head. Section 26(3) must be read as a whole. It does not permit legislation authorizing eviction without a court order."

23.

Kruger J was also referred to the judgment in:-

Tswelopele Non-Profit Organisation v City of Tshwane Municipality 2007 (6) SA 511 (SCA) at 513;

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where Cameron JA described the eviction in that case as violating the law and the Constitution.

24.

A copy of the transcript of the hearing before Kruger J is annexed hereto as part of the record of the application for leave to appeal to the SCA marked "C". It is apparent from the transcript that Kruger J was of the view that since the order of Koen J, as he understood it, is expressed as operating prospectively, no-one could oppose the grant of the relief sought. It is equally clear that he believed that PIE does not apply. This emerges from the following statement:-

> "**KRUGER J :** Please listen to me and answer my question, if you can. If you can't, we will move on. If a homeless person, Mr. A, walks onto a piece of land owned by the MEC and says I am homeless, I need to find a place to live, I am going to construct a shack here to live and he is prevented from doing so. He starts clearing the bush and on the same day he is told to get out and he is removed from there. How is PIE applicable?"

Annexure B page 17, line 9-14.

Kruger J was referred in the heads of argument to the statement by Yacoob J in:-

Pontsho Doreen Motswagae and Fourteen Others v Rustenburg Local Municipality and Promptique TR 9 CC [2013] ZACC 1

where he said:-

> "[18] The course of action the municipality ought to have adopted was to secure the eviction of the applicants from their homes before carrying on with intrusive and objectionable construction work on the properties on which their homes were situated. The interdict should therefore have been granted. The applicants had a clear right not to be disturbed in the peaceful occupation of their homes; they

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> were suffering irreparable harm; and no alternative remedy was available to them".

Leave to appeal was sought and refused by Kruger J without his furnishing any reasons for the decision.

Annexure C Page 22 Lines 4-7

THE SCA:

25.

A copy of the application for leave to appeal presented to the SCA is annexed hereto marked "C". As part of that application, the Applicant annexed the MUNICIPALITY's Land Protection Policy. It emerges from that policy that it, contrary to the provisions of PIE defines occupation in this way:-

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

This policy, it is submitted is clearly inconsistent with the Constitution and PIE.

26.

Before the SCA the position of the MEC was maintained in this way:-

(a) the Applicant had no direct and substantial interest in the outcome of the application and consequently had no *locus standi*;

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(b) the order only affected the actions of people engaged in the illegal activity of trespassing and taking occupation of properties in circumstances where they had no lawful right to do so.

A CONSTITUTIONAL ISSUE:

27.

The order in the form granted by Koen J means that no inquiry is undertaken as to the plight of the person found to be in occupation of the property even if only for a very short period of time. Since the order affects unlawful occupiers the question which it raises is whether those unlawful occupiers' rights enshrined in section 26 of the Constitution and PIE may be eliminated by a court order. Such an elimination is achieved by the order of Koen J.

PROSPECTS OF SUCCESS AND INTERESTS OF JUSTICE:

28.

I respectfully submit that in the light of the facts and submissions set out above the Applicants have good prospects of success in the appeal.

29.

The order of Kruger J has the potential to unleash on the Province of KwaZulu-Natal evictions based simply upon the proposition that the MUNICIPALITY and the MEC believe that a person to be removed from property, which is occupied illegally, has no lawful right to be there in the first place and consequently no inquiry must be made into their personal circumstances and how they came to occupy the land

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CONCLUSION:

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I respectfully seek leave to appeal and ask for an order in terms of the notice of application for leave to appeal.

LINDELWA SHIRLEY MDODANA

In terms of Regulation R1258 published in Government Gazette No. 3619 of the 21st July, 1972 having been complied with I hereby 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 DURBAN on the 23rd day of AUGUST 2013.

COMMISSIONER OF OATHS

Full names:

Address:

Capacity:

Area:

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