

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NUMBER: 57075/2020

(1) REPORTABLE: YES

(2) OF INTEREST TO OTHER JUDGES: YES

DATE: 29 November 2023

SIGNATURE:

In the matter between:

MADIBENG LOCAL MUNICIPALITY

APPLICANT

And

**UNKNOWN TRESSPASSERS OF LETLHABILE-
B EXTENSION 1 TOWNSHIP**

FIRST RESPONDENT

**THE UNLAWFUL OCCUPIERS OF LETLHABILE
B EXTENSION 1 TOWNSHIP**

SECOND RESPONDENT

ALLY SELLO MALULEKA

THIRD RESPONDENT

Delivery: *This judgment is issued by the Judge whose name appears herein and is submitted electronically to the parties /legal representatives by email. It is also uploaded on CaseLines and its date of delivery is deemed 29 November 2023.*

Summary: *Interdict - Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) – s 6 – eviction of unlawful occupiers – just and equitable order. Application dismissed - no costs -of this application.*

JUDGMENT

NTLAMA-MAKHANYA AJ

[1] This is the application for the eviction of various occupiers that unlawfully occupied the land belonging to the Madibeng Local Municipality and an applicant in this matter. The land is situated at Letlhabile - B Extension 1 Township registration JQ North-West Province. The Respondents are the alleged unlawful occupiers (First, Second and Third). The application was comprised of two parts. **Part A** was for a temporary interdict which was directed at anyone that intended to erect structures on the said land. **Part B** was an application for a final interdict for eviction of those that are already in unlawful occupation (2nd -3rd Respondents). The Third Respondent is cited herein as a Representative of the Second Respondents. To the exclusion of the 4th-6th Respondents, I will refer to the 1st-3rd as Respondents without separating them as they constitute a group that is classified as the 'unlawful occupiers'. For the purpose of this application, the focus is on PART B with its intended consequence for the granting of a final interdict that is inclusive of the prayer in PART A.

[2] The applicant stated that the Respondents:

- [2.1] unlawfully occupied the land that belongs to the Municipality as the rightful owner of the said land.
- [2.2] have received no consent in law or otherwise to occupy the land.
- [2.3] occupied land that has been earmarked and allocated to other people to be sold once the Municipality is able to provide services to the stands situated therein.
- [2.4] occupation of the land under these circumstances is illegal; and
- [2.5] were provided with notices to vacate the land by the Municipality and refused to accept the said notices.

[3] With the above assertions, the applicant prays for:

[3.1] a final interdict in respect of the interim relief prayed for in PART A of this application.

[3.2] all the Respondents that occupy the property in question to be ordered to vacate the land within sixty (60) days of the receipt of the order.

[3.3] in the result of failure in respect of the above prayer, the Sheriff of this court to take all the reasonable steps including but not limited to obtaining the assistance of the South African Police Service (Respondents 4-6).

[3.4] unlawful occupiers to pay for the costs of this application.

[3.5] any other alternative or further relief.

[4] The application is opposed by the Respondents and Respondents 4-6 have since withdrawn from opposing this matter.

[5] This brings me to the foundations of this application.

Background

[6] The applicant in this matter is the Madibeng Local Municipality (Municipality) and the owner of the land that is subject of this application. This land was unlawfully occupied by the Respondents. On becoming aware of the invasion of the land, the applicant launched an urgent application for the removal and eviction of the Respondents from the said land.

[7] The invasion of the land came after the applicant invited bids on 30 May 2019 through the tender system to be made by the residents in its area of jurisdiction for the low-income earners to purchase stands for possible building of their

homes. The price for each of the stands was valued between R40 000-R50 000 depending on the valuation and size of the stand in question. At first, a flaw was identified in the applicant's administrative processes which prompted the withdrawal and re-advertisement of the call for bidding. Following the second call and whilst the process was underway, for the transfer of the land to successful bidders, the applicant, through Ward Councilor Mr Emmanuel Diale (Mr Diale) on or about 19 June 2019, learnt that the Respondents and other various occupiers intended to invade the land on 20 June 2019 which they eventually did between 20-27 June 2019. The prospects of engaging with the unlawful occupiers became fruitless and the applicant acted swiftly and approached this court for immediate relief on 29 October 2020 and obtained an order of service on 24 November 2020 in terms of section 4(2) of the Prevention of Illegal Eviction from and Unlawful Occupation Act 19 of 1998 (PIE Act). The brief of this notice was by agreement between the parties:

- [7.1] to remove the matter from the urgent roll to the normal roll for adjudication of PART A and PART B of this application.
- [7.2] Respondents to ensure that the properties they have will not be further invaded or occupied.
- [7.3] The applicant to serve a section 4(2) notice in terms of the PIE Act to all the Respondents to the hearing of the PART B of this application; and
- [7.4] The section 4(2) notice to be served on the attorneys of record and all the listed respondents in the occupancy audit.

- [8] The occupied land is near an established community that has become agitated by the unlawful occupation which also extended to the illegal connections of services. The said community had threatened the applicant to attend the invasion as a matter of urgency. The applicant also indicated that although there are structures erected on the land, most of them remain unoccupied and there are no more than 10 families that are residing therein. In addition, the applicant listed

the number of occupiers that do not qualify for the low-income housing who are likely to be owning immovable property elsewhere and not in desperate need for access to the land. The occupiers themselves have not been cooperative in managing the situation as Mr Diale and the South African Police Service (SAPS) Members tried to engage with them only to be met with aggression and violent conduct.

- [9] The Respondents opposed this application and asserted that at the time this application was launched, they had stayed on the land since January 2020. It is their assertion that they were hoping to settle the matter out of court without being involved in this protracted litigation. The Respondent's replying affidavit by Mr Maluleke, whom the applicant classified as a ringleader who caused violence in the area, traces this matter to the municipal resolutions of the December 2015 meeting for the community to occupy the land which was in consultation with Mr Diale. It was, therefore, the community meeting of 01 January 2020 that endorsed the occupation of the land due to the concerns on the levels of crime which was committed in and around the open space next to their houses. It was in this meeting that a resolve was taken for the children of the community that should build from the stands which included Mr Diale's son. Mr Diale himself requested he be allocated 4 stands which was a thorny subject for the community and spelt it out that he does not qualify except for his son. Following his disqualification, he categorically stated that he will champion for their removal from the applicant's side. The Respondents have, since January 2020, never had a meeting with Mr Diale and have been residing on their properties without interruption. They also have been in communication with the applicant about the land in question since October 2019 and on 10 April 2020 a meeting was arranged between them which the applicant failed to attend. It was in this meeting that a resolution for water services and for Eskom to provide electricity to the Respondents was made. Another meeting of 02 July 2020 was held between the parties where the Respondents stated in unequivocal terms that they reside on the land, and it is for the applicant to legalise their stay. It was the

applicant, represented by Mr Maabe (Acting Manager) who requested to be provided with the details of each of the occupiers and promised them with water which was delivered on 03 July 2020. Therefore, the Respondents have been residing at the said property without any disruption.

- [10] This court as the last line of defence in this matter is now assessing the facts presented before it to determine a just outcome in this dispute.

Discussion

- [11] This court is faced with the historic manifestation of the legacy of this country regarding the question of the lack of access to land which touches on many of the fundamental rights and responsibilities that are envisaged in the Constitution 1996. It will also not focus on this history. The question of access to land has become a contested terrain in South Africa today. The applicant as a 'coal face' of governance in the local sphere carries the brunt of responding to the imperatives of the new dispensation in addressing the historic imbalances in this area of contestation. This role raises a question in this application with reference to the balancing of competing rights and responsibilities regarding the fulfilment of rights by the applicant and access to such rights by the Respondents.

- [12] The applicant, as an organ of state exercising authority in the local sphere of government is defined in section 239 of the Constitution as:

- (a) any department of state or administration in the national, provincial, or local sphere of government; or
- (b) any other functionary or institution:
 - (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or

- (ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer; and

[13] This provision gives due recognition not only to the status of the applicant but its broad functions regarding its role in the local sphere of government. It is common cause that the applicant is the face of the general system of governance in concretising the gains that were attained during South Africa's democratization in 1994. It is at the forefront in ensuring the delivery of quality basic services as in this case because of its direct contact with the general citizenry and receives concerns about the lack of compliance with fundamental principles of the new democracy. Such a role was broadened by the adoption of the Local Government Municipal Structures Act 117 of 1998 (Structures Act). I am not going to regurgitate the legal framework as presented by both parties on papers and argument except for the limited focus on PART B of this application regarding the quest for an interdict against the unlawful occupiers of the land in question.

[14] I must first address the procedural aspect brought by this application. The Respondents attorney withdrew from this matter and their application for Legal Aid assistance was also not approved. They were represented in person by Mr Tebogo Bopape, a non-legally trained person. On the other hand, the applicant was represented by highly trained Advocates. I am raising this issue beforehand to indicate what I consider as an '**elephant and ant**' approach which indicates the unequal legal and constitutional power imbalances between the parties. Let me leave the status of legal representation and address the effect it has in this case regarding the quality of access to justice as envisaged in section 34 of the Constitution. The said section provides that:

everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

- [15] This section is broad enough as it is meant to eliminate all forms of conduct that would take over the authority of the courts in settling disputes in a fair and unbiased way. It also enhances the capacity of the court in assessing the quality of evidence on an equal basis. According to Mokgoro J in ***Lesapho v North West Agricultural Bank 1999 (12) BCLR 1420 (CC)*** and held that the:

'right of access to court is indeed foundational to the stability of an orderly society [by] ensuring the peaceful, regulated, and institutionalised mechanisms to resolve disputes, without resorting to self-help. The right of access to court is a bulwark against vigilantism, and the chaos and anarchy which it causes. Construed in this context of the rule of law and the principle against self-help in particular, access to court is indeed of cardinal importance. As a result, very powerful considerations would be required for its limitation to be reasonable and justifiable', (para 22).

- [16] In this case, the Respondents were '**left at the altar**' by their representatives and a lay person appeared in person which limited his ability to engage meaningfully on the interpretation and application of the law. Considering the costs of litigation with parties not on an equal standing in terms of the advancement of not only of the understanding of the law but the argument to be made in the context of the case at hand. The Respondents found themselves in a position where they had to deal not just with pure legal language but the constitutional language of the courts regarding the interpretation of the principles of the new dispensation. This touched on their role in giving meaning to the substance of accessing justice. Section 34 right does not entail entering the court building but the contribution to the significance of the legal framework on the matter. However, it is also not for this court to feel pity for the unequal balance in legal representation of the

Respondents. The determination of this matter touches on the foundations of the Republic as envisaged in section 1 of the Constitution.

- [17] It is therefore prudent to address the fundamental principle that is raised in this application regarding the Respondent's 'self-help' approach in accessing land to the compromise of the due process of law and mostly, at the prejudice of the law-abiding citizens that adhered to the prescripts regarding the housing allocation. The applicant classified the Respondent's conduct as 'queue jumping' to get preference in the allocation of houses. In curbing these undue tendencies, the application for an interdict is intended to restrict any present or future conducts that may bedevil the carriage of the primary mandate in the delivery of the quality of access to land. The Respondents on the other hand stated that they hoped that the matter would be settled out of court as they continued to engage with the applicant in resolving the impasse. An e-mail dated 04 November 2023 which was presented from bar and not responded to by the applicant was read for the court to indicate their attempts to resolve the matter without the involvement of the courts. However, the applicant's counsel was not made aware of the communication up until argument and his instruction was to continue with this application for the eviction of the Respondents.
- [18] This case as noted, raises an important principle against 'self-help' which may also be interpreted as 'land grabbing' by the applicant. This was viewed differently by the Respondents because of their suspicion regarding the way in which the tender system was administered and saw it imperative that they occupy the land in getting the attention of the applicant regarding their plight in accessing housing and of their concern regarding the crime rate in accordance with the resolutions of their January 2020 meeting.
- [19] The Respondents stated vehemently during argument and did not deny the unlawful occupation of the land. They justified their unlawful occupation of the land on their desperation in accessing housing. The bravery of the Respondents

during arguments which was not founded in law about their 'hostile take-over' of the land was indicative of the lack of insights on the deeper understanding of the due process of law and its interpretation. Their conduct was not reminiscent of the provision of section 34 of the Constitution as noted above on the quality of access justice as an integral framework for concrete legal arguments regarding access to the land in question. The courage on unlawful occupation was nothing more than the creation of chaos and instability in the jurisdiction of the applicant which is not consonant with a stable society. Whilst the applicant's counsel was stuck to the legal principles for the eviction of the Respondents, the latter made wild allegations about the suspicions they had regarding the way in which the applicant handled the bidding process. The suspicion does not justify the lack of respect for compliance with the laws of the Republic. Despite the Respondents situation, it is not for them to promote lawlessness in accessing housing. The Respondents, even with caution by this court, disputed that their conduct amounted to 'self-help' contrary to the prescripts of the legal framework that regulate the allocation and accessing of the land. They contended that due to the way the bidding processes were administered, they were of the view that the applicant was trying to prefer people over others that must be allocated stands. The applicant, by its own admission, conceded that there were flaws in its administration of the tender process hence they readvertised it so that it runs smoothly without any hindrance.

- [20] However, it is also not of this court to consider the suspicious allegations but to stress that it will not in any way promote vigilantism and disorder in the administration and management of the democratic system in regulating the authority by the local sphere of government. 'Self- help' creates hostility particularly in a country like ours that is governed and subscribes to the general principles of constitutionalism which are founded on the rule of law. Unlawfulness undermines stability not only in the applicant's jurisdiction but nationwide. The Respondents are equally bound by section 8 of the Constitution to respect the

foundations of democracy in defence and sustenance of the values of the new dispensation.

[21] In this case, there was also a dispute of fact on papers and argument in which the applicant had reservations about whether the occupiers moved and stayed in the land for more or less than six (6) months. The period touches on the immediate action by the applicant for having applied for the eviction of the Respondents as prescribed by section 6 of the PIE Act. The legislative prescriptions are acknowledged by this court; however, it also wishes to balance the timeframes against the applicant's corresponding duties regarding what is best for the people in distress that lack access to land and the way in which the applicant handled this matter. The applicant also stated that the '*duration or occupation is however, a self-standing consideration as envisaged in section 6(3)(b) of PIE*', (**para 16**). An inference is drawn in that the applicant is not necessarily concerned about the time frame except for the urge to have the people be removed from the land. I am also not getting into the contested facts whether the Respondents occupied the land under the impression created by Councilor Diale whilst on the other hand the applicant refutes any impression or authority that could have been created by Councilor Diale for the occupation of the land.

[22] For this application, the question of land ownership was not in dispute except for the way in which such land must be accessed and utilized. The applicant, in satisfying the remedy for an interdict, placed before this court that it is the owner of the said land and the continued unlawful occupation by the occupiers undermines its own processes in housing delivery and there is no other alternative or satisfactory remedy available to curb the Respondent's conduct, (**Madikizela v Nkosi 19408/2021 para 12**). It is clear from the applicant's contention that requirements for the granting of the interdict were satisfied as the ownership of the land was not disputed. This court will also not deal with this uncontested fact because a clear right is satisfied by the probabilities test in

considering the relief sought for an interdict in preventing present and future conducts. Adhikari AJ in **Levi v Bankitny [2023] ZAWCHC 84** citing with approval Mhlantla AJA in **National Council of Societies for the Prevention of Cruelty to Animals v Openshaw [2008] ZASCA 78** held that *‘an interdict is not a remedy for past invasion of rights but is concerned with present or future infringements. It is appropriate only when future injury is feared. Where a wrongful act giving rise to the injury has already occurred, it must be of a continuing nature or there must be a reasonable apprehension that it will be repeated, (para 20).* For the application of this principle in this case, the Respondents argued passionately about their unlawful occupation of the land putting emphasis on their suspicions regarding the way in which the bidding process was handled by the applicant. As noted, land ownership was not disputed, and this court draws an inference that the Respondents had a considered understanding of the rights and ownership of land as the applicant’s property. However, the question is hanging on the balance relating to the extent to which the applicant deals with the plight of people finding themselves in an emergency situation *vis-à-vis* the fulfilment of its own primary mandate?

[23] This brings me to the regulatory framework that governs the eviction of unlawful occupiers in a certain land by organs of state. In this instance, section 26 of the Constitution is foundational to the role of the courts in considering the interdicts for the unlawful occupation of the land and in turn for the protection of the said right as it reads as follows:

- 1 *everyone has the right to have access to adequate housing.*
- 2 *The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.*
- 3 ***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, (my emphasis).

- [24] The essence of section 26 was given context by Yacoob J in ***Government of the Republic of South Africa v Grootboom*** 2000 (11) BCLR 1169 (CC) judgment wherein the Judge said:

[section 26] need to be considered in the context of the cluster of socio-economic rights enshrined in the Constitution. It entrenches the right of access to land, to adequate housing and to health care, food, water and social security ... and also protect the rights of the child and the right to education. ... [and] it cannot be said to exist on paper only ... [and] the state is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing. Their interconnectedness needs to be taken into account in interpreting the socio-economic rights, and, in particular, in determining whether the state has met its obligations in terms of them, (paras 19-24 and all footnotes omitted).

- [25] Yacoob J's emphasis in ***Grootboom*** on the states obligations is integral to the execution of evictions of those alleged to have unlawfully occupied the land belonging to the state, which in this instance, the applicant. This means there is a needed balance of competing rights between the state in carrying its own mandate in prohibiting any unlawful conduct and on the other hand the general citizenry that is equally responsible in its quest for the fulfilment of their rights. It is acknowledged that accessing housing or land is not immediately realisable but is to be progressively realized within the framework of the financial muscle of the state. This court dispels the unequal status of rights and their categorization into inboxes as they are interdependent failing which the right to equality, dignity, freedom, and security of the person will flow into a 'hollow ring', (***Grootboom***

para 24). Therefore, the adoption of the PIE Act as envisaged in section 6 carries the plan not just for the due process to be followed but the infusion of the elements of human rights if unlawful occupiers had to be evicted from the land by a state organ. The said section reads as follows:

- (1) *an organ of state may institute proceedings for the eviction of an unlawful occupier from land which falls within its area of jurisdiction, except where the unlawful occupier is a mortgagor and the land in question is sold in a sale of execution pursuant to a mortgage, and the court may grant such an order if it is just and equitable to do so, after considering all the relevant circumstances, and if:*
 - (a) *the consent of that organ of state is required for the erection of a building or structure on that land or for the occupation of the land, and the unlawful occupier is occupying a building or structure on that land without such consent having been obtained; or*
 - (b) *it is in the public interest to grant such an order.*
- (2) *for the purposes of this section, “public interest” includes the interest of the health and safety of those occupying the land and the public in general.*
- (3) *in deciding whether it is just and equitable to grant an order for eviction, the court must have regard to:*
 - (a) *the circumstances under which the unlawful occupier occupied the land and erected the building or structure;***
 - (b) *the period the unlawful occupier and his or her family have resided on the land in question; and***
 - (c) *the availability to the unlawful occupier of suitable alternative accommodation or land, (my emphasis).***

[26] As noted, PIE is the regulatory statute governing the process of eviction of unlawful occupiers of a certain land. In giving substance to section 6 provisions, the applicant, through its Acting Manager conceded that it does not have an alternative plan for accommodating the unlawful occupiers, otherwise, '*doing so would promote unhealthy precedent and illegality*'. On the other hand, the applicant placed before this court of a possible plan to accommodate the Respondents in the municipal hall that has electricity, ablution facilities and a kitchen that may serve the purpose for alternative accommodation if the application is granted. This plan did not indicate the time frame in which people are to be resident in the said hall. It is my considered view that the applicant does not have a reasonable and alternative plan to accommodate the occupiers because putting people in a municipal hall does not accord with the quality of standards in accessing housing. This is an affront to many of the fundamental rights that are entrenched in the Constitution, 1996.

[27] I am finding it difficult for an organ of state with an entrusted responsibility to reject its own citizens due to the alleged unlawful conduct. It is evident that the unlawful occupiers appear to be outcasts that are not entitled to the quality of standard of living as is the case with other human beings. In this case, if we look at this matter through the lens of a 'family' in local government, the unlawful occupiers are vetoed by their own heads of the household that are supposed to embrace and protect them from the socio-political and legal challenges of the world. The vulnerability of the people that are supposed to be brought back from the 'unlawfulness blanket' do not have the constitutional and the rights space in their own 'home yard' due to their taking of the law into their own hands. The applicant narrowed its focus on the consequence of the actions of the occupiers and not on the cause that resulted in the said consequence. It is striking that the applicant did not view the lack of access to land and or housing as a disaster that requires emergency attention. However, this court acknowledges that it will not under any circumstance promote unlawfulness but the conduct of the applicant

as an organ of state is required to go beyond its own means and marshal the resources to ensure equal access to land.

[28] Therefore, the hierarchy of alternative considerations in section 6(3) of PIE captures the content of human rights by requiring a holistic approach in determining the factors that could have contributed to landlessness. The proof of a clear right and ownership as is the case in this matter should correspond to the circumstances in which the Respondents found themselves, and not for the organ of state (applicant) turn a blind eye and apply the rigidity of the **'move out from my land'** approach. The determined factors serve as guide to this court with reference to the *'interests and circumstances of the Respondents and pay due regard to broader considerations of fairness and other constitutional values, so as to produce a just and equitable result'*, (Ponnan JA in ***Ekurhuleni Metropolitan Municipality v Various Occupiers, Eden Park Extension 5 (873/12) [2013] ZASCA 162 para 18*** citing with approval Horn AJ in ***Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter 2000 (2) SA 1074 (SE) at 1081E-G***). It is also noted that the availability of the land alternative is at the lowest of the protocol which sets the bar low for this court in granting a just and equitable order. The determination of holistic factors that resulted in landless carry no substance if after such an undertaking, the people to be evicted would still not have alternative accommodation as presented by this case. However, the applicant does not provide the timeframe in which people would be moved to better suited accommodation except for **'throwing in the towel'** that it does not have a further alternative land.

[29] It is my considered view that the establishment of a clear right by the applicant with a potential to place people in a community hall does not address the concern about the lack of access to land. The applicant conceded that it does not have a plan or capacity to deal with this shortcoming in its systems of governance. The prospects of subjecting people to humiliating treatment by accommodating them in a municipal hall does not only undermine the requisites

of the section 6 PIE provisions but the overall scheme of the right to property as envisaged in section 25 of the Constitution which envelops access to land by giving substance to property rights as it reads as follows:

- (1) *No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.*
- (2)
- (3)
- (4)
- (5) *The state must take reasonable legislative and other measures within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.*

[30] Except for the negative obligation of the state in sub-section 1, of importance is the mandate placed upon the state, inclusive of the local sphere of government, to ensure equitable access to land. The 29 years of democracy is no 'longer about learning by doing' but the drawing from previous experiences for measures that will enable the building of capacity in addressing the question of landlessness in South Africa. I am not convinced that the plan for low-income earners is reasonable for equal access except for the applicant's determination to evict the unlawful occupiers from the land.

[31] Of further importance is the concern about the protection of the privacy rights of the people. The right to privacy is envisaged in section 14 of the Constitution which reads as follows:

everyone has the right to privacy, which includes the right not to have:

- (a) *their person or home searched;*
- (b) *their property searched;*

- (c) *their possessions seized; or*
- (d) *the privacy of their communications infringed.*

[32] The significance of this right is two-pronged in that it is individualistic in approach by endorsing individual rights of a human person and extends protection to the property rights of the said person. This right is of universal application in that article 17(1) of the International Covenant on Civil and Political Rights adopted in 1966 by the United Nations General Assembly provides that:

- 1 *no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.*
- 2 *everyone has the right to the protection of the law against such interference or attacks.*

[33] In the context of this case, if the right of privacy is of an international standing, the housing of people in a municipal hall with no prospects of them having access to quality or decent housing touches on the content of the rights of human persons despite their categorization whether they are unlawful occupiers or not. The individualistic nature of this right entails the corresponding protection of the right to property in which the Respondents' access to quality property is relegated to the sphere of no significance. The potential of the inhuman treatment of the unlawful occupiers for their accommodation in a municipal hall cannot be saved even by the limitation of rights as envisaged in section 36 of the Constitution. This section entails the determination of whether there is an infringement of the right and whether such infringement is rationally connected to the purpose to be achieved by such limitation, (***S v Makwanyane* 1995 (6) BCLR 665 (CC) para 104**). In this case, the determination of the existence of the limitation of the right necessitates the balancing of competing interests which entails the role of the applicant *vis-a vis* the right of the Respondents in accessing land. The eviction of the unlawful occupiers from the applicant's land is

not directly linked to the aspirations of the new democracy in creating an environment that is conducive for all to access their right which in turn, would have involved the fulfilment of the primary mandate of the organ of state (the applicant).

- [34] The determination of the limitation of the right is not a mere protection of the right but for each human person to be free from all forms of invasions. It serves as a central tenet for safeguarding other rights such as the right to human dignity as envisaged in section 10 of the Constitution, (***Dawood v Minister of Home Affairs 2000 (8) BCLR 837 para 35***). It buttresses the quest not to be treated in a degrading and humiliating way as it appears to be methodology that the applicant is seeking to place human beings in a municipal hall where it is common knowledge that privacy and other associated rights are likely to be severely undermined. It brings the ***elephant and the ant*** approach to the fore as evidenced by legal representation where those that are unlikely to stand up and ensure the enforcement of their rights due to the variety of factors they are faced with are relegated into the arena of inhuman treatment. The eviction of unlawful occupiers without a concrete plan for the future of the area in securing access to land is a manifestation of forced removals of South Africa's history which this judgment is restraining itself in delving into it. If Mhlantla JA in ***Rusterburg Local Municipality v Vincent Mdango (937/13) [2014] ZASCA 83*** on an appeal from the North West High Court, (Mafikeng) raised eyes browse after the court a *quo* was concerned about the '*municipality's attitude and its failure to suggest any plan regarding the resettlement of the occupiers to provide steps taken to consider the issue of alternative accommodation or land but granted the eviction order and suspended it pending the availability of suitable accommodation or land for the settlements of the respondents*' (para 10, my emphasis) in the context of this case, that case touches on the similarly situated status of the Respondents for the applicant to provide them with such accommodation before coming to this court. The suspension of the order by the

court a *quo* is indicative of the importance of the alternative accommodation principle on eviction matters.

[35] I found '**salt in the mouth**' with the applicant's attitude that shows the complete disregard not only of its role but of the fundamental principles and values of the new dispensation. The applicant, as the local sphere of governance with no comprehensive plan and or a policy that will deal with people finding themselves in distress amounts to the undermining of the lessons that should have been learnt from the Yacoob J in **Government** judgment above. In that case, the Constitutional Court found the states housing programme as having failed in its primary responsibility to develop and adopt a housing plan or policy that deals with people in emergency situations, (**para 98**).

[36] I must express that there is a needed insight which has become more urgent for the infusion of the elements of humanity in the eviction of people in distress. These elements include but not limited to the African philosophy of the value of *Ubuntu* which requires the treating of each person with humanity and respect for no other reason than being human. Sachs J in **Port Elizabeth Municipality v Various Occupiers 2004 (12) BCLR 1268 (CC)** emphasized the elements of humanity in the application of the eviction law, which in this instance, section 6 of PIE. In that case, Sachs J held that:

*... PIE expressly requires the court to infuse elements of grace and compassion into the formal structures of the law. It is called upon to balance competing interests in a principled way and promote the constitutional vision of a caring society based on good neighbourliness and shared concern. The Constitution and PIE confirm that **we are not islands unto ourselves**. The spirit of ubuntu, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines*

individual rights with a communitarian philosophy, (para 37, my emphasis).

[37] The significance of *Ubuntu* was concretised by Mokgoro J in **Makwanyane** in that *'it runs like a golden thread in our veins'*, (**para 308**). The infusion of human elements entails the interdependence of values in the system of governance as envisaged in the idiom of being **'not islands unto ourselves'** without which the centrality of the whole system of co-rights-responsibility would hang in the balance. The non-infusion of human elements in governance is an indication of the lack of a transformed system of governance in the regulation of its authority at the local sphere of governance. The way in which the applicant should respond to the manner in which it handles the eviction processes is founded in the principles and commitment that is envisioned in the preamble of the Constitution *'for a democratic and open society in which government is based on the will of the people and for each citizen to be equally protected by law'*. The adoption of **'this is my land approach'** to the exclusion of the considerations that were the subsequent cause of the unlawful occupation of the land entrenches the **'elephant and ant'** approach as is the case with accessing justice in this case. I am not satisfied that the applicant has complied with provisions of section 4(8) of the PIE Act which requires this court to grant *a just and equitable order if no valid defence has been raised and the applicant has complied with the requirements of this section*. The court is the last line of defence, the satisfaction of a clear right is intertwined with the responsibility attached to it and not the exercise of the latter right to overpower the Respondents that are not on an unequal footing in enforcing their rights.

[38] It is concerning that this court is faced by the applicant as an organ of state is at the vanguard of evicting people from the land by perpetuating the historic manifestation of the forced removals of the past under the name of **'a clear right on land ownership'** without a strategy to extend ownership to the most vulnerable people with no security of tenure that are supposed to equally benefit

from the gains of the democracy. This court finds it difficult to grant an eviction order without a plan that will ensure that the destitute do not continue to suffer humiliation and maltreatment under the hands of the government (applicant) that is founded on many of the fundamental rights alongside their values as entrenched in the Constitution.

[39] The order below is not a bar to any further attempts between the applicant and the Respondents to find alternative ways to resolve the impasse on accessing land.

[40] As a consequence, the following order is made:

[40.1] The application for an interdict is dismissed.

[40.2] There is no order of costs of this application.

**N NTLAMA-MAKHANYA
ACTING JUDGE, THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

Date Heard: 06 November 2023

Date Delivered: 29 November 2023

Appearances:

Applicant:

D van der Borget with SS Maelane
Groenkloof Chambers
Pretoria

Respondents:

In Person: Mr Tebogo Bopape

