



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: 12503/2014

In the matter between:

NKOSINATHI WISEMAN MNGOMEZULU

PLAINTIFF

and

ETHEKWINI METROPOLITAN MUNICIPALITY

FIRST DEFENDANT

THE MINSITER OF SAFETY & SECURITY

SECOND DEFENDANT

Date of Hearing : 31 July 2017 – 4 August 2017

Date of Judgment : 30 August 2017

ORDER

The following order is granted:

- (1) The claim against Ethekwini Metropolitan Municipality, the first defendant to compensate the plaintiff for damages for shooting him on 21 September 2013 is dismissed with costs.
- (2) The claim against Ethekwini to compensate the plaintiff for damages for allegedly demolishing his property is dismissed with costs.
- (3) The Minister of Safety and Security, the second defendant is liable to compensate the plaintiff for arresting and detaining him unlawfully on 21 September 2013 until his release from custody in November 2013 with costs.

JUDGMENT

D. Pillay J:

Introduction

‘[T]he very integrity of the judicial process in our young democracy – and of our country’s apex Court – is at stake.’¹

[2] This judgment is a sequel to *Zulu and others v Ethekewini Municipality and Others* in which Van Der Westhuizen J expressed the concern above. He was referring to the conduct of employees of Ethekewini Municipality, which was the first respondent in that application and is the first defendant in this action. However, his concern is also valid in the context of a bigger dilemma. When conflicts reach such a state of impasse that rationality and reasonableness are jettisoned in favour of self-help in the form of intimidation and violence, when officers of the court are prevented from carrying out their duties, then his concern ramifies beyond the immediacy of the litigation. Courts cannot function optimally under such conditions. And if decisions of the court are compromised as a result, the very integrity of the court will follow suit.

[3] Furthermore, the framework of adversarial litigation limits the scope of the court’s interventions to the issues in dispute as pleaded, proved and argued. One way or the other the court will resolve the disputes as is its constitutional duty to do;² but solving the causes of conflicts calls for processes and remedies falling beyond the reach of its institutional capacity, notwithstanding its wide powers to grant any order that is just and equitable.³

[4] In this instance one of the real causes of the conflict was the demand for social housing. Getting to the root of this or any of the other causes that suggested themselves in this action is out of the question. For, framed as this case is

¹ *Zulu and others v Ethekewini Municipality and Others* 2014 (4) SA 590 (CC) para 65.

² S 34 of the Constitution of the Republic of South Africa, 1996.

³ S 172(1)(b) of the Constitution.

for payment of damages for demolition of a shack and unlawful assault, arrest and detention of the plaintiff, it is merely a proxy for the struggle for social housing. So unless the parties engaged meaningfully and consented to redefining the terms of reference for the court's adjudication, the court had no opportunity to 'scratch the surface to get to the real substance below' in order to determine precisely what is a 'just and equitable' remedy.⁴

Background

[5] On 21 September 2013 Gavin Michael Le Cordier lead his team from the Land Invasion Unit (LIU) of Ethekewini into Cato Crest, a suburb west of Durban. They planned to demolish unoccupied built and partially built shacks in order to prevent illegal occupation of land. As the team approached the shacks the plaintiff Nkhosinathi Wiseman Mngomezulu protested loudly. Members of the LIU chased him away. They followed him to ensure that he did not tamper with their vehicles. The plaintiff approached them. An altercation occurred between Mr Le Cordier and the plaintiff. Mr Le Cordier shot the plaintiff four times in his abdomen; the plaintiff stabbed Mr Le Cordier once in his abdomen.

[6] Mr Le Cordier received treatment at St Augustine's Hospital. He was released the following day. The plaintiff underwent surgery and treatment for serious injuries at King Edward VIII Hospital. His legs were cuffed to his bed. Members of the South African Police Services (SAPS), the second defendant, were posted at his bedside to guard him. He was arrested. He remained in hospital until his discharge on 22 November 2013. On discharge from hospital the SAPS took him into custody at Cato Manor Police Station. The following day he was released from the Magistrates' Court without appearing before a magistrate. On 28 November 2014 the Senior Public Prosecutor (SPP) issued a *nolle prosequi* discharging the plaintiff from prosecution.

[7] As a result of these events the plaintiff instituted an action for damages for the following:

⁴ *Zulu and others v Ethekewini Municipality and Others* para 62.

- a) Employees of Ethekekwini wrongfully and unlawfully assaulting him.
- b) Employees of Ethekekwini unlawfully demolishing the his home.
- c) Members of the SAPS unlawfully arresting and detaining him without a warrant and without reasonable grounds to suspect that he assaulted Mr Le Cordier unlawfully.
- d) Members of the SAPS laying a false charge of assault against him (withdrawn during closing argument).

Onus and the duty to begin

[8] It was common cause that the defendants bore the onus of proving that their actions were lawful.⁵ Accordingly the defendants agreed to start.

Ethekekwini's Case

[9] The LIU had discovered that shacks were being constructed on vacant land in Cato Crest. They informed the owner of the land, which at the time was the Province. Consequently the Member of the Executive Council for Human Settlements and Public Works (MEC) for the Province of KwaZulu-Natal obtained an interdict against Ethekekwini and the Minister of Police on 28 March 2013. This 'March order' authorised Ethekekwini and the SAPS to take all reasonable and necessary steps to prevent any persons from invading, occupying or constructing structures on certain properties including Lots 17-19 of Erf 960 of Cato Manor. It also authorised the respondents to remove materials and demolish any structures on the properties on the list attached to the order. 'Any person' was interdicted and restrained from invading, occupying or constructing structures on the properties. Notice of the order had to be given by placing a copy with a translation in isiZulu in prominent places on each of the properties and by publishing it with a translation in *The Ilanga* for three consecutive days.

⁵ *Minister of Law & Order & Another v Dempsey* 1988 (3) SA 19 (A) 38 B-C; *Zealand v Minister of Justice & Constitutional Development* 2008 (2) SACR 1 (CC) [also reported at [2008] JOL 21448 (CC) at para 24 – 25.

[10] The March order had the attention of the Constitutional Court in *Zulu and others v Ethekwini Municipality and Others*. A minority of two opined that the March order should be set aside because it was unconstitutional and would cause irreparable harm.⁶ The majority reasoned that the issue on appeal was the refusal by the High Court to allow the appellants to join the proceedings granting the March order; the appellants should anticipate the return day to seek the discharge of the March order; the demolitions appeared to have stopped; the parties in three related cases in the High Court had to have an opportunity to finalise them.⁷

[11] The March order remained in force until 20 August 2015 when it was discharged. In discharging it the High Court reminded that the general rule is that court orders must be obeyed irrespective of whether they have been wrongly granted. Consequently in this action Mr Le Cordier persisted that in carrying out the March order they meticulously ensured that the only shacks demolished were those that were unoccupied. Typically the shack owners and occupiers resisted the demolitions by protesting, demonstrating and rebuilding their shacks immediately after they were demolished. Mr Le Cordier denied knowing about the High Court orders issued from August 2013 to restrain the evictions and demolitions.

[12] Turning to the assaults, when they encountered the plaintiff Mr Le Cordier was in front of Mr Kippen. The plaintiff advanced aggressively towards them ignoring Mr Le Cordier's instruction to stop. He used a plastic lid as a shield and carried a spear-like rod. Mr Le Cordier fired a paintball marker at him to stop him. A paintball marker releases a pepper spray on contact with its target. Undeterred the plaintiff continued to advance towards Mr Le Cordier. Mr Le Cordier called out for the second time. But the plaintiff failed to stop or retreat. Then Mr Le Cordier handed the paintball marker to Mr Kippen and drew his 9mm pistol from his holster. This too did not stop the plaintiff. Mr Le Cordier fired four shots into the ground in front of the plaintiff's feet. Still the plaintiff advanced. As Mr Le Cordier stepped backwards he tripped and fell. The plaintiff stabbed him in his lower abdomen with the rod. As the plaintiff motioned to stab him again Mr Le Cordier fired shots into the plaintiff's abdomen. The plaintiff retreated.

⁶ *Zulu and others v Ethekwini Municipality and Others* para 51-64.

⁷ *Zulu and others v Ethekwini Municipality and Others* para 37.

[13] Mr Le Cordier called off the demolition operation to tend to his injuries. Mr Kippen and Terence Goulding corroborated Mr Le Cordier in material respects.

The case for SAPS

[14] Constable Mondli Gabisa received a report on the radio. He also attended to a complaint from a woman and a man who introduced himself as Aron Mzimela, the cousin of the plaintiff. They reported that the plaintiff had been shot. Constable Gabisa attended on Mr Le Cordier in hospital and established that he had been stabbed. He proceeded to the Cato Crest settlement. Mr Mzimela pointed out the scene where the plaintiff had been shot. At King Edward Hospital the medical staff refused to allow him to see the plaintiff who was in a critical condition. He took a statement from Mr Mzimela. In his statement recording his involvement with the case on 21 September 2013, Constable Gabisa referred to Mr Le Cordier as the victim and the plaintiff as the patient, not a suspect. One cannot infer from this that he was necessarily biased against the plaintiff as counsel for the plaintiff suggested.

[15] Warrant Officer Brian Poliah was the Investigating Officer from 3 October 2013. His senior, Captain Khawula, instructed him to take over the investigation. Initially the docket was for assault with intention to commit grievous bodily harm. But this changed to attempted murder. He did not see the plaintiff's legs cuffed to his hospital bed. Constable Phumlani Innocent Mpanza opened a docket after visiting Mr Le Cordier in hospital. Constable Christopher Arthur Sibiya arrested the plaintiff on instructions from Captain Khawula at the hospital on 21 September 2013. Captain Khawula failed to testify.

The plaintiff's case

[16] Sibusiso Zikode is the president of the Abahlali Base Mjondolo Movement of South Africa (The Movement). He testified about the LIU'S harassment of the occupiers of the informal settlement and the latter's resistance. However, his description of the conduct of members of the LIU was not put to the witnesses for

Ethekwini. Each time shacks were demolished shack owners reconstructed them. He did not witness the events of 21 September 2013.

[17] He was in attendance in court when the Movement and 30 other applicants who were its members obtained an undertaking from Ethekwini and the MEC that their employees would refrain from evicting the 30 applicants and demolishing the informal structures remaining at Cato Crest informal settlement. That undertaking was recorded in the order of court of 22 August 2013. Costs were reserved.

[18] On 2 September 2013 the Movement and the 30 applicants returned to court and obtained an interdict against Ethekwini and the MEC. This time not only did the court restrain Ethekwini from evicting the applicants and demolishing and disposing of their informal housing structures; it also ordered Ethekwini to construct temporary habitable dwellings to afford shelter, privacy and amenities equivalent to those that were destroyed at the sites where the informal housing had been demolished. Furthermore the demolitions executed on 13 August and 1 and 2 September 2013 were declared unlawful. Ethekwini and the MEC were ordered to pay the costs of the application on the scale as between attorney and client.

[19] On 6 September 2013 the applicants returned to court for the third time and obtained an order in which The Head: Land Invasion Unit (i.e. Mr Le Cordier), the Municipal Manager of Ethekwini and the Station Commander of SAPS Cato Manor who were joined as second, third and fourth respondents were found to be in contempt of the order of 2 September 2013. The court ordered them to be committed to a term of imprisonment of 30 days, but suspended that order for one year on condition that they complied with it forthwith. Mr Le Cordier and the Municipal Manager in the contempt application were ordered to pay the costs on the scale as between attorney and client.

[20] Eventually on 12 September 2013 the court ordered the legal representatives of the Movement and the respondents to meet at the Cato Crest settlement on 17 September 2013 to identify and mark the informal structures of the

30 applicants. The interdict restraining the demolition and the disposal of the informal structures of the 30 applicants were reinforced. Costs were reserved.

[21] On the appointed day the legal representatives assembled as directed. A councillor arrived with a group of people to harass the legal representatives. As a result, marking the structures of the 30 applicants could not be executed. Mr Zikode also testified that people who spoke isiXhosa and who were not members of the African National Congress, the governing political party, were not allocated sites. This crucial evidence was not put to witnesses for Ethekwini or the SAPS. Consequently the respondents had no opportunity to admit or deny these allegations or to account for what steps they took against those harassing the occupiers of the informal settlements.

[22] The plaintiff testified that on 20 September 2013 Mr Le Cordier and the LIU arrived at Cato Crest. He presented Mr Le Cordier with copies of the court orders interdicting the eviction of occupiers and the demolition of shacks. Aron Mzimela accompanied him. Mr Le Cordier ignored the court orders. The shacks were demolished. The following day the residents rebuilt the shacks. Whilst they were doing so the LIU returned. The plaintiff accompanied by a person known as Sicelo and Mr Mzimela approached Mr Le Cordier. He was about seven metres away when Mr Le Cordier fired his first shot with rubber bullets. Mr Le Cordier placed this firearm down, pointed his handgun and shot the plaintiff. Both his companions retreated. Incensed by being shot and having no home he continued to advance towards Mr Le Cordier. As Mr Le Cordier retreated he tripped. His firearm fell. Whilst he lay on his back on the ground the plaintiff stabbed him with the iron rod before retreating. By then the plaintiff was weak. Mr Mzimela and Sicelo helped to find transport for him to hospital. He also suffered from the tear gas the LIU used to disperse people.

[23] When he regained consciousness he found that his feet were tethered to the hospital bed. Two policemen were guarding him. He was released from the hospital and taken to Cato Manor Police Station. He was deprived of his medication, which he had to take thrice a day. Whilst waiting at the magistrate's court other inmates harassed and searched him. Considering that his wounds were still bandaged these searches were particularly unpleasant. On his return from the

magistrates' court Mr Zikode took him to the Dalton Hostel where the plaintiff's brother resided.

Did the members of the LIU demolish the plaintiff's shack?

[24] The plaintiff was cross-examined at length to establish the position of his shack, which he alleged was in the woods. His explanation for citing his address as CC3421 and room 190 in his hospital records and statement of complaint to the police was that these were addresses he used so that if there was any mail for him or anyone looking for him they could find him through the residents at those addresses. However, arriving at this simple explanation was a long and winding road with many deviations. As a result the court was left in some doubt about the truthfulness of his final version.

[25] Whilst the court accepts that some occupants of informal settlements have no addresses and they rely on addresses in formal settlements nearby, the plaintiff could have given this evidence simply, clearly and concisely. The court acknowledges that he was unsophisticated with no formal education. However, he had the services of an interpreter and the evidence sought was a straightforward statement of fact. Why was he evasive then about his address?

[26] The location of the plaintiff's shack was crucial to determine whether it was one of those that the LIU demolished. If it were he would have been entitled to compensation. According to witnesses for Ethekwini, the demolitions were confined in terms of the March order to Lots 17, 18 and 19 of Erf 960 Cato Crest. Even then the demolitions were restricted to unoccupied complete and incomplete structures. In contrast, the plaintiff persisted that his shack was in the forest in an area not prone to demolition under the March order. To resolve this dispute of fact the court directed the parties to conduct an *in loco* inspection. Disconcertingly, the defendants and their legal representatives were harassed and intimidated from conducting the inspection. On advice from the security personal they left the informal settlement without accomplishing the task.

[27] Remarkably the protestors allowed the plaintiff to continue with his legal team to point out places where his shack allegedly was. From this it is fair to assume that they were supportive of him and hostile to the respondents. The *in loco* inspection could have added evidential value. However, the obstruction of the respondents and their legal representatives from carrying out their duties not only deprives the court of important evidence but also weakens the evidential value of the inspection for the plaintiff.

[28] Following the *in loco* inspection the plaintiff got an agreement from Ethekwini that the plaintiff had pointed out four spots where he alleged the shooting had occurred and where three shacks including his own were demolished on 21 September 2013. Ethekwini also agreed that these spots were marked on Google Maps, which was printed and handed in as Bundle E.

[29] However, Ethekwini's witnesses denied that the plaintiff's shack was at the points marked in Bundle E because the points fell beyond Lots 17, 18 and 19 of Erf 960 Cato Crest. Bundle E's evidentiary value is no higher than being a true printout of the electronic map depicting areas pointed out by the plaintiff. It did not amount to an admission that the plaintiff's shack was at the place that he had pointed to. For purposes of cross-examination the plaintiff's inability to read maps and to point out his location on it in court weakened its usefulness further. His illiteracy was all the more reason for conducting an inspection.

[30] Thus the position remained unchanged after the inspection with Ethekwini maintaining that the shacks it demolished were unoccupied and outside the woods whereas the plaintiff persisted that shacks including his own were inside the woods.

[31] The evidence for Ethekwini was clear, consistent and corroborated. As for the plaintiff he was a single witness to the events of 21 September 2013. He was not only evasive about his address but untruthful about whether he was in court when Mr Le Cordier testified. Initially he said that he was sitting outside; subsequently and after much probing he acknowledged that he was in court on the first and second days of the trial but vacated the court when his attorney advised him to do so. He also disingenuously denied that it was he who vacated the court instantly after the

court asked whether the plaintiff and his witnesses were inside court when Mr Zikode was testifying.

[32] In his statement of complaint to the police he denied ever stabbing any security personnel. This conflicted with his evidence. His response to differences in his evidence and in his statement to the police was that the police officer who took his statement sided with the Ethekewini officials and was unsupportive of him. Assuming this was true and accepting further that statements of witnesses taken by the police are not always accurate or complete, the recording that he never stabbed any security is an unequivocal untruthful statement. He did not deny making it. Allowances can be made for inaccuracies and misunderstandings in statements the police prepare but manifest dishonesty in the circumstances is inexcusable. Resorting to the right to silence he could have declined to make a statement rather than make a false one.

[33] Surprisingly, as a person who was so incensed by the demolition of his neighbours' properties that he rose to defend them, he was unable to get a single neighbour to corroborate his evidence about the location of his shack, the events of the previous day, the demolitions of his neighbours' properties and the assaults.

[34] Accordingly I find that the plaintiff was not an honest, reliable witness. His vacillation about the addresses he used creates doubt about whether he had a shack at all. Consequently, I find that the plaintiff has failed to prove that he had a shack in the woods or anywhere in the Cato Crest informal settlement.

Claim 1: Damages for Unlawful Assault

[35] The March order and the demolitions it authorised form the backdrop of the assault. In discharging the March order the High Court agreed with Ethekewini that it was obliged as an organ of State to comply with it. However, the Constitutional Court had been unanimous in finding that the demolitions of structures to prevent land invasions were acts of eviction and that Ethekewini's 'contradictory positions' in executing the demolitions on the strength of the March order after disavowing it, was

‘totally unacceptable’.⁸ Despite the Constitutional Court’s scathing criticism of Ethekwini, in this case its witnesses persisted in testifying to justify the demolitions again on the strength of the March Order.

[36] Ethekwini would not have known what the Constitutional Court’s opinion would be when it carried out these demolitions in September 2013, but it had to know it by the time this action commenced in October 2014, as the Court had handed down its judgment in June 2014. On Mr Le Cordier’s evidence alone Ethekwini was attempting once again to pass off the evictions as demolitions only despite the finding of the Constitutional Court to the contrary in *Zulu and Others v eThekweni Municipality and Others*.

[37] Additionally the Movement and 30 occupiers of the settlement secured subsequent orders that apply to the whole of Cato Crest informal settlement without distinguishing between marked and the unmarked plots as the March order did and interdicting both evictions and demolitions. Mr Le Cordier denied knowing about the orders granted from 22 August 2013 onwards. His denial is surprising considering that as Head of the LIU he is the second respondent in the September orders. Furthermore he was aware of the order directing the parties to meet to mark the informal structures. He confirmed that the exercise was not undertaken. If Mr Le Cordier had not been notified of the court orders of 22 August and 2 September 2013 that were preludes to the contempt order of 6 September against him, then it is a failing on the part of Ethekwini not to have alerted its officials to what was effectively a ban, an absolute prohibition on the demolitions and evictions in the entire informal settlement including the woods and Lots 17 to 19 of Erf 960.

[38] While court orders must be obeyed for as long as they are in force even if they have been wrongly made the situation in this instance was different. First, the March order was for the demolition of informal housing. Section 26(3) of the Constitution provides:

‘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’.

⁸ *Zulu and others v Ethekweni Municipality and Others* para 25-26, 35-36, and 39.

Seized with demolition and eviction matters, courts are enjoined by the Constitution to consider all relevant circumstances.⁹ The March order was granted urgently, collaboratively without opposition from Ethekewini (which provided the evidence for the application) and SAPS, without notice to the occupiers and consequently without ‘considering all the relevant circumstances’.

[39] Second, the March order was overtaken by the August and subsequent orders. Practically the LIU could not implement the March order without violating the subsequent orders. The order directing that the marking of the sites has yet to be undertaken.

[40] Third, municipalities have a ‘direct and substantial’ interest in litigation that results in homelessness.¹⁰ They have been joined in such litigation because their constitutional obligations to the homeless are automatically engaged when courts grant eviction orders.¹¹ Consequently Ethekewini’s application for the March order was extraordinarily insensitive to its constitutional commitments.

[41] Fourth, the March order was a nullity.¹² It was sought and obtained without notice to the plaintiff and occupiers of the informal settlement. Ethekewini proffered no evidence that it served the March order on the plaintiff or anyone else. Effectively, the March order was granted without having afforded the owners and (potential)

⁹ *Occupiers of Erven 87 & 88 Berea v De Wet N.O. and another* [2017] ZACC 18 para 40.; *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7; 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC) para 23, 36

¹⁰ *City of Johannesburg v Changing Tides* 2012 (6) SA 294 (SCA) para 37; *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* [2010] ZASCA 28; 2010 (9) BCLR 911 (SCA) (*Shulana Court*) at paras 11 - 15; *Occupiers of erven 87 & 88 Berea v Christiaan Frederick De Wet N.O.* [2017] ZACC 18 para 62

¹¹ *Kayamandi Town Committee v Mkhwaso and Others* 1991 (2) SA 630 (C); *Occupiers of erven 87 & 88 Berea v Christiaan Frederick De Wet N.O.* *ibid* para 59; *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* [2011] ZACC 33; 2012 (2) SA 104 (CC); 2012 (2) BCLR 150 (CC) (*Blue Moonlight*) para 24

¹² *Master of the High Court (North Gauteng High Court, Pretoria) v Motala NO and Others* 2012 (3) SA 325 (SCA) para 11-12 and 14-15

occupiers of the shacks an opportunity to be heard before the shacks were demolished. Consequently the March order was not binding on them.¹³ In all the circumstances, to persist in these proceedings on relying on it again signals intransigence on the part of Ethekewini.

[42] Against this background, counsel for the plaintiff submitted that by the LIU repeatedly defying the August and September court orders it provoked the plaintiff to resist the demolitions with force. Mr Kippen who accompanied Mr Le Cordier conceded that the occupiers would not have been aware of the intention of members of the LIU to demolish only unoccupied shacks; consequently their response to the demolitions was predictably hostile.

[43] The March order on which Ethekewini relied to effect the demolitions did not cite the plaintiff as a party. This is immaterial to determining the lawfulness of the conduct of the members of the LIU in violating the August and September court orders.

[44] There is a steady line of cases from the appellate courts that impose an obligation on local authorities to engage meaningfully with unlawful occupiers of land.¹⁴ Surprisingly, Ethekewini sought and secured the March order apparently without any engagement. Counsel for Ethekewini submitted that any engagement was not possible because the shacks demolished had no occupants. But the structures were shacks for human occupation. Human hands were involved not only in the construction of the shacks but also in the procurement of the materials, plans to occupy the structures once built and to rebuild them once demolished. Evictions and homelessness were inevitable. Thus, even if the shacks were unoccupied, members of the LIU ought reasonably to have anticipated that the destruction of the unoccupied structures would lead to homelessness. Instead of avoiding

¹³ *Kayamandi Town Committee v Mkhwaso and Others* 1991 (2) SA 630 (C); *Lewis & Marks v Middel* 1904 TS 291

¹⁴ *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* note 11 above para 57; 78; *City of Johannesburg v Changing Tides* 2012 (6) SA 294 (SCA) and the cases cited there; Brian Ray 'Occupiers of 51 Olivia Road v City of Johannesburg: Enforcing the Right to Adequate Housing through "Engagement"' 8 *Hum. Rts. L. Rev.* 703 2008

homelessness, Ethekwini created it. Worse still, it doggedly continued to demolish the shacks in the face of escalating resistance. Seeking out and engaging meaningfully with those affected was Ethekwini's constitutional duty.

[45] If Ethekwini attempted to engage meaningfully with the occupiers of the informal settlement at Cato Crest it led no such evidence. The court acknowledges that Ethekwini's duty to engage meaningfully would not been easy. Evidence of protests by the community against the respondents' employees on at least three instances that surfaced in this trial suggests that the informal settlement community was unapproachable for dialogue. Ethekwini would not be able to fulfil its constitutional responsibilities if the community fails or refuses to engage meaningfully. Nor can peaceful solutions be found if the community's ostensible demand is for social housing but its protest actions are for some other unarticulated purpose.

[46] In these proceedings the court's insight into the conflict is but a snapshot view of protracted struggles over a chronic shortage of housing. So the debate is no longer about who initiated the conflict. Nor is it about who is right and who is wrong. No one can doubt that the demolition-rebuilding tactics are highly risky not only for the protagonists but also for social order. Violence will spiral. Destruction not construction will continue. In the absence of any suggestion of a better alternative meaningful engagement remains pre-eminently the way to overcome this impasse. It has the imprimatur of the Constitutional Court for resolving socio-economic rights disputes. Without it there can be no return to rationality; without rationality nothing resembling social order is conceivable.

[47] In executing its constitutional obligations Ethekwini has a duty to initiate a process of meaningful arrangement with the occupiers of the informal settlement. How this process should unfold is a matter for Ethekwini to determine preferably with the occupiers and any other person or entities having an interest. In so far as the MEC is responsible for providing housing she would have an interest. The Movement definitely has an interest. The security forces would have an interest in restoring peace in order to facilitate meaningful engagement. The parties should seriously consider engaging the services of mediators. Meaningful engagement would have no

prospects of success if the protagonists do not genuinely commit to finding peaceful solutions.

[48] The court digressed into eviction law at the invitation of the plaintiff who pitched the evictions and demolitions as his explanation for challenging Mr Le Cordier. Notwithstanding that the value of a shack was insignificant in comparison to the costs of a five-day trial in the High Court, it took up a significant portion of the trial time. Throughout the trial people apparently supportive of the plaintiff occupied the gallery. Demolitions, evictions and homelessness were the real causes of the conflict between the occupiers and the respondents. The plaintiff's causes were but a proxy for their struggles. However, recognising the real causes of conflict does not justify any party resorting to violence. Although the court finds that the conduct of the members of the LIU was unlawful and highly provocative it cannot sanction violence unless it is in self-defence of person or property.

[49] The question remains: Did the plaintiff stab Mr Le Cordier in self-defence? Having found that the plaintiff failed to prove that he had a shack in Cato Crest the court must find that his actions were not in defence of his property. Without any corroboration of his alleged association with anyone whose shack had been demolished or that he lived in the settlement (an issue that was hotly contested), the court has to approach his evidence with caution. Even if he had established such a close connection with other occupiers the circumstances of the assault must be examined carefully.

[50] The plaintiff's version is not credible in all respects. His evidence that Mr Le Cordier shot at him first with the shotgun was not put to the witnesses for Ethekeini. Nor was it put to them that when Mr Le Cordier fell the handgun fell from his hand. The plaintiff had demonstrated to the court how he had stabbed Mr Le Cordier once and turned and walked away from him. Given that the plaintiff stabbed Mr Le Cordier when he was highly charged emotionally, it is unlikely that he would stab the disarmed Mr Le Cordier once only and retreat. What then stopped him from continuing to attack Mr Le Cordier? It had to be Mr Le Cordier shooting him in his abdomen to stop the plaintiff from stabbing him again. For this he had to have his pistol.

[51] On the plaintiff's own version he advanced towards Mr Le Cordier bearing a spear-like rod and a lid-like plastic shield. The plaintiff did not dispute Mr Le Cordier's evidence that he shouted twice to the plaintiff to stop and that he fired the paintball. He alleged that did not hear Mr Le Cordier shout. The plaintiff continued to advance towards Mr Le Cordier notwithstanding Mr Le Cordier's attempts to stop him by shouting at him and by firing the paintball. On the plaintiff's own evidence he continued to advance after he had been shot in the abdomen, incensed by the demolitions and being shot. He seized his opportunity to stab Mr Le Cordier once he had fallen on his back.

[52] Against this evidence even if one accepts the plaintiff's version that Mr Le Cordier had shot him before the plaintiff stabbed him, it is clear that the plaintiff was not deterred by either of the two verbal warnings or the paintball emissions. He resorted to self-help. Mr Le Cordier acted lawfully in defending himself. At most the plaintiff's reasons for attacking Mr Le Cordier might mitigate a sentence if he had been criminally prosecuted; it does not entitle him to compensation for damages for unlawful assault.

[53] In these circumstances I find that the plaintiff initiated the attack on Mr Le Cordier. Accepting that his anger against the unlawful conduct of the LIU was justifiable his resorting to violence, taking the law into his own hands and violating the rule of law is unjustified. Accordingly I find that employees of Ethekewini did not assault the plaintiff unlawfully.

Claim two: Damages for demolition of plaintiff's shack

[54] Having failed to prove that he had a shack this claim must be dismissed.

Claim three: Damages for unlawful arrest and detention

[55] The singular reason for finding in favour of the plaintiff is that the SAPS failed to call Captain Khawula as a witness. It was his decision to arrest the plaintiff. He had to testify about his reasons for doing so.

[56] Counsel for SAPS failed to proffer any explanation for failing to call Captain Khawula other than that he had retired. She relied on *Minister of Police v Ndala* 1956 (2) SA 777 (T) at 780 to support her submission that the evidence of the instructing officer is dispensable if the evidence of the arresting officer is led. The facts of *Ndala* are distinguishable in that the instructing officer was present when the arrest was effected. That is not the case in this instance. Counsel for SAPS also relied on *R v Blom* 1939 AD 138 at 202-203 for the submission that the court should draw the inference that Captain Khawula had issued the instruction after having acquainted himself with the statements in the docket. Inferences may be drawn only after facts have been proved to justify them. In this case SAPS failed to prove that the statements in the docket came to the attention of Captain Khawula. Furthermore, the only statement available on 21 September 2013 was that of Mr Le Cordier. The plaintiff had not given a statement at that stage. He was in a critical condition and therefore did not pose a flight risk. Arresting him without a warrant under these conditions called for an explanation. The oral testimony of Captain Khawula in court was indispensable unless there were cogent reasons why it could not be adduced.

[57] Without Captain Khawula's reasons for arresting and detaining the plaintiff and doing so without a warrant, the court must find that the SAPS failed to discharge the onus of proving the lawfulness of its actions. Consequently, his arrest and detention were unreasonable and unlawful.

[58] At the commencement of the trial the court granted a separation of issues with the parties agreeing to proceed on the issue of liability only.

Order

[59] Therefore I make the following order:

- (1) The claim against Ethekwini Metropolitan Municipality, the first defendant to compensate the plaintiff for damages for shooting him on 21 September 2013 is dismissed with costs.

- (2) The claim against Ethekwini to compensate the plaintiff for damages for allegedly demolishing his property is dismissed with costs.
- (3) The Minister of Safety and Security, the second defendant is liable to compensate the plaintiff for arresting and detaining him unlawfully on 21 September 2013 until his release from custody in November 2013 with costs.

D. Pillay J

APPEARANCES

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<i>Counsel for the second defendant</i>	:	<i>N Khumalo</i>
<i>Instructed by</i>	:	<i>The State Attorney KwaZulu-Natal</i> <i>Tel: (031) 365 2545</i> <i>Ref: Mr Kunene/ju</i>
Date of Hearing	:	31 July 2017- 4 August 2017
Date of Judgment	:	30 August 2017