

OF INTEREST

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, MTHATHA**

CASE NO: CA 51/15
(Under which are consolidated CA52/15, 75/15, 76/15)
CASE NO. 3412/2014
(Under which are consolidated 3424/14, 3434/14, 3407/14)

In the matter between

NOMKHITHA NTANTANA & OTHERS

Appellants

versus

**MHLONTLO LOCAL MUNICIPALITY
& ANOTHER**

Respondents

APPEAL JUDGMENT

HARTLE J:

1. The matter comes before us as an appeal against a judgment of this court sitting as the court of first instance, leave on petition having been granted to the appellants by the Supreme Court of Appeal.

2. The appellants, all indigent residents of the Chris Hani Park informal settlement in the District of Tsolo, issued four separate applications¹ out of the court *a quo* on an urgent basis on 26 November 2014 after their homes were summarily demolished, in which the respondents (the local municipality and its municipal manager respectively) were called upon to show cause by the following morning why certain interim relief and other orders should not be granted in the following terms:

“1.1 THAT the First, Second, Third and Fourth Respondents² be and are hereby authorised to take all reasonable and necessary steps;

1.1.1 THAT the Respondents or anyone acting through them are interdicted or restrained from not preventing any persons acting through them from invading and/or undertaking the demolition of any structure and/or placing any material upon the Applicants immovable properties situate at Chris Hani Park in the district of Tsolo in the Province of Eastern Cape.

1.1.2 THAT the Respondents be and are hereby interdicted and/or restrained from removing any materials or movable property in the Applicants houses situate at Chris Hani Park in the district of Tsolo in the Province of Eastern Cape;

¹ The original four case numbers appear from the face of the judgment. The appellants were joined variably in the separate applications which were ultimately consolidated. The groups were represented by different firms of attorney, each of which had taken the matters on a *pro bono* basis.

² There were no third or fourth respondents cited in the matter ultimately. I assume that the appellants intended to include the speaker and mayor of the first respondent respectively who were involved in community meetings with the residents to inform them of the housing development and how it would impact them.

1.1.3 THAT the Respondents be and are hereby ordered to restore the Applicants whose immovable property has been dismantled and/or demolished to their status quo before the cause of action.

1.1.4 THAT the Respondents or anyone acting through them be and are hereby interdicted and/or restrained from dismantling and/or demolishing any immovable structure or structures that have been constructed by the Applicants at their own costs.

1.2 THAT the Respondents or anyone acting through them be and are hereby interdicted and/or restrained from invading the Applicant's already constructed structures (houses) pending the provision of an alternative accommodation.

1.3 THAT the Respondents be and are hereby ordered to pay the costs occasioned thereby jointly and severally the one paying the other to be absolved.

2. That paragraphs 1.1 and 1.2 hereof shall operate as an interim mandamus with immediate effect pending the return date."³ (Sic)

3. Apart from each appellant's personal circumstances being set forth,⁴ the allegations in each application were essentially the same and each matter

³ The notice of motion in the lead matter differed somewhat from the other three applications in which the applicants in those matters prayed for an order in the following terms:

"1.

1.1 That Applicant's non-compliance with the rules relating to forms, short service and time limits be and is hereby condoned.

1.2 That Applicant be and (are) hereby granted leave to move this application on urgent basis in terms of Rule 6(12) of the Uniform Rules of Court.

2. That a Rule Nisi do hereby issue calling upon the Respondents to show cause if any, on Thursday, the 4th day of November 2014 or so soon thereafter as the matter may be heard, why an Order in the following terms should not be made final.

2.1 That the conduct of the Respondents of interfering and demolishing Applicant's property be declared unlawful;

2.2 That the Respondents or any persons acting under their authority be and are hereby interdicted and/or restrained from interfering with Applicant's property;

2.3 That the Respondents or any persons acting under their authority be and are hereby Ordered to rebuild the Applicants' dwelling they demolished;

2.4 The 1st and 2nd Respondents pay the costs of the Applicant jointly and severally the one paying the other to be absolved.

2.5 That sub-paragraphs 2.1, 2.2 and 2.3 shall operate as interim mandamus pending the finalisation of this application;

2.5 Granting such further and/or alternative relief as it deems meet." (Sic)

was predicated on a standard certificate of urgency. The lead appellant, if I may refer to her as such, Ms. Nomkitha Ntantana, explains that once it became clear to them that the respondents were intent on demolishing their structures, the affected residents rallied together and resolved that one of them should approach Legal Aid South Africa in Mthatha to launch an application for an interdict restraining the first respondent from carrying out such intention. Rather lamentably Legal Aid South Africa did nothing to advance their cause and so she and the rest of the appellants approached various attorneys who were prepared to assist them on a *pro bono* basis.⁵

4. The essential allegations gleaned from a conspectus of the founding affidavits in the four applications are the following:

- 4.1 the appellants are all indigent persons, alternatively derive an income from informal sources;
- 4.2 each of them had moved to and informally settled in the area known as Chris Hani Park because they could not afford to pay rent to property owners in the nearby township;

⁴ Most of the appellants are women, each with dependent children, who have been devastatingly impacted by the dispossession of their homes.

⁵ It is unacceptable that Legal Aid South Africa turned away the appellants. Their mandate as provided for in the Legal Aid South Africa Act, No. 39 of 2014, is to provide legal aid to indigent persons who cannot afford legal representation, especially vulnerable groups such as women and children (applicable in this case) with a view to enhancing justice and public confidence in the law and administration of justice. It cannot be gainsaid that an application by an obviously vulnerable person summarily dispossessed of her home occupied for more than a decade, in order to vindicate her constitutional rights of access to adequate housing and not to be evicted from her home or have it demolished without an order of court after considering all the relevant circumstances (section 26(1) and (3) of the Constitution), should be among the most urgent and pressing matters requiring legal representation at state expense. A copy of this judgment will be forwarded to the Board of Directors of Legal Aid SA with a view to establishing why the appellants were failed in this instance so as to avoid a recurrence of such an iniquity in the future.

- 4.3 the municipality never had any issue with them settling where they did;
- 4.4 some of the appellants have lived at the informal settlement together with their children for more than a decade;
- 4.5 on 5 November 2014 the speaker and mayor of the first respondent called a meeting with the residents of Chris Hani Park at the town hall;
- 4.6 the residents were informed by them that the municipality wished to build subsidy (“RDP”) houses for them in Chris Hani Park;
- 4.7 an “agreement” or understanding was reached that the residents would not be without accommodation pending construction of the RDP houses;⁶
- 4.8 the following day the mayor and the speaker instructed the residents to vacate their structures on or before 21 November 2014;

⁶ It is not clear whether the residents were informed that the new houses would be built alongside their makeshift ones and the latter then destroyed with their consent, or whether they would be moved to alternative accommodation pending the construction of the new RDP homes. The crux of the matter, however, is that despite whatever undertakings were given, what followed afterwards – the ultimatum to residents to vacate their structures followed by their summary demolition, was without their consent or orders of court.

- 4.9 the appellants claim that they did so in breach of the “agreement” reached on 5 November 2014;⁷
- 4.10 on 21 November 2014 Mr. Hlabiso, a ward councilor of the first respondent, arrived with a TLB machine⁸ and started to demolish the appellants’ homes without a court order;
- 4.11 some residents began demolishing their own structures with a view to salvaging materials;
- 4.12 residents protested; and
- 4.13 Mr. Hlabiso said that he would return on 24 November 2014 to continue the demolitions. He did not do so on that day, but made a reappearance on 25 November 2014.
5. The appellants contended generally in their founding affidavits that:
- 5.1 the demolition and dismantling of their structures constituted illegal acts since the ward councilor and other unknown officials of the first respondent who displaced them from their homes in this manner did so without an order of court, in violation of the law and the Constitution;

⁷ See footnote 6.

⁸ I assume from the context that this is a vehicle that consists of a tractor like unit fitted with a shovel/bucket on the front and a small backhoe on the back, commonly used on construction sites.

- 5.2 in respect of their evictions (made manifest by demolishing their structures) they were entitled to proper notice and alternative accommodation being put in place;
- 5.3 the first respondent at whose instance the demolitions were effected was liable for the unlawful action and in any event liable on a statutory and constitutional basis to facilitate their access to adequate housing under the circumstances;
- 5.4 an interdict would in the short term and pending the return date/finalization of the application in respect of the constitutional relief being sought restrain the respondents from demolishing their homes further or evicting them or removing their belongings without an order of court;
- 5.5 even in respect of the partly demolished houses, these were not conducive for habitation in such an un-reconstituted state;⁹
- 5.6 none of the applicants were in a position to arrange alternative accommodation for themselves or for their families;
- 5.7 even though the respondents may have been acting in terms of a policy by seeking to address the constitutional rights of access of all the affected parties to adequate housing, the

⁹ The import of this contention is that even part demolition is in effect tantamount to an eviction. In section 1 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (“PIE”) “evict” means to deprive a person of occupation of a building or structure, or the land on which such building or structure is erected, against his or her will, and “eviction” has a corresponding meaning.

implementation of that policy, in the manner in which it was being undertaken, was not reasonable by virtue of the fact that it entailed the residents being removed from their homes without any alternative accommodation being provided in the interim while the subsidy houses were being built;

5.8 the conduct of the respondents amounted also to spoliation. The appellants had been in peaceful and undisturbed possession of their property, which the respondents had deprived them of in a violent or unlawful manner and against their will.

6. The respondents under great haste prepared a short standard affidavit, a copy of which was filed in each matter, the ostensible objective of which was to deal with, and stave off, interim relief only at that time.¹⁰ It was stated at paragraph 2 of the affidavit deposed to by the acting municipal manager of the first respondent that:

"This is a short affidavit that I depose to in order to avert the granting of an interim interdict against me and the First Respondent. We have not had sufficient time to consult with legal Counsel and to deal with all the allegations made in the various Applicants' affidavit. I also do not propose to deal with those allegations on a paragraph – by – paragraph basis as time is simply not permitting. This matter was called in Court at about 12h00 on the 27 November 2014 and I had time to meet Counsel and had this affidavit prepared between then and 14h15 when the matter was due to be called. Within the time available, I could only lay the basis for the opposition of the application for interim relief, which if granted, I

¹⁰ The affidavit is headed "Answering Affidavit to oppose interim relief".

will motivate and file a full answering affidavit that deals with the totality of the issues that come out of the various Applicants' affidavits."

7. Setting out the basis for their opposition "today", the respondents:

- 7.1 averred that the application stood to be dismissed on account of the appellants' non-compliance with the provisions of section 35 of the General Law Amendment Act,¹¹ which requires not less than seventy-two hours' notice of an application against an organ of state for interim relief. (It was further contended that in any event the appellants had not made out a case for their failure to be condoned);¹²
- 7.2 deny that *the respondents* had demolished or intended to demolish any of the applicants' structures;
- 7.3 deny that the first respondent's employees had taken possession of any of the appellants' property or threatened to dispossess them;
- 7.4 deny that the first respondent could in any event be held vicariously liable for the acts of its mayor and speaker, not being its employees. It was however acknowledged that the municipality had not had time to investigate the veracity of the allegations against the speaker, mayor and unknown officials

¹¹ 62 of 1955.

¹² This technical objection is richly ironic having regard to the summary eviction of the appellants. The respondents did not insist at the hearing however that the matter was not urgent, or that the aspect of at least the interim relief sought did not warrant the abridgement of time periods under the circumstances.

said to be implicated in the demolition of the appellants' homes given the haste with which they had been brought before the court to deal with the appellants' request for interim relief at least at that time; and

- 7.5 contended that since the appellants had either demolished their own homes or that the demolitions had already occurred and were not imminent so to speak, the grant of a spoliation remedy was not competent.

8. Whilst shying away from the claim that the first respondent had been responsible for this unfortunate turn of events, there was no denial by either of the respondent that the appellants had in effect been evicted from their homes without an order of court. As an aside I point to the irony that, in opposition to the appellants' later application to the Supreme Court of Appeal for leave to appeal to this court, the respondents deposed to an affidavit in which they averred that they "never intended to demolish the appellants' houses without following due process of the law," thus acknowledging and respecting that (if they were so minded to evict them) such a process is vitally necessary.

9. When the matter was called before the court *a quo* in motion court there was a request that the applications be dealt with together, with a single order being issued. In the result and on the basis of this request it appears that the court consolidated the four matters. This aspect is of some relevance to the issue of costs which I deal with later.

10. In a pithy, if not uncharitable, reading of what the appellants' complaints were about and how they required the court *a quo* to deal with the matter going forward, the respondents' counsel submitted that their case made out on the papers was simply that of spoliation, and because the appellant's dwellings had already been demolished, the remedy of restoration was no longer possible. The remedy was also not available to those who had themselves taken down their structures to salvage the building materials.

11. In the Ntantana matter counsel pressed in for interim relief in the form of orders preventing the respondents from demolishing the appellants' structures (some of which were alleged to still be standing) and from removing material from their properties. In the other applications interim relief was sought in the form of orders that the respondents refrain from interfering with their properties and that they be ordered to rebuild the dwellings that had been demolished. Counsel for the appellants further sought to urge upon the court *a quo* that the relief being sought by them in the long term was more in the nature of an adaptation of the *mandament van spolie*, or constitutional relief, to include reconstituted restoration in respect of those homes which had evidently been flattened arising upon the unlawful eviction from their homes.

12. In a judgment delivered five days later the court *a quo* - remarking upon the pity that these applications had come before it in the form of *mandament van spolie*, refused the relief without further ado on the basis that "the *mandamentum van spolie* does not avail in these proceedings".

Being sensitive to the plight of the destitute appellants, however, no order as to costs was made.

13. Having viewed the application before it as strictly spoliation proceedings, it appears that the rationale for the decision of the court *a quo* was that restoration was no longer possible because the appellants' structures were demolished completely¹³. To order them to be rebuilt would further according to the court be going beyond the ambit of the *mandament*. That this was the basis for the decision is clear from the following passage:

“Spoliation proceedings have an underlying principle that of restoration of the status *quo ante*. These being application proceedings, there is no evidence on the papers as to whether that is still possible. The respondents in their answering affidavit mention that restoration is no longer possible in that the structures were demolished completely and therefore spoliation, the *mandamentum van spolie*, does not avail the applicants. In a number of decisions of our courts this is a view that has always been taken by our courts, except for a few cases where it has been held that where structures have been demolished, the municipality or whoever has destroyed those structures must again rebuild. In a number of cases in our law that has been held to go beyond the scope of the *mandament van spolie* that borders on holding the other party liable for damages and not restoring what was there before.”

14. In the later application by the appellants for leave to appeal founded upon the grounds *inter alia* that the court *a quo* had erred in finding that the respondents could not be ordered by crafting constitutional relief to rebuild

¹³ The court appears to have dealt with the matter as if the infringement of the appellants' rights had been transient only, without appreciating that their eviction, made manifest by the demolitions, was of a permanent nature.

or restore the houses that had been demolished pending the provision of alternative accommodation, the court *a quo* - despite the issue of the respondents' liability for the demolitions/evictions not ostensibly being in issue in its judgment, purported to justify for the first time the refusal of relief to the appellants on the further basis that the respondents could not be held liable for the demolition of the properties. Apart from this reservation, however, the court appeared to lean in favour of finding that the constitutional issue *might have been relevant*.

15. The following passages from the judgment demonstrate this shift change in approach:

“In broad terms the arguments advanced by (counsel for the applicants) attacked the judgement on the following grounds:

The court *a quo* erred in not considering the applicability of the provisions of sections 1(C), 26(3) and 38 of the Constitution. In substantiation, Counsel for the applicants argued that whilst they had no issue on the judgment of the court *a quo* regarding the law on spoliation, they were of the view that the court should have applied section 38 of the Constitution and ordered that those houses be reconstructed as the applicants were arbitrarily deprived of their rights and were left remediless due to the non-applicability of spoliation. In this regard Counsel referred to a number of decided cases, amongst others, namely *Tswelopele Non-Profit Organisation and 23 Others v City of Tshwane Metropolitan Municipality & Others* 2007 (6) SA 511 (SCA).

The court erred in not making an order that alternative accommodation be made available to the applicants as was decided in the *Tswelopele* matter.

(And after referring to paragraph 17 of the *Tswelopele* judgment continued as follows.... :)

Whilst the constitutional issue might have been relevant in this matter and as such the Tswelepele decision binding, there is a missing link, namely had it been established that Mr Hlabiso was an employee of the municipality and can the municipality or its manager be held liable for the demolition of the said properties? If the answer thereto is negative, there would be no basis for this court to grant the orders sought by the applicants against the respondents.”

16. Counsel for the appellants assert in the appeal before us that the court *a quo* - apart from failing in respect of the immediate interim relief being sought to distinguish one appellant’s situation from another in the sense that some of their structures were completely demolished and others still under threat of demolition (the *mandament* thus not being precluded and/or an interdict justified in certain of the scenarios), erred in not finding that an order of reconstituted restoration in the case of complete destruction could be fashioned by the court as an effective constitutional remedy in the peculiar circumstances of the matter. In so doing the court had disregarded the infringement of the appellants’ rights not to have their structures demolished or to be evicted without an order of court and had in effect condoned the illegality.

17. There is merit in this submission. What loomed on 27 November 2014 before the court *a quo* was the question of interim relief in the form of an interim interdict and, in the long term, the issue of constitutional relief advanced by counsel and foreshadowed by the papers. The court certainly shut the door to the issue of an effective constitutional remedy by summarily dismissing all the applications.

18. It is necessary to examine how our courts have dealt with remedies aimed at reparation in the context of evictions in our post-constitutional democracy.

19. In *Schubart Park Residents' Association and Others v City of Tshwane Metropolitan Municipality and Another*¹⁴ the Constitutional Court noted the interplay between the ordinary requirements of spoliation and the demands of section 26 (3) of the Constitution. When an applicant seeks an order in the High Court for restoration on the ground that he was despoiled of the possession of his home, this immediately adds the dimension of section 26 (3) of the Constitution to what would otherwise have been a normal spoliation application. The limited spoliation remedy is however aimed only at restoration of possession. It does not determine the lawfulness of competing claims to the object or property. For this reason, there are, under the common law, only a limited number of defences available to a spoliation claim, impossibility being one of them.¹⁵

20. In *Rikhotso v Northcliff Ceramics (Pty) Ltd & Others*¹⁶ it was emphasized that a spoliation order may not be granted if the property in issue has ceased to exist. This is because the remedy is of limited effect, namely for the restoration of possession, not for the making of reparation. The Supreme Court of Appeal in *Twelopele Non-Profit Organisation &*

¹⁴ 2013 (1) SA 323 (CC) at para 22.

¹⁵ *Schubart Park supra* at para 24.

¹⁶ 1997 (1) SA 526 (WLD) at 535 A – B.

Others v City of Tshwane Metropolitan Municipality & Others¹⁷ confirmed the doctrinal analysis in Rikhotso to be correct.

21. A *mandament* enjoins breaches of the rule of law and serves as a disincentive to self-help. The express object of the common law remedy is the interim restoration of physical control and enjoyment of specified property – not its “reconstituted equivalent”. The court in Tshwelopele observed that an insistence that the *mandament* be extended to mandatory substitution of the property in dispute would be to create a different and wider remedy than that received into our law which would result in its losing its possessory focus in favour of different objectives, including a peacekeeping function.¹⁸

22. In Tswelopele approximately one hundred people were removed from their homes on a vacant piece of land in Garsfontein, a suburb of Pretoria. They approached the High Court for a spoliation order. In the process of removal the materials used in the construction of their dwellings had been destroyed, with the result that they could not be restored to the possession of their homes. The High Court, following Rikhotso, held that because of this destruction, it could not order restoration under the *mandament van spolie*. On appeal the Supreme Court of Appeal wrestled with the conundrum that people whose homes have been destroyed would for this reason then be left remediless. The question with which it was faced was whether the present day remedy lay in the development of the common law spoliation, or in some other way. The court resolved that, having regard to the anomaly that

¹⁷ 2007 (6) SA 511 (SCA).

¹⁸ Tswelopele *supra* at para 24

the residents would be left remediless, relief under section 38 of the Constitution was necessary. It concluded as follows:

“It is correct ... that the rule of law is a founding value of the Constitution. This would suggest that constitutional development of the common law might make it appropriate to adapt the *mandament* to include reconstituted restoration in cases of destruction. And counsel is certainly correct in submitting that the absence of a remedy mandating substitution of unlawfully destroyed property could create a perverse incentive for those taking the law into their own hands to destroy the disputed property, rather than leaving it substantially intact.

But as already indicated, I do not think that formulating an appropriate constitutional remedy in this case requires us to seize upon a common law analogy and force it to perform a constitutional function. For there is a further dimension to the case, which takes the matter beyond even a developmentally enhanced *mandament*: the relief we give must vindicate the Constitution. As Kriegler J noted in *Fose*, ‘the harm caused by violating the Constitution is a harm to the society as a whole, even where the direct implications of the violation are highly parochial. The rights violator not only harms a particular person, but impedes the fuller realisation of our constitutional promise’:

‘Our object in remedying these kinds of harms should, at least, be to vindicate the Constitution, and to deter its further infringement’.

Vindication, Kriegler J noted, ‘recognises that a Constitution has as little or as much weight as the prevailing political culture affords it’. Essentially, the remedy we grant should aim to instil recognition on the part of the governmental agencies that participated in the unlawful operation that the occupiers, too, are bearers of constitutional rights, and that official conduct violating those rights tramples not only on them but on all. The remedy should instil humility without humiliation, and should bear the instructional message that respect for the Constitution protects and enhances the rights of all. It is a remedy special to the Constitution, whose engraftment on the *mandament* would constitute an unnecessary superfluity.

The occupiers must therefore get their shelters back. Placing them on the list for emergency *Grootboom* assistance will not attain the simultaneously constitutional and individual objectives that re-construction of their shelters will achieve. The respondents should, jointly and severally, be ordered to reconstruct them. And, since the materials belonging to the occupiers have been destroyed, they should be replaced with materials that afford habitable shelters. But because the occupiers are avowedly unlawful occupiers, who are vulnerable to a properly obtained eviction order under PIE, the structures to be erected must be capable of being dismantled.”¹⁹(Footnotes omitted.)

23. Fose v Minister of Safety and Security (referred to in the passage above)²⁰ was decided under section 7 (4) (a) of the Interim Constitution. Section 38 of the Constitution, its present day complement, provides that:

“(a)nyone listed in the section had the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights.”

24. Whilst in Tswelopele the court upheld the distinction between the common law requirements for spoliation and that of constitutional relief under section 38 of the Constitution, it granted the eventual constitutional relief even though the matter was brought purely as a spoliation application. In the present instance, however, as in Schubart Park, the appellants pertinently referred to an infringement of section 26 (3) of the Constitution, which provides that:

¹⁹ Tswelopele *supra* at paras 25-8.

²⁰ 1997 (3) SA 786 (CC).

(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. ...”

25. The appellants relied *in casu* upon an infringement of section 26(2), read with 26(1), of the Constitution as well. Sub-section (1) provides that “everyone has the right to have access to adequate housing” and sub-section (3) that “(t)he State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right”. This gives a context to the appellants’ insistence that it is tantamount to an unreasonable implementation of the subsidy scheme that they find themselves without their homes or alternative accommodation whilst the building of the RDP houses are underway. There is no contest in the brief affidavits that were exchanged between the parties that there was an obligation on the part of the first respondent to consider the interests of the residents in undertaking the building of the contemplated subsidy programme to upgrade the settlement. Further, as indicated above, the first respondent acknowledges that it is impermissible that the appellants should be evicted without due process of the law.

26. The last word on the distinction to be drawn between the *mandament* remedy and that of constitutional relief under section 38 of the Constitution was dealt with in *Schubart Park* in the following manner:

“I agree that it is conducive to clarity to retain the “possessory focus” of the remedy of spoliation and keep it distinct from constitutional relief under section 38 of the Constitution. This is because the order made in relation to factual possession in spoliation proceedings does not in itself directly determine

constitutional rights, but merely sets the scene for a possible return to the *status quo*, in order for the subsequent determination of constitutional rights in relation to the property.

The implication of this is that spoliation proceedings, whether they result in restoration or not, should not serve as the judicial foundation for permanent dispossession – that is, eviction – in terms of section 26(3) of the Constitution.”²¹

27. The judgment of the court *a quo* reflects in my view a misconception as to the true nature of the appellants’ causes of action and the case made out in the papers. In the lead application it was not clearly spelt out in the notice of motion that, apart from the necessity to grant a spoliation order where the circumstances justified this, an enquiry in the long term into the illegality was also required²² but in the other applications orders were pertinently sought declaring the conduct of the respondents in interfering with or demolishing the property of the appellants to be unlawful. In the absence of any justification by the respondents for the eviction of the appellants such as that it was necessary, or unavoidable, or warranted on any particular basis, the question whether the alleged interference with the appellants’ rights not arbitrarily to be deprived of their homes was unlawful as a precursor to the court then determining appropriate constitutional relief would certainly still require to be determined. There remains a need to interrogate, leaving aside the respondents’ denial that *they* are responsible therefor, whether there existed a valid reason for the evictions. Having had regard to the very valid considerations placed on the record by the appellants which militated against the precipitate demolition of their homes, it certainly seems necessary that

²¹ Schubart Park *supra* at para 29.

²² That a “review” into the constitutionality of the evictions was contemplated was certainly emphasised in the certificate of urgency filed in the Ntantana application.

the court's reproof of the first respondent's conduct be starkly stated, and attenuated by appropriate orders.

28. It is unfortunate that, due to the all too hasty dismissal of the appellants' applications, leaving them without any remedy whatsoever except the balm of not having to pay the costs of the application to redress the tragic situation in which they found themselves, they were denied the opportunity, on a return date and once the respondents had replied more fully to their allegations, of the court redressing the harm to them occasioned as a result of the violation of their constitutional rights by the patently illegal evictions (ostensibly by or at the instance of the first respondent) without regard to the provisions of PIE. I am inclined to agree with Mr Zilwa that the consequence of the outright dismissal of the applications is that the illegality was in effect condoned.

29. Further, what the court *a quo* was enjoined to do on 27 November 2014 was to consider the interim relief, at least to the extent of an interdict to restore possession and/or to prevent further destruction to the dwellings in those instances where this was still possible. In this respect the court *a quo* erred by not distinguishing one appellant's situation from another. Some of the appellant's structures had not been entirely flattened and it was possible to return these to the status *quo ante*. The spoliation remedy remains a potent tool when it can avail a person who has been dispossessed of something as vital as his or her home especially since it maintains the property for the subsequent determination of their constitutional rights in relation thereto. The speedy nature of the *mandament* to assuage the

unlawful deprivation of property before all else, where possession is still possible, is ideal to counter unlawful eviction and its value, as a stand-alone cause of action with its peculiar remedy, should not be underestimated.

30. The evidence establishes overwhelmingly in my view that the well-known requisites for the grant of interim relief were present in the case of those appellants whose structures were still standing and who faced the imminent threat of eviction by the demolition of their homes.²³ Although the respondents had denied that they were legally responsible for the demolitions²⁴ it was unnecessary for the court *a quo* to determine that factual dispute conclusively on 27 November 2014.

31. In an application for interim relief, as opposed to final relief, an applicant is saddled with a far less exacting onus of proof particularly because the intent of such relief is, in most cases, to preserve the status *quo* between the parties so as to allow them space and time to place full and proper evidence before the court to facilitate the determination of final relief, which carries with it a far more exacting onus. Jones J was clearly alive to

²³ The requisites for the granting of interim interdicts are well known. Corbett J (as he then was) set them out in *L F Boshoff Investments (Pty) Ltd v Cape Town Municipality; Cape Town Municipality v L F Boshoff Investments (Pty) Ltd* 1969 (2) SA 256 (C) at 267A-F as follows:

“Briefly these requisites are that the applicant for such temporary relief must show:

- (a) *that the right which is the subject-matter of the main action and which he seeks to protect by means of interim relief is clear or, if not clear, is prima facie established, though open to some doubt;*
- (b) *that, if the right is only prima facie established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right;*
- (c) *that the balance of convenience favours the granting of interim relief; and*
- (d) *that the applicant has no other satisfactory remedy.”*

²⁴ The physical aspect of demolishment is but a part of the act of an eviction. See footnote 9.

this distinction in the matter of *Pinzon Traders 8 (Pty) Ltd. v Clublink (Pty) Ltd. & Another*²⁵ when he said the following:

“This conclusion makes it unnecessary for me to consider whether or not the applicant has proved a clear contractual right, alternatively, a clear right, based on the first respondent's breach of statutory obligations, rendering the construction of the walls illegal, which entitles it to the relief of a final interdict. This is, perhaps, just as well, from the point of urgency. A proper consideration of the issues and side issues on the interdict question would have involved considerable time, analysis and possible delay. As it is, the parties now have the benefit of a speedy judgment in a matter of urgency. My *prima facie* conclusion is that, while I think there may be merit in Mr Ford's argument, that I could decide the interdict on the papers and that I could disregard so-called disputes of fact as totally confused and insufficiently formulated, it would not be proper to do so, in the light of certain deeply contested credibility issues.”

32. In the result this court is entitled to interfere with the orders of the court *a quo*.

33. In the long term (and assuming a finding in favour of the appellants on the issue of the liability of the respondents) the court will be obliged to consider what remedy falls to be granted to the appellants in the circumstances which effectively redresses the harm done to them, vindicates the Constitution and seeks to deter its further infringement.

²⁵ 2010 (1) SA 506 (ECG) at paras 10 – 11.

34. In *Hoffman v South African Airways*²⁶ the court approached the question of appropriate relief under section 38 as follows:

“The determination of appropriate relief, therefore, calls for the balancing of the various interests that might be affected by the remedy. The balancing process must at least be guided by the objective, first, to address the wrong occasioned by the infringement of the constitutional right; second, to deter future violations; third, to make an order that can be complied with; and fourth, of fairness to all those who might be affected by the relief. Invariably, the nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in the particular case. Therefore, in determining appropriate relief, ‘we must carefully analyse the nature of [the] constitutional infringement, and strike effectively at its source’.”

35. Mr Zilwa pointed out that the appellants no longer require an interim interdict since the threat of demolishment has come and gone and culminated in the permanent eviction of the appellants from their homes. However he submitted that it remained incumbent on this court to impose a remedy in line with the provisions of section 38 of the Constitution and what is proposed is reconstituted restoration by allowing the appellants to put up their structures again, albeit on a temporary basis until they are allocated permanent homes in the RDP programme. It appears that this is both possible, since the respondent has vacant land available and that the proposed intervention is affordable. The temporary accommodation need not be where their structures previously stood.²⁷

²⁶ 2001 (1) SA 1 (CC) at par 45.

²⁷ In *Schubart Park supra*, the court ordered that alternative accommodation had to be provided to the residents until the restoration of their occupation from the informal settlement from which they had been removed.

36. Despite counsel's submission that interim relief is no longer necessary, it appears desirable that whatever order this court makes in substitution of the order of the court *a quo* should be in the form of interim relief to enable the respondents on the return date to show cause why final relief should not be granted. This is because (in respect of the issues in dispute) the respondents should be afforded an opportunity to respond more fully and because the test used to resolve factual issues is entirely different when final relief is under consideration. In this regard the *dictum* of Harms DP in the case of National Director of Public Prosecutions v Zuma²⁸ is apposite:

“Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers. The court below did not have regard to these propositions and instead decided the case on probabilities without rejecting the NDPP's version.”

²⁸ 2009 (2) SA 290 at para 26.

37. But regardless of the factual dispute concerning who demolished the appellants' properties, the first respondent should not lose sight of its obligation to meaningfully engage with the appellants and to find a reasonable solution to the problem which is that they have been permanently evicted from their homes, whether it is as a result of the respondents' own making or someone else's. Even if the property on which the appellants' shacks were located has been handed over to the Department of Human Settlements, the first respondent remains the developer and responsible at its sphere of government on a co-operative basis with the national department to ensure a reasonable implementation of the housing programme.²⁹ It has not been denied that the appellants were long time occupiers at the informal settlement and adversely affected by what appears to be the unreasonable implementation of a housing policy. We were informed by Mr Zilwa that

²⁹ See *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC) at paras [39] to [44] in which the court sets out the important functions of municipalities with regard to the rights of all to have access to adequate housing; *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC) at par [56]; See also section 2 (1)(b) of the National Housing Act which obliges a municipality to consult meaningfully with individuals and communities affected by housing development; section 2 (1) (c) which provides that a municipality must ensure that housing development is administered in a transparent, accountable and equitable manner, and upholds the practice of good governance; section 2 (e) (x) that obliges it to promote the housing needs of marginalised women, *inter alia*; section 2 (h) which requires it in the administration of any matter relating to housing development to respect, protect, promote and fulfil the rights in the Bill of Rights in Chapter 2 of the Constitution, to observe and adhere to the principles of co-operative government and intergovernmental relations, and to comply with all other applicable provisions of the Constitution. See section 9 of that Act too with regard to its functions in fulfilment of the objective in section 26 (2) of the Constitution relating to the progressive realisation of the right of access to housing. See also the provisions of section 6 (3) of PIE which provide in relation to a proposed eviction at the instance of an organ of State that:

“(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*”.

(Emphasis added)

PIE preamble, in relevant part, reads further that:

“special consideration should be given to the rights of the elderly, children, disabled persons and particularly households headed by women”.

the appellants have not been included in the list of beneficiaries to whom permanent RPD houses in the settlement have been allocated. This must be explained in response to the complaint that the appellants' rights of access to adequate housing have also been infringed. The most reasonable solution appears to be to include them. The first respondent is in any event enjoined to give priority to the needs of the poor in respect of housing development.³⁰

38. Before concluding I need mention that the respondents applied at the eleventh hour to introduce further evidence on the basis that it would demonstrate that the subject matter of the appeal had become academic. The exchange of affidavits in that interlocutory application brought with it its own dispute of fact regarding whether the housing development of Tsolo Extension 7 (now in an advanced stage) was being built on the self-same sites from which the appellants had been displaced, or elsewhere. I am inclined to allow the application but not for the effect intended by the respondents. Once it is accepted that the appellants were seeking more than just a spoliation remedy it matters not whether factual possession is still or isn't possible. The fact remains that the appellants have been evicted in effect and are homeless, and it is this information which I consider relevant to permit in amplification, in terms of section 19 (b) of the Superior Courts Act³¹.

39. I looked with some expectation in the recent affidavits to see what solution may have been offered by the first respondent to the appellants to ameliorate their predicament, given that it is at least constitutionally bound

³⁰ Section 2 (1) (a) of the National Housing Act.

³¹ No 10 of 2013.

to do so, but I found none. On the contrary what the affidavits reveal, quite lamentably, is an unacceptable attitude on its part that it has no constitutional obligation to concern itself with the appellants' plight. It is narrow-minded to seek to persuade this court that because the site which the appellants first occupied has now been built upon that that is the end of the matter. The affidavits also, as Mr Zilwa astutely observed, give the unfortunate impression that the first respondent is thumbing its nose at the destitute appellants, showing them glossy photographs of the houses that have been built on the sites previously occupied by them which they are evidently not to benefit from. If the first respondent does so unwittingly then it is reprehensible that it has no idea of its constitutional and statutory obligations toward the appellants. It is worse if the intention behind the elucidation was to add insult to injury.

40. It is apposite to refer to the description by Cameron JA (as he then was) in Tswelopele, *supra* - expressed with deep pathos, of the extent of the damage wrought on unlawful occupiers arising upon the unlawful eviction from their homes and community even if only rudimentary shelters fashioned from pieces of plastic and other waste materials salvaged from surrounding building sites had been used to construct their humble "homes":

"That the wanton destruction of the occupiers' dwellings violated the Constitution was not disputed. What must be owned is how far-reaching and damaging the breach was. The governmental agencies violated not merely the fundamental warrant against unauthorised eviction, but (given the implicit menace with which the eviction was carried out) the occupiers' right to personal security and their right to privacy. It infringed not only the occupiers' property rights in their materials and belongings, but trampled on their feelings and affronted their social

standing. For to be hounded unheralded from the privacy and shelter of one's home, even in the most reduced circumstances, is a painful and humiliating indignity.

And it is not for nothing that the constitutional entrenchment of the right to dignity emphasises that "everyone" has inherent dignity, which must be respected and protected. Historically, police actions against the most vulnerable in this country had a distinctive racial trajectory: white police abusing blacks. The racial element may have disappeared, but what has not changed is the exposure of the most vulnerable in society to police power and their vulnerability to its abuse. Reading comparable case reports from the decades preceding these events, it is impossible not to endorse appellant's counsel's submission that in its lack of respect for the poor and the vulnerable, and in the official hubris displayed, what happened displays a repetition of the worst of the pre-constitutional past.”³²

41. Although I cannot condemn the respondents for ostensibly not owning their part in this unfortunate tragedy - given their denial of liability and their procedural right to still file full and proper answering affidavits and thus to place their full case before the court, (as opposed to the brief and hastily drawn affidavit which was evidently designed to deal strictly with interim relief), it is regrettable that they appear not to appreciate the extent of the injury to the appellants by the mere fact of the evictions. They have also seemingly disavowed any constitutional accountability for the appellants' situation which has endured now for a considerable period.

42. For this reason the application to introduce further evidence succeeds. The aspect of costs is however an issue which should stand over for

³² Tswelopele *supra* at paras 15-6. See also Port Elizabeth Municipality *supra* at paras [17] and [18]. Mrs Ntantana described the experience of the appellants and their families losing their homes as the shock of a lifetime.

determination on the return date since there is a dispute of fact even in respect of this exchange of affidavits.

43. Given the considerable lapse of time since the applications were dismissed and the further delay that may be occasioned by the matter being remitted to the court *a quo* for the exchange of further affidavits, the order which I intend to make in substitution of the order appealed from will anticipate the issue of what relief may be appropriate should the High Court find in the appellants' favour that the eviction from their homes, at the particular instance of the respondents, was unlawful. This aspect, of constitutional reparation, is in my view required to be addressed with some urgency.

44. I indicated above that I would return to deal with the aspect of costs relative to the consolidation of the various matters. Mr Dodson who appeared for the respondents submitted that it would be unfair, if the appeal was upheld, to mulct them with the costs as if four separate appeals were before us. It is to be noted however that prior to the appeal being heard the appellants were under the impression (not unreasonably so) that the four matters, despite what was said in the judgment of the court *a quo*, had not been consolidated. There had been no formal application for consolidation although counsel for the appellants who appeared at the hearing before the court *a quo* made a "special request" that an order in respect of one matter should apply to the other 3 matter as well. The respondents' counsel reverted after taking instructions regarding the matters which were required to be opposed and placed on record that consolidation could be effected without a formal application being made. But despite the court ostensibly

consolidating the matters, separate orders were still issued by the Registrar after the applications were dismissed and four separate applications for leave to appeal ensued. It appears that four separate orders were also issued by the Supreme Court of Appeal granting the appellants leave to appeal to this court. The respondents filed only one set of heads of argument and were inclined instead to treat the matter as a single consolidated matter upon appeal.

45. Whilst being mindful that a costs order on any basis other than on the premise that the matters were indeed consolidated by the judgment of the court *a quo* seems proper, the attorneys who put themselves at risk to take on the matters on a *pro bono* basis should also not be deprived of their reasonable attendances in cautiously ensuring that the circumstances of each separate group of appellants was properly placed before court, both in the separate applications for leave to appeal and upon appeal ultimately. I expect therefore that the taxing master will be astute to recognize that each firm representing each group of appellants (and the counsel employed by them) should be reasonably indemnified for their respective attendances. It is commendable I must add that the attorneys (and counsel) were prepared to come to the assistance of the appellants on a *pro bono* basis in all the circumstances of the matter.

46. In the result I make the following order:

1. The appeal succeeds and the court *a quo*'s orders dismissing the four applications are set aside.

2. The orders of the court *a quo* are substituted with a single order, given the consolidation of the matters, in the following terms:

"1. A rule nisi issues calling upon the respondents to show cause, if any, on Thursday, the 5th day of May 2016 at 09h30, or as soon thereafter as the matter may be heard, why the following final relief should not be granted:

1.1 that it be declared that the eviction of each appellant by the respondents by the demolition of their homes was unlawful;

1.2 that the appellants are entitled to reconstituted restoration of their homes as soon as possible, albeit on a temporary basis pending the permanent allocation of subsidy ("RDP") homes to them, at a place where they can be accommodated in the interim;

1.3 that the temporary structures (using such of the materials still at the appellants' disposal as can be employed towards this end) must be such that they afford shelter, privacy and amenities at least equivalent to the appellants' structures that were demolished, and which are capable of being dismantled upon the allocation of permanent RDP homes to them;

1.4 that the appellants and the first respondent must through their legal representatives, engage meaningfully with each other with a view to reaching agreement on the aspects referred to below and report on affidavit to the High Court

on a date to be determined what they have agreed and under what time frame their agreement is to be implemented:

- 1.4.1 the location where the appellants will be permitted to temporarily reconstruct their dwellings;
- 1.4.2 the manner in which the appellants will be assisted by officials or agents of the first respondent in the substituted restoration of their dwellings;
- 1.4.3 the stage at which the appellants can expect to be accommodated in the permanent RDP homes and the time frames generally applicable to the expected milestones to be achieved in realizing their rights of access to adequate housing ; and
- 1.4.4 the availability of services to the appellants by the first respondent and the conditions regarding payment under which these will be provided;
- 1.5 that the court grant such other or further constitutional reparation to the appellants as may seem meet as a result of the unlawful eviction from their homes by the respondents; and
- 1.6 that the respondents pay the costs of the application.”

- 3. The appellants’ representatives shall by the return date envisaged in prayer 1 above furnish to the respondents’ legal representatives and to the High Court a comprehensive schedule (reflecting the names, ages and gender of each person who occupied the

respective dwellings as at 25 November 2104 including whether they are scholars or adults and whether they are employed or not; the original site allotment number of each dwelling if applicable; the size of each dwelling (for e.g. 1 or 2 or 3 roomed structure) and what materials they were comprised of; the original date upon which each appellant took up occupation of their sites at the informal settlement and confirmation of the status of each appellant's application for subsidy assistance;

4. The respondents are ordered to pay the costs of the appeal which costs are to include the costs consequent upon the employment of two counsel.
5. The interlocutory application to introduce further evidence succeeds, provided that the costs of this application shall be reserved for determination by the High Court upon finalisation of the entire matter.
6. The Registrar is requested to forward a copy of this judgment to the Director, Legal Aid South Africa, with a view to noting the comment of this court stated in footnote 5, read together with paragraph 5 of the judgment.

B HARTLE

JUDGE OF THE HIGH COURT

I AGREE

**Z NHLANGULELA
DEPUTY JUDGE PRESIDENT OF THE HIGH COURT,
MTHATHA**

I AGREE

**R GRIFFITHS
JUDGE OF THE HIGH COURT**

DATE OF APPEAL : 19 February 2016

DATE OF JUDGMENT : 5 April 2016

Appearances:

For the appellants Mr. PHS Zilwa with Mr. L Kunju instructed by Babe & Talapile Inc in Case no 3412/14; Mr. PHS Zilwa with Mr. Z Nabela instructed by Lwazi Gwaza Inc in Case no 3424/14; Mr. PHS Zilwa with Mr.V Kunju instructed by Nkoli Madaza & Associates in Case no3434/14; and Mr. PHS Zilwa with Mr. Matotie instructed by Z Ntelezi & Co in Case no 3407/14.

For the respondents: Mr. A Dodson with Mr. A Bodlani instructed by Cingo Attorneys.