

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2024/063770

(1)	REPORTABLE: <i>No</i>
(2)	OF INTEREST TO OTHER JUDGES: <i>No</i>
(3)	REVISED:
<i>22/7</i> 2024	
DATE	SIGNATURE

In the matter between:

**JACOB MABUSELA AND FURTHER OCCUPIERS OF
THE HUMAN SETTLEMENT OF A LAND NEXT TO 173 IR
41, TAMBOKIESFONTEIN, EKURHULENI (of which the
address and the owner of the land are unknown to the
applicants) WHOSE NAMES APPEAR ON ANNEXURE
"X"**

Applicants

and

**THE CITY OF EKURHULENI METROPOLITAN
MUNICIPALITY**

First Respondent

This judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to CaseLines/Court online and by release to SAFLII. The date and time for hand- down is deemed to be 12h00 on 22 July 2024.

Order: Para [75] of this judgment.

JUDGMENT

TODD, AJ:

Introduction

- [1] This matter initially came before me on 13 June 2024 in the urgent court.
- [2] I directed the parties to deliver heads of argument in the matter, drew the parties' attention to the decision of this court in *Residents of Setjwela Informal Settlement v City of Johannesburg Department of Housing*¹ and asked them to address its relevance to this matter. After discussing timing and availability with the parties I postponed the matter to 20 June 2024. The matter was argued on that date.

Brief summary of the Applicants' case

- [3] The Applicants are members of a group of occupiers who the deponent to the founding affidavit states constitute more than 400 families. The identity of the

¹ 2017 (2) SA 516 (GJ)

individual Applicants was an issue in the proceedings. I deal with it later in this judgment.

- [4] The Applicants complain that they have been illegally evicted from their homes by members of the First Respondent's police department without a court order. They complain of what they describe as a staggered eviction, which the deponent to the founding affidavit states comprised three separate acts of eviction over a period of several days. They also complain that various personal belongings were confiscated and impounded.
- [5] The Applicants instituted this application urgently, seeking orders declaring their evictions to be unlawful and invalid, reinstating them to full occupation of the property from which they have been evicted, and for the costs of restoring their structures and material. They also seek an order interdicting further evictions other than following compliance with the provisions of the PIE Act.
- [6] In the founding papers the deponent, who is the First Applicant in the matter, states that the Applicants are among those who, during the period of covid lockdowns, had lost their jobs and suffered the serious adverse consequences that inevitably follow from a loss of income. Many had rented shacks in back yards in the Katlehong area. With the financial difficulties that resulted from job losses, they could no longer afford rent and many were evicted from back yards by their landlords.
- [7] After various community meetings, the deponent states, the group felt that their rights to adequate housing as enshrined by section 26 of the Constitution were being infringed. The deponent states that the group then "*decided to identify an empty land and occupy it with intention to create a home for ourselves*".
- [8] In due course they identified what they regarded as vacant land suitable for this purpose. The deponent states that they did not know who owned the land they had identified, but established that it had been empty for more than 15 years, was not fenced off and did not have structures on it.

- [9] The deponent states that the Applicants approached the offices of the First Respondent, the Ekurhuleni Metropolitan Municipality, to request that they be granted access to the land to make homes. They did not meet with any success.
- [10] According to the deponent when they attended at the Municipality offices they asked an official if they could have access to the land they had identified. They were asked what the address was of the land, but stated they did not know the address. They invited the official to accompany them so that they could show that person the land, but he said that he was not able to leave his work to go and view the land with them.
- [11] After these attempts to get assistance, the deponent states that the Applicants met as a group and then decided that they would occupy the land they had identified to make their homes.
- [12] They then started erecting shacks, with the stated aim of building brick houses in the future in due course because they *"regarded the area as our permanent home"*.
- [13] The Applicants do not state on what date they first occupied the land, or which individual Applicants occupied it on which dates. Nor do they state when each Applicant erected or completed a structure. The deponent asserts, however, that the Applicants occupied the land for an uninterrupted period of three weeks prior to 1 June 2024.
- [14] During that period, they state, some shacks were improved by being fenced off.
- [15] Various photographs are attached to the founding affidavit as evidence of the structures from which the Applicants were evicted. These photographs show a limited number of structures being dismantled, and in one case a mattress, a television and a fridge. They do not provide clear evidence of the state of completion of the structures, nor how many such structures were in existence. They also do not show the extent to which any one or more of such structures could reasonably be described as a dwelling or shelter within the meaning of section 1 of the PIE Act.

- [16] As indicated, the deponent to the founding affidavit does not state when and over what period each particular Applicant built or started to build a shack. He does, however, identify the date on which members of the First Respondent's police department arrived and started destroying shacks
- [17] The deponent to the founding affidavit states that this first occurred on 1 June 2024. The deponent alleges that the destruction of shacks was accompanied by assaults and that the property of shack dwellers was damaged and possessions impounded by officials of the First Respondent.
- [18] On that day 1 June 2024, after what they characterise as the first eviction, the members of the Applicant group met and decided that they would reoccupy the land. They then rebuilt their shacks "from scratch".
- [19] This had the result, the deponent states, that again on 4 June 2024 members of the First Respondents' police department arrived at the property and again they demolished shacks and took away property and structures, including furniture.
- [20] After this, the deponent states, members of the group "thought that they [members of the police] will never return" and therefore they once again reoccupied the land. This had the result, in turn, that on 5 June 2024 members of the First Respondent's police department arrived once more.
- [21] Once again structures were demolished and, according to the deponent, threats were issued and some individuals were arrested. As indicated, the deponent attached various photographs said to depict the incident on 5 June.
- [22] The Applicants contend that all material times while they were being evicted the evictions were unlawful because those evicting them did not have a court order authorising them to do so. Thereafter, members of the Applicant group decided they would bring legal proceedings and approach a court.
- [23] The deponent describes the homes that they created as "makeshift shacks" without provision of any sanitation, electricity or other basic municipal services. But, the deponent asserts, that was their only home.

- [24] The Applicants refer to the constitutional and statutory obligations of the Respondents because they say they qualify for housing assistance from the State in terms of the National Housing Code adopted in terms of section 3(4)(g) of the National Housing Act 107 of 1997. They assert that the Respondents are under a duty to act positively to protect, promote and fulfil the rights contained in Chapter 2 of the Constitution including the rights to human dignity, to equality to the security of the person to adequate housing and the rights of children to basic shelter and protection against degradation.
- [25] The essence of the urgent application brought before me, however, was that the Applicants contend that they enjoy protection under the PIE Act and may be evicted only if the court is of the opinion that such an order would be just and equitable.
- [26] The eviction process, they assert, was not preceded by meaningful engagement as required by law. There was no attempt to establish their personal circumstances and instead of meaningfully engaging with them the First Respondent had taken a heavy-handed approach and evicted them without a court order.
- [27] In the alternative, the Applicants submit, even if the provisions of the PIE Act did not apply to them, they were entitled to protection against unlawful self-help by reason of the spoliation remedy available in these circumstances, as applied in *Setjwela*.
- [28] The deponent also sets out the consequences of their eviction. These were, not surprisingly, very serious for those members of the Applicant group who are currently homeless or who were left homeless by the evictions.

Brief summary of the Respondents' case

- [29] Neither the Second nor Third Respondent delivered any papers or participated in the proceedings.
- [30] The First Respondent delivered an answering affidavit. In the first instance, the First Respondent raised a series of legal objections to litigation of the kind

brought by the Applicants. Mr Sithole, who appeared for the First Respondent, submitted that no proper particulars had been provided by the Applicants who have approached the court on an urgent basis, and that this should not be condoned. He also submitted that the matter was not urgent because the Applicants could secure adequate alternative redress in due course.

[31] Regarding the identity of the Applicants, Mr Sithole referred me to recent decisions of this court in which a firm stance had been taken that where a group of individuals seeks to approach the court for its assistance they should identify themselves by reference to their names, identity numbers and addresses so that, by way of example, if a costs order is made it will be known against whom the order may be enforced.

[32] On the merits of the application, the First Respondent contends that the Applicants' own evidence is inadequate to establish possession and occupation of the land in question, and submits that having regard to what is stated in the answering papers, all that was present on the relevant land were incomplete structures which were soon demolished. In short, the First Respondent admits that it acted to remove the Applicants from the land in question without a court order, but states that it did so to prevent an unlawful occupation of the land rather than to evict occupants who had already occupied and were in possession of the land.

[33] Mr Sithole went further and submitted, on the strength of the decision of the Supreme Court of Appeal in *City of Ekurhuleni Metropolitan Municipality vs Tshepo Gugu Trading CC*² (a case which dealt with an illegally erected billboard) that this court was not "permitted to countenance a glaring illegality". Mr Sithole submitted that in circumstances where occupiers were acting unlawfully in occupying vacant land they could not secure relief from this court. He submitted that if this court were to grant relief of the kind sought by the Applicants this would lead to a public loss of confidence in the judiciary, and the courts would be seen as endorsing unlawfulness and affording legitimacy to unlawful conduct.

² [2024] ZASCA 81

[34] In summary, Mr Sithole submitted, if this court were to interdict evictions in the present circumstances or make an order restoring the Applicants to the position they were in prior to their eviction, this would have the consequence that this court would in effect be ordering an illegal or unlawful situation to be perpetuated.

Assessment

[35] Regarding the identity of the individual Applicants, I accept that in a situation where a large number of individuals are alleged to have been evicted from their homes and proceedings must necessarily be brought on an urgent basis it may be very difficult to produce all relevant information regarding all of the individuals affected in the first instance.

[36] Furthermore, the deponent to the founding affidavit asserts, some have *“run away after being assaulted, some are afraid to come out as a result of intimidation from the First Respondent, and some simply don’t know what to do”*.

[37] There are, however, at least 11 individuals who have deposed to affidavits, including Mr Mabusela, the First Applicant, and 10 others identified in paragraph 68 of the founding affidavit, who have deposed to confirmatory affidavits. Beyond that, a supplementary affidavit attaches two lists of names, the first containing 26 names, and the second 213 names of individuals who, the deponent states, are among those who were unlawfully evicted.

[38] I am satisfied that there is a case before me with identified Applicants which I must deal with, at the very least including those who have personally deposed to affidavits in the matter. I will deal with the identity of any other Applicants further when I deal with the relief sought, later in this judgment.

[39] I am also satisfied that the application was properly brought on an urgent basis. A party who alleges that they are in the process of being evicted or have been very recently evicted unlawfully from their homes and wish to seek a spoliation or interdict remedy must necessarily seek that remedy as expeditiously as possible. The Applicants did so. The availability of an alternative remedy is a topic to which I must necessarily return if I find in favour of the Applicants on the merits, but in my view no available alternative remedy detracts from the urgency

of the matter. Indeed, since the Applicants allege that a consequence of their eviction is that some of them currently have nowhere to sleep but in the open it is surprising that the First Respondent should have disputed that the matter is one that should properly have been placed on the urgent roll.

[40] On the merits of the application, Mr Sithole's submissions on the strength of the decision of the Supreme Court of Appeal in *City of Ekurhuleni Metropolitan Municipality vs Tshepo Gugu Trading CC* (referred to above) go too far in my view.

[41] It is clear that even unlawful occupiers are fully entitled to rely on the protection of PIE, if the structures they occupy are homes of a kind that bring the provisions of that Act into play. Even where the provisions of PIE are not applicable, as was the case in *Setjwela*, applicants who enjoy peaceful possession and occupation of land, including where they have no existing legal right to do so, are entitled to the protection of a spoliation remedy.

[42] This is so well established that it should not need to be pointed out. But in light of Mr Sithole's submissions on behalf of the First Respondent it seems to me to be necessary to restate what was said by the then Appellate Division in *Setlogelo's* case in 1914³. It is "*an elementary principle of law*" that a person in *bona fide* occupation and possession of land "*is entitled to retain undisturbed occupation until ousted by someone who can establish better title than his own to occupy the land.*"⁴

[43] The right of an applicant for an interdict in these circumstances "*is perfectly clear. He is a possessor; he is in actual occupation of the land and holds it for himself. And he is entitled to be protected against any person who against his will forcibly ousts him from such possession.*"⁵

[44] This point, and the rule against self-help more generally, is at the heart of decisions such as those in *Setjwela* and also in *Tswelopele Non-Profit*

³ *Setlogelo v Setlogelo* 1914 AD 221 at 227

⁴ per De Villiers CJ at 225

⁵ at 227

Organisation and Others v City of Tshwane Metropolitan Municipality,⁶ *Ngomane and Others v City of Johannesburg Metropolitan Municipality and Another*,⁷ and *South African Human Rights Commission v City of Cape Town*⁸ (confirmed on appeal in the recently handed down judgment in *City of Cape Town v South African Human Rights Commission and Others*⁹).

- [45] The facts in these cases reflect the deep social tragedy that there is inadequate housing provided in municipal areas. They are evidence of a profound failure on the part of public authorities to make adequate provision, in compliance with their constitutional duties, for the housing needs that exist within their areas of constitutional and statutory responsibility. There is, quite simply, no place in our society for violent, high handed, reckless evictions, whether by public authorities or private actors, merely on grounds that possessors of land, or any other property for that matter, have no legal title to support their possession.
- [46] The courts have, however, also accepted that public authorities are entitled to act to pre-empt or to prevent the unlawful occupation of land. They may permissibly seek to protect property from being occupied or invaded unlawfully in the first place. Where property has already been unlawfully occupied, the provisions of the PIE Act may (and must) be invoked and the courts will, where the relevant requirements are satisfied, order the eviction of unlawful occupiers.
- [47] Where a public authority acts to pre-empt or to prevent the unlawful occupation of land, the provisions of the PIE Act generally do not come into play before occupation has been established, because there is no building or structure yet occupied. And if there is no established possession, no question of spoliation arises. In addition, provided the owner acts immediately, at the moment at which an unlawful occupier who is engaged in an act of spoliation attempts to access land in order to take possession or occupy it, the owner may permissibly take it back, relying on a procedure or defence known as counter-spoliation.

⁶ [2007] ZASCA 70; [2007] SCA 70 (RSA); 2007 (6) SA 511 (SCA)

⁷ [2019] ZASCA 57; [2019] 3 All SA 69 (SCA); 2020 (1) SA 52 (SCA)

⁸ [2022] ZAWCHC 173; [2022] 4 All SA 475 (WCC); 2022 (6) SA 508 (WCC)

⁹ [2024] ZASCA 110 (10 July 2024). Although this decision was handed down after argument in this matter it confirms the decision of the Court below and asserts principles well established in earlier decisions.

[48] In *City of Cape Town*¹⁰ the High Court explained it this way:

“The very label of counter spoliation is indicative that its objective is to resist spoliation and that it may be resorted to during the act of spoliation. Furthermore, the description of counter spoliation indicates that it must be part of the res gestae or a continuation of the spoliation - thus giving guidance to what is meant by instanter. Counter spoliation is no more than the resistance to the act of spoliation. Therefore, it follows that once the act of spoliation is completed and the spoliator has perfected possession, the window within which to invoke counter spoliation is closed.”

[49] On appeal, the Supreme Court of Appeal¹¹ confirmed this:

“[10] In Silberberg and Schoeman’s The Law of Property, the authors state that ‘[a]s a general rule, a possessor who has been unlawfully dispossessed cannot take the law into [their] hands to recover possession. Instead, [they] will have to make use of one of the remedies provided by law, for example the mandament van spolie. But if the recovery is forthwith (instanter) in the sense of being still a part of the act of spoliation, then it is regarded as a mere continuation of the existing breach of the peace and is consequently condoned by the law. This is known as counter-spoliation (contra spolie).’ It is thus an established principle that counter-spoliation is not a stand-alone remedy or defence and does not exist independently of a spoliation.

[11] As the authors explain, it is clear that counter-spoliation is only permissible where: (a) peaceful and undisturbed possession of the property has not yet been acquired, ie when the taking of possession is not yet complete; and (b) where the counter-spoliation would not establish a fresh breach of the peace. Once a spoliator has acquired possession of the property and the breach of the peace no longer exists, counter-spoliation is no longer permissible. The person who seeks to

¹⁰ At para [62]

¹¹ Citation at footnote 9 above

counter-spoliate, in this case the City, must show two requirements: (a) the (homeless) person was not in effective physical control of the property (the possessory element); and (b) thus, did not have the intention to derive some benefit from the possession (the animus element).

[12] *This means, if a homeless person enters the unoccupied land of a municipality with the intention to occupy it, the municipality may counter-spoliate before the person has put up any poles, lines, corrugated iron sheets, or any similar structure with or without furniture which point to effective physical control of the property occupied. If the municipality does not act immediately(instanter) before the stage of control with the required intention is achieved, then it cannot rely on counter-spoliation as it cannot take the law into its own hands. It will then have to seek relief from the court, for example by way of a mandament van spolie, an ordinary interdict, or pursue a remedy under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE)."* (footnotes omitted)

[50] Since the question of the constitutionality of the PIE Act, including the question whether the definition of an unlawful occupier in that Act should be read down to include invaders, was not at issue in the appeal, the Court expressly declined to consider it. In the meantime, it held, "*courts should deal with these matters on a case-by-case basis until those issues are properly raised and dealt with fully, fairly and pertinently.*"

[51] I must deal with the matter, then, on the basis that the First Respondent's conduct was lawful only if it fell within the narrow ambit of counter-spoliation as explained in the extracts above.

[52] These principles of law are relatively straightforward to explain. What is less straightforward, particularly on papers urgently prepared, is to establish whether the facts disclose a spoliation (by unlawful occupiers) already completed or still in progress. This is particularly so where a spoliation takes place gradually, for

example where unlawful occupiers arrive on a particular piece of land at different times or dates and start to establish occupation over a period of time.

- [53] The stakes are high. An eviction that violates the protection afforded by the PIE Act is a criminal offence. Courts are not naïve about the risks posed to public order in these situations. But this does not mean that they will condone violations of the protection afforded by the PIE Act which give effect to important fundamental rights under the constitution. Mediation is expressly provided for in section 7 of the PIE Act, and is not doubt an appropriate alternative if rights and obligations are unclear, or a dispute exists that might affect public order. South Africa has excellent community mediators. That process should be invoked whenever possible to resolve conflict over land.
- [54] The First Respondent is no doubt entitled to act to prevent the unlawful occupation of land from occurring.
- [55] Where, however, it seeks without a court order to remove persons already physically present on vacant land, who are in the process of establishing shacks or similar infrastructure, it can only do so in circumstances that satisfy the defence of counter-spoliation.
- [56] For that, the First Respondent must show, first, that it is the owner of the land in question or acts with the authority of the owner. Second, it must show that it is acting immediately (*instanter*) in response. I would add that it must act proportionately, not violently, and has no right to seize or impound property or material. If property or material is seized or removed as part of a counter-spoliation this must be returned or made available for collection by the owners of that property or material. It cannot simply be forfeited.
- [57] On the defence of counter-spoliation, the First Respondent falls at the first hurdle. It is not the owner of the land in question. It does not claim or plead that it is, nor that acted on any express or implied authority of the owner in evicting the Applicants from that land. That, it seems to me, is the end of the matter on the merits.

[58] Even if this were not so, on the First Respondent's own version, from the photographs which it attached to its answering papers (ignoring for the moment the fact that the Applicants dispute that these were taken on the land in question) it removed a number of completed structures which it contended were unoccupied at the time. This approach failed in *City of Cape Town*, and it seems to me that even if the First Respondent had been the owner of the land in question, or had acted with the owner's authority, it would have had difficulty establishing that its conduct fell within the narrow ambit of counter-spoliation described in the portions of that decision extracted above.

[59] In summary, the First Respondent's actions were unlawful.

Remedy

[60] That leads to the question of remedy.

[61] In *Tswelopele* the Supreme Court of Appeal considered the nature and extent of the violation of rights as important to crafting an appropriate remedy -

[15] 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.

[16] 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."

[62] In *Ngomane* the Court commented as follows:

[21] What is clear however, is that the confiscation and destruction of the applicants' property was a patent, arbitrary deprivation thereof and a breach of their right to privacy enshrined in s 14(c) of the Constitution, 'which includes the right not to have ... their possessions seized'. The conduct of the respondents' personnel was not only a violation of the applicants' property rights in their belongings, but also disrespectful and demeaning. This obviously caused them distress and was a breach of their right to have their inherent dignity respected and protected.

*[22] In the circumstances, the respondents' conduct must be declared inconsistent with the Constitution and therefore unlawful, as required by s 172(1)(a) thereof. This finding entitles the applicants to appropriate relief for the violation of their fundamental rights as envisaged in s 38 of the Constitution. As to what constitutes 'appropriate relief', the Constitutional Court the Constitutional Court said in *Fose*^[13]:*

'It is left to the courts to decide what would be appropriate relief in any particular case. Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to

secure the protection and enforcement of these all-important rights.'

And at para [69]:

'[T]his Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it... Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to "forge new tools" and shape innovative remedies, if needs be, to achieve that goal.'

[23] Although the applicants sought only the return of their property, it bears mention that a claimant in respect of a constitutional breach that has been established is not necessarily bound to the formulation of the relief originally sought or the manner in which it was presented or argued. Thus, it matters not that the applicants sought to vindicate their constitutional rights for the first time in this Court."

[63] It is clear that a declaration is warranted. Although this court will seldom grant a "bare declaration" without consequential relief, in light of the stance adopted by the First Respondent in its answering papers, and the public importance of legal rights of Applicants such as those in the present matter, a declaration would in my view be warranted even without consequential relief.

[64] In determining what consequential relief, if any, would be appropriate, there are some significant challenges facing the Applicants. The first concerns the identity of the land in question. The Applicants identify it only as land that is "at or near" a specified location. No address is provided and it appears that the Applicants and First Respondent may have submitted photographic evidence from different locations. No doubt the location could be pointed out, but a court will be reluctant to make an order restoring possession without clarity on exactly where the land

is, who owns it, and what possible unintended consequences could arise from such an order.

- [65] The second question is related to the identity of the Applicants. In whose favour should a restoratory order be granted? If only in favour of those who deposed to an affidavit, this would benefit only a tiny proportion of the many who the Applicants assert were displaced by unlawful eviction. On the Applicants' papers many have, following three separate acts of eviction, now dispersed to different locations.
- [66] Related to that, and while this certainly does not affect the lawfulness of the First Respondent's actions, the short duration of the Applicants' occupation of the land in question, the scant evidence regarding possession and tenure by the large majority of persons who the Applicants say were evicted, and the absence of corroborating evidence (for example in the form of photographs) that more than a few people were affected or structures removed militates against a wide-ranging restoratory order.
- [67] In summary, there is uncertainty about the location of the land and identity of the Applicants, a dispersed Applicant community, a short period of occupation preceding the evictions, and a risk or likelihood of subsequent eviction proceedings under PIE. For these reasons I am not inclined to grant a restoratory remedy of the kind granted in *Tswelopele*.
- [68] I am mindful of the point made in *Ngomane* that a damages claim may be unrealistic¹² –

"Instituting a damages claim would involve them in costly and time-consuming civil litigation in respect of property, which although valuable to them, is otherwise mostly of trifling commercial value. The undisputed evidence is that many of the applicants daily search for work and collect recyclable materials, which they sell in order to survive. They would be hindered in this if they were required to attend court proceedings. They have no money for transport to attend court. And for the very reason that

¹² At paragraph [25]

it would not be possible for them to prove the market value of the property destroyed in the conventional way, an action for damages is not an appropriate remedy. Such an action is likely to fail or result in a nominal award of damages.”

[69] The possessions and materials seized by the First Respondent must, in my view, be restored. An order can be made restoring these to the First Applicant on behalf of others he has been authorised to represent in these proceedings or in any other lawful manner requested by the Applicants’ attorneys.

[70] I have also considered the possibility of ordering some form of compensation, in the form of a *solatium*, as was the case in *Ngomane*. Again, the uncertainty regarding identity of the Applicants militates against this. Relief of this kind was not sought nor raised or dealt with in argument. Neither party has made submissions that this would be appropriate.

[71] I must, however, also bear in mind the injunction in *Fose v Minister of Safety and Security*¹³ -

“Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated.”

[72] Some of the difficulties I have referred to are inherent difficulties in bringing litigation of this kind. This court should not set too high a bar in urgent proceedings. However, I cannot overlook the fact that the Applicants seek final remedial relief on the strength of their papers. There are, for the reasons I have mentioned, formidable obstacles to granting consequential relief, beyond a mere declarator that one or more of them has been treated unlawfully.

[73] In *Tswelopele* the Supreme Court of Appeal did not consider it sufficient to order that the displaced occupiers be placed on the list for emergency housing assistance. In that case there was, however, a clearly defined list of Applicants who had lived peaceably in the destroyed dwellings for at least eighteen months

¹³ 1997 (3) SA 786 (CC) at paragraph 69

prior to their eviction. In the present case the Applicants include in their notice of motion as possible alternative relief an order that they be provided with alternative accommodation. In my view that is an appropriate order to make in the present circumstances.

[74] The alternative accommodation provided may include providing shelters of a kind similar to those removed by the First Respondent, on vacant land that it owns, or other accommodation of a similar kind.

[75] In the circumstances I make the following order:

1. The matter may proceed as one of urgency in terms of the provisions of Rule 6(12).
2. The First Respondent's conduct in removing occupiers and destroying or removing their shelters at or near 178 IR 41 Tambokiesfontein, Ekurhuleni, between 1 and 5 June 2024 is declared to be unlawful.
3. The First Respondent is ordered to restore all possessions and materials seized by its officers in the course of the conduct referred to in paragraph 2.
4. To give effect to the order in paragraph 3 above -
 - a. the Applicants' attorneys may, within 14 days of the date of this order, nominate in writing a location to which such possessions and materials may lawfully be delivered, and the First Respondent shall deliver all such possessions and materials to that location within 14 days after such nomination in writing;
 - b. if the Applicants' attorneys fail to nominate any such location within 14 days of the date of this order, the First Respondent shall give notice in writing to the Applicants' attorneys that it holds all such possessions and materials available for collection by the First Applicant, Jacob Mabusela or any other person nominated by the Applicants' attorneys for this purpose, and the First Respondent shall then hold them available for collection for a period of 30 days after that notice.

5. The First Respondent is ordered to provide Jacob Mabelane and each of the persons identified in paragraph [68] of the Founding Affidavit, specifically Lusanda Mankayi, Lindikhaya Yekelo, Nandipha Shosha, Nolitha Mpehle, Solwethu Makeleni, Nozibele Mngxekeza, Nocingile Magula, Yoliswa Gloria Sinxadi, Samkelo Nicholas Bence, Funisile Edwin Mphungulo, and Mpinda Alfred Dondolo, with the following –
 - a. Assistance and support in making a housing subsidy application;
 - b. Accommodation in a homeless shelter or other accommodation of a similar kind pending finalisation of the housing subsidy application. This may include providing shelters of a kind similar to those removed by the First Respondent, on vacant land that it owns or to which it has lawful access.
6. To give effect to the order in paragraph 5 above -
 - a. The First Respondent shall communicate to the Applicants' attorneys in writing, within 14 days of the date of this order, the name and contact details of its official responsible for complying with the terms of paragraph 5 of this order; and
 - b. The assistance and accommodation shall be provided to those Applicants referred to in paragraph 5 who present themselves to that official in person at a date and time arranged with the Applicants' attorneys, which shall be not later than 14 days after the date of the communication in paragraph 6a, above.
7. The First Respondent is ordered to pay the Applicants' costs.


C TODD
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

Date of Hearing: 20 June 2024

Date of Judgment: 22 July 2024

APPEARANCES

Counsel for the Applicant: Adv Mahwai

Instructed by: M Mkhathshwa Attorneys

Counsel for the Respondent: Adv E Sithole

Instructed by: Kunene Ramapala Inc.