

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NO.: 031031/2022

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **YES**
(3) REVISED: **NO**

26 November 2024

In the matter between:

DAPHNEY MMAMAOWA CHOKOE & 51 OTHERS

Applicants

and

**MEC FOR HUMAN SETTLEMENTS,
URBAN PLANNING & COOPERATIVE GOVERNANCE,
TRADITIONAL AFFAIRS, GAUTENG PROVINCIAL
GOVERNMENT**

First Respondent

EKRHULENI METROPOLITAN MUNICIPALITY

Second Respondent

**EKRHULENI METROPOLITAN MUNICIPALITY
POLIC DEPARTMENT**

Third Respondent

JUDGMENT

FORD AJ:

Introduction

[1] On 18 October 2022, the applicants approached this court on an urgent basis seeking an order in the following terms:

1.1. *Interdicting and restraining the respondents whose legally authorized officials in the police uniform and marked vehicle, on the 12th September 2022 in the company of Ekurhuleni Metro Police were seen taking pictures of the numerous informal dwellings, among others, expressly indicating that they will be coming back any day or soon thereafter to evict persons from, and demolishing any informal dwelling, hut, shack, tent, or similar structure or any other form of temporary or permanent dwelling or shelter, whether occupied or unoccupied, throughout the area of the portion 117, 118, 124, 136 and 248 farm Putfontein, in the township of Daveyton, Gauteng Province;*

1.2. *The interdict in the form of a mandamus van spolie (spoliation application), compelling the respondents to desist and cease to unlawfully and illegally evict persons from, and demolishing any informal dwelling, hut, shack, tent, or similar structure or any other form of temporary or permanent dwelling or shelter, whether occupied or unoccupied, throughout the area of the portion 117, 118, 124, 136 and 248 farm Putfontein, in the township of Daveyton, Gauteng Province, except in terms of an order of court duly obtained;*

1.3. *The respondents are and be hereby interdicted and restrained from evicting persons from, and demolishing any informal dwelling, hut, shack, tent, or similar structure or any other form of temporary or permanent dwelling or shelter, whether occupied or unoccupied, throughout the area of the portion 117, 118, 124, 136 and 248 farm Putfontein, in the township of Daveyton, Gauteng Province, except in terms of an order of court duly obtained (attached herein pictures of EMP demolishing shacks, marked bundle 'A');*

1.4. *The respondents be directed to restore, return building material and personal possessions seized from the first to fiftieth applicants initially between 17, 18 and 19 August 2020, if not, then the 23 June 2022 and again*

on 13 July 2022, first respondent and second respondent evicted and demolished informal dwelling, hut, shack, tent, or similar structure, other form of temporary or permanent dwelling or shelter, whether occupied or unoccupied throughout the area of the portion 117, 118, 124, 136 and 248 farm Putfontein in the township of Daveyton, Gauteng Province, without any due process, that is, in terms of an order of court duly obtained;

1.5. To the extent that the first respondent and second respondent evict and/or demolish any informal dwelling, hut, shack, tent, or similar structure or any other form of temporary or permanent dwelling or shelter, whether occupied or unoccupied, in terms of the of a Court Order that they do so in a manner that is lawful and respects and upholds the dignity of the evicted persons, and that they are expressly prohibited from using excessive force, and/or destroying and/or confiscating the materials which is the property of the evictees, alternatively, it declared that all or any evictions and/or demolitions aforementioned (including those in terms of the court order, if there is one) be done in a manner that is lawful and respects and upholds the dignity of the evicted persons, and that they are expressly prohibited from using any and/or excessive force, and/or from destroying and/or confiscating the materials which is the property of the evictee/s;

1.6. To the extent that any evictions, demolitions, and/or from destroying and/or confiscating the materials which is the property of the evictee, the Ekurhuleni Metro Police, are expressly prohibited from using excessive force, and/or from destroying and/or partaking in, are directed to ensure that they desist from such illegal and unlawful conduct, but to ensure that the said evictions and/or demolitions are done lawfully and in conformity with the Constitution, in accordance with the SAPS' constitutional duty to protect the dignity of the persons evicted;

1.7. The respondents be and are hereby ordered to return the building material and personal possessions seized from the first to fiftieth applicants initially between 17, 18 and 19 August 2020, again recently on/or about 23 June 2022, 16 July 2022 and 12 September 2022 first respondent and second respondent evicted, and belongings/possessions confiscated unlawfully;

1.8. The respondents be directed to make payment of R 5000 for the building and personal possessions destroyed and seized between 23 June

2022 and 12 September 2022 to each occupant for loss of personal belongings, personal possessions and building material seized;

2.

2.1 In the alternative to the relief sought in paragraph 1.1 to 1.7 seeking an order interdicting and restraining the evictions and demolitions as referred above, unless the first respondent provides temporary emergency accommodation, or the evictions/demolitions occur in terms of a court order;

2.2 The respondents are directed to restore the demolished, and/or destroyed and/or confiscated materials which are the property of the evictee/s without any unreasonable delay, failure to comply with the court order, will be considered a contempt of such order and punishable by law;

2.3 Alternative further and only if this Court is unable to grant this final relief for any reason, the applicants then seek an order on an interim basis, while the final relief is determined. The relief sought is an interim order directing the respondents to consider and restore to-date, pending the determination of the final relief.

2.4. The costs of this application are to be paid by any of the respondents individually, jointly and severally, the one paying the other to be absolved for any relief sought in this application.

2.5 Further and/or alternative relief.

[2] The urgent application, opposed by the second and third respondents, was removed from the roll by agreement with the costs reserved.

[3] The present matter concerns the enrolment of the application in the normal course, save that the second and third respondents (*“Ekurhuleni”*) persist with the objection that the matter was not urgent. And in respect of the present application, contend that, the relief sought by the applicants is confusing.

The facts

[4] Ekurhuleni is responsible, *inter alia*, for human settlement and law enforcement within its jurisdiction.

[5] In November 2018, PJJ Van Vuuren Beleggings (Pty) Ltd ("PJJ Van Vuuren") obtained an eviction order against the unlawful and illegal occupiers of holdings 2[...], 3[...] and 3[...] G[...] M[...], K[...] Park A[...] H[...]. The property is now known as "G[...] M[...]". The court order per Molahlehi J (as he was known then), directed Ekurhuleni to provide temporary emergency alternative accommodation, to the unlawful and illegal occupiers.

[6] Ekurhuleni duly complied with the court order, and provided alternative accommodation to the unlawful and illegal occupiers, at its property in Putfontein. Pursuant thereto, it embarked on a consultative process with the unlawful and illegal occupiers of G[...] M[...], and set out to do a headcount and/or verification of the unlawful and illegal occupiers.

[7] On or about 9 February 2020, Ekurhuleni, together with its former Member of Municipal Council and the Councillor responsible for Human Settlements, started a consultative process with the illegal and unlawful occupiers at G[...] M[...].

[8] Between 11 and 20 February 2020, Ekurhuleni embarked on a verification process. This was to ensure that Ekurhuleni had reliable data regarding the number of persons requiring relocation.

[9] Once all illegal and unlawful occupiers were verified, Ekurhuleni started with the relocation program, on 24 February 2020.

[10] The verification exercise established, that there were 2339 unlawful and illegal occupiers at G[...] M[...]. Of that number, 1055 illegal and unlawful occupiers agreed to be relocated to Putfontein in accordance with prayer 4 of the court order of Molahlehi J, under case number 2018/07019.

[11] The illegal and unlawful occupiers were relocated to Putfontein. According to Ekurhuleni, the Putfontein land was acquired in January 2020, through a Council resolution. Putfontein was therefore started by Ekurhuleni itself. That is why, so the argument goes, it knows which structures form part of land-invasions, and which once were constructed as part and parcel of the relocation exercise to Putfontein.

[12] Between 24 February 2020 and 26 March 2020, Ekurhuleni relocated most of the illegal and unlawful occupiers to Putfontein. The relocation was disrupted by the national state of disaster and national lock-down, following the public-health pandemic – Covid19, announced by the President of the Republic of South Africa. The relocation commenced again when the lock-down regulations were relaxed.

[13] Ekurhuleni relocated 1055 illegal and unlawful occupiers to Putfontein. Each person relocated from G[...] M[...], had to have his or her consent form stamped by an official of Ekurhuleni. The stamped form would then be received by another Ekurhuleni official, stationed at Putfontein. This was to ensure that the relocation proceeded orderly. According to Ekurhuleni, an illegal and unlawful occupier, would not be received at Putfontein, if he or she did not have a stamped consent form, received from G[...] M[...].

[14] Out of the 52 (fifty-two) applicants, 8 (eight) were illegal and unlawful occupiers of G[...] M[...]. These applicants are:

- 14.1. Daphney Mmamaowa Chokoe;
- 14.2. John Kgalabi Madisha;
- 14.3. Maropeng Kent Maboko;
- 14.4. Glory Moeng;
- 14.5. Ntsako Mirimani;
- 14.6. Mochueneng Nicholas Chuene;
- 14.7. Patricia Nontokozo Motembu; and
- 14.8. Mogesetsi Rammutla

[15] According to Ekurhuleni, the 8 (eight) applicants refused to be relocated to Putfontein. On 3 June 2020, its attorneys informed the erstwhile attorneys of record of the illegal and unlawful occupiers of G[...] M[...], and the attorneys of record of PJJ Van Vuuren, that it managed to relocate 1055 households who agreed to be moved to Putfontein. The remaining illegal and unlawful occupiers at G[...] M[...], refused to be relocated to Putfontein.

[16] On 31 March 2021, Ekurhuleni informed the legal representatives of both PJJ Van Vuuren, and the illegal and unlawful occupiers, that it had fully complied with the court order of Molahlehi J, and that the 52 (fifty-two) applicants who were not relocated to Putfontein, cannot claim that they were being evicted.

[17] Ekurhuleni contends that, through its law enforcement agency, it responds from time to time to cases of "*land invasion*" and quickly attends to such, in order to prevent invasions. To this end, where structures are erected, it demolishes them and confiscates any illegal materials that the land invaders would have attempted to use, to erect the illegal structures.

[18] It contends further, that where Ekurhuleni prevents land invasion — it is not evicting people or the applicants in this instance *per se*, it is merely acting in accordance with the law. It has identified, so the argument went, certain areas in the Eastern Region of the municipality, as so-called "hot-spots" for land invasion. These areas include Putfontein. As a result, so it is submitted, Ekurhuleni has dispatched full-time dedicated vehicles and officers, to these areas to prevent land invasions.

[19] Ekurhuleni contends, that it did not evict the applicants on grounds that they were unlawful occupiers, but that it merely prevented land invasion by the applicants. It states:

I deny that the Ekurhuleni Municipality is evicting the applicants. The Ekurhuleni Municipality has a responsibility to ensure that there is law and order within its area of jurisdiction, including prevention of land invasion. The Ekurhuleni Municipality's prevention of land invasion would naturally include demolishing and confiscation of any items that would have been utilised in the commission of land invasion.

[20] The applicants contend, that they formed part of the occupiers who were relocated to portion 117, 118, 124, 132, 136 and 248 Putfontein, in February 2020; having complied with the order of Molahlehi J.

[21] According to the applicants, over the period 17 – 19 August 2020, and again on/or about 23 June 2022 and on/or about 16 July 2022, and on 12 September 2022

without any due process, Ekurhuleni evicted them, demolished their structures and confiscated their materials. The applicants claim further that they were in peaceful and undisturbed possession of the land in question.

[22] The applicants in dealing with what transpired when the alleged evictions and demolitions took place, stated the following, in their founding affidavit:

On/or about 16 August 2022 and again recently on 12 September 2022, the first and second respondents' officials in the company of Ekurhuleni Metro Police were in the farm portion 117, 118, 124, 136 and 248 farm Putfontein, taking pictures of the numerous informal dwellings, among others, expressly indicating that they will be coming back any day or sooner to evict persons from, and demolishing any informal dwelling, hut, shack, tent, or similar structure or any other form of temporary or permanent dwelling or shelter, whether occupied or unoccupied, throughout the area of the portion 117, 118, 124, 136 and 248 farm Putfontein, in the township of Daveyton, Gauteng Province, indeed as the promised, they came back on 12 September 2022 unlawfully and illegally evicted, demolished and confiscated our personal belongings and materials.

[23] In response to this allegation, Ekurhuleni states *inter alia*:

I deny that the applicants are part of the 1055 unlawful and illegal occupiers who were relocated to Putfontein by the Ekurhuleni Municipality.

The applicants make emotive claims about the alleged impact of the prevention of land invasion. These are mere sweeping statements intended to sustain the attention of this Court.

I have explained that the applicants are not legal occupiers or residents of Putfontein. They are making serious attempts to commit land invasion. They have been stopped by the EMPD in their act. Now, they hope to obtain a court order which they will use to bar the EMPD from preventing land invasion.

If the court order is granted, the applicants will erect illegal structures unabated. The land is near an environmentally sensitive area, which is not habitable in terms of environmental laws of this country.

The Municipality has no intention of evicting the applicants. However, the Municipality is duty bound to prevent any form of land invasion. In any event, the applicants are not legal and lawful occupiers of Putfontein, they cannot therefore be evicted from the land in which they have not occupied.

[24] In so far as the allegation goes that the applicants were in peaceful undisturbed possession of the land, Ekurhuleni retorts that the applicants were not in peaceful and undisturbed possession of the land in question, as they do not form part of the occupiers who were relocated to Putfontein. According to it, the applicants were in the process of invading the land, or moving on to the property for the purposes of residential settlement. In this regard, so it was argued, the applicants have not established peaceful and undisturbed possession.

[25] Ekurhuleni contends in conclusion, that where the attempted land invasion has not been completed, the law condones the immediate recovery of the invaded land, without resorting to court for a court order. In other words, so it submits, as long as Ekurhuleni acts "*instante*" (instantly) to prevent land invasion, no court order is required.

The issue in dispute

[26] From the papers before me, the dispute in this matter is as follows. The applicants contend that Ekurhuleni demolished their structures, seized or confiscated their materials, and effected their eviction from Putfontein, without a court order. Ekurhuleni contends on the other hand that it prevented unlawful land invasion, which didn't require them to obtain a court order, to effect such preventative measures.

Analysis

[27] Ekurhuleni does not state what measures it took, or what constitutes land invasions, as opposed to unlawful eviction, nor does it expressly deny that it effected the demolitions as claimed by the applicants. Having applied the test in *Plascon-*

*Evans*¹, I have no hesitation in accepting the applicants' version that they were occupying the land at Putfontein. The fact that their names are not listed on the manifest, and them occupying the land, in any event, points to occupation which might otherwise be regarded as unlawful. That is a determination for a court to make, not Ekurhuleni.

[28] I also accept the applicants' version, that Ekurhuleni demolished their structures, seized or confiscated their materials, and effected their eviction from Putfontein, without a court order. This much is conceded by Ekurhuleni, except that it contends that it did so in order to prevent unlawful land invasion, which (according to it) didn't require them to obtain a court order, to effect such preventative measures. One would have expected Ekurhuleni to chronicle what the preventative measures it undertook, to thwart (what it refers to as) unlawful land invasions.

[29] Our Constitution (Act 108 of 1996), specifically section 26(3) states that: No one may be evicted from their home, or have their home demolished, without an order of the court made after considering all the relevant circumstance. (own emphasis)

[30] Section 26(3) affords unlawful occupiers a right not to be evicted (or have a home and shelter demolished) without a court order. In order to give effect to this right, PIE² was enacted to give effect to s 26(3), and lays out the process in which eviction must take place, cementing the requirement that the court can only order an eviction if it would be just and equitable to do so.

[31] In giving direction to the issue of unlawful occupation of land and a means to counter such invasions, the Supreme Court of Appeal ("SCA"), in *City of Cape Town v The South African Human Rights Commission and Others*³, said:

[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

¹ *Plascon-Evans Paints (TVL) Ltd. v Van Riebeck Paints (Pty) Ltd.* (53/84) [1984] ZASCA 51; [1984] 2 All SA 366 (A); 1984 (3) SA 623; 1984 (3) SA 620 (21 May 1984)

² Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998

³ 2024 (5) SA 368 (SCA) (10 July 2024)

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, i.e. 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 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).

[32] What we learn from the SCA authority is this:

- 32.1. A possessor, such as Ekurhuleni, who claims that it has been unlawfully dispossessed of land (by way of unlawful land invasions) cannot take the law into its own hands to recover possession. Instead, it will have to make use of one of the remedies provided by law, such as the *mandament van spolie*. However, if the recovery is forthwith (*instante*) in the sense of being still a part of the act of spoliation, then the recovery is regarded as a mere continuation of the existing breach of the peace, which is consequently condoned by the law;
- 32.2. A counter-spoliation is only permitted where: (a) peaceful and undisturbed possession of the property has not yet been acquired, e.g when the taking of possession is not yet complete; and (b) where the counter-spoliation would not establish a fresh breach of the peace;
- 32.3. Once a spoliator has acquired possession of the property and the breach of the peace no longer exists, counter-spoliation is no longer permissible;
- 32.4. A person who seeks to counter-spoliate, 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).

[33] When applying these considerations to the present facts, like in *Cape Town Municipality*, then the principle is as follows. If a municipality does not act immediately (*instante*) before the stage of control (by the homeless persons) with the required intention is achieved, then it cannot rely on counter-spoliation because it cannot take the law into its own hands. In those circumstances, it has to seek relief from the court.

[34] In the present matter, this court is called upon to determine whether Ekurhuleni acted *instante*? Or whether a stage of control was already achieved, which then required it to seek relief from the court. Ekurhuleni provides very little evidence of exactly when the unlawful invasions took place, which permitted it to act *instante*. On the evidence before me, it is impliedly admitted by Ekurhuleni, that it demolished structures and took possession of materials and items.

[35] The failure on the part of Ekurhuleni to prove that it acted *instante*, leads me to accept the applicants' version, that their evictions were effected after their structures were demolished. The fact that structures were raised, seems to indicate that the occupiers demonstrated an intention, of taking control of the land, in order to derive some benefit from the possession, which satisfies the *animus* requirement.

[36] Touching on the issue of when possession is established, the court in *Seale and Others v City of Johannesburg Metropolitan Municipality and Another* said⁴:

A growing line of authority clarifies that once the poles are in the ground, possession is established and can only be removed by a court order (where the owner may use common law remedies). Many of these rely on *Yeko v Qana* where the court stated that "*the possession which must be proved is not possession in the juridical sense; it may be enough if the holding by the applicant was with the intention of securing some benefit for himself.*" This approach was applied in the context of the dismantling of incomplete structures in *South African Human Rights Commission v City of Cape Town*, where the court held that "*it would appear that the peaceful and undisturbed possession was physically manifested by the occupiers commencing construction of informal structures on the land. The structures need not be completed nor occupied for the possessory element of spoliation, as defined by Yeko, to be perfected*". (Footnotes omitted)

[37] In the present matter, it is not disputed that the occupiers erected structures on the land. The erection of structures demonstrate, in the clearest terms, an intention to occupy. Where this has been achieved, a municipality cannot act *instante* to remedy its rights, it must approach the courts for relief.

[38] The applicants proved, that they have been spoliated, which entitles them to restoration. They are entitled to have their structures replaced. The position I adopt is in line with the reasoning of the SCA in *Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality*⁵, where it said:

⁴ (2023/078684) [2023] ZAGPPHC 754 (25 August 2023) para 33

⁵ 2007 (6) SA 511 (SCA) (30 May 2007) para

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.

[39] In the result, I make the following order:

Order

1. The respondents are interdicted and restrained from evicting the applicants from, and demolishing any informal dwelling, hut, shack, tent, or similar structure or any other form of temporary or permanent dwelling or shelter, whether occupied or unoccupied, throughout the area of the portion 117, 118, 124, 136 and 248 farm Putfontein, in the township of Daveyton, Gauteng Province, unless a court order to that effect is obtained;
 2. The respondents are ordered within 21 (twenty-one) days of this order, jointly and severally, to reconstruct the structures of the applicants which have been demolished and shall replace the materials belonging to the applicants that have been destroyed. The structures to be erected must be capable of being dismantled;
 3. The applicants are ordered to pay the second and third respondents costs that were reserved in the urgent application of 18 October 2022, on a party-and-party scale;
-

4. The second and third respondents are ordered to pay the applicants' costs in this application, on a party-and-party scale;
5. Counsel costs in respect of prayers 3 and 4, shall be on Scale B.



B. FORD

Acting Judge of the High Court

Gauteng Division of the High Court, Johannesburg

Delivered: This judgment was prepared and authored by the Judge whose name is reflected on 26 November 2024 and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 26 November 2024.

Date of hearing: 24 February 2024

Date of judgment: 26 November 2024

Appearances:

For the applicant:	Adv. S. Dlwathi
Instructed by:	Ndlovu R Inc. Attorneys
For the second and third respondents:	Adv. K. Monareng
Instructed by:	M B Mabunda Inc.