



**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

Reportable / ~~Not-reportable~~

CASE NO: 16136/2012

In the matter between:

ROBERT ROSS DEMOLISHERS (PTY) LTD

APPLICANT

and

**ALL PERSONS LISTED ON "RJR1" TO THE
NOTICE OF MOTION (AND THOSE PERSONS
WHOSE IDENTITIES ARE TO THE APPLICANT
UNKNOWN) WHO ARE UNLAWFULLY OCCUPYING
OR ATTEMPTING TO UNLAWFULLY OCCUPY
THE REMAINDER OF PORTION 20 OF PROPERTY
787 CAPE DIVISION, PROVINCE OF THE WESTERN
CAPE**

FIRST RESPONDENT

THE CITY OF CAPE TOWN

SECOND RESPONDENT

THE MINISTER OF HUMAN SETTLEMENTS

THIRD RESPONDENT

THE MINISTER OF PUBLIC WORKS

FOURTH RESPONDENT

**THE MINISTER OF RURAL DEVELOPMENT AND
LAND REFORM**

FIFTH RESPONDENT

MINISTER OF HUMAN SETTLEMENTS IN

SEVENTH RESPONDENT

**THE WESTERN CAPE PROVINCIAL
GOVERNMENT**

THE NATIONAL MINISTER OF POLICE

EIGHTH RESPONDENT

**THE GOVERNMENT OF THE REPUBLIC OF
SOUTH AFRICA**

NINTH RESPONDENT

Coram: SLINGERS, J et SIPUNZI, AJ

Heard: 23 and 24 April 2025

Delivered: August 2025

Summary:

ORDER

1. This court has the necessary jurisdiction in terms of the Prevention of Illegal Eviction From and Unlawful Occupation, Act 19 of 1998;
2. Prayers 1 to 6 of the application are dismissed;
3. Prayers 7 and 8 for the eviction application are postponed *sine die*;
4. The applicant is to pay the costs of the second, the sixth and the seventh respondents, including the cost of two counsel where so employed, on scale C.

JUDGMENT

Sipunzi, AJ (Slingers, J concurring):

Introduction

[1] This application highlights the tension between two fundamental competing rights: the right to property¹, and the right to housing.² It underscores the constitutional principle that everyone is equal before the law and entitled to equal protection and benefits under the law³, as guaranteed in the Bill of Rights. Central to this consideration is the extent to which the City of Cape Town as the relevant sphere of government may be tasked with the obligation to realise these rights. Furthermore, any obligations that may be imposed on the Executive at various levels of governance.

[2] In the Amended Notice of Motion, the applicant seeks an Order in the following terms:

1. Declaring that the second and ninth respondents, in failing to take steps to protect the property of the applicant known as Portion 2-0 of Farm 787 Cape Division, Province of the Western Cape ('the property'), violated the constitutional rights of the applicant to such property;
2. Declaring that the second, third, fifth, sixth, and ninth respondents in failing to have mechanisms in place to relocate the first respondents from the property, violated the constitutional rights of the applicant to such property.
3. Ordering and directing the second respondent, or such other respondent as the court may deem appropriate, to take all steps and sign all documents necessary

¹ The Constitution of the Republic of South Africa, Act 108 of 1996, S 25(1): 'No one may be deprived of property except in terms of the law of general application, and no law may permit arbitrary deprivation of property.'

² Section 26 of the Constitution: '(1) Everyone has the right to have access to adequate housing; (2) the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right; (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.'

³ The Constitution of the Republic of South Africa, 1996, S 9(1): 'Everyone is equal before the law and has the right to equal protection and benefit of the law.'

to effect the purchase of the property by such respondent from the applicant for a price to be determined as set out hereunder ('the purchase price');

4. Ordering the third and/or fifth and/or sixth and/or seventh and/or ninth respondents to pay the purchase price as set out in paragraph 3 above, insofar as the same may not exceed the budgetary constraints of the second respondent:

- 4.1. That the purchase price payable to the applicants for the property be determined by an arbitrator ('the arbitrator') in due course, the arbitrator, failing agreement between the parties within 14 days of such order as this honourable court might hand down, to be appointed by the president of the Cape Bar Council;

- 4.2. That in determining the purchase price, the arbitrator will take into account all relevant considerations and determine the purchase price based on market related value of the property as at date of the arbitration award. Without derogating from the generality of the aforesaid, the arbitrator will take specific note of the following considerations:

- 4.2.1. That the purchase price be determined as if the property in question and the surrounding were vacant land, and that the informal settlement that has developed on the property and in the surrounding area be accordingly disregarded for purposes of valuation and determination.

- 4.2.2. That the purchase price of the property be determined by taking cognizance of all services, including but not limited to roads, drainage systems, water access points and electrical access points, already installed by the applicant.

4.2.3. That the purchase price of the property be determined by taking cognizance of the use to which the applicant put the property prior to the occupation and the use to which it would have put the property in the event the occupation had not taken place.

5. Alternatively to prayer 4 above, that the second and/or third and/or fifth and /or sixth and/or seventh and/or ninth respondents pay the applicant compensation or constitutional damages pursuant to the aforementioned breach of its constitutional rights. The quantum of such compensation or constitutional damages to be equivalent to the value of the property and must be determined in the same manner and with the same considerations, as the determination of the purchase price as set out in paragraph 4.1- 4.2.3. above.
6. Alternatively to the aforementioned prayers 4 and 5 above, that the second respondent is to expropriate the property as contemplated [in] the Expropriation Act 63 of 1975. The compensation payable, as contemplated in S12, thereof, to be determined in the same manner and with the same considerations as the purchase price determinations as set out in paragraphs 4.1-4.1.3. above.
7. Alternatively, to prayers 4,5 and 6 above, that the first respondents should be ordered to vacate the property, along with all of their goods and possessions, including but not limited to all structures erected by the first respondents on the property, on a date to be determined by the above honourable court.
 - 7.1. In the event that the first respondents fail to vacate the property as set out above, the Sheriff of the above honourable court, duly assisted by the second respondent and/or the eighth respondent, shall be ordered

and directed to evict them from the property, along with all their goods and belongings, on a date to be determined by the honourable court.

7.2. That the second and/or third and/or fifth and/or sixth and/or seventh and/or ninth respondents are required to cover all costs and expenses associated with the eviction of the first respondents as set out above.

8. In the event of their eviction from the property, the first respondents will be interdicted and restrained from entering or remaining on the property for any purpose, whatsoever, or from erecting or seeking to erect any structure on the property, whether it be permanent, semi-permanent or informal.

8.1. That in the event the first respondents indeed act in a manner as contemplated in 8 above, the sheriff of the above honourable court, duly assisted by the second respondent and the eight respondents, is hereby ordered and directed to remove them from the property, along with their belongings.

8.2. That all costs of so removing the first respondents from the property shall be borne by the second respondent.

9. That the second respondent pays the costs of this application.

[3] This application is opposed. The second, sixth and seventh respondents actively participated in the proceedings. They are the respondents who filed answering affidavits in opposition to the amended notice of motion and the supplementary founding affidavits. The basis upon which they individually opposed the application was that they had no legal duty towards the applicant, and that where necessary they

made reasonable efforts to address the housing needs of the unlawful occupiers within the greater City of Cape Town, which also includes the applicant's property.

[4] It is important to note that the first respondents filed their answering affidavits in September 2012, during the initial eviction proceedings, in opposition to the original notice of motion. This opposition was directed to the interim order that had been granted by Binns-Ward J on 20 August 2012. They took no further part in the proceedings, save to attend to Prof. Huchzemeyer when she visited Isiqalo settlement on the applicant's property in response to the Gamble J order of 13 June 2013. In March 2023, the legal representatives of the first respondents, who had participated at the time of the filing of the answering affidavit and had also engaged the services of Prof. Huchzemeyer, submitted a notice of withdrawal from the proceedings. They did not provide an explanation for the withdrawal.

[5] However, when the matter served before us for argument, a community leader, Mr. Kakaza, who is also a resident of the Isiqalo attended court with another individual. When he was invited by the court to explain his presence, he advised that he had been sent by the Isiqalo community to 'take note on how the court dealt with the matter.' He also presented a letter dated 14 February 2025, as a demonstration of his mandate from the community. It became apparent that this letter was a resolution of the community meeting that was held in response to the service of the amended notice of motion and notice of set down on their notice board at the property.

[6] The record of proceedings revealed that, at least since August 2012, the first respondents were afforded legal representation through the Legal Resource Centre (LRC). This position remained until March 2024, when they withdrew as the attorneys

of record, without taking the court into its confidence as to what transpired. The last participation of the first respondents' legal representatives appears to be when the court made the May 2014 court order and when the proceedings were adjourned *sine die*, pending the filing of the survey by the sixth and seventh respondents.

[7] After submissions from the parties, and upon careful consideration, and in light of the developments as well as the history of the matter, it was ordered that the matter proceed into argument. Mr Kakaza and companions remained in the court for the duration of the proceedings.

Background

[8] The property that is the subject of this application is Portion 20 of the Farm 787, Cape Division, Province of the Western Cape, it is situated within the Philippi Horticultural Area and is a designated agricultural zone. The applicant, who has been the registered proprietor of this property since 1992, has been conducting a sand extraction business on the premises. It has since been referred to as Isiqalo.

[9] During April 2012, a handful of unknown individuals descended on the property, with partly assembled building materials. This was done without prior knowledge and consent of the applicant. They erected buildings or housing structures on the property. Initially security guards who were employees of the applicant successfully averted the apparent attempted land invasion. However, soon thereafter, the situation became uncontrollable, and within months, the number of residents increased incrementally. The second respondent, (the City) also alerted the applicant about the unlawful occupation of its property. The applicant sought the intervention of the Philippi Police

Services and the Anti Land Invasion Unit of the City. Their response proved ineffective, and ultimately the attempts to vindicate the property were in vain.

[10] On 20 August 2012, the applicant was granted an interim order of court, giving notice to the occupiers and restraining them from further occupying the property in accordance with the Prevention of Illegal Eviction From and Unlawful Occupation of Land (PIE) Act, notwithstanding the opposition from the first respondents, (Isiqalo residents). Subsequent thereto, various court orders were issued, including the order dated 03 June 2013 by Gamble J, wherein the occupation of Isiqalo was described as unlawful. Gamble J ordered that the Provincial Department of Human Settlements be joined to the court proceedings. He directed further investigations and required reports on the availability of land and prospects of provision of emergency housing for the Isiqalo residents. He also directed that once the reports had been furnished, any of the parties could re-enrol the matter for a further hearing.⁴ This order was borne out of a general realisation that the situation at Isiqalo had become untenable and at some point, all parties involved shared the view that an eviction of the Isiqalo residents was not a viable option.

[11] Another order of significance was issued on 12 May 2014, with amendments made on 06 October 2014. Gamble J essentially directed the parties to co-operate with each other, furnish the court with reports and surveys of every household in Isiqalo and adjacent property to be conducted. The due date for the filing of the reports was 14 November 2014 and the LRC was directed to provide an update to court on the outcome of the survey.

⁴ Gamble J Order, dated 03 June 2013, paragraphs 7-8

[12] The various reports were furnished, as summarised below:

Professor Huchzermeyer⁵ conducted a 'transect walk' at Isiqalo on 16 March 2013, in order to inspect the settlement and to gather information. She accepted that there were about 1600 to 1800 shacks within the settlement. There were four creches, informal businesses operated, elderly women, and children with disabilities. She had minimal interaction with some residents. Her findings indicated that Isiqalo had evolved into a settlement with a well-structured and organised community. Each household occupied a clearly demarcated erven, with housing structures consisting mainly of shacks, which were well constructed and decorated with a sense of pride.

[13] On the analysis of the condition of the surface (land) upon which the houses were constructed, she agreed with the findings of the Lukhozi Consulting Engineers' Report. She endorsed that 'in geotechnical terms, the land was fit and appropriate for human settlement and generally suitable for project-linked housing subsidy development.' She observed that Isiqalo residents and the employees of the applicant co-operated to ensure that the remaining lucrative quarrying continued. According to her, a great deal of the property had already been quarried to its natural limit and therefore required extensive rehabilitation. In her opinion such process would require about three (3) years as it would involve the installation of basic services, re-blocking, and a community-building exercise.

[14] **The Lukhozi Consulting Engineers' Report⁶:** The report was compiled concerning two properties, the applicant's and portion 5 of Farm 787, a neighbouring property that was similarly impacted by unlawful occupation. The conclusion was

⁵ Supporting Affidavit of Marie Huchzermeyer, Volume III, page 1113

⁶ Lukhozi Consulting Engineers, Volume III, page 911

reached on 18 January 2013 which indicated that extensive sand mining had led to significant changes in the characteristics and levels of the sites. Based on their study, they opined that the two properties were unsuitable for the development of a subsidised housing project and deemed them uninhabitable. They recommended that it required extensive rehabilitation.⁷ Lukhozi Consultants reported that bulk earthworks would cost approximately R11.9 mil, excluding the costs of relocation that were necessary for the rehabilitation that was envisaged.

[15] **Achmat Ebrahim, City Manager:** His affidavit is dated 17 March 2014. In response to earlier submissions from the provincial and national ministers, the City applied for land for the relocation of the occupiers. The City did not have available land within its IDP or DORA allocation. It was not possible for the City to abandon other planned projects in favour of the Isiqalo residents. The City sought to be allowed to implement its own housing roll out plans for the progressive realisation of housing within its available resources. The City further reported that it was encountering difficulties that were inherent in the provision of emergency housing. These factors included the absence of a survey or audit of the residents at Isiqalo; the National Minister of Public Works had not released land, and the application processes to national departments were experiencing significant delays.⁸ The City additionally indicated that the transfer of land to its Housing Development Agency was not intended for emergency housing purposes. The City indicated that Isiqalo had already been included in its list of informal settlements.⁹

⁷ Lukhozi Consulting Engineers, Volume III, page 921

⁸ Volume V, Page 1734, paragraph 16

⁹ Volume V, Page 1734, paragraph 19

[16] According to **Estralita Kwalo**: In compliance with the order of Gamble J, the City established a steering committee that would co-ordinate the survey. The objective of the committee was to conduct a survey of the Isiqalo residents and compile a report that would include the personal circumstances of the residents.¹⁰ The process of the survey was conducted in collaboration with City officials, the residents and representatives from the LRC¹¹. The houses were allocated numbers, resulting in a total of 2706. The survey commenced on 20 September and continued until 19 October 2019. The homes were found to have approximately 1 to 4 occupants. Some occupants included children and in some instances, there were individuals living with disabilities.

[17] Mr. Lungelo Mbandazayo, the City Manager, indicated in November 2024 that the dispute regarding the applicant's property originated in 2012. As time passed, the population on the property steadily increased to its full capacity. By May 2024, it was undeniable that moving the occupiers had become unrealistic. He asserted that the City continued to implement its Emergency Housing Programme. The City had planned and implemented the housing programme in line with the National Housing Code. Through the Integrated Human Settlements Five-Year Sector Plan 2022/23-2026/27: 2023/24 Review, there were various streams of housing models that continued to be progressively implemented across the area managed by the City. The area in which Isiqalo was located featured among the targeted informal settlement, and residents continued to be drawn for the allocation of houses. The plans that were implemented were reviewed over five year periods and according to him, reasonable

¹⁰ Gamble J order was amended in October 2014 and the due date for the submission of the report became 14 November 2014

¹¹ Affidavit of S J Rippenaar, 'Report to Court- Re Survey', Volume 7, page 940

measures and mechanisms were in place to ensure equitable housing for the residents of the City.

[18] After the reports had been filed, none of the parties re-enrolled the matter for further hearing.¹² After the matter of *Fischer v Unlawful Occupiers and Others 2018 (2) SA 228 (WCC)* was decided by this Court and a subsequent partial appeal was settled by the parties at the Supreme Court of Appeal, the applicant approached the City with an offer to sell its property. This was not successful. Notwithstanding the generally accepted unlawful status of the occupiers, the Isiqalo residents continued to occupy the applicant's property.

[19] The basis and motivation for an amended notice of motion and the supplementary founding affidavit, which became the subject of this application, was substantially founded upon the decision of this court in *Fischer v Unlawful Occupiers and Others 2018 (2) SA 228 (WCC)* judgment. According to the applicant, *in casu*, the named state respondents implicitly condoned the presence of the Isiqalo residents on the property; failed to provide or facilitate mechanisms to ensure that the occupiers were humanely relocated from his property, and thereby violated his constitutional right to property and equal protection of the law. In a nutshell, the applicant alleged the respondents failed to take reasonable measures to ensure that his rights were realised or not violated. The applicant contends that, if the findings of *Fischer* judgment were to be emulated, Isiqalo residents would be provided with security of their homes, the City would receive the land, and the applicant would be compensated for the infringement of his constitutional right to property as well as equal protection under the law.

¹² In compliance with the Paragraph 8 of Gamble J order dated 3 June 2013,

Pre-liminary Issues

[20] Before dealing with the merits of the application, two preliminary questions required consideration, namely:

20.1. Whether the application to file further affidavits in terms of Uniform Rule 6(5)(e) should be granted.

20.2. Whether this court possess the necessary jurisdiction to determine the merits of this application. This question required the court to consider whether the application ought to be decided in terms of PIE or the Extension of Security of Tenure Act¹³ (ESTA). as will be traversed hereunder. I deal with these issues below.

Rule 6(5)(e) application

[21] On 26 April 2025, during the oral arguments, the city moved an application to file a further affidavit, in terms of Rule 6(5)(e) of the Uniform Rules. This application was not opposed. Upon consideration of the purpose and the submissions by Counsel, the application was accordingly granted.

Jurisdiction

[22] The salient question at hand is whether the determination of the issues between the opposing parties should be resolved under the framework of PIE or ESTA.

[23] The applicant relies on the provisions of PIE, to the extent that the court may find that it is just and equitable to have the Isiqalo residents evicted from its property. On the other hand, the City, sixth and seventh respondents contended that the

¹³ Extension of Security of Tenure Act 62 of 1997

provisions of ESTA are applicable and that this court lacked jurisdiction to entertain the matter.

[24] The applicant argued that since April 2012, it has demonstrated that it neither consented to, nor gave the impression that it consented to the occupation of the property. It pointed out the measures it progressively employed in order to avert the unlawful occupation and to expel the occupants from the property.

[25] Such efforts included that:¹⁴

(a) On 05 April 2012, the applicant learned of the first invasion of the property, during which unknown individuals were transported by trucks, which were loaded with building material. As they were busy erecting structures, the matter was reported to the Philippi Police. However, the police declined to intervene, unless there were criminal charges;

(b) An employee of the applicant contacted a representative of the Democratic Alliance political party for assistance, but this effort was unsuccessful;

(c) The applicant's security guards were posted on the property and, at times effectively thwarted the invasions and construction of structures;

(d) In July 2012, the invasion continued, accompanied by violence towards the employees of the applicant. At this point, it was unfeasible to prevent the occupation of the property. This rendered it impossible for the applicant to continue with the sand-mining activities. The occupation appeared to be coordinated and executed very swiftly;

¹⁴ Founding affidavit of Robert William Ross, dated 30 April 2024, Vol VI page 21, paragraphs 28-50

- (e) When approached for assistance, the SAPS advised that the conduct complained of was taking place on private property and that they would only intervene if trespassing charges were instituted against the occupiers;
- (f) On 26 July 2012, assistance of the Anti-Land Invasion Unit of City was requested. They however, declined to intervene on the grounds that the land in issue was private property and therefore fell outside their mandate, unless there was a court order in place directing them to take action;
- (g) On 20 August 2012, the applicant obtained an interim order from Court; barring further invasion of the property and the intimidation of its employees; and
- (h) Notwithstanding the service of the order, more structures were erected on the property.

[26] Upon service of the order to the occupiers, they opposed the application. There was an unequivocal acknowledgement in the answering affidavit of the Isiqalo residents that the occupation of the applicant's property was unlawful.¹⁵

[27] The City also acknowledged that the occupiers themselves were aware that their occupation of the property was unlawful. However, the City contended that, although the residents were initially occupiers in the context of PIE as they were unlawful occupiers, that status had since changed and they have now become occupiers within the meaning of ESTA. The basis of this contention was founded on the premise that:

'Firstly, the applicant's calculated choice to let the eviction application lie dormant between 2014 and 2019 and from June 2019 until September 2023, reasonably led to the belief that the applicant had abandoned the eviction application. *Secondly*, the residents having lived

¹⁵ Answering affidavit of Luvuyo Booi, Volume 1 page 67 at paragraph 25.

continuously and openly on the property during the entire period of dormancy since 2014, giving rise to a statutory presumption of consent to occupy the property. *Thirdly*, the applicant having tacitly accepted the residents' continued and open occupation of the property, has failed to prove otherwise. *Lastly*, the undisputed poverty of the residents.¹⁶

[28] On the other hand the applicant alleged that the City failed to prevent the unlawful occupation of the property. The City contended that:

'the applicant was advised that the city did not have policing powers to stop persons from unlawful occupying of private land or deal with any charges laid in respect of criminal activities. Notwithstanding that, various attempts were employed by the city to resist the invasion by engaging the occupiers and their representatives and also persuaded them to vacate the property, the City had also alerted the applicant to the unlawful occupation of the property.'¹⁷

[29] As of 22 October 2012, the City maintained that it lacked temporary emergency accommodation available for the occupiers. Various reports in compliance with the Gamble J order had been furnished to the court and exchanged between the parties, until November 2014.

[30] The City's primary concern with the applicability of the PIE Act was mainly premised on the time elapsed between December 2014, when the compliance reports were furnished to the court, and the point at which the applicant sought to revive its litigation to pursue the eviction of the occupiers from Isiqalo. As I follow their argument, it is within this so called 'dormant period' that the matter ceased to fall under PIE and transitioned into ESTA. While the City continued to argue, the continued open occupation was acknowledged and thus accepted by the applicant.

¹⁶ City's heads of argument, page 8, paragraph 16

¹⁷ Compliance affidavit of Achmat Ebrahim, Volume 2, page 417, paragraph 164

[31] To make good their argument, reference was made to *Lebowa Platinum Mines Ltd v Viljoen*,¹⁸ particularly to the extent that it overruled *Halle and Another v Downs*¹⁹ on the question of *tacit* consent as occasioned by the lapse of time and /or change of circumstances. In *Lebowa Platinum Mines*, the court was called upon to determine whether the former resident employee qualified as an occupier within the meaning of ESTA, upon termination of his employment, and whilst the dispute regarding his termination of his employment was still a subject of litigation. At the time, the former employee was unemployed. In this instance, the consent to occupy was initially granted on the basis that he was an employee of the landowner. According to his employment contract, they would be allowed to remain in occupation for a specified period. The court held that, regardless of the termination of his employment, the former employee was an occupier within ESTA. This was on the basis that his former employer still consented to his continued occupation of the property, notwithstanding that his employment had terminated.

[32] With reference to *Lebowa Platinum Mines* and having regard to the Isiqalo residents situation, there had been no intervening event since they were regarded by all as unlawful occupiers. In my view, in *Lebowa Platinum Mines*, circumstances had changed when the employment was terminated and later the consent was extended. However, this did not imply that he was no longer an ESTA occupier. In the case of the Isiqalo residents, the applicant had consistently and unequivocally expressed that it did not give consent to the occupation. The elapsed time, without any express withdrawal of their efforts to expel the occupiers, provides no reasonable basis to

¹⁸ *Lebowa Platinum Mines Limited v Viljoen* 2009 (3) SA 511 (SCA)

¹⁹ *Halle and Another v Downs* 2001 (4) SA 913 (LCC)

suggest that the applicant's position could have changed or that it conveyed any indication that the consent was given.

[33] In echoing the arguments raised by the City, the sixth and seventh respondents submitted that the respondents had not consented to the jurisdiction of this court. Among others, it was submitted that the applicant provided both actual and ostensible authority for purposes of giving consent when the applicant's employees consented to the initial occupiers. Further, that when the applicant allowed the litigation to remain dormant after the due date of filing of surveys and reports by 14 November 2014, more occupiers were allowed to access the property.²⁰ The latter argument seems to be oblivious of paragraphs 7 and 8 of the 13 June 2013 order which directed the parties to re-enroll the matter for hearing after the reports had been compiled.

[34] On the other hand, in protest, the applicant emphasised that there had been a distinct and explicit absence of consent to the unlawful occupation as the applicant had not withdrawn its protest to the unlawful occupation. It was argued that, after the Gamble J order of May 2014, the applicant had reached a point where nothing more could be done to prevent mass unlawful occupation of the property.²¹

[35] In this regard, the applicant, *inter alia* also relied on *Pieterse v Venter*²², where the questions before court included whether the appellants qualified as occupiers in the context of ESTA. The appellants were notified about the illegality of their occupation, and over a period of twenty months since that notification, nothing had

²⁰ The sixth and seventh respondents, page 31 - 32 paragraph 62 - 67

²¹ The applicant's heads of arguments, page 43 - 44, paragraphs 96-98

²² *Pieterse v Venter* 2012 JDR 0184 (GSJ), paragraph 1

been done to remedy the situation.²³ In dealing with the question of alleged consent and the time lapse, it held that,

'Actual consent for the appellant and his family to reside on Holding 140 could not be established. The very intimation that the appellant had of his trespass on Holding 140 occurred upon receipt of the attorney's letter of demand to vacate the property. Attached to the letter was a copy of the notice from the municipality. Prior to receipt of that letter, there would have been no need for appellant to obtain any consent as he was of the view that he was lawfully occupying Holding 141 and not Holding 140. After receipt of the attorney's letter of demand, consent could no longer be obtained. The letter informed him of the illegality of the structures on Holding 140 and consequently his illegal occupation thereof. The letter further claimed unconditionally, his eviction from the property. Any alleged consent granted to the appellant thereafter is, therefore, spurious and fanciful.'²⁴

[36] The applicant also argued that the Gamble J order acknowledged that the occupation of its property, as is apparent in paragraph 3 of the order dated 16 June 2013, was unlawful²⁵. The applicant sought to provide additional clarification regarding the so-called dormant period and the reasons for the reduced activities related to its application of seven (7) years. It stated that 'the applicant attempted to resolve the matter extra-crucially by relying on the outcome of *Fischer*, which was substantially similar in facts to this matter. Thereafter, the applicant approached the City for further conduct of the matter, by proposing the sale of the property. This offer was rejected by the City.

[37] Therefore, the applicant submitted that the provisions of S 3(4) of ESTA were not applicable to its case, as it had not given an impression in any form, that it

²³ Pieterse v Venter 2012 JDR 0184 (GSJ), paragraph 36

²⁴ Pieterse v Venter 2012 JDR 0184 (GSJ), paragraph 19

²⁵ Volume IV, Court order dated 13 June 2013, page 1345-49

consented to the occupation of the property. In this regard, the applicant relied on *Pretorius v Madibeng Municipality and Others*²⁶. The court held that, 'A person who relied on consent must show conduct consistent with it. It took note that the applicant had made it clear that the respondents were not entitled to reside on the property and tried to negotiate alternative accommodation for them. That clearly was not conduct consistent with consent. Therefore the section 3(4) of ESTA presumption did not apply.' From the evidence presented, the court also took into account, and in favour of the property owner, that he had even provided the occupiers with water, on humanitarian grounds.²⁷

[38] The bone of contention remains whether the applicant consented to the Isiqalo residents occupying the property at any stage, particularly, the period from December 2014 until the amended notice of motion that was pursued in 2020.

[39] At this point, it will be apposite to be reminded of the foundational objectives of ESTA, namely, to strike a balance between the rights of existing parties on the farms, such as farm dwellers, farm labourers, and farmers, while also safeguarding the interests of farm dwellers who have spent their lifetime on the farm and those who had been granted accommodation after the employment by the farmer.²⁸ Although the land on which Isiqalo developed is classified as agricultural land, the residents do not fall under the category of person that were the target of ESTA. The Isiqalo residents were mainly backyard dwellers from surrounding areas, and were neither farm workers nor farm dwellers who had previously obtained consent from the owners to reside on the farm. These are the people who acknowledged that their settlement on the applicant's property was unlawful.

²⁶ *Pretorius v Madibeng Municipality and Others* 2004 JDR 0055 (T), page 9

²⁷ *Pretorius v Madibeng Municipality and Others* 2004 JDR 0055 (T), page 11

²⁸ ESTA Amendment Bill [B24-2015]: briefing by Department of Rural Development and Land Reform, 21 October 2015, Meeting Summary Parliament monitoring group

[40] Therefore, Isiqalo residents are distinguished from the occupiers in the context of ESTA. There is no evidence to suggest that any of the Isiqalo residents were once employees, or families who were granted permission to live on the applicant's land at any stage. Since the first group arrived on 12 April 2012, the Isiqalo residents had never been permitted by the applicant to dwell on its property. They were unlawful occupiers, and for that reason, they do not fit within the targeted category of ESTA. Simply put, none of the Isiqalo residents were labour tenants of the applicant, nor did their families by extension, work for the applicant.

[41] In terms of PIE, an unlawful occupier is:

'a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land, excluding a person who is an occupier in terms of the Extension of Security of Tenure Act, 1997, and excluding a person whose informal right to land, but for the provisions of this Act, would be protected by the provisions of the Interim Protection of Informal Land Rights Act, Act 31 of 1996.'

[42] In terms of ESTA, an occupier is, 'a person residing on land which belongs to another person, and who on 4 February 1997, or thereafter, had consent or another right in law to do so, but excluding-

(a).....

(b) a person using or intending to use the land in question mainly for industrial, mining, commercial or commercial farming purposes, but including a person who works the land himself or herself and does not employ any person who is not a member of his or her family; and

(c) a person who has an income in excess of the prescribed amount.' In this instance, the prescribed amount being R13, 625 per month.

[43] Section 3(4) of ESTA provides that, 'for purposes of civil proceedings in terms of this Act, a person who has continuously and openly resided on land for a period of one year shall be presumed to have consent unless the contrary is proved.' Section 3(5) provides that, 'for the purposes of civil proceedings in terms of this Act, a person who has continuously and openly resided on land for a period of three years shall be deemed to have consent unless the contrary is proved.'

[44] In determination thereof, it will be apposite to point out that it is common cause that the property in question is privately owned by the applicant since 1992 for sand mining operations within the Philippi Horticultural Area and therefore zoned as agricultural land for farming purposes. Since April 2012, at the onset of building of housing structures, it is further common cause that the applicant initiated various measures to avert the occurrence and initiated eviction proceedings on the basis that the occupation was unlawful and without consent. The applicant also attempted negotiations with the residents and sought assistance from the city and the South African Police Services in order to vindicate his property, though these attempts yielded no tangible positive outcomes.

[45] The contention over the consent to occupy the applicant's property appears to relate to the period after December 2014, when there were no activities in further pursuit of eviction of the occupiers or vindicate the property by the applicant. Apparently, the applicant also offered to sell the property to the City in 2020, however, this did not materialise. Instead in response to the offer dated 20 May 2020, the City contended that the applicant's matter was distinguishable from the *Fischer* matter. It is this period that the City insisted that it justified the invoking of S3(4) presumption and S3(5) deeming provisions, implying that the applicant was under the duty to demonstrate that it had not tacitly consented to the occupation of the property.

[46] Even though the occupants were living openly at the applicant's property, it must be taken into account that during the so-called dormant period, the continued occupation of the property was not with any lack of trying and efforts by the applicant. At some point, it seems that the applicant, as well as the City, found the complexity of the matter overwhelming, affecting everyone involved. There was an ongoing effort to find the most effective legal solutions to overcome the impasse. The court order of Gamble J also included a specific paragraph that imposed the duty on all the parties involved to have the matter re-enrolled after the reports had been filed.²⁹ In short the argument that this period should be understood to be giving consent to the occupiers is unrealistic and founded on narrow opportunistic reasoning.

[47] In this regard, the City contended that the application of the presumption, the onus shifted to the applicant and based its argument on *Frannero Property Investments 202 (Pty) Ltd v Salapa and Others*³⁰. It was argued that the court should infer from the collective evidence on record the City had established that the threshold of the occupiers fell within the ambit of ESTA. She referred the court to various averments of the opposing parties and filed reports that there was a consensus that the occupiers were the less fortunate members of the community. The City specifically pointed out that the applicant made this concession when it averred that the Isiqalo residents included people who were the 'poorest of the poor', with no viable alternatives for living elsewhere.³¹

²⁹ Order of Gamble J dated 03 June 2013, Volume v, page 981 paragraph 8

³⁰ *Frannero Property Investments 202 (Pty) Ltd v Selapa and Others* 2022 (5) SA 361 (SCA)

³¹ Supplementary Founding Affidavit, Vol 6, page 39, paragraph 76.

[48] Furthermore, there had been concession that the profile of the residents included vulnerable members of the community such as the elderly; disabled individuals and children. There has also been incontestable evidence by Prof. Huchzemeyer that there were at least three crèches within the property during her walkabout. The applicant also stated that there were young children on the property, including those of school going age.³² Based on these factors, it can be presumed that the residents of Isiqalo meet the requirement of the threshold, namely earning an income below R3500.00.

[49] When considering who bears the onus to establish the requirements for the presumption in S 3(4), the SCA held that, 'consistent with the basic common-law principle that 'the party who alleges must prove, which is applicable in the determination of the incidence of the onus in civil cases, the burden to prove that ESTA applies in relation to a specific occupier who invokes the application of the Act. The occupier is required to demonstrate that she falls within the ambit of the Act by proving that she complies with all the components of the occupier in the Act, including confirming that she is not excluded from the application of the Act under section 1(1)(x)' ³³ According to the court, in cases of ESTA, the respondents find assistance in the provisions of S 3(4) presumptions and the deeming provisions in S 3(5), in demonstrating that the property had to be presumed to fall within the scope of ESTA unless the applicant proved the contrary. Similar to the situation in Ross' case, it was universally acknowledged that the property was encompassed by ESTA, as it had been designated as farmland prior to the arrival of the occupiers.³⁴ The property is

³² Supplementary Founding Affidavit, Vol 6, page 37, paragraph 73

³³ *Frannero Property Investments 202 (Pty) Ltd v Selapa and Others* 2022 (5) SA 361 (SCA), paragraph 24

³⁴ *Frannero Property Investments 202 (Pty) Ltd v Selapa and Others* 2022 (5) SA 361 (SCA), paragraph 26

undeniably agricultural land, and the Isiqalo residents meet the criteria outlined in S 3(4)

[50] It is uncontested that the Isiqalo residents lived openly in the applicant's property in excess of 4 years after December 2014, when the last report was furnished to the court, with no further action from the applicant. The applicant has shown that the occupiers never had consent to do so. The fact that they resided openly on the property and with his knowledge does not detract from the unlawfulness of their occupation. But rather the applicant's inability to have them removed in terms of a legal process and the stalling of the application.

[51] In the light of *Pretorius v Madibeng Municipality and Others*³⁵, it cannot be said that the applicant's conduct was consistent with the giving of consent. Instead, it remains common cause that the applicant had made it clear that the Isiqalo residents were not entitled to reside on the property. Any perception that the applicant was consenting to the occupation of its property appears to be farfetched and cannot be reconciled with evidence of unequivocal expression of lack of consent. Any notion that the applicant provided consent contradicts the collective efforts of various stakeholders who endeavoured to help the applicant reclaim the property.

[52] From the moment the applicant secured an interim court order against the Isiqalo residents, there has consistently been a consensus that the property of the applicant was occupied unlawfully. As also enumerated above, the applicant was consistent in the efforts to vindicate the property from the occupiers. All the role-players, including the court appeared to accept that the occupation of the applicant's

³⁵ *Pretorius v Madibeng Municipality and Others* 2004 JDR 0055 (T), page 9

property was unlawful. The respondents were aware of these efforts, and at one point, there were collective actions taken to address the unlawful conduct of the Isiqalo residents.

[53] The respondent's claim that the illegality of this occupation has altered over time, lacks both factual and legal support, and is disingenuous. It is evident from the order of Gamble J, dated 14 May 2014, and amended on 06 October 2024, that none of the parties were precluded from approaching the court for purposes of advancing the resolution of the dispute. The time lapse between the efforts of the applicant cannot be justified as an expression of change of the unlawfulness of the occupation. Furthermore, the respondent's contention that the applicant should take the blame for the dormant period is untenable. Therefore, the respondent's insistence that the applicant should take the blame for the stalling of progress in the litigation of this matter cannot stand.

[54] Upon a consideration of facts; submissions and the applicable legal principles discussed above, it is inconceivable that the applicant's expression of lack of consent was consistent and explicit. Consequently, this court has jurisdiction to hear and determine the application.

The issues on the merits

[55] There are various question that must be answered based on the facts presented above, these include, but are not limited to:

1. Whether the City and the ninth respondent had a duty to take steps to protect the applicant's property.

2. If such an obligation existed, whether they failed to in their duty to protect the applicant's property, thereby violating the applicant's constitutional right to property.
3. Whether the City of Cape Town, as the City, with the third, fifth, sixth respondents, and National Government of South Africa as the ninth respondent, failed to implement mechanisms to relocate the Isiqalo residents from the property, and if they failed, whether this failure constituted a violation of the constitutional rights of the applicant to such property;
4. Whether any of the respondents, with the exclusion of the Isiqalo residents, should be ordered to take all necessary steps to sign all documents to effect the purchase, or alternatively expropriate the property from the applicant, at a price to be determined as directed by this court.;
5. In the alternative, the respondents, with the exception of the Isiqalo residents, should be held liable to compensate applicant or provide constitutional damages pursuant to their breach of its constitutional rights to be equivalent to the value of the property;
6. Whether the Isiqalo residents be ordered to vacate the property together with all their goods and belongings?

Whether the City of Cape Town as the City and the National Government of the Republic of South Africa, as the ninth respondents had a duty to take steps to protect the applicant's property?

[56] The applicant submitted that 'the state'³⁶ and/or its organs failed in their legal obligations towards it on two distinct, yet interlinked responsibilities. 'Firstly, an

³⁶ Applicant's heads of arguments, page 19, paragraph 54

obligation to protect the property of the applicant from unlawful invasion. Secondly, there is a responsibility towards the respondent to provide the occupiers with emergency and/or temporary accommodation.³⁷ According to the applicant, they failed to prevent the ongoing invasion and that despite the lapse of 13 years since the unlawful occupation, no steps were taken to remedy the violation of the applicant's constitutional right to property, or the occupiers' right to a home.³⁸

[57] It is noteworthy that the South African Police Services was not joined as a respondent in these proceedings. Section 205(3) of the Constitution prescribes that it is the national police service which is tasked to prevent, combat and investigate crime, to maintain public order, to protect and secure the Republic's citizens and their property, and to uphold and enforce the law.

[58] According to the applicant, on 26 July 2012, during yet another episode of the arrival of unlawful occupiers at the property, the Anti-Land Invasion Unit of the City was requested for assistance. This request was declined, on the basis that the land in issue was private property and therefore, fell beyond the mandate of the City, unless there was a court order in place, directing them to take action. The applicants contended that the provision of portable toilets and water access points to the occupiers by the city gave the unlawful occupiers an impression that their invasion of the property was condoned.

[59] In defence of the City's position, the City contended that, when the unlawful invasion at Isiqalo came to its attention, a notification about the occurrence was sent

³⁷ Applicant's heads of arguments, page 19, paragraph 54

³⁸ Applicant's Heads of Argument, page 4, para 5, and page 19 paragraph 55

to the applicant.³⁹ The City also clarified that the installation of the toilets for the occupiers was in compliance with their constitutional obligations and taking humanitarian considerations and health risks into account, particularly during winter conditions.⁴⁰ The City provided the temporary portable toilets and water stand pipes on the City's land near Isiqalo, thereby not promoting the unlawful occupation of the property. In its endeavours to assist the applicant, at some stage, the City deployed its law enforcement officers to the road reserves and the entrance into the property to resist invasions. Notwithstanding that, the unlawful occupiers would always find alternative means to gain access into the property.

[60] In addressing the enquiries stemming from the applicant's claim regarding the purported shortcomings of the 'State', it is essential to begin by pinpointing any legal duty or obligation that the respondents, whether individually or collectively, may have neglected to fulfil. This neglect would involve a failure to act or respond appropriately, resulting in a lack of measures taken to safeguard the applicant's property or to allocate land to the unlawful occupiers. In summary, the question is whether the 'State' had any legal duty or obligation to protect the right of the applicant by preventing the unlawful occupation of his property. On the other hand, a determination must be made on whether in this context of the reliefs sought by the applicant, the 'State' had failed to provide the occupiers with emergency and/or temporary accommodation.

Starting with the City

[61] The Constitution guarantees the right to property in S 25 (1) under Chapter 2, The Bill of Rights. It reads: '25. **Property.** (1) No one may be deprived of property

³⁹ Anti-land Invasion Unit letter dated 26 June 2012, Volume 1, page 146

⁴⁰ Affidavit of Mogamat Azmie Jacobs, Volume 1, page 115, paragraphs 51.9- 51.12

except in terms of law of general application, and no law may permit arbitrary deprivation of property.' To the extent that the city, a local government, may be liable for failure to protect the applicant's right to property, regard must be had to the corresponding Constitutional provision in relation to the establishment and objects of local government. These are provided for under Chapter 7 of the Constitution, in particular, that the **'152 Objects of local government-** (1) The objects of local government are-

- (a) To provide democratic and accountable government for local communities;
 - (b) To ensure the provision of services to communities in a sustainable manner;
 - (c) To promote social and economic development
 - (d) To promote a safe and healthy environment; and
 - (e) To encourage the involvement of communities and community organisations in the matters of local government.
- (2) a municipality must strive, within its financial and administrative capacity, to achieve the objects set out in subsection (1)'

[62] It must also be borne in mind that in its complaint, the applicant binds the City with other levels of the government, thereby collectively identifying them as the 'State'. This raises the question of whether, in the approach adopted by the applicant, it will be competent to impute liability, if any, to the various levels of government, either collectively or individually, considering the circumstances of the applicant. In this regard, the applicant relied on 'The duty of the state to respect, protect, promote and fulfil the rights in the Bill of Rights'⁴¹. Further read with the constitutional provision that, 'the Bill of Rights applied to all law, and binds the legislature, the executive, the judiciary and all organs of the state.'

⁴¹ The Constitution of South Africa, S 7(2)

[63] The applicant referred to “*Minister of Justice and Constitutional Development v X* 2015(1) SA 25 (SCA), 2015 (1) where it was held that: [17] *In Van Eeden v Minister of Safety and Security (Women’s Legal Centre Trust, as Amicus Curiae)* 2003 (1) SA 389 (SCA) [2002] 4 ALL SA 346) paragraph 11-14, it was held that the question whether a particular omission to act should be regarded as unlawful has always been an open-ended and flexible one. This court held that in determining the wrongfulness of an omission to act, the concept of the legal convictions of the community must now necessarily incorporate the norms, values and principles contained in the constitution (for my own argument, this is the point where the principle of subsidiary should apply. It can’t be that there will be a blanket blame to ‘the state’ ,_without any substantive obligation or legal duty placed on the various organs or to a specific level of the state) It would be absurd in my view that all those who may feel the urge to enforce their constitutional rights would be allowed to blanketly place obligations in the absence of a specific legal duty on that specific organ or arm of the state.) It was stressed that freedom from violence is recognised as fundamental to the equal enjoyment of human rights and fundamental freedoms and that section 12(1)(c) of the Constitution requires the state to protect individuals, both by refraining from such invasions itself and by taking active steps to prevent violation of a right._In particular it was held that section 12(1)(c) of the Constitution places a positive duty on the state to protect everyone from violent crimes. In this regard reference was made to the seminal decision of *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 SCA [2002] 3 ALL SA 741; 2002 ZASCA 79) para 20, where this court concluded that while private citizens might be entitled to remain passive when the constitutional rights of other citizens are under threat, the state has a positive constitutional duty to act in the protection of rights in the Bill of Rights.”

[64] The applicant argues that the City failed to discharge their legal duty to protect his property, the City said that in the absence of a court order, it would not be able to intervene in private property matters. Once the applicant secured a court order the excuse thereafter was that the City was not cited. This necessitates a close examination of the relationship that operates between the City and its residents or customers. This will crystalise the question of whether there was a duty on the City to protect the rights of the applicant as a private land owner. Furthermore, if the City failed to provide equal protection of the law to the applicant.

[65] The City contended that it lacked the authority to prevent anyone from unlawfully occupying private land or deal with any charges related to criminal activity.⁴² When it came to their attention that the applicant's property was unlawfully occupied, notice was sent to the applicant, and the occupiers were engaged and alerted to the unlawfulness of their occupation. The City acknowledged that they had the Anti Land Invasion Unit, which was established to protect state land and had no powers to enter into privately owned land.

[66] After examining all the relevant factors and with generous contribution from counsel, the court held that: 'It was not open to the City to respond to the request of the Fishers in terms of PIE, and that there was a series of provisions in the Constitution itself which clearly indicate that Local Government's powers to act are limited to powers conferred by the Constitution or laws of a competent authority.'⁴³ Further, it

⁴² City's compliance affidavit of Achmat Ebrahim, Vol 2, page 470, paragraph 164

⁴³ *Fischer & Ano v Persons* whose identity are to the applicant unknown and who have attempted or are threatening to unlawfully occupy Erf 150 (Remaining extent) Philippi In re *Ramavhale and Others v Fischer and Another* (297/2014) [2014] ZAWCHC 32; 2014(3) SA 297 (WCC); 2014(7) BCLR 838 (WCC); [2014; 3 ALL SA (WCC) (13 March 2014), paragraph 48.

was reiterated that the primary responsibility for safeguarding private property rests with the owner, and that it was the owner who has recourse under S 4 and 5 of PIE.⁴⁴ The court declared that the demolition of the homes and /or dismantling of the informal structures erected by the unlawful occupiers by the City was deemed unconstitutional and unlawful.⁴⁵ The matter served before the SCA on appeal, however, the subject of the appeal do not bear relevance to the points made in reference to the impact of the decision of the court of first instance. It shall therefore not be necessary to discuss same.⁴⁶

[67] The invasion of the Fischer private land occurred concurrently with the invasion of the applicant's land. The position in which the City found itself in responding to the applicant's request for intervention during the April 2012 invasions can also be considered in light of the outcome of the Fischer judgement, delivered on 13 March 2014. It was this judgment which declared conduct of the City, who deployed the Anti Invasion Unit to Fisher's property to demolish the erected homes to be unlawful and unconstitutional. Thus, even if City wished to respond in the same manner as they did to Fischer request, they were legally constrained from taking any action against the illegal occupiers, due to the series of provisions in the Constitution itself which clearly indicated that Local Government's powers to act are limited to powers conferred by the Constitution or laws of a competent authority.⁴⁷

⁴⁴ *Fischer & Ano v Persons whose identity are to the applicant unknown and who have attempted or are threatening to unlawfully occupy Erf 150 (Remaining extent) Philippi In re Ramavhale and Others v Fischer and Another* (297/2014) [2014] ZAWCHC 32; 2014(3) SA 297 (WCC); 2014(7) BCLR 838 (WCC); [2014; 3 ALL SA (WCC) (13 March 2014), paragraph 61.

⁴⁵ *Fischer & Ano v Persons whose identity are to the applicant unknown and who have attempted or are threatening to unlawfully occupy Erf 150 (Remaining extent) Philippi In re Ramavhale and Others v Fischer and Another* (297/2014) [2014] ZAWCHC 32; 2014(3) SA 297 (WCC); 2014(7) BCLR 838 (WCC); [2014; 3 ALL SA (WCC) (13 March 2014), paragraph 100.

⁴⁶ *Fischer and Another v Ramavhale and Others* (2013/2014) [2014] ZASCA 88; 2014 (4) SA 614 (SCA) [2014] 3 ALL SA 395 (SCA) (4 June 2014)

⁴⁷ *Fischer & Ano v Persons whose identity are to the applicant unknown and who have attempted or are threatening to unlawfully occupy Erf 150 (Remaining extent) Philippi In re Ramavhale and Others*

[68] Furthermore, the applicant's property was privately owned. Therefore, 'it is the duty of the owner to safeguard the property, to take reasonable steps to ensure that it is not unlawfully occupied, and if it is, to take reasonable steps to ensure the eviction of the occupiers. When the owner performs such duty diligently, unlawful occupiers will not, in the ordinary course, remain on the property for an extended duration. It is ordinarily not the municipality but the owner who has the power to take steps to resolve a problem arising out of the unlawful occupation of the property. It is accordingly not unreasonable to expect the owner to bear the risk.'⁴⁸ It was therefore the primary responsibility of the applicant to protect his privately owned land and no legal duty with reciprocal liability, whether by commission or omission or constitutional obligations can be attributed to the City. Conversely, in this instance, the City as a Local Government entity within the State and as individual municipality⁴⁹, bears no legal duty arising from the provisions of S 25 (1), Chapter 7 and S 9 of the Constitution.

[69] The City as part of the state machinery, also possessed some policing responsibilities. It ought to be considered whether these resources could have been utilised to prevent invasion or safeguard the applicant's property. The applicant argued that the City failed to discharge its duty of law enforcement and crime prevention. In this regard the applicant placed reliance on S 152 (1) and (2) of the Constitution, which, inter alia imposed the duty to promote a safe and healthy environment.⁵⁰ With reference to S 64E(c) of the SAPS Act⁵¹, it was claimed that the City failed to prevent

v Fischer and Another (297/2014) [2014] ZAWCHC 32; 2014(3) SA 297 (WCC); 2014(7) BCLR 838 (WCC); [2014; 3 ALL SA (WCC) (13 March 2014), paragraph 48.

⁴⁸ *Mkontwana v Nelson Mandela Metropolitan Municipality and Another* 2005 (1) SA 530 (CC), paragraph 59

⁴⁹ With reference to Chapter 7, in particular S 152 of the Constitution

⁵⁰ Applicant's heads of arguments, page 22 paragraph 58

⁵¹ Applicant's heads of arguments, paragraph 58. S 64E(C) of the SAPS Act provides that

criminal activities from taking place within the applicant's property, including trespassing, contempt of court order (after the applicant had obtained an interdict). The applicant also alleged that the City failed in its duty to prevent the erection of buildings without its prior approval, in terms of S 39(1) of Land Use Planning Ordinance 15 of 1985 and S 4 of the National Building Regulations and Building Standards Act 103 of 1977.⁵²

[70] In May 2001, the Cape Town Metropolitan Police Department was established in accordance with s64A of the SAPS Act. Their limited function included traffic policing; policing of the municipal-by laws and crime prevention, which excludes the criminal offence of trespassing.⁵³ Therefore, the activities that were unfolding within the private premises of the applicant expressly fell outside the jurisdiction of the Municipality Police. Consequently, no legal obligation could flow from them in regard to the conduct of the unlawful occupiers within the applicant's property.

[71] The PIE Act stipulates that the party who seeks to have another person evicted from the immovable property or land must demonstrate that as the applicant they are the owner or person in charge of the land.⁵⁴ The municipality may engage actively if mandated by the owner or individual in charge of the property and it will participate in mediations only in instances if it is not an owner of the land in question.⁵⁵ In the context of S 6 of PIE, the City notified the applicant about the occupation on its property and continuously engaged with the Isiqalo residents to sensitise them about their unlawful activities. Regarding any further efforts beyond that, the City did not possess the necessary *locus standi* or authority from the applicant to pursue the evictions in terms

⁵² Applicant's heads of arguments, paragraph 58,

⁵³ Section 64E(c) of the SAPS Act and Regulations for Municipal Police Service, 1999

⁵⁴ PIE, S 4 to S 6

⁵⁵ PIE, S 7

of PIE. Furthermore, the applicant had previously approached the court to seek an eviction order, and an interim order at its instance was obtained on 20 August 2012. This left no room for the City to intervene in terms of PIE.

Did the ninth respondent or any of its organs fail to prevent the invasion or protect the Constitutional rights of the applicant, and therefore is liable to constitutional damages?

[72] In this regard Mr Wilkin, for the applicant, submitted that the applicant's claim for constitutional damages of the applicant was not founded on any substantive claim, whether derived from common law, legislative framework, or a court order that might have established a legal duty on the respondents. He argued that the duty on the City, and the 'other Organs of the State' towards the applicant was framed in general terms. Further to that, he argued that the obligation arose from the City's knowledge that the occupiers invaded the applicant's property unlawfully. Their culpability arose from the City's failure to prevent the unlawful occupation that deprived the applicant of its right to the property as guaranteed in S 25(1) of the Constitution.

[73] Mr. Wilkin also acknowledged that there had been no court order that obliged the respondents to act in a particular way in relation to the unlawful occupation of the applicant's property. To a great extent, the applicant relied on *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) LTD (Agri SA and Legal Resources Centre, Amici Curiae); President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) LTD (Agri SA and Legal Resources Centre, Amici Curiae) 2004 (6) SA 400 (SCA and President of the Republic of South Africa v*

*Modderklip Boerdery (Pty) Ltd (Agri SA, Amici Curiae)*⁵⁶ to make the point that the 'State' had violated its constitutional rights when it failed to protect, avert and/ or prevent the invasion of its property or provide alternative land for the illegal occupiers. The applicant's amended notice of motion was also founded on the turn of events in the Fisher judgment of this court, as well as the subsequent SCA court order following the parties' settlement, which will be addressed in detail below.

[74] The sixth and seventh respondents were adamant that the *Modderklip*, Constitutional, and the SCA matters were materially distinguishable to the applicant's case and chose not to take it any further.⁵⁷ They highlighted four such distinguishing factors, namely, (a) the occupiers had been evicted, and the Benoni City triggered the right of access to adequate housing or alternative accommodation. Thereby, in the context of the applicant, he lacked *locus standi* and may not enforce the right of the Isiqalo residents. The applicant may not premise its claim for constitutional damages on the circumstances of the Isiqalo residents; (b) The Benoni City had not provided reasons for its refusal to accept the purchase offer of the farm, and there was no evidence that the land was unsuitable for housing development. In the case of Isiqalo, the main reason has been the unsuitability of the land for housing development. (c) As opposed to the applicant in this instance, the *Modderklip* had not been engaged in unlawful mining activities on the property and had approached the court with clean hands. (d) The occupiers of *Modderklip* farm were under the impression that it was unoccupied municipal land. The sixth and seventh respondents also argued that the Constitutional Court did not uphold the SCA finding that Benoni City had breached *Modderklip's* property rights.

⁵⁶ *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd (Agri SA, Amici Curiae)* 2005 (5) SA 3 (CC) from paragraph 42

⁵⁷ The sixth and seventh respondents' heads of argument, page 65, paragraph 147

Ninth respondent in the context of the Minister of Police

[75] In April 2012, the applicant, sought assistance from the SAPS. SAPS informed the applicant that the reported unlawful invasion was taking place on private land and they would only intervene if trespassing charges were filed against the occupiers. The SAPS provided minimal intervention that was not effective, prioritising other duties instead.

[76] On 03 March 2022, the applicant moved an application for the joinder of the National Minister of Police. The applicant averred that the police had failed to discharge their constitutional mandate to prevent and combat crime, maintain public order, to protect and secure the inhabitants and their property within the Republic.⁵⁸ This application was unsuccessful. The applicant did not challenge that judgement, it remains effective and binding. Hence, the applicant cannot place any reliance on *Modderklip* principle, to claim that the ninth respondent failed in any constitutional and legislative responsibilities in relation to the role of the SAPS.

In the context of the Fischer Judgment

[77] The High Court found that the City, along with the third and the fourth respondents, infringed the landowner's constitutional right to property in S 25(1) of the Constitution. Consequently, the City was ordered to purchase the property within one month of the order.⁵⁹ The Court reasoned that, 'I agree with the view that the Constitutional Court's finding in *Modderklip*, that the city was unprepared for a situation of which they had been aware of for a considerable period of time, is similar to the

⁵⁸ Founding affidavit of Robert Williams Ross, dated 1 December 2021. Volume VII, Page 956-967

⁵⁹ Fischer high court judgment, paragraph 196

City's attitude *in casu*. Here, similarly, no provision was made, financially or otherwise to address the situation. The City's eleventh- our effort to apply to secure for funding cannot be deemed reasonable in any manner, whatsoever. What we are therefore dealing with is not necessarily an unconstitutional policy, but a municipality that has failed to give effect to the constitutional rights of both applicants and the occupiers by failing to invoke the remedies available within its policies and at its disposal.⁶⁰

[78] The *Fischer* judgment also found that the state 'by failing to comply with its constitutional obligations to provide access to housing to the occupiers, the state had effectively encroached on their and the other applicants' rights in terms of s25.⁶¹ 'There is a duty on the City to proactively plan. Here the City was aware of the situation of the applicants' land and has failed to plan proactively for the settlement, whether temporarily or permanently, of these occupiers. All three spheres of government have the benefit of a clear policy in the form of chapter 13 of the National Housing Code as well as the chapter 12 – Housing assistance in emergency Housing Situations of The National Housing Programmes.'⁶²

[79] The circumstances that shaped the findings in the *Fischer* matter appear to be distinguishable in the instance of the Isiqalo residents, as briefly outlined below:

79.1. For instance, in January 2013, the City commissioned Lukhozi Consulting Engineers to undertake a study on the feasibility of Isiqalo and another similarly affected property for the development of a subsidised housing project. The report dated 18 January 2013, found that the properties were unsuitable for the development envisaged, that in its state, were not habitable and would require extensive

⁶⁰ Fischer high court paragraphs 190-191.

⁶¹ Fischer J, paragraph 178

⁶² Fischer J, paragraph 188

rehabilitation. The characteristics of Isiqalo's location within a Philippi Horticultural Area rendered it unsuitable for residential purposes due to the large population that had developed. Rehabilitation required evacuation of the property, which was not feasible.⁶³

79.2. The SAPS had not been found to have failed in their constitutional obligations towards the applicant, as they were not joined in the litigation, contrary to the situation in the Fischer matter. There had been no criminal charges laid against any of the unlawful occupiers at Isiqalo, and there was no court order that required the police to assist the sheriff in the execution of the eviction order.

79.3. When the applicant approached the City in order to activate the intervention of the Anti-Invasion Unit, the applicant had no court order to impose a positive legal duty on the City to intervene.

79.4. The property that was the subject of the dispute between the unlawful occupiers in Marikana was a residential property, while in the instance of the Isiqalo residents, it was agricultural land within the Philippi Horticultural Area, which was also deemed unsuitable for housing settlement. Due to degradation that was occasioned by long term mining, the ground was also situated below the surface and prone to flooding and other related challenges.

79.5. The Khayelitsha corridor, which also encompasses Philippi, (where Isiqalo is located) appears in the list of areas which the City prioritised for human settlements

⁶³ Lukhozi report by JT Lochner, Volume III, page 921

and housing development, including a rail infra structure.⁶⁴ Khayelitsha and Phillip (where Isiqalo is located) also featured in the Breaking New Ground (BNG) Projects for 2022/23-2026/27, which sought to provide housing to household who earn a joint monthly income of R3500 and below.⁶⁵ These developments were consistent with the contents of Achmat Ebrahim, the City Manager's affidavit dated 17 March 2014, in which he claimed that the City had already been included in Isiqalo residents plans for informal settlements.⁶⁶

79.6. In line with its ongoing commitment to housing and adherence to the Gamble J. directive, the City took a proactive role in conducting a survey of the residents in Isiqalo. The purpose of the committee that was convened was to conduct a survey of the Isiqalo residents and compile a report that would include the personal circumstances of the residents.⁶⁷ The process of the survey was done in collaboration with the City officials, the residents, and the officials from the Legal Resource Centre⁶⁸. The houses were allocated designated numbers, and added up to a total of 2706. The survey commenced on 20 September and continued until 19 October 2019. It could be established that the homes had about 1 to 4 occupants. Some occupants included children and in some instances there were people living with disabilities.

[80] The evolution of our jurisprudence regarding the relief of constitutional damages began with *Fose v Minister of Safety and Security*.⁶⁹ It was claimed in

⁶⁴ Integrated Human Settlements Five-Year Sector Plan 2022/23- 2026/27: 2023/24 Review, page 51-54 and 55-56 for purposes of rail.

⁶⁵ Integrated Human Settlements Five-Year Sector Plan 2022/23- 2026/27: 2023/24 Review, page 85-88

⁶⁶ Volume V, Page 1734, Paragraph 19

⁶⁷ Gamble J order was amended in October 2014 and the due date for the submission of the report became 14 November 2014

⁶⁸ Affidavit of S J Rippenaar, 'Report to Court- Re Survey', Volume 7, page 940

⁶⁹ *Fose v Minister of Safety and Security* (CCT 14/96) [1997] ZACC 6; 1997 (7) BCLR 851; 1997 (3) SA 786 (5 June 1997), para 21

addition to common law damages which originated from an assault that was allegedly perpetrated by police officers.⁷⁰ One of the questions for the court was whether such damages were appropriate given that the breach of the plaintiff's right, as guaranteed in S 11(2) of the interim constitution ought and could be awarded.⁷¹ When compared to the claim of the applicant (Robert Ross Demolishers), their claim for constitutional damages is independent in nature, a stand-alone. It is neither founded on any common law damages nor is it a legislated obligation in terms of a municipal by-law, or provincial, or national legal framework, nor a court order that obligated the state departments, or the ninth respondent to act in any particular manner in circumstances of the applicant.

[81] 'At this juncture, it is essential to consider that in assessing the wrongfulness of an omission to act, the notion of the legal convictions of the community must now inherently include the norms, values, and principles enshrined in the constitution. It is inappropriate to assign a general blame to 'the state' without identifying specific obligations or legal responsibilities that pertain to various organs or particular levels of the state.'⁷² Inasmuch as the applicant was also entitled to realisation of the constitutional rights that placed a positive duty on the state to protect everyone from violent crimes, the applicant chose not lay criminal charges against the illegal occupiers. The attempts by the applicant to join the Minister of Police for alleged omission to protect its property or act on charges of trespassing was unsuccessful due to such claim being time barred.⁷³ Therefore, the applicant had not engaged the positive constitutional duty for protection of its rights through the police services. The

⁷⁰ Ibid, paragraph 23

⁷¹ Ibid, paragraph 1

⁷² *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust, as Amicus Curiae)* 2003 (1) SA 389 (SCA) [2002] 4 ALL SA 346) paragraphs 11-14

⁷³ Mantame J judgment

context upon which the principle developed by the Constitutional Court cannot bear precedent in the circumstances of the applicant. In light of that omission on the part of the applicant, a positive duty on the police, or any organs of the ninth respondent had not been established.

[82] It is trite that an unlawful negligent omission occurs in circumstances that the law regards as sufficient to give rise to a legal duty to avoid negligently causing harm. It is essential to distinguish the concept clearly from the notion of fault. Where the law recognises the existence of a legal duty it does not follow that an omission will necessarily attract liability. Liability will arise only if the omission was based on reasonable person test, or if as a matter of legal policy, the omission should be deemed actionable.⁷⁴

[83] *In casu*, the applicant had not triggered a legal duty on any of the organs on the ninth respondent, nor for that matter was there any substantive liability imputed to /on any of its organs. When the police were alerted to the unlawful occupation of the applicant's property, the provisions of PIE had been triggered. The matter had not been brought to the attention of any of the provincial government department or national department for purposes of activating a legal duty on any of them, and by extension to the ninth respondent. Therefore, as was held in *Van Eden* (supra), attributing blanket blame to 'the State', without any substantive obligation or legal duty placed upon it would be absurd in the instance of the applicant.

[84] To advance its argument for constitutional damages, the applicant also referred to *President of RSA & Another v Modderklip Boerdery (Pty) LTD & Others* In *President*

⁷⁴ *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 SCA [2002] 3, paragraph 12

of the Republic of South Africa and Another v Modderklip Boerdery (Pty) LTD and Others⁷⁵, it was an appeal against an order of the SCA which ordered the state to compensate *Modderklip*, a private company, for violation of its property rights in S 25 (1), read with S 7(2), further read with S 9(1) and S 9(2), and S 26 (in relation to the occupiers) of the Constitution. The High Court had granted an eviction order against the occupiers. 'It held that the provision by the State of land or accommodation to the occupiers would have facilitated compliance with the eviction order. Wherefore, the High Court held that the State failure to provide such land or accommodation amounted to a breach of its obligation to protect the efficacy of the eviction order as required by S 165(4) of the Constitution.'⁷⁶

[85] Ms Pillay, for the City, argued that in regard to *Modderklip*, constitutional damages was distinguishable from the set of facts at hand. She submitted that the watermark on distinct features was that the Benoni City in *Modderklip* was bound by a court order, with specific relief that it had failed to comply with. She highlighted that in the instance of the applicant herein, there had been no court order nor a specific legislative provision that required the City to act in a particular manner in the given circumstances.

[86] It is worth noting that in *Modderklip*, the order of constitutional damages which was awarded by the SCA related to the violation of S 25(1); and S 9(2) of the Constitution. However, the Constitutional Court overturned the SCA order regarding constitutional damages and specifically issued the order that, 'Declaring that the State, by failing to provide an appropriate mechanism to give effect to the eviction order of the

⁷⁵ *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) LTD (Agri SA and Others, Amici Curiae)* 2005 (5) SA 3 CC, paragraph 1

⁷⁶ *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) LTD (Agri SA and Others, Amici Curiae)* 2005 (5) SA 3 CC, Paragraph 16

Johannesburg High Court, infringed the right of *Modderklip Boerdery (Pty) Ltd* which is entrenched in section 34 read with S 1 (C) of the Constitution.⁷⁷ So, the rights asserted by the applicant under S 25(1) and S 9(2), which were granted by the SCA, were not upheld in the Constitutional Court.

[87] In the case of the applicant, there was no eviction order that obligated either the City or any provincial department of the Western Cape, and or national departments, to act in any particular manner to safeguard the constitutional rights claimed by the applicant and or those under S 34 of the Constitution, as was the case in *Modderklip*. I am in agreement with the assertion that applicant's constitutional damages claim is substantially distinguished from *Modderklip*, in many respects. Therefore, to the extent that the applicant relied on the principles set out in the *Modderklip* Constitutional Court judgment, they do not advance the applicant's cause in enforcing the Constitutional right to property.

[88] In conclusion, regarding prayer 1, fortified by established jurisprudence, as discussed above, the applicant has not demonstrated that the City and the ninth respondent violated its rights as promised in S 25(1) and S 9(2) of the Constitution. Furthermore, the applicant has not demonstrated that the respondents failed in any respective positive duty and obligation to take measures to protect the applicant's property and or prevent the occupation of its property by the Isiqalo residents. There are no factors upon which it can be concluded that the second and the ninth respondent or any of its entities, have directly and indirectly violated the applicant's constitutional right under S 25(1) and S 9(2).

⁷⁷ *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae* 2005 (5) SA 3 CC, Paragraph 68 (3) (a), the Court Order

Whether the City of Cape Town as the City, third, fifth, sixth and National Government of South Africa as the ninth respondent failed to have mechanisms in place to relocate the Isiqalo residents from the property, and if they failed, whether that failure violated the constitutional rights of the applicant to such property? (Prayer 2)

[89] The Isiqalo residents were actively involved in the proceedings when they filed an answering affidavit in opposition of the interim order, as well as when the affidavit of Prof Hartzemeyer was filed. The Isiqalo residents did not continue to oppose the application following the amended notice of motion. However, it remained common cause that the Isiqalo residents were in unlawful occupation of the property of the applicant, since 2012, totalling over twelve years at the time of hearing of this application. The Isiqalo residents described themselves as a group of desperate poor people who mainly came from makeshift shelters and who would be left homeless if they were evicted from the land without having any form of alternative accommodation available to them.⁷⁸ Returning to their previous homes had become impossible, as those places were now occupied by other families.

[90] During the course of the litigation that was solely at the instance of the applicant and the owners of the neighbouring property (Lynton Properties), in another respect, there was an unequivocal acknowledgement that an eviction of the illegal occupiers was not a feasible option. Their conclusion was based on various observations, including the composition of the group, which included children and other vulnerable people, and that it had become a large group which had evolved into a sizeable

⁷⁸ Answering affidavit of Luvuyo Boo, paragraph 62, page 75.

community.⁷⁹ In various court orders that were issued overtime, there was consistent acknowledgement that the situation at Isiqalo was a call to engage extra-ordinary measures to resolve the question of housing within the area of the City. Hence there was a directive by Gamble J to the respondents to compile reports, which would in turn assist the court in its determination.

[91] The Isiqalo residents did not seek any relief in terms of S 26 of the Constitution, nor did they allege that there was a violation of this right. The styling of the relief sought in prayer 2 of the amended notice of motion invokes S 26 of the Constitution. In particular subsection 2 which provides that, 'the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the right to have access to adequate housing.' The national legislation that gives effect to subsection (2), is the Housing Act 107 of 1997, Part 4 which imposes specific duties and functions to local government municipalities, and in the administration of the national housing programme by ensuring that the commitment in S 26 was realised.

[92] In the context of the factual matrix *in casu*, the Isiqalo residents have not expressly sought to enforce their rights either by invoking S 26 (2) of the Constitution or the duties of the City under the Housing Act. This raises a question as to whether it is competent for the applicant to invoke the constitutional rights of the Isiqalo residents and in a way to vindicate its property that is currently occupied by these residents. The City argued that it should not be permissible for the applicant to do so, for it lacked *locus standi* under S 38(d)⁸⁰ of the Constitution.

⁷⁹ Gamble J judgments dated 13 June 2013, 12 May 2014 and October 2014.

⁸⁰ Section 38(d) of the Constitution provides that, '**Enforcement of rights** – 38 Anyone listed in this section has the right to approach a competent court, alleging that a right in the bill of rights has been

[93] Therefore, 'the issue is whether the applicant, objectively speaking raised this right of the Isiqalo residents in their interest, bearing in mind that he would also vindicate his property in the event that the City was found to have failed to provide alternative accommodation or in violation of S 26(2).⁸¹ It seems that, in a sense if the applicant succeeded in his obtaining the relief sought in prayer 2, by extension the matters central to the realisation of S 26(1) and (2) rights of Isiqalo residents would also be addressed. In my view, the question of the relocation or putting reasonable mechanisms in place to relocate the Isiqalo residents cannot be answered without reference to S 26 in relation to them, as well as S 25(1) and S 9(2) in respect of the applicant. It is in the best interest of all parties to engage with this matter.

[94] The applicant asserts that the City failed to take proactive measures to address the plight of the Isiqalo residents' overtime. The result of which has seen the applicant saddled with the duty of accommodating the Isiqalo residents indefinitely, a situation that should not be allowed. The applicant also argued that the occupation of its property has created an unsafe and unhealthy environment, which the City has a constitutional obligation to prevent. The applicant referred to S 152 of the Constitution in this regard.

[95] The City argued that it engaged in various emergency and other housing projects in the discharge of its responsibilities to give effect to right to adequate housing on a progressive basis within its available resources. They argued that the City had put in place reasonable mechanisms, and that it was impossible to

infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are- (d) anyone acting in public interest ;.....'

⁸¹ *Lawyers for human rights v Minister of Home Affairs* 2004 ZACC 12, 2004 (4) SA 125 CC, paragraph 18

accommodate the entire population of Isiqalo simultaneously, without the undesirable disruption of community life that had developed in Isiqalo. It had also implemented and continued to implement an Emergency Housing Programme. The City also highlighted that the residents of Isiqalo were individually among the recipients of the progressive allocation of housing that was pursued in line with its housing programme.⁸²

[96] The applicant also claimed against third, fifth, and sixth respondents, as organs of the state, regarding their responsibility to intervene when a municipality fails to fulfil an executive obligation in terms of the Constitution or relevant legislation.⁸³ According to the applicant, the state failed to exercise their positive powers and corresponding responsibilities to protect the applicant. They also failed in their duty to respect, protect, promote and fulfil the applicant's rights to property and they failed to take positive steps to alleviate the violation.⁸⁴ The applicant placed substantial reliance on the *Modderklip SCA* judgment⁸⁵ to highlight that it was entitled to an appropriate relief where it established a breach of a Constitutional right, noting that *Modderklip's* S 25(1) right had been violated. With respect, it should be noted that the applicant should not be allowed to rely on this passage as this part of the SCA judgment which was set aside by the Constitutional Court. As already found above, *in casu*, the applicant had not established that its S 25(1) constitutional right had been violated by any of the

⁸² In this regard, see the outline in paragraphs

⁸³ Applicant's heads of argument, page 24, para 59. The Constitution, S 139(1) '**Provincial Intervention in local government**- When a municipality cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, the relevant provincial executive may intervene by taking any appropriate steps to ensure fulfillment of that obligation, including-(a) issuing a directive to the Municipal Council, describing the extent of the failure to fulfill its obligations and stating any steps required to fulfill its obligations; (b) assuming responsibility for the obligation in that municipality to the extent necessary to- (i) maintain essential national standards or meet established minimum standards for the rendering of a service; (ii) prevent that municipal council from taking unreasonable action that is prejudicial to the interests of another municipality or to the province as a whole; or (iii) making economic unity; or (c) dissolving the municipal Council and appointing an administrator until a newly elected Municipality Council has. Been declared elected, if exceptional circumstances warrant such a step.'

⁸⁴ Applicant's heads of arguments para 60-64

⁸⁵ Applicant's heads of arguments, para 64- *Modderklip SCA* judgments paragraphs 18; 21 22; 26; 30; 32 and 34

respondents. The applicant had not demonstrated that it was entitled to the relief sought in prayers 1 of its amended notice of motion.

[97] In respect of its reliance on the *Modderklip CC* judgment, the reliance was to the extent that court dealt with the obligations, specifically of the State's obligations to execute particular court orders and failure of the state to provide reasons for its failure to assist *Modderklip*.⁸⁶ In the instance of the applicant, the S 34 constitutional rights had not been triggered, because there was no court order directing any of the respondents or organs of the government to act in a particular manner towards the applicant. The applicant had not sought a remedy that was available to it through the South African Police Services, which was seized with the duties of crime prevention or the investigations of criminal charges against the occupiers. The applicant had not triggered the legal duties of the SAPS and the Municipality by means of obtaining court orders that would have imposed some obligations on these organs of the government.

[98] Conversely, had the respondents acted in what seemed to be an apparent vacuum, they would have risked interfering with the rights of the applicant, as a private property owner, who had also not given the respondents any permission to pursue his rights according to the Constitution or applicable legislation at the local level, or court order. None of the constitutional obligations of the provincial respondents were triggered by the applicant and in terms of S 139(1) of the Constitution, the applicant has not demonstrated a connection, namely, a duty to act and an omission or failure to carry out that specific duty.

⁸⁶ Applicant's heads of arguments, paragraph 66- *Modderklip's CC* judgment in paragraphs 43; 47; 48 and 50.

[99] In a determination as to whether the City acted reasonably within the available resources (*my emphasis*), the following aspects are decisive:

- a) the occupants were on private property, and the owner had every right in terms of PIE to obtain the eviction of the occupiers. That process would have required of the applicant to show that the said eviction was just and equitable, and that door is not closed to the applicant.
- b) Implementation of the Emergency Housing Programme (EHP)
- c) Back in 2014, all role players were *ad idem* that the situation was difficult, and such difficulty equally applied to the City as it was to the applicant. This was also acknowledged in *Modderklip CC*, when the court argued that it was mindful of the fact that those charged with the provision of housing face immense problems. Confronted by fierce and intense competition for scarce resources from people forced to live in the bleakest of circumstances, the situation of local government officials can never be easy.⁸⁷ Therefore, the *Grootboom* reasonableness test as it also flows from S 26(2) of the Constitution should be alive to the realities confronted by all involved.

[100] However, the circumstances that may have informed this determination do not necessarily find favour in the application of the '*Grootboom* reasonableness test' and widely developed jurisprudence. Particularly if regard is had to the applicant's case, it remains largely about the alleged violation of its S 25(1) and less about the S 26 of the constitution rights of the Isiqalo residents.

[101] The yardstick in the assessment of the steps taken or efforts, if any, was articulated in *Government of the Republic of South Africa and Others v Grootboom*

⁸⁷ *Modderklip CC*, paragraph 47 (*supra*)

and Others.⁸⁸ 'That all levels of government must ensure that the housing program is reasonably and appropriately implemented in the light of all the provisions in the Constitution. All the implementation mechanisms and all State action in relation to housing fall to be assessed against the requirements of s 26 of the Constitution. Every step at every level of government must be consistent with the constitutional obligation to take reasonable measures to provide adequate housing.'

[102] One is inclined to agree with the City's contention that its duty to relocate the unlawful occupiers or provide alternative accommodation from the applicant's property should not and did not arise in the context of a contested eviction application. Nonetheless, it is necessary to closely examine whether the City, as demonstrated in various instances,⁸⁹ had made efforts within its available resources to implement housing programmes that were reasonable and appropriately implemented, in order to directly address the Isiqalo situation.

[104] It was also emphasized by the Constitutional Court in *Modderklip CC*, that -
 "the State is under an obligation progressively to ensure access to housing or land for the homeless. I am mindful of the fact that those charged with the provision of housing face immense problems. Confronted by intense competition for scarce resources from people forced to live in the bleakest of circumstances, the situation of local government officials can never be easy. The progressive realisation of access to adequate

⁸⁸ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 CC, paragraph 82

⁸⁹ The compliance affidavits dated 22 October 2012 explored various options based on its available resources in order to intervene in Isiqalo; 25 January 2013 highlighted the constraints encountered and when it learned that the property was not feasible for settlement; 29 April 2013 explained why it was impossible to upgrade the property into an informal settlement programme; 13 December 2013 explained that emergency housing program did not apply to Isiqalo, based on information that was available; 17 March 2024 where an application for allocation of land for relocation was submitted and 12 November 2024, which sought to give an overview of challenges faced in exploring temporary relocation of Isiqalo residents.

housing, as promised in the Constitution, requires careful planning and fair procedures made known in advance to those most affected. Orderly and predictable processes are vital. Land invasions should always be discouraged. At the same time, for the requisite measures to operate in a reasonable manner, they must not be unduly hamstrung so as to exclude all possible adaptation to evolving circumstances. When social reality fails to conform to the best-laid plans, reasonable and appropriate responses may be necessary. Such responses should advance the interests at stake and not be unduly disruptive towards other persons. Indeed, any planning which leaves no scope whatsoever for relatively marginal adjustments in the light of evolving reality, may often not be reasonable.”⁹⁰

[105] As regards the sixth and the seventh respondents, context should bear the desired answers on whether there was any failure to put mechanisms in place to relocate the occupiers. At the backdrop of the contentions that the respective roles of the departments were designed in a manner that ensured no overlap and undesirable interference in the functions of various spheres of government, Counsel for the applicant was at pains to point out existing legal obligation upon these respondents to relocate or put mechanisms in place to have the occupiers relocated. In turn, the respondents also argued that their involvement in terms of S 139 of the Constitution and S 10(3) of the Housing Act had not been triggered in the prevailing circumstances.

[106] Seemingly, the initial eviction application of 20 August 2012, did not envisage that, there would be a role to be played by any of the provincial departments. The departments were neither approached for intervention nor cited in that eviction application. When these departments were joined, belatedly, as directed in the

⁹⁰ *Modderklip CC*, paragraph 47

Gamble J 13 June 2013 order, it does not seem that the applicant had made any efforts or attempts to seek their intervention or in the least engage them, if the applicant envisaged that these departments had any specific responsibility, either in the applicant's pursuit to vindicate its property, or by means of eviction or relocation of the occupiers. On a closer reading of the Gamble J 13 June 2013, it could be seen that, there was no legal duty imposed on these departments to provide alternative accommodation or relocation of the residents. Rather, it served as an invitation for them to investigate and furnish the Court with any necessary information to reach a just and equitable order concerning the eviction relief sought by the applicant and contested by the Isiqalo residents.

[107] In regard to the claim for measures or mechanisms to relocate Isiqalo residents, the applicant elected not be specific in terms of the period or timeframe during which the alleged failure occurred or when the legal duty of various respondents in relation to prayer 2 and its alternatives arose. The question of the time frames became relevant when bearing in mind that the unlawful occupation of the applicant's property occurred in 2012. As the number of occupants increased, in August 2012, the applicant obtained an interim order of eviction notice. At that time the target of the application was the unlawful occupiers, the rest of the respondents were joined belatedly when directed by the court, for purposes of exploring various options in addressing the impasse.

[108] The litigation was inactive until 2023, when the notice of motion was amended. During oral submissions, Mr. Wilkin emphatically indicated that, ' if it was not for the *Fischer* judgment, the applicant would not have pursued this application.' Let alone that the substances of the matters were glaringly distinguishable in various aspects, already highlighted above.

[109] In the applicant's case, the invasion of its property or the development of Isiqalo happened in 2012. However, the allegations that there was a failure to take steps to relocate the residents first surfaced in the amended notice of motion in 2023, and there had been no mention of the precise time or period in which the alleged failure occurred. In the absence of such clarity a broader approach had to be adopted in assessing whether there was a duty or failure to relocate the Isiqalo residents over the period, starting from 2012, to date.

[110] The obligation of progressive realisation requires the government to consistently review its policies to ensure that the achievement of the right is progressively attained, taking into account the reasonableness of the steps taken.⁹¹ In *Modderklip CC* the court also cautioned that responses to housing needs should advance the interests at stake and not be unduly disruptive towards other persons, there has been no basis laid for the court to invoke section 139 of the Constitution and or S 10(3) of the Housing Act, even in terms of the amended notice of motion. A thorough assessment of the mechanisms put in place and efforts demonstrated by the City do not support an assertion that there was a violation of the applicant's rights in this context.

The purchase of the applicant's land (Prayers 3 and 4)

[111] As stated by the applicant, 'considering the similarities in the facts of the cases and the relief sought, along with the non-compliance with the Gamble orders, it was determined to wait for the outcome of the Fischer matter, as it had become clear that the forced removal of the occupiers was objectively impossible.'⁹² The applicant

⁹¹ Treatment Action. Campaign, paragraph 76

⁹² Supplementary replying affidavit

submitted that the judgment in the *Fischer* matter, which had some similarities to the Isiqalo situation, caused it to believe that it would, to some extent, provide direction or serve as precedent for the resolution of its eviction application.

[112] For purposes of advancing the purchase of the Isiqalo, and drawing from the *Fischer v Unlawful Occupiers and Others*(*supra*), the applicant submitted the alternative appropriate relief in its circumstances would be the 'buy-out' , as one of the means to restore the harm it suffered from the unlawful invasion of the land.⁹³The court held that, in terms of the *Fischer* judgement, [169] "The City's argument that to accommodate the occupiers would disrupt existing efforts to provide housing within their jurisdiction, and would interfere with housing plans and policies in light of their constitutional obligation to, as a priority, make provision for emergency situations, is not reasonable. In my view reasonable action would include acquiring the applicant's property."

[113] Among others, the City contended that its own investigations revealed that the property of the applicant was not suitable for acquisition. The Lukhozi report found that due to degradation that was occasioned by the sand mining on the property, it was not habitable and not suitable for housing development. Furthermore, it argued that it was not competent for this court to dictate terms of a contract to the local government as a sphere of government.

[114] The sixth and the seventh respondents argued that the buying relief sought to disregard the intergovernmental framework that regulated various levels of the government and therefore, required the applicant to demonstrate that exceptional circumstances existed to justify an interference. According to them, the applicant

⁹³ Applicant's heads of argument, page 4, Paragraph 6

sought a relief that had the features of a *mandamus* and failed to demonstrate that it was legally permissible for a Provincial government to pay a purchase price when a local sphere of government acquired land.⁹⁴ According to these respondents, the City had sufficiently demonstrated that it had carried out its obligations and there was no basis upon which this court could compel it to enter into a contract with the applicant. With reference to *Ekurhuleni Metropolitan Municipality v Dada NO and Others*⁹⁵ they argued that the SCA has authoritatively decided that an order requiring a Municipality to purchase a property was clearly not appropriate relief.

[115] The approach to this relief requires a value judgment of the circumstances that uniquely characterised the situation at Isiqalo. The persuasive effect, if any, of the *Fischer* judgment, which the applicant relied on substantially in pursuit of the 'buy out relief', shall be determined by matters that are specific to Isiqalo. The starting point being the basis upon which the City and or any other affected respondents should be directed to buy the property as well as other ancillary factors. Such factors would in the main include suitability of the applicant's property for the settlement of the Isiqalo residents; the number of people that make up the Isiqalo community and the suitability of such relief in the prevailing findings on prayers 1 and 2 above.

[116] On the buyout relief, the *Fischer* High Court judgment involved three applicants and their respective applications, whose purpose was to vindicate their constitutional rights to property (s25(1); the rights of the occupiers of access to adequate housing (26); to enforce the duty of the state to respect, protect, promote and fulfil the rights in the Bill of Rights (s7(2) and an exercise of the right of anyone to approach a competent

⁹⁴ Sixth and seventh heads of arguments, paragraph 143

⁹⁵ *Ekurhuleni Metropolitan Municipality v Dada NO and Others* 2009 (4) SA 463 (SCA) at paragraph 14

court, acting in public interest (38(d)). The land that was the subject matter became known as *Marikana*, occupied by some 60 000 individuals. In an eviction application, the applicants sought to obtain a relief whereby in terms of the City, (the respondent *in casu*) was ordered to purchase or, alternatively, expropriate the applicants' properties for provision of housing to the unlawful occupiers.

[117] The court in *Fischer* concluded that the City's failure to take reasonable measures infringed the constitutional rights of the property owners in terms of section 25(1) and those of the occupiers in terms of S 26 when it failed to secure land for the occupiers. In the case of the applicant *in casu*, City also argued that its duty to relocate the unlawful occupiers or provide alternative accommodation from the applicant's property did not arise in the context of a contested eviction application. In order to come to a conclusion in the instance of the applicant, a closer examination of the factual matrix of what unfolded over time will be imperative.

[118] In relation to the sixth and the seventh respondents, the applicant sought to have them paid the purchase price for the property, in the event that it was not possible for the City to do so. It must be borne in mind that other spheres of government may only intervene upon the invoking of Section 139 of the Constitution and or section 10(3) (c) of the Housing Act.⁹⁶ The Provincial Department of Human Settlement in its submissions, committed itself in regard to the position of lack of funding or budgetary constraints in which the City found itself. The Province expressed that the City may seek approval for an emergency housing project, in any form it considers suitable, in accordance with Chapter 12 of the Housing Code.

⁹⁶ Further affidavit by eight respondent, Chief Director Rayan Rughubar, Vol 5 pages 1636, paragraphs 5 and 8.2

[119] However, in line with the constitutional responsibilities of the departments and their purpose within the hierarchy of the ninth respondent, the applicant had to advance their claim by showing factors that would have occasioned the necessity to prescribe how these departments should address the matter, when presumably, there were ongoing programmes to address the housing issues within the area of the City.

[120] It is important to remember that seeking mandatory reliefs can lead to undesirable or disruptive effects on the governance and daily operations of the institutions involved. For instance in a case of a restraining order that was sought in *City of Tshwane Metropolitan Municipality v Afriforum and Another*⁹⁷, the court cautioned that, “it must be borne in mind that the effect of the restraining order granted is to mortify and prevent Council from implementing its resolution. And this is the resolution taken in terms of its constitutional and statutory powers. To say that this amounts to an intrusion by the courts into the domain reserved exclusively for the Executive, would not be an overstatement.”

[121] In this matter, the court has not been furnished with any background information about the financial status of these departments, including whether the relief, if granted would be executable. The applicant has failed to present exceptional circumstances that may have characterised its situation to justify the court's interference in the business of these departments, bearing in mind that they fall under another arm of the state, the Executive. In short, a case in this regard has not been made in every material respect possible.

⁹⁷ *City of Tshwane Metropolitan Municipality v Afriforum and Another* (157/15) [2016] ZACC 19; 2016 (9) BCLR 1133 (CC); 2016 (6) SA 279 (CC) (21 JULY 2016), paragraph 39

[122] It is on record that the applicant was counselled to obtain court orders and or pursue criminal charges in order to elicit a legitimate response from law enforcement, however, he declined to follow that advice. Nonetheless, the applicant claims that it should be compensated for the harm it suffered due to the failure of this state organs to protect its property, which consequently led to a breach of its constitutional right to property and the equal right to the protection of the law. As already found above, the applicant has not established a case to justify the declaratory reliefs in prayers 1 & 2.

Conclusion on the buying relief

[123] In *Ekurhuleni Metropolitan Municipality v Dada NO and Others* (280/2009) [2009] ZASCA 21; 2009 (4) SA 463 (SCA); [2009] 3 All SA 379 (SCA) the court remarked that, "the judge was perhaps right in coming to the conclusion that the municipality had not dealt with the problems of the informal settlement on the property with the measure of alacrity which could reasonably be expected of them. But that did not justify his adopting a solution which was well outside the limits of his powers. Even if he considered that the occupiers were entitled to bypass the statutory provisions expressly entrenched in Chapter 2 of the Constitution, he was nevertheless bound to consider the occupiers' case under the provisions of S8 of the Constitution, in which event he was empowered to grant 'appropriate relief'. The order that the municipality should purchase the property was plainly not 'appropriate relief.'" In regard to the *Fischer* judgment, the buying relief was granted consequential to the finding of the court which had declared a constitutional violation of the S 25(1) rights of the applicant and S 26 right of the Isiqalo residents.

[124] In *casu*, the buying out relief was framed as a stand-alone, without providing any legal basis upon which it was sought as such. One reasons that such relief may have been notionally available to the applicant is if there was a constitutional violation of its rights. In this instance, a violation has not been established and the city 'had dealt with the persistent problems of housing with the measure of alacrity which could reasonably be expected of them.'⁹⁸

[125] The applicant has not established that the harm it may have suffered was occasioned by any illegal conduct of the organs of the state or government entities. it follows that, as the applicant could not establish the contravention of any constitutional rights, then it should follow there would be no entitlement to direct the respondents to purchase its property. Furthermore, such relief in the circumstances of the applicant would not have been competent. Therefore, there was no factual and legal basis established for a consideration of the purchasing of the applicant's property as the most appropriate relief, in the case of the applicant.

Would it be just and equitable to order the eviction of the unlawful occupiers at Isiqalo (Prayer 7 and 8)

[126] Since April 2012, at the onset of the unlawful occupation of Isiqalo, the applicant responded to what later became a coordinated unlawful occupation of its property by deploying its own security guards and through its employees. With 200 structures that were initially erected, followed by a rapid increase of the number of structures that were built daily. The applicant sought the intervention of the law enforcement from the SAPS and the City's Anti-Land Invasion Unit. However, they did not ensure that these

⁹⁸ *Ekurhuleni Metropolitan Municipality v Dada NO and Others (supra)*, paragraph 14

authorities responded lawfully.⁹⁹ When the applicant obtained an interim order in terms of the Binns ward J order of 20 August 2012, and on the return date, it was opposed. It was then that the applicant was required to demonstrate that a final eviction order would be just and equitable.

[127] Central thereto was the provision that, "*No one may be evicted from their home, or have their home, or have their home demolished, without an order of court made after considering all the relevant circumstances.*"¹⁰⁰ "It is the courts which have the right and duty to make the order, which, in the circumstances of the case, would be just and equitable and it prescribes some circumstances that have to be taken into account in determining the terms of the eviction."¹⁰¹ "The courts must have regard to:

- a) *The circumstances under which the unlawful occupiers occupied the land and erected the building or the 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.*"¹⁰²

[128] In turn, the Isiqalo residents along with any other involved parties, were required to show cause why an order of eviction should not be made final. Subsequent thereto, the Isiqalo residents actively opposed their eviction application. Since then, various court orders have been issued. There was a consistent appreciation among the parties

⁹⁹ Founding Affidavit of Robert Ross

¹⁰⁰ Section 26(3) of the Constitution

¹⁰¹ *Ndlovu v Ngcobo, Bekker and Another v Jika* (1) (240/2001, 136/2002) [2002] SASCA 87; [2002] 4 all SA 384 (SCA); 2003 (1) SA 113 (SCA) (30 August 2002), Paragraph 3

¹⁰² Section 6(3) of PIE....

involved, including the Court that based on the evidence that was available, an eviction order was not an option in the circumstances that were ventilated before the Court.

[129] An eviction application was launched in respect of this property in August 2012 for the portion 20 of Farm 787. The interim order was obtained, and at the centre of this application is the inability of the applicant's to establish that it would be just and equitable to obtain the final eviction of the occupants. Unlike in the *Fischer* matter, where the municipality took no further action following the court order that found its demolition of the homes unconstitutional and unlawful, the City *in casu* engaged various other measures to intervene.

[130] Throughout the litigation process, the applicant was particularly consistent that eviction or relocation of the residents would be detrimental to the community that had developed on the property.¹⁰³ At some point, the applicant described the occupiers as 'not just a large group of unidentified people, but thousands of persons who were minors, elderly, women headed homes, some with disability and some with life threatening diseases.'¹⁰⁴ However, in paragraphs 7 and 8 of the relief sought in the Amended Notice of Motion still effectively sought the eviction of the Isiqalo occupiers.

[131] In order to obtain an eviction order, it has become a prerequisite to demonstrate that granting of such order would be just and equitable, by among others providing alternative accommodation to the evictees. 'In instances, where the eviction is sought by a private land owner, the availability of alternative land or accommodation assumes greater importance in the enquiry of what is just and equitable. It is in such cases that

¹⁰³ Supplementary Founding Affidavit, Volume 6, page 38, paragraph 74

¹⁰⁴ Supplementary Founding Affidavit, Volume 6, page 38, paragraph 76

the constitutional obligations of the appropriate arm of government, like the municipalities come into focus and assume greater importance.¹⁰⁵

[132] In *casu*, the prevailing circumstances between the applicant; the unlawful occupiers; the City and various other interventions by this court¹⁰⁶, highlighted that it would be difficult to demonstrate that it was just and equitable to grant the final eviction order of Isiqalo residents. Hence the Gamble J orders directed specific investigations to be undertaken by various role players. The court ordered that, “2. *the following parties are joined to these proceedings for purposes of providing the reports referred to in paragraphs 3 and 4 below and providing the Court with any information it may require to make a just and equitable order:*

2.1. *the Minister of Human Settlements (in national sphere of government):*

2.2. *the Minister of Public Works (in the national sphere of government):*

2.3. *the Minister of Rural Development and Land Reform (in the national sphere of government);*

2.4. *the Minister of Human Settlements in the Western Cape Provincial government*

2.5. *the Minister of Public Works in the Western Cape provincial government.”¹⁰⁷*

[133] In compliance with the order that required reports that would be considered for purposes of the eviction order that was sought, all the role players involved filed their reports. As pointed out earlier, among the reports was the report from the engineering consultants who made findings about the suitability of the property for human settlement (‘The Lukhozi report’). There was also the report from Prof. Huchzemeyer, who was considered an expert in matters of informal settlement. The main significance with her report was that she had first hand interaction with the residents; matters that

¹⁰⁵ *City of Johannesburg v Changing Tides 74 (Pty) LTD* 2012 ZASCA 116 (14 September 2012)

¹⁰⁶ Court orders of Binswaard J; Mantame J and many others of Gamble J

¹⁰⁷ Gamble J order, dated 13 June 2013, paragraph 2, Volume IV, pages 1350-1354

related to their socio-economic and their psycho-social factors. There was also reports from the City managers, who had to provide insight into its housing plans; challenges and their financial constraints. These were contained in the affidavits of Mr A Ebrahim, Ms E Kwalo and Mr L Mbandazayo, and the survey report, including from the provincial department, Chief Director R Rughubar.

[134] Although these reports spoke directly to significant matters that related to the Isiqalo residents and would have been central in the ultimate determination of the court on the eviction application, they have somewhat become stale due to lapse of time since they were compiled. For instance, the Lukhozi, Ebrahim and the Huchzemeyer reports were dated and prepared more than ten (10) years ago and by any measure their relevance and value in any determination possible has diminished.

[135] Back at the time when there was a realisation that an eviction was not a feasible option, these reports had not been compiled. In the case of the applicant's desire for an eviction order, if provided with relevant or updated evidence, the court may still make determination as to whether the relief of eviction would be just and equitable. Based on the evidence presented, and in the absence of an eviction order, the applicant failed to utilise and exhaust various measures or remedies it may have progressively pursued and that were at its disposal in order to vindicate its right to the property.¹⁰⁸ In other words, the applicant still has the opportunity to pursue the matter once updated information has been gathered and presented to the court.

Other consequential reliefs sought (Prayers 5 and 6)

¹⁰⁸ *Thubakgale residents*, paragraph 81

[136] The applicant conceded that a relief of the expropriation in terms of S 9(3) of the Expropriation Act 63 of 1975, in the prevailing circumstances, would not have been competent. It is therefore, not necessary to traverse matters related thereto. In regard to the claims of constitutional rights violations, the findings have not been favourable to the applicant. Therefore, it is unnecessary to address in detail the consequential reliefs sought regarding them.

In conclusion

[137] In short, the applicant failed to invoke his constitutional rights in s25(1) and s9 at the level of the City, either by way of legal framework or a court order which would impose a legal duty to act in any particular form. In regard to the relocation or placing reasonable mechanisms in place to relocate Isiqalo residents, the respondents also acted within the available resources and legal framework to address the housing needs of its residents and continued to do so. I agree with the City that the functions or rights of municipalities to perform should not be compromised or impeded by undue interference unless there are systematic processes which actively engaged other levels of government.¹⁰⁹ This affirms the principle of subsidiarity among the various spheres of government, and the applicant has not established factors that demonstrated substantial failures and constitutional violations on the part of the City.

[138] The opposition by the sixth and seventh respondents to all the reliefs sought in the amended notice of motion multi layered and multi-faceted. The summary indicates that the applicant did not demonstrate a failure to fulfil their constitutional duties, whether through a breach of the established legal framework or by failing to comply with court orders regarding their responsibilities to the applicant or the Isiqalo

¹⁰⁹ Section 151 (4) of the Constitution

residents. The applicant had not triggered the exercise of their powers and obligations towards it.

[139] The evidence presented along with the application of established jurisprudence and applicable legal principles, indicate that the applicant has not made a case that justify the granting of the relief sought in prayers one to six of the amended notice of motion.

[140] In regard to the prayer for an eviction order, as set out in prayer 7 and 8, this court has not been provided with adequate evidence to enable it to make a conclusive determination at this stage.

Order

[141] Therefore, the following order is proposed:

1. This court has the necessary jurisdiction in terms of the Prevention of Illegal Eviction From and Unlawful Occupation, Act 19 of 1998;
2. Prayers 1 to 6 of the application are dismissed;
3. Prayers 7 and 8 for the eviction application are postponed *sine die*;
4. The applicant is to pay the costs of the second, the sixth and the seventh respondents, including the cost of two counsel where so employed, on scale C.



N SIPUNZI

ACTING JUDGE OF THE HIGH COURT

I agree. It is so ordered.



HM SLINGERS

JUDGE OF THE HIGH COURT