THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no:1489/2024

In the matter between:

CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY **APPELLANT**

and

CALVIN BANTHAM **FIRST RESPONDENT**

ALL UNLAWFUL OCCUPIERS OF ERF 1[...] R[…] R[…] EXTENSION 1 **SECOND RESPONDENT**

Neutral citation: *City of Johannesburg Metropolitan Municipality v Bantham and Others* (1489/2024) [2026] ZASCA 86 (23 June 2026)

Coram: KEIGHTLEY and COPPIN JJA and VALLY AJ

Heard: 27 February 2026

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, published on the Supreme Court of Appeal website, and released to SAFLII. The date and time for hand-down is deemed to be 23 June 2026 at 11h00.

Summary: Property law – *mandament van spolie* – interdict against unlawful eviction – onus on applicants to prove *locus standi* and entitlement to relief – not for court to remedy defects in applicants' case.

ORDER

On appeal from: Gauteng Division of The High Court, Johannesburg (Wilson J sitting as court of first instance):

1. The appeal is upheld.
2. The order of the high court is set aside and is substituted by the following order:

'The application is dismissed.'

JUDGMENT

R Keightley JA (Coppin JA and Vally AJA concurring):

Introduction

[1] This is an appeal by the City of Johannesburg Metropolitan Municipality (the City) against an order granted by the Gauteng Division of the High Court, Johannesburg (the high court), *per* Wilson J, in an application filed by the respondents in the appeal. The respondents' causes of action were the *mandament van spolie*, and a final interdict prohibiting their eviction without an order of court. They claimed that they had been in possession and occupation of an immovable property (the property) owned by the City, and that they had been dispossessed and evicted therefrom unlawfully.

[2] The application was first enrolled on the urgent court roll on 5 December 2023. The City opposed the application, one of its grounds being that of an absence of urgency. It was heard on 14 December 2023, when it was struck for want of urgency. The respondents did not immediately re-enrol the matter on the

ordinary opposed motion court roll. Four months later, on 8 April 2024, by means of a supplementary founding affidavit, they approached the urgent court, relying on an alleged new act of dispossession and eviction. The matter was struck-off for lack of urgency for the second time. It was then enrolled on the ordinary opposed motion court roll for the week of 22 July 2024 before Wilson J.

[3] When the matter was called on 23 July 2023, the parties informed the court that they had agreed that the matter be postponed *sine die* on the basis that neither party would disturb the *status quo* on the property as at the date of the postponement order. Counsel for the parties informed the high court that they had agreed that the City would not evict anyone who was in occupation of the property at that time, and that the respondents would not encourage further occupation of the property. As I discuss in more detail later, the high court directed the parties to compile an agreed list of current *bona fide* occupiers. When the parties were unable to agree on this list, the application proceeded on an opposed basis.

[4] This, in summary, is the litigation backdrop to the order on appeal. The high court granted the order on 2 August 2024, with reasons for the order following on 5 August 2024. The high court: declared that the eviction by the City of the respondents from the property, was unlawful; ordered the City to restore the respondents' peaceful and undisturbed possession of the property; and granted an interdict prohibiting the City from evicting any of the respondents, their spouses, life partners or children from the property without a court order. Attached to the order was annexure A, which comprised a list of over 200 persons to whom the relief was granted. The high court dismissed the City's application for leave to appeal. Leave to appeal was subsequently granted by this Court.

[5] For reasons that will become apparent, it is important to say something more about the respondents and their citation in the high court proceedings. The first respondent, who was the first applicant in the high court proceedings, is Calvin Bantham (Mr Bantham). In the founding affidavit filed in support of the application that served before the high court he described himself as 'currently residing at and occupying' the property. He stated that he was one of many occupiers of the property. Together, according to him, they had formed a community of which he was one of the unofficial leaders. Mr Bantham averred that he had been duly appointed and recognised as such by the majority of occupiers of the property. He stated that he had instituted the application in his personal capacity as an occupier and on behalf of the other occupiers.

[6] The remaining respondents (second respondents and second applicants in the high court) were cited in the high court proceedings as 'All Unlawful Occupiers' of the property. Save for specific reference to a few individuals, they were not named in the founding affidavit nor, indeed, in either the replying or supplementary affidavits filed by the respondents. The high court order amended the citation of the second respondents to 'The Further Unlawful Occupiers of Erf 1[...] R[…] R[…] Extension 1 Listed in Annexure A'. This is an aspect of the high court proceedings to which I return later.

Background

[7] The property is one of three erven owned by the City in the greater Rabie Ridge area (the GRRA). The respondents do not dispute the City's assertion that all three of these erven have become a 'hotspot' for land invasion over an extended period of time by different groups of people. According to the City, it is involved in parallel litigation with another group who are also claiming a right to occupy the property. There has also been litigation involving similar

activities and claims in relation to the other two erven in the GRRA. The high court has, in respect of the latter properties, granted orders interdicting individuals and groups from, among other things, erecting or completing further structures or further occupying the land. These orders span are dated from 2017 to 2022, indicating that, by all accounts, land invasions on these properties have been ongoing over an extended period.

[8] The property is earmarked for a housing project. To this end, cement slabs were laid some years ago with a view to further development, but this seems to have ground to a halt. Mr Bantham avers in his founding affidavit that at the time that the planned development was initiated, it was earmarked for occupation by 'the community' he represents. Further, that 'the community members had been granted the right to occupy the property by the late Mayor Geoff Makhubo' and the member of the municipal council for housing, Mlungisi Mabaso, in 2020. The press reports the respondents rely on do not support this claim. Nonetheless, according to Mr Bantham, the community took possession and occupation of the property in September 2023 and have remained in occupation ever since.

[9] The City disputes this. It explains that in order for it to deal with the constant threat of land invasion in the GRRA it had to employ service providers to patrol the land to prevent this. It presents several examples of reports filed by the Johannesburg Metropolitan Police Department (JMPD) and service providers about these activities. The reports cover the GRRA and are not specific to the property. They present a picture of organised attempts by groups of people to occupy the City's land, together with continued counter-action on the part of the JMPD and the service providers to prevent this and to remove illegal structures.

[10] The City avers in its answering affidavit that only 'unfinished and/or unoccupied structures with no evidence of occupation' are demolished. The respondents do not specifically address this averment in their replying affidavit, saying that it, and the related averments by the City regarding the operations by the JMPD and the service providers in the GRRA, were not within their personal knowledge. The high court found the common cause fact of the City's demolition of unfinished and uninhabited structures on the property to be the definitive factor in granting relief to the respondents.

High court litigation

[11] Before the high court the respondents sought an order declaring their 'eviction, alternatively dispossession' from, or of, the property to be unlawful, together with an order directing that their possession of, and access to the property be immediately restored *ante omnia*. In addition, they prayed for an interdict prohibiting the City and its co-respondents from taking any steps with the intention of evicting them from, or dispossessing them of the property, or destroying or demolishing the respondents property 'until such time that the eviction and/or dispossession … is deemed lawful'.

[12] Mr Bantham deposed to the founding affidavit on 4 November 2023. He asserted that he and the remaining respondents, 'as a community' had acted to protect the property from unlawful invasion after it was allegedly earmarked for their eventual occupation. He stated that with the onset of the Covid-19 pandemic, the majority of the respondents had lost their employment and income. They had been 'compelled to socially distance [themselves] from the individuals from whom [they] had been renting'. Out of urgent necessity, on 18 September 2023, he explained, 'the community members and myself took occupation of the property and commenced with the erection of dwellings'. He asserted that they had had no other alternative but to do so, as the vast majority

of ‘the community’ had applied for RDP housing to no avail. He stated that he wished to place on record that their occupation of the property was expected to be for an indefinite period, while waiting for assistance from the Provincial government.

[13] Mr Bantham proceeded to describe seven subsequent instances of the JMPD, assisted by one or other of the service providers, allegedly arriving at the property and demolishing what were described as the respondents’ homes, and evicting them from the property. These events were alleged to have occurred on 25 September 2023, 9 October 2023, 12 October 2023, 26 October 2023, 6 November 2023, 9 November 2023 and 30 November 2023. Mr Bantham explained that following these demolitions, the respondents had rallied and rebuilt what he described as ‘their homes’.

[14] In each instance it was alleged that the demolitions were carried out with a measure of violence. It was alleged that on 16 November, some occupiers were injured with rubber bullets and another had been assaulted ‘with open hands’. It was also alleged that building material and other belongings had been confiscated. These events had all occurred without a court order.

[15] The four respondents who were alleged to have been assaulted, being Reagan Warren Plaatjies (Mr Plaatjies), Tony Eddie Davids (Mr Davids), Doulen Olivier (Mr Olivier), and Vincent Juwana Manana (Mr Manana) provided standard confirmatory affidavits that were attached to the founding affidavit. In each affidavit, the deponent stated that he currently resided at the property and confirmed the correctness of the contents of Mr Bantham’s affidavit ‘insofar as it relates to me and the events which had occurred in respect of the [property]’. That was the extent of each confirmatory affidavit. These

affidavits were all commissioned on 30 November 2023, four days before Mr Bantham had his affidavit commissioned on 4 December 2023.

[16] Also attached to the founding affidavit were several photographs. One was of what appears to be a thigh with an injury. Three others are of a man wearing a hat with an emblem holding onto the front of the neck of another man's shirt and shoulders. The photos were undated but appear to have been sent or received by way of a social media application on a cellular phone on 16, 20 and 30 November. Another, undated photograph depicts a man showing a wound on his arm above the elbow.

[17] Another large batch of photos attached to the founding affidavit were described as being of 'the property as well as members of the community'. They depict what appear to be plywood sheets on the ground, or being held by unidentified persons; some plywood walls in the process of being put up; unidentified persons (some children) in the vicinity of the walls or half-finished structures, some personal belongings on cement slabs; a few small informal structures and a couple of interiors of informal structures with some personal belongings and some people.

[18] These photographs are all undated. None of them bear any geographic location reference points. There is no affidavit by anyone confirming that they took the photographs and what they depict. There is no description of who or what is shown in each photograph. Significantly, no one depicted in any of the photos is identified. It is also worth recording that four of the photographs appear to depict cement slabs, and a formal RDP-type structure under construction, with men in blue overalls engaged in the construction activity. There is no explanation of how photographs of what appear to be men

employed to construct a formal dwelling came to be included in the batch attached to the founding papers.

[19] The only indicators of any details regarding these photos were a batch of six standard-form confirmatory affidavits from persons whom Mr Bantham described as being 'occupiers of the property'. These confirmatory affidavits are in exactly the same form as those referred to earlier. They provide no details connecting the photographs to the deponents, nor any personal details about each deponent and his or her connection to the property. As with the other confirmatory affidavits attached to the founding affidavit, all but one of them was deposed to before Mr Bantham deposed to the founding affidavit.

[20] In support of the relief sought, Mr Bantham alleged that he and 'the occupiers' had occupied the property since 18 September 2023. They had also allegedly been in peaceful and undisturbed possession of the property, and had been deprived of that possession by the City, which had resorted to self-help by evicting the respondents without the necessary court order under the Prevention of Illegal Eviction from Unlawful Occupation of Land Act 19 of 1998 (the PIE). This threat was ongoing because, Mr Bantham averred, the respondents had rebuilt the structures after each alleged eviction. However, they lived with the ongoing threat of being unlawfully evicted again.

[21] Although the City did not dispute that demolition exercises had been conducted on the property on the dates alleged by the respondents, it opposed the urgent application on multiple bases. Significantly, for purposes of this appeal, it also pertinently raised a point *in limine* under the heading 'Unidentified Occupiers'. The City referred to an order of the high court dated

18 December 2020 granted by Siwendu J[1] (*Ntombela v City*) involving another of the City's properties in the GRRA. In that order, the high court had recorded that: 'Other than the first applicant, the second and further applicants are not properly before the court, and it is not discernible who the applicants are and whether they have a direct interest in the matter.' The City pointed out that, as in *Ntombela v City*, the second respondents in this matter were not identified. It stated that if the application succeeded, each of the unnamed individuals would be entitled to be restored to their alleged possession of the property. The City thus disputed the identities of the unnamed applicants. In addition, it disputed the authority of the instructing attorney to represent them, and filed a Rule 7 notice.

[22] As regards the merits of the application, the City disputed that the respondents had established that they were in peaceful and undisturbed possession because any possession they may have sought to establish had been thwarted by the demolitions. The City contended that the situation was one of spoliation by the respondents, coupled with counter-spoliation on its part.

[23] It also denied that the respondents had any right to occupy the land or that they were in occupation. The City averred, as noted earlier, that in the actions undertaken to prevent land invasions in the GRRA, only unfinished and uninhabited structures were demolished. In instances where informal structures were occupied, the City applied for the necessary eviction orders. On the City's version, therefore, no eviction order had been necessary in the case of the respondents because they had not established that they were occupiers protected under the PIE.

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[1] *Zakhele Ntombela and the Occupiers of Portion 79 of Erf 1344, Rabie Ridge Extension 2 v City of Johannesburg Metropolitan Municipality and Others*, Unreported order of the Gauteng Division of the High Court, Johannesburg, Case no:20/43429, 18 December 2020.

[24] The City denied that the demolitions had been done violently or that the assaults had occurred. As regards the photographs attached to the founding affidavit, it placed their authenticity in dispute, pointing out the shortcomings described earlier.

[25] Regarding the interdict sought by the respondents, in addition to disputing that they were occupiers and entitled to the protection of the PIE, the City contended that alternative relief was available to them. It referred to the correspondence between the respondents' attorney and the City's in which the City had expressed the view that the matter was capable of resolution through mediation. The City had invited the respondents to agree to pursuing this path as opposed to litigation. This suggestion was rebuffed. The City pointed out that this alternative remained open to the parties as a realistic option, given that the high court had previously directed mediation in similar proceedings involving another of the properties in the GRRA. The reference in this regard was to the order granted in *Ntombela v City*, in which Siwendu J had directed that the parties engage in mediation regarding the applicants' housing grievance.

[26] By the time the matter was heard by the high court in July 2024, more than seven months had elapsed since the matter was first enrolled. It was then ten months since the averred possession and occupation and the first incident of alleged dispossession and eviction. It was no doubt with this lapse of time in mind that the parties jointly sought an order from the high court postponing the matter on the terms described earlier.

[27] The high court was not willing to accede to the parties' request for a postponement without further steps being taken. Its reasons are stated in the judgment as follows:

'I was not satisfied that this would be a proper or a competent order to make, because there was no evidence before me of what the "status quo" was. In other words, there was nothing before me that set out the extent to which the property had been re-occupied after the [April 2024] demolition operation, and accordingly no meaningful way in which I could ascertain exactly what conduct the postponement order would enjoin. I asked counsel whether the parties would be prepared to provide a list of individuals who both parties accepted were in occupation of the property on 23 July 2024. If that could be done then I could make an order directing the City to refrain from removing those individuals from the property, and directing the applicants to refrain from encouraging further occupation of the property for the period of the postponement. The parties agreed to follow this approach. I stood the matter down to Thursday 25 July 2024 in order for the list to be agreed.'[2]

[28] To this end, the high court made an order on 23 July 2024 (the 23 July order) directing the parties 'to compile and confirm a list of *bona fide* occupiers currently at the property as of 23 July 2024, which list will be compiled and confirmed by Wednesday, 24 July 2024. The aforesaid list is to be attached to this order as "annexure A"'. Details of the exercise undertaken by the parties in an attempt to reach agreement on the list of occupiers are captured in supplementary affidavits filed by the parties after they had failed to reach consensus as to whom should be included in the envisaged 'annexure A'.

[29] In its supplementary affidavit, the City stated that some of its officials and legal team had visited the property on 18 July 2024, prior to the hearing of the matter. They found one completed and occupied structure on the property. Photographs were annexed to the affidavit, with confirmatory affidavits. According to the City, when its legal team arrived for the inspection on 23 July 2024, they observed the same, single completed and occupied structure.

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[2] *Bantham and Others v City of Johannesburg and Others* (2023/128720) [2024] ZAGPJHC 706 (*Bantham HC*) para 12.

[30] However, during the joint inspection of the property, Mr Ramogale, the deponent to the City's supplementary affidavit, noted several individuals attempting to construct additional structures on the property. They alleged that members of the JMPD had demolished their structures that morning. The City denied these claims, as they were not supported by any evidence. It also denied a second explanation, provided by individuals present at the inspection, for the absence of structures. This was that the City had directed them to remove their structures. However, the City rejected this explanation, too, as there were no details of how this had occurred or who had issued the directive. The City contended that: 'It is highly improbable if not impossible that structures belonging to approximately 159 individuals could have been demolished/removed between 11h45 after the granting of [the July 2023 order] and the arrival of the legal representatives at the property … .' This, stated the City, was far-fetched and misleading.

[31] The City took the view that it would be futile to compile a list of *bona fide* occupiers beyond the list of the four occupants of the single completed and occupied structure. The parties agreed to convene for a second day on the property in an attempt to reach consensus.

[32] The agreed time of the meeting was 16h00 on 24 July 2024 However, the City team arrived approximately two hours earlier. Once again, attempts to build new structures were observed, as well as people moving mattresses onto the property. When both teams were present, the respondents produced a handwritten list of approximately 159 names, apparently prepared by Mr Bantham. Their legal team proceeded to call out names from this list, marking peoples' presence or absence. The City rejected the list and procedure. Subsequent to the inspection, a reduced list of 114 names was provided to the City by the respondents' attorneys on the basis that these were the individuals

whom they considered to be the most vulnerable and, presumably, in need of housing.

[33] In its supplementary affidavit the City made two significant averments. First, it stated that Mr Bantham had been present at the inspections and had been unable to point out a structure or dwelling that belonged to him. Second, the City referred to photographs sent to it by the respondents' attorneys in letters exchanged before the second day of inspection. It averred that over the two days of inspection none of the alleged occupiers could point out any dwellings pictured in the photographs as belonging to them or their location. The City also disputed the photographs, contending that they were misleading and not authenticated.

[34] Mr Bantham once again deposed to an affidavit on behalf of the respondents. In it he gave a third explanation for the absence of structures at the time of the inspections of the property. He averred that most of the occupiers on the revised list had deconstructed their informal dwellings that morning to avoid harassment by the City. According to him, this was done on a daily basis, with the materials being stored elsewhere. In the evenings, the materials were routinely collected and the structures rebuilt. Mr Bantham stated that for all intents and purposes, those on the revised list of names 'remain and have always been in occupation' because the fact that their informal dwellings are dismantled does not detract from the fact that they continue to occupy the property. He expressly denied that there was only one occupied structure on the property on the days of the inspection.

[35] On the question of the revised list of 114 names produced by the respondents, Mr Bantham averred that this was 'an accurate list of *bona fide* occupiers in respect of the property'. Somewhat confusingly, however, he went

on to state that it did not include the names of persons who were not present on the property 'when their names were called'. Elsewhere in his supplementary affidavit, Mr Bantham averred that 'over 300 community members' had been affected by the City's actions.

[36] In his affidavit Mr Bantham did not deny the City's averment that he had been unable to identify his structure or dwelling. He simply did not respond to this allegation. Similarly, save for a bare denial, he did not deal with, or give any explanation for, the City's second averment concerning the inability of anyone present at the inspection to identify their structures from photographs provided.

[37] With the parties at a stalemate, the matter was argued before the high court on an opposed basis.

Judgment of the high court

[38] In its judgment, the high court identified two areas of dispute. The first comprising factual issues. These were: whether each of the respondents was identified on the papers; 'the fact that each of the [respondents] had been removed from the property during the City's demolition operations'; the authority of Mr Bantham to depose to the founding affidavit; and the authority of the instructing attorney to represent the respondents. The second area of dispute identified in the high court judgment was the question whether the demolition operations between 25 September and 30 November 2023 constituted unlawful acts of spoliation.

[39] On the factual issues identified, the high court referred to Mr Bantham's reference in his founding affidavit to 'a series of confirmatory affidavits in which each of the applicants is identified, and in which each of them avers that

they are "residing" at the property'. The high court proceeded in this regard as follows:

'I cross-referenced the confirmatory affidavits *on the court file* with the power of attorney to produce a list of just over 200 people who had both deposed to confirmatory affidavits and signed the power of attorney. *These individuals were, on the face of it, identified on the papers as occupiers of the property whose shacks had been demolished during the seven demolition operations that took place between 25 September and 30 November 2023*, and who had instructed the attorney to bring the spoliation application.' (Emphasis added.)

[40] The power of attorney referred to was that filed in response to the Rule 7 notice referred to earlier. It was not included in the appeal record. The confirmatory affidavits referred to were not annexed to the founding affidavit, nor included in the appeal record. This was an issue when the appeal was argued before this Court. I deal later with what transpired in that regard.

[41] The high court noted that the City had argued that the confirmatory affidavits should not be accepted 'but could not say why'. The high court went further, finding that the City had not placed the contents of the confirmatory affidavits in dispute, nor did it dispute 'except perhaps in the vaguest terms' that each of the respondents before the court 'had identified themselves'. The high court concluded that:

'In these circumstances, I had to accept that the applicants in whose favour I made my order were properly before me, and I annexed a list of their names to my order of 2 August 2024, identifying all of them save Mr Bantham as the second applicants.'

This explains the compilation by the high court of annexure A to its final order and its *mero motu* amendment of the citation of the second respondents.

[42] Having thus identified the second respondents and accepting their locus standi, the high court considered whether they had established a case for relief. Central to the high court's determination was the common cause fact that in its

demolition exercises aimed at preventing land invasions, the City had removed incomplete or vacant structures from the property. The high court considered the principles applicable to the *mandament van spolie*. It stated that the critical question was whether, in this case the respondents had established possession.

[43] While noting that this question, in practice, is highly fact-dependent, the high court followed this Court's approach in *City of Cape Town v South African Human Rights Commission* (*COT v SAHRC*),[3] and the high court's earlier judgment in *Residents of the Setjwetla Informal Settlement v Johannesburg City*[4] (*Setjwetla*). It found that 'a person who has commenced construction of a dwelling on land clearly "holds" both the material out of which the dwelling is constructed and the land on which it is being constructed'.[5] Consequently, at that stage, the remedy of counter-spoliation is not available and cannot justify the demolition of the relevant structures, regardless of whether they are occupied or vacant. In rejecting the City's defence of counter-spoliation, the high court held that:

'The [City] would … have been entitled to repel the [respondents] as trespassers if it had found them on the property with building tools and materials. It may also have been entitled to repel them when they were marking out stands or levelling earth for the construction of their dwellings. But what [the City] could not do – at least not without a court order – was demolish the [respondents'] structures once they were completed or in the process of construction.'[6]

[44] It granted the following relief (in addition to an award of costs in the respondents' favour):

'1 The [respondents'] eviction from the property … is declared unlawful.

[3] *City of Cape Town v South African Human Rights Commission* [2024] ZASCA 110; 2024 (5) SA 368 (SCA).
[4] *Setjwetla Informal Settlement v Johannesburg City* 2017 (2) SA 516 (GJ).

[6] *Bantham HC* para 32.

2 The [City] is directed forthwith to restore the [respondents'] peaceful and undisturbed possession *ante omnia*.

3 The [City] is thereafter interdicted and restrained, whether by itself or through the agency of any other person, from evicting any of the applicants, their spouses, life partners or children from the property, without an order of court specifically authorising it to do so.'

[45] Plainly, from its order, the high court was satisfied that the respondents had adduced sufficient evidence to establish not only possession sufficient to warrant protection under the *mandament van spolie*, but also occupation and protection from eviction by the City without the necessary order under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998 (the PIE Act). Although the order granted an interdict against eviction, the high court's judgment provides no indication that it considered the requirements for that relief. It found only, in closing, that it 'was bound to grant the applicants the spoliation order and the interdict they asked for'.

Annexure A

[46] Critical to this appeal is annexure A. The City takes issue with the high court having taken matters into its own hands in compiling this list of respondents without alerting the parties of its intention to do so and, consequently, incorporating annexure A into the order without giving the parties the prior opportunity to make submissions on the proposed list. The City points out that the 249 names included in annexure A are far in excess of the list of 159 names, and the subsequently reduced list of 114 names of the alleged second respondents that were produced during the inspections on 23 and 24 July 2024. The high court, it contends, gave the respondents far more than even they had contended for when it formulated its own list. In doing so, the high court gave rights of occupation to, what the City called, an unverified group of persons

whose possession and occupation were disputed. It submits that the high court misdirected itself in doing so.

[47] A feature of all the affidavits deposed to by Mr Bantham is that he describes and deals with the respondents as an amorphous group. He refers to 'the community' or 'the occupiers' without providing any details of the group's number, composition or identities. On Mr Bantham's version of events, this amorphous group acted as one in taking possession of the property, suffering dispossession and re-taking possession several times. As at July 2024, according to him, this community was still in occupation of the property ten months later.

[48] As the high court appreciated, relief cannot be sought by, or effectively granted to, an amorphous group. The basic problem before the high court was that there was no indication in the respondents' founding affidavit identifying who the second respondents, individually, were. Without evidence to establish this basic requirement of *locus standi*, the court could not properly determine whether the respondents had made out a case for relief. It was for this reason that the City raised the non-identification of the individual respondents as a point *in limine*.

[49] The high court resolved this problem by using the confirmatory affidavits 'on the court file' to compile annexure A. However, as I noted earlier, only a few confirmatory affidavits were annexed to the founding and other affidavits filed by the respondents. The appeal record included no confirmatory affidavits other than these. Therefore, it was not clear which other confirmatory affidavits the high court had accepted as evidence of the second respondents' *locus standi* and entitlement to relief. At the hearing of the appeal, counsel for the parties were unable to provide ready answers to this question.

[50] Seeking the necessary clarity, the Court issued a directive after the hearing. The directive required the instructing attorneys to consult the record of the high court proceedings and to clarify whether the confirmatory affidavits and power of attorney referred to in paragraph 19 of the high court's judgment had been served and filed and, if so, on what date.

[51] The parties' affidavits filed in response to the directive provided important clarity that was not apparent from the appeal record. Large batches of confirmatory affidavits (the un-annexed confirmatory affidavits) were uploaded onto the Court Online/CaseLines system on 11 December 2023. The extracts included in the respondents' attorney's affidavit reflect that each batch comprised several single confirmatory affidavits. They were uploaded two days after the City had filed its answering affidavit, which was on 9 December 2023. The City's instructing attorney stated in his affidavit that the confirmatory affidavits were never served on the City.

[52] There is no evidence of any covering affidavit explaining why the un-annexed confirmatory affidavits were not completed and filed timeously, and why they were simply uploaded onto the CaseLines system. The City points out that there was a further problem with those confirmatory affidavits that were annexed to the founding affidavit. All but one of these was commissioned on 30 November 2023, four days before the founding affidavit itself was commissioned. The respondents' attorneys do not dispute this.

[53] The respondents' attorney helpfully provides details of what is contained in the un-annexed confirmatory affidavits. First, the name and gender of the deponent. Second, an averment that they reside on the property. Third, the following averment: 'The facts herein contained are within my own personal knowledge and are, unless otherwise appears to the contrary from the context

hereof, to the best of my belief both true and correct.' The latter is a strange formulation of the standard introductory paragraph of a confirmatory paragraph, but I say no more on that. Finally, the averment that: 'I have read the Answering Affidavit of CALVIN BANTHAM and confirm the correctness thereof insofar as it relates to me and the events which had occurred in respect of the aforesaid immovable property.' The applicant's attorney submitted that the reference to 'answering affidavit' was a typographical error explicable by the urgency with which the application had been instituted.

[54] The power of attorney, according to the respondents' attorneys' affidavit, comprised a list of 277 signatures. It is common cause that this was uploaded onto CaseLines on 12 December 2023.

The high court's reliance on annexure A

[55] The question is whether the high court was correct in concluding that it was bound to accept the un-annexed and annexed confirmatory affidavits as evidence that the individuals listed in annexure A were occupiers of the property whose informal dwellings had been demolished by the City. In other words, was it correct in finding that the persons listed in annexure A had satisfied the onus resting on them to demonstrate their entitlement to relief.

[56] In evaluating this question it is important to consider the context within which the case arose. It is not disputed that ongoing land invasion activity is rife in the GRRA. Many people seek to stake a claim to this vacant land, sometimes in competition with others. This much is clear from the several examples of court orders issued by the high court, and referred to by the City, involving land invasion activity in the GRRA. One must be mindful that this may be driven by the backlog in housing solutions for those in need. Our constitution and the PIE Act protect unlawful occupiers from unsanctioned evictions. However, at the

same time, it is a basic requirement of the rule of law that those who claim its protection as unlawful occupiers must establish the *bona fides* of their claims.

[57] This requires that they adduce the evidence necessary to prove their relationship with the property, in respect of both their *locus standi* and the merits of their claim. The onus rests upon them to do so and, as this is a factual inquiry, the trite principles applicable where there are material disputes of fact will apply against them.

[58] The high court compiled annexure A and accepted that the individuals listed had *locus standi*. The primary difficulty with this is that annexure A was generated by the high court and not by the respondents. This primary difficulty reveals a further problem: the very reason that the high court felt it necessary to compile annexure A was because the respondents' case was deficient in this regard. They did not identify the members of the community whom they claimed had *locus standi*. There was no evidence to establish who the second respondents were in the founding affidavit. The relatively few confirmatory affidavits that were annexed were materially deficient as they were prematurely commissioned. The un-annexed confirmatory affidavits were simply uploaded, without service on the City, after it had filed its answering affidavit, and without any explanation. The power of attorney, too, seems to have simply been uploaded. Appended to it were 277 signatures, but these would not have been under oath.

[59] While the respondents' case had commenced as an urgent matter when time pressure might have provided some explanation for these irregularities, this was no longer so by the time its merits were considered, seven months later. The respondents still had not provided any evidence to clarify who the second respondents were, nor any explanation for why the names of the other

respondents were not listed when the application was instituted. On Mr Bantham's version, 'the community' had been in possession and occupation of the property since September 2023. If the community comprised a fixed group of persons, as is implicit in the respondents' case, the individual members of the occupier group would have been known and identifiable from commencement.

[60] The high court accepted as evidence the signatures appended to the power of attorney and the annexed and un-annexed confirmatory affidavits. This was a matter in which the City had pertinently raised the question of the absence of evidence to establish *locus standi* in its answering affidavit. It was for the respondents, and not the high court, to remedy this fundamental deficiency in the respondents' case.

[61] Compounding the problem, the high court conducted its own active forensic exercise in determining who had *locus standi*. It did so because the documents upon which it placed reliance, being the un-annexed confirmatory affidavits and the signatures on the power of attorney, were contradictory. There were more signatures to the power of attorney than there were confirmatory affidavits.

[62] Again, this was an issue that the respondents were required to explain and rectify. It was not open to the high court, in these circumstances, to rectify the respondents' difficulties. It is concerning, too, that the high court did so of its own accord, without involving the parties or providing them with the opportunity to make submissions on its proposed annexure A. The judgment does not explain why it adopted this course. The matter was no longer urgent and there was no need for haste to override the necessity for an open and transparent process.

[63] This was not a case in which the respondents had secured interim relief pending a final determination. Inevitably, the situation on the ground had evolved in the seven months that had elapsed since the matter had been struck from the urgent court roll in December 2023. No doubt this informed the parties' decision to find a via media and jointly to approach the high court for the postponement of the matter.

[64] The *locus standi* of the respondents and the alleged fact of their possession and occupation were disputed issues from the commencement of the litigation. They became more, rather than less, complicated when the parties' efforts to reach consensus in response to the 23 July order stalled. Importantly, both parties filed supplementary affidavits placing facts before the high court that were relevant to the issues in dispute.

[65] It was the respondents' case that as a group they had taken possession and occupation of the property on 18 September 2023. In Mr Bantham's affidavit filed after the inspections conducted pursuant to the 23 July order, he re-stated, on behalf of the second respondents, that they remained in occupation of the property. In their affidavits the respondents averred that they took possession and occupation in September 2023 and, despite the City's unlawful attempts to dispossess and evict them, they nonetheless retained their possession and occupation as at the date of the opposed motion hearing. The substance of the relief they sought was to ensure their continued, undisturbed possession and continued occupation until ordered to leave by a valid court order.

[66] It was this version that the City disputed. In its original answering affidavit, it disputed the authenticity of the photographs relied upon by the respondents as evidence of their alleged occupation, and pointed out their shortcomings. The respondents did nothing to rectify the obvious evidentiary

defects in the photographs. None of them proved that the persons whom the high court accepted had *locus standi* were occupiers of the property, or that they had been evicted from the uninhabited and incomplete structures that the City had demolished.

[67] In the City's supplementary affidavit filed after the inspections in July 2024, it averred that neither Mr Bantham nor any of the other alleged occupiers had been able to point to their structures in the photographs their attorneys had provided. Mr Bantham did not substantially dispute these averments. It was the respondents who bore the onus to prove their allegation that they had, and continued to, occupy the property. The City's version of the facts ought to have prevailed. Yet, the high court accepted the photographs as evidence of the respondents' occupation and their eviction. It failed to consider the City's evidence which plainly called into question the credibility of the averments made by Mr Bantham that the respondents were *bona fide* occupiers of the property.

[68] There was also a marked absence of clarity about the number of second respondents. I have already noted the discrepancy between the un-annexed confirmatory affidavits and the signatures on the power of attorney, which prompted the high court to conduct its own exercise in compiling annexure A. Mr Bantham was never clear on the extent of the group he contended was the community that had become occupiers. Sometimes, he claimed that over 300 people had been affected by the City's actions. Yet he proceeded to produce a list of 159 people whom he claimed were the occupiers. This list was then reduced to 114. This list was attached to the City's supplementary affidavit and not disputed by Mr Bantham in his responding affidavit. In the face of these clear contradictions in the respondents' own evidence, the high court's

conclusion that the individuals listed in annexure A had established their *locus standi* and entitlement to relief is insupportable.

[69] The high court found that the averments made in the annexed and un-annexed confirmatory affidavits were proof that those listed in annexure A were in possession and occupation of the property. I earlier detailed the contents of these affidavits, as confirmed by the respondents' attorney: the bland statement that they were resident on the property, and the confirmation of the facts stated by Mr Bantham. This Court has previously criticised this form of confirmatory affidavit as reflecting the 'slovenly practice' of adducing hearsay allegations in its main affidavit, supported by 'so-called' confirmatory affidavits by witnesses who should have provided the necessary detail, but who merely seek to confirm what has been said in the main affidavit 'insofar as it relates to me' or words to that effect.[7]

[70] In this case, there was a marked absence of any personal information or details provided by the respondents to demonstrate their possession and occupation of the property, and to link them to the structures that were removed. The community and its conduct were explained by Mr Bantham in broad and general terms. When the City raised its point *in limine* challenging the community's composition and the identities of the second respondents, their only response was to upload the un-annexed confirmatory affidavits.

[71] As I stated earlier, this was a case that was litigated in the context of ongoing, concerted land invasion activity by many people. The onus on the respondents was not to establish that they wished to occupy the property, or that they aligned themselves with those seeking to occupy the City's land. To

[7] *Eskom Holdings SOC Limited v Masinda* [2019] SCA 98; 2019 (5) SA 386 (SCA) para 3, citing *Drift Supersand (Pty) Ltd v Mogale City Local Municipality & Another* [2017] ZASCA 118; [2017] 4 All SA 624 (SCA) para 31.

succeed, they had to adduce evidence to support their case that they were the persons who had constructed the unoccupied or unfinished structures that the City had removed and were thus entitled to legal protection of their actual occupation. In the light of the deficiencies in their case, described earlier, the generalised statements in their confirmatory affidavits were not proof of this. The high court erred in accepting it as such.

[72] For the reasons discussed above, I find that the high court erred in concluding that Mr Bantham and the persons it listed in annexure A were entitled to the relief granted. While the high court focused in its judgment on the issue of what conduct constitutes possession and occupation, in the context of counter-spoliation, the respondents' case was flawed at a more fundamental level. For this reason, the high court ought to have dismissed their application.

Conclusion and order

[73] It follows that the appeal must be upheld. The City did not press for costs orders against the respondents in respect of either the high court proceedings or the appeal. I accordingly make the following order:

1. The appeal is upheld.
2. The order of the high court is set aside and is substituted by the following order:

'The application is dismissed.'

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R M KEIGHTLEY

JUDGE OF APPEAL

Appearances

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