



Republic of South Africa

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

Case Number: **16420/2018**

In the matter between:

**ALL THOSE PERSONS MENTIONED IN
ANNEXURE “X”**

Applicant

and

WELBELOOND (PTY) LTD

First Respondent

SHERIFF OF THE HIGH COURT, CAPE TOWN

Second Respondent

MINISTER OF POLICE

Third Respondent

**SOUTH AFRICAN POLICE SERVICES,
WESTERN CAPE PROVINCIAL COMMISSIONER**

Fourth Respondent

**STATION COMMANDER, MILNERTON
POLICE STATION**

Fifth Respondent

CITY OF CAPE TOWN

Sixth Respondent

**J U D G M E N T:
HANDED DOWN ON WEDNESDAY, 26 SEPTEMBER 2018**

MACWILLIAM AJ:

[1] On 7 September 2018 this matter was postponed for hearing to 20 September 2018 on the urgent roll.

- [2] As the duty judge dealing with urgent applications on 20 September 2018, the papers were only brought to me on the afternoon of 19 September 2018. The papers were voluminous and brought to me too late to read them in advance. At that time, I indicated that the parties should approach the Judge President with a view to ascertaining whether the matter could be set down separately before a dedicated judge who had had an opportunity to read the papers in advance.
- [3] Unfortunately, I was advised by the duty judge during the following week's court vacation that it was he who would have to hear the matter, with the result that I heard the matter on 20 and 21 September 2018.
- [4] It was the 9th urgent application which had been set down on 20 September 2018, in circumstances where the papers ran to some 750 pages and five sets of Heads of Argument were filed of record. At the start of his argument, the Applicants handed up a bundle of authorities of 140 pages and referred to a further judgment which ran to 114 pages. Copies of further cases were also handed up during the hearing.
- [5] At the start of his argument, the Applicants' counsel emphasised that the Applicants were seeking to enforce their Constitutional rights and argued that the matter was inherently urgent. He called in aid of his argument the opening passage in the judgment of Fortuin J to the following effect:

*“[1] This is an application in which, at the outset, it is necessary to ask the following pertinent question: What does one do with 60 000 people when neither the owner of the land on which they reside, nor the local authority in whose jurisdiction they live, can or want to accommodate them? The further question that needs to be answered is why are we in this situation? I decided to start this judgment with a quotation from a publication called *Business as Usual* by the Centre on Housing Rights & Evictions, also known as COHRE:*

‘The growing elite fear that shacks (which are nothing more than the homes of the very poor) will be a threat to a “world class” future, and the consequent demand for their annihilation, is a desire to escape the suffering of the past by excluding it from sight and mind and concern rather than by overcoming it by patient collective effort. This injunction to take seriously the history that has produced a situation where shacks are the best housing option for millions of people is an injunction to see poverty - and not the effort of the poor to house themselves - as a social crisis.’”

[6] The Applicants’ counsel further stated unequivocally that in the hearing before me, the Applicants sought a final order against all of the Respondents. That order was in the following terms:

“1. The Applicant’s non-compliance with the Uniform Rules of Court as they relate to forms, service and time periods is condoned and the matter is heard on an urgent basis in terms of Rule 6(12);

2. *Declaring the actions and/or conduct of those Respondents who unlawfully evicted the Applicants from and demolished their homes from ERF 39371 Cape Town, Western Cape, without an eviction order, to be invalid, inconsistent with the Constitution and unlawful;*
3. *Declaring that the Respondents' seizure of the Applicants' personal property, including but not limited to building materials, housing structures, electrical appliances, furniture, clothing and personal effects, is unlawful;*
4. *Directing that the Respondents and/or its duly appointed officials immediately, alternatively, within such period as this Honourable Court may deem fit, restore possession forthwith to the Applicants of the property ERF 38371 Cape Town, Western Cape;*
5. *Directing that the Respondents and/or its duly appointed officials restore possession forthwith to the Applicants of the property in paragraph 3 above;*
6. *Directing that the Respondents provide and/or erect habitable temporary shelters on ERF 38371 Cape Town, Western Cape, and, provide temporary accommodation for the Applicants at the Respondents' expense until such time as these shelters have been provided and/or erected;*
7. *Interdicting and restraining the Respondents from any further unlawful interference with the Applicants' property in paragraph 3 and/or 4 and/or 6 above;*

8. *That the costs of this application be paid by the Respondents, jointly and severally, the one paying the other to be absolved, on an attorney and own client scale."*

[7] Not only that, but this final order was sought in circumstances of extreme urgency, in circumstances where none of the Applicants described where they were staying at the time when their affidavits were signed.

[8] The papers were served in the course of Tuesday, 4 September 2018, and the matter was set down on 7 September 2018.

[9] The Respondents denied that the Applicants had made out a case for urgency which justified the matter being heard as one of such extreme urgency and alleged that there were serious disputes of fact which could not be resolved on the papers. All of the Respondents asked that the application be dismissed with costs. It was argued that in the circumstances of this case, the application amounted to an abuse of process.

[10] Thereafter, only limited time was allowed to the Respondents to file their answering affidavits and the matter proceeded in front of me for final relief 14 days later.

THE APPLICANTS' CASE

[11] The application was brought by 81 persons who were listed in annexure "X" to the Notice of Motion. The Founding Affidavit was

signed by the first of those persons and initially two confirmatory affidavits were filed by two other of those persons. A further 79 confirmatory affidavits were signed over the period 5 to 11 September 2018. The deponents all stated in their affidavits no more than that they were “*residing at Dunoon, Milnerton*”. None of them indicated what their current housing situation was or what property, if any, they had lost or when or in what circumstances they had been evicted.

[12] In the Founding Affidavit, the deponent states that the Applicants were previously backyard dwellers in the Dunoon area and that the living conditions in Dunoon were terrible. As a result, the Applicants moved on to Erf 38371, the First Respondent’s property, in February 2018, where they remained in occupation until April 2018 when the officials of the Second, Fifth and Sixth Respondents demolished their houses and took away their property. They state that at that time, there were approximately 108 housing structures on the land.

[13] During May 2018 they again rebuilt their homes on the property where they stayed peacefully until 21 August 2018, when the Second Respondent and officials of the Fifth and Sixth Respondents came to demolish their houses again. That demolition took place on 24 August 2018 when the Applicants state that all of their belongings were removed. As a result, they erected a large shelter to accommodate 25 of them, but that shelter was also

demolished on 31 August 2018. As a result, they say that they were left destitute and again made homeless during the course of the weekend.

THE RESPONDENTS' OPPOSITION

[14] The picture painted by the Respondents in their affidavits was a completely different one. This picture is best encapsulated in the affidavits filed by the Sixth Respondent, the City of Cape Town. In the affidavit of Barry Robertson, the City's Principal Field Officer of its Northern Anti-Land Invasion Unit (where the land in question falls) he provided a chronology in following terms:

"16. Insofar as the chronology of relevant events is concerned, I confirm as follows:

16.1 As set out above, the Dunoon area has been identified as a so-called 'hot spot' for land invasions and, as a result, the City constantly monitors the area through regular patrols conducted by members of its Land Invasion Unit.

16.2 In and during February 2018, the property in question was observed as being completely vacant and unoccupied. This observation was made by members of the City's Land Invasion Unit, whilst conducting routine patrols of vacant land in the vicinity. In this regard, I refer to the confirmatory affidavit of Heloise Lelani Stark, a senior field officer in the employ of the

City's Land Invasion Unit, delivered evenly herewith. Ms Stark is responsible for monitoring and ensuring that regular patrols of the area are conducted, as well as attending to any complaints that may arise as a result of land invasions and related activity. To the extent that Ms Stark's affidavit bears relevance, I note that it is filed for the purpose of confirming what is stated in relation to the City's observations of the property, at all time material to the present matter.

16.3 The City continued to monitor the property during the course of March 2018. During this time the property remained unoccupied.

16.4 On or about 3 April 2018, the City received complaints regarding a possible land invasion in progress at the property. In response, members of the City's Land Invasion Unit were dispatched to investigate these complaints, and discovered that a number of plots had been 'pegged out' by potential land invaders. For the sake of clarity, I note that it is generally a practice for potential land invaders to peg out a plot prior to any attempt to erect a structure. This 'pegging out' enables persons attempting to invade land to identify the portion and extent of the property which they intend to occupy.

16.5 At that stage, the City took steps to establish contact with the owner of the property (i.e. the First

Respondent) who requested the City's assistance in removing these pegs.

16.6 The City obliged the owner with the above request, albeit that the property is privately owned land. The reason for obliging said request, is for the same reason already advanced in relation to the City's active monitoring of the property.

16.7 On 12 April 2018, the City scheduled a demolition operation in respect of half erected structures in the Dunoon area. This operation was scheduled to take place in relation to City owned land that was in the process of being unlawfully occupied, and on the basis that the action to be taken would have amounted to an act of counter-spoliation.

16.8 At this juncture, it is pertinent to mention that the City, particularly members of its Land Invasion Unit, are well aware that they may not demolish or remove any structure that may have been erected on land (whether it be on City or privately owned land), and which is both completed and occupied. In other words, when a structure, irrespective of the fact that it has been erected unlawfully, is completed and becomes occupied, then an eviction order must be sought in accordance with the provisions of the Prevention of Illegal Eviction from and Unlawful

Occupation of Land Act, No. 19 of 1998 (hereafter 'PIE').

16.9 At the time of the operation scheduled for 12 April 2018, the City received further reports that the property in the question may have become the subject matter of a further potential land invasion. At that stage, members of the City's Land Invasion Unit were dispatched to investigate and assess the extent to which the property had been invaded. Upon attendance at the property, it was established that numerous plots had been pegged out, and that there was 1 half built structure present at the property. Again, the owner of the property was informed of the situation and was advised to take appropriate measures to protect the property in future. The City however, with knowledge of the property owner, proceeded to schedule and operation to remove the pegs, as well as and half built structure. This occurred on 15 April 2018. By the time this operation was carried out, approximately 200 pegs were present at the property, along with four incomplete and unoccupied structures. These pegs and structures were duly removed from the property.

16.10 On 4 May 2018, the City once again conducted routine patrols of the Dunoon area, including the property in question. The property appeared to be vacant.

16.11 On 26 May 2018, and at the conclusion of a further patrol of the Dunoon area, it was established that the property remained vacant, and that no irregularities or unlawful activity had been observed at any of the properties in the vicinity.

16.12 Thereafter, and on or about 6 June 2018, the City received complaints from the owner of the property, pertaining to a further attempted land invasion. The City, once again, dispatched members of its Land Invasion Unit to investigate the complaint, and on 9 June 2018 it was established that illegal structures were in the process of being erected at the property, as well as on adjacent City owned land. At the request of the owner of the property, and on 10 June 2018, the City provided assistance in removing all incomplete and unoccupied structures. At the same time, the City attended to quell the situation on its own land. During the course of this operation, 11 incomplete and unoccupied structure were removed from the property and adjacent City owned land, along with approximately 200 pegs. At this operation, the City's Law Enforcement and Metro Police departments, provided assistance to the Land Invasion Unit. No incidents of violence and/or riotous behaviour on the part of the potential land invaders occurred on that day.

16.13 *With regard to the above, I accordingly refer the Honourable Court to the confirmatory affidavit deposed to by Charlotte Maree, who is the Superintendent responsible for the City of Cape Town, Metro Police: Tactical Response Unit (hereafter 'TRU') filed evenly herewith. I pause to mention that TRU inter alia provides protection services in respect of operations related to land invasions. At all times material to the present matter, Superintendent Maree was responsible for the deployment of the TRU and its officials to the property.*

16.14 *I also refer to the confirmatory affidavit deposed to by Ricardo Martin Petersen, who is a Principal Inspector, employed by the City of Cape Town: Law Enforcement, Anti Land Invasion Unit (hereafter 'Law Enforcement'). At all times material to the present matter, Principal Inspector Petersen was responsible for the deployment of Law Enforcement Officers to the property in question.*

16.15 *On 12 June 2018, the City received further reports from the owner of the property, advising that a land invasion was again in progress. The City did not take any steps to assist the owner in relation to the complaint.*

16.16 *On 17 June 2018, the City again received reports from the owner of the property, save that on this occasion*

it was reported that 5 structures were in the process of being erected at the property. The City, as with the owner's report of 12 June 2018, did not take any active steps to assist the owner in relation to the complaint.

16.17 On 22 June 2018, and according to information at the disposal of the City, a demolition operation occurred at the property. This operation was however arranged by the property owner, and without the intervention of the City's Land Invasion Unit.

16.18 I do however pause to mention, that assistance was indeed provided to the property owner by the City's Law Enforcement Officials, in particular, those falling under the control and/or command of Principal Inspector Petersen. I once again refer to his confirmatory affidavit that is delivered evenly herewith.

16.19 I am advised that on the occasion described above, approximately 118 structures were demolished. This information was conveyed to me by Principal Inspector Petersen, who unfortunately could not comment as to whether any of these structures had been occupied. Presumably, the structures were not occupied as the Applicants have clearly not raised any complaint in relation to this operation.

16.20 In amplification of the above, Inspector Petersen has advised me that to the extent that Law Enforcement was involved in the operation of 22 June 2018, the officials under his control did not attend on the property per se, but merely provided support to the property owner, the Sheriff and members of SAPS, by inter alia:

16.20.1 Monitoring the flow of traffic on Malibongwe Drive (which is situated adjacent to the property in question); and

16.20.2 Providing support to members of SAPS, in the event of possible protest action spilling over from the property and into the streets.

16.21 Save as set out above, Law Enforcement had no other involvement in the demolition operation of 22 June 2018.

16.22 On 28 June 2018, members of the City's Land Invasion Unit observed that 2 structures were in the process of being erected on the property, and endeavoured to contact the owner to alert it to this happening. The City's attempts to establish contact with the owner were unsuccessful. No further attempts were made to address the situation on the part of the City.

16.23 Notwithstanding the events of 28 June 2018, I have managed to ascertain that the property remained vacant thereafter. In this regard, and on or about 12 July 2018, the City conducted an aerial survey of the Dunoon area. The purpose of this survey was to monitor *inter alia*, the extent and growth of informal settlements in the area. Aerial photographs were taken for the purpose of discharging this objective.

16.24 I accordingly attach a copy of a relevant photograph, taken in 12 July 2018, which depicts the Doornbacht informal settlement, as well as the property in question. This photograph is annexed annexures ‘CCT 1’, confirms that the property was indeed vacant and unoccupied as at 12 July 2018. I confirm that the only dwellings and/or structures depicted in the attached photograph are those situated on the (City owned) Doornbacht land.

16.25 According to the City’s knowledge, the property remained vacant until 18 August 2018, when a subsequent patrol of the area by the City’s Land Invasion Unit, revealed that structures were in the process of being erected thereon.

16.26 Further reports were then received on 19 August 2018, with regard to a land invasion in progress of the property. This culminated in a demolition operation being scheduled for 21 August 2018 by the owner of

the property. I can confirm that the City's Land Invasion Unit had no hand in this scheduled intervention, save that some of its officials attended at the property (but remained on the outskirts) purely for the purpose of observing the happenings on the day. The scheduled operation was however to be supported by the City's Law Enforcement Officials, under the command of Principal Inspector Petersen. The extent of this assistance, I am advised, is the same as that which was provided by Law Enforcement on 22 June 2018.

16.27 I am advised further, that as at 21 August 2018 there were approximately 10 half erected and incomplete structures present at the property.

16.28 The scheduled operation however, did not take place and was deferred to 24 August 2018.

16.29 As at 24 August 2018, I am advised that there were 81 structures present on the property, none of which appeared to be both complete and occupied. I pause to mention that in consultation with Principal Inspector Petersen, I was advised that on 24 August 2018 the City's Law Enforcement officials, in fact attended upon the property (as opposed to merely waiting in the road and controlling traffic) for the purpose of supporting SAPS and providing protection to the Sheriff if the need arose.

16.30 *At the time of this operation, and according to Principal Inspector Petersen's reports, there were approximately 20 persons (potential land invaders) at the property and, of the 81 structures referred to above, it appeared to him that these were unoccupied. The officials under the command of Principal Inspector Petersen, however, did not have any active participation in the demolition of these structures.*

16.31 *On 31 August 2018, a further 7 incomplete and unoccupied structures were in the process of being erected at the property. These structures were also demolished without the intervention of the City's Land Invasion Unit, although assistance was again provided to the property owner by the City's Law Enforcement Officials under the command of Inspector Petersen. As with the operation of 22 June 2018, as detailed above, Law Enforcement merely assisted in controlling traffic on Malibongwe Drive, which is adjacent to the property.*

16.32 *I am advised by Principal Inspector Petersen, that according to his observation, which was made from the road adjacent to the property, there appeared to be 7 structures that were in the process of being erected the property. This observation, however, was made from a distance and from the adjacent road.*

16.33 Inspector Petersen could however, confirm, with a great degree of certainty, that there was no 'big' temporary structure erected on the property, and which appeared capable of accommodating 25 people, at the relevant time."

[15] The City further filed affidavits by Mr Meiring, the Manager of the City's Department of Informal Settlements and Backyarders, Ms Stark of the City's Anti-Land Invasion Unit, Mr Petersen, the Principal Officer of Law Enforcement and the Anti-Land Invasion Unit and Ms Maree, a Superintendent of the City's Tactical Response Unit, the latter three confirming the allegations made concerning them and their units in Mr Robertson's affidavit as set out in paragraph 16 above.

[16] In the First Respondent's Answering Affidavit, apart from disputing that a case had been made out for extreme urgency and disputing that the Applicants had ever taken occupation of the land or the structures which had been demolished (which the deponent alleged took place while they were in the course of construction), the First Respondent relied upon a court order which had been granted by this Court on 30 March 2017, as amended by this Court on 22 June 2018, to justify the actions which it took - it alleged that all if its actions had been authorised by orders of this Court.

[17] The order as amended (as in the case of the two orders which preceded it) was addressed to "**THE PERSONS WHOSE IDENTITIES**

ARE UNKNOWN, WHO HAVE AND/OR WHO INTEND TO OCCUPY ERF 38371, CAPE TOWN, WESTERN CAPE". The order as amended, provided:

- "1.1 that the respondents be interdicted and restrained from entering and/or remaining on the property known as Erf 38371 Cape Town, Western Cape ('the property');*
- 1.2 that the respondents be interdicted and restrained from erecting or attempting to erect any form of structure, be it of a temporary or permanent or semi-permanent nature on the property;*
- 1.3 that in the event that the respondents act in a manner contrary to the relief as prayed above, that the applicant, duly supported by law enforcement officers of the City of Cape Town and/or the officers of the South African Police Service, and/or the Sheriff, Cape Town North, insofar as same may be necessary, is authorised to bar them from entry to the property and/or remove them from the property together with their belongings."*

[18] In its Answering Affidavit, the First Respondent went on to allege that:

- "7. After a period of relative peace, on 21 March 2018, approximately 10 shacks and pole structures ('structures') were erected by people on the property. I called Mr Barry Robertson of the CALIU [the City's Anti-Land Invasion Unit].*

The CALIU, under the protection of the metro police and the SAP removed the structures. The applicants admit that they were part of the group of occupiers.

- 8. When removing the structures, on this and on all other occasions, before and afterwards, copies of the court orders were made available at the property by the CALIU and/or the sheriff.*
- 9. On 13 April 2018, people returned to the property and erected another approximately 10 structures. I contacted CALIU once again and the structures were removed in the same manner.*
- 10. On 10 June 2018, approximately 20 structures were erected on the property. I contacted the sheriff and the CALIU removed the structures, again under the protection of the metro police and SAPS.*
- 11. Each time the sheriff implements the orders on the property she erects boards with copies of the relevant court order attached. I annex a photograph illustrating this as Annexure 'AM7'. This is also apparent from the returns of service where it is one of the items for which she invoices Welbeloond. I annex a copy of a return of service received as Annexure 'AM8'.*
- 12. By this stage I had incurred legal costs in the amount of approximately R170 000.00 to obtain the court orders as well as the sheriff's fees.*

13. *On or about 21 June 2018, 118 structures were erected on the property. These structures had been erected over approximately 11 days since the previous removal of structures on 10 June 2018. On this occasion, the sheriff subcontracted Salie Davids Construction (SDC) to remove the structures. This was done at a substantial cost of approximately R110 000.00.*
14. *Around this time the sheriff indicated that she required the variation of the final order and Welbeloond's legal representatives attended to this.*
15. *SDC, on removal of the structures on this and subsequent occasions, took the materials removed to the municipal dump. Typically, there would be very little in the structures so what was removed was, in the main, building materials.*
16. *On Tuesday 21 August 2018, 10 structures were again erected on the property and once again I requested the sheriff to act, which she did, again using SDC as a sub-contractor. By the time SDC removed the structures on 24 August 2018, 10 had grown to 81.*
17. *A week later, on Friday 31 August 2018, 7 structures were removed from the property by SDC following the same protocol.*
18. *Immediately after the removal of the 7 structures on 31 August 2018, people commenced building more structures and at the time of deposing to this affidavit, there*

are 3 structures on the property. I have asked the sheriff to arrange for their removal.

19. *Up to date this situation has cost Welbeloond approximately R440 000.00 in legal fees and other costs. This amount excludes the cost of opposing this application.”*

[19] Apart from certain of the events which took place on 22 June 2018 and in August 2018, the remainder of the factual allegations made in these paragraphs were not dealt with in the Applicants’ Replying Affidavit.

[20] Answering Affidavits to similar effect were also filed by the Second Respondent and the Third to Fifth Respondents (*“the SAPS Respondents”*).

[21] All of the deponents to the Respondents’ affidavits denied under oath that any of the structures which were demolished in the course of 2018 were occupied.

[22] In the circumstances, a significant dispute of fact had been raised by the Respondents.

THE APPLICANTS’ REPLY

[23] A single replying affidavit was signed by the First Applicant on 14 September 2018. Amongst other things, the Applicants alleged that the disputes which had arisen were no more than bare denials which were far-fetched and clearly untenable.

- [24] In the replying affidavit, heavy emphasis was placed on annexures to the SAPS answering affidavits, which referred to “*evictions*” having taken place on the property on 22 June 2018, 21 August 2018, 24 August 2018 and 31 August 2018. Inconsistencies and inadequacies in the various opposing affidavits were also highlighted, and the service on the Applicants of the court orders on which the First Respondent relied, was disputed.
- [25] In essence, the First Applicant, in her Replying Affidavit, restricted the Applicants’ reply to argument that the annexures to the police report and the returns by the sheriff indicated that the Applicants were indeed in occupation of the property. However, none of the Applicants filed affidavits in which they replied to the factual statements under oath by all of the Respondents that no occupation had taken place. One would have thought that, in the result, it was clear that a substantial dispute of fact had arisen which could not be resolved on affidavit.
- [26] It is particularly striking that not one of the other 80 Applicants filed any affidavits at all in reply and none of the Applicants described where they were and what they were doing during the period in question, whether they were in fact in occupation of their own homes, let alone what actually happened on the days described in the City’s chronology (save in relation to the events which took place on 22 June 2018, which is dealt with further hereafter).

THE STRIKING OUT APPLICATION

[27] On the day before the hearing, the Applicants filed an application to strike out paragraphs 16.2 to 16.2, 16.9 to 16.16, 16.22, the first sentence of paragraph 16.26 and paragraph 16.27 of the City's affidavit which I have quoted above, on the grounds that the allegations contained therein were hearsay.

[28] Not only were most of the allegations in these paragraphs confirmed by confirmatory affidavits, but the Applicants had proceeded as a matter of extreme urgency. In this situation, the fact that certain of the factual allegations contained in the City's comprehensive opposing affidavits may not have been covered by each of the confirmatory affidavits filed, is not unsurprising.

[29] In any event, and in particular insofar as the aerial photograph is concerned, the City relied on Section 3(1) of the Law of Evidence Amendment Act, 45 of 1988. In my opinion, the City made out a compelling case for this evidence to be taken into account. In the short time available to the City, the City had put up no less than 5 affidavits and a comprehensive answer, in litigation where a very flimsy case had been made out against it in the first case - the City having disputed any active role in the events of August 2018, which role was not disputed by any factual averment in reply.

[30] On the other hand, what does call for censure, is the Applicants' attempt to hide behind the alleged hearsay nature of the City's

evidence so as to not to answer the allegations of fact which plainly called for an answer by the Applicants. At issue is the occupation by each of the Applicants of the property, and there is no-one better placed to put the correct facts before the Court than them - that is if they had genuine grounds to dispute the facts. Instead, they chose to hide behind the alleged hearsay nature of the evidence. They did not even put up their own version in the alternative, in the event that the City's allegations were not struck out, which is the usual way to deal with disputed evidence of this nature.

THE EVENTS OF 22 JUNE 2018

[31] In reply, the Applicants conceded that the events of 22 June 2018 described in paragraphs 16.17 to 16.21 of the City's affidavit quoted above¹ had occurred and sought to justify their failure to deal with it in their Founding Affidavit in the following way:

“65.1 In this regard I wish to point out that we returned to the property the next day, being 23 June 2018, and restored our structures on the property. This is not contained in my founding affidavit for the following reasons:

65.1.1 at the time we consulted with our legal representatives we were focussed on the events of 21 and 24 August 2018;

¹ In the Applicants' Replying Affidavit, reference is made to paragraphs 16.22 to 16.29 of the City's affidavit, but that reference appears to be an error as those paragraphs did not deal with the events of 22 June 2018 as appears from the paragraphs which are quoted above.

65.1.2 *we were quite anxious as we had been rendered homeless by these events, coupled with the fact that we didn't have any funds either to sustain ourselves nor children;*

65.1.3 *this period seemed inconsequential to us as we were back in our homes the very next day. Such a short time period did not alert us to it being relevant at the time when the founding papers were drawn up, unlike the period during April 2018."*

[32] This response not only lacks credibility, but it is unsupported by any other affidavit. It also seemed strange that of all the events described by the Respondents, the Applicants elected to only deal with, and to admit, this specific one. It seemed strange, until one realises that the Applicants wished to rely on the hearsay police reports concerning the events of 22 June in their Replying Affidavit.

THE ABANDONMENT OF THE CASE BASED ON SPOLIATION

[33] In the course of his argument in reply, and to everyone's surprise, the Applicants' counsel disavowed any reliance on the principles relating to spoliation for the relief which the Applicants seek. He did this notwithstanding the express statement in the Applicants' Founding Affidavit that *"the Applicants are, mainly seeking a relief by way of a mandament van spolie, as the Respondents unlawfully deprived us of possession without following legal procedures"*.

[34] The Applicants now narrowed their argument to one based solely upon the Constitution. In terms of this argument, the Applicants now argued that they were entitled to all the relief which they seek, even if their occupation of the property was unlawful and even if that occupation had not been peaceful.

[35] For this argument, the Applicants' counsel relied, in the first instance, on Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality and Others.²

[36] While their reliance on that case may be relevant to certain of the relief sought by the Applicants, that case does not provide an alternative basis to obtain what amounts to a spoliation order without satisfying the requirements for a *mandament van spolie*.

[37] The Applicants also relied on Schubert Park Residents' Association and Others v City of Tshwane Metropolitan Municipality and Another.³ However, that case once again dealt with a different issue where, in the first instance, the requisites for a *mandament van spolie* had already been established, but it was not possible for the court to order the immediate restoration of possession.

[38] In the result, neither case is authority for the proposition that in the circumstances of this matter, the Applicants had established an entitlement to the final relief sought by them.

² 2007 (6) SA 511 (SCA)

³ 2013 (1) SA 323 (CC)

URGENCY

[39] Insofar as urgency is concerned, the First Respondent points out that by no later than April 2018, if the Applicants were in occupation of their homes and they had been evicted, they would, and should, have proceeded to court for relief, but they failed to do so. Their explanation that they did not know what their rights were at that time, against the history of this matter, is, at best, dubious, especially in the light of the deficient nature of their Replying Affidavit. Plainly, this land has a history of invasions from nearby areas, so much so that the First Respondent went to court to attempt to stop those invasions in 2017 already.

[40] It is not in dispute that all of the Respondents believe that they were acting lawfully in terms of court orders granted by this Court, the first having been granted on 15 March 2017, the second on 30 March 2017 and the third, being the amendment of the second order on 22 June 2018.

[41] As it turned out when their actions were challenged in their Answering Affidavits, and apart from the First Applicant, none of the other Applicants filed affidavits to set out their version of the facts or explain their actions, or their knowledge of the court orders (or the lack thereof).

[42] In any event, the First Respondent alleged that at all times it acted in accordance with the law, as do the remaining Respondents, and

in the light of the existence of the court orders which have not been set aside,⁴ it is not possible to reject their version on motion in these circumstances, let alone to decide this issue as one of extreme urgency.

COSTS

[43] This Court will always have regard to the rights and interests of the poor and underprivileged and will always regard their Constitutional rights in the most serious light. There are countless judgments from the courts of our land which emphasise that.

[44] However, that does not mean that the underprivileged are entitled to abuse court processes.

[45] There can be no doubt that significant disputes of fact were raised by the Respondents, which the Applicants elected to deflect by way of argument in their Replying Affidavit - and they did so at their peril when they failed to address the specific and detailed factual averments made in the Answering Affidavits.

[46] Furthermore, there were simply no grounds made out to justify the extreme urgency with which the Applicants proceeded in this case, as the foregoing analysis indicates.

[47] Moreover, the Applicants persisted with their claims for far-ranging final relief on motion when it was plain that they had failed to lay

⁴ cf *Oudekraal Estates (Pty) Limited v City of Cape Town and Others* 2004 (6) SA 222 (SCA)

any basis to do this, let alone that it was inappropriate to do so in front of the Urgent Court.

[48] When I asked the Applicants' counsel why the Applicants should not be ordered to pay the Respondents' costs, he called in aid the Constitutional Court decision of Biowatch.⁵

[49] However, that principle does not have application in this matter, certainly insofar as the First and Second Respondents are concerned. Insofar as the Third to Sixth Respondents are concerned, significant relief was sought against them on the strength of vague, unsubstantiated allegations which were comprehensively answered in their opposing affidavits. Not daunted, the Applicants persisted with their claim for final relief against all of the Respondents, without attempting in any effective way to deal with the factual allegations made in the answering affidavits.

[50] While in the normal course I would have been very reluctant to make a costs order against indigent applicants, the circumstances of this matter are such that I have decided to accede to the Respondents' request and to order that the costs should follow the result and that the Applicants should pay the Respondents' costs jointly and severally, the one paying the others to be absolved.

⁵ Biowatch Trust v Registrar, Genetic Resources 2009 (6) SA 232 at p. 246 paras [22] and [23]

THE ORDER

[51] In the circumstances, the application is dismissed with costs, such costs to be paid jointly and severally by the Applicants.

MACWILLIAM AJ

DATE OF HEARING:

20 September 2018

21 September 2018

APPEARANCES

For the Applicant:

Adv. A Njeza and Adv. K Adriaanse

Instructed by:

Melanie Stevens Attorneys,
Cape TownFor the 1st Respondent:

Adv. P Myburgh

Instructed by:

Norton Rose Fulbright South Africa,
Cape TownFor the 2nd Respondent:

Adv. D Mitchell

Instructed by:

Marlon Shevelew & Associates,
Cape TownFor the 3rd, 4th, 5th Respondents:

Adv. H Cronje

Instructed by:

State Attorneys, Cape Town

For the 6th Respondent:

Adv. R Wynne

Instructed by:

Timothy & Timothy Attorneys,
Cape Town