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IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NOs: 3329/2013

In the matter between

THE MEC FOR HUMAN SETTLEMENTS & PUBLIC WORKS OF THE PROVINCE OF KWAZULU-NATAL	**APPLICANT**
and	
ETHEKWINI MUNICIPALITY	**FIRST RESPONDENT**
MINISTER OF POLICE	**SECOND RESPONDENT**
JABULANI ZULU AND 389 OTHERS	**THIRD RESPONDENT**

and

CASE NO: 9189/2013

In the matter between

ABAHLALI BASEMJONDOLO AND 30 OTHERS	**1st TO 31ST APPLICANTS**
And	
ETHEKWINI MUNICIPALITY	**FIRST RESPONDENT**
THE MEC FOR HUMAN SETTLEMENTS & PUBLIC WORKS OF THE PROVINCE OF KWAZULU-NATAL	**SECOND RESPONDENT**

JUDGMENT

Date delivered: 20 August 2015

MOKGOHLOA J

[1] The four matters served before me on special motion session i.e 3329/2013, 9189/2013, 4431/2013 and 1762/2014. The first case relates to the confirmation of the rule issued under an interim interdict granted on 28 March 2013, the second relates to leave to intervene in the proceedings under case number 3329/2013, the third relates to an order to compel the reconstruction of the demolished houses, and the fourth relates to an interdict against the eviction of the residents of the Madlala Village.

[2] At the commencement of the hearing I was informed that the third respondents have withdrawn their application under case number 4431/2013 as well as their opposition in the application under 1762/2014. What remains to be dealt with are case numbers 3329/2013 and 9189/2013.

Case number 3329/2013

[3] The applicant (the MEC of the Executive Council for Human Settlements and Public Works KZN Province), is the owner of various immovable properties which are fully described in annexures 'NOM1 to NOM37' of the notice of motion. The properties are earmarked for housing development and other public services.

[4] On or about 25 February 2013, officials of the applicant became aware that one of the properties i.e. Lot 532 Bonela was being unlawfully invaded. The applicant sought the assistance of the South African Police Services (the SAPS), the first respondent's Land Invasion Control Unit (the LICU) and the Metro Police Unit (the MPU) in order to prevent the invasion. The SAPS, LICU and MPU succeeded in preventing the invasion and undertook the removal of all materials

that were taken to the property for the purposes of the construction of the proposed structures.

[5] An affidavit deposed to in isiZulu by one Angel Duma on 5 March 2013 was communicated to the applicant. The affidavit translated in English reads:

> 'Our houses have been demolished and we have no place to stay.
> We tried to secure shelter and now we are being chased away from the forest.
> They say we must figure out what to do next and we have no idea where to go.
> We intend going back to the forest on Monday.'

The content of the affidavit was endorsed and supported by 71 other named persons. The applicant understood the content of the aforesaid affidavit as a proposal to undertake the unlawful invasion of other vacant areas. The LICU succeeded in repelling the proposed land invasion.

[6] On 8 March 2013 the Legal Resources Centre (the LRC), acting on behalf of the occupants of the shacks, addressed a letter to the officials of the applicant and the first respondent. The LRC alleged, inter alia, that the rights of occupation of their clients had apparently been interfered with by officials of the first respondent.

[7] A meeting was convened on 11 March 2013 between the representatives of the applicant, the first respondent and the LRC. The LRC indicated at that meeting that they were ready to launch an urgent application to have their clients' homes restored to the position in which they were prior to its unlawful destruction by members of the LICU and to prevent further demolitions of their clients' homes by the first respondent. It was then agreed that the LRC would provide the applicant with a list setting out the names and identity numbers of their clients for purposes of a verification exercise to establish whether their clients were indeed homeless.

[8] On 13 March 2013 a group of unknown individuals sought to invade the private property of one Mansoor in Cato Manor. Mansoor engaged the services of a private company to repel the invasion. Attempts were made to invade Lot 1010, Bonela (a property owned by the applicant). The applicant engaged the services of the SAPS, LICU and MPU who removed the invaders together with the material they placed on the property. During the night of 13 March 2013 further attempts were made to construct four structures on this property. These structures were however demolished during the morning of 14 March 2013.

[9] On 15 March 2013 the applicant launched an urgent application in this court under case number 2778/2013 for an order interdicting Angel Duma as well as the supporters to her affidavit from invading and/or occupying the properties owned and controlled by the applicant in Cato Manor. **D Pillay J** granted the order prayed and other appropriate relief including an order authorising SAPS and the first respondent to take all reasonable and necessary steps to prevent such invasions.

[10] Subsequent to the above-mentioned order being granted, and on the same day, 15 March 2013, a meeting was held between the LRC, the applicant and the first respondent. The LRC produced a list of persons who were allegedly in occupation of the Lamontville property. During the course of the meeting the representatives of the first respondent expressed concern about the ongoing land invasions. They indicated that all known and existing informal settlements had been audited and properly documented for accommodation purposes. They wanted to know where the persons who claimed to have lived on the Lamontville property came from. It was then agreed that the list provided by the LRC would have to be verified and that those without identity documents would be assisted by the LRC in applying for identity documents. It was further agreed that the LRC would provide the first respondent with information as to where its clients came from. The LRC undertook to do so within a week.

[11] The representatives of the applicant indicated to the LRC that they were not convinced that the persons occupying the Lamontville property were in fact homeless. They noted that in the event that their negotiations with the LRC failed, they would pursue an application for the eviction of the persons in occupation of the Lamontville property. The LRC requested that they be given notice of any such application.

[12] On 28 March 2013 the applicant launched an urgent application under case number 3329/2013. This application was against the first and second respondents respectively. The applicant acknowledged in her affidavit that there were people occupying the Lamontville property but only disputed those people's right to occupy such property. The application was enrolled for 11h30 and was served on the LRC at 11h30.

[13] The application came before **Koen J** on 28 March 2013 who issued a *rule nisi* with an interim interdict in the following terms:

> '1. That a *rule nisi* do hereby issue calling upon the Respondents and all other interested persons to show cause to this Honourable Court on the 11 day of April 2013 at 09H30 or soon thereafter as the matter may be heard why an order in the following terms should not be granted:
>
> 1.1 that the first and second respondents are hereby authorised to take all reasonable and necessary steps:
>
> 1.1.1 to prevent any persons from invading/or occupying and/or undertaking the construction of any structures and/or placing any material upon the immovable properties described in "NOM1-37" to the notice of motion;
>
> 1.1.2 to remove any materials placed by any persons upon the aforementioned properties;

1.1.3 to dismantle and/or demolish any structure or structures that may be constructed upon the aforementioned properties subsequent to the grant of this order.

1.2 interdicting and restraining any persons from invading and/or occupying and/or undertaking the construction of any structures and/or placing of any material upon any of the aforementioned properties;

1.3 that any respondent or respondents or any other party who opposes this application be ordered to pay the costs occasioned thereby jointly and severally, in the event that more than one respondent does so.

2. That paragraph 1.1 and 1.2 hereof shall operate as interim order with immediate effect pending the return date of the *rule nisi.*

3. That the grant of this order shall be advertised:

3.1 by placing a copy of this order together with a translation thereof in isiZulu in prominent places upon each of the aforementioned properties;

3.2 By publishing this order together with a translation thereof in isiZulu in the Ilanga newspaper for a period of three days consequent upon the grant of this order.'

[14] The third respondents anticipated the return date and brought an application for leave to intervene in the proceedings. They complained that the applicant had not cited them in that application notwithstanding the fact that the order sought affected them as it is related to the property on which they lived. They contended that they had a direct and substantial interest in the proceedings and therefore, had *locus standi.* The applicant and the first respondent opposed the application and they argued that the third respondents had no *locus standi* in the proceedings because the interim order did not affect them or their rights since it is only related to invasions or attempted invasions that occurred or would occur after the grant of that order.

[15] The application for leave to intervene came before **Kruger J** who dismissed it. Leave to appeal in the High Court and the petition for leave to

appeal to the Supreme Court of Appeal were dismissed as well. The third respondents, aggrieved by the dismissals, approached the Constitutional Court which granted them leave to appeal and set the appeal down for hearing. The Constitutional Court upheld the appeal and set aside the order of **Kruger J.**

[16] The matter was finally set down for confirmation of the rule granted by **Koen J.** The third respondents opposed the confirmation of the rule on the grounds that the interim interdict

15.1 contravenes section 26(3) of the Constitution Act 108 of 1996;

15.2 authorises ongoing evictions and demolitions absent a further order of Court and absent any consideration of the relevant circumstances particular to the persons affected by such eviction or demolition;

15.3 seeks to condone ongoing non-compliance with the prescriptive requirements and rules of PIE;

15.4 seeks to limit a constitutional guarantee against arbitrary eviction as encapsulated by Section 26(3) of the Constitution; and

15.5 seeks to empower the first and second respondents with the discretionary powers and the oversight function which is reserved solely for the Honourable Court by virtue of the provisions of Section 26(3) of the Constitution.

[17] The third respondents argued that the application should be dismissed and the rule be discharged. The first respondent decided to abide by the decision of this court.

[18] The applicant on the other hand submitted that the application had been set down at the instance of the third respondents with a view to determine the constitutionality and/or validity of the interim order granted by **Koen J**. According to the applicant, the order was granted against the first and second respondents who were duly cited as parties in the application and that there is therefore no basis to set the order aside. The applicant submitted that the fact that the third respondents were not joined in the proceedings, does not render the interim order a nullity.

[19] The applicant referred to a case of *Kayamandi Town Committee v Mkhwaso & Others* 1991 (2) SA 630 (C). In this case, the applicant, a town committee, launched an urgent application against nine named respondents for an order that they vacate and be prohibited from reoccupying certain specified stands under the control of the applicant in the township of Kayamandi, an area outside Stellenbosch. The applicant alleged that a group of approximately 150 persons, among them the residents, had erected shacks on land which had been earmarked for residential development. Service was affected only on first and sixth respondents and the applicant alleged that it was not reasonably practicable to effect services on the other respondents.

The court, accepted that it was impossible for the applicant to identify the persons residing on the stands in question, refused to grant any order against the unidentified occupiers and held that the applicant had other remedies under the Prevention of Illegal Squatting Act 52 of 1951.

[20] The applicant contended that the facts in *casu* are fundamentally distinguishable from those in *Kayamandi*. It submitted that the order in *casu* was sought against a background of orchestrated land invasions which had taken place and which the applicant apprehended on reasonable grounds would continue. Furthermore, that it was impossible in the prevailing circumstances to establish the identities of such prospective invaders. According to the applicant,

the order was not intended to be and is not an eviction order. Its purpose, it contended, was to prevent the threatened unlawful invasion of its properties.

[21] I have considered the facts in *Kayamandi* and cannot find any fundamental distinction with the present case. In my view, the distinction sought to be made appears to be a distinction without any difference in that, the land in *Kayamandi* was earmarked for residential development and the town committee also had fears than an explosive situation may arise if the squatters were not removed. Accordingly, the applicant, as was the town committee in *Kayamandi*, has other remedies under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) and was not entitled to obtain an interdict against the third respondents without them being joined in the proceedings. To do so would contravene the provisions of section 26 (3) of the Constitution Act which requires that prior to an eviction being granted or the demolition of home being authorised, an order of Court must be sought by the applicant and that such order may only be granted after a consideration of all of the relevant circumstances.

[22] Against its argument, the applicant produced an amended order and prayed for same to be confirmed. The amended order reads:

> "1.
>
> "That a Rule *nisi* do hereby issue calling upon the respondents and any and all other interested persons to show cause to this Honourable Court on the day of 2014 at 09h30 or so soon thereafter as the matter be heard why an order should not be granted in the following terms:
>
> 1.1 That the first and second respondents are hereby authorised to take all reasonable and necessary steps to:
>
> 1.1.1 prevent any person from:
>
> 1.1.1.1 invading; and or

1.1.1.2 undertaking the construction of any structures and /or

1.1.1.3 placing any material, subsequent to the grant of this order upon any of the immovable properties ("*the properties*") described in annexure '**NOM1-37**' of the notice of motion;

1.1.2 prevent any persons other than those who are already in occupation and/or who have taken occupation of any of the properties from taking any steps to occupy any of the properties;

1.1.3 remove any material placed by any of the persons foreshadowed by sub-paragraph 1.1.1 hereof form the properties.

1.2 Interdicting and restraining any persons:

1.2.1 from invading and/or undertaking the construction of any structures; and/or

1.2.2 other than those who are already in occupation from placing any material upon,

any of the properties.

1.3 That any respondent or respondents or any other party who opposes this application be ordered to pay the costs occasioned thereby jointly and severally in the event that more than one respondent does so.

> That paragraph 1.1 and 1.2 hereof shall operate as an interim order with immediate effect pending the return date of the Rule *nisi*."

[23] I have serious concerns in respect of the proposed amended order. Firstly, the amended order was attached to the applicant's heads of argument which were served five (5) days after the third respondents had filed their heads of argument and three (3) days before the hearing of the application. The third respondents were not granted an opportunity to file affidavits to answer and respond to the amended order. The applicant does not advance any reason why the proposed amended order was filed late. In fact, no application to amend **Koen J's** order was sought. The applicant did not ask for an adjournment to allow the respondents to respond to the proposed amended order. Instead the applicant submitted that the objection that the interim order is unconstitutional and/or invalid should be dismissed and the proposed amended order should be confirmed.

[24] Secondly, the proposed amended order draws a distinction between invaders and persons who are already in occupation of the properties. There is no guidance to the first respondent, LICU and SAPS as to who is an invader and who was already in occupation of the property. In my view, the proposed amended order will permit the applicant, the first and second respondents to decide who is an invader and not an occupier and then to evict that person at will. This will amount to self-help which is in violation of the provision of s 1(c) of the Constitution 108 of 1996.

[25] Thirdly, none of the occupants of any properties to which the proposed amended order would apply have been joined in the proceedings. The applicant argued that it is impractical to join all occupants of those properties to the proceedings. This argument is untenable. Evictions are governed by the

provisions of PIE. The rules and requirements of PIE are not optional. The Supreme Court of Appeal held in *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA) para 3:

> 'PIE has its roots, *inter alia*, in s 26(3) of the Bill of Rights, which provides that 'no one may be evicted from their home without an order of court made after consideration of all the relevant circumstances'. *Cape Killarney Property Investments (Pty) Ltd v Mahamba and Others* 2001 (4) SA 1222 (SCA) at 1229E. It invests in the courts 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.'

[26] In any event, it is not impractical to join the residents of the property. What is required is not a list of names, but a description of the affected parties.

[27] Although the majority of the Constitutional Court in *Zulu & Others v Ethekwini Municipality & Others* 2014(8) BCLR 971 (CC) refrained from determining the validity of the interim interdict granted by **Koen J**, **Van der Westhuizen J** pointed out that:

> "[44] Eviction is governed by the provisions of PIE, which aim to ensure that the most vulnerable among us are protected. Its rules and requirements are not optional. The interim order authorises evictions – and has been used as authority for at least three evictions - without providing the unlawful occupiers a hearing and ensuring that they were protected to the extent required by law. An order of this nature deprives unlawful occupiers of rights enshrined in the Constitution and recalls a time when the destitute and landless were considered unworthy of hearing before they were unceremoniously removed from the land where they had tried to make their homes.
>
> [45] At the very least, an eviction could not lawfully have been issued without judicial determination that it was just and equitable to do so, considering all

relevant circumstances and having allowed affected persons, especially the most vulnerable, to present evidence of their circumstances in a hearing. The order was issued without consideration of those persons whom it would impact, in obvious contravention of PIE and in direct violation of underlying constitutional rights. I would find that the interim order is unlawful and therefore unconstitutional on the basis that it negates the Madlala Village resident's rights (as well as those unnamed others) under PIE and section 26(3) of the Constitution.

[46] Not for a moment do I doubt the seriousness of illegal invasions. But serious too is the illegal eviction of vulnerable individuals with nowhere else to live. This was the motivation for the enactment of PIE and its protective measures which are intended to ensure due process and sufficient consideration of housing needs prior to eviction. As State organs, the respondents have failed in their constitutional obligations by repeatedly evicting (or, as the case may be, sanctioning the eviction of) the Madlala Village residents without an appropriate court order."

[28] I fully agree with **Van der Westhuizen J**. **Koen J**'s interim order deprives the third respondents and other people affected of their rights enshrined in the Constitution of being heard before they are removed from the land they have tried to make their homes. In my view, the interim order is in contravention of the rules and requirements of PIE and consequently unlawful and invalid and remain to be set aside.

Case number 9189/2013

[29] The applicants in this matter (Abahlali Basemjondolo) are residents of an informal settlement known as Cato Crest which is owned by the MEC (the applicant in case number 3329/2013). They ask for leave to intervene in the present proceedings. It is clear that the applicants' right of occupation is affected by the interim interdict in this case and have to be granted leave to intervene.

[30] The applicants have lived in Cato Crest for a period of about 15 years. During August and September 2013 the eThekwini Municipality (the Municipality) the police evicted the applicants from their homes on a number of occasions. On each occasion, the applicants' homes were destroyed.

[31] The applicants sought and obtained interdicts restraining the Municipality from evicting them without a valid court order. The evictions continued. The applicants then brought an application to hold the Municipality in contempt of the orders restraining it from evicting them. This did not stop the Municipality from continuing with the evictions. In fact, the Municipality in case number 3329/2013 stated that the evictions were as a result of the interim order granted by **Koen J** and that they were merely implementing the provisions of that order.

[32] It is a general rule that an order of court has to be obeyed irrespective of whether it has been wrongly made. An order of court, whether correctly or incorrectly granted has to be obeyed until it is properly set aside (see *Culverwell v Beira* 1992 (4) SA 490 (W) at 494A-C).

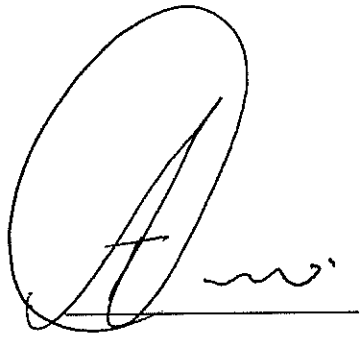
[33] I agree with the Municipality that it is obliged as a state organ to comply with the court orders.

[34] In the result, the following order shall issue:

Order:

1. The applicants in case number 9189/2013 are granted leave to intervene.
2. The interim order granted on 28 March 2013 is set aside and the rule is discharged.

3. The applicant (i.e. MEC) is ordered to pay costs in respect of the third respondents under Case No: 3329/2013 and the applicants under Case No: 9189/2013.



MOKGOHLOA J

COUNSEL

Counsel for the Applicants	:	Adv Gajoo SC/ Adv Abraham
Instructing Attorneys	:	The State Attorney Sixth Floor Metropolitan Life Building Anton Lembede Street, Durban Ref: 551/000079/13/A/P21
Counsel for the 1st Respondent	:	Adv T Norman SC/ Adv Bhangwandeen
Instructing Attorneys	:	Gcolotela & Peter Incorporated 294 Mathews Meyiwa Street Morningside, Durban Ref: Mr Peter/NR/ETH153
Counsel for the 3rd Respondent	:	Adv Broster SC/ Adv Veerasamy
Instructing Attorneys	:	Legal Resources Centre N240 Diakonia Centre 20 Diakonia Avenue, Durban Ref: CRN1086013/D/FBM/FBM/WN/ED
Counsel for the Interveners	:	Adv S Wilson
Instructing Attorneys	:	Seri-Law Clinic 6th Floor, Aspern House 52 De Korte Street Blamfontein, JHB c/o Bowman Gilfillen Unit 3, The Crescent West Westway Office Park Harry Gwala Road Westville Ref: Ms T Nichols/lt/MSER0011
Date of hearing	:	21 May 2015
Date of Judgment	:	20 August 2015