IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

CASE NO : 13904/2011

In the matter between:

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| MTHUNZI ALSON MCHUNU<br>AND 36 OTHERS | First to Thirty-Seventh Applicants |
| ABAHLALI BASEMJONDOLO<br>MOVEMENT SOUTH AFRICA | Thirty-Eighth Applicant |

and

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| THE EXECUTIVE MAYOR, ETHEKWINI<br>MUNICIPALITY | First Respondent |
| THE MUNICIPAL MANAGER,<br>ETHEKWINI MUNICIPALITY | Second Respondent |
| THE DIRECTOR OF HOUSING,<br>ETHEKWINI MUNICIPALITY | Third Respondent |
| THE FURTHER RESIDENTS OF<br>THE RICHMOND FARM TRANSIT CAMP | Fourth Respondent |
| THE MEC FOR TRANSPORT,<br>KWAZULU-NATAL PROVINCE | Fifth Respondent |
| ETHEKWINI MUNICIPALITY | Sixth Respondent |

JUDGMENT
(delivered 19 SEPTEMBER 2012)

HOLLIS AJ [1] On 6 March 2009 *Sishi J* granted an order in Case No 16732/2008, KwaZulu-Natal High Court Durban against the Ethekwini Municipality, hereinafter referred to as the 6th respondent, *inter alia*, in the following terms:

> "1. That the respondents (which include the applicants in this application (my insertion)) will be relocated to the transit camp situated at Richmond Farm for a period of no more than one year.
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> 2. That the 52nd respondent (i.e. the eThekwini Municipality (my insertion)) is directed to investigate the misallocation of houses designated for the respondents in the Khulula housing project forthwith and to correct the misallocation by providing such houses to the respondents, alternatively by providing other houses, commensurate with the houses in the Khulula housing project to the respondents.
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> 3. That the 52nd respondent is directed to serve on the respondents' attorneys of record and file an affidavit setting forth the outcome of its investigation referred to in paragraph 2 above and the actions taken and to be taken by the

52nd respondent in accordance with paragraph 2 within one month of the date of this order and at three monthly intervals thereafter.

4. That should the 52nd respondent fail to comply with the order referred to in paragraph 3 above, that it serve and file an affidavit on the same day setting forth the reasons for its non-compliance.

5. That the respondents are entitled to file a response to the affidavit filed on behalf of the 52nd respondent within 14 days of service of such affidavit on the respondents' attorneys of record.

6. That should any dispute arise as to the compliance on the part of the 52nd respondent with the orders referred to in paragraphs 2, 3 and 4 above, that any (sic) party is entitled to set the matter down for hearing on 5 days' notice, for the determination of that issue.

7. That the respondents reserve their rights after they have relocated to the transit camps and vacated the road reserve by 17 March 2009 to approach this Court for any relief deemed appropriate on proper notice to the applicant

and the 52nd respondent or any other interested party."

I shall refer to this order as "the Court order".

[2] Simultaneously with the granting of the Court order, another order granted by *Sishi J* ordered the eviction of the applicants from their homes at the Siyanda informal settlement, Newlands East, situated inside the road reserve, to make way for the construction of the M577 Road. The eviction proceedings had been instituted by the MEC for Transport (KwaZulu-Natal).

[3] The applicants duly vacated the road reserve, but notwithstanding the terms of the Court order that they would not remain in the transit camp for a period of more than one year, they remain and live there in unsafe and unhygienic conditions. They vacated the road reserve as they had been assured by the Department of Transport in conjunction with the 6th respondent that they would be provided with permanent housing at a housing project situated at Khulula, the construction of which was to be undertaken by the 6th respondent.

[4] The 6th respondent became aware of the order granted against it on or about 23 March 2009. In consequence of this the 6th respondent referred the matter to the office of the Ombudsperson to investigate the misallocation of the houses designated for the applicants. In its report dated 12 February 2010 the Acting Ombudsperson and Head of Investigations concluded, *inter alia*, that the applicants were part of the beneficiaries of the low cost houses entitled to housing because of the construction of M577

Road and recommended to the 6th respondent that houses be allocated to them. The Head: Housing of the 6th respondent was directed to implement the recommendation and advise the Ombudsperson of the date of implementation and the responsible official responsible therefor. Since then correspondence has passed between the attorneys acting for the applicants and the 6th respondent and a meeting was finally held with the Executive Mayor of the 6th respondent on 13 October 2011 in an endeavour to have the 6th respondent comply with the Court order. The Court order, as mentioned, anticipated the relocation of the applicants to low cost housing by 7 March 2010. Unfortunately this did not occur and in consequence these proceedings were launched in December 2011.

[5] The nature of these proceedings is to hold the Executive Mayor, the Municipal Manager and the Director of Housing of the 6th respondent, (hereinafter referred to as the 1st, 2nd and 3rd respondents respectively in their official capacities) accountable for compliance with the terms of the Court order. The reason for this is that they are the functionaries of the 6th respondent and have the power and duty to ensure that the 6th respondent complies with the Court order. The relief sought in these proceedings and amended during argument was formulated as follows:

> "1. It is declared the the first, second and third respondents in their respective capacities as the Executive Mayor, Municipal Manager and Director of Housing of the sixth respondent, are constitutionally and statutorily obliged to

take all necessary steps to ensure that the Ethekwini Municipality ("the Municipality") complies with the terms of the order of his Lordship Mr Justice Sishi handed down on 9 March 2009 under case number 16732/2008 ("the court order").

"2. The first, second and third respondents in their aforesaid capacities are ordered to take all the administrative and other steps necessary to ensure that the Municipality –

2.1 complies, within 60 days of the date of this order, with its obligations in terms of paragraph 2 of the court order either to correct the misallocation of houses designated for the first to thirty-eighth applicants at the Khulula housing project by providing houses at the Khulula housing project to the first to thirty-eighth applicants or to provide other houses, commensurate with the houses in the Khulula housing project, to the first to thirty-eighth applicants;

2.2 complies, within 30 days of the date of this order, with its obligations in terms of

paragraph 3 of the court order to serve on the applicants' attorneys of record and file with the Registrar of this Court an affidavit setting out the outcome of its investigation referred to in paragraph 2.1 above and the steps the Municipality has taken, and will in future take, and when such steps will be taken, to comply with its obligations to provide housing to the first to thirty-eighth applicants;

3. If the first to third respondents in their aforesaid capacities fail to comply with either of the orders in paragraph 2 above, the applicants are given leave to supplement their notice of motion and founding affidavit and to enrol this application on reasonable notice to the respondents, for a further hearing on, and determination of, such complaints of contempt of court against the first to third respondents as the applicants might then advance.

4. The sixth respondent is ordered to pay the costs of this application."

[6] Although Mr Pammenter SC who, with Ms Bhagwandeen

appeared for the 1st, 2nd, 3rd and 6th respondents, did not contend that the 6th respondent did not have a constitutional obligation to provide low cost housing for indigent persons, he submitted that there was no absolute obligation imposed upon the 6th respondent to provide permanent housing.

[7] The nature of the opposition contained in the answering affidavit to the relief sought was firstly to raise two points *in limine*, one relating to *lis pendens* and the other to a misjoinder, but both of these were abandoned and then secondly, to explain what the 6th respondent had done in an endeavour to comply with the terms of the Court order. It had referred the investigation relating to the misallocation of the homes to the Ombudsperson and because of budgetary constraints and the unavailability of units that could be allocated to the applicants, it had been unable to comply with the Court order. It further contended that it would be very unfair to put applicants ahead of other beneficiaries of the 6th respondent's housing projects as this would amount to "queue jumping". I have some difficulty understanding this proposition as the applicants had already been allocated houses in the Khulula project, but had been hijacked in having houses allocated to them through no fault of their own. The 6th respondent also claimed no fault in this regard and said it had been the responsibility of the Department of Transport acting through its own consultants to have homes allocated to the applicants. The thrust of the answering affidavit deposed to by a legal advisor employed by the 6th respondent in its Legal Services Department and duly authorised by the 1st, 2nd, 3rd and 6th respondents (although no confirmatory affidavits were deposed to by the 1st, 2nd and 3rd respondents) was that the

6th respondent was not in wilful default and had not been neglecting its obligations and had attempted to carry out its obligations in terms of the Court order.

[8] Mr Pammenter, for the first time in heads of argument filed on behalf of the 6th respondent, raised a further defence, namely that the Court order was a nullity as it had been granted in circumstances in which the 6th respondent had been advised in the eviction proceedings instituted by the MEC for Transport (KwaZulu-Natal) that no relief was being sought against it.

[9] In those proceedings (Case No: 16732/2008) the 6th respondent had been cited as the 52nd respondent and had been served with the application papers pursuant to the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, No 19 of 1998 commonly referred to as the PIE Act, more particularly in terms of section 4(2) thereof.

[10] Mr Budlender SC, who appeared with Mr Wilson and Ms Lewis for the applicants, submitted that a Court order is a nullity in terms of the common law only in three types of cases, namely:

(a) where there was no proper service or the party concerned was not properly cited;

(b) where the Court lacks jurisdiction; and

(c) where the attorney lacks a proper mandate.

[11] For this submission he relied upon the judgment in *Tödt v Ipser* 1993(3) SA 577 (AD) at 589 C-D. The position postulated on behalf of the 6th respondent did not fall into any of these categories and accordingly the

Court order was not a nullity.

[12] Mr Pammenter, on the other hand, relied upon the principle expounded in *Lewis and Marks v Middel* 1904 TS 291 at 303 for the submission that the Court order was a nullity. In my view, that case is distinguishable as the legal proceedings in that matter had been initiated against a party who should have been cited and served with notice of the proceedings before an order was made against it. In that case no notice of the Land Commission's sitting had been given as required by statute. Even though the 6th respondent was advised that no relief was being sought against it by the applicant (which would have been the MEC for Transport (KwaZulu-Natal)), this did not mean that a Court was entitled to make an order in terms of the provisions of PIE, namely section 4(12) thereof which provides as follows:

> "Any order for the eviction of an unlawful occupier or for the demolition or removal of buildings or structures in terms of this section is subject to the conditions deemed reasonable by the court, and the court may, on good cause shown, vary any condition for an eviction order."

Section 6(6) of PIE makes the provisions of section 4(12) applicable to an organ of state.

[13] A further ground of nullity submitted by Mr Pammenter, was that the Court lacked jurisdiction as the 6th respondent had not provided details to the Court of the units that were available and therefore the Court did not have the power to order the 6th respondent to make housing available to the

applicants. It clearly would have been desirable for the 6th respondent to have submitted an affidavit by a responsible official dealing with the position of the applicants' plight, but its failure to do so, did not, in my view, prevent the Court from making the order it did.

[14] As was stated by *Wallis JA* in a very recent, as yet unreported, Supreme Court of Appeal judgment in *The City of Johannesburg v Changing Tides 74 (Pty) Limited and Others*, Case No 735/2011 at paragraph 54, such judgment being delivered on 14 September 2012:

> "… The City needs to be actively engaged in addressing the situation where people are living in squalid conditions such as these, and should be as concerned as the owner and the occupiers to resolve that situation as soon as possible. The legal representatives of the parties must also be mindful that what is being sought is a solution to a social problem and conduct the litigation with that in mind."

Although in that case the issue related to the provision of temporary emergency accommodation for the evictees, the principle, in my view, is equally applicable as the 6th respondent should have been far more active than it was in resolving this matter, more particularly in the light of the Court order.

[15] Mr Pammenter had no answer to the question why, once the 6th respondent had become aware of the order just over a fortnight after it

had been granted, it had been taken no steps to have the Court order set aside on the basis that it had been granted by default in its absence. In its answering affidavit, the 6th respondent's complaint is not that an order should not have been granted against it, but the timeframe stipulated would have been impossible to comply with and should have been extended. Be that as it may, I do not consider for the aforegoing reasons that the Court order granted by *Sishi J* was a nullity. Furthermore, as stated by Goldstein, J in *Culverwell v Beira 1992 (4) SA 490 (WLD) at 494A-C* all orders of court, whether correctly or incorrectly granted, have to be obeyed until they are properly set aside. This principle was endorsed in *Clipsal Australia (Pty) Ltd and others v GAP Distributors and others 2010 (2) SA 289 (SCA) at paragraph 22 on 298-299*.

[16] In these circumstances, the 6th respondent is and was bound by the Court order. In terms of section 165(5) of the Constitution, a Court order binds the 6th respondent as an organ of State to adhere to it. As the Constitutional Court has held, the State must lead by example in its conduct. In *Mohamed and Another v President of the Republic of South Africa and Others* 2001(3) SA 893 (CC) on page 921 at para 68, the celebrated words of *Justice Brandeis* in *Olmstead et al v United States* were endorsed by the Court as follows:

> "In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously … Government is the potent, omnipresent teacher. For good or for ill, it teaches

> the whole people by its example … If the government becomes a law-breaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy."

This principle applies to the 6th respondent as an organ of State. Furthermore, in *S v Mamabolo (E TV and Others Intervening) 2001 (3) SA 409 (CC)* Kriegler J stated at paragraph 63 on 438 the following:

> "They, as servants of the State, were obliged to be exemplary in their obedience to court orders, subject of course to the right that existed to take the order on appeal. Moreover, the Constitution recognises and expressly commands not only exemplary conduct by the Executive and Legislative branches of the State, but the active support of all organs of State in s 165(3), (4) and (5)."

and at paragraph 65 on 438:

> "It would have been a very serious matter indeed, calling for speedy and decisive action, if the order had actually been defied. The spectre of executive officers refusing to obey orders of court because they think they were wrongly granted is ominous. It strikes at the very foundations of the rule of law when government servants presume to disregard orders of court. ..."

[17] I asked Mr Pammenter if I found that the Court order was not a nullity, what type of order should be made against the 6th respondent to compel the 6th respondent to provide the required low cost housing to the applicants. Understandably he was not able to furnish an alternative order to the one contended for by the applicants other than submit that the timeframes of 60 and 30 days should be extended. Mr Pammenter emphasised the budgetary constraints of the 6th respondent and the unavailability of units in housing projects commensurate with the units in the Khulula housing project.

[18] Unfortunately the answering affidavit deposed to on behalf of the 1st, 2nd, 3rd and 6th respondents by a legal advisor in the 6th respondent's employ, lacks particularity in regard to:

(a) the 6th respondent's budgetary constraints;

(b) the reason why the 6th respondent did not implement the recommendation made by the Ombudsperson more than two and a half years ago;

(c) the position when circumstances change after a person who has been allocated housing does not take it up, for instance where the person is unable to secure funding, dies or finds alternative accommodation;

(d) whether the full amount allocated by the Province for housing to the 6th respondent in the relevant financial years 2010, 2011 and 2012

had been fully utilised; and

(e) why particular provision for additional funding in those budgets could not have been made to cater for the applicants' situation.

Even accepting there is a huge backlog of some 220 000 units, this application relates to a limited number of 37 units. It is indeed unfortunate that the 1st, 2nd and 3rd respondents did not depose to affidavits setting out the position to assist the Court to make an order.

[19] I find that the applicants have made out a case for the relief sought but before making an order, as amended, extending the time periods, there is the question of costs.

[20] Mr Pammenter conceded that if the application was granted a cost order should make provision for the employment of two counsel. Mr Budlender, however, submitted that because the 6th respondent had ignored the Court order over many years, had conducted the litigation in a cynical manner and had shown callous disregard for the desperate situation in which the applicants find themselves, a punitive order of costs should be made. I have carefully considered this submission, but I do not think that at this stage a punitive order is justified. It is correct that the officials of the 6th respondent have failed to comply with the terms of the Court order, but I am unable at this stage to say they have ignored it wilfully. Their efforts to comply with the Court order have fallen far short of what should have been done. I point out further that the relief sought in the application contemplated only the granting of party and party costs. It may have been that Mr Budlender, in claiming an order for punitive costs, was motivated by

the 6th respondent raising the defence of the alleged nullity of the order at the eleventh hour. Be that as it may, I consider costs should only be awarded on a party and party basis.

[21] Before making the order, I record my appreciation to counsel representing the parties for their helpful heads of argument without which it would not have been possible to deliver this judgment within two days of the hearing. In conclusion therefore, I make the following order:

1. It is declared that the 1st, 2nd and 3rd respondents in their respective capacities as the Executive Mayor, Municipal Manager and Director of Housing of the 6th respondent, are constitutionally and statutorily obliged to take all necessary steps to ensure that the Ethekwini Municipality ("the Municipality") complies with the terms of the order of his Lordship Mr Justice Sishi handed down on 9 March 2009 under case number 16732/2008 ("the court order").
2. The 1st, 2nd and 3rd respondents in their aforesaid capacities are ordered to take all the administrative and other steps necessary to ensure that the Municipality:
    2.1. complies, within 3 months of the date of this order, with its obligations in terms of paragraph 2 of the court order <u>either</u> to correct the misallocation of houses designated for the 1st to 38th applicants at the Khulula housing project by providing houses at the Khulula housing project to the 1st to 38th applicants <u>or</u> to provide other houses, commensurate with the houses in the Khulula housing project, to the 1st to 38th applicants;

2.2. complies, within 2 months of the date of this order, with its obligations in terms of paragraph 3 of the court order to serve on the applicants' attorneys of record and file with the Registrar of this Court an affidavit setting out the outcome of its investigation referred to in paragraph 2.1 above and the steps the Municipality has taken, and will in future take, and when such steps will be taken, to comply with its obligations to provide housing to the 1st to 38th applicants;

3. If the 1st to 3rd respondents in their aforesaid capacities fail to comply with either of the orders in paragraph 2 above, the applicants are given leave to supplement their notice of motion and founding affidavit and to enrol this application on reasonable notice to the respondents, for a further hearing on, and determination of, such complaints of contempt of court against the 1st to 3rd respondents as the applicants might then advance.

4. The 6th respondent is ordered to pay the costs of this application, such costs to include the costs occasioned consequent upon the employment of two counsel where this occurred.

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| **COUNSEL FOR THE APPLICANTS:** | Mr G. BUDLENDER S.C.<br>MR S. WILSON<br>MISS N. LEWIS<br>**Instructed by:**<br>SERI LAW CLINIC<br>c/o NICHOLS ATTORNEYS |
| **COUNSEL FOR 1ST, 2ND, 3RD AND 6TH RESPONDENTS:** | MR C. J. PAMMENTER S.C.<br>MISS N. BHAGWANDEEN<br>Instructed by:<br>GCOLOTELA & PETER INC. |
| **DATE OF HEARING:** | 17 SEPTEMBER 2012 |
| **DATE OF JUDGMENT** | 19 SEPTEMBER 2012 |

# IN THE KWAZULU-NATAL HIGH COURT, DURBAN
# REPUBLIC OF SOUTH AFRICA

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CASE NO : 13904/11

DATE : 19 SEPTEMBER 2012

M A MCHUNU & OTHERS

versus

MEC FOR TRANSPORT & OTHERS

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BEFORE THE HONOURABLE MR ACTING JUSTICE HOLLIS

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ON BEHALF OF APPLICANT : MR T NICHOLS

ON BEHALF OF RESPONDENT : MR N BHAGWANDEEN

INTERPRETER : NOT REQUIRED

EXTRACT
JUDGMENT

REPORT ON RECORDING

CLEAR. Thank you.