NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
EAST LONDON CIRCUIT LOCAL DIVISION

Case No. EL 738/2020

In the matter between:

SIMPHIWE FANI & 77 OTHERS
(WHO FOR CONVENIENCE ARE COLLECTIVELY
REFERRED TO AS "RESIDENTS OF FARM
GREYDELL (AIRPORT PARK)") **"First Applicant"**
VATHISWA JACK **Second Applicant**

and

NATIONAL DEPARTMENT
OF PUBLIC WORKS **First Respondent**
SHERIFF OF THE COURT **Second Respondent**

JUDGMENT

HARTLE J

[1] In this urgent application I issued an order on 21 September 2020 in the following terms:

"[1] The preliminary point of *locus standi* raised against the first applicant is determined in favour of the first respondent.

[2] The "first applicant" is invited, in view of the allegation that residents who it purports to represent have been unlawfully evicted from their homes, to encourage those concerned to seek their separate joinder (including himself) to these proceedings, or to substitute a properly vouched for group under the provisions of section 38 (c) or (d) of the Constitution in place of the presently cited first applicant.

[3] The determination of the first respondent's second preliminary objection (as against the second applicant who is the only party still before this court) is to stand over for determination at the hearing.

[4] The application is postponed to 5 October 2020, to be heard at the East London Tribunal at 11h30.

[5] Prayers 2 and 3 of this court's order dated 1 August 2020, read together with prayers 4 and 5 of the subsequent order dated 4 August 2020, are to remain operational pending the hearing and final determination of the application.

[6] The costs are reserved."

[2] My reasons for doing so were provided in a brief judgment delivered together with the order, which is attached for the reader's convenience.

[3] By the time the matter resumed before me on 5 October 2020, an application for the joinder of Simphiwe Fani and 77 others had been filed. The first respondent did not oppose this application, neither did it supplement its papers intimating that it did not wish to delay the matter any further. Instead Mr. Ntsaluba who appeared together with Mr. Nabela on behalf of the respondents submitted in supplementary heads of argument filed on behalf of their clients that the matter was ready for hearing and final determination of the remaining issues in the application.

[4] In the light of the aforesaid concessions made by counsel, I granted an order as prayed in the application for joinder in the following terms:

1. Simphiwe Fani and 77 others, whose identities are annexed hereto as annexure “JF 1” and “JF 2” are joined as “first applicant”; and
2. Leave is granted to the applicants to amend the headings of all the documents filed of record in the main application in order to reflect such joinder.

[5] The respondents’ concerns of the applicants’ legal standing now having been resolved, the abiding question which remains for determination is whether the applicants (as defined after the joinder application) were unlawfully evicted *from their homes* at Airport Park on 27 July 2020[1] by a demolishment operation carried out by the second respondent on the instructions of the first respondent and, if so, whether they are entitled as a result to the orders of constitutional restoration, reparation and or compensation prayed for.

[6] The first respondent in opposing the application asserts that the applicants have failed to make out a case for any of the relief sought in the Notice of Motion.[2]

[7] It especially denies the evictions contended for, claiming instead in an answering affidavit deposed to on its behalf by Mr. Vuyani Maqetuka, Head of Security employed by it responsible to oversee all issues of the Department’s security in the Eastern Cape, that it only demolished certain “incomplete and unoccupied structures” on its property in an attempt to address a longstanding issue of land invasion and illegal occupation thereof. It pleads further that its

[1] It is common cause that this is the date upon which the second respondent, acting on the instructions of the first respondent, demolished 108 structures at Airport Park which is the property of the first respondent. 19 of them were built of brick and mortar. The remaining 89 structures were described as “shacks”.

[2] It is not clear that the second respondent, who also opposes the application, does so in her own right. The impression gleaned from the context of the opposing papers is that she has thrown her weight behind exonerating the first respondent of the claimed illegality.

authority to have done so arises from a prior order granted by this court which operates against such unlawful invaders.

[8] I should refer to the terms of that order ("the prior order") to give a context to the present proceedings. The order was granted by Stretch J on 14 March 2017 as reads as follows:

> "1. The respondents, including anyone else acting on their behalf and/or at their behest, are hereby interdicted and restrained from entering or commencing to occupy and/or permitting to be occupied on their behalf or any part or portion of the remainder of Portion 1 of the Farm Greydell 871, East London (previously also commonly known as Grey Dell Outspan) ("the property");
> 2. The respondents, including anyone else acting on their behalf and/or at their behest, are hereby interdicted and restrained from demarcating any sites for whatever purpose and/or commencing or continuing to erect and/or occupy and/or permit to be occupied on their behalf any structure on the property;
> 3. The Sheriff of the Court, with the assistance, where required, of the South African Police Service, is hereby directed, authorized and/or empowered to take any and all necessary and reasonable steps to dismantle and/or demolish any structure erected on the property in contravention of this Order."

[9] A cursory look at the papers filed by the first respondent in support of the prior application is that that order was targeted at unidentifiable respondents described in the following terms:

> "The respondents are at the present moment unidentifiable but they constitute a group of persons who are members of the public and who, as will become more apparent in this affidavit, either have attempted, or are threatening or may even be inclined to try to occupy the remainder of Portion 1 of the Farm Greydell 871, East London. Their respective addresses for service of process in this matter are unknown to the applicant, hence a separate application was made to the above Honourable Court for leave to

serve the founding papers herein on them by means of substituted service. Such form of service was authorized by the honourable court on 8 November 2016."

[10] The background to and purpose of the prior application appear from paragraphs 12 and 13 of the founding papers filed in support of the prior application as follows:

"Over the years the property has been invaded by illegal occupiers who have erected structures on the property and have taken up residence at various times. Plans to relocate such illegal occupiers are afoot and in this regard I can confirm that such plans include various departments at both the National and Provincial levels which are concerned with human settlements and related issues as well as the Buffalo City Metropolitan Municipality. For that reasons as well as for the reasons of the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act No 19 of 1998 eviction of such illegal occupiers is not being sought in these proceedings.

Rather this application seeks to arrest, stop and prevent further invasion of the land on the property which has not yet been occupied illegally."

[11] The circumstances that necessitated the prior application were described thus:

"14. As indicated above, over a period of time which now spans several years the property has been invaded by illegal occupiers who have erected structures on the property and now reside on the property.

15. The invasion and illegal occupation of the land on the property has continued unabated and has assumed the character of a continuing invasion by new land invaders all the time. There is continuing demarcation of new sites on the land as well as concomitant clearing of the forest on the outskirts of the existing settlement, which is itself illegal although, and which, as indicated above, does not form part of the present application ….

> 16. The East London Airport is surrounded by illegal settlements to its western side, where the property in issue herein is situated, the northern and the north-eastern sides. The applicant is concerned only with the western side as it does not own the land bordering the airport on the northern and north-eastern sides. One thing is certain, though, and that is the obvious fact that the settlements pose a serious socio-economic catastrophe which can only be described as a disaster waiting to explode at any time. For its part, the applicant seeks to prevent further expansion of the catastrophe so that planning which involves other stakeholders stands a chance of becoming both meaningful and manageable. As indicated above, the applicant is working with other stakeholders to address the issue of settlement of the illegal occupiers already on the property but this situation needs to be stabilized first by preventing further invasion."

[12] The then anticipated order was published in one edition of the Daily Dispatch and Isolezwe Newspapers respectively pursuant to the antecedent order authorizing substituted service of the application papers on the respondents (as defined in that application) in such manner.

[13] The first respondent advised that it would erect notice boards on the property that was under threat of invasion and would display the notice of motion and final order as was then being sought on it. It was further envisaged that the method of publication would give the defined respondents or any other sufficiently interested persons (read members of the public) notice of the application and that if so inclined, such persons would have the opportunity to oppose the application and to know the source of authority of the sheriff (and the police if necessary) in removing them and their structures from the property.

[14] Whether they did so or not is unclear but self-evidently a period of three years had expired since the grant of the prior order by the time the demolishment operation mandated by it was carried out by the second respondent on its property.

[15] Before dealing with the alleged evictions under discussion here it is important to note that the effect of the prior order is both retrospective and prospective. I believe from the stated purpose of the originating application that the first respondent also intended it to act prospectively against invaders who might after the issue of the prior order illegally occupy the property. But inasmuch as it purports to permit the second respondent or the South African Police Service (where required) without further ado to dismantle and/or demolish any structure erected on the property if such are people's homes, even if in contravention of the prior order, such a purport cannot be countenanced. From a clear reading of the first respondent's founding affidavit filed in the prior application (which is relevant to set the tone for what happened on 27 July 2020) the first respondent was even then concerned with illegal *occupiers* who had "*taken up residence"* on the property at various times and it was only under the unique circumstances sought to be described by the Department at the time (namely a plan of relocation and consultation with key role player that had as its objective the provision of accommodation elsewhere) that the first respondent claimed it was unnecessary to seek the eviction of these occupiers, thus avoiding the need to invoke the procedure provided for in the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, No. 19 of 1998 ("the PIE Act"), which is a necessary step before obtaining an eviction order. This much it appears to recognize but seeks to distance itself presently from an expected recourse to the dictates of the PIE Act on the basis that nobody by the exercise of the demolishment operation was evicted from their homes.

[16] The application of the PIE Act is restricted to those instances in which persons unlawfully occupy premises for residential purposes because the object is focused on protecting an occupant from being unjustly displaced from his home. It is in every matter a question of fact whether the contested property

from which he is sought to be evicted is in fact his "home" or constitutes a dwelling.[3] The reason for this is that the PIE Act has its origin in s 26(3) of the Constitution which provides that:

> 'No one may be evicted from their home, or have their home demolished, without an order of court made after considering all relevant circumstances. No legislation may permit arbitrary evictions.'

[17] The dismantling or demolishing of a residential structure is tantamount to an eviction and calling it by another name does not change the fact that it remains an eviction. In section 1 of the PIE Act "evict" means to deprive a person of occupation of a building or structure, or the land on which the structure is erected, against his or her will, and "eviction" has a corresponding meaning. "Building or structure" includes any hut, shack, tent or similar structure or any other form of temporary or permanent *dwelling or shelter.*

[18] Essentially how arbitrary evictions are avoided is by strict application of the relevant provisions of the PIE Act peculiar to this matter, which for convenience are set out below:

> **"2. Application of Act**
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> This Act applies in respect of all land throughout the Republic.
>
> **4. Eviction of unlawful occupiers**
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> (1) Notwithstanding anything to the contrary contained in any law or the common law, the provisions of this section apply to proceedings by an owner or person in charge of land for the eviction of an unlawful occupier.

[3] The PIE Act does not apply to buildings or structures which do not perform the function of dwellings or shelter for humans, in particularly commercial premises. See in this regard the definition of 'building or structure" in the Act as well as Ndlovu v Ngcobo, Bekker and Anotrher v Jika (2002) 4 All SA 384 (SCA) paragraph [20]. See also Shoprite Checkers (Pty) Ltd v Jardim 2004 (1) SA 14 (O) 502 at 504C-D; Dries v Venter 2005 (6) SA 67 (T) at paragraph [9]; Venter v Van Wyk [2005] JOL 15796 (T) at paragraphs [18] and [19]; Afzal v Kalim, unreported judgment of Plasket J in ECG case no 4165/12 dated 9 July 2013 at paragraphs [24] and [25].

(2) At least 14 days before the hearing of the proceedings contemplated in subsection (1), the court must serve written and effective notice of the proceedings on the unlawful occupier and the municipality having jurisdiction.
(3) Subject to the provisions of subsection (2), the procedure for the serving of notices and filing of papers is as prescribed by the rules of the court in question.
(4) Subject to the provisions of subsection (2), if a court is satisfied that service cannot conveniently or expeditiously be effected in the manner provided in the rules of the court, service must be effected in the manner directed by the court: Provided that the court must consider the rights of the unlawful occupier to receive adequate notice and to defend the case.
(5) The notice of proceedings contemplated in subsection (2) must—
(a) state that proceedings are being instituted in terms of subsection (1) for an order for the eviction of the unlawful occupier;
(b) indicate on what date and at what time the court will hear the proceedings;
(c) set out the grounds for the proposed eviction; and
(d) state that the unlawful occupier is entitled to appear before the court and defend the case and, where necessary, has the right to apply for legal aid.
(6) If an unlawful occupier has occupied the land in question for less than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women.
(7) If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women.
(8) If the court is satisfied that all the requirements of this section have been complied with and that no valid defence has been raised by the unlawful

occupier, it must grant an order for the eviction of the unlawful occupier, and determine—

(a) a just and equitable date on which the unlawful occupier must vacate the land under the circumstances; and

(b) the date on which an eviction order may be carried out if the unlawful occupier has not vacated the land on the date contemplated in paragraph (a).

(9) In determining a just and equitable date contemplated in subsection (8), the court must have regard to all relevant factors, including the period the unlawful occupier and his or her family have resided on the land in question.

(10) The court which orders the eviction of any person in terms of this section may make an order for the demolition and removal of the buildings or structures that were occupied by such person on the land in question.

(11) A court may, at the request of the sheriff, authorise any person to assist the sheriff to carry out an order for eviction, demolition or removal subject to conditions determined by the court: Provided that the sheriff must at all times be present during such eviction, demolition or removal.

(12) 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.[4]

6. Eviction at instance of organ of state

(1) An organ of state may institute proceedings for the eviction of an unlawful occupier from land which falls within its area of jurisdiction, except where the unlawful occupier is a mortgagor and the land in question is sold in a sale of execution pursuant to a mortgage, and the court may grant such an order if it is just and equitable to do so, after considering all the relevant circumstances, and if—

[4] It is not insignificant in my view that a court must grant an order for the demolishment and removal of the building or structures that were the subject of the illegal occupation and also indicate the conditions deemed reasonable by it for such purposes.(See sub-sections (10) to (12)) Self evidently the act of breaking down a dwelling takes the act of evicting an occupier from it to a higher, permanent and in my view mostly irreversible level, especially if the dwelling is constructed of bricks and mortar.

(a) the consent of that organ of state is required for the erection of a building or structure on that land or for the occupation of the land, and the unlawful occupier is occupying a building or structure on that land without such consent having been obtained; or

(b) it is in the public interest to grant such an order.

(2) For the purposes of this section, "public interest" includes the interest of the health and safety of those occupying the land and the public in general.

(3) In deciding whether it is just and equitable to grant an order for eviction, the court must have regard to—

(a) the circumstances under which the unlawful occupier occupied the land and erected the building or structure;

(b) the period the unlawful occupier and his or her family have resided on the land in question; and

(c) the availability to the unlawful occupier of suitable alternative accommodation or land.

(4) An organ of state contemplated in subsection (1) may, before instituting such proceedings, give not less than 14 days' written notice to the owner or person in charge of the land to institute proceedings for the eviction of the unlawful occupier.

(5) If an organ of state gives the owner or person in charge of land notice in terms of subsection (4) to institute proceedings for eviction, and the owner or person in charge fails to do so within the period stipulated in the notice, the court may, at the request of the organ of state, order the owner or person in charge of the land to pay the costs of the proceedings contemplated in subsection (1).

(6) The procedures set out in section 4 apply, with the necessary changes, to any proceedings in terms of subsection (1).

8. Offences and private prosecutions

(1) No person may evict an unlawful occupier except on the authority of an order of a competent court.”

[19] In Patrick Mpaka and Others v KSD Local Municipality and Department of Rural Development and Rural Reform[5] the Department had obtained an order against the applicants restraining and/or interdicting them "and others" from demarcating, selling or dealing with its land in any manner whatsoever. The applicants were also directed to demolish and remove all structures, fences or anything erected on the invaded land of the applicant to which end the deputy sheriff was granted authority to demolish and remove any structures built by the respondents thereon in the event that they failed to demolish or remove such structure within ten days of the order. The purported execution of the order, four years down the line, resulted in structures constructed by the applicants being demolished. The High Court was approached on an urgent basis with the applicants evincing a determination to challenge the demolishment as being unconstitutional and seeking an order restraining the first respondent and the Minister of Police from proceeding with any further demolishment of structures without a court order and a mandamus directing the respondents to rebuild the applicants' demolished structures. The applicants in that matter submitted that their occupation was not connected to the occupation that was interdicted four years before and that it was therefore improper for the respondents to have demolished their structures without first obtaining a court order.

[20] The respondents countered that the structures that were demolished had been unoccupied as they were incomplete, having been built to below window level. In considering whether the demolishment complained of was unlawful the court, apart from having to deal with the question of whether the prior order was intended to operate against the applicants, was well minded to question the effect of the order on members of the public generally as follows:

[5] (3627/2015) ZAECMHC (11 July 2017).

> "Mr *Msiwa*, who appeared for the second respondent, was hard put to explain how it was available to this court to have granted an order of general application perpetually enjoining the public at large to obey the law. The procedure adopted by the second respondent constituted a flagrant violation of section 26(3) of the constitution which proscribes the eviction of persons from their home or have their home demolished without an order of court made after considering all the relevant circumstances."[6]

[21] The court observed in those circumstances that:

> "…it could never have been, and never was, the intention of the court when granting the order it did on 17 November 2011 to make the order applicable to other surrogates and unauthorised invaders of the land in question in 2015."[7]

[22] The same applies in my view *in casu*. This court per Stretch J could never have envisaged the implied bypassing of the provisions of section 26 (3) of the Constitution read together with the applicable provisions of the PIE Act in the present scenario. It goes without saying that the prior order is not an order authorizing the eviction (including the dismantling or demolishment of) structures which constitute the dwellings or homes of illegal invaders at Airport Park without an order of court and certainly not without a consideration of the matters specified in section 6 (3) of the PIE Act. I would go so far as to say that even if the necessary enquiry pursuant to those provisions had been enquired into before the granting of the prior order that they would need to be revisited at the present time before proceeding to dismantle or demolish structures illegally occupied, failing which the very clear objectives of the PIE Act would be obfuscated. At best for the first respondent then in my view it was only entitled to vindicate its disadvantage by the alleged flouting of the interdict by instituting contempt of court proceedings against those specifically identified to

[6] *Supra* at para [16].

[7] *Supra* at para [15].

be in purported contravention of prayers 1 and 2 of the prior order. That is a different matter to evicting them all under one foul sweep by the grand scale demolition exercise carried out by the second respondent at its instance, under the putative authority in prayer 3, on 27 July 2020.

[23] Leaving aside the provisions of the PIE Act, it must be so too that the evictions, without any order of court or pursuant to any enquiry in the case of each illegal occupier at the time (Alert Level 3), were in contravention of the applicable regulations promulgated under the Disaster Management Act, No. 57 of 2002, the relevant paragraph of which provides as follows:

> **"Eviction and Demolition of places of residence:**
>
> 53. (1) A person may not be evicted from his or her land or home or have his or her place of residence demolished for the duration of the national state of disaster unless a competent court has granted an order authorising the eviction or demolition.
>
> (2) A competent court may suspend or stay any order for eviction or demolition contemplated in subregulation (1) until after the lapse or termination of the national state of disaster unless the court is of the opinion that it is not just or equitable to suspend or stay the order having regard, in addition to any other relevant consideration, to-
>
> (a) the need, in the public interest for all persons to have access to a place of residence and basic services to protect their health and the health of others and to avoid unnecessary movement and gathering with other persons;
>
> (b) any restrictions on movement or other relevant restrictions in place at the relevant time in terms of these regulations;
>
> (c) the impact of the disaster on the parties;
>
> (d) the prejudice to any party of a delay in executing the order and whether such prejudice outweighs the prejudice of the person who will be subject to the order;

(e) whether any affected person has been prejudiced in his or her ability to access legal services as a result of the disaster;

(f) whether affected persons will have immediate access to an alternative place of residence and basic services;

(g) whether adequate measures are in place to protect the health of any person in the process of a relocation;

(h) whether any occupier is causing harm to others or there is a threat to life; and

(i) whether the party applying for such an order has taken reasonable steps in good faith, to make alternative arrangements with all affected persons, including, but not limited to, payment arrangements that would preclude the need for any relocation during the national state of disaster.

(3) A court hearing any application to authorise an eviction or demolition may, where appropriate and in addition to any other report that is required by law, request a report from the responsible member of the executive regarding the availability of any emergency accommodation or quarantine or isolation facilities pursuant to these regulations." [8]

[24] As I have stated above the first respondent appears to acknowledge that the eviction of unlawful occupiers *from their homes* without due process would be tantamount to an unlawful eviction. Its point of departure however is that the structures taken down by the second respondent at its instance *were not places of residence*. They contend further the applicants (including those just joined) have not made out a case on the papers to say that these were their homes neither have they made sufficient allegations to support the averment that they were evicted.

[25] Mr. Ntsaluba submitted further that no effort has been made to gainsay the contention by the first respondent that no one was evicted from the homes,

[8] Notice no 891 published in Government Gazette No. 43620 dated 17 August 2020.

meaning that the Plascon Evans rule[9] should prevail in the respondents' favour in respect of this material dispute of fact.

[26] A study of the papers reveals however that each of the applicants (including the joined persons) have described themselves as owners of a brick house or shack at Airport Park respectively, which were demolished by the second respondent on 27 July 2020. The demolishment at least of 108 structures is common cause. Further, each of them although not specifying how and when they came to occupy the property, have made it plain that the effect of the demolishment in each instance has meant that they are now bereft of their homes and have had to take up residence with other persons. In the founding affidavit Mr. Fani in numerous places refers to those persons affected by the demolishment as "residents". Also alleged is the fact that each of them "have been living (on) that land for almost three years." Indeed, the mere fact that he contends the provisions of the PIE Act are applicable is on the basis that they are illegal occupiers of *residential* property. In this respect he refers to the unfortunate consequence by the demolition exercise that "residents are left without roof(s) over their head(s) including homes that are headed by women, and no alternative accommodation was arranged for them."

[27] Mr. Fani has also gone to the trouble of providing photographs and video material (the admissibility concerning which the respondents have expressed no demur) which on the face of it suggest a lived in community, people obviously distraught by the upheaval and collecting their displaced possessions appearing to be household goods and furniture in the aftermath of the large scale demolition, and houses built up to completion. For what purpose one may ask, except to reside in.

[9] Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)

[28] There is the further averment made by the second applicant who claims to have been present when the operation by the second respondent was carried out and who witnessed "people being pushed out of their homes and some being forced to take out their belongings from the houses so that the TLB (could) demolish their structures." She saw the demolishment of the structure owned by her comprising of blocks of cement built up "already occupied by (her) and (her) child" who was at school at the time and who arrived home to find the structure dismantled with their "belongings that were in the house at the time of the unfortunate event" thus displaced. She asserts that each of the affected structures she saw being destroyed (70 in total) were complete and "occupied" by the relevant owners.

[29] Who the affected owners are in relation to the demolishment exercise is brought into sharper focus in the affidavit filed in support of the joinder application. In it Mr. Fani describes the persons now joined to the application as those "whose residential structures were demolished by the respondents leaving them with no place to stay." He reiterates that each of them has as a consequence of the second respondent's operation been rendered "without homes of their own" and "left in the cold with no homes to live in." He clarifies that he himself has been "residing" at Airport Park since February 2019.

[30] He explains that pursuant to this court's so-called preliminary judgment of 21 September 2020, only those applicants whose residential homes were demolished by the respondents were encouraged by him to join in the main application in their individual capacities.

[31] In making the formal averments pointing out the illegality of the respondents' actions again the underlying premise is asserted that the applicants

have been arbitrarily deprived of the possession of their *residential* homes. This is the very basis upon which the alleged illegality is said to be founded.

[32] Finally, each of those affected persons now joined to the main application have confirmed the averments of Mr. Fani and the second applicant as it pertains to them and verified in each case that they are the owners of either the brick houses or shacks as applies to each of them and that they have "no place to stay due to the fact that (their house or shack as the case may be) was demolished."

[33] In my view the applicants need to do no more than aver that these structures which were demolished by the first respondent's own admission among the 108 targeted were their homes. What more should they say? I do not agree as was submitted by Mr. Ntsaluba that they have to bring themselves within the purview of the PIE Act by stating their period of occupation etc. The issue in contention here is whether they were evicted from *their homes* by the demolition operation. They say so in no uncertain terms in my view even if by confirming after the fact what Mr. Fani asserted quite emphatically on their behalf in the first place.

[34] In countering this issue purportedly in dispute, namely whether the applicants were evicted from their homes as opposed to incomplete or unoccupied structures, the deponent on behalf of the first respondent says the following:

> " .. I was present throughout when only the incomplete and unoccupied structures were demolished on 27 July 2020. I categorically dispute that the operation was by any means an eviction. Completed and occupied structures were not touched at all, including those that were situated among, around and next to the ones that were targeted, namely, the incomplete and unoccupied structures in line with both the letter and spirit of the Court order. To this end I

> annex hereto, marked VM3A-M, a sample of contemporaneous photographs of structures that were in fact demolished. I was there to see for myself the execution by the Sheriff of the Court… of the Court order but did not in any way direct the Sheriff's activities. I was a mere passive observer with a vested interest as adumbrated above.
>
> The Court order, as the applicants correctly understand it, is prohibitory in nature and clearly proscribes the erection of new structures. The structures that were demolished on 27 July 2020 fitted the bill as they were still in the process of being erected and were unoccupied as the photographs clearly show.
>
> I contend, very strongly so, that there was therefore absolutely nothing wrong, incorrect or unlawful in the execution of the Court order and the order remains extant as it has never been varied or rescinded. The Sherriff, in my presence did exactly what the order directed. No basis exists for it not to be executed.
>
> In some cases, there were some items of household goods and furniture in the unoccupied structures and the second respondent furnished an inventory of such items with her return of service and I annex a copy thereof, marked VM4.
>
> Over and above the formal return of service, the second respondent has also furnished a report on her operation of the day a copy of which I annex hereto, marked VM5, in which she reports in further detail as set out therein. …
>
> As will be gleaned from above, the pertinent point I make here is that no one was evicted from their home or residence as no one has taken occupation and therefore established a home in any demolished structures and there can consequently be no reason for the Department to provide alternative accommodation to any of the applicants, faceless as they are."

[35] The most striking feature of the first respondent's answering affidavit is that the deponent does not say why each of the structures the Department ordered demolished fell to be destroyed in terms of the prior order (which I find in any event is no justification to arbitrarily evict any of the illegal occupiers from their homes) and it begs the question what the mandate was that it issued to the second respondent in this respect. Bearing in mind too that three years have passed since the order was issued, which structures did it identify specifically as having been erected on the property in contravention of the order and why in each case did it contend that the sheriff's intervention on this basis was warranted? And what were the "necessary and reasonable steps" referred to

in the order that the second respondent was asked to take to dismantle these structures?

[36] The second respondent's purported return of service does not suggest the answer, or the basis of the instruction given to her. Indeed, neither does the return appear to me to be one flowing from the provisions of par 3 of the prior order. An inventory is provided by way of an attachment to the return, as "a judicial attachment of movable property"(Sic), the header of which, far from reflecting the narrow range of respondents at the time of the order as ones who "have attempted, are threatening or may even try to occupy" the property are in fact recorded as "unlawful occupants". Further, although it is common cause that 89 shacks were dismantled, the "inventory" records the details of movable property associated with only five of them.[10]

[37] Her further "Report on "the Demolition for the Department of Public Works" suggests a misconception on her part regarding what "unoccupied" means. This is evident from the following description given by her in it:

> "The operation started at about 8.00am. All member of SAPS, Law Enforcement, Contractor, Official from the Department of Public works together with 2 officials and Sheriff's Office employees proceeded to the site at Remainder Portion 1 of the Farm Greydell 871.
>
> Eskom was called upon board so as to deal with the illegal connections at the said address so as to ensure the safety of all people at the site involved in the operation. The officials from Eskom represented by manageress, Tembekazi Mayoli joined us at the site to offer their services immediately before the operation started.

[10] The second respondent is an officer of the court who, when she purports to execute an order of the high court is obliged, by virtue of the provisions of section 43 of the Superior Courts Act, No 10 of 2013, to give a full, proper and formal account of her service. In terms of subsection (2) her return is proof of the matters stated therein, but what about what the return does no say?

> We started the operation by marking the structures, assessed if they were occupied or unoccupied and then proceeded to demolish the unoccupied structures. We noticed that some of the structures were having only a few items. There was no reasonable indication that such structures were occupied. We continued with the demolition of the unoccupied structures. *As we were busy attending to the operation, we noticed further that some members of the community were taking out their belongings themselves, leaving the structures empty and unoccupied. They requested us not to touch their possessions. We continued to demolish every structure that was unoccupied.*
>
> The number of structures demolished were 108 being 19 brick houses and 89 shacks.
>
> The situation at the said address were volatile. The illegal *occupants* at the said address were angry with the people attending to the operation. They started throwing stones at the people attending to the operation." (Emphasis added)

[38] In her affidavit filed in opposition to the application she repeats her confirmation that "only such structures as were still under construction and therefore unoccupied, or were on (her) own observation unoccupied, were demolished." Those observations would be the same ones recorded in her report aforesaid on which the first respondent in turn relies. She adds her explanation that from some of the structures she salvaged the household goods and effects listed in the inventory attached to her return of service, which are not under attachment as such, but which were taken into her custody for safekeeping and preservation until claimed by their respective owners within a reasonable time, an allegation which in itself flies in the face of her denial that the structures felled were the applicants' homes.

[39] Whilst some of the photographs put up by the first respondent as "samples" of structures dismantled or demolished do in fact depict incomplete structures, the department's failure to assert that any of these belonged to the

applicants, renders the so-called dispute of fact rather illusory. One would have expected it to come and say well this applicant who claims to be bereft of a home is not being truthful because here is a photograph of his or her home and how was it possible for him or her to have claimed that it constituted a dwelling against this overwhelming evidence. One must bear in mind too that 108 structures were destroyed but only 79 applicants have complained that they were displaced from their homes by the second respondent's operation. The respondents who carried out a large-scale demolishment operation in purported pursuance of a formal court order should be ready to give a full and proper account to the court rather than relying on a vague assurance that the properties they targeted are not the homes of the applicants, especially since each of the applicant in affidavits filed in substantiation of the recent joinder application have confirmed that they were occupants, with nothing specifically gainsaid by the first respondent in this respect.

[40] in opposed motions where there is a dispute of fact on the affidavits, an applicant is only entitled to succeed if the facts which are stated by the respondent, together with the admitted facts, justify an order in its favour. In such circumstances an applicant is therefore bound to accept the version which has been put forward by its opponent.[11] At the same time, it is equally well-established that where a dispute of fact is not a "real, genuine or *bona fide*" one the court will be justified in ignoring it and may proceed to find on the applicant's version thereof.[12] So too, where the respondent's version is clearly or palpably far-fetched or untenable, the court may take a robust approach and decide the matter on the basis of the applicant's version.[13] As always, in

[11] Plascon-Evans, *Supra*, at 634E.

[12] Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T) at 1163 *et seq.*

[13] Plascon-Evans, *Supra*, at 635B–C.

evaluating the contents of the affidavits the court must have due regard for the treatment which the respondent has given to the averments under reply. In this respect a respondent has a duty to engage with the facts which are put up by the applicant, and to deal with them fully and comprehensively.[14] Any "skimpiness" and improbabilities in his version may thus count against him.[15]

[41] These trite principles must in my view conduce in this instance to finding on the applicants' version that these were their homes amongst the 108 structures demolished and that they were destroyed without an order of court, thus rendering their evictions arbitrary and unlawful. There is no greater duty to engage with the facts put up by the applicant in an instance such as the present one where the applicants assert an eviction from their homes and where the respondents claim they are entitled to evict them on the basis of an order of court and that they have executed that order to the letter. How? The second respondent as an officer of this court has also simply failed in her duty to give a full and proper account of her purported execution of the order or to satisfy the court that she was entitled to take the steps which she did.

[42] In the premises I am satisfied that the declarator sought by the applicants that their evictions were unlawful should issue. I believe that it will follow from my reasoning above that anyone else affected by the demolition exercise in the same way but who were not fortunate enough to be joined in these proceedings will be in the same position as the applicants. It is hoped that the first respondent will ameliorate their situation as well.

[43] In addition to the declarator sought, the applicants also seek consequential relief. In Tswelopele Non-Profit Organization v City of Tshwane

[14] Wightman t/a JW Construction v Headfour (Pty) Ltd and another 2008 (3) SA 371 (SCA).

[15] Per the dissenting judgment of Bozalek J a quo in Wightman t/a JW Construction v Headfour (Pty) Ltd *and another* 2007 (2) SA 128 (C) at para [14].

Municipality[16] the court formulated an appropriate special constitutional remedy aimed at instilling recognition on the part of government agencies that participated in the unlawful operation that occupiers too are bearers of constitutional rights and ordered that the occupiers whose shelters had been demolished were afforded "temporary habitable dwellings that affords shelter, privacy and amenities at least equivalent to those that were destroyed, and which were capable of being dismantled, at the site at which their previous shelters were demolished".

[44] Whilst it is appropriate in my view for the court to consider how the unlawful evictions *in casu* fall to be remedied in all the circumstances and with some alacrity to assuage the unfortunate consequence of the applicants being bereft of their homes, I am inclined to agree with Mr. Ntsaluba though that the applicants have contented themselves with making vague assertions in respect of their alleged entitlement to compensation if they have gone into any detail at all. This is however but an aspect of the overall relief sought by them and is not a basis to dismiss the application out of hand.

[45] I believe though that it is not possible for a court to come to the assistance of such applicants holding out for compensation without each of them supplementing their papers substantially to deal with this aspect. Further, should they do so, each of them would be well advised to consider the first respondent's outstanding "preliminary second objection" still alive that this relief may best be sought by way of action rather than in the present application, or by a referral of this aspect in this application to trial or oral evidence

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[16] 2002 (6) SA 511 (SCA). See also Ntantanta and Others v Mhlontlo Local Municipality and Another (CA51/15, CA52/15, 75/15/ 76/15, 3412/14, 3434/14, 3407/14) [2016] ZAECMHC 10 (5 April 2016) at para [18] – [28].

(assuming the necessary supplementation of their papers) going forward.[17] I intend to issue an order permitting them to supplement their papers with reference to this remaining aspect should they so wish.

[46] I can at the very least however (on the simple averment of each of them that their structures were dismantled) direct the respondents to return such goods as were spoliated by the respondents in the process in the meantime and order reconstituted restoration pending formal proceedings by the first respondent against each of them for their eviction in due course.

[47] I expect that the issue of the provision of alternative accommodation will be addressed by the first respondent in seeking the eviction of the applicants in proper form in due course, but I intend to preempt this aspect in the order which I make below.

[48] As for costs, I am satisfied that the applicants have achieved substantial success and should be entitled to their costs including the reserved costs of 1 and 4 August 2020, provided that the "first applicant" as constituted before the joinder of the substituted parties shall not be entitled to recover as against either respondent costs of the proceedings of 17 September 2020.

[49] In the premises I issue an order in the following terms:

1. The eviction of each applicant by the second respondent acting under the mandate of the first respondent by the demolition of their homes at Remainder of Portion 1 of Farm Greydell 871, East London, ("the property"), on 27 July 2020, is declared to be unlawful.

[17] This is not to say that I find in favour of the respondents on the issue of the second preliminary objection. I cannot agree necessarily that claims for compensation must be claimed by way of an action rather than in motion proceedings.

2. The applicants are entitled to reconstituted restoration of their homes as soon as possible, albeit on a temporary basis pending the finalization of an application(s) to be brought by the first respondent against them for their eviction from the first respondent's property described as Remainder of Portion 1 of Farm Greydell 871, East London, at a place(s) where they can be accommodated in the interim.

3. The reconstituted structures (using such of the materials still at the applicants' disposal as can be employed towards this end) must be such that they afford the applicants shelter, privacy and amenities at least equivalent to their structures that were demolished, and which are capable of being dismantled upon their eviction from the property ultimately, if so ordered by this court.

4. The second respondent is directed to forthwith return to the applicants such goods as were spoliated by her from the site of the demolished structures at the cost of the first respondent.

5. The issue of the applicants' entitlement to compensation arising from the unlawful evictions is postponed *sine die*.

6. Such of the applicants who wish to persist with claims for compensation by way of these application proceedings are given leave to supplement their papers if so advised.

7. The respondents are directed to pay the costs of the application jointly and severally the one paying the other to be absolved, such costs to include the reserved costs of 1 and 4 August 2020.

8. The second applicant shall be entitled to recover the reserved costs of 17 September 2020, if any, against the first respondent.

9. The "first applicant" as was constituted before the order issued in the joinder application shall not be entitled to recover any costs against the respondents in respect of the proceedings of 17 September 2020.

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B HARTLE
JUDGE OF THE HIGH COURT

DATE OF HEARING: 5 October 2020
DATE OF JUDGMENT: 29 October 2020*

*Judgment delivered electronically by email to the parties on this date.

APPEARANCES:

For the applicants: Mr. Z Madukuda instructed by Sipho Klaas Attorneys, East London (ref. SK/eviction2020/1)

For the respondents: Messrs T.M Ntsaluba SC and Mr. N Nabela instructed by The State Attorney, East London (ref. Mrs Tyani – 322/16-P2)